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TRIAL CHAMBER V

Before: Judge Beti Hohler,, Presiding Judge
Judge Joanna Korner
Judge Keebong Paek

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Prosecution’s Request for the Formal Submission of the
Prior Recorded Testimony of P-2462 pursuant to Rule 68(2)(c)”, 21 May 2021,
ICC-01/14-01/18-1003-Conf**

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

The Office of the Prosecutor

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

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Victims and Witnesses Unit

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Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests the formal submission of the prior recorded testimony of witness P-2462, in accordance with rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the conduct of the proceedings” (“Directions”).¹ P-2462’s prior recorded testimony comprises the witness’s 10 June 2019 statement and its associated exhibit (“Prior Statement”).²

2. The prior recorded testimony is admissible under rule 68(2)(c) because: (i) P-2462 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence; (ii) the Prosecution could not anticipate the need for article 56 measures to obtain her evidence; and, (iii) the evidence is reliable.

3. P-2462 is a Muslim civilian who lived in BOSSANGO during the conflict. She describes the commission of crimes by the Anti-Balaka against the Muslim population in BOSSANGO and surroundings between September 2013 and February 2014 comprising [REDACTED], killings, forcible displacement, and the destruction of property. She also describes the 5 December 2013 Anti-Balaka attack on BOSSANGO, during which she was [REDACTED]. P-2462 further provides evidence on the displacement of BOSSANGO’s Muslim population to the *Ecole de la Liberté* as a result of the Anti-Balaka’s attack, and their subsequent evacuation to CHAD. P-2462’s Prior Statement is thus *prima facie* relevant to and probative of material issues at trial. It does not concern the acts or conduct of the Accused.

¹ ICC-01/14-01/18-631, para. 33.

² See ICC-01/05-01/08-1386, paras. 79-81 (“Bemba Appeals Decision”), confirming that written witness statements can be introduced as “previously recorded testimony”. See also ICC-01/09-01/11-1938-Red-Corr, paras. 30-33, analysing the term “previously recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para. 136; ICC-01/05-01/08-886, para. 6; ICC-01/04-01/06-1603, para. 18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362.

4. Having taken note of the Chamber's guidance, the Prosecution has carefully assessed the Prior Statement to provide the Chamber with the information necessary to conduct the required case-by-case assessment.³ Additionally, mindful of the concerns regarding the amount of written evidence to be tendered,⁴ the Prosecution has identified portions in the Prior Statement on which it does not seek to rely, which may assist the Chamber's assessment of the relevant issues, and reduce (as much as possible) the volume of extraneous material in the case, as a whole.

5. The relevance and probative value of the Prior Statement is set out in more detail in a brief summary of the salient issues, along with the associated exhibit, and the sources of other corroborative evidence. *Confidential* Annex A (a Summary Chart) lists the relevant statement and the corresponding associated exhibit. It also identifies the relevant paragraphs of the Confirmation Decision to which the witness's evidence relates. *Confidential* Annex B contains the Prior Statement itself, with grey highlights identifying the portions on which the Prosecution does not seek to rely. The associated exhibit is available to the Defence and the Trial Chamber in e-Court.

II. CONFIDENTIALITY

6. Pursuant to regulation 23*bis*(1) of the Regulations of the Court ("RoC"), this Request and its annexes are filed as "Confidential", as they contain information concerning a witness which should not be made public. A "Public Redacted" version of the Request will be filed as soon as practicable.

³ ICC-01/14-01/18-685, para. 34; See ICC-01/05-01/08-1386, para. 81 ("*Bemba* Appeals Decision") and ICC-01/04-02/06-1029, para. 14.

⁴ See ICC-01/14-01/18-685, paras. 31, 32.

III. SUBMISSIONS

A. Applicable Law

7. The Initial Directions on the Conduct of Proceedings permits parties to file applications pursuant to rule 68(2)(c) “should a witness become unavailable”.⁵ In turn, rule 68(2)(c) allows a Chamber to admit or deem formally submitted a witness’s prior recorded testimony where they have subsequently died, must be presumed dead or, due to obstacles that cannot be overcome with reasonable diligence, are unavailable to testify orally.

8. Such prior recorded testimony may be introduced where the Chamber is satisfied that the person is ‘unavailable’; the necessity of measures under article 56 could not be anticipated; the prior recorded testimony has sufficient indicia of reliability;⁶ and its introduction is not prejudicial to or inconsistent with the rights of the Accused.⁷

9. Under rule 68(2)(c)(ii), “[t]he fact that the prior recorded testimony goes to proof of acts and conduct of an Accused may be a factor against its introduction, or part of it”.⁸

B. The Prior Recorded Testimony fulfils all Requirements of Rule 68(2)(c)

10. *First*, P-2462’s Prior Statement constitutes prior recorded testimony within the meaning of rule 68.⁹ It is relevant to, and probative of, the charges in this case, in

⁵ ICC-01/14-01/18-631, para. 33.

⁶ Rule 68(1) and (2)(c) of the Rules; *see also* ICC-01/04-02/06-1029, para. 12.

⁷ Rule 68(1) of the Rules and article 69(2) of the Statute; *See also* ICC-01/12-01/18-1111-Conf, para. 7; ICC-01/05-01/08-1386, para. 78 (“*Bemba Appeals Decision*”).

⁸ *See also* ICC-01/04-02/06-1029, para. 13.

⁹ *See* ICC-01/05-01/08-1386, OA5 OA6, paras. 79-81, confirming that written witness statements can be introduced as “previously recorded testimony”. *See also* ICC-01/09-01/11-1938-Red-Corr, paras. 30-33, analysing the term “previously recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08- 2012-

particular counts 30-35 and 37-42, referenced in the Decision on the Confirmation of Charges.¹⁰

11. The Prior Statement may be recognised as formally submitted under rule 68(2)(c) because its key requirements are fulfilled: P-2462 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence; the Prosecution could not anticipate the need to use article 56 to preserve her evidence; and, the witness's Prior Statement bears sufficient indicia of reliability. Moreover, it does not concern the acts or conduct of the Accused and its introduction is not prejudicial to or inconsistent with their rights.

i. P-2462 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence

12. P-2462 is unavailable within the meaning of rule 68(2)(c). For over five months, the Prosecution has been unable to contact P-2462.

13. During a phone conversation with Prosecution representatives on [REDACTED] P-2462 expressed, for the first time, reservations about testifying. The witness stated that she is facing some problems and could not give any additional explanations.

14. On [REDACTED], Prosecution representatives tried to reach the witness on [REDACTED], including *via* WhatsApp, to seek additional details or clarifications. The witness did not respond. [REDACTED]. The WhatsApp application indicates that it was last accessed through that phone on [REDACTED]. Another unsuccessful attempt to contact P-2462 on [REDACTED] her phone numbers was made on [REDACTED].

Red, para. 136; ICC-01/05-01/08-886, para. 6; ICC-01/04-01/06-1603, para. 18; ICC-01/04-01/07-2289- Corr-Red; ICC-01/04-01/07-2362.

¹⁰ ICC-01/14-01/18-403-Conf-Corr, p. 108-111.

15. Prosecution representatives have since continued to try to contact the witness on [REDACTED] of her phone numbers. These comprise calls on [REDACTED]. Some of the attempted calls did not go through, and others were not answered by the witness.

16. In exercising reasonable diligence, the Prosecution reached out to [REDACTED] (through whom P-2462 became originally known to the Prosecution¹¹) on [REDACTED] in an effort to obtain additional contact details for the witness. However, the phone number provided by [REDACTED] for P-2462 was one of the two contact numbers already available to the Prosecution. The Prosecution is not in possession of contact details of P-2462's relatives.

ii. Article 56 measures could not be anticipated

17. The Prosecution could not have anticipated any need to take testimony or evidence under article 56 because it reasonably expected P-2462 to testify orally. *First*, the witness was initially willing to testify. As described above, she expressed reservations about testifying for the first time during a phone conversation with OTP representatives on [REDACTED]. The Prosecution has not been able to contact P-2462 to obtain any additional details or clarifications since. *Second*, she was cooperative during her interview and communications with the Prosecution prior to [REDACTED]. *Third*, the Prosecution did not encounter impediments to contacting her prior to [REDACTED]. The Prosecution was thus unable to predict that it would be unable to re-establish contact with the witness.

iii. The tendered evidence is reliable

18. P-2462's Prior Statement is *prima facie* reliable. It is truthful, authentic, and consistent. Moreover, there is no indication of any motive for P-2462 to fabricate or distort her account. As noted below, the Prior Statement i) is signed; ii) was given in

¹¹ CAR-OTP-2109-0175, at 0176.

the presence of a qualified interpreter; iii) contains a declaration of honour and conscience that it is accurate; iv) is internally consistent; and v) is predicated on information within the witness's actual knowledge, in that the witness readily admitted when she did not know certain information.¹²

19. P-2462's Prior Statement was obtained by the Prosecution in the ordinary course of its investigation.¹³ In accordance with rule 111, the witness's factual account was provided voluntarily and signed by her, as well as the investigators conducting the interview.¹⁴ The Prior Statement was interpreted and read back to her by a qualified interpreter in a language she fully understood. It further contains an express acknowledgement attesting to its voluntariness and the truth of its contents, to the best of the witness's knowledge and recollection.¹⁵ Further, the Prior Statement is internally consistent, and sufficiently corroborated by other evidence in the case, as detailed in paragraph 25 below.

20. As noted, the Prior Statement is limited to information within the witness's knowledge and experience. She was forthcoming in her interview about her lack of knowledge or lack of memory of certain events.¹⁶ Further, P-2462 gave reasonable and logical explanations in her narrative of events without any apparent embellishments or speculation, stating for example, that she saw her attackers carrying weapons, but "cannot say what kind of weapons they had" because she "do[es] not know weapons".¹⁷

iv. The Prior Statement does not concern the Accused's acts or conduct

¹² ICC-01/04-02/06-1205, para. 16.

¹³ See ICC-01/09-01/11-1938-Red-Corr, para. 66; see also ICC-01/05-01/13-1481-Red-Corr, para. 20.

¹⁴ ICC-01/05-01/13-1481-Red-Corr, para. 20.

¹⁵ CAR-OTP-2111-0452, at 0470.

¹⁶ CAR-OTP-2111-0452, paras. 19, 26, 45-46, 52, 54, 57, 78, 80, 83.

¹⁷ CAR-OTP-2111-0452, para. 45.

21. P-2462's Prior Statement does not relate to the acts and conduct of the Accused.¹⁸ The evidence does not establish that the Accused participated in, or shared the intent of the perpetrator or perpetrator group concerning the charged crimes. It does not suggest or imply any action of the Accused going to any mode of liability under article 25, or to their participation in the charged crimes. As such, rule 68(2)(c)(ii) is not a consideration here.

C. P-2462's prior recorded testimony is relevant and probative

22. As described below, P-2462's Prior Statement is highly relevant and probative. It primarily goes to proof of the crime-base, particularly i) the charged 5 December 2013 attack on BOSSANGO and related counts 30-35 and 37-42; and ii) the nature and extent of the widespread attack carried out by the Anti-Balaka against the Muslim civilian population between September 2013 and December 2014 ("Relevant Period"), as part of the contextual elements of Crimes against Humanity and War Crimes, under articles 7 and 8, respectively. Specifically, the evidence concerns the campaign of retributive violence committed by the Anti-Balaka against Muslim civilians in BOSSANGO, pursuant to a criminal organisational policy, as confirmed.¹⁹ The prior recorded testimony is thus *prima facie* relevant to and probative of material issues at trial.

23. P-2462's Prior Statement comprises 19 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the Prior Statement.

24. The witness's prior testimony establishes the following:

¹⁸ See ICC-01/04-02/06-1667-Red, 11 (citing ICC-02/04-01/15-596-Red, paras. 11-12); see also ICC-01/14-01/18-710-Conf, para. 9.

¹⁹ See ICC-01/14-01/18-403-Conf-Corr, paras. 61, 63-64 and 105-109, see further at pp. 105, 107, 109, 111 (referencing paragraphs 90-114 of the Document Containing the Charges - ICC-01/14-01/18-286-Conf-AnxB1).

- P-2462 is a Muslim civilian who lived in BOSSANGOA before and during the conflict;
- The witness describes the Seleka's takeover of BOSSANGOA in March 2013, and the subsequent departure of some of the Christians from the town into the bush, to attend training in preparation for revenge against the Seleka;
- P-2462 provides information about Anti-Balaka attacks on villages surrounding BOSSANGOA (including ZERE, BOWAYE, and BENZAMBE) in early September 2013, and the resulting displacement of Muslims from these villages to the *Ecole de la Liberté* in BOSSANGOA;
- The witness describes the 17 September 2013 Anti-Balaka attack on BOSSANGOA, during which civilians, [REDACTED], were killed;
- P-2462 witnessed the 5 December 2013 Anti-Balaka attack on BOSSANGOA. She describes how [REDACTED] by the Anti-Balaka while trying to flee. P-2462 describes [REDACTED] by a group of armed Anti-Balaka elements and [REDACTED]. P-2462 identifies the Anti-Balaka who [REDACTED]. P-2462 explains "[REDACTED]"²⁰ and adds that the other Anti-Balaka addressed him as [REDACTED]²¹ during the incident;
- The witness provides evidence of the killing of civilians during the attack, including [REDACTED]; and
- She describes the displacement of BOSSANGOA's Muslim population to the *Ecole de la Liberté* from 5 December 2013 onwards, and their subsequent evacuation to CHAD in February and April 2014. P-2462 describes being evacuated from BOSSANGOA on a convoy that left in April 2014.

²⁰ CAR-OTP-2111-0452, para. 45; "Chaolin" was also identified as one of the Anti-Balaka elements responsible for the 17 September 2013 attack on BOSSANGOA by P-2049 (see CAR-OTP-2088-2173, para. 64).

²¹ CAR-OTP-2111-0452, para. 45.

25. P-2462's proposed evidence is corroborated by, *inter alia*, the evidence of P-1577, P-2200, P-2049, P-2453, P-2657, and P-2658, as well as by documentary evidence,²² in relation to (i) the Anti-Balaka attacks on villages surrounding BOSSANGO in early September 2013; (ii) the 17 September 2013 Anti-Balaka attack on BOSSANGO; and (iii) the 5 December 2013 Anti-Balaka attack on BOSSANGO and its aftermath.

26. The Prosecution tenders one associated exhibit for formal submission, set out at Confidential Annex A. The associated exhibit is a sketch of relevant places in BOSSANGO related to the witness's description of the events that took place there during the 5 December 2013 attack. This associated exhibit is assessed as indispensable to the comprehension of the Prior Statement, or would otherwise diminish its probative value if excluded.

D. Balance of interests

27. Granting the Request advances the interests of justice. By its terms, rule 68(2)(c) does not *per se* unfairly prejudice the Defence in permitting the introduction of uncross-examined evidence unrelated to the acts and conduct of the Accused.²³ On the contrary, although rule 68 is an exception to the principle of orality²⁴ and publicity,²⁵ its application "is *per se* generally considered *compatible* with the rights of the accused"²⁶ and indeed all statutory rights because it is express in the Court's procedural framework. Additionally, the Chamber's appropriate exercise of discretion in determining the evaluative criteria as defined in the Rules, among others, serves as a sufficient procedural safeguard against potential prejudice. Similarly, the fact that the Parties can avail themselves of the provision further underscores its

²² See for example CAR-OTP-2001-3302, at 3304; CAR-OTP-2001-6437, at 6454; CAR-OTP-2005-0197, at 0197, 0199, 0205; CAR-OTP-2079-0622; CAR-OTP-2081-0973, from [00:02:50] to [00:03:04].

²³ ICC-01/05-01/13-1478-Red-Corr, paras. 38-39.

²⁴ ICC-01/05-01/08-1386, para. 78.

²⁵ ICC-01/14-01/18-685, para. 25 (referencing articles 64(7) and 67(1)).

²⁶ ICC-01/14-01/18-685, para. 26.

inherent neutrality.²⁷ Thus, any claim of prejudice should only be entertained in light of the particular circumstances of the specific witness, their evidence, and the case — not presumptively, nor in the abstract.

28. P-2462's evidence is manifestly relevant to the proper adjudication of salient issues in this case, and its formal submission does not cause any unfair prejudice to the Accused either in respect of the nature of rule 68(2) itself, or as applied in these circumstances.²⁸ Significantly, and as the Chamber has acknowledged, a careful case-by-case assessment must be made of each witness's proposed evidence. Given that the application of the rule is by its terms compatible with the statutory framework, prejudice may not be assumed neither for the specific witness, nor the case.

29. Furthermore, the inability to cross-examine P-2462 on her evidence does not completely deprive the Accused of their right to challenge the evidence provided in her prior recorded testimony. Defence retains the right to lead evidence during the Defence case, or to question other witnesses, on the basis of information contained in P-2462's Prior Statement. Any potential prejudice to the Accused resulting from a prospective conviction on any of the charges that may rely to a decisive extent on P-2462's uncross-examined testimony should be evaluated by the Chamber at the end of the trial, during its assessment of the *weight* to be accorded to her Prior Statement, as foreseen by the Chamber's adoption of the submission regime.²⁹ In that assessment, the Prior Statement should be accorded weight, bearing in mind its probative value and indicia of reliability, as well as the fact that the prior recorded testimony is corroborative of other documentary evidence and witness testimony, which can be tested by the Defence in cross-examination.

²⁷ ICC-01/09-01/11-1938-Red-Corr, para. 25.

²⁸ ICC-01/09-01/11-1938-Red-Corr, para. 27.

²⁹ See ICC-01/14-01/18-631, paras. 52-53.

30. P-2462's Prior Statement should thus be admitted and the Chamber shall consider to what extent a conviction on any of the charges supported by P-2462's evidence is appropriate on the basis of *all* relevant evidence at the end of the trial.

IV. CONCLUSION

31. For the foregoing reasons, the Prosecution requests the Chamber to deem as formally submitted the Prior Statement of P-2462 together with its associated exhibit as set out at Annex A, pursuant to rule 68(2)(c).



Mame Mandiaye Niang, Deputy Prosecutor

Dated this 19th day of February 2026
At The Hague, The Netherlands