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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-1838 pursuant to Rule 68(3)”, 17 May 2022,
ICC-01/14-01/18-1412-Conf**

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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-1838, in accordance with rule 68(3) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the conduct of the proceedings”(“Request”).¹ P-1838’s prior recorded testimony comprises his witness statement dated 15 January 2019 (“Prior Statement”)² and its associated exhibits.³ Should the Chamber deem the Prior Statement formally submitted, the Prosecution further requests leave to conduct a limited examination-in-chief, currently estimated at approximately two hours, elaborating specific issues raised therein, and other matters highly relevant to the case.

2. P-1838 was [REDACTED] P-1838 provides evidence on the situation in MBAIKI, before, during and after the arrival of the Anti-Balaka and YEKATOM’s Group. P-1838’s evidence is relevant to the contextual elements for war crimes and crimes against humanity; YEKATOM’s Group’s involvement in murder and rape in the areas surrounding MBAIKI; the killing of town’s Muslim Deputy Mayor Djido SALEH; YEKATOM’s Group’s advancement from PK9 to MBAIKI and targeting of the Muslim population; the mass displacement of Muslims from MBAIKI as a result of the Anti-Balaka’s actions; YEKATOM’s command over his elements, and involvement in the ransoming of civilians’ goods. The Prior Statement is thus *prima facie* relevant to, and probative of material issues at trial.

3. Granting the Request would reduce the presentation of the Prosecution’s examination-in-chief and help to streamline the proceedings. Moreover, it would not

¹ ICC-01/14-01/18-631, para. 58.

² CAR-OTP-2100-0252.

³ 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.

unfairly prejudice the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber itself.⁴

4. 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 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.⁷

5. 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 and the sources of other corroborative evidence. *Confidential* Annex A lists the relevant portions of the Prior Statement being tendered for formal submission, 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, with grey highlights identifying the portions on which the Prosecution does not seek to rely. The associated exhibits are available to the Defence and the Trial Chamber in e-Court.

II. CONFIDENTIALITY

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

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.

⁷ 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).

witness 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

7. 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,⁸ its submissions in its first request for the formal submission of prior recorded testimony under rule 68(3),⁹ and in its first and second requests for the formal submission of prior recorded testimony under rule 68(2)(b).¹⁰

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

8. The Prior Statement may be deemed formally submitted under rule 68(3). P-1838 will attest to its accuracy; he will be present in court; and he will be available for examination by the Defence, Participants, and the Chamber.

9. As described below, the Prior Statement is highly relevant and probative. It contains evidence that goes directly to the crimes alleged at counts 24-28, and YEKATOM’s Group’s perpetration of these crimes. The Prior Statement also goes to proof of the nature and extent of the widespread attack carried out by the Anti-Balaka against the Muslim civilian population between September 2013 and December 2014 (“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 Muslims

⁸ 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’).

⁹ ICC-01/14-01/18-750-Conf, paras. 8-12, 23, 27-33.

¹⁰ ICC-01/14-01/18-710-Conf, paras. 47-49; ICC-01/14-01/18-744-Conf, paras. 36-40.

perceived to be associated with the Seleka in towns and villages in western CAR pursuant to a criminal organisational policy,¹¹ particularly in MBAIKI and surrounding villages. P-1838'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.

10. P-1838's Prior Statement comprises 25 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.

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

- P-1838 was [REDACTED]
- P-1838 recounts the increasing lack of security along the PK9 – MBAIKI axis, stating that as YEKATOM progressed through LOBAYE, all the Muslims from the villages from PK9 to MBAIKI fled to MBAIKI to find security;
- P-1838 recollects occasions in which he spoke to displaced Muslims, who said to the witness that after hearing what happened to their fellow Muslims at the hands of the Anti-Balaka in BANGUI, they feared for their lives and had no option but to flee;
- P-1838 states that this lack of security not only affected Muslims, but also Christians. He describes the trail of destruction that YEKATOM's Group left wherever they passed by, recounting the destruction of [REDACTED] houses in PK5, and the burning of a mosque in PISSA;

¹¹ 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).

- P-1838 recounts that before DJOTODIA resigned and the Seleka left MBAIKI, YEKATOM was called to a meeting in around December 2013, concerning the fate of Muslims, as there was an increase in reports of violence towards the Muslim population by the Anti-Balaka and YEKATOM's Group;
- Despite attending this meeting and stating that their intent was not to kill people, P-1838 states that YEKATOM "[...] wanted the head of Muslims, by that I mean he wanted to kill Muslims [...]";
- After this meeting, P-1838 recounts the decision to evacuate Muslims from MBAIKI, as their safety could not be granted. He explains that then, through diplomatic channels, the Chadian Head of State made arrangements to evacuate Muslims from MBAIKI;
- P-1838 recounts that when Muslims left they were all crying as they were forced to leave. He states that most Muslims understood and agreed to the evacuation as they felt that they had no option but to go and survive, or to stay and risk their lives;
- According to the witness, some Muslims decided to stay in MBAIKI but the population of the city was probably reduced by a third after the evacuation. P-1838 also describes the living conditions of the Muslim population in BAGUIRMI neighbourhood in MBAIKI, stating that they were short of food and lived under constant fear of the Anti-Balaka;
- The Anti-Balaka arrived in MBAIKI on the same day that the Seleka left. YEKATOM arrived with COEUR DE LION and many of his elements. They settled in MBAIKI and YEKATOM accompanied his elements to install them in abandoned houses that belonged to Muslims before their evacuation;

- P-1838 recounts an incident that happened after the Seleka left MBAIKI, around February 2014, [REDACTED]. He states that YEKATOM sent his Anti-Balaka elements to kill a Muslim man living in the area, with the intent to seize his property and his goods, as this Muslim man was notably wealthy;
- P-1838 states that YEKATOM probably gathered money through his elements, who he used to loot, steal, and extort the civilian population. He explains i.e., that all Muslim houses were looted by the Anti-Balaka;
- [REDACTED] Muslim man attacked at [REDACTED] who survived and were transferred to the hospital in MBAIKI, where he learned that they had been attacked by the Anti-Balaka;
- He recounts that one of the killers lost his identity card at the scene of the killing in [REDACTED]. He was later informed that the person was one of YEKATOM's elements;
- P-1838 concluded that YEKATOM was the one who ordered the killing as he controlled the area from PK9 to the outskirts of BODA, including the towns surrounding MBAIKI;
- For a brief period after the Seleka's withdrawal, YEKATOM also had the control of MBAIKI and, according to P-1838, YEKATOM's elements "[...] did not take any action unless they were authorised to do so by YEKATOM himself";
- P-1838 states that YEKATOM also wanted to kill [REDACTED]. [REDACTED] informed P-1838 that YEKATOM once said to [REDACTED] that he had the opportunity to kill him but decided not to;

- P-1838 also recounts the killing of MBAIKI's Second Deputy Mayor Djido SALEH, a Muslim who was murdered by YEKATOM's group. He describes that he heard about this incident, and states that the Anti-Balaka slaughtered SALEH in the Gendarmerie compound. According to reports P-1838 heard, the Anti-Balaka would have dragged his body and then cut off his genitals, having the latter being recorded and circulated amongst the youth after SALEH's killing. P-1838 did not see the killing, [REDACTED];
- After SALEH's killing, YEKATOM left the centre of MBAIKI, even though remaining influential in the surrounding areas, such as BANGUI-BOUCHIA, MBATA and PISSA.
- P-1838 states that YEKATOM established a base in PISSA, and a barrier where people had to pay his group to go through. He explains that YEKATOM's Anti-Balaka caused many problems at the barrier, including regular cases of rape of young girls, looting, the stealing of goods, and murder. YEKATOM patrolled the barricades to collect the money, goats, sheep and whatever his elements got from people;
- Hence, P-1838 explains the role of YEKATOM and his Group, including: (i) their progression along the PK9-MBAIKI road following the Seleka's retreat; (ii) their track of destruction wherever they passed by; (iii) YEKATOM's command over his elements; and (iv) the Anti-Balaka's harassment of Muslims as well as their stealing of money from civilians; (v) the killings ordered by YEKATOM and carried out by his elements;

12. P-1838's proposed evidence on YEKATOM and his Group's takeover of the PK9-MBAIKI axis is corroborated by, *inter alia*, the evidence of P-2475, P-0954, P-2419, P-2388, P-2353, P-2354, and P-2084. P1838's proposed evidence on YEKATOM's patrolling the barricades on his motorbike, and that in addition to money, the Anti-

Balaka took goats, sheep, and whatever else they could extort from people is corroborated by, *inter alia*, the evidence of P-1339, P-1647, and P-1824. P-1838's proposed evidence on the forced displacement of Muslims from LOBAYE to MBAIKI for fearing attacks by the Anti-Balaka is corroborated by, *inter alia*, the evidence of P-0954, and P-1813. P-1838's proposed evidence on YEKATOM's Group perpetuation of an increasingly hostile environment towards Muslims causing them to flee MBAIKI *en masse*, leading to the evacuation by Chadian forces is corroborated by, *inter alia*, the evidence of P-0954, P-1647, P-1823, P-1839, P-2582, P-2196, P-2041, P-2354, and P-2084. Finally, P-1838's proposed evidence on the killing of Djido SALEH is corroborated by, *inter alia*, the evidence of P-1813, and P-1595.

C. Associated exhibits

13. The Prosecution tenders three associated exhibits for formal submission, as listed in Confidential Annex A namely i) a note with contact details [REDACTED]; ii) a marked map of MBAIKI and the roads entering the town with key locations; iii) a map detailing the national road between BANGUI and MBAIKI with key locations.

14. The items tendered with this application are assessed as indispensable to the comprehension of the Prior Statement, 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, the exhibits are directly relevant to and probative of material issues in dispute, and its submission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-1838's evidence.

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

15. The Prior Statement is brief. A limited and focused supplemental examination-in-chief would thus clarify and elaborate P-1838's testimony, and would be beneficial to the proper adjudication of the issues arising from the charges.

16. Mindful of the Chamber's direction concerning the need to "streamline its questioning considerably",¹² the Prosecution has carefully reviewed its two-hour estimate given for P-1838 in its Final Witness List.¹³ The Prosecution considers that it cannot further reduce the estimate. This estimated supplemental examination of P-1838 takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,¹⁴ and accounts for the prospect of appropriate redirect examination.

17. A lesser amount of time would not provide the Prosecution with a reasonable opportunity to develop, explain, or clarify, limited facets of P-1838's evidence through the use 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, including those parts relating to the Accused's acts and conduct, but also to advance the Chamber's fundamental truth-seeking function.

18. 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 four hours to present – twice as long.

¹² ICC-01/14-01/18-685, para. 36.

¹³ ICC-01/14-01/18-724-Conf-AnxA, p. 38.

¹⁴ See *e.g.*, ICC-01/14-01/18-T-001-ENG ET, p. 6 ln. 18-25; see ICC-01/14-01/21-T-001-ENG ET, p. 3 ln. 14-22, p. 4 ln. 20-22 (noting practical complications involved in the live in-Court interpretation).

E. Balance of interests

19. The projected shortening of P-1838's in-court-testimony by half is "considerable", and on balance the introduction of P-1838'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

20. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the Prior Statement of P-1838 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.



Karim A. A. Khan QC, Prosecutor

Dated this 15th day of June 2022
At The Hague, The Netherlands