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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

Public Redacted Version of 'Defence Response to the "Prosecution's Request for Submission of the Prior Recorded Testimony of P-2269 pursuant to Rule 68(2)(c)" (ICC-01/14-01/18-1986), 17 July 2023'

Source: Defence of Patrice-Edouard Ngaißsona

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 its response to the “Prosecution’s Request for Submission of the Prior Recorded Testimony of P-2269 pursuant to Rule 68(2)(c)”, dated 4 July 2023 (“Prosecution’s Request”).¹ The Defence avers that the Prosecution did not fulfil the requirements for Rule 68(2)(c) of the Rule of Procedure and Evidence (“the Rules”) and objects to the admission of P-2269’s prior-recorded statement (“P-2269’s Prior Statement”)² and associated exhibits.
2. The Prosecution failed to provide sufficient evidence that witness P-2269 is unavailable because he is dead or should be presumed dead. The reports provided by the bailiff following his missions to serve the summons to the witness contain contradictory and insufficient information, that cannot be sufficient to establish that P-2269 is unavailable to testify. Furthermore, P-2269 has shown signs of reluctance and withdrawal of cooperation with the Prosecution, which cannot fall within the meaning of ‘unavailable’ for the purpose of Rule 68(2)(c) of the Rules.
3. The introduction of P-2269’s Prior Statement via Rule 68(2)(c) of the Rules would deprive Mr Ngaïssona of an opportunity to examine evidence relating to his alleged acts and conduct, important issues in the case that go beyond background information and issues on which the witness is uncorroborated and unreliable that would have benefitted from examination. Information of this importance for the Accused cannot only stem from Rule 68(2)(c) evidence. For these reasons, the formal submission of P-2269’s prior testimony under Rule 68(2)(c) would cause undue prejudice to the fair trial rights of

¹ ICC-01/14-01/18-1957-Conf. (“Prosecution’s Request”)

² CAR-OTP-2111-0336. (“P-2269’s Prior Statement”)

Mr Ngaïssona that significantly outweighs the probative value of his prior recorded statement.

II. CONFIDENTIALITY

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

III. APPLICABLE LAW

5. The Defence incorporates by reference the summary of the applicable law set out by the Chamber in the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules” (“First Decision on Rule 68(2)(c)”),³ in paragraphs 17 to 39. The Defence nonetheless wishes to reiterate that the burden of proof falls on the Prosecution to establish every factual requirement of Rule 68(2) of the Rules and that the applying party must sufficiently establish their allegations, and provide adequate documentation to substantiate such allegations.⁴
6. The requirements pursuant to Rule 68(2)(c) of the Rules are to be assessed on a case-by-case basis and the impact of any request on the fairness of the proceedings more generally should be considered.⁵ Moreover, Article 69(2) and (4) of the Statute are relevant in this context and therefore the relevance and probative value of the prior recorded testimonies *vis-à-vis* any prejudice that

³ ICC-01/14-01/18-1975-Conf, paras. 17-39.

⁴ ICC-02/04-01/15-1288, para. 9.

⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 78; *The Prosecutor v. Bosco Ntaganda*, Decision on the Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, ICC-01/04-02/06-619, 2 June 2015, para. 36; *the Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Red, 19 August 2015, para. 150.

admission may cause to a fair trial or to a fair evaluation of the testimony of a witness should also be taken into consideration.⁶

IV. SUBMISSIONS

A. P-2269's unavailability to testify has not been established

7. P-2269's unavailability to testify has not been demonstrated to the requisite standard. The documentation coming from the bailiff that is relied upon by the Prosecution – mission reports and *procès-verbal de carence* – does not establish the unavailability of witness P-2269. In the absence of any further documentation, the Prosecution does not meet the established requirement of “unavailability” pursuant to Rule 68(2)(c) of the Rules.
8. The Prosecution argues that witness P-2269 is unavailable to testify because the witness is either dead, to be presumed dead, or otherwise unavailable based on the withdrawal of his cooperation with the Court.⁷ As conceded by the Prosecution, the witness clearly withdrew his collaboration with the Court, to the point where he led people to believe he had died to avoid having to testify.⁸ It is the Defence's view that the Prosecution failed to satisfactorily establish that the witness is dead or must be presumed dead. To the contrary, the Defence contends that there are signs that the witness is not deceased and is simply leading people to believe that he died in order to avoid having to testify for the Prosecution. Also, the Prosecution's argument that the witness should be considered ‘unavailable’ for the purpose of Rule 68(2)(c) of the Rules because he withdrew his cooperation with the Court is utterly misapplying the jurisprudence, that clearly states that “a witness's simple unwillingness to

⁶ *The Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-1029, 20 November 2015, para. 14.

⁷ Prosecution's Request, para. 8.

⁸ ICC-01/14-01/18-1701-Conf-Red2, para. 24.

testify, or refusal to provide the declaration required under Rule 68(2)(b)(ii) of the Rules, is not sufficient to conclude that said witness is ‘unavailable’ within the meaning of Rule 68(2)(c) of the Rules”.⁹

9. *First*, the Prosecution submits that the witness was in the process of going to Bangui to obtain his passport to be able to travel for his testimony in October 2021, and that the last contact with the witness was towards the end of the month. The witness said he would call back the Prosecution after his trip, but never did.¹⁰
10. The Defence obtained information about the alleged death of the witness, that was transmitted in February 2022 to the Prosecution in a Defence filing.¹¹ According to the information received by the Defence, the witness had died in early October 2021. At that time, the Defence was not aware that the witness was in the process of obtaining his passport and that the Prosecution had difficulties contacting the witness. The information received is disinterested and therefore can be considered credible.
11. It is striking that the Defence came across information that the witness was deceased at the same time as his collaboration with the Prosecution was becoming more tangible, in the form of getting his passport to travel for the purpose of his testimony. The Defence can only note the peculiarity of the timing.
12. In addition to this, the Prosecution mentioned in its Request that the alleged son of P-2269 informed the Prosecution in August 2022 that his father had passed away. The same month, the Prosecution obtained information from the

⁹ ICC-01/14-08-1975-Conf, para. 27, citing to ICC-01/12-01/18-2445-Red, para. 23; see also ICC-01/12-01/18-2124, para. 12 and See Decision on the introduction into evidence of P-0130’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, 21 February 2022, ICC-01/12-01/18-2124-Conf, para. 12.

¹⁰ Prosecution’s Request, para. 9.

¹¹ ICC-01/14-01/18-1273-Conf, para. 9.

wife of the witness that he was not dead but “faked his [the witness’s] death so that a white woman would stop calling him”.¹²

13. *Second*, the summons was issued on 31 January 2023 by the Chamber.¹³ The bailiff assigned to serve the summons to witness P-2269 did a first mission mid-March in order to locate the witness. According to the bailiff’s March report, [REDACTED]. The bailiff travelled to [REDACTED] and met with the [REDACTED], who said that [REDACTED]. They tried to reach him by phone, but none of the attempts were successful. They tried to go to the market, but could not locate the witness.¹⁴

14. In his second report from the April mission, the bailiff stated that P-2269 was deceased according to the information obtained from [REDACTED]. P-2269 would have allegedly died [REDACTED]. According to the report, the bailiff could not confirm this information with any family members. No additional information on his alleged death was provided, such as the timeframe of these events, whether a burial was held and whether any death certificate exists, as well as who provided [REDACTED] with the information concerning the witness’ death.¹⁵

15. Surprisingly enough, information on the witness’s death were found on the second mission by the bailiff. Even more noteworthy, the bailiff confirmed that he could not reach any family members of P-2269,¹⁶ whereas the Prosecution seemed to have no trouble in the past reaching out to the entire family of P-2269. It does not appear that any further efforts were made to reach the witness family members by the Prosecution.

¹²Prosecution’s Request, para. 13.

¹³ ICC-01/14-01/18-1738-Conf.

¹⁴ “Rapport de mission”, attached to the e-mail from the Registry sent on 28 June 2023 at 16:35.

¹⁵ “Rapport de mission”, attached to the e-mail from the Registry sent on 28 June 2023 at 16:35.

¹⁶ “Rapport de mission”, attached to the e-mail from the Registry sent on 28 June 2023 at 16:35.

16. The Defence contends that the information concerning the alleged death of P-2269 is insufficient to fulfil the standard pursuant to Rule 68(2)(c) of the Rules. No statement from a close family member, no death certificate, contradictory information from [REDACTED], who first said [REDACTED] and then confirmed he was dead approximatively a month later.¹⁷
17. This is about one month after the issuance of the summons. The Defence underlines that separately, all this information might not amount to a particular conclusion. However, when taken cumulatively, it appears that witness P-2269 seems to be trying to avoid testifying for the Prosecution and decided to make people believe that he has passed away.
18. The Defence therefore submits that the Prosecution failed to fulfil the criteria of unavailability for Rule 68(2)(c) of the Rules. On these grounds only, the Prosecution's Request should be rejected. In the alternative, the Prosecution should be ordered to engage in further efforts to locate the witness, or to provide further documentation to support the allegation that the witness is now dead.

B. P-2269 prior recorded statement does not bear sufficient indicia of reliability

19. Contrary to the Prosecution's Request, P-2269's Prior Statement does not bear sufficient indicia of reliability to fulfil the requirement of Rule 68(2)(c) of the Rules. Indeed, his narrative is fraught with internal and external inconsistencies that seriously dispute the veracity of the witness' account of events.

¹⁷ "Rapport de mission", attached to the e-mail from the Registry sent on 28 June 2023 at 16:35.

20. P-2269's timeline concerning [REDACTED] can be summarized as follows: (i) he would have fled to [REDACTED], where he would have spent [REDACTED];¹⁸ (ii) he would have then [REDACTED];¹⁹ (iii) around this time he would have met up with several alleged Anti-Balaka leaders in [REDACTED];²⁰ (iv) him and the other leaders would have decided to [REDACTED], where they would have spent [REDACTED] training and planning the Bangui attack;²¹ (v) the groups would have then left [REDACTED] to descend upon Bangui via different routes, conducting attacks on various locations on their way;²² (iv) they would have arrived at the outskirts of Bangui a mere few days before the 5 December attack.²³

21. The witness' timeline is not credible, in addition to being contradicted by other items of evidence on the record. According to P-2269's narrative, he would have left [REDACTED]. Yet, the [REDACTED] he provided to the Prosecution shows that he was [REDACTED].²⁴ Witness P-0446, who only fled from [REDACTED],²⁵ claims to have met P-2269 in [REDACTED].²⁶ Witness P-2232 expressly mentioned P-2269's name among the [REDACTED].²⁷ Further, while the Defence could only gather limited information on the localization of P-2269's alleged phone numbers²⁸ due to the fact that they were not subjected to a targeted CDR request, it appears that the witness's alleged phone numbers connected to cell towers in [REDACTED] consistently for the [REDACTED].²⁹ This indicates that at the time, the witness was either in [REDACTED].³⁰ These

¹⁸ P-2269's Prior Statement, para. 25.

¹⁹ P-2269's Prior Statement, para. 35.

²⁰ P-2269's Prior Statement, para. 46.

²¹ P-2269's Prior Statement, para. 112.

²² P-2269's Prior Statement, paras. 74-75.

²³ P-2269's Prior Statement, paras 81 and 82, [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

items of evidence seriously put into question the veracity of the witness' claim that he was only [REDACTED], as it rather appears that the witness was there for much longer and potentially up until shortly before the Bangui attack, as stated by P-2232.

22. These inconsistencies are all the more relevant when confronted with the overall Prosecution narrative of how events unfolded over the course of 2013. According to the Prosecution, the Anti-Balaka started gathering in Gobere from June onwards.³¹ With the above-mentioned evidence in mind, it is difficult to give any weight to the witness' narrative that he would have been the [REDACTED].³² What is more, P-2251, who testified [REDACTED], stated that the Anti-Balaka left Gobere in early September 2013.³³ P-0975 corroborates this timeline, stating that he arrived in [REDACTED].³⁴ This evidence makes it unlikely that P-2269 would have simply gone to [REDACTED], such as at the [REDACTED], as it appears that by that time, the alleged gathering of the Anti-Balaka in Gobere had come to an end.

23. A further inconsistency that casts doubt on the witness' account of events and timeline relates to the alleged [REDACTED]. Notably, the witness claims that he was prompted to [REDACTED]. He would have [REDACTED].³⁵ Yet, the witness later contradicted himself when stating that once he arrived in [REDACTED], he [REDACTED].³⁶ Furthermore, his account of events around the killing of his mother confirms the doubts about his timeline, given that he claims that [REDACTED],³⁷ which only happened in September 2013.

³¹ Prosecution's Trial Brief ICC-01/14-01/18-723-Conf, para. 91.

³²[REDACTED].

³³ P-2251: ICC-01/14-01/18-T-043-CONF-ENG CT, pages 12-14 lines 18-8 and CAR-OTP-2093-0045-R01, at 0052 para. 44.

³⁴[REDACTED].

³⁵[REDACTED].

³⁶[REDACTED].

³⁷[REDACTED].

24. P-2269's narrative concerning [REDACTED] within the Anti-Balaka movement is entirely uncorroborated, if not largely refuted by a significant amount of evidence on the record. The witness claims that he was given a "task" by Maxime Mokom to return to CAR and attack the Seleka,³⁸ pursuant to which he would have travelled to the north of the country where he single-handedly organized a leaders' appointment in [REDACTED].³⁹ He also mentions several of the leaders he would have supposedly been in touch with and later met, among which [REDACTED].⁴⁰ Unsurprisingly, CDR evidence on the record does not corroborate the witness's assertions. Having cross-checked each individual phone number attributed to each of these alleged Anti-Balaka leaders⁴¹ with the two phone numbers attributed to the witness,⁴² the Defence found no evidence whatsoever of contact between these individuals, up to after 5 December 2013. This casts serious doubts on the truthfulness of the witness' account of events, especially since he claims that he was "constantly" and personally in touch with the leaders while walking in the bush.⁴³

25. Some of these alleged Anti-Balaka leaders have either testified in this case or have been interviewed by the Prosecution. Significantly, their respective narratives don't corroborate P-2269's. [REDACTED] (P-0306) does not corroborate the witness' assertion that they were constantly in touch and that they [REDACTED]. While he referred to other alleged Anti-Balaka leaders who would have supposedly [REDACTED],⁴⁴ he never mentioned the witness'

³⁸P-2269's Prior Statement, paras 38-39.

³⁹ [REDACTED].

⁴⁰ P-2269's Prior Statement, para. 47.

⁴¹ Telephone numbers attributed either in the Telephone Attributions Table annexed to Prosecution's Pre-Trial Brief (ICC-01/14-01/18-723-Conf-AnxD) or listed in other items of Prosecution evidence.

⁴²See CAR-OTP-2130-9701-R01.

⁴³ P-2269's Prior Statement, paras 55 and 78.

⁴⁴ P-0306 : ICC-01/14-01/18-T-064-CONF-ENG ET, pages 26-27 lines 23-25 and 1-3, page 29 lines 5-20, page 30 lines 11-20, pages 31-32 lines 23-25 and 1-3, page 40 lines 7-23.

name. Further, he repeatedly insisted that when he was in [REDACTED], he did not make use of a phone.⁴⁵ Similarly, [REDACTED] (P-1048) never mentioned P-2269's name when he was heard by the Prosecution, nor did he mention a meeting that would have taken place in [REDACTED]. He further stated that while [REDACTED], appointments were not given via phone due to difficulties with finding phone credit and reception.⁴⁶ [REDACTED](P-1951) never mentioned P-2269 either, and P-2269's name does not appear on the lists he provided to the Prosecution, which would allegedly show the FACA elements who were present in Gobere since the summer of 2013.⁴⁷ Furthermore, P-1951 specified to the Prosecution that [REDACTED],⁴⁸ thereby dispelling P-2269's narrative that he would have been the one suggesting that they all [REDACTED].⁴⁹

26. P-2269 claims to have been [REDACTED], as he was [REDACTED],⁵⁰ whom he would have [REDACTED].⁵¹ Yet, none of the witnesses who allege to have been in [REDACTED] mentioned him, either as an element or as a chief. P-2602 named all of the leaders of the "companies" that composed the [REDACTED] and did not mention P-2269.⁵² P-0966,⁵³ P-0975,⁵⁴ P-2251⁵⁵ did not mention the witness either, despite listing the names of several chiefs. P-1521 wrote down a list of leaders of the [REDACTED], whom he would have met [REDACTED].⁵⁶ Unsurprisingly, P-2269's name cannot be found on that list

⁴⁵ ICC-01/14-01/18-T-064-CONF-ENG ET, page 52 lines 7-13. See ICC-01/14-01/18-T-067-CONF-ENG CT page 53 lines 20-25[REDACTED].

⁴⁶ P-1048: CAR-OTP-2094-0447-R01, at 0456 lines 296-346.

⁴⁷ CAR-OTP-2068-0118; CAR-OTP-2068-0123.[REDACTED].

⁴⁸[REDACTED].

⁴⁹[REDACTED].

⁵⁰[REDACTED].

⁵¹[REDACTED].

[REDACTED].

⁵³ See for example P-0966 in ICC-01/14-01/18-T-117-ENG ET WT, page 38.[REDACTED].

⁵⁴[REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

either. It appears that the only evidence placing P-2269 in [REDACTED] is his own statement, which, in light of the crucial role the witness claims to have had, is – to say the least – suspicious. Furthermore, P-2269’s narrative of events does not corroborate that of other [REDACTED] witnesses on important elements. For example, several witnesses who claim to have been in [REDACTED], such as P-0975, P-2602 and P-0966 stated that [REDACTED].⁵⁷ Yet, P-2269 did not attribute any particular role to Dedane and simply stated that he was “a fighter like us”,⁵⁸ which once again sheds doubt as to whether the witness directly witnessed the events that unfolded in [REDACTED].

27. P-2269’s statement on the provision and transport of weapons from Bangui to Bossangoa also presents serious reliability concerns. Notably, P-2269 claims that at the arrival of the Seleka, weapons had been hidden at the farm of a person he knows very well, [REDACTED]. P-2269 would have [REDACTED] about the weapons and would have later [REDACTED].⁵⁹ P-2232 told a similar but somewhat unreconcilable story. Namely, he would have tricked a Seleka friend [REDACTED] into providing some weapons to him, making him believe that he wanted to use them to assist the Seleka. The weapons would have then been picked up [REDACTED].⁶⁰ The difference in the two witnesses narratives is stark, especially since both claim to have been directly involved in the events. There is no way to reconcile P-2232’s story that [REDACTED], with P-2269’s narrative that [REDACTED]. This significant inconsistency seriously impedes both witnesses’ credibility on these alleged events.

28. Moreover, the Prosecution’s submissions that P-2269’s evidence on Mr Ngaïssona’s financing of the Anti-Balaka is corroborated by other evidence

⁵⁷ P-0975: CAR-OTP-2033-7885-R02, at 7889 para. 29; P-0966: CAR-OTP-2031-0241-R03, at 0246 para. 31; P-2602: CAR-OTP-2118-9598-R01, at 9613 lines 504-507.

⁵⁸ P-2269’s Prior Statement, para. 76.

⁵⁹ P-2269’s Prior Statement, paras 68-69.

⁶⁰ [REDACTED].

in the case is simply disingenuous. Of the three witnesses cited by the Prosecution, namely P-2673, P-2843 and P-1847, none of them referred to any financing by Mr Ngaïssona of the Gobere group. It must be recalled that corroboration does not mean that evidence has to be identical, but it has to be evidence that will “confirm, even in a different way, the same fact”.⁶¹ In the present case, the witness’ Prior Statement clearly departs from the rest of the evidence on the record and finds no corroboration on the alleged financial contribution of Mr Ngaïssona to the Gobere group. Not a single item of evidence mentions [REDACTED], the person whom, according to the witness, would have served as an intermediary for these financial transactions.⁶² The complete absence of corroboration of this information casts considerable doubts on its truthfulness, especially in light of the fact that, according to the witness, these transactions were not a secret but were rather known by all of the chiefs.⁶³

29. What is more, witnesses who allege to have been in [REDACTED] do not corroborate P-2269’s story with respect to [REDACTED] or ever hearing about Mr Ngaïssona during their time in [REDACTED]. P-2251 said that it was difficult to find food in [REDACTED] and that sometimes they would go for even for two days without eating.⁶⁴ P-0975 painted a similar picture and clearly stated that he did not hear Mr Ngaïssona’s name [REDACTED].⁶⁵ P-0966 said that they did not receive any money in [REDACTED] and that he did not hear Mr Ngaïssona’s name in 2013.⁶⁶ P-0306 clearly stated that he did not receive

⁶¹ *The Prosecutor v. Bosco Ntaganda*, Judgement on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgement’, ICC-01/04-02/06-2666-Red, 30 March 2021, para. 672.

⁶² P-2269’s Prior Statement, paras 109-112.

⁶³ P-2269’s Prior Statement, paras 110-112: [REDACTED].

⁶⁴ P-2251: ICC-01/14-01/18-T-043-CONF-ENG CT, page 19 lines 1-10 and CAR-OTP-2093-0045-R01, at 0050, paras 32-33.

⁶⁵ [REDACTED].

⁶⁶ P-0966: CAR-OTP-2031-0241-R03, at 0247 para. 32 and at 0253 para. 68; ICC-01/14-01/18-T-117-ENG, p. 23.

any money from Mr Ngaïssona, either before or after the BANGUI attack.⁶⁷ Therefore, the statements of alleged [REDACTED] witnesses not only do not corroborate P-2269's allegations on Mr Ngaïssona's financial assistance, but directly refute them. Again, this is an issue that goes to the core of the charges against Mr Ngaïssona and it should not be introduced on the record via Rule 68(2)(c) of the Rules without any credible and reliable corroboration.

30. Lastly, at the time of giving his statement, the witness provided a list of his elements⁶⁸ which he claimed to have compiled himself whilst in the bush.⁶⁹ However, the witness also admitted to having limited writing skills,⁷⁰ and the calligraphy in which the list is written does not at all match the witness calligraphy in the waiver to be assisted by counsel, which he signed during his testimony.⁷¹ This suggests that the witness provided fabricated evidence to the Prosecution, or lied on the provenance of said evidence. Against this backdrop, and in light of the important inconsistencies raised above, as well as the lack of corroboration by other evidence on the events described by the witness, the Defence submits that P-2269's Prior Statement lacks sufficient indicia of reliability. Its introduction under Rule 68(2)(c) would therefore not assist the Chamber in its truth-seeking mission.

C. The admission of P-2269's Prior Statement will cause undue prejudice to Mr Ngaïssona

⁶⁷ P-0306: ICC-01/14-01/18-T-064-CONF-ENG, page 17 lines 17-22.

⁶⁸ CAR-OTP-2111-0367.

⁶⁹ P-2269's Prior Statement, para. 169.

⁷⁰ P-2269's Prior Statement, front page information.

⁷¹ CAR-OTP-2111-0362-R01.

31. The admission of P-2269's Prior Statement should not be granted as the prejudice it would cause to Mr Ngaïssona's right to a fair trial significantly outweighs the relevance and probative value of the witness' Prior Statement.
32. *First*, parts of the witness' Prior Statement go to proof of Mr Ngaïssona's act and conducts, especially his alleged contribution to the crimes for which he is charged.⁷²
33. Under Rule 68(2)(c)(ii), if a prior recorded statement goes to proof of acts and conducts of the accused, this is a factor that may be considered against the introduction of the statement, or at least part of it,⁷³ which should be assessed on a case-by-case basis.⁷⁴ However, "reliance on such evidence should not be prejudicial to or inconsistent with the rights of the accused"⁷⁵. As such, to admit the statement in full would cause undue prejudice to Mr Ngaïssona, since the Prior Statement, as elaborated above, goes directly to elements that are relevant to the acts and conduct of the Accused, in the form of his contribution to the charged crime, and should be rejected.
34. *Second*, P-2269's Prior Statement concerns core issues of the case, such as the alleged formation of the Anti-Balaka in [REDACTED], the planning and execution of the Bangui attack, and the alleged involvement of individuals such as Mr Maxime Mokom and Mr Yekatom. P-2269's Prior Statement also contains

⁷² ICC-01/14-01/18-1701-Conf-Red2, para. 27, "Ainsi qu'exposé ci-dessus, le témoignage de P-2269 se rapporte à des aspects centraux du dossier, notamment (1) la contribution apportée par NGAISSONA aux crimes poursuivis (entre autres à travers son assistance financière aux groupes Anti-Balaka rassemblés à GOBERE, qui ont par la suite attaqué BANGUI et BOSSANGO le 5 décembre 2013, puis comme Coordonnateur Général des Anti-Balaka postérieurement à l'attaque de BANGUI), [...]".

⁷³ ICC-01/04-02/06-1029, para. 13.

⁷⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', ICC-01/05-01/08-1386 OA5 OA6 ('Bemba Appeals Judgment'), para. 78.

⁷⁵ *The Prosecutor v. Bosco Ntaganda*, Judgement on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 entitled 'Judgement', ICC-01/04-02/06-2666-Red, 30 March 2021, para. 15.

allegations on Mr Ngaïssona's leadership role in 2014. For example, P-2269 claims that Mr Yekatom was Mr Ngaïssona's subordinate,⁷⁶ that Mr Ngaïssona made all of the appointments within the Anti-Balaka structure and created some alleged "rules of the Anti-Balaka",⁷⁷ and that comzones only acted pursuant to the orders of the "hierarchy".⁷⁸ These allegations are at the core of this case and are materially in dispute, as summarized by the Prosecution itself and conceded in its Request to issue the summons.⁷⁹

35. The Defence recalls that as submitted above, the witness appears to be faking his death in order to avoid having to testify for the Prosecution. Furthermore, his Prior Statement is unreliable, as it is not only uncorroborated, but even directly contradicted by a large amount of evidence. Against this backdrop, and given the centrality of certain allegations of P-2269 to the charges against Mr Ngaïssona and the mode of criminal liability, the introduction of P-2269's Prior Statement pursuant to Rule 68(2)(c) would cause undue prejudice to Mr Ngaïssona's fair trial rights and should not be admitted without the possibility of examination by the Defence. The right to examine Prosecution witnesses that go directly to the acts and conduct of the Accused is a paramount aspect of the right to a fair trial, especially in the case of unreliable evidence.

⁷⁶ P-2269's Prior Statement, para. 132.

⁷⁷ P-2269's Prior Statement, paras 142 and 149.

⁷⁸ P-2269's Prior Statement, para. 138.

⁷⁹ Prosecution's Request, paras. 24; ICC-01/14-01/18-1701-Conf-Red2, para. 27, "Ainsi qu'exposé ci-dessus, le témoignage de P-2269 se rapporte à des aspects centraux du dossier, notamment (1) la contribution apportée par NGAÏSSONA aux crimes poursuivis (entre autres à travers son assistance financière aux groupes Anti-Balaka rassemblés à GOBERE, qui ont par la suite attaqué BANGUI et BOSSANGO le 5 décembre 2013, puis comme Coordonnateur Général des Anti-Balaka postérieurement à l'attaque de BANGUI), [....]".

V. Conclusion

36. In light of the above, the Defence respectfully requests the Chamber to reject the Prosecution's Request on the sole basis of the Prosecution's failure to fulfil the requirement of 'unavailability' of Rule 68(2)(c) of the Rules. However, the provision of further information substantiating the death of the witness would not be sufficient to salvage the Prosecution's Request. Due to the highly prejudicial and unreliable nature of P-2269's Prior Statement, its admission pursuant to Rule 68(2)(c) of the Rules would not be in the interest of justice.

VI. RELIEF SOUGHT

37. The Defence respectfully requests the Chamber to:

REJECT the Prosecution's Request to introduce the prior recorded statements and associated exhibits of P-2269 pursuant to Rule 68(2)(c).

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 13 October 2023

At The Hague, the Netherlands.