

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1639-Conf is reclassified as "Public"

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **28 October 2022**

**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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Confidential**

**Yekatom Defence Observations to 'Prosecution's Request for the Formal  
Submission of the Prior Recorded Testimony of P-2625 pursuant to  
Rule 68(3)', 17 October 2022, (ICC-01/14-01/18-1621-Conf)**

**Source:** Defence for Mr. Alfred Rombhot Yekatom

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1639-Conf is reclassified as "Public"

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

**The Office of the Prosecutor**  
Mr Karim Asad Ahmad Khan  
Mr Kweku Vanderpuye

**Counsel for Mr. Yekatom**  
Ms Mylène Dimitri  
Mr Thomas Hannis  
Ms Anta Guissé

**Counsel for Mr. Ngaïssona**  
Mr Geert-Jan Alexander Knoops  
Mr Richard Omissé-Namkeamaï  
Ms Marie-Hélène Proulx

**Legal Representatives of Victims**  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

Mr Abdou Dangabo Moussa  
Ms Elisabeth Rabesandratana  
Mr Yaré Fall  
Ms Marie-Edith Douzima-Lawson  
Ms Paolina Massidda

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**  
Mr Xavier-Jean Keïta

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

---

**Registrar**  
Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**  
Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1639-Conf is reclassified as "Public"

## INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby submits its observations to the 'Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-2625 pursuant to Rule 68(3)' ('Request').<sup>1</sup>
2. The Defence does not presently object to the substance of the Request, but is concerned by the Prosecution's disregard of the procedures established by the Trial Chamber in its Initial Directions on the Conduct of the Proceedings ("Initial Directions").<sup>2</sup>

## PROCEDURAL HISTORY

3. On 16 July 2020, the Trial Chamber published the Decision Setting the Commencement Date of the Trial.<sup>3</sup> Therein, the Chamber ordered the Office of the Prosecutor ("OTP") to provide its final list of Prosecution witnesses ("Final Witness List") by 9 November 2020.<sup>4</sup> It was moreover mandated that this list include *inter alia* the intended mode of testimony, particularly whether rule 68 of the Rules of Procedure and Evidence ("RPE") would be sought for each specific witness.<sup>5</sup>
4. On 26 August 2020, the Trial Chamber provided its Initial Directions, in which it expanded on its previous decision.<sup>6</sup> *Inter alia*, it required the Prosecution to list all witnesses for whom it planned to rely on rule 68(3) in the Final Witness List,<sup>7</sup> and set 9 November 2020 as the date until which the Prosecution could file the ensuing applications.<sup>8</sup>

---

<sup>1</sup> [ICC-01/14-01/18-1621-Conf](#).

<sup>2</sup> [ICC-01/14-01/18-631](#).

<sup>3</sup> [ICC-01/14-01/18-589](#).

<sup>4</sup> *Id.*, para. 14.

<sup>5</sup> *Id.*, para. 15.

<sup>6</sup> [ICC-01/14-01/18-631](#).

<sup>7</sup> *Id.*, para. 32.

<sup>8</sup> *Id.*, para. 33.

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1639-Conf is reclassified as "Public"

5. On 14 September 2020, the OTP requested a variation of time limit for the submission of rule 68 applications pursuant to regulation 35 of the Regulations of the Court.<sup>9</sup> This request was partially granted by the Court in its 16 October 2020 decision, in which the Trial Chamber allowed the OTP to submit its rule 68(3) applications up to 45 days before the scheduled date of a witness' testimony.<sup>10</sup>
6. On 10 November 2020, the OTP filed the Final Witness List.<sup>11</sup> The Defence notes that P-2625 is therein listed as a 'live witness', *a contrario* of those listed as either rule 68(2) or 68(3).<sup>12</sup> The Defence further notes that this stated intended mode of testimony to the Court remained unchanged as of 3 October 2022, when the OTP notified its Revised Anticipated Upcoming Prosecution Witness Order.<sup>13</sup>
7. While P-2625 was scheduled to appear as the seventh OTP witness in the case,<sup>14</sup> the planned start date of his testimony was postponed by his decision not to testify, which prompted the Prosecution to request for the Court to compel his attendance.<sup>15</sup>
8. On 8 January 2021, the Court granted the Prosecution's request and compelled the appearance and testimony of P-2625.<sup>16</sup> The OTP then communicated to the Parties that P-2625 would be called on 29 March 2021,<sup>17</sup> which was then postponed several times. On 17 October 2022, P-2625 appeared before the Court and provided a sworn undertaking pursuant to rule 66(1) RPE.<sup>18</sup>

---

<sup>9</sup> [ICC-01/14-01/18-652](#).

<sup>10</sup> [ICC-01/14-01/18-685](#), para. 19.

<sup>11</sup> [ICC-01/14-01/18-724-Conf-AnxA](#).

<sup>12</sup> *Id.*, number 90.

<sup>13</sup> See email from the Prosecution to the Defence of 3 October 2022 at 17:14 and attached document.

<sup>14</sup> [ICC-01/14-01/18-724-Conf-AnxB](#).

<sup>15</sup> [ICC-01/14-01/18-739-Conf-Red](#).

<sup>16</sup> [ICC-01/14-01/18-804-Conf](#).

<sup>17</sup> See email from the Prosecution to the Defence of 18 June 2021 at 13:27.

<sup>18</sup> ICC-10/14-01/18-T-165-FRA RT at 14 :07 :41.

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1639-Conf is reclassified as "Public"

## ARGUMENTS

9. As a preliminary consideration, the Defence reiterates the findings of the Chamber to the effect that the Prosecution's heavy reliance on rule 68 in the present case is 'rather unprecedented',<sup>19</sup> which has prompted the Chamber to find that the Prosecution's projected use of that rule 'appears, prima facie, disproportionate in light of the principles of orality and publicity and potentially prejudicial to the rights of the accused'.<sup>20</sup> The Defence notes that out of the 46 witnesses that have so far testified, rule 68(3) was utilized in 32 cases, which matches closely in proportion that which was proposed by the OTP in its Provisional Witness List.<sup>21</sup> Of particular note, every past use of rule 68(3) was requested to the Chamber by the OTP in conformity with their intent stated on the Final Witness List.
10. The Defence submits that any request for the introduction of prior recorded testimony pursuant to rule 68(3) can only be made regarding witnesses for whom the OTP has stated its intent to proceed through such mode of testimony in the Final Witness List. It further notes that for the first time since the beginning of the trial, the Prosecution seeks to introduce the prior recorded testimony of a witness indicated as 'live'.
11. Pursuant to article 64(8)(b) of the Statute, the Trial Chamber set procedures in its Initial Directions, namely on the question of rule 68, on which it set the OTP two concurrent obligations. Firstly, it was enacted that "[any] relief sought under [rule 68] for a specific witness must be made clear from the Final Witness List provided to the other participants and the Chamber".<sup>22</sup> Secondly, it was ordered that the applications to the Court acting upon this stated intent be filed

---

<sup>19</sup> [ICC-01/14-01/18-685](#), para. 13.

<sup>20</sup> *Id.*, para. 32.

<sup>21</sup> *Id.*, para. 2 : with 24 live witnesses to 77 rule 68(3) witnesses, the latter form 76% of the total of both categories.

<sup>22</sup> [ICC-01/14-01/18-631](#), para. 32.

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1639-Conf is reclassified as "Public"

as soon as possible, and before the deadline set for the Final Witness List at the latest.<sup>23</sup> This second obligation was afterwards amended by the Chamber upon request by the OTP in favour of a 45 days rolling deadline prior to a witness' planned testimony.<sup>24</sup>

12. Therefore, the obligations conferred on the OTP by the Court in its Initial Directions are twofold: firstly, the OTP had to make its intention to apply for relief under rule 68 clear in its Final Witness List,<sup>25</sup> and secondly, the OTP had to submit its applications to that effect before the 9<sup>th</sup> of November 2020.<sup>26</sup> While the Prosecution requested the Court for an extension of the latter deadline, it did not request or argue then for an amendment to its former obligation.<sup>27</sup> This is reflected namely in the Decision on the Extension Request, which amends the OTP's duties regarding the 9 November 2020 deadline for the submission of rule 68 applications, but makes no direct mention of the obligation to indicate the mode of testimony in the Final Witness List. However, it does rely on the fact 68(3) applications will have been "long telegraphed" to support its arguments,<sup>28</sup> which indicates that it did not perceive the request as an exemption from its concurrent obligation set in the Initial Directions.
13. The present request by the Prosecutor is unprecedented, in that it concerns a witness for whom no mention of prior recorded testimony was indicated in the Final Witness List.<sup>29</sup> Notably, the OTP's intent to have P-2625 testify 'live' was reiterated up until the 3<sup>rd</sup> of October 2022.<sup>30</sup>
14. The Defence further notes that no mention of the obligation mandated by para. 32 of the Initial Directions is made in the Prosecution's request. While the

---

<sup>23</sup> *Id.*, para. 33.

<sup>24</sup> [ICC-01/14-01/18-685](#), para. 19.

<sup>25</sup> [ICC-01/14-01/18-631](#), para. 32.

<sup>26</sup> *Id.*, para. 33.

<sup>27</sup> [ICC-01/14-01/18-652](#)

<sup>28</sup> *Id.*, para. 27.

<sup>29</sup> [ICC-01/14-01/18-724-Conf-AnxA](#).

<sup>30</sup> See email from the Prosecution to the Defence of 3 October 2022 at 17:14 and attached document.

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1639-Conf is reclassified as "Public"

Defence does not contest that the Chamber can revise its decisions upon request or *proprio motu*, it does object to parties attempting a *de facto* revision which would place all other parties in front of the *fait accompli*. More specifically, the Defence regrets that the Prosecution's Request, structured and drafted substantially like previous such applications, would in practice result in the change of P-2625's planned mode of testimony, without effort to explain this change or justify it. The Defence can only speculate that this might be linked to the different circumstances around P-2625's testimony since the deposition of the Final Witness List. However, this still does not provide self-evident reasons for the request; the OTP still appears to expect a substantial degree of cooperation from the witness, considering it still plans to conduct five hours of supplementary examination out of an estimated 8 to 10 without prior recorded testimony.<sup>31</sup>

## **CONCLUSION**

15. The Defence fundamentally disagrees with the suggestion that the OTP can unilaterally amend a witness' intended mode of testimony without at the very least providing reasonable grounds to do so.<sup>32</sup> Such an ability would effectively make much of the Chamber's decisions on the Final Witness List and its contents mere suggestions to which the Prosecution holds by convention rather than obligation. The Defence thus submits that the Prosecution Request goes contrary to the spirit of the Chamber's Initial Directions, if not their letter. Mindful of the already prodigious recourse to exceptions to the principle of orality, both accepted and planned, and in the interests of legal certainty, the Defence believes that the Chamber is empowered to require the OTP to provide arguments to substantiate this highly irregular departure from protocol before even considering the merits of the request.

---

<sup>31</sup> [ICC-01/14-01/18-1621-Conf](#), para. 15, 17.

<sup>32</sup> Except when reverting to the norm, which per article 69(2) of the Statute is *viva voce* in-full testimony.

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1639-Conf is reclassified as "Public"

16. This being said, given the lack of specific prejudice to the Defence in this particular instance, the Defence does not oppose the Prosecution request on its merits, and respectfully defers to the Chamber.

**CONFIDENTIALITY**

17. The response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed forthwith.

**RESPECTFULLY SUBMITTED ON THIS 28<sup>TH</sup> DAY OF OCTOBER 2022<sup>33</sup>**



Me Mylène Dimitri  
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands

---

<sup>33</sup> The Defence thanks Legal Intern Mr. Tobie Raphael Godue for his precious assistance in the drafting of this filing.