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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**First Decision on the Prosecution Requests for Formal Submission of Prior
Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2), 67(1) and 69(2) of the Rome Statute (the ‘Statute’) and Rule 68(2)(c) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules’.

I. Procedural history

1. On 16 October 2020, following an extension request by the Office of the Prosecutor (the ‘Prosecution’),¹ the Chamber amended the deadlines for the submission of applications pursuant to Rule 68 of the Rules² and provided initial guidance for the Prosecution’s forthcoming applications under this provision (the ‘Initial Guidance’).³
2. On 9 November 2020, the Prosecution filed its Final Witness List, indicating (i) the witnesses it intends to call to testify fully *viva voce*; (ii) the witnesses it intends to call pursuant to Rule 68(3) of the Rules; and (iii) the witnesses whose testimony it seeks to introduce pursuant to Rule 68(2) of the Rules.⁴
3. On 24 June 2021, the Prosecution informed the Chamber that witnesses P-1654 and P-1172 passed away.⁵

¹ Prosecution’s Request pursuant to Regulation 35 to vary the Time Limit for the Submission of Applications pursuant to Rule 68, 14 September 2020, ICC-01/14-01/18-652 (the ‘Rule 68 Time Limit Request’). The Chamber further notes that, on 15 September 2020, the Prosecution submitted further observations, in particular, with regard to its intended use of Rule 68(3) of the Rules, *see* Prosecution’s Observations on its intended approach to Rule 68(3) in the presentation of its case, ICC-01/14-01/18-655.

² Initial Directions on the Conduct of the Proceeding, ICC-01/14-01/18-631 (the ‘Initial Directions’), para. 33.

³ Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, ICC-01/14-01/18-685.

⁴ Prosecution’s List of Witnesses and Evidence, ICC-01/14-01/18-724 (with confidential Annexes A-C) (corrigendum of Annex C notified on 8 January 2021, ICC-01/14-01/18-724-Conf-AnxC-Corr). Annex A to the Prosecution’s List of Witnesses and Evidence, ICC-01/14-01/18-724-Conf-AnxA, contains the Final Witness List.

⁵ See email from the Prosecution, 24 June 2021, at 16:39.

4. On 8 November 2021, the Prosecution filed the ‘Prosecution’s Request for Submission of the Prior Recorded Testimony of P-1654 pursuant to Rule 68(2)(c)’ (the ‘P-1654 Request’).⁶
5. On 19 November 2021, the Yekatom Defence opposed the P-1654 Request (the ‘Yekatom Defence Response to the P-1654 Request’).⁷ In the alternative, it requests that the Chamber defer its decision on the P-1654 Request and grant leave to the Yekatom Defence to make further submissions after the conclusion of the in-court testimonies of witnesses P-1704, P-1705, P-0967, P-1716, P-1811, P-2233 and P-1839 (the ‘Further Submission Request’).⁸
6. On the same day, the Ngaïssona Defence informed the Chamber that it joins the Yekatom Defence Response to the P-1654 Request, including the relief sought by the Yekatom Defence.⁹
7. In respect of P-1558, on 29 July 2022, the Prosecution initially filed a request pursuant to Rule 68(3) of the Rules (the ‘P-1558 Rule 68(3) Request’).¹⁰
8. On 14 November 2022, the Prosecution filed the ‘Prosecution’s Request for Submission of the Prior Recorded Testimony of P-1558 pursuant to Rule 68(2)(c)’ (the ‘P-1558 Request’), following confirmation of his death.¹¹

⁶ ICC-01/14-01/18-1169-Conf (with confidential Annexes A and B) (public redacted version notified on 11 November 2021, ICC-01/14-01/18-1169-Red).

⁷ Yekatom Defence Response to the “Prosecution’s Request for Submission of the Prior Recorded Testimony of P-1654 pursuant to Rule 68(2)(c)”, ICC-01/14-01/18-1169-Conf, 8 November 2021, ICC-01/14-01/18-1181-Conf (public redacted version notified the same day).

⁸ Yekatom Defence Response to the P-1654 Request, ICC-01/14-01/18-1181-Red, paras 2-3, pp. 14-15.

⁹ Email from the Ngaïssona Defence, 19 November 2021, at 16:27.

¹⁰ Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of Witness P-1558 pursuant to Rule 68(3), 29 July 2022, ICC-01/14-01/18-1533-Conf (with confidential annexes A and B) (public redacted version notified on 23 August 2022, ICC-01/14-01/18-1533-Red).

¹¹ ICC-01/14-01/18-1663-Conf (with confidential Annexes A and B, with the latter containing a copy of the death certificate, ICC-01/14-01/18-1663-Conf-AnxB (the ‘P-1558’s Death Certificate’)).

9. On 25 November 2022, the Yekatom Defence filed its response to the P-1558 Request.¹² The Ngaïssona Defence informed the Chamber that it does not intend to respond and defers to the Yekatom Defence's position.¹³
10. Having received information about P-1558's death, the Chamber considered the P-1558 Rule 68(3) Request moot.¹⁴
11. On 28 November 2022, the Prosecution filed the 'Prosecution's Request for Submission of the Prior Recorded Testimony of P-1172 pursuant to Rule 68(2)(c)' (the 'P-1172 Request').¹⁵
12. On 4 December 2022, the Ngaïssona Defence filed its response to the P-1172 Request (the 'Ngaïssona Defence Response to the P-1172 Request').¹⁶
13. On 5 December 2022, the Yekatom Defence filed its response to the P-1172 Request.¹⁷

II. Analysis

14. The Chamber will first set out the applicable law before turning to its analysis of the respective requests for submission of prior recorded testimonies.
15. Each request will be assessed on a case-by-case basis and with due regard to the specific nature and content of each prior recorded testimony.¹⁸ The Chamber will

¹² Yekatom Defence Response to the 'Prosecution's Request for Submission of the Prior Recorded Testimony of P-1558 pursuant to Rule 68(2)(c)', 14 November 2022, ICC-01/14-01/18-1663-Conf, ICC-01/14-01/18-1675-Conf (public redacted version notified on 12 December 2022, ICC-01/14-01/18-1675-Red) (the 'Yekatom Defence Response to the P-1558 Request').

¹³ Email from the Ngaïssona Defence, 25 November 2022, at 10:30.

¹⁴ Nineteenth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1647, P-2083, P-2082, P-2625, P-2582, P-1442 and P-1558, 21 December 2022, ICC-01/14-01/18-1712-Conf, paras 10, 52.

¹⁵ ICC-01/14-01/18-1677-Conf (with confidential Annexes A and B, with the latter containing a copy of the death certificate, ICC-01/14-01/18-1677-Conf-AnxB (the 'P-1172's Death Certificate')) (public redacted version notified the same day, ICC-01/14-01/18-1677-Red).

¹⁶ Defence Response to the "Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-1172 pursuant to Rule 68(2)(c)", ICC-01/14-01/18-1687-Conf (notified on 5 December 2022).

¹⁷ Yekatom Defence Response to 'Prosecution's Request for Submission of the Prior Recorded Testimony of P-1172 pursuant to Rule 68(2)(c)', 28 November 2022, ICC-01/14-01/18-1677-Conf, ICC-01/14-01/18-1689-Conf (public redacted version filed on 7 December 2022, ICC-01/14-01/18-1689-Red) (the 'Yekatom Defence Response to the P-1172 Request').

¹⁸ Initial Guidance, ICC-01/14-01/18-685, paras 28, 34.

be guided by the principles regarding Rule 68 of the Rules as set out below¹⁹ and in its Initial Guidance.²⁰

16. Where the prior recorded testimony is introduced pursuant to Rule 68(2)(c) of the Rules, full consideration of the standard evidentiary criteria, particularly in terms of its relevance and probative value, is deferred to the Chamber's eventual deliberation of its judgment.²¹

A. Applicable law

17. Rule 68(1) of the Rules gives the Chamber discretion to 'allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met'.
18. Pursuant to Rule 68(2)(c) of the Rules, the Chamber may allow the introduction of the 'prior recorded testimony' of a person who (i) has subsequently died; (ii) must be presumed dead; or (iii) is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence.
19. If such is the case, the prior recorded testimony may only be introduced if (i) the Chamber is satisfied that the person is unavailable, as set out; (ii) the necessity of measures under Article 56 of the Statute could not be anticipated; and (iii) the prior recorded testimony has sufficient indicia of reliability. Further, pursuant to Rule 68(2)(c)(ii), the fact that the prior recorded testimony goes to proof of acts and conduct of the accused may be a factor against its introduction, or part of it.

¹⁹ See Section (A).

²⁰ Initial Guidance, ICC-01/14-01/18-685, paras 23-34.

²¹ The Chamber recalls the Presiding Judge's directions in this regard, see Initial Directions, ICC-01/14-01/18-631, section M.(1), Submission Approach.

20. The Chamber notes that its determination whether a prior recorded testimony can be introduced pursuant to Rule 68 of the Rules depends on its consideration of the testimony as a whole.²²
21. In the following, the Chamber will address its interpretation of the abovementioned requirements and factors governing its assessment of the requests pursuant to Rule 68(2)(c) of the Rules.

1. *Requirements under Rule 68(2)(c) of the Rules*

- i. Notion of ‘prior recorded testimony’

22. The Chamber recalls the applicable law in respect of the notion of ‘prior recorded testimony’ as set out in its earlier decision.²³
23. The Chamber further recalls its approach, in respect of Rule 68(2)(b) of the Rules, that all items which have been discussed by a witness form an integral part of the prior recorded testimony and should thus be introduced under this provision, regardless of whether a request was made in this regard. Accordingly, and where deemed appropriate, it therefore introduced all such associated items.²⁴ The Chamber adopts the same approach with applications made pursuant to Rule 68(2)(c) of the Rules.

- ii. Death or ‘must be presumed dead’

24. Rule 68(2)(c) of the Rules states that a Chamber may allow the introduction of a prior recorded testimony of a person who, after providing such testimony, has died, or must be presumed dead.

²² See also Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaiisona Defence Motion to Limit the Scope of P-2926’s Evidence, 10 March 2021, ICC-01/14-01/18-907-Conf (public redacted version notified on 1 April 2021, ICC-01/14-01/18-907-Red) (the ‘Rule 68(3) Decision’), para. 16; Corrected version of First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules, 6 April 2023, ICC-01/14-01/18-1833-Conf-Corr (corrected version notified on 17 April 2023) (public redacted version notified the same day, ICC-01/14-01/18-1833-Corr-Red) (the ‘First Rule 68(2) Decision’), para. 18.

²³ First Rule 68(2) Decision, ICC-01/14-01/18-1833-Corr-Red, paras 23-25.

²⁴ See First Rule 68(2) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 54 with further references to this approach.

25. As regards a person's death, trial chambers have previously accepted death certificates as proof of death.²⁵ In situations where death certificates could not be obtained, some trial chambers have accepted documents *in lieu* of death certificates to conclude that a witness could be presumed dead, such as, for example, Prosecution investigators' notes describing phone conversations with individuals who independently reported the death of a witness they knew.²⁶

iii. Notion of 'unavailable'

26. Rule 68(2)(c) of the Rules states that a person may be unavailable to testify orally due to 'obstacles that cannot be overcome with reasonable diligence'.
27. The Chamber agrees with other trial chambers that the term 'unavailable' in Rule 68(2)(c) of the Rules must be interpreted broadly.²⁷ Previously, this term has been interpreted to include situations where (i) a witness suffers from a medical condition(s) that impacts their ability to testify orally;²⁸ (ii) a witness is in an area of high insecurity and the associated challenges cannot be overcome within a reasonable time without unduly delaying the trial proceedings;²⁹ (iii) a

²⁵ See for example, Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, 11 March 2016, ICC-01/04-02/06-1205 (the '*Ntaganda* P-0103 Rule 68(2)(c) Decision').

²⁶ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18-1413 (the '*Al Hassan* P-0125 Rule 68(2)(c) Decision'), para. 10.

²⁷ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence', 12 November 2015, ICC-01/05-01/13-1481-Red-Corr (the '*Bemba et al.* Rule 68(2)(c) Decision'), para. 16; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, 16 December 2022, ICC-01/12-01/18-2445-Conf-Exp, confidential *ex parte*, only available to the Defence and the Registry (public redacted version issued the same day, ICC-01/12-01/18-2445-Red) (the '*Al Hassan* D-0002 and D-0146 Rule 68(2)(c) Decision'), para. 21 *et seq.*

²⁸ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0570's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 13 July 2021, ICC-01/12-01/18-1588-Conf (public redacted version notified on 11 August 2021, ICC-01/12-01/18-1588-Red) (the '*Al Hassan* P-0570 Rule 68(2)(c) Decision'); Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, 24 February 2017, ICC-01/04-02/06-1802-Conf (public redacted version notified the same day, ICC-01/04-02/06-1802-Red) (the '*Ntaganda* P-0016 Rule 68(2)(c) Decision').

²⁹ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of the prior recorded testimony of D-0008, D-0611 and D-0627 pursuant to Rule 68(2)(c) of the Rules and the Defence's request for reconsideration of the decision

witness cannot be located after numerous attempts and efforts;³⁰ or (iv) the Registry is unable to provide for the *viva voce* testimony of the witness by video-link at a reasonable stage of the proceedings.³¹

28. However, the Chamber also finds illustrative that trial chambers have considered that situations do not fall within the meaning of ‘unavailable’, *inter alia*, (i) where a witness is simply unwilling to testify;³² (ii) the Prosecution is unable to locate the witness but further efforts to locate them can still be made;³³ or (iii) a possibility of video-link testimony could be explored without placing the witness at undue risk.³⁴

iv. Notion that ‘the necessity of measures under article 56’ of the Statute could not be anticipated

29. Rule 68(2)(c)(i) of the Rules states that when a prior recorded testimony is introduced pursuant to this rule, it must be demonstrated that the necessity of measures under Article 56 of the Statute could not have been anticipated.
30. The Chamber agrees that this requirement is meant to avoid introducing evidence through this provision when measures under Article 56 of the Statute could have been a viable alternative at an earlier stage.³⁵

rejecting the introduction into evidence of D-0146’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18-2461-Conf, 30 January 2023 (public redacted version filed the same day, ICC-01/12-01/18-2461-Red), para. 11.

³⁰ Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Prosecution’s second application to introduce the prior recorded testimony of P-0085 under Rule 68(2)(c), 14 December 2022, ICC-02/05-01/20-834.

³¹ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on certain requests related to the admission of the prior recorded testimony of Witness D-0080, 22 February 2018, ICC-01/04-02/06-2242-Conf (public redacted version notified the same day, ICC-01/04-02/06-2242-Red).

³² See *Al Hassan* D-0002 and D-0146 Rule 68(2)(c) Decision, ICC-01/12-01/18-2445-Red, para. 23.

³³ See Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68(2)(c), 21 February 2022, ICC-02/05-01/20-603-Conf (public redacted version notified the same day, ICC-02/05-01/20-603-Red) (the ‘*Abd-Al Rahman* Rule 68(2)(c) Decision’), para. 31.

³⁴ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request for admission of the prior recorded testimony of Witness D-0080, 7 November 2017, ICC-01/04-02/06-2100-Conf (public redacted version notified the same day, ICC-01/04-02/06-2100-Red), paras 14-16.

³⁵ *Bemba et al.* Rule 68(2)(c) Decision, ICC-01/05-01/13-1481-Red-Corr, para. 19; *Al Hassan* D-0002 and D-0146 Rule 68(2)(c) Decision, ICC-01/12-01/18-2445-Red, para. 31 *referring to* Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of the prior recorded testimony of P-0605 and P-0582 pursuant to Rule 68(2)(c) of the

31. The Chamber finds illustrative that trial chambers have previously considered situations sufficient to satisfy this criterion where: (i) a witness passed away unexpectedly and suddenly;³⁶ (ii) there were no indications of medical issues that could have prevented a witness from being able to testify;³⁷ (iii) a witness with no medical condition passed away three months after providing their prior recorded testimony;³⁸ or (iv) measures were contemplated but could not be implemented due to concerns about the security or well-being of the witness falling under Article 68(1) of the Statute.³⁹ In assessing this requirement, the Chamber may have regard to, *inter alia*, the diligence exercised by the Prosecution in inquiring about factors affecting a witness's availability and/or assessing the need for measures under Article 56 of the Statute.⁴⁰

v. Notion of having 'sufficient indicia of reliability'

32. The Chamber recalls its earlier decision setting out the jurisprudence concerning 'sufficient indicia of reliability' in respect of Rule 68(2)(b) of the Rules.⁴¹

33. In particular, the Chamber recalls its findings concerning the fulfilment of formal requirements at the time the prior recorded testimony is taken. The Chamber recalls that formal requirements previously considered by chambers of this Court included the following: whether the prior recorded testimony (i) was obtained by the Prosecution in the ordinary course of its investigations; (ii) was signed by the witness and the investigator(s) conducting the interview; (iii) was given voluntarily; (iv) was obtained in the presence of a qualified interpreter; (v) was verified by the witness at the time; and (vi) includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement to the Prosecution (the 'Formal Requirements').

Rules, 14 February 2022, ICC-01/12-01/18-2114-Conf (public redacted version notified on 17 March 2022, ICC-01/12-01/18-2114-Red) (the '*Al Hassan* P-0605 and P-0582 Rule 68(2)(c) Decision'), para. 31.

³⁶ *Ntaganda* P-0103 Rule 68(2)(c) Decision, ICC-01/04-02/06-1205, para. 12.

³⁷ *Al Hassan* P-0570 Rule 68(2)(c) Decision, ICC-01/12-01/18-1588-Red, para. 21.

³⁸ *Al Hassan* P-0125 Rule 68(2)(c) Decision, ICC-01/12-01/18-1413, paras 11-12.

³⁹ *Bemba et al.* Rule 68(2)(c) Decision, ICC-01/05-01/13-1481-Red-Corr, paras 18-19; *Al Hassan* P-0605 and P-0582 Rule 68(2)(c) Decision, ICC-01/12-01/18-2114-Red, para. 31.

⁴⁰ See for example *Ntaganda* P-0016 Rule 68(2)(c) Decision, ICC-01/04-02/06-1802-Red, para. 17.

⁴¹ First Rule 68(2) Decision, ICC-01/14-01/18-1833-Corr-Red, paras 42-47 with further references to the jurisprudence.

Consistent with previous decisions of other chambers, the Chamber clarifies that no single indicator is, in and of itself, conclusive or mandatory to establish the presence of ‘sufficient indicia of reliability’, but their presence may militate in favour of the introduction of a prior recorded testimony.⁴²

34. The Chamber considers that these equally apply to the assessment of ‘sufficient indicia of reliability’ as a requirement under Rule 68(2)(c) of the Rules. Thus, in its determinations below, the Chamber will limit its assessment to the Formal Requirements unless it identifies manifest issues as to the reliability of the information provided by the witness or if the Defence raises specific objections.⁴³

vi. Absence of prejudice to or inconsistency with the rights of the accused

35. As generally required in all instances under Rule 68 of the Rules, the introduction of a prior recorded testimony is not permitted if it is prejudicial to or inconsistent with the rights of the accused, as specified in Rule 68(1) of the Rules.
36. The Chamber may consider a number of factors in this assessment, such as:
- (i) whether the evidence relates to issues that are materially in dispute;
 - (ii) whether the evidence provides background information or is central to core issues in the case; or (iii) whether the evidence is cumulative or corroborative of other evidence.⁴⁴

2. *Factors guiding the Chamber’s discretion in assessing applications pursuant to Rule 68(2)(c) of the Rules*

37. Provided that a prior recorded testimony meets the abovementioned requirements, the Chamber’s decision as to whether to allow the introduction of a prior recorded testimony pursuant to this provision is discretionary. Each prior

⁴² First Rule 68(2) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 45.

⁴³ Trial Chamber VI, *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the Prosecution’s Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses, 20 October 2022, ICC-01/14-01/21-506-Conf (public redacted version notified on 26 October 2022, ICC-01/14-01/21-506-Red) (the ‘*Said Rule 68(2)(c) Decision*’), para. 16.

⁴⁴ *Al Hassan* P-0570 Rule 68(2)(c) Decision, ICC-01/12-01/18-1588-Red, para. 10 *with further references to the jurisprudence*; *Said Rule 68(2)(c) Decision*, ICC-01/14-01/21-506-Red, paras 22, 25, 39, 46; *Abd-Al Rahman* Rule 68(2)(c) Decision, ICC-02/05-01/20-603-Red, paras 37, 39.

recorded testimony must be assessed case-by-case and on the basis of the circumstances before the chamber.

38. When making this assessment, the Chamber may also consider whether a prior recorded testimony goes to ‘acts and conduct’ of the accused. While Rule 68(2)(c)(ii) of the Rules does not preclude the introduction of prior recorded testimony going to proof of the acts and conduct of the accused, it provides that this may be a factor against the introduction of the evidence.⁴⁵
39. In assessing which portions of a prior recorded testimony constitute acts and conduct of the accused, the Chamber will apply the same criteria as set out in its earlier decision concerning Rule 68(2)(b) of the Rules.⁴⁶ Further, when allowing the submission of prior recorded testimony referring to acts and conduct of the accused, the Chamber has ensured that this introduction is not prejudicial to or inconsistent with the rights of the accused.

B. Analysis of the prior recorded testimonies

40. The Chamber will now turn to its individual assessment of the requests, and address the participants’ submissions, as necessary.

1. P-1654

41. P-1654 was a Christian civilian who lived in the Boeing neighbourhood of Bangui during the conflict.⁴⁷ P-1654 was initially listed on the Prosecution’s Final Witness List as a witness expected to testify pursuant to Rule 68(3) of the Rules.⁴⁸

⁴⁵ *Al Hassan* P-0125 Rule 68(2)(c) Decision, ICC-01/12-01/18-1413, para. 21; *Al Hassan* P-0605 and P-0582 Rule 68(2)(c) Decision, ICC-01/12-01/18-2114-Red, para. 45; *Said* Rule 68(2)(c) Decision, ICC-01/14-01/21-506-Red, para. 10; *Abd-Al Rahman* Rule 68(2)(c) Decision, ICC-02/05-01/20-603-Red, para. 7; *Ntaganda* P-0016 Rule 68(2)(c) Decision, ICC-01/04-02/06-1802-Red, para. 26.

⁴⁶ First Rule 68(2) Decision, ICC-01/14-01/18-1833-Corr-Red, paras 26-28 *with further references to the jurisprudence*.

⁴⁷ P-1654 Request, ICC-01/14-01/18-1169-Red, para. 7.

⁴⁸ Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, p. 28.

i. Submissions

42. The Prosecution informs the Chamber that P-1654 passed away on [REDACTED] 2021.⁴⁹
43. The Prosecution submits that P-1654 was interviewed by it in 2017 and that he ‘was approximately [REDACTED] years [old] and did not report any serious health issues’ and it was only notified of P-1654’s minor health concerns⁵⁰ in January 2020.⁵¹ Subsequently, in September 2020 and February 2021, respectively, after inquiring, it was reported to the Prosecution that P-1654 did not have ‘any serious health concerns’.⁵² The Prosecution submits that, in these circumstances, it had no information in its possession that his evidence needed to be preserved pursuant to Article 56 of the Statute.⁵³ In June 2021, the Prosecution was informed by P-1654’s family that P-1654 had passed away after being sick for a year.⁵⁴
44. The Prosecution submits that P-1654’s statement is *prima facie* reliable, ‘truthful, authentic, and consistent’ and taken in the ordinary course of its investigation.⁵⁵ It adds that the statement is internally consistent, sufficiently corroborated by other evidence in the case,⁵⁶ and limited to information within P-1654’s knowledge and experience.⁵⁷ It further submits that the statement is relevant and probative.⁵⁸
45. The Yekatom Defence requests that the Chamber reject the P-1654 Request, arguing that (i) the Prosecution lacked diligence in relation to Article 56 measures; (ii) P-1654’s statement ‘goes to the acts and conduct of Mr. Yekatom and would prejudice his rights’; and (iii) P-1654’s statement and its associated

⁴⁹ P-1654 Request, ICC-01/14-01/18-1169-Conf, para. 9; Copy of P-1654’s Death Certificate, CAR-OTP-2135-0270.

⁵⁰ P-1654 Request, ICC-01/14-01/18-1169-Red, para. 10.

⁵¹ Yekatom Defence Response to the P-1654 Request, ICC-01/14-01/18-1181-Conf, para. 16; email from the Prosecution to the Yekatom Defence, 12 November 2021, at 09:16.

⁵² P-1654 Request, ICC-01/14-01/18-1169-Red, para. 10.

⁵³ P-1654 Request, ICC-01/14-01/18-1169-Conf, para. 10.

⁵⁴ P-1654 Request, ICC-01/14-01/18-1169-Conf, para. 9; CAR-OTP-2134-0139.

⁵⁵ P-1654 Request, ICC-01/14-01/18-1169-Red, para. 11.

⁵⁶ P-1654 Request, ICC-01/14-01/18-1169-Red, para. 11.

⁵⁷ P-1654 Request, ICC-01/14-01/18-1169-Red, para. 12.

⁵⁸ P-1654 Request, ICC-01/14-01/18-1169-Red, para. 14.

exhibit lack reliability.⁵⁹ Alternatively, it presents the Further Submission Request.⁶⁰

46. The Ngaïssona Defence informed the Chamber that it joins the Yekatom Defence's response and indicates that it 'concurs with the position expressed therein including the relief sought'.⁶¹

ii. Chamber's determinations

47. The Chamber notes the Further Submission Request, in which the Yekatom Defence requests 'an opportunity to provide further submissions highlighting *inter alia* further inconsistencies or lack of corroboration after an assessment of [the other witnesses'] in-court testimonies'.⁶² The Chamber notes that the parties, notably the Yekatom Defence, had the opportunity to use P-1654's prior recorded testimony in examining the other witnesses. At this stage, in deciding on the P-1654 Request, the Chamber will not be assisted by additional submissions by the parties on his statement and therefore rejects the Further Submission Request. In any event, the Yekatom Defence remains at liberty to make further submissions on the Yamwara School incident, including P-1654's evidence and how it relates to other evidence on the record, at other stages of the proceedings.
48. In his statement,⁶³ the witness describes, *inter alia*, the Seleka's arrival in Bangui on 24 March 2013 and crimes allegedly committed by them; the Anti-Balaka's arrival in Bangui in December 2013 and crimes allegedly committed by them against both Christians and Muslims; Anti-Balaka elements stopping and abducting seven people and mistreating them at Yamwara School; [REDACTED] Yamwara School [REDACTED]⁶⁴ who had been abducted; being told by [REDACTED]; [REDACTED]; [REDACTED]; fleeing Boeing with his family [REDACTED]; certain abductees being released '3 or 4 days after their abduction' with the help of Catherine Samba Panza, the then mayor of Bangui.

⁵⁹ Yekatom Defence Response to the P-1654 Request, ICC-01/14-01/18-1181-Red, paras 13-39.

⁶⁰ Yekatom Defence Response to the P-1654 Request, ICC-01/14-01/18-1181-Red, paras 2-3.

⁶¹ Email from the Ngaïssona Defence, 19 November 2021, at 16:27.

⁶² Yekatom Defence Response to the P-1654 Request, ICC-01/14-01/18-1181-Red, para. 47.

⁶³ Statement, CAR-OTP-2053-0112.

⁶⁴ [REDACTED].

49. The witness makes several remarks in relation to Mr Yekatom. In particular, he states that ‘a school in the Boeing neighbourhood called YA[M]WARA’ is ‘ROMBOT’s base’.⁶⁵ P-1654 indicates that he was [REDACTED].⁶⁶ P-1654 indicates that [REDACTED] warned by ‘ROMBOT’ not to [REDACTED] because of being fearful of ‘ROMBOT’s threats’.⁶⁷ He indicates that [REDACTED] and believes that he ‘was [REDACTED]’.⁶⁸ He describes that ‘after [REDACTED] ROMBOT and his men’, it was clear ‘[REDACTED]’. He further describes that the news [REDACTED] and that his wife was scared [REDACTED].⁶⁹ P-1654 indicates that ‘ROMBOT is now a serving politician’ and ‘[h]is complete name is Alfred “ROMBOT” Yekatom’.⁷⁰ The witness does not mention Mr Ngaïssona.
50. The witness further provided and discusses a [REDACTED] complaint to the [REDACTED] (CAR-OTP-2050-0737).⁷¹
51. Having regard to the submissions made by the Prosecution and the death certificate provided,⁷² the Chamber is satisfied that P-1654 is unavailable to testify within the meaning of Rule 68(2)(c)(i) of the Rules.
52. As regards the requirement of Article 56 of the Statute, the Chamber notes the Yekatom Defence’s submission that the Prosecution did not diligently inquire into P-1654’s health situation.⁷³ The Chamber notes that the Prosecution had contacts with P-1654 after his interview and was assured by P-1654 and his family that he did not have any serious health issues but only minor health concerns.⁷⁴ In light of this, the Chamber finds that the Prosecution could not have anticipated such measures and therefore the relevant requirement has been satisfied.

⁶⁵ Statement, CAR-OTP-2053-0112, at 0116, paras 28, 30.

⁶⁶ Statement, CAR-OTP-2053-0112, at 0116-17, paras 32-33, 36-38.

⁶⁷ Statement, CAR-OTP-2053-0112, at 0117-18, paras 39, 47.

⁶⁸ Statement, CAR-OTP-2053-0112, at 0117-18, paras 39, 48.

⁶⁹ Statement, CAR-OTP-2053-0112, at 0118, para. 44.

⁷⁰ Statement, CAR-OTP-2053-0112, at 0118, para. 49.

⁷¹ Statement, CAR-OTP-2053-0112, at 0118, para. 47.

⁷² Confidential Annex B to the P-1654 Request, ICC-01/14-01/18-1169-Conf-AnxB; CAR-OTP-2135-0270.

⁷³ Yekatom Defence Response to the P-1654 Request, ICC-01/14-01/18-1181-Red, paras 20-21.

⁷⁴ P-1654 Request, ICC-01/14-01/18-1169-Red, para. 10.

53. The Yekatom Defence submits that P-1654's prior recorded testimony does not satisfy the reliability criteria due to potential witness contamination.⁷⁵ The Chamber finds that the Yekatom Defence's submission relates to the weight that the Chamber may attach to the evidence, if introduced. The Chamber recalls that it will assess the ultimate reliability of the evidence in its deliberations of the judgment. For the purposes of deciding on the P-1654 Request, the Chamber considers that P-1654's statement shows sufficient indicia of reliability. Notably, it was obtained by fulfilling the Formal Requirements.
54. The Chamber considers that large portions of P-1654's statement concern acts and conduct of Mr Yekatom in relation to Counts 11 to 16. The Chamber recalls that while this may be a factor against its introduction, this is not an absolute bar.⁷⁶
55. The Chamber notes the Prosecution's argument that P-1654's prior recorded testimony is 'not central to allegations in the case',⁷⁷ while the Yekatom Defence asserts its importance 'in relation to the charges brought against Mr. Yekatom'.⁷⁸ The Chamber finds that P-1654's prior recorded testimony relates to the allegations in the case because P-1654 witnessed events related to [REDACTED] and his testimony relates to that of other witnesses, namely, *inter alia*, P-1704, P-1705, P-1811, P-1839. At the same time, the Chamber notes that the parties, including the Yekatom Defence, have already discussed significant parts of P-1654's prior recorded testimony, including those which go to the acts and conduct of the accused, with other witnesses in-court. Therefore, in view of the Chamber, the Yekatom Defence has had an opportunity to test P-1654's account against those provided by other witnesses, including as regards the alleged inconsistencies between the various accounts. Furthermore, the Chamber finds that the introduction of P-1654's evidence would assist in its determination of the truth.

⁷⁵ Yekatom Defence Response to the P-1654 Request, ICC-01/14-01/18-1181-Red, paras 35-36.

⁷⁶ See above para. 38.

⁷⁷ P-1654 Request, ICC-01/14-01/18-1169-Red, paras 8, 20.

⁷⁸ Yekatom Defence Response to the P-1654 Request, ICC-01/14-01/18-1181-Red, para. 19.

56. The Chamber reiterates in this regard that it will consider the participants' arguments when assessing the probative value of P-1654's prior recorded testimony in the context of its deliberation of the judgment.
57. In light of the above, the Chamber considers that the introduction of P-1654's prior recorded testimony is not prejudicial to or inconsistent with the accused's rights and that the interests of justice are better served by its introduction.
58. Accordingly, the Chamber grants the introduction of P-1654's statement⁷⁹ and the associated item⁸⁰ pursuant to Rule 68(2)(c) of the Rules.

2. P-1558

59. P-1558 was a Central African [REDACTED].⁸¹ P-1558 was initially listed on the Prosecution's Final Witness List as a witness expected to testify pursuant to Rule 68(3) of the Rules.⁸²

i. Submissions

60. The Prosecution informs the Chamber that P-1558 passed away on [REDACTED] 2022.⁸³
61. It submits that when P-1558 was interviewed by the Prosecution in 2019, he was approximately [REDACTED] years old and did not report any serious health issues and the Prosecution remained in contact with him. In [REDACTED] 2022, P-1558 reported to the Prosecution on his medical condition, the fact that he was undergoing treatment, and that he believed he was fit to testify.⁸⁴ The Prosecution submits that, in these circumstances, it had no information in its possession that his evidence needed to be preserved pursuant to Article 56 of the Statute. P-1558

⁷⁹ Statement, CAR-OTP-2053-0112.

⁸⁰ Complaint, CAR-OTP-2050-0737.

⁸¹ P-1558 Request, ICC-01/14-01/18-1663-Conf, para. 7.

⁸² Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, p. 45.

⁸³ P-1558 Request, ICC-01/14-01/18-1663-Conf, para. 9; P-1558's Death Certificate, ICC-01/14-01/18-1663-Conf-AnxB.

⁸⁴ P-1558 Request, ICC-01/14-01/18-1663-Conf, para. 11.

passed away subsequently in [REDACTED] 2022 following medical complications.⁸⁵

62. The Prosecution submits that P-1558's prior recorded testimony is *prima facie* reliable, 'truthful, authentic, and consistent' and was taken in the ordinary course of its investigations. It adds that the prior recorded testimony is internally consistent, sufficiently corroborated by other evidence in the case,⁸⁶ and limited to the information within P-1558's actual knowledge and experience.⁸⁷ It further submits that the prior recorded testimony is relevant and probative.⁸⁸
63. The Yekatom Defence does not oppose the P-1558 Request but responds to the Prosecution's characterisation of P-1558's evidence therein.⁸⁹ The Ngaïssona Defence informed the Chamber that it does not intend to respond to the P-1558 Request and defers to the Yekatom Defence's position.⁹⁰

ii. *Chamber's determinations*

64. In his statement,⁹¹ the witness describes, *inter alia*, his professional background; an incident at PK9 concerning killings committed by the Seleka; the creation of Seleka identity cards; the Anti-Balaka allegedly checking telephones for phone numbers of Muslims; background of a Seleka colonel named Abatom; his brief detention by the Seleka; the difference between a Seleka 'foreigner' and Muslims; going to Scad and meeting '*Coeur de Lion*' on the way; the role of FACA and ComZones within Mr Yekatom's group; the movement of Muslims on the Mbaïki route; the [REDACTED].
65. The witness makes several remarks in relation to Mr Yekatom. In particular, he describes, *inter alia*, his first meeting with Mr Yekatom before 2013; Mr Yekatom having received a call from Mr Ngaïssona and François Bozizé; Mr Ngaïssona having asked Mr Yekatom to join the Anti-Balaka; Mr Yekatom

⁸⁵ P-1558 Request, ICC-01/14-01/18-1663-Conf, para. 12.

⁸⁶ P-1558 Request, ICC-01/14-01/18-1663-Conf, para. 13.

⁸⁷ P-1558 Request, ICC-01/14-01/18-1663-Conf, paras 14-15.

⁸⁸ P-1558 Request, ICC-01/14-01/18-1663-Conf, paras 16-18.

⁸⁹ Yekatom Defence Response to the P-1558 Request, ICC-01/14-01/18-1675-Red, paras 2-3.

⁹⁰ Email from the Ngaïssona Defence, 25 November 2022, at 10:30.

⁹¹ Statement, CAR-OTP-2105-0195.

joining the Anti-Balaka and beginning to receive money; Mr Yekatom forming his group and their stay at Yamwara School; Mr Yekatom's control over the area around Pissa and checkpoints set up by his elements in the area from PK9 to Mbaïki; Mr Yekatom disciplining his elements, including Mazimbele; Mr Yekatom's presence at the meeting at the Mbaïki Cathedral and subsequent events; his private interactions with Mr Yekatom; Mr Yekatom's presence on the Mbaïki route; the presence of young individuals in Mr Yekatom's group; Mr Yekatom's relations with '*Coeur de Lion*' and Kamezolai; and Mr Yekatom's locations prior to arriving at Yamwara School.⁹² The witness mentions Mr Ngaïssona only in relation to one phone call that Mr Yekatom received after 5 December 2013.⁹³

66. The associated items consist of two videos on which the witness commented during his interview with the Prosecution, specifically, portions of the video '*Une Autre Vision du Combat*' (CAR-OTP-2094-7618), and another video (CAR-OTP-2012-0523),⁹⁴ in which he, *inter alia*, identified some elements within Mr Yekatom's group.
67. Having regard to the submissions made by the Prosecution and the death certificate provided, the Chamber is satisfied that P-1558 is unavailable to testify within the meaning of Rule 68(2)(c)(i) of the Rules.
68. As regards the requirement of Article 56 of the Statute, the Chamber is satisfied that, given P-1558's age and condition at the time of his interview with the Prosecution investigators and the subsequent developments in his health, the Prosecution could not have anticipated such measures.
69. The Chamber considers that P-1558's statement shows sufficient indicia of reliability. Notably, it was obtained by fulfilling the Formal Requirements.

⁹² Statement, CAR-OTP-2105-0195, at 0197, para. 15, at 0199-0204, paras 21-52.

⁹³ Statement, CAR-OTP-2105-0195, at 0199-0200, para. 24.

⁹⁴ The Chamber notes that the statement mentions that the witness was shown and commented on a video titled '*Au Coeur du chaos*' with ERN CAR-OTP-2012-0523. See Statement, CAR-OTP-2105-0195, at 0209-0210, paras 108-23. This ERN corresponds to a video titled 'ANNEX C / ANNEX A / ANNEX C / ANNEX B / Video 178 / RCA : SPECIAL INVESTIGATION LA FRANCE ARME LES MILICES CHRÉTIENN' (the 'Special Investigation video').

70. The Chamber notes that P-1558's prior recorded testimony concerns acts and conduct of Mr Yekatom. The Chamber recalls that while this may be a factor against its introduction, this is not an absolute bar.⁹⁵ Barring his private interactions with Mr Yekatom, the Chamber considers that the remaining portions of his prior recorded testimony contain evidence that is cumulative of other evidence on the record. The Chamber further notes that P-1558's associated items have been shown and used in court to elicit evidence from several witnesses.⁹⁶ Therefore, the Chamber considers that his evidence concerning these items is cumulative to and/or corroborative of other evidence on the record. The Chamber would also benefit from having on the record [REDACTED], as well as the nature of the witness's interactions with Mr Yekatom. In light of this, the Chamber considers that the references to Mr Yekatom's acts and conduct in P-1558's statement do not bar its introduction.
71. Having regard to the above and noting that neither Defence team opposes the introduction of P-1558's prior recorded testimony, the Chamber considers that it is not prejudicial to or inconsistent with the accused's rights and that the interests of justice are better served by its introduction.
72. Accordingly, the Chamber grants the introduction of P-1558's statement pursuant to Rule 68(2)(c) of the Rules.⁹⁷ The Chamber notes that it has already recognised as submitted the associated items requested by the Prosecution, namely videos CAR-OTP-2094-7618⁹⁸ and CAR-OTP-2012-0523,⁹⁹ and therefore it need not rule on them again.

⁹⁵ See above para. 38.

⁹⁶ See for example the excerpts of the Special Investigation video, CAR-OTP-2012-0523 were shown and discussed with witnesses, *inter alia*, P-1521, P-1339, P-1839, P-1858, P-1647, P-1786, P-0967 and P-0487; and the excerpts of video 'Une Autre Vision du Combat' CAR-OTP-2094-7618 were shown and discussed in court with witnesses, *inter alia*, P-0888, P-2475, P-1339, P-1839, P-1647 and P-0487.

⁹⁷ Statement, CAR-OTP-2105-0195.

⁹⁸ Ninth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0992, P-0446, P-0888, P-0889 and P-1416, 21 December 2021, ICC-01/14-01/18-1226-Conf, para. 27, pp. 17-18; transcript of hearing, 8 April 2022, ICC-01/14-01/18-T-120-ENG, p. 10, line 11 - p. 13, line 7.

⁹⁹ Eleventh Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0954, P-1811, and P-0966, 18 March 2022, ICC-01/14-01/18-1317-Conf, para. 31, p. 14; transcript of hearing, 30 March 2022, ICC-01/14-01/18-T-114-ENG, p. 5, line 15 - p. 8, line 21.

3. P-1172

73. P-1172 was a member of the FACA who had contact with Maxime Mokom during the relevant period in relation to the activities of the Anti-Balaka.¹⁰⁰ P-1172 was initially listed on the Prosecution's Final Witness List as a witness expected to testify pursuant to Rule 68(3) of the Rules.¹⁰¹
74. P-1172 was interviewed by the Prosecution twice, in 2017 (the 'First Statement')¹⁰² and in 2018 (the 'Second Statement'; collectively, 'P-1172's prior recorded testimony').¹⁰³

i. Submissions

75. The Prosecution informs the Chamber that P-1172 passed away on [REDACTED] 2019.¹⁰⁴
76. The Prosecution submits that at the time of his second interview, the witness was approximately [REDACTED] years old and did not report any serious health issues and the Prosecution remained in contact with him. In November 2020, the Prosecution was informed that P-1172 had passed away after a short illness. The Prosecution submits that, in these circumstances, it had no information in its possession that his evidence needed to be preserved pursuant to Article 56 of the Statute.¹⁰⁵
77. The Prosecution does not request the formal submission of P-1172's First Statement but only of P-1172's Second Statement.¹⁰⁶
78. The Prosecution submits that P-1172's Second Statement is *prima facie* reliable, 'truthful, authentic, and consistent' and taken in the ordinary course of its investigations.¹⁰⁷ It adds that it is internally consistent, sufficiently corroborated

¹⁰⁰ P-1172 Request, ICC-01/14-01/18-1677-Red, paras 6-7.

¹⁰¹ Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, pp. 1-2.

¹⁰² CAR-OTP-2046-1003.

¹⁰³ CAR-OTP-2082-1058.

¹⁰⁴ P-1172 Request, ICC-01/14-01/18-1677-Red, para. 8; P-1172's Death Certificate, ICC-01/14-01/18-1677-Conf-AnxB.

¹⁰⁵ P-1172 Request, ICC-01/14-01/18-1677-Red, paras 8-9.

¹⁰⁶ See P-1172 Request, ICC-01/14-01/18-1677-Red, paras 1, 20; see also Annex A, ICC-01/14-01/18-1677-Conf-AnxA.

¹⁰⁷ P-1172 Request, ICC-01/14-01/18-1677-Red, para. 10.

by other evidence in the case,¹⁰⁸ and limited to the information within P-1172's knowledge and experience.¹⁰⁹ It further submits that it is relevant and probative.¹¹⁰

79. The Yekatom Defence does not oppose the P-1172 Request but notes that it does not mention a number of exonerating statements contained in P-1172's prior recorded testimony.¹¹¹
80. The Ngaïssona Defence opposes the P-1172 Request in relation to paragraphs 50-53 of P-1172's Second Statement as they concern acts and conduct of Mr Ngaïssona and relate to issues central to the Prosecution's case and materially in dispute.¹¹² The Ngaïssona Defence also responds to the Prosecution's characterisation of P-1172's evidence as set out in the P-1172 Request.¹¹³ The Ngaïssona Defence further submits that the Prosecution fails to adequately substantiate why P-1172's First Statement should not be formally recognised; it argues, *inter alia*, that the two statements form a whole and are inseparable.¹¹⁴ The Ngaïssona Defence requests that P-1172's First Statement be introduced into evidence (the 'Ngaïssona Defence Request').¹¹⁵

ii. Chamber's determinations

81. In his First Statement, the witness describes, *inter alia*, his personal background and joining the FACA; meeting former President Djotodia; Seleka exactions including his arrest and mistreatment by them, and subsequent detention and escape. It does not contain any references to either accused.
82. In his Second Statement, the witness describes, *inter alia*, fleeing to Zongo and meeting Maxime Mokom there; hearing about the rising of a movement against the Seleka; being contacted by Maxime Mokom and his communications with

¹⁰⁸ P-1172 Request, ICC-01/14-01/18-1677-Red, para. 10.

¹⁰⁹ P-1172 Request, ICC-01/14-01/18-1677-Red, paras 10-11.

¹¹⁰ P-1172 Request, ICC-01/14-01/18-1677-Red, paras 13-15.

¹¹¹ Yekatom Defence Response to the P-1172 Request, ICC-01/14-01/18-1689-Red, paras 2-3; *see also* paras 4-9.

¹¹² Ngaïssona Defence Response to the P-1172 Request, ICC-01/14-01/18-1687-Conf, paras 2, 7-10, 17.

¹¹³ Ngaïssona Defence Response to the P-1172 Request, ICC-01/14-01/18-1687-Conf, paras 11-15.

¹¹⁴ Ngaïssona Defence Response to the P-1172 Request, ICC-01/14-01/18-1687-Conf, para. 16.

¹¹⁵ Ngaïssona Defence Response to the P-1172 Request, ICC-01/14-01/18-1687-Conf, para. 17.

him; Maxime Mokom's contacts with individuals in Bossangoa; members of the military from Bangui joining the movement; Maxime Mokom informing him of the attack on Bangui on 5 December 2013 before it took place; the Anti-Balaka coordination; Maxime Mokom's thoughts about Mr Ngaïssona; returning to Bangui after the President of the Transitional Government Catherine Samba-Panza took over; Mazimbele taking a vehicle from a priest; Maxime Mokom attending a meeting in Kenya and a subsequent meeting with the '[m]ilitary from the Anti-Balaka'; divisions in the Anti-Balaka between those following Maxime Mokom and those following Mr Ngaïssona; his communications with other members of the Anti-Balaka and information about them, including Brice Emotion Namsio, Sylvestre Yagouzou, Judicael Orofei, Yvon Konate, Sebastien Wenezoui, Gilbert Kamezolari and Ngremangou.

83. In respect of Mr Ngaïssona, the witness states in his Second Statement, *inter alia*, 'hearing about NGAISSONA as the Coordinator of the movement'; going to Mr Ngaïssona's compound to attend an Anti-Balaka meeting; and later participating in a meeting at Mr Ngaïssona's second compound in which the objective was to appoint Anti-Balaka chiefs to go and see former President Catherine Samba-Panza.¹¹⁶
84. In respect of Mr Yekatom, the witness states in his Second Statement, *inter alia*, knowing Mr Yekatom since 2003; Mr Yekatom's presence in Zongo; Mr Yekatom appearing in Mbaïki and Mongoumba; and not seeing Mr Yekatom at the two Anti-Balaka meetings he attended after his return from Zongo.¹¹⁷
85. Having regard to the submissions made by the Prosecution and the death certificate provided, the Chamber is satisfied that P-1172 is unavailable to testify within the meaning of Rule 68(2)(c)(i) of the Rules.
86. As regards the requirement of Article 56 of the Statute, the Chamber is satisfied that, given P-1172's age and condition at the time of his interview with the

¹¹⁶ Second Statement, CAR-OTP-2082-1058, at 1065, para. 40, at 1066-67, paras 50-53.

¹¹⁷ Second Statement, CAR-OTP-2082-1058, at 1070, para. 73.

Prosecution investigators and that he passed away after a short illness, the Prosecution could not have anticipated such measures.

87. The Chamber considers that P-1172's prior recorded testimony shows sufficient indicia of reliability. Notably, it was obtained by fulfilling the Formal Requirements.
88. As regards P-1172's First Statement, the Chamber notes that while the Prosecution did not request its formal submission, the Ngaïssona Defence did. The Chamber notes that this statement does not relate to the acts and conduct of either of the accused. It also does not directly relate to any of the factual allegations in the present case. However, in view of the Chamber, P-1172's First Statement provides the necessary background and context to understanding, in particular, P-1172's background in the FACA, the reasons why he fled the CAR, and the motivations underlying his cooperation with the Anti-Balaka as described in his subsequent statement.
89. As regards P-1172's Second Statement, the Chamber notes that it contains limited references to the accused's acts and conduct. The Chamber also notes the Ngaïssona Defence's objections concerning paragraphs 50-53 referring to Mr Ngaïssona. The Chamber considers that these paragraphs contain information that is cumulative and corroborative of accounts provided by other witnesses. In any event, this information is confined to the witness's perception of the events, which was limited in nature. Further, in view of the Chamber, the references in P-1172's Second Statement concerning Mr Yekatom are limited and peripheral. For these reasons, the Chamber considers that the references to the accused's acts and conduct in P-1172's Second Statement do not bar its introduction.
90. In light of the above and noting that neither Defence teams opposes the introduction of P-1172's prior recorded testimony except paragraphs 50-53 of the P-1172's Second Statement, the Chamber considers that the introduction of P-1172's prior recorded testimony is not prejudicial to or inconsistent with the accused's rights and that the interests of justice are better served by its introduction.

91. Having regard to this, the Chamber grants the Ngaïssona Defence Request and the introduction of P-1172's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules.¹¹⁸

FOR THESE REASONS, THE CHAMBER HEREBY

DECIDES that the prior recorded testimonies of the following witnesses are introduced into evidence, pursuant to Rule 68(2)(c) of the Rules:

- **P-1654:** Statement, CAR-OTP-2053-0112 and associated item CAR-OTP-2050-0737.
- **P-1558:** Statement, CAR-OTP-2105-0195.
- **P-1172:** First Statement, CAR-OTP-2046-1003; Second Statement, CAR-OTP-2082-1058.

REJECTS the Further Submission Request;

GRANTS the Ngaïssona Defence Request;

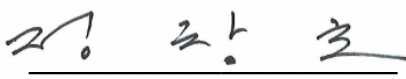
REMINDS the Prosecution of its directions to publish public redacted versions of the aforementioned prior recorded testimonies;

ORDERS the Prosecution to file a public redacted version of the P-1558 Request, ICC-01/14-01/18-1663-Conf, within two weeks of notification of the present decision; and

ORDERS the Ngaïssona Defence to file a public redacted version of the Ngaïssona Defence Response to the P-1172 Request, ICC-01/14-01/18-1687-Conf, within two weeks of notification of the present decision.

¹¹⁸ First Statement, CAR-OTP-2046-1003; Second Statement, CAR-OTP-2082-1058.

Done in both English and French, the English version being authoritative.

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 12 July 2023

At The Hague, The Netherlands