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

Public

**Public redacted version of “Prosecution’s Request for the Formal Submission of the
Prior Recorded Testimony of P-2012 pursuant to Rule 68(3)”,
(ICC-01/14-01/18-861-Conf), 1 February 2021**

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. The Office of the Prosecutor (“Prosecution”) requests the formal submission of the prior recorded testimony of witness P-2012, in accordance with rule 68(3) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the conduct of the proceedings” (“Directions”).¹ P-2012’s prior recorded testimony comprises a Witness Statement (“Prior Statement”), dated 5 October 2018 and its associated exhibits.² Should the Chamber deem the Prior Statement formally submitted, the Prosecution further requests leave to conduct a limited examination-in-chief, estimated currently to take no longer than two hours, elaborating specific issues raised therein, and other matters highly relevant to the case.

2. P-2012 travelled to Central African Republic (“CAR”) on multiple occasions, including during 2014 and 2015 [REDACTED], as described in his Prior Statement. [REDACTED],³ [REDACTED].

3. P-2012’s Prior Statement provides evidence about Anti-Balaka’s creation, organisation, and leadership, as well as evidence forming a part of the contextual elements for war crimes and crimes against humanity; in particular, the Anti-Balaka’s engagement in an armed conflict between September 2013 and December 2014 (“Relevant Period”). The Prior Statement also describes the position of the Anti-Balaka leadership within the framework of the group (an organization), as well as the respective roles of the Accused during the Relevant Period. The Prior Statement is thus *prima facie* relevant to and probative of material issues at trial.

¹ ICC-01/14-01/18-631, para. 58.

² See ICC-01/05-01/08-1386, paras. 79-81 (“Bemba Appeals Decision”), confirming that written witness statements can be introduced as “previously recorded testimony”. See also ICC-01/09-01/11-1938-Red-Corr, paras. 30-33, analysing the term “previously recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para. 136; ICC-01/05-01/08-886, para. 6; ICC-01/04-01/06-1603, para. 18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362.

³ CAR-OTP-2001-2564.

4. Granting the Request would reduce the presentation of the Prosecution's examination-in-chief and help to streamline the proceedings. Moreover, it would not unfairly prejudice the Defence, as the Witness will be fully available for cross-examination and any inquiry by the Chamber itself.⁴

5. Having taken note of the Chamber's guidance, the Prosecution has carefully assessed the Prior Statement to provide the Chamber with the information necessary to conduct the required case-by-case assessment.⁵ Additionally, mindful of the concerns regarding the amount of written evidence to be tendered,⁶ the Prosecution has sought narrowly to identify the associated exhibits on which it intends to rely, in order to reduce (as much as possible) the overall volume of such material in the case as a whole.

6. The relevance and probative value of the Prior Statement is set out in a brief summary of the salient issues, along with the associated exhibits or documents, and the sources of other corroborative evidence. *Confidential Annex A* (a Summary Chart) lists the relevant statement and the corresponding associated exhibits. It also identifies the relevant paragraphs of the Confirmation Decision to which the Witness's evidence relates. *Confidential Annex B* contains the Prior Statement itself. The associated exhibits are available to the Defence and the Trial Chamber in e-Court.

II. CONFIDENTIALITY

7. Pursuant to regulation 23*bis*(1) of the Regulations of the Court ("RoC"), this Request and its annexes are filed as "Confidential", as they contain information

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").

⁵ ICC-01/14-01/18-685, para. 34; See ICC-02/11-01/15-744, para. 69 ("*Gbagbo and Blé Goudé Appeals Decision*").

⁶ See ICC-01/14-01/18-685, para. 31, 32.

concerning witnesses which should not be made public. A “Public Redacted” version of the Request will be filed as soon as practicable.

III. SUBMISSIONS

A. Applicable Law

8. The Prosecution incorporates by reference its summary of the applicable law set out in paragraphs 4 to 8 of its observations on its intended approach to rule 68(3) in the presentation of its case,⁷ its submissions in its first request for the formal submission of prior recorded testimony under rule 68(3),⁸ and in its first and second requests for the formal submission of prior recorded testimony under Rule 68(2)(b).⁹

B. The Prior Recorded Testimony fulfils all Requirements of Rule 68(3)

9. The Prior Statement may be deemed formally submitted under rule 68(3). P-2012 will attest to its accuracy; he will be present in court; and will be available for examination by the Defence, Participants, and the Chamber.

10. As described below, the Prior Statement is highly relevant and probative. It goes to proof of the contextual elements for war crimes and crimes against humanity; in particular, the Anti-Balaka’s engagement in an armed conflict between September 2013 and December 2014 (“Relevant Period”). P-2012’s evidence further bears on the identity of the Anti-Balaka as an ‘organisation’ or ‘group’ involved in the commission of the article 7 widespread attack. It also describes the position of the Anti-Balaka leadership within the framework of the group, as well as the respective roles of the Accused during the Relevant Period.

⁷ ICC-01/14-01/18-655 (“Rule 68(3) Observations”); *see also*, ICC-01/14-01/18-710-Conf, para. 8 (identifying the relevant jurisprudence on the nature of ‘prior recorded testimony’).

⁸ ICC-01/14-01/18-750-Conf, paras. 8-12, 23, 27-33.

⁹ ICC-01/14-01/18-710-Conf, paras. 47-49; ICC-01/14-01/18-744-Conf, paras. 36-40.

11. P-2012's Prior Statement of 5 October 2018 comprises 19 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the Prior Statement.

12. The Witness's Prior Testimony establishes the following:

- P-2012 [REDACTED] travelled to CAR on multiple occasions from 2012 until 2015, including [REDACTED] in 2014 and 2015 [REDACTED].
- During [REDACTED] trips to BANGUI [REDACTED], P-2012 spent time in [REDACTED].¹⁰
- The Witness identifies Thierry LEBENE (aka '12 PUISSANCES') Sébastien, WENEZOU, and NGAISSONA as Anti-Balaka leaders, and clarifies that 12 PUISSANCES was one of the leaders of the 5 December 2013 Anti-Balaka attack on BANGUI.
- [REDACTED], NGAISSONA stated that he had returned to BANGUI from CAMEROON on 14 January 2014, acknowledged that he had provided the Anti-Balaka with identification cards, and [REDACTED].¹¹ NGAISSONA provided information on the FACA joining the Anti-Balaka, and the provenance of the weapons used by the Anti-Balaka. [REDACTED] NGAISSONA consistently blamed "fake" Anti-Balaka for the crimes committed against the Muslim population. P-2012 explains that in his view "there was no actual distinction between fake and real Anti-Balaka".¹²

¹⁰ CAR-OTP-2001-2564.

¹¹ CAR-OTP-2091-0127, at 0134, para. 33.

¹² CAR-OTP-2091-0127, at 0134, para. 32.

- P-2012 provides information on [REDACTED],¹³ [REDACTED], *inter alia*, information on the Anti-Balaka's killing of Muslims. P-2012 also elaborates on [REDACTED].
- P-2012 provides a template for the Anti-Balaka identity cards,¹⁴ [REDACTED].
- The Witness refers to [REDACTED],¹⁵ where he spoke about what he had seen and analysed during his [REDACTED] trip to CAR in [REDACTED] 2014.
- P-2012 briefly describes [REDACTED] trips to CAR, which took place [REDACTED].
- [REDACTED]. MOKOM stated that [REDACTED]¹⁶ and explained that [REDACTED].¹⁷ He also provided information on the structure and leadership of the Anti-Balaka. MOKOM provided further information on the role of the ComZones, including in the 5 December 2013 attack on BANGUI, and explained that YEKATOM [REDACTED].¹⁸
- P-2012 made [REDACTED]¹⁹ [REDACTED].²⁰ [REDACTED] in his Prior Statement.

13. P-2012's proposed evidence is corroborated by, *inter alia*, the evidence of P-0808, P-0884, P-0966, P-1193, P-1521, P-1962, and P-2658, as well as by documentary

¹³ CAR-OTP-2001-2564.

¹⁴ CAR-OTP-2091-0290 and CAR-OTP-2091-0291.

¹⁵ CAR-OTP-2081-0603.

¹⁶ CAR-OTP-2091-0127, at 0141, para. 68.

¹⁷ CAR-OTP-2091-0127, at 0142, para. 70.

¹⁸ CAR-OTP-2091-0127, at 0142, para. 69.

¹⁹ CAR-OTP-2091-0264.

²⁰ CAR-OTP-2091-0237.

evidence,²¹ in relation to (i) the Anti-Balaka's creation and structure, including the introduction of ID badges; (ii) provenance of Anti-Balaka's weapons; (iii) false claims of 'fake' Anti-Balaka committing crimes in BANGUI and in the Provinces; (iv) NGAISSONA's leadership role within the Anti-Balaka; and (v) YEKATOM's command of Anti-Balaka elements in the LOBAYE Prefecture.

C. Associated Exhibits

14. The Prosecution tenders seven associated exhibits for formal submission, set out at Confidential Annex A. These comprise a selection of items detailed with precision in P-2012's Prior Statement, namely: (1) P-2012's [REDACTED]; (2) P-2012's [REDACTED]; (3) notes taken by P-2012 [REDACTED]; (4) notes taken by P-2012 [REDACTED]; (5) template of Anti-Balaka ID cards obtained by P-2012 [REDACTED]; (6) second template of Anti-Balaka ID cards obtained by P-2012; and (7) P-2012's sketch of [REDACTED].

15. Although each exhibit referenced in the Prior Statement was discussed and may be helpful to contextualise and facilitate its understanding, the items tendered with this application are *narrowly* assessed as indispensable to its comprehension or would otherwise diminish its probative value if excluded. As tendered, the associated exhibits avoid flooding the Parties, Participants, and the Chamber with material that is superfluous or tangential to the import of the Witness's testimony, while assisting the Chamber in its assessment of the relevant evidence in its article 74 decision. As an integral part of the Prior Statement, each exhibit is directly relevant to and probative of material issues in dispute, and their admission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-2012's evidence.

²¹ See for example CAR-OTP-2003-1076, CAR-OTP-2104-0337, CAR-OTP-2076-0825 from [00:02:40] to [00:03:47], and CAR-OTP-2066-2466, at 2488.

D. A supplementary examination-in-chief is necessary and appropriate

16. Although the Prior Statement is comprehensive, a limited and focused supplemental examination-in-chief to clarify and elaborate P-2012's testimony would be beneficial to the proper adjudication of the issues arising from the charges.

17. The Prosecution's two-hour estimated supplemental examination of P-2012²² takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,²³ and accounts for the prospect of appropriate redirect examination.

18. A lesser amount of time would not provide the Prosecution with a reasonable opportunity to develop, explain, or clarify, limited facets of P-2012's evidence through the use of some of the associated exhibits, other documents, or as concerns other relevant evidence. The limited examination requested is necessary not only to fully understand and contextualise the Prior Statement, but also to advance the Chamber's fundamental truth-seeking function, particularly as regards the Accused's acts and conduct.

19. Alternatively, in the absence of the formal submission of the Prior Statement under rule 68(3), the Prosecution estimates that the witness's testimony on direct examination would require at least 5 hours to present – over twice as long.

E. Balance of interests

20. The projected shortening of P-2012's in-court-testimony by more than half is "considerable", and the Prosecution considers on balance that the introduction of P-

²² ICC-01/14-01/18-724, AnxA, p. 43.

²³ See e.g., ICC-01/14-01/18-T-1-ENG ET, p.6 ln.18-25.

2012's Prior Statement under rule 68(3) is appropriate. Moreover, there is no resulting prejudice. The Chamber's and the Parties' interests in advancing this large and complex case efficiently, good trial management, the expeditious conduct of the proceedings, and that the Prior Statement is supported and corroborated by other evidence to be tested at trial, warrants its formal submission in the fair exercise of the Chamber's broad discretion.

IV. CONCLUSION

21. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the Prior Statement of P-2012 together with its associated exhibits as set out at Annex A, subject to the fulfilment of the further conditions of rule 68(3). Should the Chamber do so, it should further grant the Prosecution leave to conduct a limited examination-in-chief of this witness as indicated above.



James Stewart, Deputy Prosecutor

Dated this 23rd day of March 2021
At The Hague, The Netherlands