

**Cour  
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Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **13 October 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 *THE PROSECUTOR v.*  
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Public**

**Public Redacted version of the “Yekatom Defence Consolidated Response to Prosecution Rule 68(2)(c) Requests for Submission of Prior Recorded Testimony of P-0975 & P-2602”, 17 July 2023, ICC-01/14-01/18-1985 Conf**

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

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

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## INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby responds to the 'Prosecution's Request for Submission of the Prior Recorded Testimony of P-0975 pursuant to Rule 68(2)(c)'<sup>1</sup> ('P-0975 Request') and the 'Prosecution's Request for Submission of the Prior Recorded Testimony of P-2602 pursuant to Rule 68(2)(c)'<sup>2</sup> ('P-2602 Request') (collectively, 'Rule 68(2)(c) Requests').
2. The Requests should be denied.
3. The Prosecution has failed to establish that P-2602 is dead or presumed dead. Further, the Prosecution has failed to establish that either P-0975 or P-2602 are 'unavailable to testify orally' within the meaning of rule 68(2)(c). Lastly, the Prosecution could have anticipated the necessity of article 56 measures in respect of P-0975.

## SUBMISSIONS

4. The Defence notes that in the P-2602 Request – as was argued in respect of P-2269, whose prior recorded testimony the Prosecution has also tendered via rule 68(2)(c) ('P-2269 Request')<sup>3</sup> – the Prosecution argues that P-2602 'was unavailable to testify due to obstacles that could not be overcome with reasonable diligence, and is not presumed dead';<sup>4</sup> in other words, the Prosecution seeks to rely on alternative limbs of rule 68(2)(c).
5. The Defence thus reiterates that the evidence underpinning the Prosecution's arguments as to each limb must be considered on its own merits; and that separate determinations as to whether either limb has duly been established must be made. In this regard, for reasons of judicial economy, the Defence

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<sup>1</sup> ICC-01/14-01/18-1965-Conf.

<sup>2</sup> ICC-01/14-01/18-1958-Conf.

<sup>3</sup> ICC-01/14-01/18-1957-Conf.

<sup>4</sup> ICC-01/14-01/18-1958-Conf, paras 2 and 10.

respectfully refers the Chamber to its submissions on this point as set out in its response to the P-2269 Request, which the Defence submits are applicable *mutatis mutandis* to the P-2206 Request.<sup>5</sup>

**A. The Prosecution has not established that P-2602 is dead or presumed dead within the meaning of rule 68(2)(c).**

6. In the P-2602 Request, the Prosecution relies on a bailiff's report dated [REDACTED] ('Second Bailiff's Report'), in which it is stated that P-2602 died shortly after [REDACTED].<sup>6</sup> The Second Bailiff's Report cites i) [REDACTED], the [REDACTED]; ii) the wife of P-2602 (unnamed); and iii) the *Chef du quartier* of [REDACTED], a '[REDACTED]' (who himself had been informed of P-2206's purported death by the wife of P-2206).<sup>7</sup>
7. The information contained in the Second Bailiff's Report is insufficient to sustain a finding that P-2602 is dead or presumed dead.
8. No death certificate has been provided;<sup>8</sup> nor any formal confirmation, oral or written, by an official at any level of government. Nor was any information received – let alone any statement taken – from anyone who attended or otherwise had knowledge of any burial or funeral ceremony in respect of P-2602.<sup>9</sup> The bailiff also expressly conceded that he was unable to 'seriously pursue the inquiry' on account of insecurity in [REDACTED]neighbourhood and the 'very short' timeframe available to him.<sup>10</sup>

<sup>5</sup> See, Yekatom Defence Response to 'Prosecution's Request for Submission of the Prior Recorded Testimony of P-2269 pursuant to Rule 68(2)(c)', 17 July 2023, (filing number pending), para 4-8.

<sup>6</sup> See, [REDACTED] Bailiff's Report ('Second Bailiff's Report'), p.1, attached to Email from Registry of 28 June 2023 at 16:35.

<sup>7</sup> Second Bailiff's Report, pp 1-2.

<sup>8</sup> Cf. ICC-01/14-01/18-1975-Conf, para. 25 and fn. 25; and *Prosecutor v Ongwen*, Decision on Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, [ICC-02/04-01/15-1288](#), 19 June 2018, para. 9.

<sup>9</sup> Cf. *Prosecutor v Ntaganda*, 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, [ICC-01/04-02/06-1029](#), 20 November 2015, paras 17-19.

<sup>10</sup> Second Bailiff Report, p. 2.

9. The relevant provisions of the CAR national law on death certificates, as set out in the CAR *Code de la famille* ('CAR Family Code') are also illustrative of the paucity of evidence of P-2269's purported death.<sup>11</sup> Article 146 stipulates that burials can take place only with the authorisation of a civil registrar ('*officier de l'état civil*') or with the authorisation of the *Chef de village* or *Chef du quartier*, along with two witnesses. The Prosecution has not produced statements from such civil authorities.
10. In this regard, it is notable that according to [REDACTED].<sup>12</sup> Again, in arguing that the Second Bailiff's Report is sufficient to ground a finding that P-2602 is presumed dead within the meaning of rule 68(2)(c), the Prosecution unjustifiably asks that the Chamber simply sidestep the existing applicable legal framework of CAR.<sup>13</sup>
11. Further, the Prosecution does not appear to have even attempted to contact the wife of P-2602 (*qua* individual who personally knew P-2602 and purportedly independently reported his death),<sup>14</sup> let alone taken a statement from her. The Prosecution's failure to do so is especially remarkable given that pursuant to the CAR Family Code,<sup>15</sup> P-2602's wife would be empowered to legally declare the death of P-2602; all the more so, given [REDACTED].
12. Nor does the Prosecution appear to have contacted [REDACTED] or [REDACTED]. In fact, there is no indication that the Prosecution even spoke to the bailiff himself. As such, it is unclear on what basis [REDACTED] was informed of the alleged death; and by the same token, whether [REDACTED] – like [REDACTED] – was informed of his death by P-2602's wife. Likewise, it is

<sup>11</sup> CAR *Code de La Famille, Loi No. 97.013* ('CAR Family Code'), articles 146-160; available at <http://jafbase.fr/docAfrique/Centrafrrique/code%20de%20la%20famille.pdf>.

<sup>12</sup> See, Email from Registry of 28 June 2023 at 16:35.

<sup>13</sup> See, Yekatom Defence Response to 'Prosecution's Request for Submission of the Prior Recorded Testimony of P-2269 pursuant to Rule 68(2)(c)', 17 July 2023, (filing number pending), paras 16-17.

<sup>14</sup> Cf. ICC-01/14-01/18-1975-Conf, para. 25 and fn. 26.

<sup>15</sup> CAR Family Code, articles 148; available at <http://jafbase.fr/docAfrique/Centrafrrique/code%20de%20la%20famille.pdf>.

unclear whether [REDACTED] was himself acquainted with P-2602 to any degree,<sup>16</sup> especially given that P-2602 was a resident of [REDACTED],<sup>17</sup> and that there is thus no indication of any link between P-2602 and the [REDACTED] neighbourhood of [REDACTED] prior to his [REDACTED]. In any event, no attempt to contact the *chef du quartier* of [REDACTED] neighbourhood appears to have been made; the bailiff instead having limited himself to seeking the assistance of *chef du groupe* (i.e. a higher, and thus more remote, administrative rank) [REDACTED], who was also a *chef du quartier* of a different neighbourhood ([REDACTED]).<sup>18</sup>

13. Nor has the Prosecution sought to contact the '*concubine*' of P-2602. This omission is also notable, given that i) it was she who provided P-2602's contact details to the bailiff during his first attempt to [REDACTED] on P-2602; and who informed the bailiff that P-2602 had left to [REDACTED]; and that ii) she appears to have been under the impression that P-2602 was alive at the time of this bailiff's first attempt, i.e. at some point between 18 March and 20 April 2023.<sup>19</sup> The fact that this '*concubine*' appears to be [REDACTED], only further underscores the Prosecution's investigative failure in this regard.<sup>20</sup>
14. In this respect, the Prosecution has confused what are effectively potential investigative leads indicating that P-2602 has possibly died, with evidence of his death. The First and Second Bailiff's Report lists four individuals – P-2602's wife; [REDACTED]; P-2602's concubine; and (to a degree) [REDACTED] – who appear to be in a position to assist the Prosecution in its inquiries as to the whereabouts and/or fate of P-2602. Yet the Prosecution has inexplicably failed to pursue these leads; and as such, the investigation remains incomplete.

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<sup>16</sup> Cf. ICC-01/14-01/18-1975-Conf, para. 25 and fn. 26.

<sup>17</sup> [REDACTED] Bailiff's Report ('First Bailiff's Report'), p.1, attached to Email from Registry of 28 June 2023 at 16:35.

<sup>18</sup> See, First Bailiff Report and Second Bailiff Report.

<sup>19</sup> First Bailiff's Report, p. 1.

<sup>20</sup> First Bailiff's Report, p. 1.

15. The information contained in the Second Bailiff's Report thus cannot ground a finding that P-2602 is dead or presumed dead. This is especially the case, given that this information must be assessed in the context of the witness's alleged deliberate avoidance of contact with the Prosecution, which itself led the Prosecution to [REDACTED] seek the issuance of a summons in respect of P-2602.<sup>21</sup>
16. In this regard, the relevant circumstances appear to present too many coincidences to be ignored. First: the fact that P-2602 [REDACTED] one day after the bailiff was notified of [REDACTED].<sup>22</sup> Likewise, the fact that P-2602's alleged death appears to have taken place in the month prior to the bailiff's [REDACTED]; and in any event, in the period between [REDACTED].<sup>23</sup> It is also notable that P-2602 allegedly died while he was residing in the [REDACTED] neighborhood, i.e. the same neighbourhood as P-2269, whom the Prosecution concedes was simulating his death to avoid testifying.
17. In the P-2602 Request (as it did in the P-2269 Request), the Prosecution relies on the Registry's suggestion that the process of verification of P-2602's purported death [REDACTED] in suggesting that the Chamber may find that P-2602 can be presumed dead for the purposes of the Request.<sup>24</sup> The Defence maintains its position that this argument is fundamentally flawed; and the Defence respectfully refers the Chamber to its prior submissions, which apply *mutatis mutandis* here.<sup>25</sup>

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<sup>21</sup> ICC-01/14-01/18-1958-Conf, para. 11. See also, ICC-01/14-01/18-1690-Conf, and ICC-01/14-01/18-1738-Conf.

<sup>22</sup> See, First Bailiff Report, p. 1.

<sup>23</sup> See, First Bailiff Report, p. 1.

<sup>24</sup> ICC-01/14-01/18-1958-Conf, para. 15.

<sup>25</sup> See, Yekatom Defence Response to 'Prosecution's Request for Submission of the Prior Recorded Testimony of P-2269 pursuant to Rule 68(2)(c)', 17 July 2023, (filing number pending), paras 23-25.

**B. The Prosecution has not established that either P-0975 or P-2602 are ‘unavailable’ within the meaning of rule 68(2)(c).**

18. ‘Unavailability’ within the meaning of rule 68(2)(c) cannot be invoked where a witness has simply withdrawn their cooperation and/or is unwilling to testify; it must be established that the witness is inaccessible or otherwise incapable of testifying orally.<sup>26</sup>
19. The Prosecution has failed to do so in respect of either P-0975 or P-2602; and far from having ‘exhausted all reasonable measures to secure’ their attendance, a variety of ‘further efforts to contact [either] can still be made’.<sup>27</sup>
- i) *P-0975 is not ‘unavailable to testify orally’.*
20. At outset, the Defence notes the Prosecution’s failure to request a summons in respect of P-0975. The Prosecution’s justification for its failure to do so – i.e. the purported fact that there was ‘no reasonable likelihood that P-0975 [could] be contacted, located, or [that a summons could successfully be executed’ is unfounded. It is unclear what distinguishes the circumstances applicable to P-0975 from those applicable to P-2269 and P-2602, in respect of both of whom the Prosecution sought the issuance of summonses in December 2022.<sup>28</sup> In this regard, it is notable that the Prosecution has been aware of P-0975’s whereabouts since June 2021, when it received information that P-0975 had returned to his village of [REDACTED].<sup>29</sup> Nor can there be any suggestion that the Prosecution had no means of accessing [REDACTED], given Police Commissioner [REDACTED]’s investigative mission there, executed at the behest of the Prosecution, in June 2023.<sup>30</sup>

<sup>26</sup> See, ICC-01/14-01/18-1975-Conf, para. 28, and fn. 32; and *Prosecutor v Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039, [ICC-01/04-02/06-1325](#), 19 May 2016 paras 9-10.

<sup>27</sup> See, ICC-01/14-01/18-1975-Conf, para. 28, and fn. 33.

<sup>28</sup> ICC-01/14-01/18-1690-Conf-Red and ICC-01/14-01/18-1701-Conf-Red.

<sup>29</sup> ICC-01/14-01/18-1965-Conf, para. 10; see also, para. 13, where the Prosecution concedes that it is ‘highly likely’ that P-0975 had indeed returned to [REDACTED] after his [REDACTED].

<sup>30</sup> ICC-01/14-01/18-1965-Conf, para. 12.



21. In any event, it cannot be reasonably argued that the Prosecution exhausted all reasonable measures to secure the attendance of P-0975. A Prosecution Investigation Report ('Report') dated 12 July 2023 disclosed *inter partes*, setting out the efforts in has made in this regard, only serves to illustrate this point.<sup>31</sup>
22. In sum, in the period of April 2019 until February 2023, the Prosecution's efforts to secure the testimony of P-0975 consisted solely of telephone calls to three phone numbers provided by P-0975. Notably, from April 2019 through February 2021 – i.e. for nearly two years – one of the phone numbers on which the Prosecution had been attempting to reach P-0975 was in fact incorrect, it having been incorrectly transcribed from the original source document into the Prosecution file.<sup>32</sup> Shortly after this error was rectified, the Prosecution was able to reach P-0975 and/or [REDACTED] in a series of calls in February, April, and June 2021, during which investigators were informed that P-0975 had [REDACTED].<sup>33</sup>
23. For a further 20 months, the Prosecution continued to attempt to reach P-0975 via telephone, until February 2023. During this entire period, not a single effort was made to seek the assistance of local authorities, or other intermediaries, to attempt to reach P-0975 via alternative means that might actually have been effective. This is despite the Prosecution having been aware that, given P-0975 lived in a village [REDACTED], telephone communication was a highly unreliable method of contact, given the network issues experienced in provincial CAR – a fact of which the Prosecution would have been no doubt aware given its lengthy investigations in CAR (and indeed, as was specifically confirmed to the Prosecution in June 2023).<sup>34</sup> The Prosecution was thus content to quite literally phone it in.

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<sup>31</sup> CAR-OTP-00001687.

<sup>32</sup> CAR-OTP-00001687, 000001-000002.

<sup>33</sup> CAR-OTP-00001687, 000002-000003.

<sup>34</sup> CAR-OTP-00001687, at 000001, 000005.

24. It was only in February 2023 – no less than 20 months after having been informed that P-0975 had been taken to [REDACTED] – that the Prosecution contacted local authorities, including Police Commissioner [REDACTED], who confirmed his ability and willingness to travel from [REDACTED].<sup>35</sup> For reasons unspecified, the Prosecution waited another four months before providing [REDACTED] for the mission.<sup>36</sup> Within one week, [REDACTED] provided the Prosecution with concrete information as to the whereabouts of P-0975, effectively confirming the information it had received two years prior: i.e. that an individual who had [REDACTED]; and further, that i) [REDACTED] had no phone network; ii) that much of the local population had left in 2020 due to the volatile security situation; and iii) that no one with the name of P-0975 was currently present in [REDACTED].<sup>37</sup>
25. It is notable that by 10 March 2023 – i.e. after having been informed of Commissioner [REDACTED]’s willingness to attempt to locate P-0975 in [REDACTED], but prior to actually engaging him for that purpose – the Prosecution had made the determination that P-0975 was ‘unavailable’ within the meaning of rule 68(2)(c) and that it would seek admission of his statement on that basis.<sup>38</sup>
26. There thus remain serious questions about the diligence of the Prosecution’s efforts to secure the testimony of P-0975: its repeated attempts to reach P-0975 on an incorrect phone number; its failure to seek a summons to appear; its apparent belief<sup>39</sup> that simply having investigators repeatedly and (for the most part) unsuccessfully attempt to call P-0975 for a period of nearly four years comprised exhausting ‘all reasonable measures’ to secure his testimony; and most critically, its decision to wait 20 months before acting on information that

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<sup>35</sup> CAR-OTP-00001687, at 000004-000005.

<sup>36</sup> CAR-OTP-00001687, at 000005.

<sup>37</sup> CAR-OTP-00001687, at 000005.

<sup>38</sup> ICC-01/14-01/18-1965-Conf, para. 5.

<sup>39</sup> As effectively conveyed on 10 March 2023; see, *ibid.*

P-0975 was located in [REDACTED], and to wait another four months before providing Commissioner [REDACTED] he required to undertake his mission there.

27. In any event, the fact remains that had the Prosecution contacted local authorities immediately upon receiving information about P-0975 residing there in June 2021, as opposed to waiting until February 2023 (or more correctly, until June 2023) there is a very high likelihood that it would have been able to locate him. This in turn would have given rise to the possibility of securing his testimony (including via article 56 measures); or at the very least, of establishing further, more reliable channels of communication – contact details of acquaintances, or family members; or possible home and work ‘addresses’ – that would have increased the likelihood of securing his testimony upon the end of [REDACTED].
28. Given the prejudice to fundamental fair trial rights inherent in rule 68(2)(c), the Prosecution should be barred from seeking to rely on that provision where its failure to secure a witness’s testimony is based in substantial part on its own negligence. In other words, the Prosecution cannot invoke the ‘unavailability’ of a witness where its purported inability to secure their testimony was directly brought about by its own failure to have acted on a *prima facie* reliable investigative lead in a reasonably timely manner – especially where other attempts to do so had proved fruitless. Such a reading of rule 68(2)(c) is essential to ensure due compliance and respect of the safeguards inherent in that rule and in the applicable legal framework, not to mention consistent with basic fairness.<sup>40</sup>

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<sup>40</sup> See e.g. rule 68(1) and (2)(c) *chapeau*; articles 69(2) and (4), 64(2), 67(1)(e), and 54(1)(b).

ii) P-2602 is not 'unavailable to testify orally'.

29. The Prosecution has previously argued that P-2602 had withdrawn his cooperation with the Court and was deliberately evading further contact; and further, that it was 'apparent' that P-2602 would not testify in the proceedings unless compelled to do so.<sup>41</sup>
30. It therefore can be inferred that P-2602 is simply unwilling to testify. In this respect, the Defence notes that the Chamber has previously found 'illustrative' case law in which such unwillingness was deemed to not constitute 'unavailability' within the meaning of rule 68(2)(c).<sup>42</sup>
31. The Defence also notes that the [REDACTED] in respect of P-2602 was not ultimately [REDACTED], the bailiff having concluded that P-2602 was dead.<sup>43</sup> As such, and given the paucity of reliable evidence that P-2602 is in fact dead, actual [REDACTED] remains a potential 'further effort to contact' P-2602 that is yet to be effectively exhausted.
32. Other such potential avenues include investigative inquiries with the three individuals who claim to have received information about the death of P-2602; or indeed, with the 'concubine' of P-2602, who [REDACTED].<sup>44</sup>
33. The Prosecution's failure to make inquiries with these individuals, despite clearly being in a position to obtain their contact details, and its effective outsourcing of its investigative duties to the bailiff, thus belie the Prosecution claim to have exhausted 'all reasonable avenues' to secure the testimony of P-2602.

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<sup>41</sup> ICC-01/14-01/18-1690-Conf-Red2, paras 1, 18-19.

<sup>42</sup> ICC-01/14-01/18-1975-Conf, para. 28 and fn. 32.

<sup>43</sup> See, *Proces-verbal de Carence*, [REDACTED], attached to Email from Registry of 28 June 2023 at 16:35.

<sup>44</sup> See, *supra*, paras 9-12.

**C. The necessity of article 56 measures could have been anticipated in respect of P-0975.**

34. Given that the Prosecution was in a position to reach P-0975 while he was [REDACTED], its failure to act on this information, especially in light of the Prosecution's previous difficulties in reaching him via telephone, would support a finding that the necessity of article 56 measures could in fact have been anticipated,<sup>45</sup> and by extension, should militate against the introduction of his statement pursuant to rule 68(2)(c)(i).
35. The Prosecution's attempt to justify its failure to anticipate article 56 measures, in claiming that 'no reliable communication could be established', must be assessed in light of the Prosecution's unjustifiable (and ultimately highly consequential) two-year delay in acting on reliable information as to P-0975's whereabouts, received in June 2021.<sup>46</sup> In this regard, its claim that 'the witness's location could not be determined' is simply incorrect.<sup>47</sup>
36. In the same vein, the Prosecution's claim to not have been in possession of information indicating that P-0975's [REDACTED] as to warrant article 56 measures' is squarely at odds with the facts.<sup>48</sup> In the period of April to June 2021, Prosecution investigators were informed that i) P-0975 had been in [REDACTED]; ii) P-0975 had REDACTED]; and iii) P-0975 had been taken to [REDACTED].<sup>49</sup> The above circumstances would arguably have necessitated article 56 measures in respect of a witness in any country, let alone a country with such poor medical care outcomes as CAR. Further, the Prosecution's reliance on the fact of P-0975's apparent recovery from [REDACTED] is misguided; the ends do not justify the means.<sup>50</sup>

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<sup>45</sup> Contra, ICC-01/14-01/18-1965-Conf, paras 17-18.

<sup>46</sup> Cf. ICC-01/14-01/18-1965-Conf, para. 18.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> CAR-OTP-00001687, at 000002-000003.

<sup>50</sup> Cf. ICC-01/14-01/18-1965-Conf, para. 18.

37. Lastly, and in any event, the Prosecution appears to misconstrue rule 68(2)(c)(i): the obligation to anticipate article 56 measures is not limited to situations involving [REDACTED] of a witness, but rather, to any situation where difficulties in securing a witness's testimony can be anticipated. In the circumstances therefore, regardless of his state [REDACTED], article 56 measures could have been anticipated as soon as the Prosecution received reliable information about his whereabouts in June 2021, given that this information came against the backdrop of chronic difficulties in communicating with P-0975, including the 'concerns' voiced in February 2021 to investigators, by P-0975 himself, 'about his availability to testify as [REDACTED] and did not have access to a network, and he did not know where he would be when required to testify'.<sup>51</sup>

### **CONFIDENTIALITY**

38. This response is filed on a confidential basis corresponding to the classification of the Rule 68(2)(c) Requests. A public redacted version will be filed forthwith.

### **RELIEF SOUGHT**

39. In light of the above, the Defence respectfully requests that the Chamber:  
  
**DENY** the Rule 68(2)(c) Requests.

**RESPECTFULLY SUBMITTED ON THIS 13<sup>th</sup> DAY OF OCTOBER 2023**



Me Mylène Dimitri  
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The Hague, the Netherlands

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<sup>51</sup> CAR-OTP-00001687, at 000002.