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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-Ho Chung
Judge Beti Hohler, Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
THE PROSECUTOR *v.* ALFRED YEKATOM AND PATRICE-ÉDOUARD
NGAISSONA**

Public Document

Public Redacted Version of the “Response by the Common Legal Representatives of the Victims of Other Crimes to the “Ngaïssona Defence request to exclude evidence or, alternatively, to recall Prosecution witness P-2657” (ICC-01/14-01/18-2300-Conf)” (No. ICC-01/14-01/18-2327-Conf, dated 25 January 2024)

Source: Common Legal Representatives of Victims of Other Crimes

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 Patrice-Édouard Ngaïssona

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

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Legal Representatives of the Victims

Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie Édith 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**

Ms Paolina Massidda
Mr Enrique Carnero Rojo

**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

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representatives of the Victims of Other Crimes (the “CLR”) hereby respond to the “Ngaïssona Defence request to exclude evidence or, alternatively, to recall Prosecution witness P-2657” (the “Request”, “Request to Exclude” and “Request to Recall”).¹ The Request should be rejected as unnecessary, unjustified, and disproportionate.

2. The CLR submit that the exclusion of evidence related to the rape of [REDACTED] P-2657 [REDACTED] (the “Impugned Evidence”) is not necessary to ensure the fairness of the trial. The information disclosed to the Ngaïssona Defence (the “Defence”) on [REDACTED] regarding the death of [REDACTED] on [REDACTED] September 2013 (the “New Information”) is not exculpatory and not even related to P-2657’s rape on 5 December 2013.

3. Even assuming *arguendo* that the New Information is exculpatory, there are remedies alternative to the exclusion of the Impugned Evidence that will ensure the fairness of the trial. The Defence may obtain from other sources information related or identical to the New Information and put it on the record of the case. As a last resort, the Chamber may call the source of the New Information to testify.

4. Moreover, the CLR submit that recalling [REDACTED] P-2657 [REDACTED] is not justified to ensure the fairness of the trial. The Defence could have obtained the New Information through the exercise of reasonable diligence before P-2657’s testimony and may still do so before the completion of the trial. Finally, recalling P-2657 for further examination by the Defence is not a proportionate measure

¹ See the “Ngaïssona Defence request to exclude evidence or, alternatively, to recall Prosecution witness P-2657”, No. [ICC-01/14-01/18-2300-Conf](#), 15 January 2024 (the “Request”, “Request to Exclude” and “Request to Recall”).

considering the need to protect P-2657's well-being and to ensure the expeditiousness of the proceedings.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially following the classification chosen by the Defence. A public redacted version will be filed in due course.

III. PROCEDURAL BACKGROUND

6. On 18 August 2019, the Prosecution filed the document containing the charges (the "DCC").²

7. On 11 December 2019, Pre-Trial Chamber II issued the decision on the confirmation of charges (the "Confirmation of Charges Decision").³

8. On 12 March 2020, the Prosecution disclosed to the Defence the witness statement of P-2657 ("P-2657's Statement").⁴

9. On 31 August 2020, the Prosecution filed a brief summary of P-2657's anticipated testimony.⁵

² See the "Prosecution's Notification of Filing of the Document Containing the Charges and List of Evidence", No. [ICC-01/14-01/18-282-Conf-AnxB1](#), 19 August 2019 (the "DCC").

³ See the "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona" (Pre-Trial Chamber II), No. ICC-01/14-01/18-403-Conf, 11 December 2019. On 14 May 2020, a corrected version of this decision was issued, No. [ICC-01/14-01/18-403-Conf-Corr](#) (the "Confirmation of Charges Decision").

⁴ See Witness Statement, [CAR-OTP-2126-0058-R01](#), 14 February 2020 ("P-2657's Statement").

⁵ See the "Notification of the Provisional List of Prosecution Witnesses with a Summary of their Anticipated Testimony", No. [ICC-01/14-01/18-642-Conf-AnxA](#), 31 August 2020, p. 18.

10. On 9 November 2020, the Prosecution filed its Trial Brief (the “Brief”).⁶
11. On 3 and 4 March 2022, P-2657 testified before the Chamber (“P-2657’s Testimony”).⁷
12. On [REDACTED], the Prosecution disclosed to the Defence a witness statement dated [REDACTED] which mentioned *inter alia* [REDACTED] the corpse of [REDACTED] from OUHAM BAC on [REDACTED] September 2013 (the “New Information”).⁸
13. On 15 January 2024, the Defence filed the Request.
14. On 24 January 2024, the Prosecution filed its response to the Request.⁹

IV. SUBMISSIONS

15. As a preliminary matter, the CLRV contest the Defence’s assertion that “P-2657’s alleged rape is not charged in the present case”.¹⁰
16. P-2657’s rape was contained in the DCC. On the basis of P-2462’s statement,¹¹ it was alleged that “a second victim raped by Anti-Balaka elements during the 5 December 2013 attack on BOSSANGO also reported the crime”.¹² In the Confirmation of Charges Decision, this allegation was found to be “not established to

⁶ See the “Prosecution’s Trial Brief”, No. [ICC-01/14-01/18-723-Conf](#), 9 November 2020 (the “Brief”).

⁷ See the transcripts of the hearings held on 3 and 4 March 2022, Nos. [ICC-01/14-01/18-T-104-CONF-ENG CT](#) and [ICC-01/14-01/18-T-105-CONF-ENG CT2](#) (“P-2657’s Testimony”).

⁸ See Witness Statement, [CAR-OTP-00001982-000001](#), 12 October 2023, at 000005-6, para. 34 (the “New Information”).

⁹ See the “Prosecution’s Response to the Ngaïssona Defence Request to exclude evidence or, alternatively, to recall Prosecution witness P-2657 (ICC-01/14-01/18-2300-Conf)”, No. [ICC-01/14-01/18-2325-Conf](#), 24 January 2024.

¹⁰ Cf. the Request, *supra* note 1, para. 11.

¹¹ See Witness Statement, [CAR-OTP-2111-0452-R01](#), 10 June 2019, at 0463, para. 53.

¹² See the DCC, *supra* note 2, para. 386.

the relevant standard” as rape (counts 40-41),¹³ but it was included in the decision as one of the acts of persecution confirmed against Mr Ngaïssona (count 42).¹⁴ Consequently, the Prosecution listed P-2657’s rape on 5 December 2013 [REDACTED],¹⁵ and called to testify P-2462,¹⁶ [REDACTED] P-2049 [REDACTED],¹⁷ P-2657,¹⁸ and P-2453¹⁹ in relation to this allegation.

1. Excluding evidence related to P-2657’s rape is unnecessary

17. The Defence contends that the Request to Exclude portions of evidence related to P-2657’s rape, namely the relevant parts of the testimony given by this witness and the mentions of her rape made by [REDACTED] P-2049 [REDACTED], P-2462 and P-2453 (the “Impugned Evidence”),²⁰ is “essential to preserve the fairness of the proceedings” because “new information has been uncovered, which casts serious doubts as to the veracity of claims put forward by several Bossangoa witnesses who testified during the Prosecution case”.²¹ The CLRV submit that the exclusion of the Impugned Evidence is unnecessary to ensure a fair trial.

18. *First*, assuming *arguendo* that “P-2657’s alleged rape is not charged in the present case”,²² the Request to Exclude is moot. In other words, the New Information (the death of [REDACTED] from OHUAM BAC by [REDACTED] September 2013)²³

¹³ See the Confirmation of Charges Decision, *supra* note 3, paras. 107, 110; pp. 109, 111.

¹⁴ *Ibid.*, paras. 105-109; p. 111.

¹⁵ [REDACTED].

¹⁶ See the transcript of the hearing held on 30 August 2021, No. [ICC-01/14-01/18-T-059-CONF-ENG ET](#), p. 30 (private session).

¹⁷ See the transcript of the hearing held on 25 February 2022, No. [ICC-01/14-01/18-T-100-CONF-ENG CT](#), p. 73 (private session).

¹⁸ See the transcript of the hearing held on 3 March 2022, No. [ICC-01/14-01/18-T-104-CONF-ENG CT](#), pp. 19-20 (private session).

¹⁹ See the transcript of the hearing held on 24 June 2022, No. [ICC-01/14-01/18-T-138-CONF-ENG CT](#), pp. 44-45 (open session); and Witness Statement, [CAR-OTP-2111-0415-R02](#), 7 June 2019, at 0430, paras. 70-71.

²⁰ See the Request, *supra* note 1, paras. 12, 22 and Annex 1.

²¹ *Ibid.*, paras. 1-2.

²² *Ibid.*, para. 11.

²³ See the New Information, *supra* note 8.

would be inconsequential as it would be related to a crime not alleged in this case (P-2657's rape on 5 December 2013).²⁴

19. *Second*, even if P-2657's rape is charged in this case – as indeed it is,²⁵ the Request to Exclude remains unnecessary because the New Information is not “exculpatory”. Contrary to the Defence's contention, this information neither “clearly and directly contradicts the evidence given by P-2657”²⁶ nor “makes the commission of the crime impossible”.²⁷ Moreover, if “the death of [REDACTED] on [REDACTED] September 2013” had been put on the record in its examination of P-2657, it would not have raised a “reasonable doubt [...] as to the veracity of the rape allegations” or “affected the credibility of the witness [P-2657]”.²⁸

20. The Defence's submissions regarding the relevance and impact of the New Information are speculative and misplaced. The mere coincidence of a first name ([REDACTED]) and a place (“OUHAM BAC”) in both P-2657's Testimony²⁹ and the New Information³⁰ cannot *per se* bring into question P-2657's evidence on the person who raped her on 5 December 2013. Considering the countless persons with the same first name in CAR and the thousands of people born and/or living in OUHAM BAC, the crime suffered by P-2657 may well have been committed by a person different from the one referred to in the New Information.

21. *Third*, assuming *arguendo* that the New Information is exculpatory, the Request to Exclude is misplaced because exclusion is not “the only avenue[s] available to avoid

²⁴ See the Request, *supra* note 1, para. 11.

²⁵ See *supra* para. 16.

²⁶ Cf. the Request, *supra* note 1, para. 12.

²⁷ Cf. *ibid.*, para. 27.

²⁸ Cf. *ibid.*, paras. 13, 22.

²⁹ See the transcript of the hearing held on 3 March 2022, No. [ICC-01/14-01/18-T-104-CONF-ENG CT](#), p. 20, lines 13 and 17-18 (private session).

³⁰ See the New Information, *supra* note 8.

an injustice”,³¹ there are “other avenues available to test P-2657’s evidence”,³² and it has not been established that “the Defence is unable to submit New Information on the record”.³³ The CLRV submit that there are remedies alternative to the exclusion of the Impugned Evidence that will ensure a fair trial, such as introducing the New Information in the record of the case via a different legal avenue.³⁴

22. Contrary to the Defence’s contention,³⁵ the Defence may seek the New Information from another source and bring it to the Chamber’s attention either during the examination of upcoming witnesses or by means of future filings. In this regard, when ruling on requests for the inclusion of evidence obtained after the prescribed time limit to file evidence, the Chamber has clarified that

*“[c]ertain relevant materials may be received only after the time limit for the provision of the Prosecution’s list of evidence expires, or the relevance of certain others may only become apparent with the development of the trial proceedings which are necessarily dynamic in nature”.*³⁶

23. Moreover, the Chamber has found that

*“it would be unreasonable for the Chamber, to which a truth-seeking function is assigned by the Statute, to determine that potentially relevant evidence could not, under any circumstance, be used by the Prosecution at trial if not itemised in the list of evidence [...] before the trial commences”.*³⁷

³¹ Cf. the Request, *supra* note 1, para. 18.

³² Cf. *ibid.*, para. 28.

³³ Cf. *ibid.*, para. 22.

³⁴ Cf. *ibid.*, para. 12.

³⁵ Cf. *ibid.*, para. 21.

³⁶ See the “Decision on the Prosecution Request to Add Six Email Threads to its List of Evidence” (Trial Chamber V), No. [ICC-01/14-01/18-989-Red](#), 6 May 2021, para. 6. See also the jurisprudence referenced therein.

³⁷ *Idem.*

The Chamber has extended this approach to the Defence.³⁸

24. Therefore, despite [REDACTED],³⁹ the CLRV submit that it is not “too late”⁴⁰ for the Defence to secure the same information from another source. The Defence’s consideration that doing so “would be too resource-intensive”⁴¹ cannot be the sole basis for an extraordinary remedy such as the exclusion of the Impugned Evidence.

25. Lastly, the Request hinges on the power of the Chamber to exclude evidence under article 64(2) of the Rome Statute (the “Statute”) to ensure the fairness of the proceedings.⁴² For this purpose, the Defence solely relies on a finding in the *Ruto & Sang* case, whereby article 64(2) was interpreted to grant the Chamber the “power to exclude evidence, which may include for reasons for fairness, expeditiousness and public policy”.⁴³ The CLRV submit that the Defence misunderstands and improperly extends the scope of this finding.

26. The *Ruto & Sang* decision relied upon by the Defence was issued to determine the *prima facie admissibility* of evidence submitted through a bar table motion.⁴⁴ By contrast, the Request to Exclude argues in essence that the Impugned Evidence might be untruthful or unreliable when considered in light of the New Information. This type of analysis goes beyond the Chamber’s discretionary power to determine the admissibility of the evidence or, under the “Submission Approach”, the “standard evidentiary criteria (namely the relevance, probative value and potential prejudice)”.⁴⁵

³⁸ See the “Decision on the Ngaïssona Defence Request for Leave to Add Fourteen Items to its List of Evidence” (Trial Chamber V), No. [ICC-01/14-01/18-2292](#), 11 January 2024, para. 6; and the “Decision on the Yekatom Defence First Request for Leave to Add an Item to its List of Evidence” (Trial Chamber V), No. [ICC-01/14-01/18-2241](#), 5 December 2023, para. 4.

³⁹ See the Request, *supra* note 1, para. 19.

⁴⁰ *Ibid.*, para. 21.

⁴¹ *Idem.*

⁴² See the Request, *supra* note 1, para. 25.

⁴³ *Ibid.*, para. 23, quoting the “Decision on the Prosecution’s Request for Admission of Documentary Evidence” (Trial Chamber V(a)), No. [ICC-01/09-01/11-1353](#), 10 June 2014, para. 16.

⁴⁴ *Ibid.*, para. 15.

⁴⁵ See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber V), No. [ICC-01/14-01/18-631](#), 26 August 2020, paras. 53-55, 57.

27. In any event, as argued below in response to the Request to Recall,⁴⁶ the Defence was in a position to fully test and seek clarifications from P-2657 on the matter it now alleges it was not able to adequately prepare for or fully explore in court after the Chamber accepted and/or recognised the formal submission of the Impugned Evidence.

28. In these circumstances, the CLRV submit that the Chamber's power "to assess freely all evidence submitted" pursuant to article 64(9) of the Statute and rule 63(2) of the Rules of Procedure and Evidence (the "Rules") provides sufficient remedy for the prejudice allegedly caused by the New Information.⁴⁷ During the trial, the Chamber has expressly and repeatedly given assurances that it will duly consider all of the evidence before it (including the Impugned Evidence and the upcoming evidence to be presented by the Defence) holistically and in its proper context.⁴⁸

29. Indeed, the Chamber is "*able to weigh evidence and consider it in its proper context, or when applicable, to disregard any particular piece of evidence they have heard or read*".⁴⁹ Accordingly, even if the Chamber finds it unnecessary to use its powers under articles 64(6)(d) and 69(3) of the Statute to call the source of the New Information to testify in relation to the death of [REDACTED],⁵⁰ the Chamber might still consider the Defence's

⁴⁶ See *infra* paras. 34-36.

⁴⁷ For the same view, see *mutatis mutandis* the "Decision on Defence application to exclude the evidence of or recall P-0547" (Trial Chamber X), No. [ICC-01/12-01/18-2344-Red](#), 21 September 2022, paras. 23, 29.

⁴⁸ See e.g. the transcripts of the hearings held on 25 March 2021, No. [ICC-01/14-01/18-T-021-Red2-ENG CT](#), p. 41, lines 5-7; 30 March 2021, No. [ICC-01/14-01/18-T-028-Red2-ENG CT2](#), p. 8, lines 21-24; 19 July 2022, No. [ICC-01/14-01/18-T-146-Red2-ENG CT2](#), p. 37, lines 17-22; and 23 January 2023, No. [ICC-01/14-01/18-T-192-ENG CT](#), p. 40, lines 5-12.

⁴⁹ See e.g. ICTY, *Prosecutor v. Popović et al.*, "[Decision on Joint Defence Interlocutory Appeal concerning the Status of Richard Butler as an Expert Witness](#)" (Appeals Chamber), No. IT-05-88-AR73.2, 30 January 2008, para. 31 (internal citations omitted).

⁵⁰ Cf. the "Order regarding the Remainder of the Prosecution's Presentation of Evidence and Order pursuant to Article 64(6)(d) of the Statute" (Trial Chamber V), No. [ICC-01/14-01/18-1739-Red](#), 31 January 2023, paras. 9-11.

alleged impossibility to contact this source of information when deliberating its judgment pursuant to article 74(2) of the Statute.⁵¹

2. Recalling P-2657 for further examination is unjustified and disproportionate

30. In the alternative, the Defence advances its Request to Recall P-2657 on her accounts of her rape arguing that it “was deprived of the right to examine P-2657 on a fundamental aspect of her evidence because of the Prosecution’s failure under Article 54(1) of the Statute”;⁵² that recalling P-2657 is “the only manner in which the Defence can put the New Information on the record of the case”;⁵³ and that “good cause” and “the most compelling circumstances” exist for doing so.⁵⁴ The CLRV submit that recalling P-2657 is neither required nor proportionate to ensure a fair trial.

31. *First*, the Defence does not show how the Prosecution failed to investigate incriminating and exonerating circumstances equally in relation to P-2657⁵⁵ or how the disclosure of the New Information was untimely.⁵⁶

32. In the Request, the Defence quotes the Prosecution’s response [REDACTED]. On [REDACTED], the Prosecution indicated that [REDACTED]”, and that the source of the New Information, [REDACTED],⁵⁷ [REDACTED].⁵⁸

33. The Prosecution’s response indicates that all material information regarding this matter had already been disclosed to the Defence or was otherwise in its

⁵¹ See the “Initial Directions on the Conduct of the Proceedings”, *supra* note 45, para. 53.

⁵² See the Request, *supra* note 1, para. 15.

⁵³ *Ibid.*, para. 26.

⁵⁴ *Ibid.*, paras. 27-28.

⁵⁵ *Cf. ibid.*, para. 24.

⁵⁶ *Cf. ibid.*, paras. 17, 29.

⁵⁷ See the New Information, *supra* note 8.

⁵⁸ See the Request, *supra* note 1, para. 7.

possession or control when P-2657 testified. Moreover, as recently stated by the Prosecution, it must be noted that [REDACTED].⁵⁹

34. *Second*, the Defence does not show “good cause” to recall P-2657. In assessing “good cause”, i.e. “a substantial reason amounting in law to a legal excuse for failing to perform a required act”,⁶⁰ the Chamber must consider both “the purpose for recalling the witness as well as the applicant’s justification for not eliciting the relevant evidence from the witness when he or she originally testified”.⁶¹ Moreover, a witness will not be recalled “simply because a party has obtained material after completion of the witness’s testimony that it could have obtained through the exercise of reasonable diligence before the testimony”.⁶²

35. In the case at hand, the Prosecution duly questioned P-2657 about the identity of the person who raped her on 5 December 2013, who P-2657 recognised as [REDACTED] and said lived in OUHAM BAC.⁶³ The Defence had thus a full opportunity to raise with P-2657 issues relevant to this evidence during her testimony,

⁵⁹ See the “Prosecution Response to the Yekatom Defence ‘Request for the Exclusion of Fabricated Evidence’ (ICC-01/14-01/18-2240-Conf)”, No. [ICC-01/14-01/18-2313-Conf](#), 19 January 2024, para. 11.

⁶⁰ See e.g. ICTR, *Prosecutor v. Kayishema and Ruzindana*, “[Decision on the Defence Motion for the Re-examination of Defence Witness DE](#)” (Trial Chamber II), No. ICTR-95-1-T, 19 August 1998, para. 14.

⁶¹ See the “Public redacted version of Decision on Defence request for recall of Witness P-0290” (Trial Chamber VI), No. [ICC-01/04-02/06-1791-Red](#), 17 February 2017, footnote 23; the “Second Redacted version of ‘Decision on ‘Prosecution’s Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169’ (ICC-01/05-01/08-3138-Conf-Red) and ‘Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/08-3139-Conf)’ of 2 October 2014” (Trial Chamber III), No. [ICC-01/05-01/08-3154-Red2](#), 11 December 2014, footnote 74; and the “Public redacted version of Decision on ‘Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’” (Trial Chamber III), No. [ICC-01/05-01/08-2924-Red](#), 11 December 2014, footnote 70. These three decisions refer to ICTY, *Prosecutor v. Ante Gotovina et al.*, “[Decision on prosecution motion to recall Marko Rajčić](#)” (Trial Chamber I), No. IT-06-90-T, 24 April 2009, para. 10; and ICTR, *Prosecutor v. Bagosora et al.*, “[Decision on the Defence Motion to Recall Prosecution Witness OAB for Cross-Examination](#)” (Trial Chamber I), No. ICTR-98-41-T, 19 September 2005, para. 2.

⁶² See the “Public redacted version of Decision on ‘Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, *supra* note 61, para. 35; and the “Redacted Version of Decision on the ‘Defence Motion for Disclosure Pursuant to Rule 77” (Trial Chamber III), No. [ICC-01/05-01/08-1594-Red](#), 29 July 2011, para. 25.

⁶³ See the transcript of the hearing held on 3 March 2022, No. [ICC-01/14-01/18-T-104-CONF-ENG CT](#), p. 20, lines 11-18.

such as the perpetrator's age, identification details and current whereabouts. However, the Defence [REDACTED].⁶⁴

36. In fact, the Defence had the relevant information to investigate the person who raped P-2657 at least since 12 March 2020,⁶⁵ and could thus have done so and fully examined the witness on whether the perpetrator was still alive at the time of questioning.⁶⁶ The Defence's choice to not do so and to limit the scope of its examination of P-2657 in March 2022 can thus not be excused by the disclosure of the New Information on [REDACTED].⁶⁷ Furthermore, given the fulsome evidence already in the record of the case in relation to P-2657, it is certainly unclear that this witness may provide further assistance on the details contained in the New Information.⁶⁸

37. *Third*, the Defence does not show either "the most compelling circumstances" to recall P-2657. The New Information does not even *prima facie* match the perpetrator referred to by P-2657 during her testimony and therefore cannot be probative.⁶⁹ Moreover, as argued above,⁷⁰ the Defence could have investigated the person who raped P-2657 two years before she testified.⁷¹ Recalling P-2657 to testify on the New Information is thus contrary to judicial economy.

38. *Fourth*, the Defence can put the New Information in the record of the case without P-2657 being recalled for further examination, as argued above.⁷² In other

⁶⁴ See the transcript of the hearing held on 4 March 2022, No. [ICC-01/14-01/18-T-105-CONF-ENG CT2](#), pp. 27-30.

⁶⁵ [REDACTED].

⁶⁶ Cf. the Request, *supra* note 1, paras. 16-17, 27-29.

⁶⁷ For a similar conclusion supporting the dismissal of a request to recall a witness, see the "Decision on Defence application to exclude the evidence of or recall P-0547", *supra* note 47, para. 37.

⁶⁸ *Ibid.*, paras. 35-36.

⁶⁹ See *supra* para. 20.

⁷⁰ See *supra* para. 36.

⁷¹ For a similar conclusion supporting the dismissal of a request to recall a witness, see the "Decision on Defence application to exclude the evidence of or recall P-0547", *supra* note 47, para. 37.

⁷² See *supra* paras. 21-24.

words, there is no prejudice to the Defence or violation of its rights because the Defence is in a position to challenge P-2657's evidence and address issues regarding her rape during its upcoming presentation of evidence.⁷³

39. As found in other cases, the absence of a thorough questioning (cross-examination) on a given issue (e.g. the identity of P-2657's perpetrator) is not a factor which justifies recalling a witness to check their credibility,⁷⁴ but just one of the many factors to be taken into account in the ultimate determination of the weight to be given to the witness at hand.⁷⁵ P-2657's credibility will thus be evaluated in conjunction with all the evidence in the case as a whole,⁷⁶ considering also the Defence arguments in this regard.⁷⁷ Moreover, the Chamber itself may eventually recall P-2657 at a later stage pursuant to its power to request the submission of any evidence that it considers necessary for the determination of the truth pursuant to articles 64(6)(d) and 69(3) of the Statute,⁷⁸ as done in other cases.⁷⁹

40. *Fifth*, the Request to Recall is not a proportionate measure for a fair trial either. Articles 64(2) and 68(1) of the Statute require balancing the rights of the accused with the protection of the psychological well-being and dignity of victims and witnesses. In this regard, the CLRV notes that P-2657 is a victim of sexual violence who has been granted protective measures to *inter alia* minimise re-traumatisation "due to the

⁷³ For the same approach, see the "Public redacted version of Decision on Defence request for recall of Witness P-0290", *supra* note 61, para. 12.

⁷⁴ For the same approach, see the "Public redacted version of 'Decision on 'Defence request for recall of Witness P-178'" (Trial Chamber III) No. [ICC-01/05-01/08-3186-Red](#), 11 December 2014, para. 21.

⁷⁵ For the same approach, see the "Public redacted version of Decision on Defence request for recall of Witness P-0290", *supra* note 61, para. 12.

⁷⁶ See the "Initial Directions on the Conduct of the Proceedings", *supra* note 45, para. 53.

⁷⁷ For the same approach, see the "Decision on Defence application to exclude the evidence of or recall P-0547", *supra* note 47, paras. 39-40.

⁷⁸ For the same conclusion see the "Public redacted version of Decision on Defence request for recall of Witness P-0290", *supra* note 61, para. 17.

⁷⁹ See the "Second Redacted version of 'Decision on 'Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169' (ICC-01/05-01/08-3138-Conf-Red) and 'Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/08-3139-Conf)' of 2 October 2014'", *supra* note 61, para. 30.

inherent nature of such crimes and the regrettable but persisting associated stigma”,⁸⁰ and because she “expressed fears that testifying without protective measures could cause stigmatisation and ostracism by [her] communit[y] as well rejection by potential partners”.⁸¹ P-2657 has expressed clear fears for herself and her family, and re-calling her would bring attention to her and her family.

41. Moreover, the Victims and Witness Unit recommended that, as a vulnerable witness, special measures under rule 88 of the Rules were adopted, including that “[REDACTED]”.⁸² In these circumstances, recalling P-2657 “to testify *de novo* on her accounts of her alleged rape”⁸³ will have a deleterious impact on her well-being and will certainly re-traumatise her because she will have to testify *again* about the sexual crime she suffered.

42. *Lastly*, recalling P-2657 would also be contrary to the expeditiousness of the proceedings, which, as held by the Appeals Chamber, is “more than just a component of the fair trial rights of the accused”⁸⁴ because it “assures [victims] of receiving justice and of going through the healing process quickly. For witnesses, it relieves them as soon as possible of the anxiety of having to appear in court to give evidence”.⁸⁵ Moreover, hearing P-2657 again in the present circumstances would extend the length of the remaining proceedings in a manner inconsistent with the Chamber’s obligations arising from regulation 43 of the Regulations of the Court to “make the questioning of

⁸⁰ See the “Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses” (Trial Chamber V), No. [ICC-01/14-01/18-906-Conf-Red](#), 9 March 2021, para. 57.

⁸¹ *Ibid.*, para. 59.

⁸² See the VWU email from 25 February 2022 at 11:41 (emphasis added).

⁸³ See the Request, *supra* note 1, para. 30 (emphasis added).

⁸⁴ See the “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’” (Appeals Chamber), No. [ICC-01/04-01/07-2259 OA10](#), 12 July 2010, para. 47.

⁸⁵ *Ibid.*, para. 46.

witnesses and the presentation of evidence fair and effective, avoid delays and ensure the effective use of time”.⁸⁶

V. CONCLUSION

43. For the foregoing reasons, the Common Legal Representatives of the Victims of Other Crimes respectfully request that the Request be rejected.



Paolina Massidda
For the team of
Common Legal Representatives
of the Victims of Other Crimes

Dated this 13th day of June 2024
At The Hague (The Netherlands)

⁸⁶ See the “Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042” (Trial Chamber IX), No. [ICC-02/04-01/15-1623](#), 1 October 2019, para. 13.