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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-0965 pursuant to Rule 68(3)”,
(ICC-01/14-01/18-948-Conf), 8 April 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-0965, 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-0965’s prior recorded testimony comprises the transcribed statement of the witness’s four day interview from 23 July 2016 to 26 July 2016 (“Prior Statement”), 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 four hours, elaborating specific issues raised therein, and other matters highly relevant to the case.

2. P-0965 was a member of [REDACTED] Anti-Balaka group. He provides information on the emergence and organisation of the Anti-Balaka and the structure and operations of [REDACTED] group. He describes his role and activities [REDACTED]. P-0965 describes the planning, coordination and execution of the 5 December 2013 attack on BANGUI and the support provided by François BOZIZE (“BOZIZE”). He also describes NGAISSONA’s role and activities as the Anti-Balaka General Coordinator and provides evidence of the Anti-Balaka’s policy and targeting Muslims in BANGUI, BOSSANGO, BOUCA, and BOALI. Finally, he provides evidence of the use of child soldiers by the Anti-Balaka.

3. P-0965’s Prior Statement provides evidence about the position of the Anti-Balaka leadership within the framework of the group (an organisation), as well as the respective roles of the Accused during the relevant period. It further provides evidence forming a part of the contextual elements for war crimes and crimes against

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.

humanity; in particular, the Anti-Balaka's engagement in an armed conflict between September 2013 and December 2014 ("Relevant Period"). P-0965 provides evidence concerning the crimes committed against the Muslim civilian population in BANGUI and BOSSANGO, as part of the widespread Anti-Balaka attack carried out between September 2013 and December 2014 in the western CAR, as set out in the Pre-Trial Chamber's 11 December 2019 Decision on Confirmation of Charges.³ The Prior Statement covers evidence of the Anti-Balaka's course of conduct involving the multiple commission of crimes and acts against the Muslim civilian population in western CAR, including the pattern and intensity of their protracted mistreatment in various localities, pursuant to a criminal organisational policy.⁴ The Prior Statement is thus *prima facie* relevant to, and probative of material issues at trial.

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.⁵

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.⁶ Additionally, mindful of the concerns regarding the amount of written evidence to be tendered,⁷ the Prosecution

³ See ICC-01/14-01/18-403-Conf-Corr, paras. 64, 70, *et seq.*, and pp. 111, 107.

⁴ See ICC-01/14-01/18-703-Conf, para. 45, 48 (observing that "several non-confirmed incidents fall within the 'facts and circumstances' of the case", and that the facts concerning crimes allegedly committed by the Anti-Balaka in Yaloké, Gaga, Zawa, Bossempaté, Boda, Carnot, Berbérati and Guen "pertain to the contextual elements of the charged crimes and form part of the 'facts and circumstances' of the case"); *see also* article 7(2); ICC-01/04-02/06-309, para. 23; See ICC-01/14-01/18-403-Conf-Corr, paras. 64, 70, *et seq.*, and pp. 111, 107; *see* para. 164 (noting that the perpetrator groups committing acts and crimes as part of the article 7(1) attack lasting from September 2013 to December 2014 "were formally and politically under the umbrella of the National Coordination").

⁵ 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").

⁶ ICC-01/14-01/18-685, para. 34; See ICC-02/11-01/15-744, para. 69 ("*Gbagbo and Blé Goudé Appeals Decision*").

⁷ See ICC-01/14-01/18-685, para. 31, 32.

has identified portions in the Prior Statement on which it does not seek to rely, which may assist the Chamber's assessment of the relevant and contested issues, and reduce (as much as possible) the volume of extraneous material in the case, as a whole.⁸

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 interview transcripts, and the corresponding associated exhibits. It also identifies the relevant paragraphs of the Confirmation Decision to which the witness's evidence relates and, where applicable, any charged incidents the witness discusses.

7. Due to the length of the Prior Statement,⁹ a summary thereof, organised by topic, is attached at Confidential Annex B to facilitate the Parties', Participants', and Chambers' understanding of its content, and to more easily identify its relevance and probative value ("Summary"). The Summary is not tendered for formal submission, rather, it clearly and concisely sets out the substance of the transcripts comprising the Prior Statement hereby tendered. The transcripts are incorporated by way of reference in the footnotes of the Summary.¹⁰ To avoid confusion and inaccuracies, each referenced page rather than the page and line number, is tendered.

8. Additionally, mindful of the concerns regarding the amount of written evidence to be tendered,¹¹ the Prosecution has identified in grey, in the Summary, the portions of the Prior Statement on which it does not intend to rely. The Prosecution does not seek to tender the transcripts referenced in the footnotes of these portions.

⁸ Consistent with the Chamber's decision: ICC-01/14-01/18-907-Conf, para. 16 (even though the entire Prior Statement as a whole is submitted).

⁹ The Prior Statement comprises 19 interview transcripts totalling approximately 225 pages.

¹⁰ This approach differs from that followed by the Prosecution in ICC-01/14-01/18-879-Conf. Given the higher volume of transcript pages involved, and with the aim of facilitating the reader's understanding of the witness's evidence, the Prosecution believes that this new approach is a more efficient to present the substance of the witness's Prior Statement to the Chamber.

¹¹ See ICC-01/14-01/18-685, para. 31, 32.

II. CONFIDENTIALITY

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

10. 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,¹² its submissions in its first request for the formal submission of prior recorded testimony under rule 68(3),¹³ and in its first and second requests for the formal submission of prior recorded testimony under Rule 68(2)(b).¹⁴

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

11. The Prior Statement may be deemed formally submitted under rule 68(3). P-0965 will attest to its accuracy; he will be present in court; and will be available for examination by the Defence, Participants, and the Chamber.

12. As described below, the Prior Statement is highly relevant and probative. In addition to the issues described above at paragraph 2, the Prior Statement bears on the identity of the Anti-Balaka as an ‘organisation’ or ‘group’ involved in the commission of the article 7 widespread attack, and establishes the roles of both Accused within the organisation’s leadership during the Relevant Period. It further goes to proof of the nature and extent of the widespread attack carried out by the Anti-

¹² 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’).

¹³ ICC-01/14-01/18-750-Conf, paras. 8-12, 23, 27-33.

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

Balaka against the Muslim civilian population during the Relevant Period as a part of the contextual elements of Crimes against Humanity and War Crimes, under articles 7 and 8, respectively. It provides evidence of the campaign of retributive violence committed by the Anti-Balaka against Muslim civilians in towns and villages in western CAR pursuant to a criminal organisational policy,¹⁵ particularly in BANGUI and BODA.

13. P-0965's Prior Statement of 23 to 26 July 2016 comprises 225 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.

14. P-0965 is an Anti-Balaka insider and a [REDACTED] Anti-Balaka group.

15. The witness's Prior Statement establishes the following:

- P-0965 describes his role and activities as [REDACTED].
- The witness provides evidence on the emergence, leadership, and organisation of the Anti-Balaka. He describes the presence of trained militaries in the Anti-Balaka such as, *Lieutenant* Yvon KONATE ("KONATE"), *capitaine* Eugène NGAIKOSSET ("NGAIKOSSET"), and Maxime MOKOM ("MOKOM"). P-0965 provides information on [REDACTED].
- P-0965 describes NGAISSONA's role as the General Coordinator, which included providing financial contributions to the Anti-Balaka to buy ammunition.

¹⁵ See ICC-01/14-01/18-403-Conf-Corr, paras. 64, *see further* pp. 107, 111 (referencing paragraphs 90-114 of the Document Containing the Charges - ICC-01/14-01/18-286-Conf-AnxB1).

- The witness discusses the roles of various ComZones, including Emotion NAMSIO, Séverin NDOGUIA (aka “Le Bleu”), and Thierry LEBENE (aka “12 Puissances”).
- P-0965 provides information on the planning, coordination and execution of the 5 December 2013 Anti-Balaka attack on BANGUI and the support provided by BOZIZE. He describes BOZIZE giving orders regarding the attack to KONATE who in turn passed on these orders to other Anti-Balaka leaders.
- The witness provides evidence of the Anti-Balaka policy of targeting Muslims, in particular in BANGUI, BOSSANGO, BOUCA, and BOALI. He describes the commission of crimes by the Anti-Balaka against the Muslim population, comprising killings, forcible displacement, and the destruction of property.
- P-0965 provides information on [REDACTED] authority to discipline and punish his recalcitrant elements. He explains that the Anti-Balaka elements received more severe punishment if they helped the Muslims to escape.
- P-0965 provides evidence of the use of child soldiers by the Anti-Balaka, in particular in [REDACTED] group.

16. P-0965’s proposed evidence is corroborated by, *inter alia*, the evidence of P-0884, P-0966, P-1521, P-1962, P-1839, P-0974, P-1786, P-1339, P-1647, P-1719, P-2232, P-0808, P-1074, P-0446, in relation to (i) NGAISSONA’s role as the General Coordinator; (ii) the Anti-Balaka’s commission of crimes in BANGUI, BOSSANGO, BOUCA, and BOALI against the Muslim civilian population; (iii) [REDACTED] authority to discipline and punish his recalcitrant elements; and (iv) the 5 December Anti-Balaka attack on BANGUI.

C. Associated Exhibits

17. The Prosecution tenders one associated exhibit for formal submission set out at Confidential Annex A, namely, P-0965's [REDACTED]

18. The associated exhibit was referenced in the Prior Statement and is indispensable to its comprehension or would otherwise diminish its probative value if excluded. As an integral part of the Prior Statement, the associated exhibit is directly relevant to and probative of material issues in dispute, and its admission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-0965's evidence.

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

19. Although the Prior Statement is comprehensive, a limited and focused supplemental examination-in-chief to clarify and elaborate P-0965's testimony would be beneficial to the proper adjudication of the issues arising from the charges.

20. The Prosecution's four-hour estimated supplemental examination of P-0965¹⁶ takes into consideration the realistic pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,¹⁷ and accounts for the prospect of appropriate redirect examination.

21. A lesser amount of time would not provide the Prosecution with a reasonable opportunity to develop, explain, or clarify, limited facets of P-0965's evidence through the use of the associated exhibit, other documents, or as concerns other relevant evidence. The limited examination requested is necessary not only to fully understand

¹⁶ ICC-01/14-01/18-724, AnxA, p. 43.

¹⁷ See e.g., ICC-01/14-01/18-T-1-ENG ET, p. 6 ln. 18-25; ICC-01/14-01/21-T-1-ENG ET, p. 3 ln. 14-22, p. 4 ln. 20-22.

and contextualise the Prior Statement, particularly as regards the Accused's acts and conduct, but also to advance the Chamber's fundamental truth-seeking function.

22. 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 eight hours to present – twice as long.

E. Balance of interests

23. The projected shortening of P-0965's in-court-testimony by half is "considerable", and the Prosecution considers on balance that the introduction of P-0965'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

24. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the Prior Statement of P-0965 together with its associated exhibit 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, as indicated above.



Fatou Bensouda, Prosecutor

Dated this 15th day of April 2021
At The Hague, The Netherlands