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**International
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Court**

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Date: **9 October 2023**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

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

Public

**Public redacted version of "Prosecution's Request for Submission of the Prior
Recorded Testimony of P-2200 pursuant to Rule 68(2)(c)" ,
ICC-01/14-01/18-1967-Conf, 7 July 2023**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamai
Ms Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Oswaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests the formal submission of P-2200’s prior recorded testimony in accordance with rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”), the “Initial Directions on the Conduct of the Proceedings” (“Directions”)¹, and “Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence)” (“Further Directions”)² P-2200’s prior recorded testimony comprises his 1 September 2020 interview (“Prior Statement”)³ and its associated exhibits.⁴

2. The Prior Statement may be formally submitted under rule 68(2)(c) because P-2200 is deceased, and as detailed below: (i) the Prosecution could not anticipate the need for article 56 measures to obtain his evidence; (ii) the evidence has sufficient indicia of reliability; (iii) the evidence is relevant and probative; and (iv) there is no undue prejudice to either Accused from its submission. The relevance and probative value of the Prior Statement and associated exhibit is set out in more detail below, along with other sources of corroborative evidence.

3. P-2200 was [REDACTED] in BOSSANGO when the conflict in the Central African Republic (“CAR”) broke out. His evidence is relevant to: (i) the contextual elements for war crimes and crimes against humanity committed by the Anti-Balaka in BOSSANGO; (ii) the 17 September 2013 Anti-Balaka attack on BOSSANGO; (iv) the 5 December 2013 Anti-Balaka attack on BOSSANGO; (v) the targeting of the Muslim population; (vi) the murder, persecution, and forced displacement of Muslims

¹ ICC-01/14-01/18-631, para. 33.

² ICC-01/14-01/18-1892, paras. 3-4.

³ CAR-OTP-2088-2146.

⁴ 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.

civilians in BOSSANGOA; (vii) the looting and pillaging of Muslim houses and shops; (viii) the destruction of religious buildings in BOSSANGOA, including its two mosques; and (x) the evacuation of the Muslim population to CHAD.

4. The relevance and probative value of the Prior Statement is set out in more detail below in a brief summary of the salient issues, together with the sources of other corroborative evidence. *Confidential Annex A* (a Summary Chart) lists P-2200's Prior Statement, its five associated exhibits,⁵ and identifies the relevant paragraphs of the Confirmation Decision to which P-2200's evidence relates. *Confidential Annex B* contains the Prior Statement. *Confidential Annex C* contains recently obtained proof of the witness's death.⁶

II. CONFIDENTIALITY

5. 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.

III. SUBMISSIONS

A. Applicable Law

6. 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.

⁵ CAR-OTP-2085-2972, CAR-OTP-2085-3832, CAR-OTP-2085-3122, CAR-OTP-2085-4082, CAR-OTP-2085-5082.

⁶ CAR-OTP-00001616.

7. A Chamber may formally recognise the submission of the prior recorded testimony of a witness who has died when: (i) the necessity of measures under article 56 of the Statute could not be anticipated; (ii) the prior recorded testimony bears sufficient indicia of reliability;⁷ (iii) the evidence is relevant and probative; and (iv) its submission is not prejudicial to or inconsistent with the rights of the accused.⁸

8. 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”.⁹ But, it is not dispositive.¹⁰

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

9. P-2200’s Prior Statement may be recognised as formally submitted under rule 68(2)(c) because it fulfils all of the requirements: P-2200 was unavailable to testify due to obstacles that could not be overcome with reasonable diligence, and he is now deceased; the Prosecution could not have anticipated the need to use article 56 to preserve his evidence; and the Prior Statement bears sufficient indicia of reliability. Moreover, as explained below, it does not concern the acts or conduct of the Accused and its formal submission would not cause any unfair prejudice.

i. P-2200 was unavailable to testify due to obstacles that could not be overcome with reasonable diligence and is now deceased

10. P-2200 was unavailable to testify prior to his untimely death due to obstacles that could not be overcome with reasonable diligence. Although P-2200 did not withdraw

⁷ ICC-01/04-02/06-1029, para. 12.

⁸ ICC-01/12-01/18-1111-Conf, para. 7; ICC-01/05-01/08-1386, para. 78 (“*Bemba Appeals Decision*”).

⁹ See also ICC-01/04-02/06-1029, para. 13.

¹⁰ ICC-01/05-01/13-1481, paras. 21-22 (observing that a Chamber may consider *inter alia* whether the evidence: (i) relates to issues that are not materially in dispute; (ii) central to the allegations of the case; and (iii) is corroborative.¹⁰

his cooperation, the Prosecution encountered substantial difficulties in maintaining contact with the witness regarding the scheduling of his testimony.

11. The Prosecution interviewed P-2200 on 1 September 2018. Since then, despite substantial logistical difficulties in reaching the witness attendant to his living circumstances as a refugee [REDACTED], Prosecution investigators maintained periodic contact with the witness. With regard to his prospective testimony, the witness indicated in April 2021 reaffirmed his preparedness to testify.

12. In January 2022, Prosecution investigators were in further contact with P-2200 regarding the possible scheduling his testimony in March 2022. At the time, P-2200 complained principally of back pain which he considered might impact his travel quite some distance [REDACTED] to testify. Nevertheless, he remained committed to testify in the case. Given the logistical complexities involved in organising the witness's video-link testimony and the uncertainty of his ability to travel at the proposed time, the scheduling of his testimony was postponed.

13. Following several unsuccessful attempts to contact the witness in early May, on [REDACTED] May 2022 Prosecution investigators were informed that the witness had died.¹¹ Upon further inquiry, [REDACTED] related that P-2200 had died due to an apparent complication from [REDACTED] injury sustained [REDACTED].¹² The witness had apparently sustained several [REDACTED] injuries during the attack [REDACTED].¹³ The wound became infected, and although the witness received treatment,¹⁴ he eventually succumbed on [REDACTED] March 2022.

14. As set out in a 13 June 2023 Investigation Report, since 16 May 2022, Prosecution investigators have made numerous attempts to obtain official confirmation of the

¹¹ CAR-OTP-00001606.

¹² CAR-OTP-00001606-000009.

¹³ CAR-OTP-00001606-000009.

¹⁴ CAR-OTP-00001608 [REDACTED] – CAR-OTP-00001607-00001615).

witness's death. Repeated contact was made [REDACTED] to obtain his [REDACTED] *carnet de santé* and/or death certificate. These contacts were had in June 2022, September 2022, October 2022, November 2022, March 2023, April 2023, and May 2023,¹⁵ when the Prosecution finally received a Medical Certificate of the Cause of Death [REDACTED] (*Confidential Annex C*). The Certificate provides that [REDACTED] (P-2200) died on [REDACTED] March 2022, [REDACTED]. The Certificate is signed by Dr [REDACTED].¹⁶

ii. Article 56 measures could not be anticipated

15. Following P-2200's September 2018 interview, the witness did not report health issues that would give rise to concern about his potential availability to testify. Nor, did the witness otherwise indicate any reluctance to do so. His death in March 2022 was thoroughly unforeseen. And, despite difficulties contacting with the witness, the Prosecution had no reason to suspect that the witness was facing a risk of imminent death, or that he would become unavailable for any other reason. To the contrary, as noted above, P-2200 had confirmed and reconfirmed his willingness to testify.

16. Moreover, to the extent that – at one point – the witness's [REDACTED] may have impeded his inability to travel in order to testify, the same issue would manifestly have defeated the feasibility of evidence preserving measures under article 56.

¹⁵ CAR-OTP-00001606-000001-000003, 000008.

¹⁶ CAR-OTP-00001616 (Annex C).

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

17. P-2200's fleeting mention of NGAISSONA is peripheral information at best,¹⁷ and does not comprise acts and conduct evidence within the meaning of rule 68(2)(c).¹⁸

iv. The tendered evidence is reliable

18. P-2200's Prior Statement is *prima facie* reliable. It is truthful, authentic, and consistent. The Prosecution obtained P-2200's Prior Statement in the ordinary course of its investigation in September 2018.¹⁹ In accordance with rule 111, the witness's factual account was provided voluntarily and signed by him, as well as the investigators conducting the interview.²⁰ The Prior Statement was interpreted and read back to him by a qualified interpreter in a language he 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.²¹

19. The Prior Statement is limited to information within the witness's knowledge and experience. He was forthcoming in his interview about his lack of knowledge or lack of memory of certain events.²² Further, P-2200 gave reasonable and logical explanations in his narrative of events without any apparent embellishments or speculation, stating for example, "[je] n'ai pas connaissance de la commission de crimes sexuels à BOSSANGOA [...]".²³

20. In sum, the Prior Statement is reliable in that it (i) is signed; (ii) was given in the presence of a qualified interpreter; (iii) contains an acknowledgement that it is

¹⁷ See Summary at Annex B, paras. 121-122, 126 (regarding NGAISSONA) and para. 134 (regarding YEKATOM).

¹⁸ See ICC-01/04-02/06-1667-Red, para. 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-01/09-01/11-1938-Red-Corr, para. 66; see also ICC-01/05-01/13-1481-Red-Corr, para. 20.

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

²¹ CAR-OTP-2088-2146, paras. 99-101.

²² CAR-OTP-2088-2146, paras. 15, 87.

²³ CAR-OTP-2088-2146, para. 82.

accurate; (iv) is internally consistent; and (v) is predicated on information within the witness's actual knowledge, in that the witness readily admitted when he did not know certain information.²⁴

21. In addition, the Prior Statement sufficiently corroborated by other evidence in the case.²⁵ The following witnesses, among other evidence, provide such corroboration, P-2049, P-1577, P-2462, P-2657, P-0314, P-0287, P-2049, P-2658, P-2647, P-0287, P-0567, P-2453, P-2328, P-2657, P-2652, P-1231, P-2133, P-0314, and P-1074.

v. P-2200's prior recorded testimony is relevant and probative

22. P-2200's Prior Statement is highly relevant and probative. It primarily goes to proof of the crime-base, particularly 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, as part of the contextual elements of Crimes against and War Crimes, under articles 7 and 8, respectively. Specifically, the evidence concerns the attacks against the Muslim population in BOSSANGOA before and on 5 December 2013.

23. P-2200's Prior Statement comprises 20 pages, as well as five associated exhibits. 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 Statement describes the following:

- P2200 was a Central African [REDACTED];

²⁴ CAR-OTP-2105-0195, paras. 5, 9.

²⁵ See para. 8 *infra*.

- P-2200 related that between August and October 2013, the Anti-Balaka attacked several villages around BOSSANGO, killing many Muslims;
- He described the 17 September 2013 Anti-Balaka attack against the Muslim population in BOSSANGO, and states that their aim against the Muslim population was clear, as the Anti-Balaka entered the city and attacked residential areas, such as the BORO and ARABE neighbourhoods. All Muslims from [REDACTED] ARABE neighbourhood - took refuge [REDACTED], where they stayed for four days. [REDACTED] seven Muslim civilians killed in the attack;
- P-2200 described the 5 December 2013 attack on BOSSANGO, stating that the heavily armed Anti-Balaka deliberately targeted the Muslim population in residential areas, killing and injuring several. In the course of the attack, the Anti-Balaka killed at least 18 Muslim civilians, including [REDACTED]. P-2200 stated that he saw the bodies of the victims;
- P-2200 reported that UDAC soldiers (from Guinea and Cameroon) advised the Muslim population to take shelter at *l'école de la liberté*. P-2200 reported that around 40-50 Muslims [REDACTED] were convinced by the soldiers to proceed to the school, who escorted them;
- P-2200 stated that the Muslims lived like prisoners at the school, under guard by different military contingents. Anti-Balaka elements established checkpoints throughout the town. Muslims could not move around for fear of being killed by the Anti-Balaka;
- During and after the 5 December attack, Muslim houses and shops were targeted. They were pillaged and looted, and the Anti-Balaka nearly destroyed some Muslim neighbourhoods like BORO. By 9 December, they had destroyed the two BOSSANGO mosques, leaving Muslims with no place of worship;

- P-2200 noted that eventually, the entire Muslim population was evacuated to CHAD under escort, as doing so otherwise would have been impossible because of the Anti-Balaka;

25. The Prosecution tenders five associated exhibits for formal submission, listed in *Confidential Annex A*: These associated exhibits (photographs) are indispensable to the comprehension of the Prior Statement, and if excluded, would diminish its probative value.

C. Balance of interests

26. 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 submission of uncross-examined evidence unrelated to the acts and conduct of the Accused.²⁶ On the contrary, although rule 68 is an exception to the principle of orality²⁷ and publicity,²⁸ its application “is *per se* generally considered *compatible* with the rights of the accused”²⁹ 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 inherent neutrality.³⁰ 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.

27. P-2200’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

²⁶ ICC-01/05-01/13-1478-Red-Corr, paras. 38-39.

²⁷ ICC-01/05-01/08-1386, para. 78.

²⁸ ICC-01/14-01/18-685, para. 25 (referencing articles 64(7) and 67(1)).

²⁹ ICC-01/14-01/18-685, para. 26.

³⁰ ICC-01/09-01/11-1938-Red-Corr, para. 25.

the Accused either in respect of the nature of rule 68(2) itself, or as applied in these circumstances.³¹

28. Here, the Defence retains the right to lead evidence during its direct case, and has availed itself of the opportunity examine other and related witnesses on the basis of, and concerning, the information contained in P-2200's Prior Statement. Further, the Court's jurisprudence prohibiting a Chamber from entering a conviction on any charge founded to a 'decisive extent' on unexamined testimony serves as an additional further safeguard. Moreover, as professional judges, the Chamber will undoubtedly consider the appropriate *weight* to be accorded the Prior Statement at the end of trial as the submission regime foresees,³² bearing in mind its probative value, extrinsic and intrinsic reliability, as well as the fact that it is corroborative of other documentary evidence and cross-examined testimony.

29. P-2200's Prior Statement should thus be recognised as formally submitted, and the Chamber duly consider the extent to which it may support a conviction on any of the charges on the basis of *all* relevant evidence at the end of the trial.

³¹ ICC-01/09-01/11-1938-Red-Corr, para. 27.

³² See ICC-01/14-01/18-631, paras. 52-53.

IV. CONCLUSION

30. For the foregoing reasons, the Prosecution requests the Chamber recognise as formally submitted the Prior Statement of P-2200 including its five associated exhibits, listed in Annex A, pursuant to rule 68(2)(c).

A handwritten signature in black ink, appearing to be 'K.A.K.', with a horizontal line underneath it. The signature is centered on the page.

Karim A. A. Khan KC, Prosecutor

Dated this 9th day of October 2023
At The Hague, The Netherlands