



Original: **English**

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

Date: **10 October 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

**Public redacted version of "Prosecution's Request for Submission of the Prior
Recorded Testimony of P-0975 pursuant to Rule 68(2)(c)",
ICC-01/14-01/18-1965-Conf, 6 July 2023**

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

Karim A. A. Khan KC
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis
Anta Guissé
Ms Sarah Bafadhel

Counsel for Patrice-Edouard Ngaïssona

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

Legal Representatives of Victims

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

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests the formal submission of witness P-0975’s 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” (“Initial Directions”).¹

2. P-0975, an Anti-Balaka, essentially provided information on GOBERE and the 5 December BANGUI attack. P-0975 cannot be located despite the exercise of reasonable diligence, and is thus unavailable to testify orally in this case. As set out below, the other conditions under rule 68(2)(c) are satisfied, and the formal submission of P-0975’s prior recorded testimony would not cause unfair prejudice in the circumstances, while facilitating the Chamber’s search for the truth.

3. As listed in the Annex, P-0975’s prior recorded testimony comprises the witness’s 11 and 12 August 2016² statement to the Prosecution; the witness’s waiver of his right to counsel pursuant to article 55(2)(d), dated 11 August 2016;³ and a document put to and explained by P-0975 during his interview (“Prior Statement”).⁴ The Annex also identifies the relevant paragraphs of the Confirmation Decision to which P-0975’s evidence relates.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this Request and its annex are filed as “Confidential”, as they contain information concerning a witness

¹ ICC-01/14-01/18-631, para. 33.

² CAR-OTP-2033-7885, and its translation CAR-OTP-2107-1329.

³ CAR-OTP-2033-7896.

⁴ ICC-02/04-01/15-596-Red, para. 10 (“Ongwen Rule 68(2) Decision”).

which should not be made public. A public redacted version of the Request will be filed as soon as practicable.

III. SUBMISSIONS

A. Procedural Posture

5. On 9 April 2021, the Prosecution filed its “Request for the Formal Submission of the Prior Recorded Testimony of P-0975 pursuant to Rule 68(3)” (“9 April 2021 Request”),⁵ which the NGAISSONA Defence did not oppose, deferring to the Chamber’s discretion.⁶ On 10 March 2023, the Prosecution provided its revised list of remaining witnesses and examination estimates pursuant to the Chamber’s 31 January 2023 “Order regarding the Remainder of the Prosecution’s Presentation of Evidence and Order pursuant to Article 64(6)(d) of the Statute”.⁷ The Prosecution indicated that for P-0975, it intended to file a rule 68(2)(c) request, because he has become unavailable.⁸

B. Applicable Law

6. The Initial Directions 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.”⁹

7. Pursuant to rule 68(2)(c), the Chamber may allow the introduction of the prior recorded testimony from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify

⁵ ICC-01/14-01/18-950-Conf.

⁶ ICC-01/14-01/18-960-Conf, para. 3 (“Defence Response to the Prosecution’s 9 April 2021 Request” or the “Response”).

⁷ ICC-01/14-01/18-1791-Conf; ICC-01/14-01/18-1739-Conf, para. 5.

⁸ ICC-01/14-01/18-1791-Conf, para. 6.

⁹ ICC-01/14-01/18-631, para. 33.

orally. In such a case, the Chamber must be satisfied that: (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;¹⁰ (iii) the evidence is relevant and probative; and (iv) the submission is not prejudicial to or inconsistent with the rights of the accused.¹¹ Under rule 68(2)(c)(ii), if prior testimony goes to the acts and conduct of an accused, it may be a factor against its introduction or part of it. But, it is not dispositive. In such a case, a Chamber shall take into consideration, in particular, whether the evidence: (i) relates to issues that are not materially in dispute; (ii) is central to the allegations of the case; (iii) is purportedly corroborative.¹²

C. The Prior Statement fulfils the requirements of Rule 68(2)(c)

- i. P-0975 has become unavailable to testify due to obstacles that could not be overcome with reasonable diligence, and cannot be located*

8. As noted, P-0975 has become unavailable within the meaning of rule 68(2)(c).

9. The Prosecution has not been able to communicate meaningfully with P-0975 since 2021. In particular, P-0975 was contacted in February 2021, when he expressed a concern regarding his availability to testify before the connection was cut. The Prosecution next managed to get through to one of P-0975's phone numbers in April 2021. At that time, he informed the Prosecution that he was in BANGUI, having been hospitalized and undergone [REDACTED] surgery after [REDACTED] a few weeks prior. However, the connection was lost before his availability to testify could be discussed. Following this contact, the Prosecution has never been able to speak directly with P-0975 again. Indeed, one day later, the Prosecution was able to communicate with an individual who identified himself [REDACTED]. He related

¹⁰ ICC-01/04-02/06-1029, para. 12 ; ICC-01/14-01/21-506-Conf, para. 15.

¹¹ ICC-01/12-01/18-1111-Conf, para. 7; ICC-01/05-01/08-1386, para. 78; ICC-01/14-01/21-506-Conf, paras. 7-10.

¹² ICC-01/05-01/13-1481, paras. 21-22.

that P-0975 had suffered a head injury [REDACTED] and that his doctor would not allow the witness [REDACTED].

10. In June 2021, after several attempts to get through to P-0975's phone, [REDCATED] answered and informed the Prosecution that P-0975 had returned to his village, [REDACTED], located some [REDACTED] from BANGUI, to receive [REDACTED] medicine treatments.

11. Several unsuccessful attempts to contact P-0975 were subsequently made throughout 2021 and 2022. At the end of 2022, a call to P-0975's number revealed that he was not using the number anymore. On that occasion, an unidentified person on the line stated that he had been using the number for the past year.

12. Since the beginning of 2023, the Prosecution field office in BANGUI has contacted the police commissariats in the regions of [REDACTED] to obtain contact details of *Chefs de quartier* who could, possibly, gather reliable information on P-0975's whereabouts, if he is still alive. Indeed, there is no phone network [REDACTED]. The Prosecution field office in BANGUI thus made contact with [REDACTED], Police Commissaire [REDACTED]. In June 2023, Police Commissaire [REDACTED] provided the information to the Prosecution field office in BANGUI that [REDACTED] has been heavily impacted by the military and political crisis in 2020, triggering the departure of half of its population to other localities [REDACTED]. At the end of June 2023, Police Commissaire [REDACTED] was able to establish, through information obtained from the local population of [REDACTED] and the *Chef du village*, named [REDACTED], that there was no health centre there, and that the population in [REDACTED] indeed used indigenous medical treatments. *Chef du village* [REDACTED] provided the information that a person who had suffered [REDACTED] had come to [REDACTED], had been healed there, but had left the village over a year ago. *Chef du village* [REDACTED] did not know this person's name.

However, the village is small and it was established that person in question is not present in the village anymore.

13. It is thus highly likely that P-0975 returned to [REDACTED], and that he was the person who received treatment there over a year ago. However, P-0975 has since left his village and his whereabouts are unascertainable.

14. P-0975 has thus become unavailable.

15. As set out above, the Prosecution has made repeated efforts to contact and locate P-0975, including through several call attempts to him and his brother, and by way of contacts with local officials, who have sought to gather and verify information in the field, in particular in [REDACTED]. This has been undertaken notwithstanding the currently unstable security situation in the Central African Republic¹³ and that the village is located [REDACTED] from BANGUI.

16. The Prosecution has thus exercised reasonable diligence to overcome the existing obstacles to P-0975 testifying orally at trial within the meaning of rule 68(2)(c). There is no reasonable likelihood that P-0975 can be contacted, located, or relatedly, that a summons to secure his testimony could be successfully executed in the circumstances.

ii. Article 56 measures could not be anticipated

17. P-0975 was interviewed on 11 and 12 August 2016. At the time of the interview, the witness was [REDACTED] and did not report any serious health issues. Between 2016 and 2021, there were no indications that evidence preserving measures could be necessary.

¹³ Twelfth Periodic Report of the Registry on the Political and Security situation in the CAR, ICC-01/14-01/18-1889-Conf-Anx.

18. Although P-0975 became increasingly harder to reach with over the years, the mere fact that in April 2021, [REDACTED] informed the Prosecution that P-0975 had purportedly undergone surgery, does not suffice to concretely trigger the need for article 56 measures. In addition, the questionable information provided by P-0975's [REDACTED] between April and June 2021, that P-0975's doctor had recommended that the witness [REDACTED], and that the witness had returned [REDACTED] to receive [REDACTED] medical treatment, did not constitute information that would prompt consideration of evidence preserving measures under article 56, particularly since their implementation would necessarily require reliable contact with the witness. Aside, the Prosecution did not have – and still does not have – information in its possession indicating that the witness's health situation was of such gravity as to warrant article 56 measures. To the contrary, P-0975 seems to have recovered. In any event, any such application would not have been feasible, considering the witness's location could not be determined and that no reliable communication could be established. This requirement of rule 68(2)(c)(i) is thus met.

iii. The tendered evidence has sufficient indicia of reliability

19. In the Court's relevant case law, "'indicia of reliability' have been understood to include formal aspects concerning the prior recorded testimony. [...] [N]o single indicator of reliability is, in and of itself, conclusive or mandatory to establish the presence of 'sufficient indicia of reliability', but their presence may militate in favour of the introduction of a prior recorded testimony".¹⁴ In addition, "Trial Chambers are not obliged to consider factors beyond formal requirements. [...] [If] some factors, such as the witness's competence to testify about the facts, the internal consistency of the statement and potential inconsistencies with other evidence in the record are not

¹⁴ ICC-02/04-01/15-596-Red, Ongwen Rule 68(2) Decision, para. 18, *see also* para. 19; *See* ICC-01/09-01/11-1938-Red-Corr, para. 66; ICC-01/05-01/13-1481-Red-Corr, para. 20; 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.

taken into account during this assessment, they may still be considered when assessing the probative value of the evidence.”¹⁵

20. P-0975’s Prior Statement is *prima facie* reliable. The Prosecution obtained P-0975’s Prior Statement in the ordinary course of its investigation. In accordance with rule 111, the Prior Statement was read over to the witness in a language he fully understood, with the presence of a qualified interpreter.¹⁶ It was signed by P-0975, the interpreter and the investigators who conducted the interview.¹⁷ It contains an express acknowledgement attesting to its voluntariness and the truth of its contents, to the best of the witness’s knowledge and recollection.¹⁸ Further, given his role as the leader of a group of 20-30 Anti-Balaka from July 2013 to late December 2013, which carried out attacks in the prefectures of OUHAM and OMBELLA-M’POKO and took part in the 5 December attack on BANGUI, P-0975 was duly informed of his rights under article 55(2).¹⁹ He waived his right to the presence of counsel at the interview.²⁰

21. In sum, the Prior Statement bears sufficient indicia of reliability as per the requirements of rule 68(2)(c)(i).

D. P-0975’s Prior Statement is relevant and probative

22. P-0975’s Prior Statement is relevant and probative. It primarily goes to the formation of the Anti-Balaka in the provinces, their gathering and training in GOBERE, the Anti-Balaka attacks in the context of the march to BANGUI, the 5

¹⁵ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, 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)”, 1 November 2016, ICC-02/11-01/15-744 OA8, paras. 3, 103-104.

¹⁶ CAR-OTP-2033-7885, at 7886, para. 4 and at 7895.

¹⁷ CAR-OTP-2033-7885, at 7885, 7895.

¹⁸ CAR-OTP-2033-7885, at 7895.

¹⁹ CAR-OTP-2033-7885, at 7886, para. 6.

²⁰ CAR-OTP-2033-7885, at 7886, para. 7 and CAR-OTP-2033-7896.

December 2013 BANGUI attack, and NGAISSONA's leadership role within the National Coordination.

23. P-0975's Prior Statement comprises 11 pages. 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.

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

- Two weeks after the Seleka entered BANGUI, P-0975 fled from his neighbourhood [REDACTED] and went to BOGOIN, DAMARA. During the three and a half months he spent there, he witnessed Seleka crimes committed by "AMIN" who served under General AL KHATIM.
- P-0975 describes having walked to GOBERE, with others, through BOGANGOLO, NDJO and BOSSANGO, after hearing men were gathering in GOBERE to prepare *gris-gris* and revolt against the Seleka. In June or July 2013, P-0975 arrived in GOBERE, which he describes as a place of refuge, training and regrouping.
- P-0975 provides an account of his two-month stay in GOBERE, including the training he received from FACA members; the command structure there; the emergence, at the time, of the name "Anti-Balaka"; and the strategy to first control the provinces, where the Anti-Balaka came from, then to go to BANGUI where the Seleka leaders were.
- P-0975 states that on the way to BANGUI, the Anti-Balaka marched through the OUHAM and OMBELLA M'POKO prefectures, "freeing" NDJO, BOGANGOLO, GOBOYO and DAMARA. They used local informants to find and fight the Seleka, leading to the flight and death of Seleka and civilians.
- P-0975 reports that Anti-Balaka elements progressively arrived at the BOY-RABE hill, where they spent two weeks planning the December BANGUI "revolt", of

which ANDJILO was the commander. P-0975 explains how the attack unfolded, and that they used the same tactics as they did in the provinces, *i.e.*, the use of informants, by phone, which was coordinated by BEJOUANE.

- A fortnight after 5 December 2013, P-0975 sent his combatants back [REDACTED], since he was worried there would be killings and lootings. P-0975 declares that he stayed in BANGUI. There, the structure of the Anti-Balaka remained the same as in the provinces.
- P-0975 states that MOKOM, BOZIZE, and NGAISSONA are relatives who used the Anti-Balaka to return to power. According to P-0975, MOKOM and NGAISSONA fought over the position of Coordinator of the Anti-Balaka. P-0975 also states that Olivier FEISSONA was Coordinator of Operations for the Anti-Balaka and gave operational orders. P-0975 states that he never heard NGAISSONA giving orders, but that NGAISSONA gave money to Anti-Balaka, including wrongdoers, and got arrested ComZones released.
- P-0975 explains that NGAISSONA convened meetings that ComZones, Battalion Chiefs, and Section Chiefs attended. P-0975 states that [REDACTED], P-0975 had no contact with NGAISSONA or MOKOM, was not involved in Anti-Balaka operations, but remained in the movement as the Anti-Balaka [REDACTED].
- P-0975 declares that KONATE betrayed the movement by providing information to SAMBA-PANZA, that ANDJILO remained ComZone for OMBELLA M'POKO prefecture until his arrest, and that YADOUNGOU [REDACTED].

E. Balance of interests

25. Granting the Request advances the interests of justice. *First*, by its terms, rule 68(2)(c) is an exception to the principle of orality and publicity.²¹ Its application “is *per*

²¹ ICC-01/05-01/08-1386, para. 78; ICC-01/14-01/18-685, para. 25 (referencing articles 64(7) and 67(1)).

se generally considered *compatible* with the rights of the accused”.²² It does not *per se* unfairly prejudice the Defence in permitting the submission of uncross-examined evidence, in particular for evidence *unrelated* to the acts and conduct of the Accused.²³ *Second*, if prior testimony goes to the acts and conduct of an accused, a Chamber may take into consideration, in particular, whether the evidence relates to issues that are not materially in dispute, is central to the allegations of the case or is purportedly corroborative.²⁴ *Third*, 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. 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, including when acts and conduct of the Accused may be concerned. In relation to corroborative evidence, the Prosecution notes that it is not necessary that “the accounts accord in every detail”, but that it is sufficient that the testimony is provided on similar facts.²⁵

26. P-0975’s evidence is relevant to the proper adjudication of salient issues in this case, in particular as regards the Anti-Balaka organizing, structuring and training in GOBERE. The submission of P-0975’s evidence does not cause any unfair prejudice to the Accused: P-0975’s testimony is not unique. The tendered evidence on the emergence and organisation of the Anti-Balaka in GOBERE, their participation in the coordinated 5 December 2013 BANGUI attack, and NGAISSONA’s leadership of the Anti-Balaka is cumulative to, and corroborated by, documentary evidence included in the Prosecution’s List of Evidence.²⁶ It is cumulative to and corroborated by, *inter*

²² ICC-01/14-01/18-685, para. 26.

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

²⁴ Rule 68(2)(c)(ii); ICC-01/05-01/13-1481, paras. 21-22.

²⁵ ICC-01/12-01/2114-Conf, para. 39.

²⁶ See for example CAR-OTP-2068-0123; CAR-OTP-2001-5365; CAR-OTP-2041-0783; CAR-OTP-2076-1083, from [00:25:00] to [00:25:19] and its transcript CAR-OTP-2087-8960, at 8974, l.481-489; CAR-OTP-2076-1082, from [00:20:18] to [00:22:11] and its transcript CAR-OTP-2087-8944, at 8952-8953, l.300-341; CAR-OTP-2072-1814-R01, at 1818-1819, l.126-180; CAR-OTP-2042-2467, from [00:25:01] to [00:28:05] and its transcript CAR-OTP-2107-1489; CAR-OTP-2082-0646, from [00:06:30] to [00:07:05] and its transcript and translation CAR-OTP-2127-4519 and CAR-OTP-2127-4611; CAR-OTP-2023-2935, from [00:00:00] to [00:07:55] and its transcript CAR-OTP-2107-1521; CAR-OTP-2066-1601, at 1738.

alia, the evidence of a number of other witnesses, namely P-0446, P-0801, P-0808, P-0884, P-0888, P-0889, P-0966, P-1074, P-1521, P-1786, P-2012, P-2027, P-2232, P-2251, P-2556, P-2658, and P-2841. Except for one at this stage,²⁷ the above-mentioned witnesses have testified in the course of the trial, meaning that the Defence has had the opportunity to cross-examine them.

27. Further, the peripheral information regarding the intention of the Anti-Balaka leaders to reclaim power including NGAISSONA, does not amount to evidence sufficiently going to the Accused's acts or conduct.²⁸ The Prior Statement does not evidence the Accused's participation in, or sharing in the intent of the perpetrator or perpetrator group concerning the charged crimes. Rule 68(2)(c)(ii) is not a genuine consideration here.

28. Even if the Chamber were to consider the application of rule 68(2)(c)(ii), it bears noting that it would only be limited parts of the Prior Statement that relate – remotely and generally – to NGAISSONA's acts and conduct. This would have no preclusive effect on the submission of the Prior Statement. Rather, their probative value outweighs any potential unfair prejudice. Indeed, the fact that NGAISSONA was National General Coordinator for the Anti-Balaka is not materially in dispute. As for other allegations made by P-0975 in relation to NGAISSONA's conduct, although relevant, they are narrow in scope and, as mentioned above, merely corroborate other substantial evidence, *inter alia*, NGAISSONA's leadership of the Anti-Balaka. Thus, any potential prejudicial effect caused to the Accused in this respect is limited; furthermore, "the introduction of the Statement is evidently without prejudice to the

²⁷ P-1074.

²⁸ See ICC-01/04-02/06-1667-Red, para. 11 (citing ICC-02/04-01/15-596-Red, paras. 11-12); see also ICC-01/14-01/18-710-Conf, para. 9.

probative weight, if any, that the Chamber might attach to it later”,²⁹ as foreseen by the Chamber’s adoption of the submission regime.³⁰

29. Notably, the Court’s acknowledgement that a conviction may not rest to a ‘decisive extent’ on prior recorded testimony unexamined by an accused, serves as an additional safeguard against unfair prejudice.³¹ The Prior Statement should thus be recognised as formally submitted and the Chamber further consider to what extent a conviction on any of the charges supported by P-0975’s evidence is appropriate having regard to *all* relevant evidence at the end of the trial.

IV. CONCLUSION

30. For the foregoing reasons, the Prosecution requests the Chamber recognise as formally submitted the Prior Statement of P-0975 pursuant to rule 68(2)(c).



Karim A. A. Khan KC, Prosecutor

Dated this 10th day of October 2023
At The Hague, The Netherlands

²⁹ See ICC-01/05-01/13-1481-Red-Corr, para. 22.

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

³¹ See *e.g.*, ICC-01/04-02/06-2666-Red, para. 630 (noting, “prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such”); *see also* ICC-01/04-01/06-803-tEN, paras. 102-103, and ICC-01/04-01/07-717, paras. 118-119.