

**Cour
Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER V

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA***

Public

**Public Redacted Version of the “Response of the Common Legal Representative of the Former Child Soldiers to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2620 pursuant to Rule 68(3)”,
No. ICC-01/14-01/18-1382-Conf, dated 29 April 2022**

Source: Office of Public Counsel for Victims (CLR1)

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the “Legal Representative”) hereby files his response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2620 pursuant to Rule 68(3)” (the “Request”).¹

2. The Legal Representative supports the Request insofar as it pertains to the formal submission of the prior recorded testimony of P-2620 (or the “Witness”) and associated exhibits in accordance with rule 68(3) of the Rules of Procedure and Evidence (the “Rules”). In particular, the Legal Representative submits that the prior recorded testimony and related documents in question: (i) are corroborative of other evidence; (ii) their introduction will not be prejudicial to the rights of both Accused; and (iii) this course of action will also promote the rights of the Victims to expeditious proceedings. The Legal Representative further supports the Request insofar as the Prosecution seeks leave to conduct a limited examination-in-chief of the Witness, and submits that this course of conduct will facilitate the expeditiousness of the proceedings and is in the best interests of the Witness given the nature of her victimisation.

II. PROCEDURAL BACKGROUND

3. On 26 August 2020, the Presiding Judge of Trial Chamber V (the “Chamber”) issued the “Initial Directions on the Conduct of the Proceedings” (the “Initial Directions”).²

¹ See the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2620 pursuant to Rule 68(3)”, [No. ICC-01/14-01/18-1361-Red](#), 14 April 2022 (the “Request”), with Confidential Annex A, [No. ICC-01/14-01/18-1361-Conf-AnxA](#) and Confidential Annex B, [No. ICC-01/14-01/18-1361-Conf-AnxB](#).

² See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber V, Presiding Judge), [No. ICC-01/14-01/18-631](#), 26 August 2020 (the “Initial Directions”).

4. On 16 October 2020, the Chamber issued the “Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules” (the “Guidance on Rule 68 Decision”).³

5. On 13 April 2022, the Prosecution filed its Request.⁴

III. CLASSIFICATION

6. Pursuant to regulation 23bis (1) and (2) of the Regulations of the Court, the present submissions are classified as confidential following the classification chosen by the Prosecution and because they refer to the content of documents likewise classified as confidential. A public redacted version will be filed in due course.

IV. SUBMISSIONS

7. The Legal Representative recalls that, in the Initial Directions, the Presiding Judge held that the Chamber will rule on applications under rule 68 of the Rules as follows:

“[...] Submission Approach [...] Article 69(4) of the Statute, as confirmed by the Appeals Chamber, gives the Chamber discretion on whether to rule on the admissibility of each piece of evidence upon its submission. [...] In accordance with the established practice of other chambers, this Chamber will adopt the so-called ‘Submission Approach’. Consequently, it will not rule on the admissibility of each item of evidence during the course of the proceedings. Rather, the Chamber will assess the standard evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgment pursuant to Article 74(2) of the Statute. [Nonetheless] the Court’s legal framework contains a number of exclusionary rules, including procedural bars, obstacles and preconditions, which require the Chamber to rule on the admissibility of evidence prior to its assessment of evidence for the purposes of Article 74 of the Statute. Chambers thus have

³ See the “Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules (Trial Chamber V)”, [No. ICC-01/14-01/18-685](#), 16 October 2020 (the “Guidance on Rule 68 Decision”). See also the “Prosecution’s Request pursuant to Regulation 35 to vary the Time Limit for the Submission of Applications pursuant to Rule 68”, [No. ICC-01/14-01/18-652](#), 14 September 2020.

⁴ See the Request, *supra* note 1.

*to rule on applications under Rule 68 of the Rules prior to the assessment of evidence for the purposes of Article 74 of the Statute”.*⁵

8. Moreover, the Chamber held in the Guidance on Rule 68 Decision that:

*“[...] Rule 68 of the Rules permits the “introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met”. [While] the principle of orality enshrined in Article 69(2) of the Statute [...] provides that the “testimony of a witness shall be given in person” [...] Rule 68 of the Rules represents one of the statutory exceptions to the rule of orality and publicity. This means that this way of introducing prior recorded testimony is per se generally considered compatible with the rights of the accused. [...] Moreover, Rule 68 of the Rules is widely acknowledged as a useful tool to expedite and streamline the proceedings and its use therefore encouraged. [...] Nonetheless, it must be noted that Rule 68 of the Rules itself requires that its application is not “prejudicial to or inconsistent with the rights of the accused. [Moreover, Rule 68(3) of the Rules] allows the introduction of previously recorded testimony when a witness is present before the chamber, provided that the witness ‘does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings’. No further restrictions are imposed with regard to the instances under which Rule 68(3) of the Rules may be used”.*⁶

9. Furthermore, according to the jurisprudence of the Court, several factors may be relevant for the Chamber’s determination to allow the introduction of such type of testimony, including whether the evidence: (i) relates to issues that are not materially in dispute; (ii) is not central to core issues in the case, but only provides relevant background information; and (iii) is corroborative of other evidence.⁷ Yet, these are *only factors but not requirements* under rule 68(3) of the Rules and prior recorded

⁵ See the Initial Directions, *supra* note 2, paras. 34 and 52-56.

⁶ See the Guidance on Rule 68 Decision, *supra* note 3, paras. 20-26. See also, the “Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses” (Trial Chamber I), [No. ICC-01/04-01/06-1603](#), 15 January 2009, paras. 22 and 24.

⁷ See the “Decision on Prosecution’s Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, [No. ICC-02/04-01/15-621](#), 5 December 2016 (the “Ongwen Rule 68(3) Decision”), para. 7.

testimonies may still be introduced even if they relate to issues that are materially in dispute and central to core issues of the case or are uncorroborated.⁸

10. Additionally, in order to make its determination under rule 68(3) of the Rules, a chamber must analyse the importance of each witness statement in light of the charges and the evidence already presented or intended to be presented before it.⁹ Moreover, expeditiousness is another factor relevant to the implementation of rule 68(3) of the Rules since its use in principle aims at reducing the amount of time devoted to hearing oral testimony in court.¹⁰ In this regard, the Legal Representative notes that the Prosecution has submitted that in the absence of the formal submission of the prior recorded testimony and associated exhibits, the estimation for this Witness's testimony on direct examination would require approximately six hours.¹¹ This would be three times as long as the currently estimated direct examination of two hours should the Request be granted, and would save the Court a significant amount of time.¹² Furthermore, the crime-based witness P-2620 is a former child soldier who falls under the category of a vulnerable victim.¹³ Upon recruitment, she was [REDACTED] which had the impact of increasing her vulnerability. Accordingly, a limited examination-in-chief of the Witness will facilitate the expeditiousness of the proceedings and is in the best interests of the Witness given the nature of her victimisation.

11. The Legal Representative submits that given the content of the prior recorded testimony in question, it appears unnecessary for the evidence provided by P-2620 to be presented orally in its entirety. This is because the prior recorded testimony and associated exhibits of the Witness are evidentiary material falling within the meaning

⁸ See the "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)'" (Appeals Chamber), [No. ICC-02/11-01/15-744 OA8](#), 1 November 2016, paras. 67 and 69.

⁹ *Idem*, para. 71.

¹⁰ *Idem*, para. 61.

¹¹ See the Request, *supra* note 1, para. 18.

¹² *Idem*, para. 16 and 18.

¹³ See e.g. the "Sentencing Judgment" (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019, paras. 193 and 195.

of “*prior recorded testimony*” in the context of rule 68 of the Rules since: (a) it is a written statement taken pursuant to rules 111 and 112 of the Rules and; (b) the Witness understood – when giving her statement – that she was providing information which may be relied upon in the context of legal proceedings or was questioned in the capacity as a witness.¹⁴ Associated exhibits to these statements are an integral part of the prior recorded testimony itself under the established practice of the Court.¹⁵

12. More importantly, said statement and associate exhibits provide evidence regarding the organisation and structuring of the Anti-Balaka in [REDACTED] under YEKATOM’s leadership, and the conscription and use of children under 15 to participate actively in hostilities within the Anti-Balaka. The Witness also provides evidence of the contextual elements of war crimes and crimes against humanity, specifically regarding the Anti-Balaka being an organised armed group with the intention to target Muslim civilians pursuant to a criminal organisational policy between September 2013 and December 2014.¹⁶ She describes being threatened and conscripted as a child soldier into the Anti-Balaka [REDACTED].¹⁷ The Witness also details that during her time at this base, [REDACTED].¹⁸ She describes how [REDACTED] trained her to use a Kalashnikov, that she was provided with drugs, encouraged to kill, and how [REDACTED] forced her to witness a murder

¹⁴ See the “Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules” (Trial Chamber IX), [No. ICC-02/04-01/15-596-Red](#), 18 November 2016, para. 9; the “Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony” (Trial Chamber V(a)), [No. ICC-01/09-01/11-1938-Corr-Red2](#), 28 August 2015, paras. 32-33; the “Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests”, (Trial Chamber VII), [No. ICC-01/05-01/13-1478-Red-Corr](#), 12 November 2015, para. 29; the “Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103” (Trial Chamber VI), [No. ICC-01/04-02/06-1029](#), 20 November 2015, paras. 23 and 35; the “Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, (Trial Chamber VI), [No. ICC-01/04-02/06-1205](#), 11 March 2016, paras. 7 and 15; and the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)” (Trial Chamber I), [No. ICC-02/11-01/15-573-Red](#), 9 June 2016, para. 5.

¹⁵ See the “Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules”, *supra* note 14, para. 10.

¹⁶ See the Request, *supra* note 1, para. 9.

¹⁷ *Idem*, para. 11.

¹⁸ *Ibid.*

[REDACTED].¹⁹ Consequently, the prior recorded statement in question appears to be *prima facie* relevant to and probative of material issues at trial. While some parts of this statement, in particular, concerning the acts or omissions of the Accused may relate to issues that are in dispute, this does not bar its introduction into evidence given their nature and content.²⁰ The Legal Representative recalls that the Chamber has stated that “*references to the accused’s acts and conduct do not per se constitute an obstacle to the introduction of a prior recorded testimony pursuant to [Rule 68(3) of the Rules]*”²¹ and therefore, any evidence of the Witness on YEKATOM’s *mens rea*, his alleged essential contributions to the counts against him, and on the contextual elements are not an obstacle to granting the Request.

13. Moreover, the evidence contained in the prior recorded testimony of P-2620 is of a cumulative or corroborative nature.²² In other words, it is – in light of its relative importance in the body of evidence expected to be presented at trial – of such nature that it is unnecessary for the evidence provided by the Witness to be presented orally in its entirety.

14. Additionally, the Legal Representative posits that the introduction of the prior recorded testimony and associated exhibits of P-2620 will, *inter alia*, enhance the efficiency of the proceedings, avoid unnecessary repetition of oral testimony and ultimately save the Court’s time and resources.²³ The unnecessary repetition of oral testimony is important in light of the need to avoid re-traumatisation, given the nature

¹⁹ *Ibid.*

²⁰ See, for example, the “Twelfth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1704, P-1528, and P-0314” (Trial Chamber V), [No. ICC-01/14-01/18-1364-Red](#), 14 April 2022 (the “Twelfth Rule 68(3) Decision”), para. 14; [REDACTED]; the “Tenth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1595, P-2658 and P-2453” (Trial Chamber V), [No. ICC-01/14-01/18-1282-Red](#), 15 February 2022 (the “Tenth Rule 68(3) Decision”), paras. 12-13.

²¹ *Ibid.*

²² See the Request, *supra* note 1, para. 12.

²³ See the *Ongwen* Rule 68(3) Decision, *supra* note 7, para. 31. See also, for example, the Twelfth Rule 68(3) Decision, *supra* note 20, paras. 18-19 and 28-29; [REDACTED]; the Tenth Rule 68(3) Decision, *supra* note 20, paras. 15-16, 23-24, and 28-29.

of the events the Witness will testify about. More importantly, the time saved by proceeding under rule 68(3) of the Rules furthers both of the Accused's right to an expeditious trial without undue delay.²⁴

15. It follows that the introduction of the prior recorded testimony and associated exhibits of P-2620 are not prejudicial to the fairness of the proceedings and, more specifically, to the rights of both Accused since the Defence will have an ample opportunity to examine the Witness. Indeed, under rule 68(3) of the Rules, the calling party is expected to streamline its questioning considerably in light of the fact that this provision allows for the formal submission of the Witness's previously recorded testimony and thus the Prosecution is expected to only conduct a limited and focused examination.²⁵ This permits the Defence to test the entirety of the evidence, both in relation to the testimony given in court and the prior recorded testimony.²⁶ Consequently, while the Prosecution is granted the opportunity to conduct a limited examination of the Witness, the Defence is not constrained to the amount of time used by the Prosecution.²⁷

16. Regarding the Prosecution's failure to extract, download and process for disclosure the dual status victim application of P-2620, the Legal Representative concurs with the Prosecution that although the timing is regrettable, the prejudice resulting from this inadvertence is curable.²⁸ P-2620 is currently listed at number 72 in the Prosecution's expected calling order of witnesses,²⁹ thus the Defence still has ample

²⁴ See the *Ongwen* Rule 68(3) Decision, *supra* note 7, para. 10. See also, for example, the Twelfth Rule 68(3) Decision, *supra* note 20, paras. 18-19 and 28-29; the Eleventh Rule 68(3) Decision, *supra* note 20, paras. 18-19, 29-30, and 35-36; the Tenth Rule 68(3) Decision, *supra* note 20, paras. 15-16, 23-24, and 28-29.

²⁵ See the Guidance on Rule 68 Decision, *supra* note 3, para. 36.

²⁶ *Idem*, para. 30. See also, for example, the Twelfth Rule 68(3) Decision, *supra* note 20, paras. 14-16; the Eleventh Rule 68(3) Decision, *supra* note 20, paras. 16-17; the Tenth Rule 68(3) Decision, *supra* note 20, paras. 12-13.

²⁷ See the *Ongwen* Rule 68(3) Decision, *supra* note 7, para. 32.

²⁸ See the "Prosecution's Response to Yekatom Defence's Motion for Finding of Disclosure Violation (ICC-01/14-01/18-1318-Conf)", [No. ICC-01/14-01/18-1344](#), 1 April 2022 (the "Prosecution's Response to Disclosure Violation"), paras. 4 and 8.

²⁹ See the Email correspondence from the Prosecution to the Chamber, parties and participants on 1 April 2022 at 19:26.

time to investigate the information recently disclosed regarding P-2620.³⁰ Hence, the introduction of the prior recorded testimony and associated exhibits of P-2620 is not prejudicial to the rights of the Accused.

17. In addition, the Legal Representative submits that this course of conduct will also promote the rights of Victims to fair and expeditious proceedings. Indeed, as already underlined in previous submissions,³¹ Victims have been awaiting justice for many years, and are concerned with the prospect of a lengthy trial. Thus, any procedural steps that would unnecessarily prolong the total duration of the trial will further frustrate the legitimate expectations of Victims to promptly receive justice.

18. Finally, while rule 68(3) of the Rules only refers to the possibility for the parties and the Chamber to question the witness concerned, the Legal Representative recalls that he may also be authorised to question the Witness, in particular on the harms the Witness personally suffered, or the harms of other victims observed by the Witness.³²

V. CONCLUSION

19. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to grant the Request in its entirety.

³⁰ See the Prosecution's Response to Disclosure Violation, *supra* note 28, para. 8.

³¹ See [REDACTED]; and the "Common Legal Representatives' Joint Response to the "Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-1962 pursuant to Rule 68(3)", [No. ICC-01/14-01/18-779-Red](#), 17 December 2020, para. 17.

³² See the Initial Directions, *supra* note 2, para. 19.

RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to read 'Dmytro Suprun', with a long vertical stroke extending downwards from the bottom of the signature.

Dmytro Suprun
Common Legal Representative of the Former Child Soldiers

Dated this 4th day of May 2023

At The Hague, The Netherlands