

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **13 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Public Redacted Version of 'Defence Response to the "Prosecution Request for the Formal Submission of the Prior Recorded Testimony of P-2602 pursuant to Rule 68(2)(c)" (ICC-01/14-01/18-1987), 17 July 2023'

Source: Defence of Patrice-Edouard Ngaißsona

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 the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamaï
Ms Marie-Hélène Proulx
Mr Alexandre Desevedavy
Ms Mélissa Beaulieu Lussier

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé

Legal Representatives of the Victims

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

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

The Office of Public Counsel for Victims

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

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 Other**

I. INTRODUCTION

1. The Defence for Mr Patrice-Edouard Ngaïssona ("Defence") hereby submits its response to the "Prosecution Request for the Formal Submission of the Prior Recorded Testimony of P-2602 pursuant to Rule 68(2)(c)", dated 4 July 2023 (the "Request").¹ The Defence avers that the Prosecution did not fulfil the requirements for Rule 68(2)(c) of the Rule of Procedure and Evidence (the "Rules").
2. The Prosecution failed to provide sufficient evidence that witness P-2602 is unavailable because he died or should be presumed dead. The reports provided by the bailiff following his missions to serve the summons to the witness contain contradictory and insufficient information to establish that P-2602's is unavailable to testify. The Defence disputes the fact that P-2602 is dead and since he has expressed his reluctance to testify and even expressly withdrew his cooperation with the Prosecution, P-2602 should not be considered 'unavailable' to testify for the purpose of Rule 68(2)(c) of the Rules.
3. The introduction of P-2602's prior recorded statement ("Prior Statement") via Rule 68(2)(c) would deprive Mr Ngaïssona of an opportunity to examine evidence relating to important issues in the case as well as issues on which the witness' evidence is uncorroborated. P-2602's Prior Statement discusses a wide array of matters and events which go beyond 'background' information, such as information on the alleged events taking place in GOBERE, from the perspective of a high-level element.
4. For these reasons, the formal submission of P-2602's Prior Statement under Rule 68(2)(c) would cause undue prejudice to the fair trial rights of

¹ ICC-01/14-01/18-1958-Conf. ("Prosecution's Request")

Mr Ngaïssona which would significantly outweighs the probative value of his prior recorded statement.

II. CONFIDENTIALITY

5. In accordance with regulation 23bis(1) of the Regulations of the Court, this response is filed confidentially as it responds to documents of the same classification. A public redacted version will be filed in due time.

III. APPLICABLE LAW

6. The Defence incorporates by reference the summary of the applicable law set out by the Chamber in the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules” (“First Decision on Rule 68(2)(c)”),² in paragraphs 17 to 39. The Defence nonetheless reiterates that the burden of proof falls on the Prosecution to establish every factual requirement of Rule 68(2) of the Rules and that the applying party must sufficiently establish their allegations, and provide adequate documentation to substantiate such allegations.³
7. The requirements pursuant to Rule 68(2)(c) of the Rules are to be assessed on a case-by-case basis and the impact of any request on the fairness of the proceedings more generally should be considered.⁴ Moreover, Article 69(2) and (4) of the Statute are relevant in this context. Therefore the relevance and probative value of the prior recorded testimonies *vis-à-vis* any prejudice that

² ICC-01/14-08-1975-Conf.

³ ICC-02/04-01/15-1288, para. 9.

⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo, Appeals Chamber*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 78; *The Prosecutor v. Bosco Ntaganda*, Decision on the Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, ICC-01/04-02/06-619, 2 June 2015, para. 36; *the Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Red, 19 August 2015, para. 150.

admission may cause to a fair trial or to a fair evaluation of the testimony of a witness should also be taken into consideration.⁵

IV. SUBMISSIONS

8. P-2602's unavailability to testify orally is not established to the requisite standard. The documents coming from the bailiff that are relied upon by the Prosecution – mission reports and *procès-verbal de carence* – do not establish the unavailability of witness P-2602. The Prosecution fails to substantiate (a) the basis for the argument that P-2602 was unavailable to testify due to obstacles that could not be overcome with reasonable diligence and (b) the fact that he is dead.⁶
9. The Defence recalls the Chamber's First Rule 68(2)(c) Decision's finding 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 [...]"⁷
10. As of April 2021, the witness had withdrawn his collaboration with the Prosecution.⁸ This clear position from the witness refusing to cooperate with the Prosecution should only be construed as the witness being unwilling to testify, and not as the witness being unavailable to testify due to obstacles that could not be overcome with reasonable diligence. The Prosecution mistakenly conflated those two concepts.

⁵ *The Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-1029, 20 November 2015, para. 14.

⁶ Prosecution's Request, para. 9.

⁷ ICC-01/14-08-1975-Conf, para. 27, citing to ICC-01/12-01/18-2445-Red, para. 23; see also ICC-01/12-01/18-2124, para. 12 and See Decision on the introduction into evidence of P-0130's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, 21 February 2022, ICC-01/12-01/18-2124-Conf, para. 12.

⁸ Prosecution's request, para. 10.

11. Indeed, when the Prosecution sought the Chamber's assistance in summoning the witness, the Prosecution itself argued that P-2602 was already "deliberately avoiding further contact" with the Prosecution.⁹ The Prosecution should not be allowed to take advantage of allegations on the witness's (un)fortunate passing to now argue the witness's unavailability. One's unwillingness to cooperate with the Prosecution when alive should not turn into one's unavailability to cooperate due their alleged subsequent death, in particular when this death is not clearly established. On this sole basis, the Prosecution request should be rejected, as this is not the standard to fulfil Rule 68(2)(c) of the Rules or rely on it in the first place.
12. Subsidiarily, and in any event, the Prosecution fails to satisfactorily establish that the witness is dead or presumed dead. To the contrary, the Defence contends that there are reasons to believe that the witness is not deceased and is simply leading people to believe that he died to avoid having to testify for the Prosecution.
13. Indeed, the summons was issued on 31 January 2023 by the Chamber.¹⁰ The bailiff in charge of serving the summons to witness P-2602 did a first mission in March to locate the witness. The bailiff located the '*concubine*' of P-2602 with [REDACTED], and she gave the bailiff P-2602's phone contact. The bailiff then attempted to phone the witness. According to the report, the first time the phone rang but no one picked up, and then "*curieusement*", the phone seemed to have been turned off the second time he tried to call.¹¹ The report does not mention if the [REDACTED] provided information about the situation of the witness, notably if he [REDACTED].

⁹ ICC-01/14-01/18-1690-Conf-Exp, para. 18.

¹⁰ ICC-01/14-01/18-1738-Conf.

¹¹ *Rapport de Mission*, dated 20 April 2023, attached to the e-mail from the Registry sent on 28 June 2023 at 16:35.

14. In the second mission report, following the mission that took place at the end of April (25 to 28 April), the bailiff met with [REDACTED], who confirmed that P-2602 had died, shortly after [REDACTED]. The bailiff called P-2602's wife who confirmed that he had passed away, however, the second time he tried to contact her, the line was turned off. The [REDACTED], allegedly confirmed that he received similar information from the wife. Whether the 'concubine' and the wife of the witness are the same person is unclear, as the Prosecution did not take further steps to obtain additional information about those individuals who provided information on the witness's situation.
15. The Defence notes with concern that, all the while being in possession of this limited information around P-2602's alleged death, no further steps were taken either by the bailiff or the Prosecution, even though the investigation could not be further carried out "sérieusement", as the bailiff himself stated in his report.¹² The Prosecution did not take any measures to secure a sworn statement from the [REDACTED] and/or the [REDACTED]. The Prosecution cannot establish the unavailability of a witness without even providing a statement from someone who knew the witness, or witnessed P-2602's death or burial, or a death certificate.¹³
16. Indeed, there has been no attempt from the Prosecution to verify the fact of death beyond a request to obtain the report from the bailiff. Moreover, the Prosecution has not produced a sworn statement from someone who may have direct knowledge of the witness's death. Therefore, the Prosecution cannot argue that P-2602 has become unavailable due to his unforeseen alleged death when efforts can still be made to either confirm his alleged death or locate him.

¹² *Rapport de Mission de Bossangoa*, dated 30 April 2023, attached to the e-mail from the Registry sent on 28 June 2023 at 16:35.

¹³ ICC-01/04-02/06-1029; ICC-01/04-02/06-1205.

17. What is more, the Defence has come across information pointing in the direction of the witness still being alive. In the event the Defence is to secure a statement to this effect, it will be shared as soon as practicable with the Chamber, parties and participants.
18. Given the above, not only doubts around P-2602's alleged death still remain but the likelihood that he is simply unwilling to further cooperate with the Prosecution still stands. As such, the Request should be rejected.

A. The admission of P-2602's Prior Statement is unduly prejudicial to Mr Ngaïssona's fair trial rights in light of P-2602's proposed evidence

i. P-2602's Prior Statement touches upon core issues in dispute

19. Many of the issues discussed by this witness are core issues in this case and are materially in dispute, especially the issues relating to (i) the alleged organisation and structure of the Anti-Balaka in GOBERE and (ii) the alleged BOSSANGO attack and its planning by the GOBERE Group. The former is directly linked to Mr Ngaïssona's alleged contributions to the Charged Crimes by allegedly "provid[ing] money, food, weapons, and/or ammunitions to the elements located [in GOBERE]".¹⁴ The latter is linked to twelve different counts, i.e., counts 30 to 35 and 37 to 42, all of which are brought against Mr Ngaïssona.
20. The Defence submits that the subject matters covered by P-2602, especially in relation to the alleged GOBERE Group and the alleged gathering of Anti-Balaka leaders, the alleged military-like training, organisation and planning of alleged attacks in the northern OUHAM region from GOBERE, are crucial and unique, such that introducing P-2602's Prior Statement pursuant to Rule 68(2)(c) would be unduly prejudicial to Mr Ngaïssona's fair trial rights.

¹⁴ ICC-01/14-01/18-723-Conf, para. 227. *See also*, ICC-01/14-01/18-723-Conf, paras. 393, 418, and 431.

ii. P-2602's Prior Statement is unique

21. P-2602's proposed evidence on the origins of the Anti-Balaka as the [REDACTED] is unique and not corroborated by other Prosecution witnesses that have provided testimonial evidence particularly testimony elicited under Defence examination. Indeed, no other witnesses have testified to the "GOBERE group" allegedly originating in BANGUI.

22. Despite the apparent centrality of GOBERE to the Prosecution's case, only a few witnesses who were or alleged to have been in GOBERE have appeared before the Chamber. Of twelve (12) witnesses who were or allege to have been there, the statements of five (5) were withdrawn by the Prosecution during the course of the trial,¹⁵ and the statements of two (2) are being tendered through Prosecution's requests pursuant to Rule 68(2)(c).¹⁶ The remaining witnesses include:

- P-2251,a [REDACTED] who had limited knowledge about any alleged organisation of the group;¹⁷
- P-2658,a [REDACTED]and therefore has a similarly limited knowledge;¹⁸ and
- P-0306, a witness who had difficulties admitting that he was ever in GOBERE in the first place and provided vague testimony in this regard;¹⁹

23. The witnesses for whom the Prosecution filed requests pursuant to Rule 68(2)(c) are:

¹⁵ P-1048, P-0458, P-1337, P-1951, P-0958.

¹⁶ P-2269: ICC-01/14-01/18-1834-Conf; P-0975 : ICC-01/14-01/18-1965-Conf.

¹⁷ P-2251: ICC-01/14-01/18-T-043-CONF-ENG CT, p. 14[REDACTED]; ICC-01/14-01/18-T-043-CONF-ENG CT, p. 18 [REDACTED].

¹⁸ P-2658: ICC-01/14-01/18-T-135-CONF-ENG ET, e.g., pp. 43-44 (where the witness says not to have heard the content of alleged gatherings in GOBERE as he was standing at a distance. A similar remark is made with respect to alleged training that would have taken place there).

¹⁹ P-0306: ICC-01/14-01/18-T-067-CONF-ENG CT, pp. 55-56.

- P-2269, whose presence in [REDACTED] is largely disputed by the Defence;²⁰ and
- P-0975, who does not provide in-depth information but rather limited evidence on [REDACTED] and, as will be detailed below, [REDACTED].

24. Against this backdrop, it is evident that P-2602, an [REDACTED] who [REDACTED] group is unique. The nature of P-2602's evidence was put forward by the Prosecution itself in its "Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon [the] witness", arguing that P-2602's "evidence is material and unique".²¹ Rule 68(2)(c) evidence can be corroborated with evidence that is not exactly identical, but it has to be on similar facts,²² which is not the case here. Solely on this basis, granting the Prosecution Request would be inconsistent with the rights of the Accused and significantly outweigh the interest of justice.

iii. P-2602's Prior Statement is uncorroborated in many aspects and contains internal inconsistencies

25. Contrary to the Prosecution's assertion, P-2602's proposed evidence is not corroborated by the testimonies of witnesses who heard about the GOBERE group or allege to have been part of the "GOBERE group" on several points.

26. *First*, on leadership of the GOBERE Group, the corroborative nature of P-2602's evidence as presented in the Request does not meet the threshold of corroboration under Rule 68(2)(c). P-0884, P-0889, P-2232, and P-1521 never set foot in GOBERE and relayed only hearsay information on GOBERE. While P-2602 mentioned that there were initially acting as chiefs in GOBERE and they

²⁰ See Defence Response to the "Prosecution Request for the Submission of the Prior Recorded Testimony of P-2269 pursuant to Rule 68(2)(c)", filed 17 July 2023.

²¹ ICC-01/14-01/18-1690-Conf-Red2, para. 20.

²² *The Prosecutor v. Bosco Ntaganda*, Judgement on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 entitled 'Judgement', ICC-01/04-02/06-2666-Red, 30 March 2021, para. 672.

were later joined by other [REDACTED],²³ P-0975 mentioned that there were only four (4) or five (5) of them.²⁴

27. *Second*, P-2602's proposed evidence on the structure of the "GOBERE group", is not corroborated by other witnesses. If anything, other witnesses have provided contrasting evidence in this regard. While P-2602 stated that the GOBERE group was organised in [REDACTED], P-0966 stated that there were [REDACTED],²⁵ while P-2269 stated that the group was [REDACTED].²⁶ The Prosecution's suggestion that P-2602's prospective evidence on the structure and alleged leadership of the "GOBERE group" would be corroborated by witnesses such as P-1521 is simply misleading. P-1521 was never in GOBERE²⁷ and expressly stated that he was not aware of how the group was organised.²⁸ Similar evidence was presented by P-2027.²⁹

28. *Third*, with respect to the alleged involvement of the FACA and the training that would have been provided by them, P-2251, [REDACTED], does not corroborate P-2602 and claims [REDACTED].³⁰ P-2251 further stated that he did not see any automatic weapons there,³¹ a claim also made by P-0975,³² which contrasts with P-2602's evidence. In the same vein, P-1521 also informed the Chamber that, to his knowledge, [REDACTED]³³

29. *Fourth*, contrary to the Prosecution's assertion, P-2602's proposed evidence on "his communication with other Anti-Balaka leaders, especially with

²³ [REDACTED].

²⁴ CAR-OTP-2033-7885-R02, para. 29.

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ P-1521: ICC-01/14-01/18-T-081-CONF-ENG ET, p. 46 lines 4-5 ; P-2027: CAR-OTP-2078-0059-R03, paras 47-48.

²⁸ ICC-01/14-01/18-T-081-CONF-ENG ET, pp. 11-12 lines 21-1.

²⁹ CAR-OTP-2078-0059-R03, para. 102.

³⁰ [REDACTED].

ICC-01/14-01/18-T-043-CONF-ENG CT, p. 20 lines 9-16.

³² CAR-OTP-2033-7885, para. 28.

[REDACTED].

[REDACTED], is not corroborated. While P-0966 did state that P-2602 made phone calls, he was not present when said calls were made.³⁴ As to P-1521, he does not corroborate that P-2602 was in contact with [REDACTED], nor was he in a position to do so as [REDACTED]. Indeed, while he confirmed having heard that the two were in contact, he made it very clear that he [REDACTED].³⁵ P-1521's knowledge is therefore presumably limited to this timeframe. Lastly, P-2027 did not provide any evidence on P-2602's contact with other Anti-Balaka leaders. Similarly, P-2027 did not provide any specific evidence on MOKOM's involvement in the BOSSANGO attack, nor on P-2602's involvement therein for that matter.³⁶

30. *Finally*, there are inconsistencies within the witness' own narrative, forcing the interviewers to ask for clarification over different recordings of the witness' prior testimony. The most notable instance concerns the timeline of P-2602's [REDACTED], regarding which the transcripts of deposition are not intelligible as they stand. The witness said that [REDACTED].³⁷ In another recording, the witness says that "it could be 12 or 13 days before the 5th of December attack".³⁸ Nevertheless, P-2602 said in a different recording that he received a call from and that was [REDACTED].³⁹ This left the interpreter "a bit confused".⁴⁰ The witness then corrected himself and said that he [REDACTED] the first time he went [REDACTED].⁴¹ However, in a previous recording, P-2602 specifically said that the first time he allegedly [REDACTED].⁴²

³⁴ ICC-01/14-01/18-T-116-CONF-ENG ET, p. 44.

³⁵ [REDACTED].

³⁶ CAR-OTP-2078-0059-R03, para. 101 (P-2027 specifically said that P-2602 did not tell him about any clashes he might have had).

³⁷ [REDACTED].

³⁸ CAR-OTP-2118-9714, line 153.

³⁹ [REDACTED].

⁴⁰ CAR-OTP-2118-9737, line 343.

⁴¹ [REDACTED].

⁴² CAR-OTP-2118-9714, lines 163 – 177.

B. Granting the Prosecution request would be prejudicial to Mr Ngaïssona's right his fair trial rights

31. The Prosecution asserts that no prejudice could arise from the introduction of P-2602's Prior Statement under Rule 68(2)(c) as the Defence was able to challenge P-2602's evidence by putting questions to other witnesses who came to testify. First, and as mentioned above, no other witness was able to confirm or refute P-2602's proposed evidence, as the Prosecution has not called any other witness that was in a leadership position in GOBERE and was therefore privy to the same information. Second, the Defence could not have anticipated the Request for the introduction of P-2602's Prior Statement via Rule 68(2)(c) of the Rules in light of the Prosecution's previous submissions in its Request under Articles 64(6)(b) and 93 of the Rome Statute⁴³ as well as its Request for the Formal Submission of the Prior Recorded Testimony of P-2602 pursuant to Rule 68(3).⁴⁴ As such, the Defence was not in a position to mitigate the prejudice that arises from being unable to examine P-2602.
32. Therefore, the Defence was not in position to properly test the evidence that constitutes the core aspect of the Prosecution's narrative on the role played by the GOBERE Group in the attacks allegedly led in the Northern area of the OUHAM region, including BOSSANGO.
33. The fact that P-2602's unavailability has not been diligently established by the Prosecution coupled with the fact that P-2602's proposed evidence is materially in dispute, central to core issues in the case, and uncorroborated in several aspects, altogether weigh against the formal submission of the P-2602's Prior Statement. Recognising P-2602's Prior Statement as formally submitted would deprive Mr Ngaïssona, once again, of his rights to examine a witness

⁴³ ICC-01/14-01/18-1690-Conf-Red2.

⁴⁴ ICC-01/14-01/18-1834-Conf.

who proposes evidence on GOBERE that is crucial to the Prosecution's case in establishing Mr Ngaïssona's alleged direct contribution to the charged incidents in the Northern OUHAM region.

C. Conclusion

34. Considering the above, P-2602's unique prior recorded testimony should not be introduced into evidence because his alleged death is unsupported by sufficient evidence. In any event, on the sole basis of the Prosecution's failure to fulfil the requirement of Rule 68(2)(c) of the Rules of 'unavailability', the Request should be rejected. However, even in the event that the Prosecution would bring further information concerning the death of the witness, the highly prejudicial impact of the Request militates against the admission of P-2602's Prior Statement.

V. RELIEF SOUGHT

35. The Defence respectfully requests the Chamber to:

REJECT the Prosecution's Request to introduce the prior recorded statements and associated exhibits of P-2602 pursuant to Rule 68(2)(c).

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 13 October 2023

At The Hague, the Netherlands.