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**International
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Date: **14 April 2023**

TRIAL CHAMBER V

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

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

Public

Public Redacted Version of the ‘Supplemental Response to “Prosecution’s Sixth Formal Submissions of Prior Recorded Testimony pursuant to Rule 68(2)”, ICC-01/14-01/18-1574-Conf-Exp, 15 September 2022

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. Following the *Decision on the Yekatom Defence Motion for Finding of Disclosure Violation* ("Decision"),¹ Counsel representing Mr. Alfred Rombhot Yekatom (the "Defence") respectfully submits this Supplementary Response to the *Prosecution's Sixth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)* ("Sixth Request").²
2. The Defence maintains its position and opposes the formal submission of the prior recorded testimony of P-0365 and P-2671, and supplements its previous submission, arguing that their evidence relates to issues materially in dispute; is not corroborative of other evidence, and to the contrary highlight discrepancies and incoherencies of P-2620's and other witnesses' accounts; does not present sufficient indicia of reliability; and it is in the interests of justice to reject the Sixth Request with respect to P-0365 and P-2671.

PROCEDURAL BACKGROUND

3. On 8 January 2021, the Prosecution filed its Sixth Request for the admission of the prior recorded testimony of seven witnesses including P-0365 and P-2671 whose evidence is relevant for Count 29.³
4. On 21 January 2021, the Defence filed its response to the Sixth Request, with its corrigendum filed on 2 March 2021, and requested the Chamber to reject the Prosecution's Sixth Request in relation to the prior recorded testimony of P-0365 and P-2671 ("Defence Response").⁴
5. On 25 March 2022, the Prosecution disclosed the *Formulaire de demande de*

¹ [ICC-01/14-01/18-1566-Conf-Corr](#); Public Redacted Version [ICC-01/14-01/18-1566-Red](#).

² [ICC-01/14-01/18-802-Conf-Corr](#); Public Redacted Version [ICC-01/14-01/18-802-Corr-Red](#).

³ [ICC-01/14-01/18-802-Conf-Corr](#); Public Redacted Version [ICC-01/14-01/18-802-Corr-Red](#).

⁴ [ICC-01-14-01/18-845-Conf-Corr](#); Public Redacted Version [ICC-01/14-01/18-845-Corr-Red](#).

participation à titre individuel ("Complete Victim Application")⁵ which contained new evidence regarding identifying information of P-2620 and regarding her account of the events subject of these proceedings.

6. On 21 March 2022, the Defence filed a Motion for Finding of Disclosure Violation arguing that the late disclosure of the Complete Victim Application of P-2620 comprised a violation of the Prosecution's disclosure obligations. It further requested the Chamber to reject the Prosecution's Sixth Request in relation to P-2671 and P-0365. A corrigendum was filed on 22 August 2022 ("Violation Motion").⁶
7. On 5 September 2022, the Chamber issued its Decision, finding that the late disclosure of the Complete Victim Application comprised a violation of the Prosecution's disclosure obligation and, as a remedy, directed the Defence to file a supplementary response to the Sixth Request.⁷

APPLICABLE LAW

8. Rule 68 (2)(b)(i) of the Rules of Procedure and Evidence ("Rules")

In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question:

- relates to issues that are not materially in dispute;
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- relates to background information;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability.

SUBMISSIONS

⁵ CAR-OTP-2135-2412.

⁶ [ICC-01/14-01/18-1318-Conf-Corr](#); Public Redacted Version [ICC-01/14-01/18-1318-Red](#).

⁷ [ICC-01/14-01/18-1566-Conf-Corr](#); Public Redacted Version [ICC-01/14-01/18-1566-Red](#).

9. As a preliminary observation, part of the ongoing Defence investigations are aiming at establishing the real identity of P-2620, including establishing her real name, the name of her family members, and finally her real date of birth. [REDACTED],⁸ [REDACTED].⁹
10. That being said, since the Response to Sixth Request, the Complete Victim Application consist of new evidence affecting the credibility of P-2620. The Defence will therefore show that this evidence further demonstrates that P-0365's and P-2671's evidence fails to meet any of the criteria of Rule 68(2)(b)(i).
11. Firstly, the Defence further submits that the evidence of P-0365¹⁰ and P-2671¹¹ touches upon core issues materially in dispute, and do not merely consist of background information (A). Secondly, it brings new discrepancies to light in the overall evidence regarding P-2620 reinforcing the Defence's position that P-0365 and P-2671's evidence is neither cumulative nor corroborative of other evidence (B).¹² Thirdly, the evidence of P-2671 is itself marked with such problems as to affect its reliability (C). Finally, it is in the interests of justice to allow the Defence to examine those witnesses, or to reject their evidence entirely (D).

A. The evidence relates to issues materially in dispute, and does not relate to background information.

12. The Prosecution's stated aim is to use P-0365 and P-2671's evidence to clarify "the *date of birth* which appears on P-2620's [REDACTED] *birth certificate*".¹³ In other words, the Prosecution intends to submit both P-0365's and P-2671's evidence to establish P-2620's date of birth as indicated on her alleged birth certificate, and taking into account the alleged typographical error.

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ See [ICC-01-14-01/18-845-Conf-Corr](#), paras. 27-28.

¹¹ See [ICC-01-14-01/18-845-Conf-Corr](#), para. 58.

¹² See [ICC-01-14-01/18-845-Conf-Corr](#), paras. 19, 58

¹³ [ICC-01/14-01/18-802-Conf-Corr](#), paras. 14 and 18.

13. It is the Defence's position¹⁴ that establishing the date of birth of P-2620 is a crucial issue to "the Chamber's eventual determination of the charges against the accused in its judgment under Article 74 of the Statute."¹⁵
14. Indeed, the age of an alleged child soldiers is an element of the crime of conscription, enlistment and use of child soldiers i.e. that such person or persons were under the age of 15 years. The Prosecution intends to use P-2671 and P-0365 to prove this element which consist of the crime under Count 29 in these proceeding.¹⁶
15. Consequently, contesting the date of birth of alleged child soldiers, notably through contesting the authenticity of identifying documents, is central to the Defence's strategy. This was shown during the examination of P-2475 during which a number of identifying documents collected through the Defence's investigations were tendered for the purpose of establishing that P-2475,¹⁷ amongst others,¹⁸ was not in fact under the age of 15 at the time of the events. This brings the authenticity of identifying documents of alleged former child soldiers to the heart of the issues relating to Count 29.
16. The matter of the date of birth and of the authenticity of P-2620's birth certificate are therefore "soundly and conceivably"¹⁹ disputed between the Defence and the Prosecution.
17. It follows from this that the evidence of both P-0365 and P-2671 relates to an issue materially in dispute, which does not consist of background information,

¹⁴ [ICC-01-14-01/18-845-Conf-Corr](#), para. 28.

¹⁵ *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, 1 December 2016, [ICC-02/04-01/15-596-Red](#), para. 15.

¹⁶ [ICC-01/14-01/18-802-Conf-Corr](#), paras. 15 and 19.

¹⁷ See for e.g. CAR-D29-0013-0004 and CAR-D29-0013-0096.

¹⁸ See for e.g. CAR-D29-0015-0021, CAR-D29-0015-0029, CAR-D29-0015-0031, CAR-D29-0015-0029 and CAR-D29-0013-0128.

¹⁹ *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, 1 December 2016, [ICC-02/04-01/15-596-Red](#), para. 15.

such that their admission under Rule 68(2)(b) should be rejected.

B. The evidence is not corroborative of other evidence.

18. Since the submission of the Defence Response to the Sixth Request, new information has been brought to the Defence's attention which reinforces the fact that the evidence of P-0365, P-2671 and P-2620 regarding the latter's date of birth cannot be considered as mutually corroborative.
19. Should the Prosecution wish to introduce P-0365 and P-2671's statement into evidence, the Defence should be given the opportunity to examine all three of these witnesses, in accordance with Mr Yekatom's right to examine witnesses brought against him under article 67(1)(e) of the Statute, and the principle of orality enshrined in article 69 (2). The Defence should also be able to confront them with the incoherencies within their evidence, as well as with other evidence that contradicts their own.
20. It is the Prosecution's position that P-2620, P-0365 and P-2671 are all corroborative of each other in establishing P-2620's date of birth.²⁰ However, for evidence to be corroborative "it must itself be credible, and it must come from a source independent of any evidence which is to be supported by it."²¹
21. Within the Complete Victim Application, P-2620 provided two dates of birth, namely [REDACTED]²² and [REDACTED].²³ These two dates differ from the date she provided in her first and second statement, i.e. respectively [REDACTED],²⁴ which she corrected to [REDACTED].²⁵

²⁰ [ICC-01/14-01/18-802-Conf-Corr](#), paras. 15 and 19.

²¹ *Le Procureur c. Laurent Gbagbo et Charles Blé Goudé*, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion, Reasons of Judge Henderson, 6 July 2019, [ICC-02/11-01/15-1263-AnxB-Red](#), para. 46.

²² CAR-OTP-2135-2412, at 2412.

²³ CAR-OTP-2135-2412, at 2419.

²⁴ CAR-OTP-2123-0057, para. 11.

²⁵ CAR-OTP-2121-2567, para. 11.

22. Within her first statement,²⁶ P-2620 states [REDACTED].²⁷ [REDACTED],²⁸ [REDACTED].²⁹
23. Notably, P-2620 told Prosecution investigators in her first statement that she did not herself know her date of birth and that she needed to ask her family members.³⁰
24. Firstly, considering the multitude of versions of P-2620 regarding her date of birth, it is inadequate for the Prosecution to claim corroboration through these P-2671 and P-0365's statement if introduced under Rule 68(2)(b)(i).
25. Secondly, it is to be noted that none of the dates provided *verbatim* by P-2620 are corroborated by the comments of P-2671 and P-0365 of P-2620's birth certificate. Both P-0365 and P-2671 state that the date of birth that should be read on P-2620's birth certificate is [REDACTED]. However, P-2620 herself did not adopt [REDACTED] as her date of birth, but [REDACTED], when she observed and provided her birth certificate.³¹
26. Further, regarding P-2671's account, [REDACTED],³² [REDACTED].³³ [REDACTED].
27. Thirdly, the Prosecution obtained the birth certificate from P-2620³⁴ [REDACTED].³⁵ This entails that Prosecution is, in any event, barred from arguing that [REDACTED]. Again, P-2620 did not adopt [REDACTED] as her date of birth. Further, the birth certificate is not an independent document [REDACTED].

²⁶ CAR-OTP-2123-0057, para. 66.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ CAR-OTP-2123-0057, para. 75.

³¹ CAR-OTP-2121-2567, para. 11.

³² [REDACTED].

³³ [REDACTED].

³⁴ CAR-OTP-2121-2567, para. 11; See also metadata of CAR-OTP-2121-2577.

³⁵ CAR-OTP-2121-2567, para. 11.

28. Fourthly, P-0365's evidence falls short of being corroborative of P-2620's date of birth. P-0365 simply claims that the document *appears* to be original although he *believes* that there is a typographical error, and that the year should read [REDACTED] instead of [REDACTED],³⁶ therefore and like P-2671, he contradicts all the dates given *verbatim* by P-2620.
29. Fifthly, there are contradictions in the overall evidence presented by the Prosecution, affecting the authenticity of P-2620's birth certificate.
30. Indeed, P-0365 is unable to attest as to the authenticity of the document. To the contrary, he provides two (apparently irreconcilable) pieces of information which show that he is not in a position to confirm that the birth certificate is original. First, [REDACTED], and second [REDACTED].³⁷ In these two scenarios, at best the authenticity of the birth certificate is not attested; and at worst, it can be inferred that the birth certificate is not authentic.
31. Moreover, according to P-2671, [REDACTED].³⁸ [REDACTED],³⁹ [REDACTED].
32. Notably, P-2671 [REDACTED].⁴⁰
33. Finally, [REDACTED]. Indeed, it is to be recalled the alleged identity of P-2620 herself, including her name, is contested. [REDACTED]. Indeed, P-2671 should be examined regarding *inter alia* [REDACTED]. Likewise, P-0365 should be examined [REDACTED].
34. The Defense is puzzled that the Prosecution in light of all these discrepancies finds it suitable to tender this evidence under Rule 68(2)(b)(i) while it should be seeking clarification on this core issue consisting of an element of a charged

³⁶ CAR-OTP-2122-9042, para. 24.

³⁷ CAR-OTP-2122-9042, para. 26.

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

crime.

C. The evidence does not present sufficient indicia of reliability.

35. According to Court's jurisprudence, consideration as to the substance of the evidence for the purpose of the reliability factor should be limited to "establishing whether or not problems as to the credibility of the information provided by a witness in his or her prior recorded testimony are so manifest and of such nature that the questioning of the witness at trial would be more appropriate than the introduction of the prior recorded testimony under Rule 68(2)(b) of the Rules."⁴¹
36. The evidence disclosed since the Defence Response was filed, [REDACTED], are putting into question [REDACTED] of P-2671's account making it paramount for the Defence to be able to test her testimony through an examination.
37. [REDACTED].
38. As mentioned above, [REDACTED], P-2671 mentions two different points in time at which P-2620 would have been born, [REDACTED]. [REDACTED];⁴² [REDACTED].
39. Moreover, as suggested during P-2475's testimony, it is the Defence's position that P-2620's real name is not [REDACTED], nor [REDACTED],⁴³ but [REDACTED], as shown on the various Facebook pages she created.⁴⁴ The Defence would like to underline that P-2671 was friends on Facebook with P-

⁴¹ *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, 1 December 2016, [ICC-02/04-01/15-596-Red](#), para. 19.

⁴² CAR-OTP-2125-0348, para. 13.

⁴³ CAR-OTP-2135-2412, at 2412.

⁴⁴ See CAR-D29-0016-0059 compared with CAR-D29-0016-0033; CAR-D29-0016-0064.

2620 (“[REDACTED]”) since at least [REDACTED]⁴⁵ and that [REDACTED].⁴⁶ [REDACTED].

40. These two elements give rise to problems as to the credibility of P-2671’s evidence on P-2620’s age and identity, such that questioning the witness at trial is “more appropriate than its introduction of the prior recorded testimony under Rule 68(2)(b) of the Rules”.⁴⁷
41. In addition, it is the Defence’s position that [REDACTED].⁴⁸ [REDACTED],⁴⁹ [REDACTED].⁵⁰ [REDACTED].⁵¹ While these are not contradictions with regard to the date of birth of P-2620, [REDACTED]. These incoherencies further show that P-2671’s evidence contains manifest problems of credibility.
42. Further, in her Complete Victim Application, P-2620 indicates that her mother’s name is [REDACTED].⁵² This is in contradiction with her own statement where she identified her mother as [REDACTED].⁵³ [REDACTED].⁵⁴ This consists of another contradiction in P-2620’s personal information, [REDACTED].
43. Finally, according to the Prosecution’s evidence, P-2671 sent [REDACTED] a text message on [REDACTED]⁵⁵ and [REDACTED] registered 101 calls and one text message with [REDACTED] from [REDACTED] to [REDACTED].⁵⁶ P-2620 registered three calls with [REDACTED] in [REDACTED].⁵⁷ As the Chamber is aware, there are strong indications that [REDACTED] has been improperly

⁴⁵ See, CAR-D29-0016-0012 and CAR-D29-0016-0035; see also, ICC-01/14-01/18-T-133-CONF-FRA ET, p. 49 lines 11-16.

⁴⁶ CAR-D29-0016-0053.

⁴⁷ *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, 1 December 2016, [ICC-02/04-01/15-596-Red](#), para. 19.

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² CAR-OTP-2135-2412 at p. 2416.

⁵³ See CAR-OTP-2121-2567 and CAR-OTP-2123-0057.

⁵⁴ [REDACTED].

⁵⁵ See CAR-OTP-2135-4034; for attribution see CAR-OTP-00000012.

⁵⁶ See CAR-OTP-2135-4034; for attribution see CAR-OTP-00000012.

⁵⁷ See CAR-OTP-2135-4034; for attribution see CAR-OTP-00000012.

attempting to reach out to alleged former child soldiers in this case,⁵⁸ and provided falsified documents, including a false birth certificate for P-2475, to Prosecution investigators.⁵⁹ The nature of these communications need to be elucidated, and the Defence, in light of the evidence in these proceedings, should be able to question P-2671 on [REDACTED], among other things.

44. In light of the nature of the contested information, and the manifest problems found within P-2671's evidence, the reliability of P-2671's evidence is affected in a way such that the Defence should be able to examine P-2671 [REDACTED].

D. The interests of justice militate against the introduction of P-2671 and P-0365's prior recorded testimonies.

45. In light of the lack of corroboration between the evidence, the lack of credibility of both P-2671's and P-2620's accounts, and intrinsic limitation of P-0365's statement, allowing the introduction of P-2671's and P-0365's statements as prior recorded testimony under Rule 68 (2)(b)(i) of the Rules would gravely prejudice the right of Mr. Yekatom to test the evidence brought against him, and would generally affect the fairness of these proceedings.

CONCLUSION

46. P-2671 and P-0365 evidence on P-2620's age at the time of the event directly relate to a core issue in this case. There are internal and external contradictions regarding the date of birth of P-2620 where the evidence of both P-2671 and P-0365 are not corroborative of P-2620's account. Further, the absence of information within P-2671's evidence on [REDACTED] and [REDACTED], all indicate that P-2671 and P-0365's statement should not be introduced as prior recorded testimony under Rule 68(2)(b)(i).

⁵⁸ CAR-OTP-2135-4034, line 9409; for attribution see CAR-OTP-00000012.

⁵⁹ P-2475: ICC-01/14-01/18-T-133-CONF-FRA ET p. 69, line 5 to p. 72, line 12.

CONFIDENTIALITY

47. Pursuant to Regulation 23 bis (1) and (2) of the Regulations of the Court, this response is filed ex parte available only to the Defence of Mr Yekatom as it refers to significant and substantive parts of the Defence's strategy. A confidential redacted version and public redacted version will be filed forthwith.

RELIEF SOUGHT

48. In light of the above observations, the Defence respectfully requests the Trial Chamber to:

REJECT the Prosecution's formal submission of the Prior Statements of witnesses P-0365 and P-2671, together with their associated exhibits as set out at Annex A of the Sixth Request.

RESPECTFULLY SUBMITTED ON THIS 14TH DAY OF APRIL 2023



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