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**International
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Court**

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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

Public Redacted Version of the “Response of the Common Legal Representative of the Former Child Soldiers to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2582 pursuant to Rule 68(3)”, No. ICC-01/14-01/18-1303-Conf, dated 7 March 2022

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the “Legal Representative”) hereby files his response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2582 pursuant to Rule 68(3)” (the “Request”).¹

2. The Legal Representative supports the Request insofar as it pertains to the formal submission of the prior recorded testimony of P-2582 (or the “Witness”) and associated exhibits in accordance with rule 68(3) of the Rules of Procedure and Evidence (the “Rules”). In particular, the Legal Representative submits that 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. The Legal Representative further supports the Request insofar as the Prosecution seeks leave to conduct a limited examination-in-chief of the Witness, and submits that this course of conduct will facilitate the expeditiousness of the proceedings and is in the best interests of the Witness given the nature of her victimisation.

II. PROCEDURAL BACKGROUND

3. 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

¹ See the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2582 pursuant to Rule 68(3)”, [No. ICC-01/14-01/18-1283-Conf](#), 15 February 2022, with Confidential Annex A [No. ICC-01/14-01/18-1283-Conf-AnxA](#) and Annex B [No. ICC-01/14-01/18-1283-Conf-AnxB](#) (the “Request”).

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”).

4. 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

5. On 15 February 2022, the Prosecution filed its Request.⁴

6. On 17 February 2022, following the Yekatom Defence’s request,⁵ the Single Judge of the Chamber extended to 7 March 2022 the time limit for all participants for any response to the Request.⁶

III. CLASSIFICATION

7. Pursuant to regulation 23bis (1) and (2) of the Regulations of the Court, the present submissions are 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 Legal Representative recalls that, in the Initial Directions, the Presiding Judge held that the Chamber will rule on applications under rule 68 of the Rules of Procedure and Evidence (the “Rules”) as follows:

“[...] 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

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.

⁵ See the Email correspondence from the Yekatom Defence to the Chamber on 16 February 2022 at 17:18.

⁶ See the Email correspondence from the Chamber to the parties and participants on 17 February 2022 at 16:42.

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. 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".⁷

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".⁸

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 testimony, including whether the evidence: (i) relates to issues that are not materially in dispute; (ii) is not central to core issues in the case, but only provides relevant

⁷ See the Initial Directions, *supra* note 2, paras. 34 and 52-56.

⁸ 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 and 24.

background information; and (iii) is corroborative of other evidence.⁹ 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.¹⁰

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.¹¹ 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.¹² In this regard, the crime-based witness P-2582 is a former child soldier who falls under the category of a vulnerable victim.¹³ Upon recruitment, she was also [REDACTED] which had the impact of increasing her vulnerability. Accordingly, a limited examination-in-chief of the Witness will facilitate the expeditiousness of the proceedings and is in the best interests of the Witness given the nature of her victimisation.

12. The Legal Representative submits that given its nature and the content of the prior recorded testimony in question, it appears unnecessary for the evidence provided by P-2582 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) it is a written statement taken pursuant to rules 111 and 112 of the

⁹ 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").

¹⁰ 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 OA8](#), 1 November 2016, paras. 67 and 69.

¹¹ *Idem*, para. 71.

¹² *Idem*, para. 61.

¹³ See e.g. the "Sentencing Judgment" (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019, paras. 193 and 195.

Rules and; (b) the Witness understood – when giving her statement – that she was providing information which may be relied upon in the context of legal proceedings or was questioned in the capacity as a witness.¹⁴ Associated exhibits to these statements are an integral part of the prior recorded testimony itself under the established practice of the Court.¹⁵

13. More importantly, said statement and associate exhibits provide evidence concerning the crimes committed in the Anti-Balaka's 5 December 2013 attack of BANGUI, and the group's commission of crimes against Muslim civilians. The Witness discusses the forcible conscription of children in YEKATOM's group, and its structure and activities. She describes the demobilisation project organised by UNICEF. She also provides evidence of the contextual elements for war crimes and crimes against humanity, in particular the Anti-Balaka being an organised armed group, and its intent to target the Muslim civilians pursuant to a criminal organisational policy between September 2013 and December 2014. The Witness also describes being [REDACTED] by [REDACTED], a Commander in YEKATOM's Group at [REDACTED]¹⁶. Consequently, the prior recorded statement in question appears to be *prima facie* relevant to and probative of material issues at trial. While some parts of this statement, in particular, concerning the acts or omissions of the Accused may relate to issues that

¹⁴ 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-Red](#), 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.

¹⁵ See the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules", *supra* note 14, para. 10.

¹⁶ See [REDACTED].

are in dispute, this does not bar its introduction into evidence given their nature and content.¹⁷

14. Moreover, the evidence contained in the prior recorded testimony of P-2582 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 Legal Representative posits that the introduction of the prior recorded testimony and associated exhibits of P-2582 will, *inter alia*, enhance the efficiency of the proceedings, avoid unnecessary repetition of oral testimony and ultimately save the Court's time and resources.¹⁸ The unnecessary repetition of oral testimony is important in light of the need to avoid re-traumatisation, given the nature of the events the Witness will testify about. 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.¹⁹

16. It follows that the introduction of the prior recorded testimony and associated exhibits of P-2582 are 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

¹⁷ See, for example, the "Tenth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1595, P-2658 and P-2453" (Trial Chamber V), [No. ICC-01/14-01/18-1282-Red](#), 15 February 2022, paras. 12-13 (the "Tenth Decision on Prosecution Requests").

¹⁸ See the Ongwen Rule 68(3) Decision, *supra* note 9, para. 31. See also, for example, the Tenth Decision on Prosecution Requests, *supra* note 17, paras. 15-16, 23-24, and 28-29.

¹⁹ See the Ongwen Rule 68(3) Decision, *supra* note 9, para. 10. See also, for example, the Tenth Decision on Prosecution Requests, *supra* note 17, paras. 15-16, 23-24, and 28-29.

examination.²⁰ 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.²¹ 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.²² Hence, the introduction of the prior recorded testimony and associated exhibits of P-2582 is not prejudicial to the rights of the Accused.

17. In addition, the Legal Representative submits that this course of conduct will also promote the rights of Victims to fair and expeditious proceedings. Indeed, as already underlined in previous submissions,²³ Victims have been awaiting justice for many years, and are concerned with the prospect of a lengthy trial. Thus, any procedural steps that would unnecessarily prolong the total duration of the trial will further frustrate the legitimate expectations of Victims to promptly receive justice.

18. Finally, while rule 68(3) of the Rules only refers to the possibility for the parties and the Chamber to question the witness concerned, the Legal Representative recalls that he may also be authorised to question the Witness, in particular on the harms the Witness personally suffered, or the harms of other victims observed by the Witness.²⁴

²⁰ See the Guidance on Rule 68 Decision, *supra* note 3, para. 36.

²¹ *Idem*, para. 30. See also, for example, the Tenth Decision on Prosecution Requests, *supra* note 17, paras. 12-13.

²² See the Ongwen Rule 68(3) Decision, *supra* note 9, para. 32.

²³ 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; and the “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)”, [No. ICC-01/14-01/18-779-Conf](#), 17 December 2020, para.17.

²⁴ See the Initial Directions, *supra* note 2, para. 19.

V. CONCLUSION

19. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to grant the Request in its entirety.

RESPECTFULLY SUBMITTED

A handwritten signature in black ink, appearing to read 'D. Suprun', with a period at the end. The signature is written in a cursive style.

Dmytro Suprun
Common Legal Representative of the Former Child Soldiers

Dated this 16th day of January 2023

At The Hague, The Netherlands