



Original: English

No. ICC-01/14-01/18

Date: 11 August 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Second Decision on the Prosecution Request for Formal Submission of Prior
Recorded Testimony pursuant to Rule 68(2)(c) of the Rules concerning Witness
P-1819**

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

The Office of the Prosecutor

Karim A. A. Khan
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis
Anta Guissé

Counsel for Patrice-Edouard Ngaïssona

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

Legal Representatives of Victims

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

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2), 67(1) and 69(2) of the Rome Statute (the ‘Statute’) and Rule 68(2)(c) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Second Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(c) of the Rules concerning Witness P-1819’.

I. Procedural history and submissions

1. On 18 May 2022, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1819 pursuant to Rule 68(3)’ (the ‘P-1819’s Prior Recorded Testimony’).¹
2. On 30 May 2022, the Yekatom Defence responded and did not oppose this request but took issue with how the Prosecution had characterised the evidence.² On the same day, the Ngaïssona Defence indicated that it did not intend to file a response to this request.³
3. On 11 November 2022, the Chamber introduced P-1819’s Prior Recorded Testimony, together with certain associated documents, into evidence, subject to the fulfilment of the legal requirements of Rule 68(3) of the Rules.⁴
4. On 7 July 2023, the Prosecution filed the ‘Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1819 pursuant to Rule 68(2)(c)’ (the ‘Request’).⁵ The Prosecution submits that P-1819 is unavailable to testify due to ‘obstacles that could not be overcome with

¹ ICC-01/14-01/18-1414-Conf (with confidential Annexes A and B) (public redacted version notified the same day, ICC-01/14-01/18-1414-Red).

² Yekatom Defence Response to ‘Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1819 pursuant to Rule 68(3)’ (ICC-01/14-01/18-1414-Conf), ICC-01/14-01/18-1439-Conf (public redacted version filed on 17 November 2022, ICC-01/14-01/18-1439-Red), para. 2.

³ Email from the Ngaïssona Defence, 30 May 2022, at 11:49.

⁴ Corrected version of ‘Eighteenth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1858, P-1823, P-1819, P-1813, P-2476, P-1786, P-2587 and P-0487’, ICC-01/14-01/18-1661-Conf-Corr (with one annex) (corrected version notified on 17 November 2022), para. 42, p. 33. The Chamber noted that certain associated items linked to P-1819’s Prior Recorded Testimony had already been submitted and therefore, it need not rule on them. *See* para. 40.

⁵ ICC-01/14-01/18-1968-Conf (with one confidential Annex).

reasonable diligence’⁶ and that other requirements of Rule 68(2)(c) of the Rules are also fulfilled.⁷

5. On 13 July 2023, the Yekatom Defence responded to the Request (the ‘Yekatom Defence Response’).⁸ It argues, *inter alia*, that the condition of the unavailability of the witness as required by Rule 68(2)(c) of the Rules has not been met and, therefore, the Request should be rejected.⁹ It further submits that the Prosecution mischaracterised the content of P-1819’s Prior Recorded Testimony.¹⁰
6. On 14 July 2023, the Ngaïssona Defence indicated that it fully supports and joins the Yekatom Defence Response.¹¹
7. On 19 July 2023, the Prosecution made certain clarifications regarding the Yekatom Defence Response by email and requested leave to reply,¹² which the Yekatom Defence opposed.¹³ On 21 July 2023, the Single Judge decided to disregard the Prosecution’s clarifications and rejected the Prosecution’s request for leave to reply *in limine*.¹⁴

II. Analysis

8. The Chamber recalls the applicable law concerning Rule 68(2)(c) of the Rules as set out in its earlier decision.¹⁵
9. P-1819 travelled to the Central African Republic twice between the beginning of October and end of December 2013 in a professional context.¹⁶ P-1819 provided a statement to the Prosecution along with several associated items, some of which

⁶ Request, ICC-01/14-01/18-1968-Conf, paras 8-13.

⁷ Request, ICC-01/14-01/18-1968-Conf, paras 14-28.

⁸ Yekatom Defence Response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1819 pursuant to Rule 68(2)(c)”, ICC-01/14-01/18-1968-Conf, 7 July 2023, ICC-01/14-01/18-1977-Conf.

⁹ Yekatom Defence Response, ICC-01/14-01/18-1977-Conf, paras 2, 29-34; *see also* paras 17-28.

¹⁰ Yekatom Defence Response, ICC-01/14-01/18-1977-Conf, paras 11-16.

¹¹ Email from the Ngaïssona Defence, 14 July 2023, at 16:09.

¹² Email from the Prosecution, 18 July 2023, at 15:13.

¹³ Email from the Yekatom Defence, 19 July 2023, at 13:14.

¹⁴ Email from the Chamber, 21 July 2023, at 15:28.

¹⁵ First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules, 12 July 2023, ICC-01/14-01/18-1975-Conf (public redacted version notified the same day, ICC-01/14-01/18-1975-Red) (the ‘First Rule 68(2)(c) Decision’), paras 15-39.

¹⁶ *See generally* P-1819 Statement, CAR-OTP-2093-0493-R01.

have already been recognised as formally submitted before the Chamber in relation to other witnesses.¹⁷

10. The Prosecution submits that after having taken all reasonable steps, it was unable to secure the testimony because of P-1819's recently confirmed unwillingness to cooperate.¹⁸ The Chamber notes 'the repeated efforts by the Prosecution to secure [the witness's] testimony' and the Prosecution's submission concerning 'the unlikelihood' of summoning P-1819 to testify in due time.¹⁹ The Chamber also notes the Prosecution's general submission that witness unavailability under this provision must be interpreted broadly. It argues that unavailability should include situations whereby 'it was not possible to secure or reach a witness, although that witness could, with reasonable diligence be traced'.²⁰
11. The Yekatom Defence submits that P-1819 is not dead or physically incapable of testifying but that the nonappearance before the Court is resulting from the 'choice to not testify' motivated by concerns related to personal and professional life.²¹
12. The Chamber will first address whether P-1819 can be considered 'unavailable', in the sense that the witness has 'died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally', within the meaning of Rule 68(2)(c) of the Rules. The Chamber recalls that it found illustrative that trial chambers have considered that certain situations do not fall within the meaning of 'unavailable', *inter alia*, (i) where a witness is simply unwilling to testify; (ii) the Prosecution is unable to locate the witness but further efforts to locate them can still be made; or (iii) a possibility of

¹⁷ See above n. 4.

¹⁸ Request, ICC-01/14-01/18-1968-Conf, para. 8.

¹⁹ Request, ICC-01/14-01/18-1968-Conf, paras 9-13.

²⁰ Request, ICC-01/14-01/18-1968-Conf, para. 8 referring to Trial Chamber VII, *Prosecutor v. Bemba 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-Conf-Exp-Corr (public redacted version notified the same day; corrected version also notified the same day, ICC-01/05-01/13-1481-Red-Corr) (the '*Bemba et al.* Rule 68(2)(c) Decision'), n. 18.

²¹ Yekatom Defence Response, ICC-01/14-01/18-1977-Conf, para. 30 referring to INVESTIGATION REPORT / OTP efforts to secure testimony of CAR-OTP-P-1819, CAR-OTP-00001655 (the 'Investigation Report'), at 000002.

video-link testimony could be explored without placing the witness at undue risk.²²

13. The Chamber finds that the information provided to it by the Prosecution suggests that the witness is simply unwilling to testify because of personal and/or professional concerns that the Prosecution has been unable to allay. There is no information before the Chamber which could suggest that the witness is inaccessible or otherwise incapable of testifying, thus possibly indicating unavailability. There is also no information suggesting that the witness's security concerns are such that protective measures, or otherwise a testimony via video-link, would be insufficient to address them.
14. As regards the efforts made by the Prosecution, the Chamber notes the Prosecution's submission generally referring to the 'unlikelihood' of the witness being summonsed in due time.²³ However, it has no information to meaningfully assess why the Prosecution did not inquire into her unwillingness and/or request the Chamber to summons the witness earlier, or more proactively, if needed, within the time necessary to schedule the testimony. In this regard, the Chamber notes that the witness had 'first hinted' at an unwillingness to cooperate as early as January 2021, which appeared to have materialised towards the end of the year 2022.²⁴ It also notes the Prosecution's exchanges with the witness in April and May 2023.²⁵
15. The Chamber considers that, in April 2023, the Prosecution seems to have misjudged that the witness had reconsidered her decision not to testify and was

²² First Rule 68(2)(c) Decision, ICC-01/14-01/18-1975-Red, para. 28 *referring inter alia* to Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, 16 December 2022, ICC-01/12-01/18-2445-Conf-Exp, confidential *ex parte*, only available to the Defence and the Registry (public redacted version issued the same day, ICC-01/12-01/18-2445-Red), para. 23; Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Prosecution's request to introduce prior recorded testimonies under Rule 68(2)(c), 21 February 2022, ICC-02/05-01/20-603-Conf (public redacted version notified the same day, ICC-02/05-01/20-603-Red), para. 31; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request for admission of the prior recorded testimony of Witness D-0080, 7 November 2017, ICC-01/04-02/06-2100-Conf (public redacted version notified the same day, ICC-01/04-02/06-2100-Red), paras 14-16.

²³ Request, ICC-01/14-01/18-1968-Conf, para. 13.

²⁴ Request, ICC-01/14-01/18-1968-Conf, para. 9. *See also* Investigation Report, CAR-OTP-00001655.

²⁵ Request, ICC-01/14-01/18-1968-Conf, para. 10.

willing to appear before the Court. Further, at the very latest, by mid-May 2023, the witness had unequivocally indicated her unwillingness to testify.²⁶ Accordingly, in this case, the Chamber is unable to conclude whether the Prosecution could have requested summons, or otherwise persuaded the witness, within the time needed, had it exercised reasonable diligence.

16. Further, the Chamber is not persuaded by the Prosecution's argument that a broad interpretation to the term 'unavailability' under Rule 68(2)(c) of the Rules would mean that P-1819 could be considered unavailable to testify. In this regard, the Chamber finds inapposite the Prosecution's reliance on the decision of Trial Chamber VII. The Chamber notes that Trial Chamber VII concluded that the personal circumstances of the witness presented obstacles to her ability to cooperate with the Court and to the ability of the Court to secure the oral testimony that could not be overcome with reasonable diligence.²⁷ It further concluded that requiring oral testimony would place the witness in unnecessary hardship that was disproportionate to the purported significance of the concerned evidence; it added that calling or summoning the witness would in all likelihood entail negative consequences for the witness, which would be incompatible with its obligations pursuant to Article 68(1) of the Statute.²⁸ In view of the Chamber, for the reasons mentioned above,²⁹ similar considerations do not apply to P-1819.
17. Having regard to the above, the Chamber finds that P-1819 is not 'unavailable' to testify within the meaning of Rule 68(2)(c) of the Rules.
18. Accordingly, the Chamber need not address whether the remaining requirements of Rule 68(2)(c) of the Rules are met. For the same reasons, the Chamber also need not address the Yekatom Defence's submissions on the mischaracterisation of P-1819's Prior Recorded Testimony.

²⁶ Request, ICC-01/14-01/18-1968-Conf, para. 12.

²⁷ *Bemba et al.* Rule 68(2)(c) Decision, ICC-01/05-01/13-1481-Red-Corr, para. 17.

²⁸ *Bemba et al.* Rule 68(2)(c) Decision, ICC-01/05-01/13-1481-Red-Corr, para. 18.

²⁹ See above para. 13.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the Prosecution and the Yekatom Defence to file a public redacted version of the Request, ICC-01/14-01/18-1968-Conf and Yekatom Defence Response, ICC-01/14-01/18-1977-Conf, respectively within two weeks of notification of the present decision.

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



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 11 August 2023

At The Hague, The Netherlands