

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 March 2021

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public

**Redacted Version of “Common Legal Representatives’ Joint Response to the
“Prosecution’s Request for the Formal Submission of the Prior Recorded
Testimony of P-1962 pursuant to Rule 68(3)”, 17 December 2020
(ICC-01/14-01/18-779-Conf)**

Source: Common Legal Representatives of Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri

Counsel for Patrice-Édouard Ngaïssona

Mr Geert-Jan Alexander Knoops

Legal Representatives of the Victims

Mr Dmytro Suprun

Legal Representatives of the Applicants

Mr Abdou Dangabo Moussa

Ms Marie Édith Douzima Lawson

Mr Yaré Fall

Ms Paolina Massidda

Ms Elisabeth Rabesandratana

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

Mr Dmytro Suprun

Mr Orchlon Narantsetseg

Ms Anne Grabowski

Ms Nadia Galinier

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the “Common Legal Representatives”) hereby file their joint response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1962 pursuant to Rule 68(3)” (the “Request”).¹

2. The Common Legal Representatives submit that the Request to have admitted the prior recorded testimony and associated exhibits of P-1962 (or the “Witness”) under rule 68(3) of the Rules of Procedure and Evidence (the “Rules”) should be granted.

3. In particular, the Common Legal Representatives support the Request since the prior recorded testimony and related documents in question: (i) are corroborative of other evidence; (ii) their introduction will not be prejudicial to the rights of both Accused; and (iii) this course of action will also promote the rights of the Victims to expeditious proceedings.

¹ See the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1962 pursuant to Rule 68(3)”, [No. ICC-01/14-01/18-750-Conf](#), 04 December 2020, with Confidential Annex A [No. ICC-01/14-01/18-750-Conf-AnxA](#) and Annex B [No. ICC-01/14-01/18-750-Conf-AnxB](#) (the “Request”).

II. PROCEDURAL BACKGROUND

4. On 26 August 2020, the Presiding Judge of Trial Chamber V (the “Chamber”) issued the “Initial Directions on the Conduct of the Proceedings” (the “Initial Directions”).²

5. On 16 October 2020, the Chamber issued the “Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules” (the “Guidance on Rule 68 Decision”).³

6. On 4 December 2020, the Prosecution filed its Request.⁴

III. CLASSIFICATION

7. Pursuant to regulation 23bis (1) and (2) of the Regulations of the Court, the present submission is classified as confidential following the classification chosen by the Prosecution and because it refers to the content of documents likewise classified as confidential. A public redacted version will be filed in due course.

IV. SUBMISSIONS

8. The Common Legal Representatives recall that, in the Initial Directions, the Presiding Judge held that the Chamber will rule on applications under rule 68 of the Rules as follows:

² See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber V, Presiding Judge), [No. ICC-01/14-01/18-631](#), 26 August 2020 (the “Initial Directions”).

³ See the “Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules (Trial Chamber V)”, [No. ICC-01/14-01/18-685](#), 16 October 2020 (the “Guidance on Rule 68 Decision”). See also the “Prosecution’s Request pursuant to Regulation 35 to vary the Time Limit for the Submission of Applications pursuant to Rule 68”, [No. ICC-01/14-01/18-652](#), 14 September 2020.

⁴ See the Request, *supra* note 1.

“[...] Submission Approach [...] Article 69(4) of the Statute, as confirmed by the Appeals Chamber, gives the Chamber discretion on whether to rule on the admissibility of each piece of evidence upon its submission. [...] In accordance with the established practice of other chambers, this Chamber will adopt the so-called ‘Submission Approach’. Consequently, it will not rule on the admissibility of each item of evidence during the course of the proceedings. Rather, the Chamber will assess the standard evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgment pursuant to Article 74(2) of the Statute. [Nonetheless] the Court’s legal framework contains a number of exclusionary rules, including procedural bars, obstacles and preconditions, which require the Chamber to rule on the admissibility of evidence prior to its assessment of evidence for the purposes of Article 74 of the Statute. [Thus] Chambers thus have to rule on applications under Rule 68 of the Rules prior to the assessment of evidence for the purposes of Article 74 of the Statute”.⁵

9. Moreover, the Chamber held in the “Guidance on Rule 68 Decision” that:

“[...] Rule 68 of the Rules permits the “introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met”. [While] the principle of orality enshrined in Article 69(2) of the Statute [...] provides that the “testimony of a witness shall be given in person” [...] Rule 68 of the Rules represents one of the statutory exceptions to the rule of orality and publicity. This means that this way of introducing prior recorded testimony is per se generally considered compatible with the rights of the accused. [...] Moreover, Rule 68 of the Rules is widely acknowledged as a useful tool to expedite and streamline the proceedings and its use therefore encouraged. [...] Nonetheless, it must be noted that Rule 68 of the Rules itself requires that its application is not “prejudicial to or inconsistent with the rights of the accused. [Moreover, Rule 68(3) of the Rules] allows the introduction of previously recorded testimony when a witness is present before the chamber, provided that the witness ‘does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings’. No further restrictions are imposed with regard to the instances under which Rule 68(3) of the Rules may be used”.⁶

10. Furthermore, according to the jurisprudence of the Court, several factors may be relevant for the Chamber’s determination to allow the introduction of such type of

⁵ See the Initial Directions, *supra* note 2, paras. 34, 52-56.

⁶ See the Guidance on Rule 68 Decision, *supra* note 3, paras. 20 – 26. See also, the “Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses” (Trial Chamber I), [No. ICC-01/04-01/06-1603](#), 15 January 2009, paras. 22, 24 and 29.

testimony, including: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.⁷ Yet, these are *only factors* but *not requirements* under rule 68(3) of the Rules and prior recorded testimonies may still be introduced even if they relate to issues that are materially in dispute and central to core issues of the case or are uncorroborated.⁸

11. Additionally, in order to make its determination under rule 68(3) of the Rules, a chamber must analyse the importance of each witness statement in light of the charges and the evidence already presented or intended to be presented before it.⁹ Moreover, expeditiousness is another factor relevant to the implementation of rule 68(3) of the Rules since its use in principle aims at reducing the amount of time devoted to hearing oral testimony in court.¹⁰

12. The Common Legal Representatives submit that given its nature and the content of the prior recorded testimony in question, it appears not necessary for the evidence provided by P-1962 to be presented orally in its entirety. This is because the prior recorded testimony (and associated exhibits) of the Witness are evidentiary material falling within the meaning of “*prior recorded testimony*” in the context of rule 68(2)(b) of the Rules since: (a) they are written statements taken pursuant to rules 111 and 112 of the Rules and; (b) the Witness understood - when giving his respective statements - that he was providing information which may be relied upon in the

⁷ See the “Decision on Prosecution’s Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, [No. ICC-02/04-01/15-621](#), 5 December 2016, para. 7 (the “Ongwen Rule 68(3) Decision”).

⁸ See the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’”, [No. ICC-02/11-01/15-744](#), 1 November 2016, paras. 67 and 69.

⁹ *Idem*, para. 71.

¹⁰ *Idem*, para. 61.

context of legal proceedings or were questioned in the capacity as a witness.¹¹ Associated exhibits to these statements are an integral part of the prior recorded testimony itself under the established practice of the Court.¹²

13. More importantly, said statement and associates exhibits provide evidence concerning the crimes committed in BODA as part of the widespread Anti-Balaka attacks carried out between September 2013 and December 2014 in the western Central African Republic, [REDACTED], as well as [REDACTED]. Consequently, the prior recorded statements in question appear to be *prima facie* relevant to and probative of material issues at trial. While some parts of these statements, in particular, concerning the acts or omissions of both Accused may relate to issues that are in dispute, this does not bar their introduction into evidence given their nature and content.

14. Moreover, the evidence contained in the prior recorded testimony of P-1962 is of a cumulative or corroborative nature. In other words, it is – in light of its relative importance in the body of evidence expected to be presented at trial – of such nature that it is unnecessary for the evidence provided by the Witness to be presented orally in its entirety.

15. Additionally, the Common Legal Representatives posit that the introduction of the prior recorded testimony and associated exhibits of P-1962 will, *inter alia*, enhance

¹¹ See the “Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules (Trial Chamber IX)”, [No. ICC-02/04-01/15-596-Conf](#), 18 November 2016, para. 9 and the “Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony” (Trial Chamber V(a)), [No. ICC-01/09-01/11-1938-Corr-Red2](#), 28 August 2015, paras. 32-33; the “Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests”, (Trial Chamber VII), [No. ICC-01/05-01/13-1478-Red-Corr](#), 12 November 2015, para. 29; the “Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103” (Trial Chamber VI), [No. ICC-01/04-02/06-1029](#), 20 November 2015, paras. 23 and 35; the “Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, (Trial Chamber VI), [No. ICC-01/04-02/06-1205](#), 11 March 2016, paras. 7 and 15; and the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, [No. ICC-02/11-01/15-573-Red](#), 09 June 2016, para. 5.

¹² See the “Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules”, *supra* note 11, para. 10.

the efficiency of the proceedings, avoid unnecessary repetition of oral testimony and ultimately save Court's time and resources.¹³ More importantly the time saved by proceeding under rule 68(3) of the Rules furthers both Accused's right to an expeditious trial without undue delay.¹⁴

16. It follows that the introduction of the prior recorded testimony and associated exhibits of P-1962 is not prejudicial to the fairness of the proceedings and, more specifically, to the rights of both Accused since the Defence will have an ample opportunity to examine the Witness. Indeed, under Rule 68(3) of the Rules, the calling party is expected to streamline its questioning considerably in light of the fact that this provision allows for the formal submission of the witness's previously recorded testimony and thus the Prosecution is expected to only conduct a limited and focused examination.¹⁵ This permits the Defence to test the entirety of the evidence, both in relation to the testimony given in court and the prior recorded testimony.¹⁶ Consequently, while the Prosecution is granted the opportunity to conduct a limited examination of the Witness, the Defence is not constrained to the amount of time used by the Prosecution.¹⁷ Hence, the introduction of the prior recorded testimony and associated exhibits of P-1962 is not prejudicial to the rights of the Accused.

17. In addition, the Common Legal Representatives submit that this course of event will also promote the rights of Victims to fair and expeditious proceedings. Indeed, as already underlined in previous submissions,¹⁸ Victims have been waiting for justice since many years now. They are concerned with the speed which the investigation conducted by the Prosecution has taken so far and the prospective of a lengthy trial. Thus, any procedural steps that would unnecessarily prolong the total duration of the

¹³ See the Ongwen Rule 68(3) Decision, *supra* note 7, para. 31.

¹⁴ *Idem*, para. 10.

¹⁵ See the Guidance on Rule 68 Decision, *supra* note 3, para. 36.

¹⁶ *Idem*, para. 30.

¹⁷ See the Ongwen Rule 68(3) Decision, *supra* note 7, para. 32.

¹⁸ See the "Common Legal Representatives' Joint and Consolidated Response to the Prosecution's Second and Third Request for the Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b)", [No. ICC-01/14-01/18-761-Conf](#), 10 December 2020, para. 19.

trial will further frustrate the legitimate expectations of Victims to promptly receive justice.

18. Lastly, while rule 68(3) of the Rules only refers to the possibility for the parties and the Chamber to question the witnesses concerned, the Legal Representatives of Victims recall that they may also be authorised to question said witnesses if the personal interests of their clients are affected by the testimony.¹⁹

V. CONCLUSION

19. For the foregoing reasons, the Common Legal Representatives respectfully request the Chamber to grant the Prosecution's Request and conditionally admit into evidence the prior recorded statements and associated exhibits of P-1962 pursuant to rule 68(3) of the Rules.

¹⁹ See the Initial Directions, *supra* note 2, para. 19.

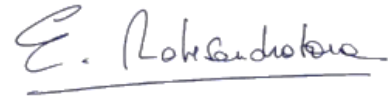


Dmytro Suprun

Common Legal Representative
Victims Former Child Soldiers



Paolina Massidda



Elisabeth Rabesandratana



Yaré Fall



Abdou Dangabo Moussa



Marie-Edith Douzima-Lawson

Common Legal Representatives
Victims of Other Crimes

Dated this 16th day of March 2021

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle
(France) and Saint Louis (Senegal)