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**International
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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's Request for Submission of the Prior
Recorded Testimony of P-0975 pursuant to Rule 68(2)(c)'"
(ICC-01/14-01/18-1988-Conf), filed 17 July 2023**

Source: Defence of Patrice-Edouard Ngaïssona

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
Ms Despoina Eleftheriou

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé

Legal Representatives of the Victims

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

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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 Other
Section**

I. INTRODUCTION

1. The Defence hereby responds to the “Prosecution’s Request for Submission of the Prior Recorded Testimony of P-0975 pursuant to Rule 68(2)(c)” (“Request”).¹ As elaborated below, the Defence respectfully requests Trial Chamber V (‘Chamber’) to reject the Prosecution’s Request to introduce P-0975’s prior-recorded testimony pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (‘Rules’). Contemporaneous documentation regarding the Prosecution’s attempts to contact the witness are lacking in order to meet the standard under Rule 68(2)(c) of the Rules. The Request should be rejected without prejudice to the Prosecution to resubmit this request at a later stage, once the Prosecution will be in possession of updated documentation in relation to the unavailability of the witness.

II. CONFIDENTIALITY

2. In accordance with regulation 23 *bis* (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 as soon as practicable.

III. APPLICABLE LAW

3. Under Rule 68(2)(c) of the Rules, the Chamber may, after having heard the parties, allow the introduction of previously recorded testimony coming 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 orally, provided that: (i) the introduction is not prejudicial to or inconsistent with the rights of the accused;² (ii) the necessity of measures under Article 56 of the

¹ ICC-01/14-01/18-1965-Conf, together with Confidential Annex.

² Rule 68(1) of the Rules and article 69(2) of the Statute.

Rome Statute ('Statute') could not be anticipated; and (iii) the prior recorded testimony has sufficient indicia of reliability.

4. As far as unavailability is concerned, the Chamber in its recent 'First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules' echoed other trial chambers' approach, i.e. that the term must be interpreted broadly,³ encompassing, for example, situations where "a witness cannot be located after numerous attempts and efforts".⁴ However, cases where the Prosecution is "unable to locate the witness but further efforts to locate them can still be made", are excluded.⁵
5. The Chamber further reiterated that the introduction of a prior recorded testimony is not permitted if it is prejudicial to or inconsistent with the rights of the accused, as specified in Rule 68(1) of the Rules. Consequently, a number of factors are considered in this assessment, such as (i) whether the evidence relates to issues that are materially in dispute; (ii) whether the evidence provides background information or is central to core issues in the case; or (iii) whether the evidence is cumulative or corroborative of other evidence.⁶

³ See ICC-01/14-01/18-1975-Conf, para. 27 citing *The Prosecutor v. Jean-Pierre Bemba Gombo 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-Red-Corr, para.16; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of '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. 21 *et seq.*

⁴ ICC-01/14-01/18-1975-Conf, para. 27.

⁵ ICC-01/14-01/18-1975-Conf, para. 28.

⁶ ICC-01/14-01/18-1975-Conf, para. 36 citing *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of 'Decision on the introduction into evidence of P-0570's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules', 11 August 2021, ICC-01/12-01/18-1588-Red, para. 10 *with further references to the jurisprudence*; *The Prosecutor v. Mahamat Said Abdel Kani*, Public redacted version of 'Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses', 20 October 2022, ICC-01/14-01/21-506-Red, paras 22, 25, 39, 46; *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Public redacted version of '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-Red, paras 37, 39.

6. The above requirements 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.⁷ Moreover, Article 69(2) and (4) of the Statute are relevant in this context and therefore the relevance and probative value of the prior recorded testimonies *vis-à-vis* any prejudice that admission may cause to a fair trial or to a fair evaluation of the testimony of a witness should also be taken into consideration.⁸

IV. SUBMISSIONS

7. The Prosecution alleges that it has exercised reasonable diligence and has made repeated efforts to contact and locate P-0975, including through several call attempts to him and to [REDACTED], and by way of contacts with local officials, who have sought to gather and verify information in the field, in particular in the area of [REDACTED].⁹
8. The Defence submits that P-0975's unavailability is not sufficiently demonstrated, due to the lack of contemporaneous investigator reports or notes annexed to the Request. Paragraphs 8 to 16 of the Request simply list the Prosecution's attempts to contact P-0975 since 2021 without any reference to contemporaneous documentation attesting to them. For example, it appears that P-0975 has multiple phone numbers,¹⁰ which were used by other people as well, such as P-0975's [REDACTED], [REDACTED] and an unidentified

⁷ *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.

⁸ *The Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-1029, 20 November 2015, para. 14.

⁹ ICC-01/14-01/18-1965-Conf, paras 15-16.

¹⁰ See ICC-01/14-01/18-1965-Conf, para. 9 "The Prosecution next managed to get through to one of P-0975's phone numbers in April 2021" (emphasis added).

individual. The Prosecution should be in a position to inform the Chamber, the parties and participants how many phone numbers for P-0975 has in its possession and how many of these numbers the Prosecution tried to call.¹¹

9. Furthermore, there is no certainty as to the accuracy of the information provided to the Defence. *First*, the Prosecution mentions that in February 2021, the witness expressed concern regarding his availability to testify,¹² without providing more details. In April 2021, P-0975 said that he had undergone [REDACTED], whereas the next day, P-0975's [REDACTED], who picked up P-0975's phone, said that the witness had suffered [REDACTED] and the doctor would not allow the witness [REDACTED].¹³ To this day, it is unclear if the Prosecution has verified the veracity of this information which is material to assess the witness's unavailability. No medical report is available to the Defence.
10. *Second*, it appears that the Prosecution has not verified whether [REDACTED], who answered P-0975's phone twice, is indeed [REDACTED] and if he is in fact a reliable source of information about P-0975. This person has given information to the Prosecution about P-0975's health condition¹⁴ and his alleged whereabouts¹⁵, which the Prosecution accepts as truthful despite never verifying the identity of the source and, consequently, the accuracy of the information relayed.
11. *Third*, according to the Prosecution, "[s]everal 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

¹¹ Such information could be given with the necessary redactions applied.

¹² ICC-01/14-01/18-1965-Conf, para. 9.

¹³ ICC-01/14-01/18-1965-Conf, para. 9.

¹⁴ ICC-01/14-01/18-1965-Conf, para. 9.

¹⁵ ICC-01/14-01/18-1965-Conf, para. 10.

using the number for the past year”.¹⁶ It is unclear who the unidentified person claiming to be using the number for the past year is and whether his statement is truthful. Again, the Prosecution is submitting unverified information, expecting the Chamber and the Defence to accept it at face value, without any details.

12. *Fourth*, in addition to the failed phone calls, there is no indication that the Prosecution has tried to reach the witness physically, for example, by sending an investigator to his last known place of residence. It appears that, by contacting the local authorities in [REDACTED] and [REDACTED] of [REDACTED], the Prosecution was more interested to corroborate what P-0975’s brother told them, i.e. that after [REDACTED], the witness went to [REDACTED] to receive [REDACTED], than to actually locate P-0975. After failing to verify the identity of the individual who received treatment in [REDACTED],¹⁷ the Prosecution simply concludes that “[i]t is thus highly likely that P-0975 returned to [REDACTED], and that he was the person who received treatment there over a year ago”.¹⁸ However, witness unavailability pursuant to Rule 68(2)(c) of the Rules cannot be established based on assumptions and hypotheses.

13. *Lastly*, the Prosecution submits that, [REDACTED] P-0975’s whereabouts are unascertainable,¹⁹ without providing any evidence of their further actions to try and locate P-0975, such as requesting the local authorities to locate other family members or closed associates of the witness who could have information on the matter.

¹⁶ ICC-01/14-01/18-1965-Conf, para. 11.

¹⁷ ICC-01/14-01/18-1965-Conf, para. 12: “[REDACTED] did not know this person’s name”.

¹⁸ ICC-01/14-01/18-1965-Conf, para. 13.

¹⁹ ICC-01/14-01/18-1965-Conf, para. 13.

14. On 6 July 2023, the Yekatom Defence requested the abovementioned information from the Prosecution.²⁰ The Prosecution responded on 13 July 2023 and provided an investigation report titled “Additional Information on P-0975”, dated 12 July 2023.²¹ A *post facto* document created in response to a request sent by the Yekatom Defence and which summarizes the steps taken by the Prosecution to contact the witness is not sufficient to show unavailability pursuant to Rule 68(2)(c) of the Rules. The Defence does not have the underlying material which led the Prosecution to conclude that the witness is unavailable and, based on that, create this document. Moreover, the Prosecution has not amended its original Request to include the missing information. Should the Prosecution do so, the Defence reserves its right to respond to the Prosecution’s amended request containing this investigation report disclosed *inter partes*.

15. The missing information as well as the production of a *post facto* investigation report raise questions about the Prosecution’s diligence in establishing P-0975’s unavailability. These questions might have been answered had the Prosecution provided the contemporaneous investigator notes or reports relating to its attempts to contact the witness rather an investigation report created *post facto*, which summarizes the steps taken. The Prosecution has not demonstrated that the witness is unavailable pursuant to Rule 68(2)(c) of the Rules, while further efforts and verifications should be made to locate the witness in order to secure his testimony. The Defence therefore requests the Chamber to reject the Request without prejudice to resubmit it at a later stage, once the missing contemporaneous documentation becomes available.

²⁰ Email from the Yekatom Defence to the Prosecution on 6 July 2023 at 16:58.

²¹ CAR-OTP-00001687. The document is yet to be formally disclosed to the parties and participants.

V. RELIEF SOUGHT

16. The Defence respectfully requests the Chamber to **REJECT** the Prosecution's Request to introduce P-0975's prior-recorded testimony pursuant to Rule 68(2)(c) of the Rules without prejudice to resubmit it at a later stage, once the missing contemporaneous documentation becomes available.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 13 October 2023

At The Hague, the Netherlands.