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**International
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Court**

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Date: **14 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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Public Redacted Version of the “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, 13 July 2023**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Mr Karim Asad Ahmad Khan
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Mr. Yekatom

Ms Mylène Dimitri
Ms Anta Guissé
Mr Thomas Hannis
Mr Florent Pages-Granier

Counsel for Mr. Ngaïssona

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

Legal Representatives of Victims

Mr Dmytro Suprun

Legal Representatives of Applicants

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

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

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

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. The Defence for Mr. Alfred Rombhot Yekatom ("Defence") hereby responds to the *"Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-1819 pursuant to Rule 68(2)(c)"*, notified on 7 July 2023 ("Request").¹
2. The Defence submits that the Prosecution's Request should be rejected as the condition of the unavailability of the witness, for the submission of P-1819's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence ("Rules"), is not met. In addition, the Defence argues that the Prosecution's lack of diligence in respect to P-1819's testimony also militates in favor of the rejection of the Request.

PROCEDURAL HISTORY

3. On [REDACTED] the Prosecution conducted a screening interview of Witness P-1819.² A formal interview was subsequently conducted between [REDACTED].³
4. On 10 November 2020, Witness P-1819 was included by the Prosecution in its Final Witness List.⁴
5. On 11 January 2021, the Defence requested the Prosecution to inquire whether Witness P-1819 was willing to be interviewed by the Defence pursuant to the applicable protocol.⁵ On 25 January 2021 the Prosecution replied that *"P-1819 was reached on [REDACTED] regarding our request and advised that she wanted to think about it and would get back to us on [REDACTED]. She has since done so and advised that she declines to meet with the Defence"*.⁶

¹ ICC-01/14-01/18-1968-Conf.

² CAR-OTP-2060-0425-R01.

³ CAR-OTP-2065-0003-R01.

⁴ ICC-01/14-01/18-724-Conf-AnxA, page 44, witness #88.

⁵ Email from the Defence to the Prosecution dated 11 January 2021 at 16:56.

⁶ Email from the Prosecution to the Defence dated 25 January 2021 at 16:42.

6. On 11 November 2022, the Chamber granted the Prosecution's request to introduce P-1819's statement under Rule 68(3) of the Rules. The Chamber noted that the Defence took *“ issues with the Prosecution's characterisation of the evidence of P-1819 in the Request' which it submits 'at times borders on the misleading' ”*.⁷
7. On 25 May 2023, the Prosecution informed the Chamber and Parties that P-1819 has definitely withdrawn its cooperation and is *“thus unavailable”*.⁸
8. On 7 July 2023, the Prosecution disclosed an investigation report regarding its *“efforts to secure testimony of CAR-OTP-P-1819”*, listing various interactions between their Office and the witness from 8 October 2020 to 15 May 2023.⁹ On the same day the Prosecution filed its Request.

APPLICABLE LAW

9. Rule 68(2)(c) of the Rules states that :

If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:

(c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case:

(i) Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability.

(ii) The 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.

⁷ ICC-01/14-01/18-1661-Conf-Corr, para. 36.

⁸ Email from the Prosecution to the Chamber and Parties titled “Update on the Remainder of the Prosecution Case” and dated 25 May 2023 at 23:50.

⁹ CAR-OTP-00001655-R01.

SUBMISSIONS

10. The Defence will first address the mischaracterization by the Prosecution of the content of P-1819's statement (A); secondly, the Defence will argue that the criteria set out in Rule 68(2)(c) of the Rules are not met (B).

A. On the mischaracterization by the Prosecution of the content of P-1819's statement

11. The Defence recalls that in its response to the Prosecution's request to introduce P-1819's prior recorded testimony pursuant to Rule 68(3) of the Rules, submissions were made regarding the Prosecution's characterisation and borderline misleading presentation of this witness' evidence.¹⁰
12. The Defence unfortunately notices that the Prosecution, again, mischaracterised the content of P-1819's testimony in its Request. It should also be noted that the absence of any reference to paragraphs of P-1819's statement in the Request does not allow the Chamber or Parties to easily verify the Prosecution's multiple affirmations.¹¹
13. For the Chamber to have an accurate presentation of P-1819's evidence, the Defence wishes to make the following remarks on the Prosecution's Request :
- The Prosecution indicates that "[o]n 3 December, P-1819 saw Peuhl victims of Anti-Balaka's attack [...]";¹² it should be noted that P-1819's source of information are [REDACTED] and that the attackers are identified as "milices chrétiennes".¹³
 - The Prosecution asserts that the "*witness indicates she saw the dead bodies of Muslims civilians at the Mosque in PK5 following the 5 December attack*";¹⁴ the

¹⁰ ICC-01/14-01/18-1439-Conf, para. 3. Public redacted version available : ICC-01/14-01/18-1439-Red.

¹¹ See ICC-01/14-01/18-1968-Conf, para. 20, pages 10-11.

¹² ICC-01/14-01/18-1968-Conf, para. 20, page 10.

¹³ CAR-OTP-2065-0003-R01, para. 92.

¹⁴ ICC-01/14-01/18-1968-Conf, para. 20, page 10.

Defence notes that P-1819 never mentions that the dead bodies were civilians, she insists that [REDACTED] and that she does not remember if there were bodies of women or children.¹⁵

- The Prosecution avers that P-1819 *“provides evidence of the commission of crimes by YEKATOM’s Group, comprising the cruel treatment, torture and illegal detention of Muslim civilians [...]”* ;¹⁶ the Defence highlights that P-1819’s statement does not make any reference to such acts against Muslim civilians, to the contrary the witness indicates [REDACTED].¹⁷ For completeness, P-1819 also mentions reprisals against members of the group or villagers that were accused of being spies, but never makes any mention to their religion, and adds [REDACTED].¹⁸
- The Prosecution affirms that P-1819’s *“evidence establishes that YEKATOM’s Group was well organised under YEKATOM’s authority”*;¹⁹ in reality P-1819’s clearly states the opposite [REDACTED].²⁰ She also indicated that [REDACTED].²¹
- The Prosecution, in relation to Mr. Yekatom’s group, indicates that P-1819’s evidence describes [REDACTED];²² this is again an incorrect interpretation by the Prosecution as P-1819 never mentions [REDACTED] in relation to the [REDACTED], says that she thinks [REDACTED] but does not really remember, and adds that she does not think [REDACTED].²³

¹⁵ CAR-OTP-2065-0003-R01, para. 37.

¹⁶ ICC-01/14-01/18-1968-Conf, para. 20, page 10.

¹⁷ CAR-OTP-2065-0003-R01, para. 133.

¹⁸ CAR-OTP-2065-0003-R01, para. 144.

¹⁹ ICC-01/14-01/18-1968-Conf, para. 20, page 10.

²⁰ CAR-OTP-2065-0003-R01, para. 136.

²¹ CAR-OTP-2065-0003-R01, para. 74.

²² ICC-01/14-01/18-1968-Conf, para. 20, page 11.

²³ CAR-OTP-2065-0003-R01, para. 146.

- The Prosecution, in relation to Mr. Yekatom's group, indicates that P-1819's evidence describes [REDACTED].²⁴ While the Prosecution's list is not erroneous, it should be noted that P-1819's statement indicates that [REDACTED].²⁵
- The Prosecution also affirms in its Request that P-1819 provides evidence on Mr. Yekatom's authority indicating, *inter alia*, that he planned attacks and that elements "*turned to him when they needed authorisations*".²⁶ On this topic the Defence highlights that P-1819's also provides evidence to the effect that in reality everybody was doing what they wanted, including leaving without any authorisation, and that [REDACTED].²⁷
- The Prosecution avers that P-1819 describes "*YEKATOM's frequent interactions [REDACTED] and other Anti-Balaka leaders in BOEING and BANGUI*".²⁸ The Defence notes that the Prosecution's description of P-1819's statement goes way further than its actual content as the witness merely states that Mr. Yekatom was in contact with other Anti-Balaka groups.²⁹ No mentions are made by P-1819 regarding the fact that the persons in contact with Mr. Yekatom are "*leaders in BOEING and BANGUI*".
- The Prosecution also incorrectly states in its Request that "[REDACTED] '*young*' Anti-Balaka recruits at the third base".³⁰ Indeed, P-1819 mentions the "third base", [REDACTED]; at no point the age of members of the group is mentioned or an allusion to some of them being "young" is ever made by P-1819. The only mention regarding the age of individuals

²⁴ ICC-01/14-01/18-1968-Conf, para. 20, page 11.

²⁵ CAR-OTP-2065-0003-R01, para. 146.

²⁶ ICC-01/14-01/18-1968-Conf, para. 20, page 11.

²⁷ CAR-OTP-2065-0003-R01, para. 136.

²⁸ ICC-01/14-01/18-1968-Conf, para. 20, page 11.

²⁹ CAR-OTP-2065-0003-R01, para. 81.

³⁰ ICC-01/14-01/18-1968-Conf, para. 20, page 11.

[REDACTED], with the witness explaining that *“j’ai vu des Anti-Balaka jeunes mais pas très jeunes. Selon moi, les plus jeunes avaient environ 16 ans”*.³¹

While this extract of the statement by P-1819 appears to be general [REDACTED], which would include the “third camp”, the Prosecution’s assertion regarding [REDACTED] young recruits at the third base remains erroneous. In light of those clarifications, the Prosecution’s subsequent indication that P-1819’s evidence shows “the presence of young children in YEKATOM’s Group”,³² should be entirely dismissed as incorrect and misleading.

- The Prosecution also mentions “[REDACTED] YEKATOM during which he often referred to the Seleka as “Arabs and foreigners” from whom he wanted to save CAR”.³³ For the sake of fairness, and given its importance for the case, it should also be noted that P-1819, in the same paragraph, indicates that *“RHOMBOT ne tenait pas de discours haineux envers les civils musulmans ou Peuhls [REDACTED]”* and that *“[q]uand il parlait d’attaques RHOMBOT parlait systématiquement des Seleka”*.³⁴
- The Prosecution also mentioned in the request that [REDACTED];³⁵ it should have been noted regarding [REDACTED].³⁶

14. Despite its relative absence from the Request, the Defence also notes that P-1819’s statement brings evidence on the tensions and lack of coordination between Anti-Balaka groups. P-1819 specifically indicated on this topic that [REDACTED]³⁷ and that [REDACTED].³⁸

³¹ CAR-OTP-2065-0003-R01, para. 130.

³² ICC-01/14-01/18-1968-Conf, para. 24.

³³ ICC-01/14-01/18-1968-Conf, para. 20, page 11.

³⁴ CAR-OTP-2065-0003-R01, para. 75.

³⁵ ICC-01/14-01/18-1968-Conf, para. 20, page 11.

³⁶ CAR-OTP-2065-0003-R01, para. 79.

³⁷ CAR-OTP-2065-0003-R01, para. 74.

³⁸ CAR-OTP-2065-0003-R01, para. 81.

15. The Defence also notes that P-1819 brought forward evidence on the 5th December attack regarding the Seleka firing their weapons indiscriminately, without verifying if civilians were present or not.³⁹
16. The Defence wished to address those points as the Prosecution “pick and choose” approach, combined with its imprecise or erroneous interpretations, gave a false image of the content of P-1819’s statement.

B. On the absence of fulfilment of Rule 68(2)(c) criteria

17. The Defence will argue that the Prosecution lacks of diligence (i) and the absence of unavailability of P-1819 (ii) militates in favor of the rejection of the Request.

i) On the Prosecution’s lacks of diligence

18. It is recalled that Article 67 of the Statute enshrines the rights of the accused, including the right to “examine, or have examined, the witnesses against him or her”. Article 69(2) provides that “[t]he testimony of a witness at trial shall be given in person” and is the foundation of the principle of orality at the International Criminal Court. Rule 68(2)(c), which authorizes the submission of a prior recorded statement of a witness that will not come to testify, is an exception to these two important principles and consequently should be used with extreme precaution.
19. The drafters, when amending Rule 68, chose to explicitly state in sub-rule (1) that use of this provision should “not be prejudicial to or inconsistent with the rights of the accused” to “draw attention expressly to this fundamental protection in the context of exceptions to the principle of orality”.⁴⁰ In relation with the rights of the accused, a specific guidance was included in sub-rule (ii) regarding the use of Rule 68(2)(c): “[t]he fact that the prior recorded testimony

³⁹ CAR-OTP-2065-0003-R01, paras 35, 53, 104.

⁴⁰ [ICC-ASP/12/37/Add.1](#), Annex II.A, para. 12.

goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.”

20. Per the Prosecution’s own description, P-1819’s prior recorded testimony “is manifestly relevant to the proper adjudication of salient issues in this case”;⁴¹ especially in light of [REDACTED] in the days following the 5th December 2013 attack on Bangui.
21. As such, and in light of the exception that constitute Rule 68(2)(c) to the principles described above, the Prosecution must be diligent enough in order to ensure that obstacles to P-1819’s in-court testimony cannot be overcome.
22. The Defence first notes that witness P-1819 is neither dead, seriously ill or missing. P-1819 is [REDACTED]; [REDACTED],⁴² [REDACTED].⁴³
23. Moreover, the witness is still in contact with the Prosecution as they exchanged messages two months ago, on 15 May 2023, and that there are no indication that P-1819 would outright refuse any more contacts.⁴⁴ On the contrary, the Prosecution’s investigator note confirms that P-1819 always responded, perhaps not promptly, to the Prosecution’s either on the phone or by SMS. Consequently, communication with P-1819 is not an obstacle in the present situation.
24. Within this context, the Defence submits that the Prosecution failed to explore another avenue to secure P-1819’s testimony: requesting the Chamber to summon the witness pursuant to Article 64(6)(b) of the Statute. Indeed, the Prosecution previously requested such summons against uncooperative witnesses,⁴⁵ or even against witnesses which were presumed dead.⁴⁶ As P-1819

⁴¹ ICC-01/14-01/18-1968-Conf, para. 23.

⁴² [REDACTED]

⁴³ [REDACTED]

⁴⁴ CAR-OTP-00001655-R01, para. 12.

⁴⁵ See as an example [REDACTED].

⁴⁶ See as an example [REDACTED].

mainly resides [REDACTED], can be easily reached, and in light of the Prosecution's own assessment of her importance for the case, the Defence argues that the Prosecution could have requested the Chamber to summon the witness in order to guarantee her testimony before the Court.

25. Failure to even request a summon to the Chamber shows a lack of diligence on the Prosecution's part as, should it have been granted, it would have been easily served to P-1819 and could have ensure her appearance before the Court. The Prosecution repeatedly moved P-1819 down its Order of Appearance and should therefore have anticipated some time ago the possibility to summon her; especially as it alluded to this possibility in its Request.⁴⁷
26. The Prosecution lacked diligence in order to prevent the necessity for a Rule 68(2)(c) submission, but also lacked diligence in relation to the potential Article 56 measures that could have been put in place in order to mitigate prejudice for Mr. Yekatom.
27. Indeed, the Prosecution is aware of the Defence's interests in interviewing P-1819 to clarify part of her statement [REDACTED] since January 2021.⁴⁸ Despite P-1819's initial refusal to meet with the Defence, and as P-1819 can be easily contacted, the Prosecution could have seized the Chamber to put in place Article 56 of the Statute measures when they first became aware of the witness refusal to testify. Specifically, the Prosecution could have requested measures pursuant to Article 56(2)(d) of the Statute in order for the Prosecution and Defence to both conduct a joint interview of the witness where clarification questions could have been put to the witness in order to protect the right of the defence.

⁴⁷ ICC-01/14-01/18-1968-Conf, para. 13.

⁴⁸ See paragraph 5 above.

28. The Defence submits that the Prosecution's failure to explore those avenues shows a lack of diligence on its part that militates in favor of the rejection of the Request.

ii) On the unavailability of Witness P-1819

29. The Defence submits that, contrary to the Prosecution's assertion in its Request, witness P-1819 is not unavailable in the meaning of Rule 68(2)(c).

30. Indeed, the Prosecution clearly indicated that P-1819 is not dead or in a physical incapacity to testify, instead her non appearance before the Court is resulting from her choice to not testify motivated by concerns for her personal and professional life should she testify publicly.⁴⁹ More specifically she indicated to the Prosecution being concerned by: (i) [REDACTED]; (ii) uncertainty about the modalities of the testimony, and; (iii) dissatisfaction with the Prosecution not updating her timely.⁵⁰

31. In a similar situation, Trial Chamber VI rejected in the *Ntaganda* case submission of a prior recorded testimony pursuant Rule 68(2)(c) of the Rules when "*the Witness simply stated that he did not want to testify under the condition set by the Chamber. Moreover, the Chamber notes that the information currently before it does not suggest that the Witness's condition or situation has changed in a way that would render him inaccessible or otherwise incapable of testifying orally*".⁵¹ In the same vein, the Chamber recently found "*illustrative that trial chambers have considered that situations do not fall within the meaning of 'unavailable', inter alia, (i) where a witness is simply unwilling to testify [...]*".⁵²

⁴⁹ CAR-OTP-00001655, para. 8.

⁵⁰ CAR-OTP-00001655, para. 7.

⁵¹ *Prosecutor v. Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039, 19 May 2016, [ICC-01/04-02/06-1325](#), para. 9.

⁵² ICC-01/14-01/18-1975-Conf, para. 28 citing *Al Hassan*, 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-Red](#), para. 23.

32. Trial Chamber VI further found that *“the Chamber does not consider that its decision not to summon the Witness amounts to him being ‘unavailable’ within the meaning of Rule 68(2)(c) of the Rules”*.⁵³
33. The Defence submits that the present situation of P-1819 falls squarely within the precedent set by Trial Chamber VI and within the *Al Hassan* decision quoted by the Chamber as mentioned above: P-1819 is neither inaccessible or incapable of testifying orally, the witness merely informed the Prosecution that it did not wished to continue with the process of being a witness for the reasons set out above. The fact that the Prosecution did not even attempt to request the Chamber to summon P-1819 further the fact that the witness is not unavailable, as even a rejection of such a request would not be sufficient to meet this threshold.
34. As the legal requirements regarding the unavailability of a witness under Rule 68(2)(c) are not met for Witness P-1819, the Defence respectfully argues that the Chamber should reject the Prosecution’s Request.

CONFIDENTIALITY

35. The present response is filed on a confidential basis corresponding to the classification of the Request and in light of the disclosure of P-1819’s identity. A public redacted version will be filed forthwith.

RELIEF SOUGHT

36. In light of the above, the Defence respectfully requests Trial Chamber V to:
- REJECT** the Request.

⁵³ *Ibid*, para. 10.

RESPECTFULLY SUBMITTED ON THIS 14th DAY OF AUGUST 2023

A handwritten signature in blue ink, appearing to read 'Mylène Dimitri'.

Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands