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**International
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No: *ICC-01/14-01/18*

Date: **13 October 2023**

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

**Public Redacted Version of the
'Addendum to "Defence Response to the "Prosecution Request for Submission of
the Prior Recorded Testimony of P-2200 pursuant to Rule 68(2)(c)"', (ICC-01/14-
01/18-2025-Conf), filed on 14 August 2023**

Source: Defence of Patrice-Edouard Ngaiissona

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

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I. INTRODUCTION

1. The Defence for Mr Patrice-Edouard Ngaïssona ("Defence") hereby submits an addendum to its "Defence Response to the "Prosecution Request for Submission of the Prior Recorded Testimony of P-2200 pursuant to Rule 68(2)(c)" (the "Defence Response")¹ given that new information has been made available to the Defence by the Office of the Prosecutor (the "Prosecution").
2. The newly disclosed information reinforces the Defence's position that P-2200's alleged Medical Certificate of the Cause of Death ("MCCD") provided by the Prosecution lacks authenticity, reliability and is devoid of probative value, such that the allegation that P-2200 is deceased cannot be supported by it alone. The "Prosecution's Request for Submission of the Prior Recorded Testimony of P-2200 pursuant to Rule 68(2)(c)", dated 7 July 2023 (the "Request"),² should therefore be rejected as the procedural pre-condition for submitting a request pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (the "Rules") has not been met.

II. PROCEDURAL HISTORY

3. On 23 June 2023, the Prosecution disclosed Trial Rule 77 package 104 comprising *inter alia* the Investigation Report on *Inquiries about the alleged death of CAR-OTP-P-2200*³ as well as a pictures of P-2200's alleged MCCD provided by his alleged [REDACTED], P-2201.

¹ ICC-01/14-01/18-2013-Conf.

² ICC-01/14-01/18-1967-Conf. (the "Request")

³ CAR-OTP-00001606.

4. On 7 July 2023, the Prosecution filed the Request, with the picture of the MCCD as the sole documentary piece of evidence to support the allegation that P-2200 is deceased, thus unavailable to testify.
5. On 10 July 2023, and after several requests for disclosure relating to the above documents through unfruitful *inter partes* discussions,⁴ the Defence requested the Prosecution to disclose all communication and attempted exchanges between the Prosecution and P-2200 as mentioned in paragraphs 12 and 13 of the Request.⁵ The Prosecution declined the disclosure request, contending the lack of materiality of the sought materials.⁶
6. On 21 July 2023, the Defence filed its “Defence Request for Disclosure of Materials pursuant to Rule 77 of the Rules of Procedure and Evidence” (the “Disclosure Request”), seeking, *inter alia*, the disclosure or the inspection of all communications and attempted exchanges between the Prosecution and P-2200. The Defence also requested that the deadline to respond to the Request be suspended until the sought materials are made available to the Defence.⁷
7. On 1 August 2023, and absent the Prosecution’s Response to and the Chamber’s ruling on the Disclosure Request, the Defence filed its Defence Response. The Defence therein reserved its right to make further submissions in the event the sought materials were disclosed.⁸
8. On 2 August 2023, the Prosecution responded to the Disclosure Request.⁹ “[F]or the sake of judicial economy and to avoid unnecessarily protracted litigation”,¹⁰

⁴ See Defence email to the Prosecution dated 26 June 2023, at 14:04; See Prosecution email to the Defence dated 5 July 2023, at 09:17.

⁵ See Defence email to the Prosecution dated 10 July 2023, at 15:29.

⁶ See Prosecution email to the Defence dated 11 July 2023, at 12:48.

⁷ ICC-01/14-01/18-1998-Conf.

⁸ *Ibid.*, para. 12.

⁹ ICC-01/14-01/18-2014-Conf.

¹⁰ *Ibid.*, para. 2.

the Prosecution agreed to provide an Investigation Report on *Communications with CAR-OTP-P-2200* (the “Investigation Report”).¹¹

9. The Defence hereby exercises its right to make further submissions given the new information contained in the Investigation Report.

III. CONFIDENTIALITY

10. In accordance with regulation 23*bis*(1) of the Regulations of the Court, this response is filed confidentially as it is an addendum to written submissions of the same classification. A public redacted version will be filed in due time.

IV. SUBMISSIONS

A. The Investigation Report casts further doubts on the authenticity of the MCCD as well as on P-2201’s reliability and credibility

11. The Defence recalls that the Prosecution argued that “[t]he Prior Statement may be formally submitted under *rule 68(2)(c) because P-2200 is deceased*” (emphasis added).¹² The Defence reiterates that the MCCD is the *only* piece of documentary evidence upon which the Prosecution is relying to substantiate that P-2200 is deceased, and therefore unavailable to testify.
12. The MCCD, as certified by Dr [REDACTED], provides that P-2200 died on [REDACTED] March 2022.¹³ Yet, according to the Investigation Report, the following happened on [REDACTED] April 2022:¹⁴

¹¹ ICC-01/14-01/18-2014-Conf-Anx, annexing CAR-OTP-00001712-000001.

¹² ICC-01/14-01/18-1967-Conf., para. 2.

¹³ CAR-OTP-00001616.

¹⁴ CAR-OTP-00001712-000001, para. 6.

user could not be reached. However, P-2200 was later reached [REDACTED] phone number and informed that he is recovered, and happy that he had recovered well in time [REDACTED]. He further confirmed his willingness to testify, and the OTP just need to call him in time for him to come. P-2200 acknowledged and agreed on the propose testimony arrangements, but asks whether he could be accompanied by a trusted person in view [REDACTED]. After confirming this, the phone connection was broken.

(highlights added)

13. Additionally, on [REDACTED] May 2022 (a month and half after the date of death certified on the MCCD), an unknown interlocutor answered P-2200's phone and told the Prosecution that P-2200 "was busy and on his way to the [REDACTED]".¹⁵
14. Given the above, the Defence finds the contradiction between the date of death disclosed in the so-called MCCD and the phone calls detailed in the Investigation Report disturbing. In addition to the observations raised in the Defence Response, the [REDACTED] April phone call between the Prosecution and P-2200 casts utmost doubts on the authenticity of the MCCD and the veracity of the information it discloses. As such, the provided MCCD is unreliable in all aspects, including the crucial information that is the date of death, and cannot be relied upon to establish P-2200's alleged death. The Prosecution therefore fails to substantiate P-2200's unavailability with the MCCD as the sole documentary evidence justifying the Request.
15. Additionally, the Investigation Report further highlights the dishonest behaviour of P-2201, the sole provider of all information and documents surrounding P-2200's alleged death. On [REDACTED] April 2022 ([REDACTED] days after P-2200's alleged date of death as certified by the MCCD provided by P-2201), P-2201 "informed the Prosecution that [REDACTED] feeling better"

¹⁵ *Ibid.*, para. 7.

(*sic.*). On the same day, P-2201 informed the Prosecution that “[REDACTED] was [REDACTED]” and, as such, was not available to speak on the phone. The Defence recalls that P-2201 demanded 75.000XFA from the Prosecution arguing that the amount was necessary to obtain the MCCD form Dr [REDACTED]. The [REDACTED] April call further substantiates the Defence’s concerns that the funds transferred by the Prosecution to P-2201 were in fact funds to bribe Dr [REDACTED] to forge a MCCD and for personal enjoyment.¹⁶

16. Therefore, all information provided by P-2201 upon which the Prosecution is relying to establish P-2200’s unavailability is tainted by P-2201’s deceptive manoeuvres, thus deprived of all *indicia* of reliability and credibility.
17. Considering this new information, the Defence contends that P-2200’s death is not established, and that it cannot be ruled out that P-2200 and his entourage are actively trying to avoid cooperation through deceitful means. As recently found by the Chamber, the unwillingness of a witness to cooperate with the Court does not equate to unavailability. For these reasons, the Request for admission of P-2200’s prior statement should be rejected.
18. *Finally*, and given that the Prosecution was in possession of all the above information ahead of filing the Request, the Defence hereby points out that the Prosecution misdirected the Chamber in the Request by submitting an MCCD that it knew was either a fake, or at least, contained inaccurate information and by failing to raise the above inconsistencies.

B. Defence observations on the Prosecution’s disclosure practices

19. The Defence notes with concern that it had to file a disclosure request before the Chamber, to prompt the Prosecution to provide information that it has

¹⁶ See ICC-01/14-01/18-1998-Conf, paras 31 – 39.

consistently declined to provide since the beginning of July 2023 despite several *inter partes* exchanges.¹⁷

20. *First*, given that the Prosecution disclosed the Investigation Report on its own, ie. without a Chamber's order, it could have compiled and provided it to the Defence upon receiving the *inter partes* disclosure request. Instead, the Prosecution disclosed the Investigation Report three weeks after these *inter partes* exchanges, and after the Defence submitted its Disclosure Request and Defence Response. By doing so, the Prosecution compelled the Defence to submit the Disclosure Request and the present Addendum. The Defence objects to such practice and denounces the Prosecution's procedural behaviour to withhold material information and disclose them at a later stage under the pretence of "judicial economy" and to avoid "unnecessary protracted litigation".
21. *Second*, through *inter partes* exchanges, the Prosecution declined to disclose all its exchanges between P-2200 arguing that they are not material to the preparation of defence. As detailed above, it was clearly relevant, material, and necessary for the Defence to have access to the content of said exchanges to properly and meaningfully respond to the Request. Therefore, the Investigation Report goes unequivocally to the credibility of the evidence relied upon by the Prosecution i.e., the MCCD, to file its Request.
22. As such, the Prosecution disregarded its obligation under Article 67(2) of the Rome Statute as well as Mr Ngaïssona's fair trial right to benefit from the disclosure of "evidence [...] which may affect the credibility of prosecution evidence",¹⁸ betting on the off chance that the Defence would not file the Disclosure Request.

¹⁷ See Annex A to ICC-01/14-01/18-1998-Conf.

¹⁸ Article 67(2) of the Rome Statute.

23. Therefore, not only the Prosecution should reconsider the scope of its disclosure obligations and its interpretation of the concept of “materiality” under Rule 77 of the Rules, but it should also reconsider those of “judicial economy” and “protracted litigation”.

V. CONCLUSION

24. Considering the above, and taking into consideration the Defence Response, the only document provided by the Prosecution to support P-2200’s death, and ultimate unavailability to testify, does not display any *indicia* of authenticity and reliability and is thus devoid of probative value. The Request should therefore be rejected as the Prosecution fails to satisfactorily substantiate the reason for which P-2200 has become unavailable to testify, thus failing to satisfy the procedural precondition to Rule 68(2)(c) of the Rules.

VI. RELIEF SOUGHT

25. The Defence hereby respectfully reiterates its request to the Chamber to:

REJECT the Prosecution’s Request for Submission of the Prior Recorded Testimony of P-2200 pursuant to Rule 68(2)(c);

REMIND the Prosecution of its disclosure obligations.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 13 October 2023

At The Hague, the Netherlands.