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**International
Criminal
Court**

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

Date: **2 September 2024**

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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

With Confidential Annex A, B and C

Public Redacted Version of the “Yekatom Defence Request for the introduction of CAR-D29-P-6035’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules”, 19 June 2024, ICC-01/14-01/18-2535-Conf

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. Counsel for Mr Alfred Rombhot Yekatom ("Defence") hereby requests the formal submission of the prior recorded testimony of D29-P-6035 pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence ("Rules").
2. The prior recorded testimony consists of the statement taken on 2 and 3 November 2023 during D29-P-6035's interview with the Defence.¹ The six exhibits discussed within the statement form an integral part of D29-P-6035's testimony and are therefore associated exhibits.²
3. The Defence attaches in support of this application a statement of D29-P-6041,³ the sister of P-6035, attesting to the death of the latter, his death certificate ("*acte de deces*")⁴, as well as an investigation report related to P-6035.⁵

PROCEDURAL HISTORY

4. On 17 November 2023, the Defence submitted its list of Witnesses and Evidence which included D29-P-6035.⁶
5. On 17 November 2023, the Defence submitted a request for the formal submission of Prior Recorded Testimony pursuant to Rule 68(2)(b) which included D29-P-6035's statement and associated exhibits ("First Request").⁷
6. On 7 December 2023, the Office of the Prosecution ("OTP") submitted its response to the First Request, in which it did not oppose the submission of D29-

¹ CAR-D29-0009-0444.

² CAR-D29-0009-0451, CAR-D29-0009-0452, CAR-D29-0009-0453, CAR D29-0009-0454, CAR-D29-0009-0455, CAR-D29-0009-0456. See also, ICC-01/14-01/18-2213-Conf-AnxA, pp 9-10.

³ Annex A.

⁴ Annex B.

⁵ Annex C.

⁶ ICC-01/14-01/18-2212-Conf-AnxA, page 7, witness no. 19.

⁷ ICC-01/14-01/18-2213-Conf.

P-6035's statement under rule 68(2) of the Rules, and deferred to the Chamber's discretion.⁸

7. On 2 February 2024, the Chamber issued its Further Directions on the Conduct of the Proceedings, under which it ordered the Defence to file any requests under Rule 68(2)(c) no later than one week after the testimony of the last witness called by the Defence.⁹
8. On 26 March 2024, the Chamber granted the First Request subject to the receipt of the declarations under Rule 68(2)(b)(ii) and (iii) of the Rules ('Decision on First Request'), finding that the latter's statement and associated exhibits were suitable to be introduced under Rule 68(2)(b) of the Rules.¹⁰

APPLICABLE LAW

9. Rule 68(2)(c) of the Rules of Procedure and Evidence *inter alia* states that :

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

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

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

(ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

SUBMISSIONS

10. After having given a statement to the Defence which was intended to be introduced under Rule 68(2)(b), but prior to the completion of the certification

⁸ ICC-01/14-01/18-2249-Conf, paras 5, 15.

⁹ ICC-01/14-01/18-2342, para 5.

¹⁰ See, ICC-01/14-01/18-2424-Conf, para. 62.

process, P-6035 passed away. The Defence now renews its request for the introduction of P-6035 statement and associated exhibits in evidence, but under sub-rule (c) of Rule 68(2).

11. As mentioned in its previous request for formal submission under rule 68(2)(b),¹¹ the declaration of P-6035 is of particular relevance. P-6035 is [REDACTED]. He is also the [REDACTED].¹² Moreover, P-6035 testifies that he was in Bangui on 5 December 2013 with all of his children and step-children.¹³ He explains that after 5 December 2013, [REDACTED]¹⁴ and that [REDACTED] to keep her company and take care of the house.¹⁵
12. In addition to these elements, the importance of P-6035's declaration lies in the information he provides [REDACTED], as he affirmed they were never part of Mr Yekatom's group and were never part of any armed group.¹⁶ P-6035 also explained that they participated in a training in MBAIKI and were registered by Mr. Yekatom so that they could benefit from the training.¹⁷
13. Finally, P-6035 [REDACTED] and attested that CAR-D29-0009-0451 is the birth certificate for [REDACTED] (Annex 1) and that CAR-D29-0009-0452 is the birth certificate for [REDACTED] (Annex 2).¹⁸ These are relevant to assess the unreliable information contained in CAR-OTP-2071-0279 which the Prosecution uses in support of count 29.
14. The declaration of P-6035 is completed by other documents such as extracts from ESF report (Annex 3 – CAR-D29-0009-0453), (Annex 4 – CAR-D29-0009-

¹¹ ICC-01/14-01/18-2213-Conf, para 73.

¹² CAR-D29-0009-0446, para 15.

¹³ CAR-D29-0009-0446, para 16 to 17.

¹⁴ CAR-D29-0009-0446, para 19.

¹⁵ CAR-D29-0009-0446, para 22.

¹⁶ CAR-D29-0009-0446, para 25.

¹⁷ CAR-D29-0009-0446, para 26.

¹⁸ CAR-D29-0009-0446, para 36 and 37.

0454), (Annex 5 – CAR-D29-0009-0455) and one ESF list (Annex 6 – CAR-D29-0009-0456).

15. According to the Court’s legal framework and jurisprudence, prior recorded testimony may be submitted under Rule 68(2)(c) when it comes from a person who has died (A); if the necessity of measures under Article 56 of the Statute could not have been anticipated (B); and if the prior recorded testimony has sufficient indicia of reliability (C); and the fact that the prior recorded testimony goes to proof of the acts and conduct of the accused may be a factor against its introduction, or part of it (D).¹⁹

16. Further, the Chamber must ensure that the introduction of the statement it is not prejudicial or inconsistent with the rights of the accused (E).²⁰ To do so, the Chamber may take into consideration, *inter alia* the following factors : (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether the evidence is central to the allegations of the case; and (iii) whether the evidence is purportedly corroborative.²¹

A. The prior recorded testimony comes from a person who has died.

17. In a previous decision, the Chamber granted a request for the submission of prior recorded testimony under Rule 68(2)(c) of the Rules, and accepted death certificates as proof of “unavailability” within the meaning of that rule.²²

¹⁹ See, *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the Prosecution’s Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses, 26 October 2022, [ICC-01/14-01/21-506-Red](#), para 9. See also *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 13 July 2021, [ICC-01/12-01/18-1588-Red](#), para. 8. See also, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, [ICC-01/12-01/18-1413](#), para 5.

²⁰ See, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0570’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 13 July 2021, [ICC-01/12-01/18-1588-Red](#), para 10

²¹ See, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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”, 3 May 2011, [ICC-01/05-01/08-1386](#), para. 78.

²² See, ICC-01/14-01/18-1975-Conf, para. 51; see also, para. 25, citing *inter alia The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded

18. The Defence also notes that in *Ongwen*, Trial Chamber IX decided that, like death certificates, “statements from individuals who knew the witness and are able to confirm the [witness’s] death” could constitute relevant information substantiating the latter.²³
19. The last time the Defence met D29-P-6035 was on 3 November 2023 when his statement was taken, i.e. three months before the Defence was informed of his death.
20. On 12 February 2024, when the Defence attempted to schedule a meeting with P-6035 to comply with the certification requirement in accordance with Rule 68(2)(b)(ii)-(iii) of the Rules, it was informed that D29-P-6035 had passed away.²⁴
21. As a result, on 7 June 2024, the Defence met with Marceline INGINZA (D29-P-6041), the sister of D29-P-6035, who had been residing with him before he died and who accepted to provide a statement regarding his death.²⁵ The same day, Marceline INGINZA provided to the Defence the death certificate of D29-P-6035 delivered to her by the Mayor of Bimbo.²⁶ Her statement provides important information as she explains *inter alia* that she was present when D29-P-6035 passed away.²⁷
22. The declaration made by D29-P-6041 is reliable as it is dated and signed. She recognises her brother and gives information on his identity and family that are corroborated by the latter’s statement. Further, the required procedure was followed with her before she signed the declaration with the assistance of a Sango interpreter.

testimony of Witness P- 0103, 11 March 2016, [ICC-01/04-02/06-1205](#) (the ‘*Ntaganda* P-0103 Rule 68(2)(c) Decision’).

²³ See in this regard, Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, 19 June 2018, [ICC-02/04-01/15-1288](#), para 9

²⁴ CAR-D29-0024-0004-R01.

²⁵ CAR-D29-0009-0716.

²⁶ CAR-D29-0013-0280.

²⁷ CAR-D29-0009-0716, paras 17-19.

23. As to the death certificate, it is an official document which has been delivered by the required authority, the mayor of Bimbo, where D29-P-6035 was living before he died. The authenticity, official nature, and reliability of the document is supported by the stamps it contains, the date and the signature of the Mayor. Further, this document has been delivered in the presence of an “*officier d’état civil*” which demonstrates the required procedure has been followed.
24. The presence of this supporting evidence attest to P-6035’s death and therefore of his “unavailability” within the meaning of Rule 68(2)(c).

B. On Article 56 measures

25. While the Defence notes that Article 56 measures are technically available to both the Defence and the Prosecution,²⁸ in the context of rule 68(2)(c) applications, these measures are properly understood not as an obligation imposed on the Defence, but as a ‘right’ for the accused, contrarily to the Prosecution.
26. In the *Ntaganda* case, Trial Chamber VI, seized of a defence rule 68(2)(c) application, thus noted this distinction, holding that:

Indeed, in the context of a criminal trial, in which the Prosecution is tasked with bringing incriminating evidence against the accused, the obligation to preserve such evidence when presented with a unique investigative opportunity’ to do so, and where there is a danger that such evidence may be later unavailable for the purposes of trial cannot be said to apply with equal potency to the Defence as to the Prosecution.²⁹

²⁸ See, in this regard, Pre-Trial Chamber II, *Situation in Uganda*, Decision on prosecutor’s application for leave to appeal dated the 15th day of march 2006 and to suspend or stay considerations of leave to appeal dated the 11th day of May 2006, 10 July 2006, [ICC-02/04-01/05-90](#), para. 35; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on Defence requests related to the continuation of the confirmation Proceedings, 14 February 2014, [ICC-02/11-01/11-619](#), para. 37. See also, critically, Article 57(3)(b) of the Statute.

²⁹ *The Prosecutor v. Bosco Ntaganda*, Public redacted version of ‘Decision on certain requests related to the admission of the prior recorded testimony of Witness D-0080’, 22 February 2018, [ICC-01/04-02/06-2242-Red](#), para. 36, and references cited therein. See also *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 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. 31.

27. In any event, the Defence submits that the death of D29-P-6035 was sudden and unexpected, as it appears to have been the result of complications arising from hernia surgery.³⁰

C. The prior recorded testimony has sufficient indicia of reliability

28. In a previous decision, the Chamber considered that unless it identifies manifest issues as to the reliability of the information provided by the witnesses or there is a specific objection by one of the Parties, then, the same criteria for ‘sufficient indicia of reliability’ in respect of Rule 68(2)(b) apply for a request under Rule 68(2)(c).³¹

29. The Chamber gave a list of formal requirements to be fulfilled, which included: whether the recorded testimony (i) was obtained in the ordinary course of its investigation; (ii) was signed by the witness and the investigator(s) conducting the interview; (iii) was given voluntarily; (iv) was obtained in the presence of a qualified interpreter; (v) was verified by the witness at the time; and (vi) includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement to the Prosecution (the ‘Formal Requirements’).

30. The Defence recalls that in its Decision on First Request, the Chamber held that D29-P-6035’s statement showed ‘sufficient indicia of reliability’, finding that it was ‘obtained by fulfilling the [Formal Requirements]’.³²

31. In this regard, the Defence recalls that it met the witness in the course of its investigations and interviewed him for the purpose of having his statement submitted under Rule 68(2). As such, the Defence had the witness sign his statement, in which he acknowledges that it is given voluntarily.³³ The witness

³⁰ CAR-D29-0009-0716, paras. 17-18.

³¹ ICC-01/14-01/18-1975-Conf, para. 34.

³² ICC-01/14-01/18-2424-Conf, para. 66.

³³ CAR-D29-0009-0444, para. 45 to 47.

made his statement in French as the witness understands and speaks it.³⁴ The witness was provided with the required explanation of the procedure and reviewed his declaration before signature.³⁵

32. As such, the Prior Statement of P-6035 is sufficiently reliable in order to be introduced under Rule 68(2)(c) of the Rules.

D. The prior recorded testimony does not go to proof of the acts and conduct of the accused.

33. In its previous request for submission of prior testimony under Rule 68(2)(b) the Defence argued that, although D29-P-6035's Prior Statement relates to a number of key elements of the case, he only provided information which is not directly related to the accused's act or conduct.

34. Rather, as mentioned above, P-6035's declaration is of limited scope on the information he brought [REDACTED], [REDACTED] and [REDACTED] when he affirmed that they were never recruited in the 'Yekatom Group'. Indeed, by doing so, P-6035 testimony shows that the ESF list provided by the Office of the Prosecutor is not a reliable item.

35. The Chamber has thus previously ruled that the references to Mr. Yekatom contained in the statement are either indirect or limited and peripheral and do not constitute the core thereof; that the "references to identifying information and/or 'challenges' contained in the statement to the 'very presence of children under the age of fifteen in the Anti-Balaka group under Mr Yekatom's command' do not mention the latter's personal actions and/or omissions as such".³⁶

³⁴ CAR-D29-0009-0445, para. 3.

³⁵ CAR-D29-0009-0445, para. 13.

³⁶ ICC-01/14-01/18-2024-Conf, para 61-62. The Defence notes that the Chamber held that it will not rely on paragraph 27 of D29-6035's statement for the purpose of establishing Mr Yekatom's acts and conduct; and further, that the statement does not refer to Mr Ngaïssona.

E. The introduction of the statement is not prejudicial to or inconsistent with the rights of accused.

36. Finally, the Defence recalls that the Chamber has previously held that the introduction of D29-P-6035's statement was 'not prejudicial to or inconsistent with the accused's rights and that the interests of justice are better served by their introduction'; and that it 'particularly note[d] that this contributes to the expeditiousness of the proceedings and streamlines the presentation of evidence'.³⁷

37. In addition, the Defence recalls that the OTP did not oppose the introduction of the statement and associated exhibits; nor did the OTP avail itself its right to request to interview D29-P-6035 pursuant to the applicable protocol adopted in these proceedings.³⁸

38. In its First Request, the Defence set out how P-6035's proposed evidence is cumulative and corroborative of other evidence.³⁹ This includes *inter alia* i) video evidence CAR-OTP-2055-2610 depicting Mr. Yekatom's visit to the [REDACTED] where P-6035 is present, ii) Prosecution Witness [REDACTED] (P-2082) confirming that it was [REDACTED],⁴⁰ and iii) Prosecution witness [REDACTED] (P-1839) who testified that there were two children close to Mr. Yekatom on PK9-MBAIKI Axis, whom he treated with care like his own children, and who simply lived with him.⁴¹

CONFIDENTIALITY

39. The present request is filed on a confidential basis due to the references to information disclosing the identity of witnesses. A public redacted version will be filed forthwith.

³⁷ ICC-01/14-01/18-2424-Conf, para. 69.

³⁸ ICC-01/14-01/18-677-Anx5.

³⁹ ICC-01/14-01/18-2213-Conf, para 74

⁴⁰ **P-2082**: ICC-01/14-01/18-T-218-CONF-FRA ET, at [14:52:43].

⁴¹ **P-1839**: ICC-01/14-01/18-T-171-FRA RT, from [09:40:46] to [09:41:51].

RELIEF SOUGHT

40. In light of the above, the Defence respectfully requests Trial Chamber V to:

GRANT the request to introduce the prior recorded testimony of P-6035, together with its associated exhibits, pursuant to Rule 68(2)(c) of the Rules.

RESPECTFULLY SUBMITTED ON THIS 2ND DAY OF SEPTEMBER 2024⁴²



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⁴² The Defence is grateful for Legal Intern Ms Maider Cordova's assistance in the drafting of this filing.