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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
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public Redacted Version of

**Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior
Recorded Testimony of Six Witnesses**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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Other

TRIAL CHAMBER VI of the International Criminal Court (the ‘Chamber’), in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, pursuant to article 69(2) of the Rome Statute (the ‘Statute’) and rule 68 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Prosecution’s Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses’.

I. PROCEDURAL HISTORY

1. On 21 February 2022, the Chamber issued the ‘Decision Setting the Commencement Date of the Trial and Related Deadlines’ setting deadlines for the filing of applications pursuant to rule 68 of the Rules by the Office of the Prosecutor (the ‘Prosecution’).¹ Further directions on the filing of applications under rule 68 of the Rules were issued on 9 March 2022 and the deadline for the submission of a number of rule 68 requests was extended on 11 May 2022.²
2. On 29 April 2022, the Office of the Prosecution filed a request under rule 68(2)(c) of the Rules to introduce the prior recorded testimony of six witnesses (the ‘Request’).³
3. On 12 May 2022, the Office of Public Counsel for Victims responded in support of the Request, submitting that the introduction into evidence of the prior recorded testimony of the six witnesses ‘is appropriate and would result in enhancing the efficiency of the proceedings.’⁴

¹ Decision Setting the Commencement Date of the Trial and Related Deadlines, 21 February 2022, [ICC-01/14-01/21-243](#), para. 28.

² Directions on the Conduct of Proceedings, 9 March 2022, [ICC-01/14-01/21-251](#) (the ‘Directions on the Conduct of Proceedings’), paras 37-39; Decision on Requests to Vary the Time Limits pertaining to the Introduction of Prior Recorded Testimony of Witnesses pursuant to Rule 68 (ICC-01/14-01/21-300-Conf-Red and ICC-01/14-01/21-291), 11 May 2022, ICC-01/14-01/21-305.

³ Prosecution Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses, 29 April 2022, ICC-01/14-01/21-290-Conf. A public redacted version was notified on 9 May 2022 ([ICC-01/14-01/21-290-Red](#)).

⁴ Victims’ consolidated response to the Prosecution’s Requests to introduce prior recorded testimony under rule 68(2)(b) and (c) (ICC-01/14-01/21-289-Red and ICC-01/14-01/21-290-Red), 12 May 2022, [ICC-01/14-01/21-306](#), para. 3.

4. On 1 June 2022, having been granted an extension of the applicable time limit,⁵ the Defence filed its response to the Request (the ‘Response’).⁶
5. On 13 June 2022, the Prosecution filed its trial brief and list of evidence.⁷
6. On 25 July 2022, following a request from the Chamber,⁸ the Prosecution filed additional information regarding P-1420.⁹

II. APPLICABLE LAW

A. General Criteria

7. Rule 68 of the Rules is one exception to the general rule set out in article 69(2) of the Statute, which provides that the testimony of a witness shall be given in person.¹⁰
8. Rule 68(1) of the Rules requires that the introduction of a prior recorded testimony is not prejudicial to or inconsistent with the right of the accused and that the requirements of one of the sub-rules of rule 68 are met.

⁵ Decision on Requests to Vary the Time Limits pertaining to the Introduction of Prior Recorded Testimony of Witnesses pursuant to Rule 68 (ICC-01/14-01/21-300-Conf-Red and ICC-01/14-01/21-291), 11 May 2022, [ICC-01/14-01/21-305](#).

⁶ Réponse de la Défense à la « Prosecution Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses » (ICC-01/14-01/21-290-Conf) déposée le 29 avril 2022., 1 June 2022, ICC-01/14-01/21-340-Conf. A public redacted version was notified on 7 June 2022 ([ICC-01/14-01/21-340-Red](#)).

⁷ Prosecution’s Trial Brief, 13 June 2022, ICC-01/14-01/21-359-Conf. A public redacted version was notified on 28 July 2022 ([ICC-01/14-01/21-359-Red](#)); Prosecution’s List of Evidence, [ICC-01/14-01/21-358](#).

⁸ Email from the Chamber to the Parties, dated 11/07/2021 at 11:51.

⁹ Additional Information regarding P-1420, 25 July 2022, ICC-01/14-01/21-433-Conf (‘Additional Information’). A public redacted version was notified on 4 August 2022 ([ICC-01/14-01/21-433-Red](#)).

¹⁰ Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al Rahman (‘Ali Kushayb’)*, Public redacted version of the First Decision on the Prosecution’s request to introduce prior recorded testimonies under Rule 68(3), 20 January 2022, [ICC-02/05-01/20-559-Red](#), (the ‘*Abd-Al Rahman* Rule 68(3) Decision’), para. 10. *See also* Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926’s Evidence, 10 March 2021, [ICC-01/14-01/18-907-Red](#), para. 8. *See further* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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”, 3 May 2011, [ICC-01/05-01/08-1386 OA5 OA6](#), para. 77 (the ‘*Bemba* OA5 OA6 Judgment’); Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, 12 February 2016, [ICC-01/09-01/11-2024 OA10](#), (the ‘*Ruto & Sang* OA10 Judgment’), para. 84.

9. Pursuant to rule 68(2)(c) of the Rules, the Chamber may allow the introduction of previously recorded testimony of a witness who is not present before the Chamber when: (i) it comes from a person who has subsequently 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 of the Statute could not have been anticipated; and (iii) it has sufficient indicia of reliability.

10. While rule 68(2)(c)(ii) of the Rules does not preclude the introduction of prior recorded testimony going to proof of the acts and conduct of the accused, it provides that this may be a factor against the introduction of the evidence, or part of it. In addition, pursuant to rule 68(1) of the Rules, the introduction of the previously recorded testimony must not be prejudicial to or inconsistent with the rights of the accused. The Chamber's interpretation of a number of these factors is set out below.

B. Meaning of Prior Recorded Testimony

11. Other chambers of this Court have interpreted the notion of 'prior recorded testimony' of rule 68 of the Rules to include audio or video recordings of testimony, transcripts of a witness's testimony and written statements taken under rules 111 and 112 of the Rules.¹¹ The Chamber sees no reason to depart from this interpretation and notes that the six statements that the Prosecution seeks to introduce in the Request were taken in accordance with rule 111 of the Rules.

12. In accordance with the jurisprudence of the Court, the Chamber considers that any annex to the witness's statement, or document otherwise associated with it, that is used or explained by the witness and as such is necessary to understand the prior recorded testimony may be introduced under rule 68 of the Rules.¹²

¹¹ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, [ICC-02/04-01/15-596-Red](#) (the 'Ongwen Rule 68(2)(b) Decision'), para. 9; Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, [ICC-01/09-01/11-1938-Corr-Red2](#) (the 'Ruto and Sang Decision on Prior Recorded Testimony'), para. 32; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, [ICC-01/05-01/13-1478-Red-Corr](#), paras 29-31.

¹² [Ongwen Rule 68\(2\)\(b\) Decision](#), para. 10; [Ruto and Sang Decision on Prior Recorded Testimony](#), paras 33 and 134; [Ntaganda Rule 68\(2\)\(c\) Decision](#), paras 23 and 35; Trial Chamber VI, *The Prosecutor*

13. The Chamber notes that the Defence has not raised any specific objection to the submission of the annexes and associated items of evidence sought to be introduced in the Request. Therefore, in line with the Chamber's decision to recognise the submission of evidence without a prior ruling on its admissibility,¹³ the Chamber will defer its consideration of the standard evidentiary criteria of such items until its deliberations on the judgment under article 74(2) of the Statute. The present decision therefore addresses only the question of whether the prior recorded testimonies that are the subject of the Request meet the criteria set out in rule 68(2)(c) of the Rules.

C. Indicia of Reliability

14. Regarding the assessment of indicia of reliability, the Appeals Chamber has held, in the context of rule 68(2)(b) of the Rules, that:

Trial Chambers are not obliged to consider factors beyond formal requirements. This is because an assessment of 'indicia of reliability' [...] can be more cursory in nature so that, even if some factors, such as the witness's competence to testify about the facts, the internal consistency of the statement and potential inconsistencies with other evidence in the record, are not taken into account during this assessment, they may still be considered when assessing the probative value of the evidence.¹⁴

15. In determining what constitutes formal aspects of reliability, the Chamber recalls the Court's relevant case-law where such aspects have been understood to comprise whether the prior recorded testimony was: (i) obtained by the Prosecution in the ordinary course of its investigations; (ii) signed by the witness and the investigator(s) conducting the interview; (iii) given voluntarily; (iv) if applicable, obtained in the presence of a qualified interpreter; (v) declared to be accurate by the witness at the time

v. Bosco Ntaganda, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, 11 March 2016, [ICC-01/04-02/06-1205](#), para. 7; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), 9 June 2016, [ICC-02/11-01/15-573-Red](#), para. 9.

¹³ [Directions on the Conduct of Proceedings](#), paras 16-19.

¹⁴ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, [ICC-02/11-01/15-744](#) OA8, paras 3, 103-104.

of giving it and includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement.¹⁵

16. The Chamber is of the view that this finding applies equally to the assessment of indicia of reliability under rule 68(2)(c) of the Rules.¹⁶ Thus, the Chamber will limit its assessment of reliability to the formal requirements unless it identifies manifest issues as to the reliability of the information provided by the witness or the Defence raises specific objections. In such instances, the Chamber will assess the nature and degree of the issues for the purposes of informing its determination as to whether the prior recorded testimony should be introduced pursuant rule 68(2)(c) of the Rules. In any event, the substantive credibility and reliability of any prior recorded testimony introduced under rule 68(2)(c) of the Rules and the evidentiary weight to be accorded to such testimony will be considered during the Chamber's deliberation for the purposes of its judgment in light of the evidence as a whole.

D. Acts and Conduct of the Accused

17. The Chamber notes that the parties disagree as to the proper interpretation of the phrase 'acts and conduct of an accused' in the context of rule 68(2) of the Rules. The Prosecution submits that it 'refers to "the personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged"'.¹⁷ The Defence argues that such a distinction is artificial and that the Chamber should adopt a broad definition of acts and conduct of the accused.¹⁸ In its submission, the right of the accused to confront the

¹⁵ See, for example Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on Prosecution Request for Prior Recorded Testimony](#), 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, paras 65-66; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68\(2\)\(c\) of the Rules of Procedure and Evidence'](#), 12 November 2015, ICC-01/05-01/13-1481-Red, para. 20; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution application under Rule 68\(2\)\(c\) of the Rules for admission of prior recorded testimony of Witness P-0103](#), 11 March 2016, ICC-01/04-02/06-1205, para. 16; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)](#), 9 June 2016, ICC-02/11-01/15-573-Red, para. 22.

¹⁶ Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(c), 26 November 2021, [ICC-01/09-01/20-235-Red](#), para. 20.

¹⁷ [Request](#), para. 6.

¹⁸ [Response](#), paras 44-45.

evidence against him must be preserved in relation to each legal element necessary to establish his criminal responsibility, including the contextual elements, the crimes committed by others that are attributed to him and the mode of criminal responsibility alleged.¹⁹

18. The Chamber notes that the Appeals Chamber has recently had an opportunity to consider and interpret the phrase ‘acts and conduct of the accused’ in the context of an appeal arising from a decision under rule 68(2)(b) of the Rules in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. It determined that ‘[t]estimony used to prove the accused’s acts and conduct may indeed describe the acts and conduct of the accused directly, or it may, for example, describe the acts and conduct of individuals in an organisation that the accused was an integral member of, or of individuals over whom he or she had authority.’²⁰ It found that the latter, ‘[d]epending upon the nature of the allegations, [...] may still fall into the category of evidence that may be used, together with other evidence, to prove acts and conduct of the accused.’²¹ Thus, the Appeals Chamber rejected the limited interpretation advanced by the Prosecution that this phrase is confined to the ‘personal actions and omissions of the accused’.

19. At the same time, the Appeals Chamber did not endorse the broad approach advocated by the Defence in the present case. It cautioned that trial chambers must not interpret ‘acts and conduct of the accused’

in a manner that may defeat the objective of rule 68 of the Rules, or that may inhibit written testimony that is limited to contextual elements of crimes or background information that may be relevant to the charges. Indeed, the Appeals Chamber observes that in the practice of the ICTY, prior recorded testimony was more appropriate for what is known as “crimebase” evidence, rather than for the testimony of insider witnesses with knowledge of the accused.²²

¹⁹ [Response](#), para. 46.

²⁰ Judgment on the appeal of the Prosecution against Trial Chamber X’s “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules”, 13 May 2022, [ICC-01/12-01/18-2222](#) OA 4 (the ‘*Al Hassan Appeals Chamber Judgment*’), para. 54.

²¹ [Al Hassan Appeals Chamber Judgment](#), para. 54.

²² [Al Hassan Appeals Chamber Judgment](#), para. 55.

20. The Chamber further notes that the Appeals Chamber has previously held that ‘there is no legal impediment to prior recorded testimony admitted pursuant to rule 68(2) of the Rules being relied upon to establish individual criminal acts in circumstances in which they are not the direct acts of the accused.’²³ Therefore, the Defence argument (that the definition of acts and conduct of the accused should be extended so as to include prior recorded testimony going to proof of any of the legal elements of the charges against the accused) has already been ruled upon and rejected by the Appeals Chamber.

21. Based on the foregoing considerations, the Chamber finds that the phrase ‘acts and conduct of an accused’ is not strictly limited to what the accused is alleged to have done or omitted to do and may include the acts and conduct of other persons where this is relied upon to prove the acts and conduct of the accused. In the view of the Chamber, the mere fact that the acts and conduct of other persons may be attributed to the accused on the basis of the charged mode of criminal responsibility is not sufficient to bring them within this definition. Nevertheless and as set out below, the centrality or importance of the testimony to the case against the accused may be a relevant consideration to the assessment of prejudice within the meaning of rule 68(1) of the Rules.

E. Assessment of Prejudice

22. According to rule 68(1) of the Rules, the Chamber may only allow the introduction of previously recorded testimony in circumstances where this would not be prejudicial to or inconsistent with the rights of the accused. The Appeals Chamber has held that ‘a cautious assessment’ is required in assessing prejudice, and that a chamber may take into account ‘a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that

²³ *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, [ICC-01/04-02/06-2666-Red](#), para. 629.

evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence'.²⁴

23. The Defence further submits that, in order for prior recorded testimony to be introduced, it must not relate to disputed facts and underlines that all of the facts mentioned by the Prosecutor are disputed.²⁵ The Chamber notes that this is not a precondition for the introduction of prior recorded testimony under rule 68(2)(c) of the Rules and, in contrast to rule 68(2)(b) of the Rules, it is not explicitly cited as a relevant consideration. Although in assessing prejudice, the Chamber may take into account the fact that the prior recorded testimony relates to issues that are materially in dispute, the Chamber rejects the Defence arguments that prior recorded testimony relating to disputed facts cannot be introduced under rule 68(2)(c) of the Rules.

24. The Defence argues that: (i) in order for prior recorded testimony to be introduced under rule 68(2)(c) of the Rules, it must relate only to elements that corroborate other elements that may be tested; and (ii) corroboration means that two pieces of evidence independently confirm the same fact.²⁶ The Chamber considers this interpretation to be unsupported by a reading of rule 68(2)(c) of the Rules. First, the Chamber notes that 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. Second, 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. Third, 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'. On the basis of the foregoing, the Chamber considers that corroborative evidence is not required in order for prior recorded testimony to be introduced under rule 68(2)(c) of the Rules.

²⁴ *The Prosecutor v Jean-Pierre Bemba Gombo*, 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", 3 May 2011, [ICC-01/05-01/08-1386](#) OA5 OA6, para. 78.

²⁵ [Response](#), para. 75.

²⁶ [Response](#), para. 76.

25. Nonetheless, in line with the Appeals Chamber's pronouncement on the assessment of prejudice to the accused under rule 68(1) of the Rules, the Chamber may have regard to whether the prior recorded testimony is corroborated by other evidence, but also more broadly whether the testimony is cumulative of other evidence of similar facts. The purpose of the assessment is to inform the Chamber's exercise of discretion in determining whether prior recorded testimony should be introduced under rule 68(2)(c) of the Rules. In light of this purpose and at this stage in the proceedings, the Chamber considers that this assessment is possible only at a general level in relation to broad themes discussed by the witness. The Chamber underlines that this assessment does not predetermine or inform the manner in which this evidence may subsequently be weighed and used for the purposes of its decision under article 74 of the Statute.

F. Principle of orality and right of the accused to challenge the evidence against him

26. The Defence highlights that article 69(2) of the Statute provides that '[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules'; it emphasises the importance of the principle of orality and the right of the accused to examine witnesses against him.²⁷ The Defence submits that any infringement of the principle of orality must be exceptional and limited given the serious impact it has on the fairness of the trial.²⁸

27. Based on the Prosecution's early projections, the Defence underlines that only 13 of the 81 witnesses on whom the Prosecution intends to rely at trial will be subjected to examination-in-chief and cross-examination in an oral hearing, while 27 would have their statements admitted under rule 68(3) of the Rules and would not be subjected to a full examination in court.²⁹ The Defence submits that this means that half of the Prosecution witnesses would not testify and the principle of orality would be nullified.³⁰

28. The Chamber notes that the list of evidence ultimately filed by the Prosecution indicates that it intends to rely on 86 witnesses in total, 18 of whom will be called to testify *viva voce* and 26 of whom will be called to appear before the Chamber under

²⁷ [Response](#), paras 27-33.

²⁸ [Response](#), paras 34-36.

²⁹ [Response](#), paras 50-51.

³⁰ [Response](#), paras 52-56.

rule 68(3) of the Rules. However, this change in the Prosecution's projections does not significantly impact the overall proportion of witnesses who will appear before the Chamber versus those whose statements are sought to be introduced under rule 68(2) of the Rules (approximately 49% of the Prosecution witnesses would have their written testimony introduced under rule 68(2) of the Rules if the Prosecution's requests are accepted).

29. The Chamber is mindful of the principle of orality as enshrined in article 69(2) of the Statute and the right of the accused to examine witnesses against him set out in article 67(1)(e) of the Statute. Nevertheless, the Chamber notes that the introduction of previously recorded testimony under rule 68 of the Rules is an exception to the principle of orality that is explicitly recognised by the terms of article 69(2) of the Statute itself.³¹ The specific exception contained in rule 68(2)(c) of the Rules pertains to the testimony of witnesses who have died, must be presumed to be dead or are otherwise unavailable to testify orally.

30. The Chamber notes that the Request concerns six of the 42 witnesses whose statements are sought to be introduced under rule 68(2) of the Rules. These witnesses are alleged to be dead; thus there is no possibility of them being available to testify orally or be examined by the Defence. Given the limited number of witnesses at issue and the fact that they will be unable to testify in any event, the Chamber does not consider the proportion of witnesses who will be called to testify orally to those whose statements are admitted under rule 68 to be a relevant consideration in determining the present request. Nonetheless, it takes note of the Defence's arguments in this regard and will address this matter in further detail in determining the Prosecution's requests under rule 68(2)(b) of the Rules.

³¹ Article 69(2) of the Statute reads: 'The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.' See also [Ruto & Sang OA10 Judgment](#), para. 84; [Bemba OA5 OA6 Judgment](#), paras 76-77.

III. ANALYSIS

A. General Defence Objections

31. The Chamber notes the Defence arguments that the Prosecution fails to explain in its request why the six witnesses that are the subject of the Request are not available to testify.³² Nonetheless and as set out in more detail below, the Chamber is satisfied that the witnesses are unavailable to testify and that the necessity of measures under article 56 of the Statute could not have been anticipated based on the Prosecution's explanation as to the circumstances of the deaths of the witnesses and the documentation provided to substantiate their deaths.

32. The Chamber notes the Defence submission that all of the statements the Prosecution seeks to introduce through its Request contain hearsay to a greater or lesser degree.³³ It also submits that [REDACTED] are 'insider' witnesses and their testimony should be treated with utmost caution given that they may have a particular motivation to attribute responsibility for their actions to others.³⁴ The Chamber agrees that these factors must be carefully considered in assessing the reliability or credibility of the witness's statements or particular parts thereof. However, the Chamber does not consider the presence of hearsay within a statement or the fact that a witness is an 'insider' to be sufficient to preclude the introduction of their testimony under rule 68(2)(c) of the Rules at this stage. Rather, these are matters that will be considered by the Chamber in determining the weight to be accorded to such testimony or specific parts thereof during its deliberation for the purposes of its judgment.

33. In line with its submission that 'acts and conduct of the accused' should be given an expansive interpretation, the Defence suggests that all of the witness statements contain information going to the acts and conduct of Mr Said. While it is uncontested that the statements of P-1004 and P-3053 contain references to the acts and conduct of the accused, the Defence argues that this is also the case for the testimony of the other four witnesses. In particular, it submits that the statements of P-1420, P-1297, P-1313

³² [Response](#), paras 37-38, 67-68.

³³ [Response](#), para. 91.

³⁴ [Response](#), para. 92.

and P-0881 contain information on operations in Boy-Rabe, which are central to the contextual elements of the crimes charged in this case.³⁵ It also points out that the testimony of P-1420 contains information regarding the organisation of the State during the period of time relevant to the charges.³⁶

34. While the Chamber is mindful that the charges confirmed in the present case include the alleged direct co-perpetration of crimes together with other persons, it is not persuaded that the information identified by the Defence pertains to the acts and conduct of the accused. Although the information provided in the statements of P-1420, P-1297, P-1313 and P-0881 may be relevant to establishing Mr Said's criminal responsibility, this information does not pertain to his personal acts and conduct. At this stage, it is also not apparent that any of the information provided regarding the acts and conduct of other persons in these statements could be relied upon to establish the acts and conduct of the accused.

35. The Defence also submits that the vast majority of written statements that the Prosecution seeks to introduce into evidence are not verbatim transcripts of what the witness said, but are summaries of interviews prepared by investigators and are the subjective accounts of what the investigators understood and chose to retain from these exchanges.³⁷ The Chamber notes that, although statements are summaries prepared by investigators, this is not a reason in and of itself, and without more, to undermine their use.³⁸ The Chamber notes that such statements: (i) are based on the interview with the witness; (ii) are read back to the witness; (iii) initialled on each page by every person present during the interview; and (iv) signed at the end by the witness with a declaration providing that the contents of the statement is true to the best of the knowledge and recollection of the witness and may be used as evidence in proceedings before the Court. Similarly, the Chamber notes that rule 68 of the Rules does not require that prior

³⁵ [Response](#), paras 73-74.

³⁶ [Response](#), para. 73.

³⁷ [Response](#), paras 60-62, 90.

³⁸ Indeed in respect of the Prosecution, the Chamber observes that members of the Prosecution are subject to a comprehensive code of conduct which regulates investigations and mandates, *inter alia*, impartial conduct in the course of such investigations – See Office of the Prosecutor, [Code of Conduct for the Office of the Prosecutor](#), 5 September 2013, Chapter 2, Section 6.

recorded testimony sought to be introduced be in the form of a verbatim transcript. As such, the Chamber finds no reason to reject prior recorded testimony on that basis alone.

B. P-0881

36. According to the Prosecution, ‘P-0881 was [REDACTED] in Bangui.’³⁹ His statement ‘describes the layout of the 7th *arrondissement*, the arrival of the Seleka forces on 24 March 2013, the crimes committed by the Seleka in the 7th *arrondissement*’, in particular, the attack and crimes committed on 13 April 2013, and the response by Djotodia to reports of arbitrary arrests.⁴⁰

37. The Prosecution submits that the witness passed away in February 2021.⁴¹ It provides a death certificate, a *Jugement d’homologation en matière de succession* and the statement of P-0881’s nephew to confirm his death.⁴² The Prosecution submits that the need for measures under article 56 of the Statute could not have been anticipated as the witness reported having only minor health issues when he gave his witness statement.⁴³ On the basis of the information and documentation provided, the Chamber is satisfied that the witness is deceased and that the necessity of measures under article 56 could not have been anticipated.

38. The Chamber notes that P-0881’s statement was given: (i) in accordance with rule 111 of the Rules and signed by the witness together with a declaration that the statement was true to the best of his knowledge and belief; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in French, a language the witness spoke and understood and translated into English by a qualified translator.⁴⁴ Thus, the Chamber is satisfied that the statement has sufficient indicia of reliability for the purposes of the present assessment.

³⁹ [Request](#), para. 10.

⁴⁰ [Request](#), para. 10.

⁴¹ [Request](#), para. 8.

⁴² [Request](#), para. 8; CAR-OTP-2135-2547; CAR-OTP-2135-2548-R01; CAR-OTP-2135-2542-R01 at 2544, para. 12.

⁴³ [Request](#), para. 13.

⁴⁴ CAR-OTP-2032-0682-R01, at 0682, 0684 to 0685, 0701.

39. The Chamber further notes the Defence submission that P-0881's statement is central to the Prosecution's case as it concerns events in Boy-Rabe that are relied upon to establish the contextual elements of crimes against humanity.⁴⁵ In this respect, the Chamber acknowledges that the information provided by the witness may be important to the case against the accused in a general sense. Nonetheless, it notes that the prior recorded testimony does not concern the acts and conduct of the accused, concerns the contextual elements and is generally cumulative to and corroborative of other similar evidence.⁴⁶ In these circumstances, the Chamber is satisfied that the introduction of P-0881's statement would not be prejudicial to or inconsistent with the rights of the accused.

40. Accordingly, the Chamber authorises the Prosecution to introduce P-0881's statement pursuant to rule 68(2)(c) of the Rules.

C. P-1004

41. According to the Prosecution, P-1004's statement provides information relevant to the acts and conduct of the accused and other co-perpetrators, as well as the contextual elements of the charged crimes.⁴⁷ The Prosecution submits that P-1004 provides information regarding the accused's role and activities at the *Office Centrale de Répression du Banditisme* (the 'OCRB'), 'the structure and hierarchy of the Seleka at the OCRB and the relationship with the police officers stationed there', and 'the Seleka policy of targeting the civilian population perceived as pro-BOZIZE.'⁴⁸ In addition to the witness statement, the Prosecution seeks to introduce a diagram of the premises of the *Comité Extraordinaire pour la Défense des Acquis Démocratiques* (Extraordinary Committee for the Defence of Democratic Achievements) (the 'CEDAD') drawn by the witness.⁴⁹

⁴⁵ [Response](#), para. 73.

⁴⁶ **P-0312**: CAR-OTP-2039-0133-R01; **P-0882**: CAR-OTP-2032-0654-R01; **P-2386**: CAR-OTP-2135-2792-R01; **P-1808**: CAR-OTP-2135-2185-R01.

⁴⁷ [Request](#), para. 15.

⁴⁸ [Request](#), paras 15-16.

⁴⁹ [Request](#), para. 15; Annex A to the Request, p. 3; CAR-OTP-2043-0552.

42. The Prosecution submits that P-1004 passed away in January 2021 a month or so after he gave his statement.⁵⁰ According to the Prosecution, the witness's 'death was sudden, unexpected and could not have been anticipated' and it 'had no information in its possession to seek measures under article 56 of the Statute.'⁵¹

43. The Prosecution provides an investigation report on an attempt to contact P-1004 during which the investigator was informed [REDACTED] that the witness had died the day before.⁵² The Prosecution further provides written statements from P-2143, P-1167 and P-2563 confirming that P-1004 is deceased.⁵³ The Chamber notes a discrepancy regarding the spelling of P-1004's name [REDACTED] in these statements. P-2143's statement refers to the death of [REDACTED] in 2017, [REDACTED].⁵⁴ P-2143 identified the named individual in a photo that he was shown.⁵⁵ P-1167 stated that [REDACTED].⁵⁶ P-2563 said 'May he rest in peace' when the name [REDACTED] was mentioned to him.⁵⁷

44. On the basis of the information and documentation provided, the Chamber is satisfied that the witness is deceased and that the necessity of measures under article 56 of the Statute could not have been anticipated.

45. The Chamber notes that P-1004's statement was given: (i) in accordance with rule 111 of the Rules and signed by the witness together with a declaration that the statement was true to the best of his knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in French, a language the witness spoke and understood and translated into English by a qualified translator.⁵⁸ Thus, the Chamber is satisfied that the statement has sufficient indicia of reliability for the purposes of the present assessment.

⁵⁰ [Request](#), para. 19.

⁵¹ [Request](#), para. 19.

⁵² [Request](#), para. 19; CAR-OTP-2130-7829-R01.

⁵³ [Request](#), para. 14; CAR-OTP-2125-0896-R01; CAR-OTP-2094-0002-R01; CAR-OTP-2118-9341-R01.

⁵⁴ CAR-OTP-2125-0896-R01 at 0905, para. 53.

⁵⁵ CAR-OTP-2125-0896-R01 at 0906, paras 55-56 *referring to* CAR-OTP-2043-0562.

⁵⁶ CAR-OTP-2094-0002-R01 at 0037, para. 196

⁵⁷ CAR-OTP-2118-9341-R01 at 9348.

⁵⁸ [Request](#), para. 17; CAR-OTP-2043-0536-R01 at 0537, 0550 to 0551.

46. The Chamber further notes that P-1004's statement goes to proof of acts and conduct of the accused as the witness provides information regarding his interactions with the accused, and his role and activities at the OCRB and the CEDAD.⁵⁹ The witness also provides information related to the accused's usual attire, the vehicle he drove and his place of residence, which, in the view of the Chamber, could be relevant to establishing the 'acts and conduct' of the accused in the present case.⁶⁰ Nonetheless, the Chamber notes that the extent of the information provided by the witness in respect of Mr Said's activities in the OCRB that may be directly relevant to his criminal responsibility in this case is confined to three paragraphs of his testimony. Specifically, the witness states that Mr Said [REDACTED] and states that [REDACTED].⁶¹ The witness does not provide detailed information in this respect and, at a general level, the information provided is cumulative of or corroborated by evidence provided by other witnesses identified by the Prosecution and is not significant in light of the evidence as a whole.⁶² As a result, the Chamber is satisfied that the introduction of P-1004's statement would not be prejudicial to or inconsistent with the rights of the accused.

47. Accordingly, the Chamber authorises the Prosecution to introduce P-1004's statement pursuant to rule 68(2)(c) of the Rules.

D. P-1297

48. According to the Prosecution, P-1297's statement provides information relevant to the contextual 'elements of war crimes and crimes against humanity, particularly the Seleka's attacks on the Boy Rabe neighbourhood of Bangui on 20-24 August 2013'.⁶³

⁵⁹ CAR-OTP-2043-0536-R01 at 0540 to 0541 paras 30, 33, 36, 39; 0543 to 0546, paras 51, 53-55, 66-68, 71-72, 74.

⁶⁰ CAR-OTP-2043-0536-R01 at 0540, para. 31.

⁶¹ CAR-OTP-2043-0536-R01 at 0541, paras 33, 36, 39.

⁶² **P-0338**: CAR-OTP-2130-5761-R01 (Fr); **P-2105**: CAR-OTP-2081-0037-R01 (Fr); **P-1167**: CAR-OTP-2127-7671-R01 (Fr); **P-2161**: CAR-OTP-2127-9323-R01 (Fr); **P-2478**: CAR-OTP-2110-0745-R01 (Fr); **P-0787**: CAR-OTP-2130-0893-R01 (Fr); **P-1737**: CAR-OTP-2130-2086-R01 (Fr); **P-2504**: CAR-OTP-2107-8430-R01 (Fr); **P-2563**: CAR-OTP-2130-4911-R01 at 4927, lns. 490- 514 (Fr).

⁶³ [Request](#), para. 21.

In addition to the witness statement, the Prosecution seeks to introduce four annexes ([REDACTED]) and an associated item ([REDACTED]).⁶⁴

49. The Prosecution submits that P-1297 passed away in July 2021. The Prosecution avers that, while the witness had health issues, these ‘were being monitored and addressed as best as possible’ and it ‘had no reason to suspect or believe that the witness was facing risk of imminent death.’⁶⁵ According to the Prosecution, ‘without further information in its possession, the Prosecution could not have filed a request under article 56 of the Statute to preserve the evidence of Witness P-1297.’⁶⁶

50. The Prosecution provides an investigation report on an attempt to contact P-1297 during which the investigator was informed by P-1297’s son that the witness had died.⁶⁷ The investigation report states that [REDACTED] P-1297’s widow and son and was provided with four photographs taken at P-1297’s funeral [REDACTED], which are attached to the investigation report. The Prosecution submits that attempts ‘to acquire a death certificate from the *Hôpital de l’Amitié* were unsuccessful as no such record was available.’⁶⁸

51. On the basis of the information and documentation provided, the Chamber is satisfied that the witness is deceased and that the necessity of measures under article 56 of the Statute could not have been anticipated.

52. The Chamber notes that P-1297’s statement was given: (i) in accordance with rule 111 of the Rule and signed by the witness together with a declaration that the statement was true to the best of his knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in French, a language the witness spoke and understood and translated into English by a qualified

⁶⁴ [Request](#), para. 21; Annex A to the Request, p. 4; CAR-OTP-2039-0167-R01, CAR-OTP-2039-0184-R01, CAR-OTP-2039-0213-R01, CAR-OTP-2016-0485, CAR-OTP-2039-0216-R01, CAR-OTP-2041-0376-R01.

⁶⁵ [Request](#), paras 25-26.

⁶⁶ [Request](#), para. 26.

⁶⁷ [Request](#), para. 20; CAR-OTP-2130-7829-R01.

⁶⁸ [Request](#), para. 20.

translator.⁶⁹ Thus, the Chamber is satisfied that the statement has sufficient indicia of reliability for the purposes of the present assessment.

53. The Chamber notes the Defence submission that P-1297's statement is central to the Prosecution's case as it concerns events in Boy-Rabe that are relied upon to establish the contextual elements of crimes against humanity.⁷⁰ In this respect, the Chamber acknowledges that the information provided by the witness may be important to the case against the accused in a general sense. Nonetheless, it notes that the prior recorded testimony does not concern the acts and conduct of the accused, concerns the contextual elements and is generally cumulative and corroborative of the evidence of other witnesses identified by the Prosecution.⁷¹ In these circumstances, the Chamber is satisfied that the introduction of P-1297's statement would not be prejudicial to or inconsistent with the rights of the accused.

54. Accordingly, the Chamber authorises the Prosecution to introduce P-1297's statement pursuant to rule 68(2)(c) of the Rules.

E. P-1313

55. According to the Prosecution, P-1313's statement provides information relevant to the contextual elements for crimes against humanity, particularly the state or organisational policy element.⁷² Her statement describes how she was repeatedly raped by Seleka officers during the April 2013 operation in the Boy-Rabe neighbourhood of Bangui.⁷³ In addition to the witness statement, the Prosecution seeks to introduce eleven annexes (comprising medical records and a related consent form, as well as a photograph of the witness's brother who was killed by the anti-Balaka).⁷⁴

⁶⁹ [Request](#), para. 23; CAR-OTP-2039-0167-R01 at 0168, 0183.

⁷⁰ [Response](#), para. 73.

⁷¹ [Request](#), para. 24.

⁷² [Request](#), para. 29.

⁷³ [Request](#), para. 29.

⁷⁴ [Request](#), para. 28; Annex A to the Request, p. 5; CAR-OTP-2038-0122; CAR-OTP-2038-0123; CAR-OTP-2038-0124; CAR-OTP-2038-0125; CAR-OTP-2038-0126; CAR-OTP-2038-0127; CAR-OTP-2038-0128; CAR-OTP-2038-0129; CAR-OTP-2038-0130; CAR-OTP-2038-0110-R01; CAR-OTP-2038-0131.

56. The Prosecution submits that P-1313 passed away in March 2021 and that, although the witness had health issues, it ‘had no information that the witness was facing any risk of imminent death’ and ‘was not aware of the seriousness of P-1313’s medical condition.’⁷⁵ The Prosecution states that it ‘had no information in its possession to justify a request under article 56 of the Statute.’⁷⁶

57. The Prosecution provides a statement from P-3099 who witnessed the death and burial of P-1313, and a photograph of P-1313 in her coffin, as well as medical records provided by P-3099.⁷⁷

58. On the basis of the information and documentation provided, the Chamber is satisfied that the witness is deceased and that the necessity of measures under article 56 could not have been anticipated.

59. The Chamber notes that P-1313’s statement was given: (i) in accordance with rule 111 of the Rules and signed by the witness together with a declaration that the statement was true to the best of her knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in Sango, a language the witness spoke and understood and translated into English by a qualified translator.⁷⁸ Thus, the Chamber is satisfied that the statement has sufficient indicia of reliability for the purposes of the present assessment.

60. The Chamber further notes the Defence submission that P-1313’s prior recorded testimony is central to the Prosecution’s case as it concerns events in Boy-Rabe that are relied upon to establish the contextual elements of crimes against humanity.⁷⁹ The Defence also argues that the information provided by this witness is not corroborated by other witnesses and submits that the Prosecution [REDACTED].⁸⁰

⁷⁵ [Request](#), paras 32-33.

⁷⁶ [Request](#), para. 33.

⁷⁷ [Request](#), para. 27; CAR-OTP-2135-0032-R01; CAR-OTP-2135-2564-R01 at 2566 to 2567, paras. 11-23.

⁷⁸ [Request](#), para. 30; CAR-OTP-2038-0098-R01 at 0099, 0107 to 0108.

⁷⁹ [Response](#), para. 74.

⁸⁰ [Response](#), paras 82-83.

61. In this respect, the Chamber acknowledges that the information provided by the witness may be important to the case against the accused in a general sense. Nonetheless, it notes that the prior recorded testimony does not concern the acts and conduct of the accused and concerns the contextual elements. The Chamber notes that corroboration is not required in order to introduce prior recorded testimony under rule 68(2)(c) of the Rules.⁸¹ The Chamber considers that the testimony provided by P-1313 is generally cumulative of the evidence of other witnesses identified by the Prosecution who provide information about persons raped in Boy-Rabe by Seleka members in 2013 and particularly in the month of April.⁸²

62. In these circumstances, the Chamber is satisfied that the introduction of P-1313's statement would not be prejudicial to or inconsistent with the rights of the accused.

63. Accordingly, the Chamber authorises the Prosecution to introduce P-1313's statement pursuant to rule 68(2)(c) of the Rules.

F. P-1420

64. According to the Prosecution, P-1420's statement provides information relevant to the contextual elements for crimes against humanity, particularly the state or organisational policy element, as well as the contextual elements for war crimes.⁸³ The Prosecution submits that P-1420 was a Presidential Guard under President Francois Bozize who subsequently joined the Seleka and provides 'reliable information about the composition of the Seleka forces, the bases Seleka commanders controlled, the system of food-distribution and the checkpoints established by the Seleka.'⁸⁴ The Prosecution states that the witness provides information about the targeting of perceived Bozize supporters, the attack on Boy-Rabe in August 2013 and the transfer of the Seleka under the accused's command to the CEDAD after the Seleka were

⁸¹ See above paras 24-25.

⁸² [Request](#), para. 31.

⁸³ [Request](#), para. 35.

⁸⁴ [Request](#), para. 36.

removed from the OCRB.⁸⁵ In addition to the witness statement, the Prosecution seeks to introduce three annexes [REDACTED].⁸⁶

65. The Prosecution submits that P-1420 was interviewed in November 2016 when he was 55 years old and that he passed away in April 2017.⁸⁷ According to the Prosecution, ‘P-1420’s death was sudden, unexpected and could not have been anticipated less than six months after his interview.’⁸⁸ The Prosecution states that it ‘had no information in its possession to justify the submission of a request under article 56 of the Statute.’⁸⁹ Furthermore, the Prosecution submits that it ‘followed up with the witness on several additional occasions, but that no further aggravating information about the witness’s health situation was recorded.’⁹⁰ As proof of death, the Prosecution provides a *Déclaration de Décès* from the *Hôpital de l’Amitié*, a statement from P-1420’s nephew (P-3100), who confirms the information provided in the *Déclaration de Décès* and a *Jugement d’homologation en matière de succession* issued by the Central African authorities.⁹¹ On the basis of the information and documentation provided, the Chamber is satisfied that the witness is deceased and that the necessity of measures under article 56 could not have been anticipated.

66. The Chamber notes that P-1420’s statement was given: (i) in accordance with rule 111 of the Rule and signed by the witness together with a declaration that the statement was true to the best of his knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in French, a language the witness spoke and understood and translated into English by a qualified translator.⁹² Thus, the Chamber is satisfied that the statement has sufficient indicia of reliability for the purposes of the present assessment.

⁸⁵ [Request](#), paras 37-38.

⁸⁶ [Request](#), para. 35; Annex A to the Request, p. 6; CAR-OTP-2040-0839; CAR-OTP-2040-0841; CAR-OTP-2040-0842.

⁸⁷ [Request](#), para. 41; Additional Information, para. 9.

⁸⁸ [Request](#), para. 41.

⁸⁹ [Request](#), para. 41.

⁹⁰ Additional Information, para. 4.

⁹¹ [Request](#), para. 34; CAR-OTP-2135-2615; CAR-OTP-2135-2611-R01 at 2613, paras 11-15; CAR-OTP-2135-2616-R01.

⁹² [Request](#), para. 39; CAR-OTP-2040-0811-R01 at 0812, 0837 to 0838.

67. The Chamber notes the Defence submission that P-1420's statement is central to the Prosecution's case as it concerns the organisation of the Seleka and events in Boy-Rabe that are relied upon to establish the contextual elements of crimes against humanity.⁹³ In this respect, the Chamber acknowledges that the information provided by the witness may be important to the case against the accused in a general sense. Nonetheless, it notes that the prior recorded testimony does not concern the acts and conduct of the accused and is broadly speaking cumulative and corroborative of the evidence of other witnesses identified by the Prosecution.⁹⁴ In these circumstances, the Chamber is satisfied that the introduction of P-1420's statement would not be prejudicial to or inconsistent with the rights of the accused.

68. Accordingly, the Chamber authorises the Prosecution to introduce P-1420's statement pursuant to rule 68(2)(c) of the Rules.

G. P-3053

69. According to the Prosecution, P-3053's statement provides an account of his own detention at the OCB by the accused and Seleka elements under his command in mid-August 2013.⁹⁵ In addition to the witness statement, the Prosecution seeks to introduce three photographs that are annexed to the statement [REDACTED] and four photographs of persons that were shown to the witness during the interview.⁹⁶

70. The Prosecution submits that P-3053 was interviewed on 30-31 July and 1-2 August 2021, when he was 35 years old, and passed away soon afterwards in late August 2021.⁹⁷ As proof of death, the Prosecution provides a death certificate dated [REDACTED] October 2021 issued by the *Mairie* of Bangui and obtained from P-3053's mother.⁹⁸ According to the Prosecution, P-3053 stated that he was too ill to leave home in mid July 2021, but subsequently he indicated that he was recovering.⁹⁹ The

⁹³ [Response](#), para. 73.

⁹⁴ [Request](#), paras 35-38.

⁹⁵ [Request](#), para. 43.

⁹⁶ [Request](#), paras 43, 46; Annex A to the Request, p. 6; CAR-OTP-2130-6359-R01 at 6376 to 6378; CAR-OTP-2069-2452; CAR-OTP-2069-3226; CAR-OTP-2069-3227; CAR-OTP-2114-0323.

⁹⁷ [Request](#), para. 47.

⁹⁸ [Request](#), para. 42; CAR-OTP-2134-1594-R01; CAR-OTP-2134-1593-R01.

⁹⁹ [Request](#), para. 48.

Prosecution facilitated medical care and submits that it ‘had no reason to suspect or believe that the witness was facing the risk of imminent death’.¹⁰⁰ According to the Prosecution, ‘[t]he witness passed away three weeks after the completion of his interview [and] [i]n such a short time, the Prosecution would not have had time to initiate article 56 proceedings.’¹⁰¹ On the basis of the information and documentation provided, the Chamber is satisfied that the witness is deceased and that the necessity of measures under article 56 could not have been anticipated.

71. The Chamber notes that P-3053’s statement was given: (i) in accordance with rule 111 of the Rules and signed by the witness together with a declaration that the statement was true to the best of his knowledge and recollection; (ii) voluntarily on the understanding that it could be used in proceedings before the Court; and (iii) in Sango, a language the witness spoke and understood and translated into French by a qualified translator.¹⁰² Thus, the Chamber is satisfied that the statement has sufficient indicia of reliability for the purposes of the present assessment.

72. The Chamber notes that a number of allegations included in the witness’s statement relate directly to the acts and conduct of the accused. In particular, the witness provides incriminating information regarding [REDACTED].¹⁰³ This evidence relates to events that are materially in dispute and are central to the allegations against the accused in the present case. The Prosecution indicated its intention to call P-3056, [REDACTED] to testify orally as to the same events.¹⁰⁴ Since the Request was filed, P-3056 has appeared before the Chamber and testified as a *viva voce* witness over three days between 12 and 14 October 2022.¹⁰⁵

73. The Defence submits that it would not be fair for the Chamber to assess a charged crime or incident on the basis of the written statement of a witness who is not tested in

¹⁰⁰ [Request](#), para. 50.

¹⁰¹ [Request](#), para. 50.

¹⁰² [Request](#), para. 44; CAR-OTP-2130-6359-R01 at 6360, 6374 to 6375.

¹⁰³ CAR-OTP-2130-6359-R01 at 6367 to 6369.

¹⁰⁴ [Request](#), para. 45; CAR-OTP-2130-6639-R01.

¹⁰⁵ ICC-01/14-01/21-T-20-CONF-ENG; ICC-01/14-01/21-T-21-CONF-ENG; ICC-01/14-01/21-T-22-CONF-ENG.

court.¹⁰⁶ The Defence argues that P-3053 and P-3056 do not corroborate each other.¹⁰⁷ In particular, it underlines: (i) the witnesses' contrasting physical description of the accused; (ii) their contradictory accounts of being placed in an empty cell or a crowded cell at the OCRB; and (iii) [REDACTED].¹⁰⁸ The Defence further highlights that P-3053 does not recognise the accused when he is presented with a picture of him although his statement contains specific allegations as to the accused's involvement in his detention and mistreatment.¹⁰⁹ In addition, it claims that P-3056 is an unreliable witness because [REDACTED].¹¹⁰

74. The Chamber notes that, pursuant to rule 68(2)(c) of the Rules, the fact that the prior recorded testimony goes to proof of acts and conduct of the accused does not preclude its introduction but may be a factor against it. The Chamber has carefully considered the content of P-3053's prior recorded testimony, as well as the nature and disputed character of the allegations against the accused to which it relates. Nonetheless, it notes that P-3053's prior recorded testimony is not the only evidence regarding these events and that P-3056 has already testified regarding the experience of this group of detainees.

75. The Chamber notes the Defence's concern regarding the variations and apparent contradictions in P-3053 and P-3056's accounts of events. Nevertheless, the Chamber is of the view that it is important to have regard to the full range of available evidence on the events described by the two witnesses in order to assess the testimony of P-3056 and the issues raised by the Defence with respect to the credibility of this witness. In the view of the Chamber, a consideration of P-3056's testimony in light of the evidence as a whole will best serve the determination of the truth. In these circumstances, the Chamber is satisfied that the introduction of P-3053's statement would not be prejudicial to or inconsistent with the rights of the accused.

¹⁰⁶ [Response](#), para. 71.

¹⁰⁷ [Response](#), paras 85-88.

¹⁰⁸ [Response](#), paras 85-86.

¹⁰⁹ [Response](#), paras 93-94.

¹¹⁰ [Response](#), para. 87.

Accordingly, the Chamber authorises the Prosecution to introduce P-3053's statement pursuant to rule 68(2)(c) of the Rules.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request; and

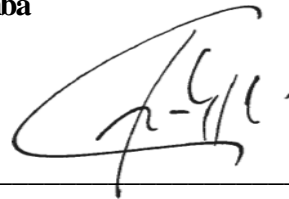
AUTHORISES the introduction of the prior recorded testimony and associated material of P-0881, P-1004, P-1297, P-1313, P-1420 and P-3053 under rule 68(2)(c) of the Rules.



Judge Miatta Maria Samba
Presiding Judge



Judge María del Socorro Flores Liera



Judge Sergio Gerardo Ugalde Godínez

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

Dated 26 October 2022

At The Hague, The Netherlands