

**Cour
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**International
Criminal
Court**

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No.: **ICC-01/14-01/18**
Date: **14 September 2023**

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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of "Prosecution's Observations pursuant to the Chamber's
"Order regarding the Remainder of the Prosecution's Presentation of Evidence
and Order pursuant to Article 64(6)(d) of the Statute", ICC-01/14-01/18-1739-Conf,
31 January 2023", ICC-01/14-01/18-1791-Conf, 10 March 2023**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Pursuant to Trial Chamber V's ("Chamber") 31 January 2023 Order,¹ the Office of the Prosecutor ("Prosecution") provides its revised list of remaining witnesses and examination estimates, contained in the Confidential Annex.

2. As concerns the second part of the Order,² requesting the Parties' views on the potential introduction of [REDACTED] previously recorded testimony under rule 68(3) of the Rules of Procedure and Evidence ("Rules"), the Prosecution considers that there is no legal or procedural impediment in the circumstances. The determination is case specific, and the Prosecution defers to the Chamber's exercise of its broad discretion. Notably, introducing [REDACTED] previously recorded testimony pursuant to rule 68(3) would contribute to the expedition and streamlining of the proceedings.³ Moreover, it would not unfairly prejudice the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber, the Prosecution, and the Participants.⁴

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this submission and its Annex are filed as "Confidential", corresponding to the classification of the Chamber's order and as they contain information concerning witnesses that may not be made public. A public redacted version will be submitted as soon as practicable.

¹ ICC-01/14-01/18-1739-Conf, para. 5.

² ICC-01/14-01/18-1739-Conf, para. 15.

³ See Rule 68(3); see also ICC-01/14-01/18-685, para. 29 (noting 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") (emphasis added).

⁴ See Rule 68(3); see also ICC-01/14-01/18-685, para. 29 (noting that, other than the specific requirements of the witness's presence and absent objection to the introduction of the prior statement, "[n]o further restrictions are imposed with regard to the instances under which Rule 68(3) of the Rules may be used").

III. SUBMISSIONS

A. Revised list of remaining Prosecution witnesses and examination estimates

4. On 10 November 2020, the Prosecution submitted its “Final Witness List”⁵ and “Order of Prosecution Witnesses”,⁶ containing a total of 96 witnesses expected to testify either fully *viva voce* or pursuant to rule 68(3).

5. By the date of this submission, the Chamber has heard the evidence of 59 of these witnesses. The Prosecution has withdrawn or filed rule 68(2)(c) applications for a further 10 witnesses.⁷

6. The Prosecution has carefully considered the Chamber’s direction to review its remaining witness list and examination estimates “with a view to identify ways to reduce the duration of its remaining evidence presentation.”⁸ The Prosecution has conducted a thorough review of its remaining 27 witnesses and determined that it will withdraw another eight,⁹ which will expedite the completion of its case in chief. For P-0975, who has become unavailable, the Prosecution intends to file a rule 68(2)(c).

7. In addition, the Prosecution would request that the Chamber consider calling P-2511 as a Court witness, pursuant to articles 64(6)(d) and 69(3). This witness, once fully cooperative during the earlier stages of the proceedings, abruptly withdrew his cooperation for reasons yet unclear.

8. The updated version of the “Order of Prosecution Witnesses”¹⁰ set out in the Annex, contains the revised list of the Prosecution’s 19 remaining witnesses and their examination estimates. As noted in the Annex, six of these witnesses (five scheduled witnesses and one contingency witness) have already been scheduled to testify during

⁵ ICC-01/14-01/18-724-Conf-AnxA.

⁶ ICC-01/14-01/18-724-Conf-AnxB.

⁷ See e-mails from the Prosecution sent on 28 July 2021, at 16:05 and on 15 November 2022, at 13:38.

⁸ ICC-01/14-01/18-1739-Red, para. 5.

⁹ P-0975, P-0314, P-2233, P-2620, P-2511, P-2442, P-2196, and P-2388.

¹⁰ ICC-01/14-01/18-724-Conf-AnxB.

the upcoming evidence block.¹¹ The Prosecution is further contemplating the withdrawal of P-2083, but intends to make its final assessment upon the completion of P-2082's testimony, anticipated to be closely related to the former in substance.

9. The Prosecution further notes that its current list of remaining witnesses may need to be further adjusted following decisions to be issued by the Chamber in relation to the Prosecution's pending rule 68(2)(b) applications.

B. Potential introduction of [REDACTED] previously recorded testimony pursuant to rule 68(3) of the Rules

10. The Prosecution defers to the Chamber's broad discretion¹² regarding the potential introduction of [REDACTED] previously recorded testimony pursuant to rule 68(3). With that said, it is the Prosecution's view that there is no legal or procedural impediment to doing so.

11. The Appeals Chamber has held that introducing prior recorded testimony under rule 68(3) on issues materially in dispute, central to core issues of the case, or uncorroborated, is not precluded *per se*.¹³ Further, the Appeals Chamber has confirmed that prior recorded testimony can be introduced under rule 68 to prove or to disprove any fact in issue before a chamber.¹⁴ This is of course subject to a case-by-case assessment with regard to the specific nature and content of the prior recorded testimony and the competing statutory considerations.¹⁵

12. In this case, should [REDACTED] prior recorded testimony be introduced pursuant to rule 68(3), it would clearly shorten the witness's in-court-testimony,

¹¹ Block 20, scheduled for 13-31 March 2023.

¹² See ICC-02/11-01/15-744, para. 68.

¹³ See ICC-02/11-01/15-744, para. 69; see also *e.g.*, ICC-01/05-01/13-1478-Red-Corr, para. 62, 79, 84, 91 (allowing rule 68(3) prior recorded testimony bearing on material elements of underlying charges); see also *Prosecutor v. Popović et al*, Case No.IT-05-88, Order to Summon Momir Nikolic, 10 March 2009, pp. 1-2 (a material witness called by the Trial Chamber under ICTY Rule 92ter), see *Prosecutor v. Blagojević et al*, Case No. IT-02-60-PT, "Statement of Facts and Acceptance of Responsibility", [Tab A to Annex A](#) to the "Joint Motion for Consideration of Plea Agreement between Momir Nikolić and the Office of the Prosecutor", 6 May 2003.

¹⁴ See ICC-01/05-01/13-2275-Red, fn. 693.

¹⁵ ICC-01/14-01/18-685, para. 34.

contributing to the expedition and streamlining of the proceedings. Moreover, this would not unfairly prejudice the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber, the Prosecution, and the Participants.¹⁶

A handwritten signature in black ink, consisting of a stylized initial 'K' followed by a long horizontal line that ends in a small dot.

Karim A. A. Khan KC, Prosecutor

Dated this 14th day of September 2023
At The Hague, The Netherlands

¹⁶ See Rule 68(3); *see also* ICC-01/14-01/18-685, para. 29 (noting that, other than the specific requirements of the witness's presence and absent objection to the introduction of the prior statement, "[n]o further restrictions are imposed with regard to the instances under which Rule 68(3) of the Rules may be used"); *see also* ICC-01/05-01/13-1478-Red-Corr, para. 51, 68.