



Original: **English**

No.: **ICC-01/14-01/18**

Date: **17 July 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

with Confidential Annexes A and B

**Public redacted version of “Prosecution’s Request for Submission of the Prior
Recorded Testimony of P-1558 pursuant to Rule 68(2)(c)”,
ICC-01/14-01/18-1663-Conf, 14 November 2022**

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

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

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Following recent confirmation of the death of P-1558, the Office of the Prosecutor (“Prosecution”) requests the formal submission of his prior recorded testimony pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the Conduct of the Proceedings” (“Directions”).¹ As listed in Annex A, P-1558’s prior recorded testimony (“Prior Statement”) comprises the witness’s 30 March 2019 statement² to the Prosecution and two associated exhibits: (i) an [REDACTED] video entitled “[REDACTED]”,³ [REDACTED], upon which the witness commented during the course of his interview; and (ii) a documentary titled “Special Investigation”,⁴ shown to P-1558 during his interview, in which P-1558 identified “ROMBHOT” and other Anti-Balaka elements. Annex A also identifies the relevant paragraphs of the Confirmation Decision to which P-1558’s evidence relates. A copy of P-1558’s recently obtained death certificate is attached as Annex B.

2. The Prior Statement is admissible under rule 68(2)(c) because P-1558 has died, and: (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.⁵ The relevance and probative value of the Prior Statement and two associated exhibits are set out in more detail below, along with other sources of corroborative evidence.

¹ ICC-01/14-01/18-631, para. 33.

² CAR-OTP-2105-0195.

³ CAR-OTP-2094-7618. The transcripts is available at CAR-OTP-2118-4284, and the translations at CAR-OTP-2118-4260/CAR-OTP-2118-4272.

⁴ CAR-OTP-2012-0523. The transcript is available at CAR-OTP-2118-5507, and the translation at CAR-OTP-2118-5547.

⁵ ICC-01/14-01/21-506-Conf, para. 9.

II. CONFIDENTIALITY

3. 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

4. The Initial Directions on the Conduct of Proceedings permits the Parties to file rule 68(2)(c) applications beyond the deadline set for the Final Witness List (i.e., 9 November 2020), “should a witness become unavailable”.⁶

5. Rule 68(2)(c) empowers the Chamber to 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 has sufficient indicia of reliability;⁷ (iii) the evidence is relevant and probative; and (iv) submission is not prejudicial to or inconsistent with the rights of the accused.⁸ As detailed below, P-1558’s Prior Statement meets all of these criteria.

6. 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 However, there is no *per se* bar to the introduction of a prior recorded testimony that goes to the acts and conduct of an Accused. In such instances, a Chamber may take into consideration *inter alia*: (i) whether the evidence relates to issues that are not

⁶ ICC-01/14-01/18-631, para. 33.

⁷ ICC-01/04-02/06-1029, para. 12 ; ICC-01/14-01/21-506-Conf, para. 15.

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.

materially in dispute; (ii) whether the evidence is central to the allegations of the case; and (iii) whether the evidence is purportedly corroborative.¹⁰

7. [REDACTED] (P-1558) was a Central African [REDACTED], from [REDACTED], who made a [REDACTED]. He was called to testify about: (i) the contextual elements for war crimes and crimes against humanity; (ii) the targeting of the Muslim population, and their forced displacement to MBAIKI as a result of the Anti-Balaka's actions; (iii) YEKATOM's command over his elements; (iv) the organisation of the Anti-Balaka, including YEKATOM's role therein; and (v) YEKATOM's Group's activities within his areas of control, including along the PK9-MBAIKI axis, and more specifically in SEKIA and PISSA.

8. Although P-1558's Prior Statement goes to YEKATOM's acts and conduct along the PK9-MBAIKI axis, his evidence is cumulative and largely corroborated by several other Prosecution witnesses including P-2475, P-0954, P-2419, P-2388, P-2353, P-2354, P-2084, P-1838, P-1813, P-0954, P-1647, P-1823, P-1839, P-2582, P-2196, P-2041, P-2354, P-2475 and P-2084. Furthermore, the [REDACTED], shows life images of YEKATOM and his entourage.

a. P-1558 is unable to testify

9. The Prosecution interviewed P-1558 on 30 March 2019. On 28 September 2022, the Prosecution was informed by YEKATOM's Defence that P-1558 had passed away. On 29 September 2022, Prosecution investigators called P-2960, [REDACTED] P-1558, who confirmed P-1558's death. P-1558's funeral was being arranged by P-2960 [REDACTED], where P-1558 was working prior to his passing. The Prosecution has recently obtained a copy of P-1558's death certificate,¹¹ attached as Annex B.

¹⁰ ICC-01/05-01/13-1481, paras. 21-22.

¹¹ CAR-OTP-00000577-000001.

b. Article 56 measures could not be anticipated

10. P-1558 was interviewed on 30 March 2019. At that time, the witness was approximately [REDACTED] and did not report any serious health issues. The Prosecution remained in contact with P-1558 after his interview, both through phone contacts and in person.

11. In May 2022, P-1558 informed the Prosecution that he was diagnosed with a [REDACTED] but that he was waiting for the results of further examinations in order to start the necessary treatment. On 12 September 2022, P-1558 informed the Prosecution that he was undergoing [REDACTED]. At that moment, the Prosecution submitted a referral to VWS to accommodate his needs in order for him to testify. On 16 September 2022, and after having discussed P-1558's Court appearance with him, during which he informed the Office that he believed he was fit enough to testify, the Prosecution liaised with the Chamber and the Defence regarding the modalities of his testimony, which was scheduled for November 2022.¹²

12. Unfortunately, P-1558 had medical complications, and passed away on 26 September 2022. Under these circumstances, the Prosecution had no information within its possession that would prompt consideration of evidence preserving measures under article 56.

c. The tendered evidence is reliable

13. P-1558's Prior Statement is *prima facie* reliable. It is truthful, authentic, and consistent. The Prosecution obtained P-1558's Prior Statement in the ordinary course of its investigation in March 2019.¹³ In accordance with rule 111, the witness's factual account was provided voluntarily and signed by him, as well as the investigators

¹² E-mail to the Chamber, Parties and Participants of 16 September 2022 at 15:10.

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

conducting the interview.¹⁴ The Prior Statement was read by the witness before signature in a language he fully understood.¹⁵ 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.¹⁶ Further, the Prior Statement is internally consistent, and sufficiently corroborated by other evidence in the case.¹⁷

14. As noted, 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.¹⁸ Further, P-1558 gave reasonable and logical explanations in his narrative of events without any apparent embellishments or speculation, stating for example, "[REDACTED]."¹⁹, or "[REDACTED]."²⁰

15. In sum, the Prior Statement is reliable in that it (i) is signed; (ii) was given in a language the witness fully understands; (iii) contains an acknowledgement that it is accurate; (iv) is internally consistent; and (v) is predicated on information within the witness's actual knowledge, in that the witness readily admitted when he did not know certain information.²¹

d. P-1558's prior recorded testimony is relevant and probative

16. P-1558's Prior Statement is relevant and probative. It primarily goes to 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 humanity and war crimes, and to YEKATOM's

¹⁴ ICC-01/05-01/13-1481-Red-Corr, para. 20; *see also* ICC-01/14-01/21-506-Conf, para. 11; ICC-02/04-01/15-596-Red, para. 9; ICC; ICC-01/09-01/11-1938-Corr-Red2, para. 32; ICC-01/05-01/13-1478-Red-Corr, paras. 29-31.

¹⁵ CAR-OTP-2105-0195, at 0196, para. 4, and at 0211.

¹⁶ CAR-OTP-2105-0195, at 0211, paras. 129-130.

¹⁷ *See* para. 8 *infra*.

¹⁸ CAR-OTP-2105-0195, at 0200, para. 26, and at 0203, para. 40.

¹⁹ CAR-OTP-2105-0195, at 0202 para. 36.

²⁰ CAR-OTP-2105-0195, at 0202, para. 39.

²¹ ICC-01/04-02/06-1205, at 0197-0198, para. 16.

role in the group. Specifically, the evidence concerns the targeting of the Muslim population, and their forced displacement to MBAIKI as a result of the Anti-Balaka's actions; YEKATOM's command over his elements; the organisation of the Anti-Balaka, including YEKATOM's role therein; and YEKATOM's Group's activities within his areas of control, including along the PK9-MBAIKI axis, and more specifically, in SEKIA and PISSA.

17. P-1558's Prior Statement comprises 17 pages, as well as two associated exhibits. There are no agreements as to the facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the Prior Statement.

18. The witness's Prior Statement describes the following:

- His discussion in January 2014 (a few days after the takeover of PK9), with [REDACTED], during which [REDACTED]. As a result, [REDACTED] at different locations, and had several conversations with him;
- How he went from [REDACTED]. P-1558 states that YEKATOM's forces controlled the area and explains that PISSA was a city with many Muslims before YEKATOM established control over the area;
- How he would [REDACTED] every operation carried out by YEKATOM. P-1558 clarifies that YEKATOM would constantly perform operations in MBAIKI, [REDACTED];
- How the group was organised: P-1558 states that the Anti-Balaka in the area were led by YEKATOM; that YEKATOM's deputy was called COEUR DE LION, who had his own *aide de camp*; that YEKATOM's elements followed his orders; and that YEKATOM is one of the leaders in the Anti-Balaka movement, who communicated with the Zone Commanders usually by phone or in person; P-1558 also explains

that KAMEZOLAI was one of YEKATOM's military consultants, and that YEKATOM would go to KAMEZOLAI for military advice;

- Who controlled the area: P-1558 mentions that in 2014, the PK9-MBAIKI axis was controlled by YEKATOM and his elements. The Anti-Balaka established check-points on the road to MBAIKI, and would demand a toll from people passing by;
- The faith of the Muslim population: P-1558 explains that the Muslims went to MBAIKI as their lives were threatened, and that they did not dare to go on the road nor pass the toll, as they would be killed either by the Anti-Balaka, or by the population if they tried to pass;
- P-1558 confirms he [REDACTED], which was shown to him by the investigators, and he identifies Anti-Balaka elements and locations in the video. He also identifies YEKATOM and other Anti-Balaka elements in the documentary "Special Investigation", shown to P-1558 during his interview.

19. The Prosecution tenders two associated exhibits for formal submission, listed in Annex A. These associated exhibits are indispensable to the comprehension of the Prior Statement, and if excluded, would diminish its probative value.²²

e. Balance of interests

20. 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.²³ On the contrary, although rule 68 is an exception to the principle of orality²⁴ and publicity,²⁵ its application "is *per se* generally considered *compatible* with the rights of the

²² ICC-01/14-01/21-506-Conf, para. 12; *see also* ICC-01/04-02/06-1205, para. 7; ICC-02/11-01/15-573-Red, para. 9.

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

²⁴ ICC-01/05-01/08-1386, para. 78.

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

accused”²⁶ and indeed all statutory rights because it is express in the Court’s procedural framework. Additionally, the Chamber’s appropriate exercise of discretion in determining the evaluative criteria as defined in the Rules, among others, serves as a sufficient procedural safeguard against potential prejudice. Similarly, the fact that the Parties can avail themselves of the provision further underscores its inherent neutrality.²⁷ Thus, any claim of prejudice should only be entertained in light of the particular circumstances of the specific witness, their evidence, and the case — not presumptively, nor in the abstract.

21. P-1558’s evidence is manifestly relevant to the proper adjudication of salient issues in this case, and its formal submission does not cause any unfair prejudice to the Accused either in respect of the nature of rule 68(2) itself, or as applied in these circumstances.²⁸ Although P-1558’s evidence also goes to YEKATOM’s acts and conduct along the PK9-MBAIKI axis, his evidence is cumulative and largely corroborated by several other Prosecution witnesses including P-2475, P-0954, P-2419, P-2388, P-2353, P-2354, P-2084, P-1838, P-1813, P-0954, P-1647, P-1823, P-1839, P-2582, P-2196, P-2041, P-2354, and P-2084. Two of them have testified,²⁹ and the Prosecution expects that all the other witnesses will be made available for cross-examination. Furthermore, as mentioned, the [REDACTED] YEKATOM, and shows life images of YEKATOM and his entourage.

22. Here, the Defence retains the right to lead evidence during its direct case, and to avail itself of examining other and related witnesses on the basis of, and concerning, the information contained in P-1558’s Prior Statement. Any potential prejudice to the Accused resulting from a prospective conviction on any of the charges that may rely to a ‘decisive extent’ on P-1558’s Prior Statement should be evaluated by the Chamber

²⁶ ICC-01/14-01/18-685, para. 26.

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

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

²⁹ Namely P-2475, and P-2353.

at the end of the trial, during its assessment of the *weight* to be accorded to his Prior Statement, as foreseen by the Chamber's adoption of the submission regime.³⁰ In that assessment, the Prior Statement should be accorded weight, bearing in mind its probative value and indicia of reliability, as well as the fact that it is corroborative of other documentary evidence and testimony.

23. P-1558's Prior Statement should thus be recognised as formally submitted and the Chamber shall consider to what extent a conviction on any of the charges supported by P-1558's evidence is appropriate on the basis of *all* relevant evidence at the end of the trial.

IV. CONCLUSION

24. For the foregoing reasons, the Prosecution requests the Chamber recognise as formally submitted the Prior Statement of P-1558 including its two associated exhibits, listed in Annex A, pursuant to rule 68(2)(c).



Karim A. A. Khan KC, Prosecutor

Dated this 17th July 2023
At The Hague, The Netherlands

³⁰ See ICC-01/14-01/18-631, paras. 52-53.