

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 February 2026**

TRIAL CHAMBER V

Before: Judge Beti Hohler, Presiding Judge
Judge Joanna Korner
Judge Keebong Paek

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public Redacted Version of the “Yekatom Defence Response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2462 pursuant to Rule 68(2)(c)”, 21 May 2021, ICC-01/14-01/18-1003-Conf”, 2 June 2021, ICC-01/14-01/18-1010-Conf

Source: Defence for Mr. Alfred Rombhot Yekatom

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INTRODUCTION

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence”) respectfully request the Trial Chamber to reject the *Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2462 pursuant to Rule 68(2)(c)* (the “Request”).
2. The Defence opposes the formal submission of the prior recorded testimony of Witness P-2462 as well as its associated exhibit as set out at Annex A of the Request as the Witness P-2462 does not qualify as being “unavailable” under Rule 68(2)(c) of the Rules of Procedure and Evidence (the “Rules”).

PROCEDURAL BACKGROUND

3. On 10 November 2020, the Prosecution filed its Final Witness List, indicating its intention to call 55 witnesses through Rule 68(2) and 69 witnesses through Rule 68(3).¹ The Prosecution indicated that Witness P-2462 would be giving her evidence orally through a video-link connection, with psychological support during her testimony.²
4. On 21 May 2021, the Prosecution filed the Request, in which it requested that the Trial Chamber deem as formally submitted the prior recorded testimony of Witness P-2462 with its associated exhibit as set at Annex A of the Request under Rule 68(2)(c).³

RELEVANT PROVISION

5. Rule 68(2)(c) of the Rules states that:

¹ [ICC-01/14-01/18-724-Conf-AnxA](#).

² [ICC-01/14-01/18-724-Conf-AnxA](#), at page 31, Witness # 49.

³ [ICC-01/14-01/18-1003-Conf](#).

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.

ARGUMENT

6. The Defence argues that P-2462's prior recorded testimony should not be admitted pursuant to Rule 68(2)(c) as P-2462 does not qualify as being "unavailable" "due to obstacles that cannot be overcome with reasonable diligence". The Prosecution has not established that its purported inability to contact P-2462 is sufficient evidence of her definitive unwillingness to testify. In any event, any such unwillingness to testify does not amount to her being "unavailable" under Rule 68(2)(c); and further, the Prosecution has not demonstrated the "reasonable diligence" required to qualify her as such.

A. On Witness P-2462's "unavailability" under Rule 68(2)(c)

7. The Defence submits that there are no indications to support the view that P-2462 is unavailable to testify "due to obstacles that cannot be overcome with reasonable diligence" pursuant to Rule 68(2)(c).

8. First, the Prosecution has not established that the witness is definitively unwilling to testify. The mere expression of “reservations” does not suffice in this regard. Appearing before any judicial authorities, let alone the International Criminal Court, is an inherently daunting experience for prospective witnesses, many of whom would likely harbour or express reservations prior to their eventual testimony.
9. Moreover, the nature of her “problems” remains unclear: they may be temporary, or otherwise limited; more importantly, they may be problems that the Court has faced in the past and remains well-equipped to overcome. While the Defence appreciates that the witness “could not give any additional explanations” in this regard during her [REDACTED] conversation,⁴ in the absence of such information, it cannot simply be assumed that these “reservations” or “problems” cannot be overcome with reasonable diligence.
10. Nor is the Prosecution’s subsequent inability to contact the witness on her telephone sufficient evidence of definitive unwillingness to testify. As set out in detail below, the Prosecution’s efforts in this regard fall far short of the threshold of “reasonable diligence” required under Rule 68(2)(c).
11. In any event, mere unwillingness to testify does not qualify a witness as “unavailable” under Rule 68(2)(c). In *Ntaganda*, Trial Chamber VI found that a witness’s unwillingness to testify under conditions set by that Chamber, added to the absence of information that the witness was “inaccessible” or “incapable” to testify orally, did not amount to him being “unavailable” under Rule 68(2)(c) of the Rules.⁵ The Prosecution has not established that the witness is “inaccessible”⁶ or “incapable” to testify in person or via video link

⁴ [ICC-01/14-01/18-1003-Conf](#), para. 13.

⁵ *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution application under Rule 68\(2\)\(c\) of the Rules for admission of prior recorded testimony of Witness P-0039](#), 19 May 2016, ICC-01/04-02/06-1323, paras 8-10.

⁶ See below, paras 16-24.

before the Chamber.⁷

12. Similarly, in the *Tolimir* case, Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) held that the Prosecution’s inability to persuade a witness to testify voluntarily was not sufficient to consider the witness unavailable under the Rule 92 *quater* of the Rules of Procedure and Evidence of the ICTY.⁸
13. Further, as noted above, P-2462’s reservations about appearing to deliver her testimony and for cross-examination are based on unknown reasons and the Prosecution’s allegation that she is therefore unavailable amounts to mere speculation. In the absence of information regarding the reasons underlying her reservations, P-2462’s position raises concerns about the reliability of her previous statement, as it cannot be ruled out that these reservations are about testifying under oath, and being cross-examined before the Chamber.
14. Although the Defence acknowledges that situations covered by Rule 68(2)(c) are broader than those listed under Rule 92 *quater* of the Rules of Procedure and Evidence of the ICTY,⁹ an unjustifiable extension of the scope of “unavailability” to mere “unwillingness” would distort the core purpose of the Rule and undermine its safeguards.
15. Additionally, to the extent that allowing formal submission for unwilling witnesses, on the basis of an interpretation that this amounts to unavailability, would be prejudicial to Mr. Yekatom’s right to challenge evidence through cross-examination, the Request is by extension contrary to the jurisprudential

⁷ *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution application under Rule 68\(2\)\(c\) of the Rules for admission of prior recorded testimony of Witness P-0039](#), 19 May 2016, ICC-01/04-02/06-1325, para 9.

⁸ *The Prosecutor v. Zdravko Tolimir*, IT-05-88/2-T, [Partial Decision on ‘Prosecution’s Rule 92bis and Rule 92ter Motion for Five Witnesses’](#), 27 August 2010, para. 33 (ICTY Rule 92 *quater* being the counterpart to Rule 68(2)(c)).

⁹ *The Prosecutor v. Bemba and al.*, [Decision on ‘Prosecution Submission of Evidence Pursuant to Rule 68\(2\)\(c\) of the Rules of Procedure and Evidence’](#), 12 November 2015, ICC-01/05-01/13-1481-Red, para. 16.

and statutory framework.¹⁰

B. On the Prosecution's reasonable diligence

16. The Prosecution has not exercised reasonable diligence regarding the forthcoming oral testimony of Witness P-2462 since it has not exhausted all available avenues to contact her, let alone secure her attendance.
17. The Prosecution's efforts in this regard are limited to attempting to reach Witness P-2462 through phone calls and WhatsApp; and contacting P-2049 on [REDACTED] for 'additional contact details'.¹¹
18. First, the Prosecution's reliance on its failed attempts to contact P-2462 via Whatsapp is misplaced. According to the Prosecution, P-2462 first expressed reservations about testifying during a phone conversation with Prosecution representatives on [REDACTED] – nearly one month after her "last access" to her Whatsapp account.¹² In other words, P-2462 evidently remained reachable on her phone, and willing to speak to Prosecution representatives, well after her last indicated access to her Whatsapp account. No inferences can be drawn from the Prosecution's inability to contact P-2462 on a Whatsapp account apparently deactivated over one month prior.
19. Subsequently to the [REDACTED] conversation, the Prosecution called her on [REDACTED] and [REDACTED]; and did not make any further attempt to contact her for three months.¹³ Nine of the eleven subsequent attempts to call P-2462 were made in a three-week period in [REDACTED]. The Prosecution submission that it has been unable to contact P-2462 "for over five months"

¹⁰ See, Rule 68(1); *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution application under Rule 68\(2\)\(c\) of the Rules for admission of prior recorded testimony of Witness P-0039](#), 19 May 2016, ICC-01/04-02/06-1325, para. 8 (To allow the introduction of previously recorded testimony under Rule 68(2)(c), in addition to standard admissibility criteria, it also must be established that i) the introduction is not prejudicial to or inconsistent with the rights of the accused').

¹¹ [ICC-01/14-01/18-1003-Conf](#), paras 15-16.

¹² [ICC-01/14-01/18-1003-Conf](#), para. 14.

¹³ [ICC-01/14-01/18-1003-Conf](#), paras 13-15.

should be considered in this context.

20. Moreover, of the thirteen phone calls made, the Prosecution does not specify exactly how many were made to P-2462's apparently defunct Whatsapp account; nor does it specify how many of those 13 calls actually connected with P-2462's telephone.¹⁴
21. The Prosecution did not submit any information on additional steps taken by Prosecution investigators to contact P-2462.
22. Moreover, the Prosecution did not submit any information on steps taken with the Victims and Witness Unit to obtain a formal report or assistance on the situation following the Witness having expressed reservations about testifying on [REDACTED].
23. Moreover, following P-2462's expression of reservations regarding her forthcoming testimony, the Prosecution did not formally request the Chamber to summon Witness P-2462 to testify before the Chamber. No information was submitted to indicate that P-2462 being compelled to testify "would place her under unnecessary hardship that is disproportionate to the purported significance of her evidence".¹⁵
24. If the Prosecution considers the submission of Witness P-2462's statement into evidence as essential to its case, it may submit a request that she be compelled to testify, as the Prosecution previously did for Witness P-2625.¹⁶
25. All relevant options must be explored before admitting this Witness's prior recorded testimony. Only in situation of unavailability that cannot be overcome with reasonable diligence should submission under Rule 68(2)(c) be

¹⁴ [ICC-01/14-01/18-1003-Conf](#), paras 14-15.

¹⁵ *The Prosecutor v. Bemba and al.*, [Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68\(2\)\(c\) of the Rules of Procedure and Evidence'](#), 12 November 2015, ICC-01/05-01/13-1481-Red-Corr, para. 18.

¹⁶ [ICC-01/14-01/18-739-Conf-Red](#); [ICC-01/14-01/18-804-Conf](#).

considered. It cannot be reasonably submitted that a mere thirteen phone calls – some of which did not even connect, and some of which appear to have been made to a defunct account – can meet this threshold.

CONFIDENTIALITY

26. This motion is being filed on a confidential basis as it responds to a confidential motion for which no public redacted version has yet been filed. A public redacted version will be filed shortly.

CONCLUSION

27. In the light of the above submissions, the Defence respectfully requests the Chamber to :

REJECT the Prosecution's Request seeking formal submission of P-2462's Prior Recorded Testimony with its associated exhibit as set out at Annex A of the Request pursuant to Rule 68(2)(c) of the Rules.

RESPECTFULLY SUBMITTED ON THIS 9TH DAY OF FEBRUARY 2026¹⁷



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands

¹⁷ The Defence thanks Legal Intern Yousra Lamqaddam for her substantial assistance with this filing.