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Date: **3 August 2023**

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godínez

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public
with Confidential Annex A**

**Public Redacted Version of “Prosecution Request under Rule 68(2)(c) to Introduce
the Prior Recorded Testimony of P-2269”, ICC-01/14-01/21-628-Conf, dated 31 July
2023**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber VI (“Chamber”) to introduce into evidence the prior recorded testimony of Witness P-2269 pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (“Application”). The Prosecution provides in Confidential Annex A, the list of material it seeks to be formally submitted for this witness.¹

2. The Documents can be introduced pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”) as this witness is unavailable to testify orally before the Court due to obstacles that cannot be overcome with reasonable diligence or in the alternative, is dead or presumed dead. P-2269 cannot be located despite numerous attempts and efforts to do so, and he has been reported dead. His prior recorded testimony is relevant, probative, and bears sufficient indicia of reliability. Further, the need for article 56 measures could not have been anticipated. Finally, the introduction of this evidence is not prejudicial to or inconsistent with the rights of the Accused Mahamat Said Abdel Kani (“Mr SAID”).

3. The evidence of witness P-2269, relates entirely to aspects of the contextual elements of war crimes. It is also cumulative to and corroborates the evidence of other witnesses, including witnesses who will testify at trial. The Defence will have the opportunity during the course of the trial to challenge and refute the evidence of this witness, including by the cross-examination of witnesses who will testify in court on overlapping facts and evidence.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this filing is confidential because it contains evidence of Prosecution witnesses, currently not public. A public redacted version will be filed as soon as practicable.

III. APPLICABLE LAW

5. In its Directions on the Conduct of Proceedings (“Directions”),² the Chamber determined that the Prosecution may file applications for the admission of prior recorded testimony pursuant to rule 68(2) of the Rules. Rule 68(2)(c) of the Rules, allows the introduction of the previously recorded testimony of a witness who is not present before the Court when the

¹ Referred to as “Documents”.

² ICC-01/14-01/21-251, para. 38.

following three requirements are met: (i) the prior recorded testimony comes from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; (ii) the necessity of measures under article 56 could not be anticipated; and (iii) the prior recorded testimony has sufficient indicia of reliability.³ In its assessment of indicia of reliability which is considered preliminary at this stage,⁴ the Chamber is not obliged to consider factors beyond formal requirements,⁵ unless it identifies manifest issues as to the reliability of the information provided by the Witness or if the Defence raises specific objections,⁶ and may do so if they consider it to be appropriate in a particular case.⁷

6. Further, the Prosecution notes that the term “unavailable” in rule 68(2)(c) of the Rules must be interpreted broadly.⁸ Previously, this term has been interpreted to include situations, *inter alia*, where (i) a witness cannot be located after numerous attempts and efforts.⁹ In *Bemba et al*, the Chamber found the scope of ‘unavailability’ to be much broader than what was originally envisaged by the International Criminal Tribunal for Yugoslavia.¹⁰ In *Al Hassan*, the Chamber considered that factors such as failure to establish contact with a witness and failure

³ *Gicheru*, ICC-01/09-01/20-235-Red, para. 8.

⁴ *Gicheru*, ICC-01/09-01/20-235-Red, para. 20; *Bemba et al*. Rule 68(2)(c) Decision, ICC-01/05-01/13-1481-Red-Corr, para. 20; *Gbagbo*, ICC-02/11-01/15-744 OA 8, paras. 3, 72, 104.

⁵ Including 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 and declared to be accurate 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; *See, for example Ruto and Sang* Decision, ICC-01/09-01/11-1938-Corr-Red2, paras 65-66; *Bemba et al* Rule 68(2)(c) Decision, ICC-01/05-01/13-1481-Red-Corr, para. 20; *Ntaganda* P-0103 Rule 68(2)(c) Decision, ICC-01/04-02/06-1205, para. 16; *Gbagbo and Blé Goudé* Rule 68(2)(b) and Rule 68(3) Decision, ICC-02/11-01/15-573-Red, para. 22.

⁶ *Said* Rule 68(2)(c) Decision, ICC-01/14-01/21-506-Conf, para. 16; *Yekatom and Ngaissona* Rule 68(2)(c) First Decision, ICC-01/14-01/18-1975-Red, para. 34.

⁷ *Gicheru*, ICC-01/09-01/20-235-Red, para. 20; *Gbagbo*, ICC-02/11-01/15-744 OA 8, paras. 3, 103-104; *Al Hassan* P-0570 Rule 68(2)(c), ICC-01/12-01/18-1588-Red, para. 28; *Al Hassan*, ICC-01/12-01/18-1413, para 15.

⁸ *Bemba et al*. Rule 68(2)(c) Decision, ICC-01/05-01/13-1481-Red-Corr, para. 16; *Al Hassan* D-0002 and D-0146 Rule 68(2)(c) Decision, ICC-01/12-01/18-2445-Red, para. 21 *et seq.*

⁹ *Abd-Al-Rahman P-0085* Rule 68(2)(c) Decision, ICC-02/05-01/20-834.

¹⁰ *Bemba et al* Rule 68(2)(c) Decision, ICC-01/05-01/13-1481-Red-Corr, para. 16: The Chamber held that “with respect to the interpretation of the provision [...] the nature of unavailability in rule 68(2)(c) of the Rules is undefined. In this vein, it is noted that unlike Rule 92 quater (A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia (‘ICTY’), which refers to the admission of a prior statement of a person ‘who has subsequently died, or who can no longer with the reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally’, the drafting history of the amended Rule 68(2)(c) of the Rules makes clear that the intention of the drafters in effecting the amendment in the Rules was to comparatively broaden the ICTY provision to include ‘a situation in which it was not possible to secure or reach a witness, although the witness could, with reasonable diligence be traced’(...). Bearing this in mind, the Chamber considers that the term ‘unavailable’ in Rule 68(2)(c) of the Rules must be interpreted broadly.”

by relevant state authorities to execute summonses because a witness cannot be located, can render a witness unavailable to testify.¹¹

7. Finally, the Prosecution notes that corroborative evidence is not required in order for the prior recorded testimony to be introduced under rule 68(2)(c) of the Rules,¹² but nonetheless, the Chamber may have regard to whether the prior recorded testimony is corroborated by or is cumulative of other evidence of similar facts.

IV. SUBMISSIONS

8. The Prosecution submits the requirements of rule 68(2)(c) of the Rules are met, because P-2269, (i) is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence or in the alternative, is dead or presumed dead; (ii) his evidence is relevant, reliable and probative; and (iii) necessity of article 56 measures could not be anticipated. These requirements are set out in section A of this Application. Thereafter, in section B, the Prosecution sets out that the rights of Mr SAID are not prejudiced.

A. Unavailability, relevance and reliability, and anticipation of article 56 measures

(i) The Witness is unavailable to testify orally

9. Witness unavailability under rule 68(2)(c) is to be interpreted broadly,¹³ and includes the inability to trace the Witness after all reasonable steps have been taken, such as the request for and issuance of a summons to appear.¹⁴ In this case, Witness P-2269 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence or in the alternative, is dead or presumed dead. As detailed below, the Prosecution has exhausted all reasonable measures to secure his attendance.

¹¹ *Al Hassan* P-0605 and P-0582 Rule 68(2)(c) Decision, ICC-01/12-01/18-2114-Red, paras 24-26.

¹² *Said* Rule 68(2)(c) Decision, ICC-01/14-01/21-506-Conf, para. 24 ((i) the existence of corroborating evidence is not a consideration that is explicitly set out in rule 68(2)(c) of the Rules although it does appear in rule 68(2)(b) of the Rules; (ii) even under rule 68(2)(b) of the Rules, corroboration is not a mandatory precondition that must be fulfilled, but rather features amongst a range of factors that must be considered in the Chamber's exercise of its discretion to introduce prior recorded testimony; (iii) rule 68(2)(b) of the Rules refers not only to corroborative evidence but more generally to evidence 'of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts').

¹³ See *Bemba et al* Rule 68(2)(c) Decision, ICC-01/05-01/13-1481-Red-Corr, para. 16; *Al Hassan* D-0002 and D-0146 Rule 68(2)(c) Decision, ICC-01/12-01/18-2445-Red, para. 21 *et seq.*

¹⁴ See *Al Hassan* P-0605 and P-0582 Rule 68(2)(c) Decision, ICC-01/12-01/18-2114-Red, para. 24-26.

10. On 27 October 2021, the Prosecution had [REDACTED] for his anticipated testimony.¹⁵ Thereafter, repeated attempts to contact the Witness directly, or through family members and intermediaries, were futile.¹⁶ On 1 November 2021, P-2269's wife told an investigator that [REDACTED],¹⁷ which the Witness never did.

11. In February 2022, it was reported that P-2269 had passed away in October 2021,¹⁸ although the Prosecution was in contact with the Witness in October 2021 and had information he was alive in November 2021.¹⁹ Following inquiries into the alleged death of P-2269 in February 2022, the CAR police [REDACTED] confirmed to the Prosecution that P-2269 was not dead, and, [REDACTED].²⁰

12. In July 2022, [REDACTED], identifying a list of CAR phone numbers related to P-2269 to be called, in search of information on P-2269's whereabouts.²¹ An investigator called these numbers and spoke to two people alleging [REDACTED] of P-2269 who provided contradictory information on whether the Witness was dead or alive.²²

13. On 16-18 August 2022, a field mission was conducted by an investigator [REDACTED] regarding P-2269's situation, he reported that the Witness' name did not appear on either the records of registered deaths at the Hospital or at the city hall [REDACTED]. Further, P-2269's wife informed the CAR police [REDACTED], which suggested that P-2269 was still alive.²³

14. In October 2022, investigators contacted intermediary P-0320 in order to clarify P-2269's state and whereabouts but searches for P-2269 [REDACTED] did not yield any result. Subsequently information received from P-2269's relatives reported that the Witness was dead. Yet no details or proof of death were provided.²⁴

¹⁵ ID report on additional information on P-2269: CAR-OTP-00001708 at 000006, para.41.

¹⁶ ID report on attempts to locate P-2269: CAR-OTP-00001711.

¹⁷ ID report on additional information on P-2269: CAR-OTP-00001708 at 000006, para.42.

¹⁸ ID report on additional information on P-2269: CAR-OTP-00001708 at 000006, para.43.

¹⁹ ID report on additional information on P-2269: CAR-OTP-00001708 at 000006, para.42.

²⁰ ID report on additional information on P-2269: CAR-OTP-00001708 at 000006-000007, paras.44-46.

²¹ ID report on additional information on P-2269: CAR-OTP-00001708 at 000007, paras. 47-48.

²² ID report on additional information on P-2269: CAR-OTP-00001708 at 000007, paras.50-51.

²³ ID report on mission in Bossangoa relayed to P-2269: CAR-OTP-00000017, at 000001, paras. 2-3, 5; **Photo annex** (hospital [REDACTED]): CAR-OTP-00000018; **Photo annex** (city hall [REDACTED]): CAR-OTP-00000019; *see also* ID report on additional information on P-2269: CAR-OTP-00001708 at 000007, paras. 49, 52.

²⁴ ID report on additional information on P-2269: CAR-OTP-00001708 at 000007-000008, paras. 54-55.

15. Between 21 November and 14 December 2022, daily attempts to call P-2269 were made by an investigator without success.²⁵ On 31 January 2023, Trial Chamber V in *Yekatom and Ngaissona*, [REDACTED],²⁶ finding that the Prosecution had “exhausted all reasonable avenues”²⁷ to locate and produce P-2269 (a common witness to the *Yekatom and Ngaissona* and the *Said* cases) thus confirming the Prosecution’s exercise of reasonable diligence.

16. On 16-18 March 2023, the CAR [REDACTED] to P-2269, conducted a first mission [REDACTED] and stated at the end of his mission that he could not locate or contact P-2269.²⁸ A second mission was conducted on 26-28 April 2023, by the CAR [REDACTED] who reported that P-2269 “*serait décédé*” [REDACTED]. No family members of P-2269 could be contacted to confirm.²⁹ On 30 April 2023, a *proces-verbal de carence* was signed by the CAR [REDACTED] to attest to his findings about P-2269’s death.³⁰

17. Finally, additional attempts to call P-2269 by an investigator on 30 March, 01 April and 15 May 2023 were unsuccessful.³¹

18. On the basis of the above information, the Prosecution submits that it has established that P-2269 is inaccessible³² as the Witness cannot be located despite numerous attempts and efforts, and considering that factors such as failure to establish contact with a witness and failure by relevant state authorities to [REDACTED] because a witness cannot be located, can render a witness unavailable to testify orally within the meaning of rule 68(2)(c) of the Rules.³³ In the alternative, the Prosecution submits that P-2262 is dead or presumed dead pending proof

²⁵ **ID report on additional information on P-2269:** CAR-OTP-00001708 at 000008, paras. 56.

²⁶ *See Yekatom and Ngaissona*, ICC-01/14-01/18-1738-Conf (see the Prosecution’s email notification on 27 July 2023 at 16:17 regarding the Trial Chamber V granting access to this filing in an email decision on 26 July 2023 at 13:56); *see also ID report on additional information on P-2269:* CAR-OTP-00001708 at 000008, paras. 57.

²⁷ *See Yekatom and Ngaissona*, ICC-01/14-01/18-1738-Conf, para. 15.

²⁸ **First [REDACTED] mission report:** CAR-OTP-00001702.

²⁹ **Second [REDACTED] mission report:** CAR-OTP-00001710; *see also ID report on additional information on P-2269:* CAR-OTP-00001708 at 000008, para. 60.

³⁰ **Proces-verbal de carence:** CAR-OTP-00001709.

³¹ **ID report on additional information on P-2269:** CAR-OTP-00001708 at 000008, paras. 58-59, 61.

³² *See Ntaganda P-0039 Rule 68(2)(c) Decision*, ICC-01/04-02/06-1325, paras. 9-10.

³³ *See Abd-Al-Rahman P-0085 Rule 68(2)(c) Decision*, ICC-02/05-01/20-834; *Al Hassan P-0605 and P-0582 Rule 68(2)(c) Decision*, ICC-01/12-01/18-2114-Red, paras 24-26.

of death or other evidence to be provided³⁴ in addition to the second [REDACTED] report and *PV de carence*.³⁵

(ii) P-2269's prior recorded testimony is relevant, reliable and has probative value

19. P-2269's prior recorded testimony consists of his witness statement and its four annexes³⁶ as all items discussed by a witness form an integral part of the prior recorded testimony.³⁷ Annex C and D attached to the prior statement are contemporaneous documents given to the investigators when he was interviewed.³⁸ P-2269, informed the investigators his level of education was "[REDACTED]".³⁹ P-2269's evidence is relevant to establish aspects of the contextual elements of war crimes. P-2269 provides information on the pro-BOZIZE forces being sufficiently organised and on the hostilities being sufficiently intense as relied upon in the Prosecution's Trial Brief.⁴⁰

20. P-2269 is an Anti-Balaka insider who stayed in Zongo and Gobere during 2013. Upon arrival of the Seleka in March 2013, the Witness fled first to Zongo [REDACTED], and then to Bossangoa and Gobere, where he joined the Anti-Balaka, [REDACTED] and others. [REDACTED] Anti-Balaka attack of Bangui on 5 December 2013.⁴¹ P-2269's prior statement provides important evidence on (i) [REDACTED];⁴² the organisation by pro-BOZIZE forces of various self-defence groups who had gathered in Gobere (near Bossangoa) (ii) where new recruits were registered and assigned to a company;⁴³ (iii) where [REDACTED] was the coordinator of operations;⁴⁴ (iv) where recruits received training from former FACA

³⁴ Including any death certificate or any formal confirmation by a CAR official (written or oral) or any other concrete evidence such as the statement of anyone who attended or had knowledge of any burial or funeral ceremony for P-2269; See *Ntaganda* P-0022, P-0041 and P-0103 Rule 68(2)(c) Decision, ICC-01/04-02/06-1029, paras 17-19.

³⁵ **Second [REDACTED] mission report:** CAR-OTP-00001710; **Proces-verbal de carence:** CAR-OTP-00001709.

³⁶ See Confidential Annex A.

³⁷ *Said* Rule 68(2)(c) Decision, ICC-01/14-01/21-506-Conf, paras. 11-12; *Yekatom and Ngaissona* Rule 68(2)(c) First Decision, ICC-01/14-01/18-1975-Red, paras. 22-23.

³⁸ **P-2269 annex C:** CAR-OTP-2111-0365; **P-2269 annex D:** CAR-OTP-2111-0367; see also **P-2269:** CAR-OTP-2111-0336, at 0358, para. 169 (Annexes C and D).

³⁹ **P-2269:** CAR-OTP-2111-0336, at 0338, para. 13.

⁴⁰ Prosecution's Trial Brief, ICC-01/14-01/21-359-Conf, paras. 36-37, 42, 47-48.

⁴¹ **P-2269:** CAR-OTP-2111-0336, at 0343-0344, paras. 56-58, at 0347-0348, paras 81-92.

⁴² **P-2269:** CAR-OTP-2111-0336, at 0350, para. 108.

⁴³ **P-2269:** CAR-OTP-2111-0336, at 0343, para. 52.

⁴⁴ **P-2269:** CAR-OTP-2111-0336, at 0341, para. 37, at 0342, para. 46, at 0345, para. 68, at 0346, para. 76.

members;⁴⁵ (v) where weapons and ammunition were supplied;⁴⁶ and (vi) where funds were provided.⁴⁷

21. P-2269's prior statement is *prima facie* probative, reliable and has sufficient indicia of reliability as it fulfils the formal requirements at the time the prior recorded testimony was taken. The prior statement was obtained by the Prosecution in the ordinary course of its investigation,⁴⁸ and was taken in compliance with rule 111 of the Rules.⁴⁹ The prior statement was initialled on each page by every person present during the interview,⁵⁰ and signed at the end by the Witness and by the investigators conducting the interview.⁵¹ The prior statement was voluntarily provided by the Witness who was given an explanation of the procedure and informed of the significance of providing a statement to the Prosecution.⁵² Where the Witness chose not to divulge certain information, he indicated as much,⁵³ underscoring the voluntary nature of his statement. The prior statement was given in Sango, a language the Witness fully spoke and understood, and interpreted into English and certified by a qualified interpreter.⁵⁴ P-2269 verified his prior statement and declared to be accurate and true at the time to the best of his knowledge and recollection,⁵⁵ understanding that it could be used in proceedings before the Court and that he could be called to testify as a witness.⁵⁶

22. The prior statement of P-2269 provides a detailed account of what happened to him and what he witnessed, describing the events in a coherent and consistent manner within his knowledge and experience. Where the Witness corrected certain information, he did it right after his interview on 14 June 2019,⁵⁷ emphasizing the reliability nature of his statement. P-

⁴⁵ **P-2269:** CAR-OTP-2111-0336, at 0343, para. 53.

⁴⁶ **P-2269:** CAR-OTP-2111-0336, at 0345, paras. 68-69.

⁴⁷ **P-2269:** CAR-OTP-2111-0336, at 0350-0351, paras. 108-112.

⁴⁸ **P-2269 screening:** CAR-OTP-2090-0162 at 0163 (basis for contact).

⁴⁹ **P-2269:** CAR-OTP-2111-0336, at 0336 (the record notes the dates, times and place of, and all persons present during the questioning).

⁵⁰ **P-2269:** CAR-OTP-2111-0336, every pages (initials of every person present during the interview).

⁵¹ **P-2269:** CAR-OTP-2111-0336, at 0336 (investigators' and witness's signatures), at 0360 (witness acknowledgment).

⁵² **P-2269:** CAR-OTP-2111-0336, at 0336 (witness's signatures), at 0337-0338, paras. 2-8 and 9-11, at 0360 (witness acknowledgment).

⁵³ **P-2269:** CAR-OTP-2111-0336, at 0342, para. 41, at 0343, para. 52, at 0353, para. 131.

⁵⁴ **P-2269:** CAR-OTP-2111-0336, at 0337, para. 5, at 0360 (witness acknowledgment), at 0361, paras. 1-5 (interpreter certification).

⁵⁵ **P-2269:** CAR-OTP-2111-0336, at 0336 (investigators' and witness's signatures), at 0360 (witness acknowledgment).

⁵⁶ **P-2269:** CAR-OTP-2111-0336, at 0337, para. 7, at 0360 (witness acknowledgment).

⁵⁷ **P-2269:** CAR-OTP-2111-0336, at 0345, para. 68 (last sentence reads [REDACTED]; **ID report on clarification of P-2269's statement:** CAR-OTP-2111-0481 (last sentence at 0345, para. 68 should read instead [REDACTED]).

2269 was forthcoming in his interview about his lack of knowledge or lack of memory of certain events.⁵⁸ Further, P-2269 gave reasonable and logical explanations in his narrative of events without embellishment or speculation.⁵⁹

23. At this stage in the proceedings and considering that this prior recorded testimony's assessment is possible only at a general level in relation to broad themes discussed by the Witness,⁶⁰ the Prosecution submits that P-2269's evidence is also reliable and truthful because it is sufficiently corroborated by other evidence in the case: it includes the testimony of P-0884, P-2232, P-2328, and P-2251⁶¹ who will testify pursuant to rule 68(3) of the Rules,⁶² as well as P-0100⁶³ and P-0966,⁶⁴ whose evidence has been certified under rule 68(2)(b) of the Rules,⁶⁵ and P-1420⁶⁶ whose evidence has been introduced pursuant to rule 68(2)(c).⁶⁷ It includes also corroborative documentary evidence on the Anti-Balaka's gathering and organisation at GOBERE in preparation to overthrow the Seleka: interviews with Anti-Balaka leaders such as

⁵⁸ **P-2269**: CAR-OTP-2111-0336, at 0340, para. 27, at 0344, para. 61, at 0344, para. 63, at 0346, para. 77, at 0347, para. 79.

⁵⁹ **P-2269**: CAR-OTP-2111-0336, at 0338, para. 18, at 0343, para. 54, at 0348, para. 93, at 0352, para. 123, at 0353, para. 130, at 0356, para. 151, at 0357, para. 157.

⁶⁰ *Said* Rule 68(2)(c) Decision, ICC-01/14-01/21-506-Conf, para. 25.

⁶¹ **P-0884 transcribed statements**: CAR-OTP-2072-1356-R01 at 1362, 1376-1383, 1387-1389, ln. 186-189, 694-913, 1053-1126; CAROTP-2072-1616-R01 at 1639, lns. 784-799; CAR-OTP-2072-1654-R01 at 1659, 1661, lns. 142-149, 218-223 [REDACTED], CAR-OTP-2072-1849 at 1856-1857, ln.237-241, ln.245-246, at 1859, ln.347, at 1860, ln.368, ln.378-379; CAR-OTP-2072-1913 at 1943, ln.1038-1040, ln.1045-1046 (Anti-Balaka's gathering and organisation at Gobere in preparation to overthrow the Seleka); **P-2232**: CAR-OTP-2090-0561-R01 at 0570-0573, paras. 63-70, 72 ([REDACTED] was the coordinator of operations in Gobere), at 0570-0573, paras. 63-70, 72 (funds were provided in Gobere), at 0569-0570, paras. 59-60 (Anti-Balaka's gathering and organisation at Gobere in preparation to overthrow the Seleka), at 0570-0571, paras. 61-63 ([REDACTED]); **P-2328**: CAR-OTP-2099-0165 at 0192, para. 140 ([REDACTED]); **P-2251**: CAR-OTP-2093-0045-R01 at 0059-0061, paras. 90-102 (Anti-Balaka attack on 5 December 2023), at 0050-0052, paras. 30-43 (Anti-Balaka's gathering and organisation at Gobere in preparation to overthrow the Seleka).

⁶² *Said* P-0291, P-0884, P-2232 and P-2251 Rule 68(3) Decision, ICC-01/14-01/21-571-Conf.

⁶³ **P-0100** : CAR-OTP-2027-2535-R01 at 2558, paras. 139-141 (Anti-Balaka attack on 5 December 2023).

⁶⁴ **P-0966**: CAR-OTP-2102-0078-R01 at 0085, 0087, paras. 29, 38 (new recruits were registered and assigned to company in Gobere), at 0086, paras. 33-34 ([REDACTED] was the coordinator of operations in Gobere); CAR-OTP-2031-0241-R01 at 0251-0252, paras. 59-67 (Anti-Balaka attack on 5 December 2023), at 0253, para. 68 (funds were provided in Gobere), at 0246-0248, paras. 28-39 (Anti-Balaka's gathering and organisation at Gobere in preparation to overthrow the Seleka), at 0250, para. 51 ([REDACTED]); see also *Yekatom & Ngaissona*, **P-0966 in-court transcript**: ICC-01/14-01/18-T-117-ENG ET, p. 10, lns. 5-11 (funds were provided in Gobere), ICC-01/14-01/18-T-116-Red2-ENG, p. 25, lns. 5-11 (recruits received training from former FACA members in Gobere), ICC-01/14-01/18-T-116-Red2-ENG, p. 27, lns. 8-11, p. 36, ln. 12 – p. 38, ln.8 and ICC-01/14-01/18-T-118- Red2-ENG, p. 58, lns. 4-14 ([REDACTED]).

⁶⁵ **P-0100 read back log certification**: CAR-OTP-00001374; **P-0966 read back log certification**: CAR-OTP-00001503.

⁶⁶ **P-1420**: CAR-OTP-2040-0811, at 0815, para. 25, at 0818, para. 42 ([REDACTED]).

⁶⁷ *Said* Six Witnesses Rule 68(2)(c) Decision, ICC-01/14-01/21-506-Conf.

Dieudonné HOURONTI⁶⁸ and a speech of Sébastien WENEZOU⁶⁹. Further, P-2269's identity is confirmed by trial Witness P-2232,⁷⁰ who testified about it in the *Yekatom & Ngaissona* trial.⁷¹

(iii) The necessity of article 56 measures could not be anticipated

24. P-2269 was interviewed by the Prosecution on 5, 6, 7 and 8 June 2019. At the time of the interview, the Witness was 39 years old and did not report any serious health issues or voice any reluctance to cooperate with the Prosecution.⁷² Further, he remained in contact with the Prosecution immediately following his interview and did not express any concerns when informed that he was on the witness list to testify.⁷³ Moreover, it appeared that he had taken affirmative steps to arrange for his travel to do so before suddenly disengaging with the Prosecution.⁷⁴ Under these circumstances, the Prosecution had no information within its possession that would prompt consideration of evidence preserving measures under article 56.

B. The introduction of the requested material is not prejudicial to or inconsistent with the rights of Mr SAID

25. Introducing the evidence of Witness P-2269 under rule 68(2)(c) of the Rules causes no undue prejudice to Mr SAID.⁷⁵ P-2269's evidence relate to issues that are materially in dispute

⁶⁸ **Audio/video material:** CAR-OTP-2084-1263 from [00:02:29] to [00:03:54] and its transcript CAR-OTP-2107-1565 at 1567-1568, l.61-91 (in which HOURONTI speaks of the establishment of an Anti-Balaka base in GOBERE). *See also audio/video material:* CAR-OTP-2081-1769 from [00:04:00] to [00:04:15] and its transcript CAR-OTP-2107-6939 at 6942-6943, l. 100-111 (in which HOURONTI says he was in BOSSANGO with the Anti-Balaka from the beginning).

⁶⁹ **Audio/video material:** CAR-OTP-2084-1331 from [00:02:37] to [00:03:00] and its transcript CAR-OTP-2107-1586 at 1587, l. 30-33 (in which WENEZOU speaks of 16 officers forming the hard pillar of the Anti-Balaka around BOSSANGO).

⁷⁰ **P-2232 first statement:** CAR-OTP-2090-0561 at 0570, para. 62 (“[REDACTED]”; **P-2232 second statement:** CAR-OTP-2100-2569 at 2595, para. 140 (“[REDACTED]”); *see also P-2232 notebook:* CAR-OTP-2093-1562 (“[REDACTED]”).

⁷¹ *See Yekatom & Ngaissona, P-2232 in-court transcripts:* ICC-01/14-01/18-T-075-Red2-ENG, p. 33, l. 2-5, p. 45, l. 2-6; ICC-01/14-01/18-T-076-Red-ENG, p. 22, l. 9-16.

⁷² **ID report on additional information on P-2269:** CAR-OTP-00001708 at 000001, para. 5.

⁷³ **ID report on additional information on P-2269:** CAR-OTP-00001708 at 000002, paras. 8-9, 13, at 000003, para. 20, at 000004, para. 25.

⁷⁴ **ID report on additional information on P-2269:** CAR-OTP-00001708 at 000003, paras. 21-22, at 000005, paras. 29, 31-34, at 000006, paras. 39, 41.

⁷⁵ Noting a number of factors including: (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: *Al Hassan* P-0570 Rule 68(2)(c) Decision, ICC-01/12-01/18-1588-Red, para. 10 *with further references to the jurisprudence*; *Abd-Al Rahman* Rule 68(2)(c) Decision, ICC-02/05-01/20-603-Red, paras 37, 39; *Bemba*, ICC-01/05-01/08-1386 OA5 OA6, para. 78; *Said* Rule

but it does not go to core issues of the events at the OCRB or the acts and conduct of Mr SAID. Instead, the evidence of the Witness pertains only to background information and events relevant to the chapeau elements of war crimes. Further P-2269's evidence is cumulative to or corroborates of other evidence to be presented at trial.⁷⁶

26. The Defence will have the opportunity to cross-examine the Prosecution witnesses that will testify before the Chamber about the same topics or events as those referred to by P-2269, including the witnesses identified as being corroborated. The Defence will also have the opportunity to rebut the evidence of the Witness, by presenting its own evidence.

27. The Chamber will make its final assessment as to the authenticity, relevance, probative value and prejudicial effect based on the entire record at the end of the case.⁷⁷ Only by then, will the Chamber determine the proper weight to be given to each piece of evidence submitted on the record and, as appropriate, pursuant to which mode it was submitted for the purposes of its decision under article 74 of the Rome Statute.⁷⁸

V. RELIEF SOUGHT

40. For the above reasons, the Prosecution respectfully requests the Chamber to accept as formally submitted into evidence the prior recorded testimony of Witness P-2269, and associated documentation, as set out in Annex A to this Application.



Karim A. A. Khan KC, Prosecutor

Dated this 3rd day of August 2023
At The Hague, The Netherland

68(2)(c) Decision, ICC-01/14-01/21-506-Conf, paras. 22, 25, 39, 46; *Yekatom and Ngaissona* Rule 68(2)(c) First Decision, ICC-01/14-01/18-1975-Red, para. 36.

⁷⁶ See para. 23 above.

⁷⁷ *Ntaganda*, ICC-01/04-02/06-1802-Red, para. 30; *Ntaganda*, ICC-01/04-02/06-1653, para. 23 (referring to *Ntaganda*, ICC-01/04-02/06-1029, para. 27; *Ruto and Sang*, ICC-01/09-01/11-1938-Corr-Red2, paras. 60, 81, 111 and 128).

⁷⁸ *Said* Rule 68(2)(c) Decision, ICC-01/14-01/21-506-Conf, paras. 13, 16, 25.