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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-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Prosecution Request for Formal Submission of Prior Recorded
Testimonies pursuant to Rule 68(2)(c) of the Rules concerning Witnesses P-0460,
P-0732, P-1779, P-1864 and P-1871**

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

☒ **The Office of the Prosecutor**

☒ **Counsel for the Defence**

Yekatom Defence

Ngaïssona Defence

☒ **Legal Representatives of the Victims**

Common Legal Representative of the Former
Child Soldiers

Common Legal Representatives of Victims of
Other Crimes

☐ **Legal Representatives of the Applicants**

☐ **Unrepresented Victims**

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(Participation/Reparation)**

☐ **The Office of Public Counsel for Victims**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2) and (6), 67(1) and 69 of the Rome Statute (the ‘Statute’), Rules 68(1) and (2)(c) of the Rules of Procedure and Evidence (the ‘Rules’), and Regulations 29 and 35 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules concerning Witnesses P-0460, P-0732, P-1779, P-1864 and P-1871’.

I. Procedural history

1. The Chamber recalls the procedural history as set out in its ‘First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules’ (the ‘First Rule 68(2)(b) Decision’).¹ In that decision, the Chamber notably decided to introduce into evidence, subject to the receipt of the respective declarations under Rule 68(2)(b)(ii) and (iii) of the Rules, the prior recorded testimonies of P-0460, P-0732, P-1779, P-1864 and P-1871 (the ‘Witnesses’) pursuant to Rule 68(2)(b) of the Rules.²
2. On 29 May 2023, noting its previous direction that the time limit set to file any applications under Rule 68(2) and (3) of the Rules would not preclude later applications under Rule 68(2)(c) of the Rules, should a witness become unavailable,³ the Chamber directed the Office of the Prosecutor (the ‘Prosecution’) to file any further requests pursuant to Rule 68(2)(c) of the Rules no later than 7 July 2023 (the ‘Rule 68(2)(c) Deadline’).⁴
3. On 11 September 2023, the Prosecution gave notice of the completion of its case.⁵

¹ First Rule 68(2)(b) Decision, 17 April 2023, ICC-01/14-01/18-1833-Conf-Corr, paras 1-6 (public redacted version notified on the same date, ICC-01/14-01/18-1833-Conf-Red; original version notified on 6 April 2023).

² First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, pp. 99-101.

³ See Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, para. 33 and n. 31.

⁴ Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence), ICC-01/14-01/18-1892, para. 4.

⁵ Prosecution’s Notice of the Close of its Case-in-Chief, ICC-01/14-01/18-2089.

4. On 22 December 2023, the Prosecution filed a request (the ‘Request’), seeking the formal submission of the prior recorded testimonies of the Witnesses pursuant to Rule 68(2)(c) of the Rules (the ‘Rule 68(2)(c) Request’).⁶ The Prosecution further requests, if deemed necessary by the Chamber, an extension of time pursuant to Regulation 35 of the Regulations for the filing of its Rule 68(2)(c) Request, submitting *inter alia* that the necessity of the extension is caused by reasons outside of its control (the ‘Regulation 35 Request’).⁷
5. On 18 January 2024, the Ngaïssona Defence⁸ and the Yekatom Defence⁹ (together, the ‘Defence’; respectively, the ‘Ngaïssona Defence Response’ and the ‘Yekatom Defence Response’) opposed the Rule 68(2)(c) Request¹⁰ and the Regulation 35 Request.¹¹

II. Analysis

A. The Regulation 35 Request

6. Pursuant to Regulation 35(2) of the Regulations, a chamber ‘may extend or reduce a time limit if good cause is shown’. Further, after the lapse of a time limit, ‘an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control’.
7. The Chamber notes that the Prosecution filed its Request almost six months after the expiration of the Rule 68(2)(c) Deadline, and over three months after the closure of its case. Having considered the arguments advanced by the parties, the

⁶ Prosecution’s Request for a Variation of Time Limit pursuant to Regulation 35 to seek the Submission of the Prior Recorded Testimonies of P-0460, P-0732, P-1779, P-1864, and P-1871 pursuant to Rule 68(2)(c), ICC-01/14-01/18-2285-Conf (with one confidential annex, ICC-01/14-01/18-2285-Conf-Anx), paras 1, 3, 81.

⁷ Request, ICC-01/14-01/18-2285-Conf, paras 3, 5, 17, 31, 46, 59, 73.

⁸ Defence response to “Prosecution’s Request for a Variation of Time Limit pursuant to Regulation 35 to seek Submission of the Prior Recorded Testimonies of P-0460, P-0732, P-1779, P-1864, and P-1871 pursuant to Rule 68(2)(c)”, ICC-01/14-01/18-2285-Conf, ICC-01/14-01/18-2311-Conf.

⁹ Response to ‘Prosecution’s Request for a Variation of Time Limit pursuant to Regulation 35 to seek the Submission of the Prior Recorded Testimonies of P-0460, P-0732, P-1779, P-1864, and P-1871 pursuant to Rule 68(2)(c)’, 22 December 2023, ICC-01/14-01/18-2285-Conf, ICC-01/14-01/18-2312-Conf.

¹⁰ See Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, paras 1, 12, 24-33; Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, paras 3, 13-28.

¹¹ See Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, paras 1, 12-23, 33; Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, paras 2, 4-12.

Chamber is not satisfied that the Prosecution was unable to file the Request before the Rule 68(2)(c) Deadline for reasons outside its control. The Prosecution fails to explain why it could not have filed its Request prior to the expiration of that deadline or, at the very least, notified the Chamber of its difficulties in contacting the Witnesses and/or in gathering the declarations under Rule 68(2)(b) of the Rules before or in a reasonable time frame following the deadline. The Regulation 35 Request is therefore rejected.

8. The Chamber nonetheless considers it appropriate, pursuant to its powers under Articles 64(2), (6)(d) and (f), and 69(3) of the Statute, to assess whether granting an extension of time for the filing of the Rule 68(2)(c) Request is warranted in the circumstances.
9. In this regard, the Chamber recalls that its First Rule 68(2)(b) Decision, in which the prior recorded testimonies of the Witnesses were found suitable to be introduced under Rule 68(2)(b) of the Rules, was issued in April 2023, thus prior to the Defence's presentation of evidence. As of that date, the Defence was appraised of the content of the Witnesses' evidence and the fact that, pending receipt of the declarations under Rule 68(2)(b) of the Rules, their prior recorded testimonies would be introduced into evidence.
10. The Chamber also recalls its finding that the introduction into evidence of the Witnesses' prior recorded testimonies was not prejudicial to or inconsistent with the rights of the accused and served the interests of justice.¹² In that context, it recalls that the statements of P-0460, P-0732, P-1779 and P-1871 relate to issues that are not materially in dispute and that some of them concern non-charged incidents.¹³ It also recalls its finding that it would not rely on certain paragraphs of P-1871's and P-1864's statements that refer to the accused.¹⁴ It further notes

¹² First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, paras 115 (for P-1864), 126 (for P-1871), 204 (for P-1779), 224 (for P-0732), 261 (for P-0460).

¹³ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Red-Corr, paras 125 (for P-1871), 202 (for P-1779), 222 (for P-0732), 259 (for P-0460).

¹⁴ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, paras 111-112, 122, 124.

that the Defence did not object to the submission of the prior recorded testimonies of P-0460, P-0732 and P-1779 pursuant to Rule 68(2)(b) of the Rules.¹⁵

11. In light of these specific circumstances, the Chamber considers that entertaining the Rule 68(2)(c) Request would cause limited prejudice to the accused. Having balanced the different interests at stake and noting the potential relevance of the Witnesses' evidence, it further finds that it is in the interests of justice and the determination of the truth to do so.
12. Accordingly, the Chamber decides that it will entertain the Rule 68(2)(c) Request pursuant to its general powers under the Statute.

B. The Rule 68(2)(c) Request

1. Applicable law

13. The Chamber recalls the applicable law as previously set out.¹⁶
14. In particular, the Chamber recalls the formal requirements that it has previously considered when assessing the notion of a prior recorded testimony having 'sufficient indicia of reliability' (the 'Formal Requirements'), which apply equally to the assessment under Rule 68(2)(b) and (c) of the Rules.¹⁷
15. Each request will be assessed on a case-by-case basis and with due regard to the specific nature and content of each prior recorded testimony.¹⁸ The Chamber will be guided by the principles regarding Rule 68 of the Rules as set out previously in its decision of 16 October 2020.¹⁹

¹⁵ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, paras 204 (for P-1779), 224 (for P-0732), 261 (for P-0460).

¹⁶ First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules, 12 July 2023, ICC-01/14-01/18-1975-Conf (the 'First Rule 68(2)(c) Decision'), paras 17-39 (confidential version notified on the same date, ICC-01/14-01/18-1975-Red).

¹⁷ See First Rule 68(2)(c) Decision, ICC-01/14-01/18-1975-Red, paras 32-34.

¹⁸ See Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, ICC-01/14-01/18-685, paras 28, 34.

¹⁹ Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, ICC-01/14-01/18-685, paras 23-34.

16. The Chamber further notes the Appeals Chamber’s recent judgment in relation to Rule 68(2)(c) of the Rules.²⁰ The Appeals Chamber found that the notion of ‘unavailability’ pursuant to Rule 68(2)(c) of the Rules needs to be assessed on a case-by-case basis, and that a ‘witness’s reluctance or unwillingness to testify does not preclude a finding that the witness is “unavailable to testify orally” [...], if it is established that there are other circumstances that cannot be overcome with reasonable diligence’.²¹

2. General submissions

17. For each of the Witnesses, the Prosecution submits that they have become unavailable to certify their statements due to obstacles that cannot be overcome with reasonable diligence,²² and that measures under Article 56 of the Statute could not have been anticipated.²³ It further argues that each prior recorded testimony (i) has sufficient indicia of reliability; (ii) is relevant and probative; and (iii) does not cause undue prejudice to the accused, as it does not concern issues that are materially in dispute and/or does not go to the acts and conduct of the accused.²⁴
18. The Ngaïssona Defence submits that the requirements under Rule 68(2)(c) of the Rules are not met for any of the Witnesses. In its view, (i) the Witnesses do not qualify as ‘unavailable’ under Rule 68(2)(c) of the Rules, as most of them demonstrated a simple unwillingness to testify or refused to provide a declaration pursuant to Rule 68(2)(b) of the Rules; and (ii) the Prosecution could have

²⁰ Appeals Chamber, Judgment on the appeal of Mr Patrice Edouard Ngaïssona against the decision of Trial Chamber V of 6 October 2023 entitled “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”, 20 May 2024, ICC-01/14-01/18-2502-Conf (public redacted version notified on the same date, ICC-01/14-01/18-2502-Red).

²¹ Appeals Chamber, Judgment on the appeal of Mr Patrice Edouard Ngaïssona against the decision of Trial Chamber V of 6 October 2023 entitled “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”, 20 May 2024, ICC-01/14-01/18-2502-Red, paras 38, 41.

²² Request, ICC-01/14-01/18-2285-Conf, paras 3, 8-16 (for P-0460), 20-30 (for P-0732), 34-45 (for P-1779), 49-58 (for P-1864), 62-72 (for P-1871).

²³ Request, ICC-01/14-01/18-2285-Conf, paras 3, 18 (for P-0460), 32 (for P-0732), 47 (for P-1779), 60 (for P-1864), 74 (for P-1871).

²⁴ Request, ICC-01/14-01/18-2285-Conf, paras 3-4, 19 (for P-0460), 33 (for P-0732), 48 (for P-1779), 61 (for P-1864), 75 (for P-1871), 76-80.

anticipated the necessity of measures under Article 56 of the Statute.²⁵ In this regard, it submits, *inter alia*, that, for alleged victims of rape, the Prosecution could have foreseen that the trauma of such alleged crimes could lead vulnerable witnesses to cease cooperation.²⁶

19. The Yekatom Defence also argues that the Prosecution has failed to satisfy the requirements of Rule 68(2)(c) of the Rules for each of the Witnesses. It submits, *inter alia*, that (i) the Prosecution has not exercised reasonable diligence to secure the Witnesses' availability in a timely manner, despite 'ample indication' that it was at risk of losing their cooperation; and (ii) the Prosecution should have anticipated the necessity of measures under Article 56 of the Statute throughout the presentation of its case.²⁷ In addition, it argues that the formal certification process is a necessary component to confirm the sufficient indicia of reliability of the evidence and that the introduction of the prior recorded testimonies of the Witnesses at this stage is prejudicial to the rights of Mr Yekatom.²⁸ For P-0460 and P-1864 specifically, it also submits that 'unavailability' pursuant to Rule 68(2)(c) of the Rules does not include circumstances whereby a witness simply refuses to provide the accompanying declaration.²⁹

3. P-0460

20. P-0460 was a [REDACTED] who lived in Bangui during the relevant period.³⁰ The Chamber refers to its First Rule 68(2)(b) Decision for the summary of the witness's prior recorded testimony,³¹ which consists of her statement³² and an associated item.³³

²⁵ Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, paras 1, 12, 24-33. *See also* paras 15 (for P-0460), 16 (for P-0732), 17 (for P-1864), 18 (for P-1871), 19 (for P-1779).

²⁶ Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, para. 30.

²⁷ Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, paras 3, 17-23.

²⁸ Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, paras 24-27.

²⁹ Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, paras 13-16.

³⁰ *See* First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Conf-Corr, para. 255.

³¹ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Conf-Corr, paras 256-58. *See also* Request, ICC-01/14-01/18-2285-Conf, para. 8.

³² Statement, CAR-OTP-2013-0536; CAR-OTP-2122-4754 (Translation). *See* Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx.

³³ Annex I, CAR-OTP-2013-0549. *See* Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx.

21. Regarding P-0460's unavailability, the Prosecution submits that there is no reasonable prospect that the witness would proceed with the certification of her statement in the future or that a summons to secure her testimony would be successful. It refers in particular to the efforts it has made to engage with the witness, the 'undisputable' vulnerability of P-0460, and the fact that summoning her would put her at risk of re-traumatisation and cause unnecessary, disproportionate hardship.³⁴
22. The Chamber notes that P-0460 [REDACTED] and that her current whereabouts are seemingly known to the Prosecution, and that the latter was notably able to reach the witness following the intervention of [REDACTED].³⁵ While the Chamber notes that the witness indicated that she 'was physically ill and unable to go through the formal certification process' of her prior recorded testimony,³⁶ and mindful of the distress that this process may cause the witness, it considers that, in the specific circumstances at hand, the information available as presented by the Prosecution is insufficient to conclude that the witness is 'unavailable to testify' within the meaning of Rule 68(2)(c) of the Rules.
23. The Chamber therefore rejects the Rule 68(2)(c) Request with regard to P-0460.

4. P-0732

24. P-0732 was a Muslim [REDACTED].³⁷ The Chamber refers to its First Rule 68(2)(b) Decision for the summary of the witness's prior recorded testimony,³⁸ which consists of her statement³⁹ and an associated item.⁴⁰

³⁴ Request, ICC-01/14-01/18-2285-Conf, paras 3, 9-16.

³⁵ See Request, ICC-01/14-01/18-2285-Conf, paras 9, 11-12.

³⁶ See Request, ICC-01/14-01/18-2285-Conf, para. 12.

³⁷ See First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 219; Request, ICC-01/14-01/18-2285-Conf, paras 20-21.

³⁸ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Conf-Corr, paras 220-21. See also Request, ICC-01/14-01/18-2285-Conf, paras 20-21.

³⁹ CAR-OTP-2061-0003; CAR-OTP-2107-7884 (Translation). See Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx.

⁴⁰ Sketch, CAR-OTP-2061-0022 (Annex 1). See Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx. The Chamber notes that, in its First Rule 68(2)(b) Decision, video CAR-OTP-2019-1230 was also considered to form an integral part of P-0732's statement (see First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 223). The Chamber however notes that this item was subsequently submitted notably through the bar table (see Decision on the Eighth Prosecution Submission Request from the Bar

25. Regarding P-0732's unavailability, the Prosecution submits that there is no reasonable prospect that the witness could be contacted or located, or that a summons to secure her testimony could be successfully executed. It further submits that summoning the witness would put her at risk of re-traumatisation and that the execution of any summons would be impossible given the unavailability of information regarding P-0732's whereabouts.⁴¹
26. Considering the information available as provided by the Prosecution, the Chamber finds that P-0732 is unavailable within the meaning of Rule 68(2)(c) of the Rules, since she could not be located after numerous attempts and efforts.⁴²
27. In this respect, the Chamber notes the Prosecution's attempts to reach the witness directly or through a possible neighbour since December 2022, as well as its subsequent unsuccessful efforts to contact and locate the witness between August and December 2023 through intermediaries and local authorities.⁴³ The Chamber further notes that, acting in response to a request for assistance from 11 August 2023, the [REDACTED] authorities also did not manage to locate the witness.⁴⁴ The Chamber agrees with the Prosecution that summoning the witness is not an appropriate alternative at this point, as the execution of the summons would be unlikely in light of the unavailability of information regarding the witness's whereabouts, particularly noting that the [REDACTED] authorities' execution of a request for assistance to locate the witness has previously not yielded any results.⁴⁵

Table (Audio-Visual Material), 12 September 2023, ICC-01/14-01/18-2092-Conf, paras 13, 15, p. 14 (public redacted version notified on the same date, ICC-01/14-01/18-2092-Red)) and that the Prosecution does not seek its submission through this witness pursuant to Rule 68(2)(c) of the Rules (*See Annex to the Request*, ICC-01/14-01/18-2285-Conf-Anx). The Chamber therefore considers that it need not rule on this item again in the context of this decision.

⁴¹ Request, ICC-01/14-01/18-2285-Conf, paras 3, 20-30.

⁴² *See also* First Rule 68(2)(c) Decision, ICC-01/14-01/18-1975-Red, para. 27 *with reference to* Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Prosecution's second application to introduce the prior recorded testimony of P-0085 under Rule 68(2)(c), 14 December 2022, ICC-02/05-01/20-834.

⁴³ *See* Request, ICC-01/14-01/18-2285-Conf, paras 22-23, 25-28.

⁴⁴ *See* Request, ICC-01/14-01/18-2285-Conf, paras 24, 28.

⁴⁵ *See* Request, ICC-01/14-01/18-2285-Conf, para. 29.

28. In these circumstances, contrary to the Ngaïssona Defence's submissions,⁴⁶ the Chamber finds that the witness's unavailability does not stem from her mere reluctance to testify or to provide the declaration under Rule 68(2)(b) of the Rules, but rather from obstacles that cannot be reasonably overcome, as it appears that she cannot be located and there is no further information available on her potential whereabouts.
29. Turning to the second requirement under Rule 68(2)(c) of the Rules, the Chamber is satisfied that no measures under Article 56 of the Statute could have been anticipated. While noting the Defence's arguments on the Prosecution's alleged lack of diligence regarding this witness,⁴⁷ the Chamber considers that there was no information in the Prosecution's possession that would have allowed it to predict the witness becoming unavailable and triggered its obligations under Article 56 of the Statute. In the Chamber's view, contrary to the Ngaïssona Defence's submissions,⁴⁸ the fact that a witness's evidence relates to alleged rape is not sufficient, on its own, to support that the Prosecution should have foreseen any subsequent loss of contact with the witness.
30. The Chamber further recalls its findings in the context of the First Rule 68(2)(b) Decision concerning this witness. Notably, it found that P-0732's statement does not go to proof of the accused's acts and conduct, relates to issues that are not materially in dispute and concerns non-charged incidents, and that the associated item has been used and explained by the witness in her statement and thus forms an integral part of it.⁴⁹ It further noted that P-0732's statement was obtained by fulfilling the Formal Requirements and considered that it shows sufficient indicia of reliability.⁵⁰ Finally, the Chamber concluded that the introduction of P-0732's prior recorded testimony was not prejudicial to or inconsistent with the rights of the accused and that the interests of justice were better served by its

⁴⁶ See Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, para. 26.

⁴⁷ See, *in particular*, Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, paras 16, 30; Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, para. 18.

⁴⁸ See Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, para. 30.

⁴⁹ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, paras 222-23.

⁵⁰ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 222.

introduction.⁵¹ The Chamber considers these findings to be also relevant to its present assessment of the introduction of P-0732's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules.

31. In this context, the Chamber notes the Yekatom Defence's argument that the declaration pursuant to Rule 68(2)(b) of the Rules is necessary to confirm the sufficient indicia of reliability of the witness's testimony.⁵² Contrary to Rule 68(2)(b) of the Rules, a declaration is however not a requirement for submission pursuant to Rule 68(2)(c) of the Rules.
32. Similarly, the Chamber is unconvinced by the Yekatom Defence's argument that the introduction of the witness's prior recorded testimony *at this stage* is prejudicial to the rights of the accused, recalling in particular that the Defence has been appraised of the content of the witness's evidence and of the fact that the prior recorded testimony was (conditionally) authorised to be part of the evidentiary record since April 2023.⁵³
33. In light of the above, the Chamber is satisfied that P-0732's prior recorded testimony is suitable to be introduced pursuant to Rule 68(2)(c) of the Rules. Accordingly, the Chamber grants the introduction of P-0732's statement⁵⁴ and its associated item⁵⁵ pursuant to that provision.

5. P-1779

34. P-1779 was [REDACTED] in the village of Gaga before and during the conflict.⁵⁶ The Chamber refers to its First Rule 68(2)(b) Decision for the summary of the

⁵¹ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 224.

⁵² See Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, paras 24-25.

⁵³ See First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, pp. 99-101.

⁵⁴ Statement, CAR-OTP-2061-0003; CAR-OTP-2107-7884 (Translation).

⁵⁵ Sketch, CAR-OTP-2061-0022 (Annex 1).

⁵⁶ See First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Conf-Corr, para. 200; Request, ICC-01/14-01/18-2285-Conf, para. 34.

witness's prior recorded testimony,⁵⁷ which consists of his statement⁵⁸ and two associated items.⁵⁹

35. Regarding P-1779's unavailability, the Prosecution submits that there is no reasonable prospect that the witness could be contacted or located, or that a summons to secure his testimony could be successfully executed. It further submits that the execution of any summons would be impossible given the unavailability of information regarding P-1779's whereabouts.⁶⁰
36. Considering the information available as provided by the Prosecution, the Chamber finds that P-1779 is unavailable within the meaning of Rule 68(2)(c) of the Rules. The Chamber considers that the witness's unavailability stems from obstacles that cannot be reasonably overcome, since he could not be located after numerous attempts and efforts.⁶¹
37. In this respect, the Chamber notes the Prosecution's attempts to reach the witness [REDACTED] between August and September 2022 and again from April 2023, as well as its unsuccessful efforts to contact and locate the witness since August 2023 through intermediaries and local authorities.⁶² The Chamber further notes that, acting in response to a request for assistance from 11 August 2023, the [REDACTED] authorities also did not manage to locate the witness.⁶³ The Chamber agrees with the Prosecution that summoning the witness is not an appropriate alternative at this point, as the execution of the summons would be unlikely in light of the unavailability of information regarding the witness's whereabouts, particularly noting that the [REDACTED] authorities' execution of

⁵⁷ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Conf-Corr, para. 201. *See also* Request, ICC-01/14-01/18-2285-Conf, para. 35.

⁵⁸ Statement, CAR-OTP-2087-9894. *See* Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx.

⁵⁹ Satellite images, CAR-OTP-2087-9916 (Annex A) and CAR-OTP-2087-9917 (Annex B). *See* Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx.

⁶⁰ Request, ICC-01/14-01/18-2285-Conf, paras 3, 34, 36-45.

⁶¹ *See* First Rule 68(2)(c) Decision, ICC-01/14-01/18-1975-Red, para. 27 *with reference to* Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Prosecution's second application to introduce the prior recorded testimony of P-0085 under Rule 68(2)(c), 14 December 2022, ICC-02/05-01/20-834.

⁶² *See* Request, ICC-01/14-01/18-2285-Conf, paras 38-40, 42-43.

⁶³ *See* Request, ICC-01/14-01/18-2285-Conf, paras 41, 43.

a request for assistance to locate the witness has previously not yielded any results.⁶⁴

38. The Chamber notes the Ngaïssona Defence's arguments that the Prosecution has not exhausted all potential sources of information regarding the location of the witness, notably in light of the information the Prosecution received from intermediary P-1231 that P-1779 was last residing [REDACTED].⁶⁵ However, the Chamber notes that the Prosecution has engaged with the local [REDACTED] authorities in [REDACTED],⁶⁶ and finds that the Prosecution has exercised reasonable diligence in its attempts to locate the witness.
39. Turning to the second requirement under Rule 68(2)(c) of the Rules, the Chamber is satisfied that no measures under Article 56 of the Statute could have been anticipated. In the Chamber's view, there was no information in the Prosecution's possession that would have allowed it to predict the witness becoming unavailable and triggered its obligations under Article 56 of the Statute. While P-1779 informed the Prosecution that 'it might be difficult to contact him on short notice',⁶⁷ the witness did not state that he might not be reachable at all. As such, the Chamber considers that the Prosecution could not have reasonably anticipated that it would not be able to reach the witness any longer afterwards. The Prosecution further acted reasonably in the circumstances in confirming the witness's phone numbers and obtaining an alternative contact in case it was unable to contact the witness.⁶⁸
40. The Chamber further recalls its findings in the context of the First Rule 68(2)(b) Decision concerning this witness. Notably, it found that P-1779's statement relates to issues that are not materially in dispute and concerns non-charged incidents, and that the associated items have been used and explained by the witness in his statement and thus form an integral part of it.⁶⁹ It further noted that

⁶⁴ See Request, ICC-01/14-01/18-2285-Conf, para. 44.

⁶⁵ See Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, para. 27.

⁶⁶ See Request, ICC-01/14-01/18-2285-Conf, para. 42.

⁶⁷ See Request, ICC-01/14-01/18-2285-Conf, para. 37.

⁶⁸ See Request, ICC-01/14-01/18-2285-Conf, para. 37. *Contra* Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, paras 19, 30-31; Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, para. 18.

⁶⁹ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, paras 202-03.

P-1779's statement was obtained by fulfilling the Formal Requirements and considered that it shows sufficient indicia of reliability.⁷⁰ Finally, it concluded that the introduction of P-1779's prior recorded testimony was not prejudicial to or inconsistent with the rights of the accused and that the interests of justice were better served by its introduction.⁷¹ The Chamber considers these findings to be also relevant to its present assessment of the introduction of P-1779's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules.

41. The Chamber also refers to its above findings in relation to the Yekatom Defence's arguments regarding the sufficient indicia of reliability of the witness's testimony and the lack of prejudice to the rights of the accused,⁷² which are equally applicable to this witness.
42. In light of the above, the Chamber is satisfied that P-1779's prior recorded testimony is suitable to be introduced pursuant to Rule 68(2)(c) of the Rules. Accordingly, the Chamber grants the introduction of P-1779's statement⁷³ and its associated items⁷⁴ pursuant to that provision.

6. P-1864

43. P-1864 is a Muslim civilian [REDACTED].⁷⁵ The Chamber refers to its First Rule 68(2)(b) Decision for the summary of the witness's prior recorded testimony,⁷⁶ which consists of her statement⁷⁷ and an associated item.⁷⁸

⁷⁰ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 202.

⁷¹ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 204.

⁷² See *above* paragraphs 31-32.

⁷³ Statement, CAR-OTP-2087-9894.

⁷⁴ Satellite images, CAR-OTP-2087-9916 (Annex A) and CAR-OTP-2087-9917 (Annex B).

⁷⁵ See First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 106; Request, ICC-01/14-01/18-2285-Conf, para. 49.

⁷⁶ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Conf-Corr, paras 107-09. See *also* Request, ICC-01/14-01/18-2285-Conf, para. 49.

⁷⁷ Statement, CAR-OTP-2064-0860; CAR-OTP-2118-4347 (Translation). See Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx. With regard to the translation, the Chamber notes that the Prosecution seeks the introduction of CAR-OTP-2107-8170. However, this appears to be a previous draft version of the translation. Noting that a later finalised version of this translation is available in JEM under CAR-OTP-2118-4347, and linked to the statement, the Chamber will rule on the submission of this item instead.

⁷⁸ Annex A, CAR-OTP-2064-0873. See Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx.

44. Regarding P-1864's unavailability, the Prosecution submits that there is no reasonable prospect that the witness would proceed with the certification of her statement in the future or that a summons to secure her testimony could be successfully executed. It refers in particular to the 'undisputable' vulnerability of P-1864, the fact that it has made repeated efforts to contact and locate her, and that summoning her would put her at risk of re-traumatisation and cause unnecessary, disproportionate hardship.⁷⁹ The Prosecution further submits that measures under Article 56 of the Statute could not have been anticipated as, at the time of its interviews with P-1864 in November 2017, the witness did not report any life threatening health issues, and she confirmed her willingness to certify her statement on two occasions.⁸⁰
45. Considering the information available as provided by the Prosecution, the Chamber considers that measures under Article 56 of the Statute could have been anticipated for this witness. In June 2020, when informed that the [REDACTED] Defence had requested to speak with her, P-1864 had 'a strong emotional response', [REDACTED]. The witness afterwards complained about physical symptoms reminding her of her rape.⁸¹ In the Chamber's view, in light of the apparent vulnerability of the witness and the strong physical and emotional distress caused by discussions surrounding her evidence, the Prosecution could have reasonably foreseen that P-1864 might cease to engage in a process that caused her to relive her victimisation over long periods of time.
46. The Chamber therefore rejects the Rule 68(2)(c) Request with regard to P-1864.

7. P-1871

47. P-1871 is a Muslim civilian who resided in Boda during the relevant period.⁸² The Chamber refers to its First Rule 68(2)(b) Decision for the summary of the

⁷⁹ Request, ICC-01/14-01/18-2285-Conf, paras 3, 49-58.

⁸⁰ See Request, ICC-01/14-01/18-2285-Conf, paras 52, 60.

⁸¹ See Request, ICC-01/14-01/18-2285-Conf, paras 50-51.

⁸² See First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 118; Request, ICC-01/14-01/18-2285-Conf, para. 62.

witness's prior recorded testimony,⁸³ which consists of her statement⁸⁴ and an associated item.⁸⁵

48. Regarding P-1871's unavailability, the Prosecution submits that there is no reasonable prospect that the witness can be contacted or located, or that a summons to secure her testimony could be successfully executed. It further submits that summoning the witness would put her at risk of re-traumatisation and that the execution of any summons would be impossible given the unavailability of information regarding P-1871's whereabouts.⁸⁶ Regarding the lack of prejudice to the accused, the Prosecution submits in particular that it does not intend to rely on paragraph 51 of P-1871's statement.⁸⁷
49. Considering the information available as provided by the Prosecution, the Chamber finds that P-1871 is unavailable within the meaning of Rule 68(2)(c) of the Rules, since she could not be located after numerous attempts and efforts.⁸⁸
50. In this respect, the Chamber notes the Prosecution's attempts to reach the witness in September 2022 and March 2023, as well as its unsuccessful efforts to contact and locate the witness between August and November 2023, through intermediaries and local authorities.⁸⁹ The Chamber further notes that, acting in response to a request for assistance from 11 August 2023, the [REDACTED] authorities also did not manage to locate the witness.⁹⁰ The Chamber agrees with the Prosecution that summoning the witness is not an appropriate alternative at this point, as the execution of the summons would be unlikely in light of the unavailability of information regarding the witness's whereabouts, particularly

⁸³ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Conf-Corr, paras 119-21. *See also* Request, ICC-01/14-01/18-2285-Conf, para. 63.

⁸⁴ Statement, CAR-OTP-2064-0884; CAR-OTP-2118-4362 (Translation). *See* Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx.

⁸⁵ Annex A, CAR-OTP-2064-0896. *See* Annex to the Request, ICC-01/14-01/18-2285-Conf-Anx.

⁸⁶ Request, ICC-01/14-01/18-2285-Conf, paras 3, 62-72.

⁸⁷ Request, ICC-01/14-01/18-2285-Conf, para. 79.

⁸⁸ *See* First Rule 68(2)(c) Decision, ICC-01/14-01/18-1975-Red, para. 27 *with reference to* Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Prosecution's second application to introduce the prior recorded testimony of P-0085 under Rule 68(2)(c), 14 December 2022, ICC-02/05-01/20-834.

⁸⁹ *See* Request, ICC-01/14-01/18-2285-Conf, paras 65-66, 68-70.

⁹⁰ *See* Request, ICC-01/14-01/18-2285-Conf, paras 67, 70.

noting that the [REDACTED] authorities' execution of a request for assistance to locate the witness has previously not yielded any results.⁹¹

51. In these circumstances, contrary to the Ngaïssona Defence's submissions,⁹² the Chamber finds that the witness's unavailability does not stem from her mere reluctance to testify or to provide the declaration under Rule 68(2)(b) of the Rules, but rather from obstacles that cannot be reasonably overcome, as it appears that she cannot be located and there is no further information available on her potential whereabouts.
52. Turning to the second requirement under Rule 68(2)(c) of the Rules, the Chamber is satisfied that no measures under Article 56 of the Statute could have been anticipated. While noting the Defence's arguments on the Prosecution's alleged lack of diligence regarding this witness,⁹³ the Chamber considers that there was no information in the Prosecution's possession that would have allowed it to predict the witness becoming unavailable and triggered its obligations under Article 56 of the Statute. As stated above, the Chamber considers the fact that a witness's evidence relates to alleged rape insufficient, on its own, to support that the Prosecution should have foreseen any subsequent loss of contact with the witness.⁹⁴
53. The Chamber further recalls its findings in the context of the First Rule 68(2)(b) Decision concerning this witness. Notably, it found that while P-1871 mentions Mr Yekatom in her statement, the Prosecution does not intend to rely on this part of the statement and it would not constitute the core of her testimony.⁹⁵ Further, it noted that P-1871's statement does not go to proof of a matter concerning the acts and conduct of Mr Ngaïssona, relates to issues that are not materially in dispute and concerns non-charged incidents, and that the associated item was used and explained by the witness in her statement and thus forms an integral part

⁹¹ See Request, ICC-01/14-01/18-2285-Conf, para. 71.

⁹² See Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, para. 26.

⁹³ See, *in particular*, Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf, paras 18, 30; Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, para. 18.

⁹⁴ See *above* paragraph 29.

⁹⁵ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 122.

of it.⁹⁶ It also noted that P-1871's statement was obtained by fulfilling the Formal Requirements and considered that it shows sufficient indicia of reliability.⁹⁷ Finally, the Chamber concluded that the introduction of P-1871's prior recorded testimony was not prejudicial to or inconsistent with the rights of the accused and that the interests of justice were better served by its introduction.⁹⁸ Noting that the Prosecution still does not intend to rely on paragraph 51 of P-1871's statement which refers to Mr Yekatom,⁹⁹ the Chamber considers these findings to be also relevant to its present assessment of the introduction of P-1871's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules.

54. The Chamber also refers to its above findings in relation to the Yekatom Defence's arguments regarding the sufficient indicia of reliability of the witness's testimony and the lack of prejudice to the rights of the accused,¹⁰⁰ which are equally applicable to this witness. In this context, the Chamber decides that, in the interests of fairness to the Defence and albeit not required under Rule 68(2)(c) of the Rules, it will not rely on paragraph 51 of P-1871's prior recorded testimony for the purposes of establishing Mr Yekatom's acts and conduct.
55. The Chamber notes that it previously deferred its decision on the associated item to P-1871's statement¹⁰¹ as it had not been disclosed to the Defence.¹⁰² The Chamber notes that this item has now been disclosed and recalls that it was used and explained by the witness in her statement, and thus forms an integral part of it.¹⁰³ Further noting that the Defence did not make any observations on the introduction of this item, the Chamber considers that it can be introduced into evidence together with P-1871's statement.
56. In light of the above, the Chamber is satisfied that P-1871's prior recorded testimony is suitable to be introduced pursuant to Rule 68(2)(c) of the Rules.

⁹⁶ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, paras 123, 125, 127.

⁹⁷ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 125.

⁹⁸ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Corr-Red, para. 126.

⁹⁹ Request, ICC-01/14-01/18-2285-Conf, para. 79.

¹⁰⁰ See above paragraphs 31-32.

¹⁰¹ Annex A, CAR-OTP-2064-0896.

¹⁰² First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Conf-Corr, para. 127.

¹⁰³ First Rule 68(2)(b) Decision, ICC-01/14-01/18-1833-Conf-Corr, para. 127.

However, it will not rely on paragraph 51 for the purposes of establishing Mr Yekatom's acts and conduct.

57. Accordingly, the Chamber grants the introduction of P-1871's statement¹⁰⁴ and its associated item¹⁰⁵ pursuant to Rule 68(2)(c) of the Rules.

¹⁰⁴ Statement, CAR-OTP-2064-0884; CAR-OTP-2118-4362 (Translation).

¹⁰⁵ Annex A, CAR-OTP-2064-0896.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Regulation 35 Request;

DECIDES to entertain the Rule 68(2)(c) Request;

DECIDES that the prior recorded testimonies of the following witnesses are introduced into evidence, pursuant to Rule 68(2)(c) of the Rules:

- **P-0732:** Statement, CAR-OTP-2061-0003; Translation, CAR-OTP-2107-7884; and associated item CAR-OTP-2061-0022 (Annex 1).
- **P-1779:** Statement, CAR-OTP-2087-9894; and associated items CAR-OTP-2087-9916 (Annex A) and CAR-OTP-2087-9917 (Annex B).
- **P-1871:** Statement, CAR-OTP-2064-0884; Translation, CAR-OTP-2118-4362; and associated item CAR-OTP-2064-0896 (Annex A). However, it will not rely on paragraph 51 of the statement for the purposes of establishing Mr Yekatom's acts and conduct.

REJECTS the Rule 68(2)(c) Request with regard to P-0460 and P-1864; and

ORDERS the Prosecution, the Ngaïssona Defence and the Yekatom Defence to file a public redacted version of the Request, ICC-01/14-01/18-2285-Conf; the Ngaïssona Defence Response, ICC-01/14-01/18-2311-Conf; and the Yekatom Defence Response, ICC-01/14-01/18-2312-Conf, respectively, within one week of notification of this decision.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt

Presiding Judge



Judge Péter Kovács



Judge Chang-ho Chung

Dated 18 July 2025

At The Hague, The Netherlands