

**Cour
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**International
Criminal
Court**

Original: **English**

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**

**Public Redacted Version of the “Yekatom Defence Request for Formal
Submission of Prior Recorded Testimony of CAR-D29-P-4011 Pursuant to
Rule 68(2)(c)”, 25 June 2024, ICC-01/14-01/18-2549-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. The Defence for Mr Alfred Rombhot Yekatom ('Defence') requests the formal submission of the prior recorded testimony of CAR-D29-P-4011 ('P-4011') pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence ('Rules') and in accordance with the Trial Chamber V's ('Chamber') Further Directions on the Conduct of the Proceedings ('Further Directions')¹
2. The Defence tenders for formal submission P-4011's statement collected on 4 and 5 June 2024 totalling approximately 11 pages,² as well as 15 associated exhibits which form an integral part of P-4011's testimony (collectively 'Prior Recorded Testimony').³
3. The Prior Recorded Testimony fulfills the requirement of rule 68(2)(c) of the Rules as P-4011 is unavailable to testify due to obstacles that could not be overcome with reasonable diligence; and the Prior Recorded Testimony bears sufficient indicia of reliability.
4. The Defence further requests leave to amend its List of Evidence to include P-4011's statement collected in June 2024, as well as her doctor's medical assessment produced on the day of the statement-taking which forms part of P-4011's testimony (collectively 'P-4011's Material').⁴

¹ ICC-01/14-01/18-2342, para.5.

² CAR-D29-0009-0680-R01

³ CAR-D29-0008-0105 and its transcript CAR-D29-0006-1404; CAR-D29-0008-0106 and its transcript CAR-D29-0006-1405; CAR-D29-0008-0107; CAR-D29-0008-0108; CAR-D29-0010-0205; CAR-D29-0010-0206; CAR-D29-0010-0207; CAR-D29-0003-0202; CAR-D29-0003-0203; CAR-D29-0003-0204; CAR-D29-0003-0205; CAR-D29-0003-0206; and CAR-D29-0009-0691.

⁴ CAR-D29-0009-0680-R01 and CAR-D29-0009-0691.

PROCEDURAL HISTORY

5. On 29 March 2023, Trial Chamber V issued the Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence).⁵
6. On 25 August 2023, the Defence filed its Preliminary List of Witnesses in which P-4011 was announced to be called as a Defence *viva voce* witness.⁶
7. On 14 November 2023, the Defence communicated the provisional witness schedule for December 2023 in which it scheduled P-4011's testimony from 1 to 15 December 2023, and mentioned the need for accommodations due to her physical limitations.⁷
8. On 17 November 2023, the Defence filed its Final List of Witnesses in which P-4011 remained listed as a live Defence witness.⁸
9. On 13 December 2023, VWU informed the Defence that P-4011 had been hospitalised and would therefore be unable to testify as anticipated on 11 to 15 December 2023.⁹
10. On 18 December 2023, the Defence communicated its intent to call P-4011 to testify on 23 and 24 January 2024.¹⁰ However, on 16 January 2024, based on VW's recommendation, the Defence removed P-4011 from the schedule.¹¹
11. In January 2024, P-4011 was placed under support referral in order to facilitate her appearance before the Chamber.¹²

⁵ ICC-01/14-01/18-1892.

⁶ ICC-01/14-01/18-2060-Conf-AnxA, p.5, n.8.

⁷ Email from the Defence to the Chamber, the Parties and the Participants on 14 November 2023 at 14:01.

⁸ ICC-01/14-01/18-2212-Conf-AnxB, p.2, n.4.

⁹ Email from VWU to Defence, 13 December 2023 at 11:36 (available on request).

¹⁰ Email from the Defence to the Chamber, the Parties and the Participants on 8 January 2024 at 11:24.

¹¹ Email from the Defence to the Chamber, the Parties and the Participants on 16 January 2024 at 12:52.

¹² Email from VWU to Defence, 10 January 2024 at 17 :10 (available on request).

12. On 14 February 2024, VWU informed the Defence that P-4011 had been discharged from the medical clinic to convalesce at home; and that VWU intended to have her medically examined after 29 February 2024 in anticipation of the witness' potential appearance in March 2023.¹³
13. On 15 February 2024, the Defence communicated the provisional schedule of the evidentiary Block 30 in which it scheduled P-4011 from 13 to 15 March 2024 while reiterating the necessity for accommodations for her testimony.¹⁴
14. On 4 March 2024, VWU informed the Defence that, while her condition was improving, P-4011 would not be able to appear in the March 2024 Evidentiary Block.¹⁵
15. On 8 March 2024, VWU indicated that P-4011's condition was improving, [REDACTED], and that she had 'no cognitive impairment'; and further, that while she was still willing to testify, measures would need to be put in place for her testimony.¹⁶
16. Also on 8 March 2024, the Defence communicated the provisional schedule of the evidentiary Block 31 in which it scheduled P-4011 from 8 to 12 April 2024, and noted that the modalities of her testimony were pending VWU's recommendations.¹⁷
17. On 20 March 2024, the Defence communicated to the Chamber, the Parties and the Participants that following VWU's most recent information, P-4011 was unable to appear in the March/April evidentiary block but that her condition was improving; and further, VWU had informed the Defence that more time was required to ensure the witness could testify in the best conditions possible.¹⁸

¹³ Email from VWU to Yekatom Defence of 14 February 2024 at 14:35 (available on request).

¹⁴ Email from the Defence to the Chamber, the Parties and Participants on 15 February 2024 at 16:19.

¹⁵ Phone call between VWU and Yekatom Defence, 4 March 2024.

¹⁶ Phone call between VWU and Yekatom Defence, 8 March 2024 at 08:40.

¹⁷ Email from the Defence to the Chamber, the Parties and Participants on 15 February 2024 at 16:19.

¹⁸ Email from the Defence to the Chamber, the Parties and the Participants on 20 March 2024 at 13:25.

18. On 21 May 2024, VWU indicated to the Defence that P-4011 was not cleared by the PNUD medical practitioner to testify in person as her condition had deteriorated.
19. On 28 May 2024, the Defence visited the P-4011 in the presence of her attending physician. She consented to provide a statement to the Defence on 4 and 5 of June 2024 with the appropriate medical care available during the interview.
20. On 28 May 2024, the Chamber ordered the Registry to provide a report on its past and ongoing efforts in securing the attendance of all remaining witnesses, including information on P-4011's "fitness to testify and realistic estimate as to whether her testimony can be arranged before the summer recess".¹⁹ The Registry provided its report on 30 May 2024 in which it indicated that P-4011 had been declared unfit to testify due to several chronic health conditions that pose a high risk and she "cannot testify now or in the future".²⁰
21. On 29 May 2024, the Defence informed the Chamber, the Parties and the Participants of its intent to collect the written statement of P-4011 in the first week of June 2024 and to submit a request for the submission of the written statement of P-4011 pursuant to rule 68(2)(c) due to her unavailability to testify.²¹
22. On 4 and 5 June 2024, the Defence took the witness statement of P-4011, in the presence of her attending physician who monitored her condition during the statement-taking.²²
23. On 6 June 2024, the Defence disclosed to the Parties and Participants the P-4011's Material.²³

¹⁹ Email from the Chamber to the Registry, the Parties and the Participants on 28 May 2024 at 16:03.

²⁰ ICC-01/14-01/18-2513-Conf-Red-Corr, para. 21.

²¹ Email from the Defence to the Chamber, the Parties and the Participants on 29 May 2024 at 12:47.

²² CAR-D29-0009-0691.

²³ Email from the Defence to the Parties and Participants sent on 6 June 2024 at 18:05, see also ICC-01/14-01/18-2523.

APPLICABLE LAW

24. Rule 68(2)(c) of the Rules provides that:

2. 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.

25. According to the Court's legal framework and jurisprudence, prior recorded testimony may be submitted under Rule 68(2)(c) where: (i) the Chamber is satisfied that the person is unavailable as they have 'subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally', (ii) if the necessity of measures under Article 56 of the Statute could not have been anticipated and (iii) if the prior recorded testimony has sufficient indicia of reliability.²⁴ In contrast to rule 68(2)(b) of the Rules, rule 68(2)(c) does not preclude the introduction of a prior recorded testimony that goes to proof of acts and conduct of the accused. Rather, in accordance with the express language of the

²⁴ ICC-01/14-01/18-2502-Conf OA4, paras 36-37. See also ICC-01/14-01/18-1975-Conf, para. 18-19. See also *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.

sub-rule, the fact that the prior recorded testimony goes to acts and conduct “may be a factor against its introduction, or part of it”.²⁵

26. The notion of ‘unavailability’ must be assessed on a case-by-case basis, and as recently noted by the Appeals Chamber, the inclusion of the term ‘obstacles that cannot be overcome with reasonable diligence’ was intended to cover “the examples that are explicitly” mentioned in the corresponding ICTY Rules of Procedure and Evidence provision, but also “other potential situations that may arise in the course of the Court’s work as a permanent institution”.²⁶ In this regard, it is recalled that ICTY Rule 92 quater explicitly permitted the ‘[t]he evidence of a person in the form of a written statement or transcript [...] who is by reason of bodily or mental condition unable to testify orally may be admitted’.²⁷

27. The Chamber has previously held that the ‘unavailability’ in the meaning of Rule 68(2)(c) must be interpreted broadly.²⁸ It further noted that this term has been interpreted in the jurisprudence of the Court as including *inter alia* “a witness [who] suffers from a medical condition(s) that impacts their ability to testify orally”.²⁹

28. Further, the Chamber must ensure that the introduction of the statement it is not prejudicial or inconsistent with the rights of the accused (iv).³⁰ 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)

²⁵ ICC-01/14-01/18-2502-Conf OA4, paras. 2 and 56.

²⁶ ICC-01/14-01/18-2502-Conf OA4, para. 38 and cites therein.

²⁷ IT/32/Rev.50, Rules of Procedure and Evidence as amended on 8 July 2015.

²⁸ ICC-01/14-01/18-1975-Conf, para. 26.

²⁹ ICC-01/14-01/18-1975-Conf, para. 27.

³⁰ 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

whether the evidence is central to the allegations of the case; and (iii) whether the evidence is purportedly corroborative.³¹

29. The Chamber's directions provided that the Defence is not precluded from applications later than the deadline set for the communication of the Final Witness List pursuant to Rule 68(2)(c) of the Rules should a witness become unavailable.³² The Chamber ordered in its Further Directions that any request under Rule 68(2)(c) of the Rules be submitted by the Defence no later than one week after the testimony of the last witness called by the Defence.³³

SUBMISSIONS

A. The Prior Recorded Testimony is relevant and probative

30. The Prior Recorded Testimony of P-4011 is relevant and probative as it bears on the destruction of the Boeing Mosque in 2013 by the civilian population, as well as on the Séléka exactions in Boeing and their relationship with Hassan Mahamat aka 'Délégué'.

31. P-4011 is a Central African national born on 6 April 1958 in Bangui. She has been living in Boeing since 1973 and currently resides next to the Boeing Mosque and the Boeing Market.³⁴

32. She provides evidence on the presence of Seleka elements in Boeing and the exactions they committed,³⁵ as well as on their presence at the Boeing market.³⁶ She recalls knowing a trader named Hassan 'Délégué' and describes his links with the Séléka.³⁷ She also describes how traders in the Boeing Market kept

³¹ 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.

³² ICC-01/14-01/18-1892, para. 21 (iii).

³³ ICC-01/14-01/18-2342, para. 5.

³⁴ CAR-D29-0009-0680-R01, paras 15-16.

³⁵ CAR-D29-0009-0680-R01, paras 32-40.

³⁶ CAR-D29-0009-0680-R01, paras 26-31, 41-42.

³⁷ CAR-D29-0009-0680-R01, paras 26-29, 41-42.

weapons in their shops and were seen shooting in the air at the arrival of the Séléka.³⁸

33. P-4011 witnessed the destruction of the Boeing Mosque by local youths in 2013.³⁹ She describes how the youths were civilians and were not wearing military uniforms and did not appear to be wearing any gris-gris.⁴⁰ She saw how they destroyed the mosque by tearing off the metal sheets and the window frames with hammers and nail pullers.⁴¹ She states that the Mosque had not been set on fire, nor had it been attacked by explosives (*'obus'*); she did not smell any petrol or hear any gunfire when the mosque was being destroyed.⁴²

34. P-4011 witnessed the destruction of the Boeing Mosque in 2013 and provides evidence on the perpetrators and the manner in which they proceeded to destroy the building, which contradicts the evidence of Prosecution witness CAR-OTP-P-1339 elicited before the Chamber [REDACTED]⁴³ [REDACTED]⁴⁴ [REDACTED].⁴⁵

B. The Prior Recorded Testimony of P-4011 fulfils the requirements of Rule 68(2)(c) of the Rules

i) The witness is unavailable to testify due to obstacles that cannot be overcome with reasonable diligence

35. The Defence submits that P-4011's current health condition and unfitness to testify in person before the Chamber qualify as an obstacle that cannot be overcome with reasonable diligence and makes her unavailable to testify orally before the Chamber in accordance with rule 68(2)(c) of the Rules.⁴⁶

³⁸ CAR-D29-0009-0680-R01, para. 31.

³⁹ CAR-D29-0009-0680-R01, paras 44-50.

⁴⁰ CAR-D29-0009-0680-R01, para. 50.

⁴¹ CAR-D29-0009-0680-R01, para. 46.

⁴² CAR-D29-0009-0680-R01, para. 49.

⁴³ ICC-01/14-01/18-T-154-CONF-FRA ET, at

⁴⁴ ICC-01/14-01/18-T-160-CONF-ENG ET, at 10:51.

⁴⁵ ICC-01/14-01/18-T-160-CONF-ENG ET, at 10:36.

⁴⁶ On the 'unavailability' of witnesses due to their medical condition, 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](#), paras.12-20. See

36. As outlined in the procedural history of the present request, the Defence has been following up closely on P-4011's health status with the assistance of VWU in the past months to ensure the witness's *viva voce* testimony could be given before the Chamber in the best possible conditions given her physical limitations.

37. P-4011's physical well-being has been subject to medical attention throughout December 2023 to June 2024. As set out above, during this period, it was made apparent to the Defence by VWU that whilst P-4011 was not yet ready to provide *viva voce* testimony, her condition appeared to be improving.

38. Unfortunately, in late May 2024 her condition deteriorated leading her to be assessed and declared unfit to testify orally. The Registry further provided in its report on 30 May 2024 that P-4011 had been declared unfit to testify due to several chronic health conditions that pose a high risk and stated that she "cannot testify now or in the future".⁴⁷ P-4011's attending physician confirmed on 5 June 2024 that she should avoid any travel and stressful situations.⁴⁸

39. In these circumstances, it is understood that any form of participation in hearings before the Chamber, including any travel to the Bangui field office in the AVL room (with its lack of windows and concomitant prolonged deprivation of fresh air) to testify remotely, would involve excessive stress for the witness and would go against the doctors' assessment.

40. Although P-4011 remains under the support referral program for the moment, the Defence understands from VWU's communications and report that it is unlikely that the witness's physical condition will improve sufficiently before

also *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, 24 February 2017, [ICC-01/04-02/06-1802-Red](#), paras 10-11.

⁴⁷ ICC-01/14-01/18-2513-Conf-Red-Corr, para. 21.

⁴⁸ CAR-D29-0009-0691

the end of the trial proceedings for her to be able to provide her testimony *viva voce* despite this being the preferred mode of testimony.

41. In light of the latest medical assessments and notwithstanding the unsuccessful efforts made over many months by the Defence and VWU to provide the necessary assistance to make the witness fit to testify, the Defence submits that P-4011 has become unavailable to testify orally in the meaning of rule 68(2)(c) of the Rules⁴⁹ despite reasonable efforts undertaken by the Defence and VWU to secure the witness' attendance.

ii) On Article 56 measures

42. While the Defence notes that Article 56 measures are technically available to both the Defence and the Prosecution,⁵⁰ 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.

43. 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.⁵¹

⁴⁹ ICC-01/14-01/18-1975-Conf, para. 27.

⁵⁰ 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.

⁵¹ *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.

44. Nor can be it said that article 56 measures would have been warranted at an earlier stage. As noted above, meaningful efforts were undertaken in order to facilitate the witness' *viva voce* testimony in suitable conditions necessitated by her medical situation. At no point, has it been the case that the witness has refused to testify, or that she lacks medical cognisance to provide her evidence. Moreover, the Defence was repeatedly informed that P-4011's medical condition was improving and that there was a reasonable prospect to call the witness live. It was only on 21 May 2024 that a final determination was made by the PNUD medical practitioner which decisively removed the option to hear the *viva voce* testimony of the witness. Upon receiving this decision, the Defence immediately sent its investigator to visit the witness on 28 May 2024, and informed the Chamber and Prosecution that it intended to take a statement from the witness on 4 and 5 June 2024.

45. The Defence further notes that any procedural prejudice to the Prosecution arising from the lack of article 56 measures is non-existent. To date, the Prosecution has not shown any indication that it seeks to meet the witness. For example, while the Prosecution did request to meet some Yekatom Defence witnesses pursuant to the Contact Protocol, the Defence notes that the Prosecution never requested to meet P-4011 in accordance with the Contact Protocol adopted in these proceedings.⁵² P-4011 was included in the Defence Preliminary List of Witnesses communicated in August 2023⁵³ and remained on the Defence Final List of Witnesses from November 2023.⁵⁴

46. The Prosecution also did not communicate its intention to meet with the witness ahead of the Defence's mission to conduct the statement on 4 and 5 June 2024.

⁵² ICC-01/14-01/18-677-Anx5, section VII.

⁵³ ICC-01/14-01/18-2060-Conf-AnxA, p.5, n.8.

⁵⁴ ICC-01/14-01/18-2212-Conf-AnxB, p.2, n.4; See for example Email from the Prosecution to the Defence on 14 September 2023 at 9:14 (available on request) where no mention of P-4011 was made in OTP request to meet 11 Defence witnesses.

iii) The Prior Recorded Testimony of the witness has sufficient indicia of reliability

47. The Prior Recorded Testimony of P-4011 has sufficient indicia of reliability for the purpose of formal submission pursuant to rule 68(2)(c) of the Rules.⁵⁵

48. P-4011's Material was (i) taken in the ordinary course of proceedings, (ii) signed by the witness and the team members conducting the interview, (iii) given voluntarily, (iv) was obtained in the presence of a qualified Sango interpreter; (v) verified by the witness at the time of the statement and, (vi) includes information that the witness was given an explanation of the procedure before the ICC and was informed of the significance of providing the statement to the Defence. In this regard, the witness's statement contains an express acknowledgment attesting to the voluntariness and the truth of its content to the best of the witness' knowledge.

49. Moreover, the current health condition of P-4011 did not affect the reliability of the Prior Recorded Testimony and the content of her evidence. As demonstrated by the Prior Recorded Testimony, P-4011 was able to describe matters to which she has knowledge of and well understood her duty to speak the truth, having signed a declaration to this effect.

50. Although the witness's condition is incompatible with travel to the headquarters or the field office and participation in a hearing, the reports from VWU and the witness's doctor received on her condition have not indicated any impediment to her provision of a written statement to the Defence due to her memory or capacity. P-4011's medical practitioner confirmed that her health condition had no impact her capacity of discernment and confirmed her ability to give a statement according to her recollection to the members of the Defence with appropriate measures being taken to ensure that her state of health

⁵⁵ ICC-01/14-01/18-1975-Conf, paras 33-34; ICC-01/14-01/18-1833-Conf-Corr, para. 42.

remains stable.⁵⁶ The witness also explained to the Defence that her eyesight problems developed after the relevant period of this case.⁵⁷

51. The Defence closely followed P-4011's doctor's recommendations while taking the witness's statement. As such, on 4 and 5 June 2024, the Defence proceeded with the statement-taking at P-4011's house to limit any travel by the witness and mitigate excessive stress, while ensuring constant monitoring of her health throughout the process with the assistance of her doctor who is well-informed on her case. The doctor recommended breaks during the interview and advised ending earlier on the first day for the witness's wellbeing and to test the witness's vital signs.⁵⁸ On the second day, the interview took place outside, at the witness's request, as she felt more comfortable being in the fresh air. The doctor monitored [REDACTED], and the interview was completed that day without needing to end it prematurely.

52. The Defence also recalls that while it does not submit an accompanying declaration for P-4011, rule 68(2)(c) of the Rules does not require the submission of an accompanying declaration unlike rule 68(2)(b) and its absence does not bar the introduction of prior recorded testimony under this Rule due its distinct nature specifically aimed at unavailable witnesses.⁵⁹

iv) The Prior Recorded Testimony does not go to proof of the acts and conduct of the accused

53. The Prior Recorded Testimony of P-4011 does not relate to the acts and conduct of the accused as charged and described in the confirmed charges or which are

⁵⁶ CAR-D29-0009-0691

⁵⁷ CAR-D29-0009-0680-R01, para. 54.

⁵⁸ CAR-D29-0009-0691

⁵⁹ 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. 22.

otherwise relied upon by the Prosecution to establish their criminal responsibility for the crimes charged.⁶⁰

54. The evidence provided by P-4011 is limited to her recollection of specific events in 2013 in which she does not mention Mr Yekatom. She stated that she did not know Mr Yekatom and had never seen him.⁶¹ Moreover, it is recalled, that to the extent that any part of P-4011's statement is deemed to pertain to acts and conduct, this is limited by nature given the aforementioned absence of any direct evidence concerning Mr. Yekatom and in any case, is not a bar to the introduction of the Prior Record Testimony in accordance with rule 68(2)(c).⁶²

v) The Prior Recorded Testimony is not prejudicial to or inconsistent with the rights of accused or the procedural rights of the Prosecution.

55. The Prior Recorded Testimony of P-4011 is not prejudicial or inconsistent with the rights of the Accused.

56. This request for submission of the Prior Recorded Testimony of P-4011 does not prejudice Mr Yekatom as it being submitted by the Defence itself. Furthermore, it is the right of the Accused to present evidence under Article 67 of the Rome Statute. The evidence is relevant and supports the Defence's case as submitted above.

57. With respect to, any procedural prejudice to the Prosecution arising from its inability to examine P-4011, this is minimal in the circumstances and the interests of justice are better served by its introduction.

58. As set out above, while the Prosecution did request to meet some Yekatom Defence witnesses pursuant to the Contact Protocol, the Defence notes that the Prosecution has never requested to meet P-4011 since she was announced to be

⁶⁰ ICC-01/14-01/18-1833-Conf-Corr, para. 28.

⁶¹ CAR-D29-0009-0680-R01, para. 55.

⁶² Supra., para. 25.

a Defence witness as early as August 2023.⁶³ This includes the period following the appearance of CAR-D29-P-4013, who testified regarding the destruction of the Boeing Mosque, and regarding the Seleka's conduct and presence in BOEING, on 15 April 2024.

59. Further, although the evidence of P-4011 relates to issues materially in dispute and central to the allegations of the case, the Defence notes that the Prosecution was afforded the opportunity to fully examine Defence witness CAR-D29-P-4013 on his account of the destruction of the Mosque, which is substantially and materially similar to that of P-4011, as previously communicated in the summary of her testimony.⁶⁴ In the same vein, the Prosecution was in a position to examine CAR-D29-P-4013 in relation to P-4011: for instance, on her whereabouts during the Seleka / Anti-Balaka period; on the location of her home; or on her evidence regarding the Boeing Market traders.⁶⁵

60. The Defence notes that the Prosecution previously provided submissions before the Chamber on associated exhibits to P-4011's statement in which it held that "it remains unclear exactly where [REDACTED] D29-P4011 resided at the time of the events, which necessarily affects the probative value and significance of the Items".⁶⁶ However, it is noted that the Prosecution did not subsequently use the opportunity to question CAR-D29-P-4013 during his testimony on this precise matter, despite the fact that CAR-D29-P-4013 had confirmed knowing P-4011 "like an elder sister,"⁶⁷ confirmed that he was aware of the location of her home;⁶⁸ and was presented associated exhibits to her statement relevant on this issue.⁶⁹

⁶³ ICC-01/14-01/18-677-Anx5, section VII.

⁶⁴ ICC-01/14-01/18-T-277-CONF-ENG CT, at 13:31. ICC-01/14-01/18-2212-Conf-AnxC, p.8-9.

⁶⁵ See, ICC-01/14-01/18-2212-Conf-AnxC, p.8-9.

⁶⁶ ICC-01/14-01/18-2414-Conf, para. 7.

⁶⁷ ICC-01/14-01/18-T-277-CONF-ENG CT, at 12:05.

⁶⁸ ICC-01/14-01/18-T-277-CONF-ENG CT, at 12:06.

⁶⁹ ICC-01/14-01/18-T-277-CONF-ENG CT, at 11:58, 12:00.

61. In this regard, the Defence notes that the Prosecution was on notice of P-4011's anticipated evidence since 17 November 2023 and thus has had ample time to conduct necessary investigations ahead of the testimony of CAR-D29-P-4013, and to test her evidence through him.

62. Further, the Prior Recorded Testimony of P-4011 is cumulative and corroborative of other evidence, including the testimony of CAR-D29-P-4013 (on the destruction of the Boeing Mosque by civilian youths,⁷⁰ who removed the roof with nail-pullers and hammers⁷¹ without the use of any firearms⁷² and the absence of any trace of fire on the Mosque⁷³); CAR-OTP-P-2682 (on the roofing of the Mosque being taken away and the bricks taken off progressively);⁷⁴ CAR-OTP-P-1528 (who received a call from Ali KAMARA to inform him that the Boeing Mosque had been 'pillaged' and 'vandalised' and that there were no more doors, windows or roof);⁷⁵ as well as CAR-OTP-P-0884 (on the manner in which the Mosque was destroyed brick-by brick and the roof was removed, and how the traders at the Boeing Market were linked with the Seleka, had firearms and used to shoot into the air).⁷⁶

63. CAR-OTP-P-2193's expert opinion that more debris would be expected to be visible in the satellite images if explosives had been used to destroy the Mosque is further corroborated by P-4011's evidence on the absence of traces of fire on the Mosque, and the fact that explosives ('*obus*') had not been used, at the time of its destruction.⁷⁷

64. Her evidence is also mutually corroborative of the testimony of CAR-D29-P-4013, in that they each recognise each other as BOEING residents who live close

⁷⁰ ICC-01/14-01/18-T-277-CONF-ENG CT, at 10 :46, 10 :50 and 13 :36.

⁷¹ ICC-01/14-01/18-T-277-CONF-ENG CT, at 10 :47-10 :51.

⁷² ICC-01/14-01/18-T-277-CONF-ENG CT, at 10 :51.

⁷³ ICC-01/14-01/18-T-277-CONF-ENG CT, at 11 :39.

⁷⁴ ICC-01/14-01/18-T-017-CONF-ENG CT, at 12 :35.

⁷⁵ CAR-OTP-2121-2831-R01, para. 14; ICC-01/14-01/18-T-277-CONF-ENG CT, 10 :32-10 :34.

⁷⁶ ICC-01/14-01/18-T-057-CONF-ENG ET, at 12 :51.

⁷⁷ ICC-01/14-01/18-T-019-ENG ET, at 14:48.

to the Mosque and Market: she explains that she knows “Yaoundou”, also known as “Gaston”, who is Dagba and who used to raise pigs;⁷⁸ that he lives on the road between the Boeing Mosque and the Boeing Market; and further, that she also knows his mother, [REDACTED].⁷⁹ For his part, during his testimony D29-P-4013 recognised P-4011 as the ‘*doyenne*’ and ‘big sister’ of the neighbourhood, who lived next to the Mosque.⁸⁰

CONFIDENTIALITY

65. The Request is filed on a confidential basis due to the references to the confidential information on a Defence witness. A public redacted version will be filed forthwith.

RELIEF SOUGHT

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

GRANT the request to introduce the prior recorded testimony of CAR-D29-P-4011 together with its associated exhibits into evidence pursuant to Rule 68(2)(c) of the Rules; and

GRANT the request to amend the Defence List of Evidence to add the prior recorded testimony of CAR-D29-P-4011 (CAR-D29-0009-0680) as well as her doctor’s medical assessment (CAR-D29-0009-0691).

RESPECTFULLY SUBMITTED ON THIS 2nd DAY OF SEPTEMBER 2024



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⁷⁸ CAR-D29-0009-0680-R01, para. 23.

⁷⁹ CAR-D29-0009-0680-R01, para. 24. See also Annex A which corresponds to the first page of P-4013’s statement unredacted where he indicated that his mother is named ‘[REDACTED]’.

⁸⁰ ICC-01/14-01/18-T-277-CONF-FRA CT, at 12:05-12:07.