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**International
Criminal
Court**

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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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Public Redacted Version of the “Yekatom Defence Response to the
“Prosecution’s Request for the Formal Submission of the Prior Recorded
Testimony of P-0487 pursuant to Rule 68(3)”, ICC-01/14-01/18-1595-Conf, 4
October 2022”, ICC-01/14-01/18-1625-Conf, 19 October 2022**

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. Defence Counsel for Mr. Alfred Rombhot Yekatom ("Defence") hereby responds to the "Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-0487 pursuant to Rule 68(3)" ("Request").¹
2. The Defence submits that the Request should be denied in light of the content of P-0487's prior recorded testimony which goes over core issues of the case and of its general unreliability. Moreover, it is argued that in light of P-0487 unique position during the events the interests of justice would not best be served by a Rule 68(3) submission of his transcribed statements.

PROCEDURAL BACKGROUND

3. On 16 October 2020, Trial Chamber V ("Chamber") issued its *Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules* in which it *inter alia* recalled that *viva voce* testimony should be the default mode of testifying,² and held that Rule 68 (3) may not be used without limits, noting that when considered against the specific circumstance of a case, its use might be disproportionate.³
4. On 10 November 2020, the Prosecution included Witness P-0487 in its Final Witness List, indicating that he will testify on a range of important aspects of the case such as "Incident YAMWARA", "YEKATOM's contributions", "the structure of YEKATOM's Group [...]", "the crimes committed by the Anti-Balaka, including the killing of Muslims", and more generally "YEKATOM's violent behaviour".⁴

¹ ICC-01/14-01/18-1595-Conf.

² [ICC-01/14-01/18-685](#), para. 25.

³ *Ibid*, para. 31.

⁴ ICC-01/14-01/18-724-Conf-AnxA, page 15 witness n°6.

5. On 4 October 2022, the Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-0487 pursuant to Rule 68(3) was filed.⁵ A Public Redacted Version was notified on the same day.⁶
6. On 13 October 2022, further to a Defence's request,⁷ the Single Judge extended the deadline to respond to the Request to the 19 October 2022.⁸

APPLICABLE LAW

7. Rule 68(3) of the Rules states:

If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

8. A Chamber's assessment as to whether prior recorded testimony may be introduced under Rules 68(3) should be made on a case-by-case basis where the factors to be considered may vary per witness.⁹
9. A Chamber must carry out an individual assessment of the evidence sought to be introduced under Rule 68(3), based on the circumstances of each case, which includes analysing the importance of this evidence in light of the charges and other evidence presented or intended to be presented; this assessment is part and parcel of the analysis a Chamber must undertake in determining whether it is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally, to allow for the evidence in question to be introduced under Rule 68 (3).¹⁰

⁵ ICC-01/14-01/18-1595-Conf.

⁶ [ICC-01/14-01/18-1595-Red](#).

⁷ Email from the Defence to the Chamber dated 12 October 2022 at 12:00.

⁸ Email from the Chamber to the Parties dated 13 October 2022 at 13:06.

⁹ *Prosecutor v Gbagbo and Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, [ICC-02/11-01/15-744](#), para. 69.

¹⁰ *Ibid*, para. 71.

10. In conducting this analysis, a Chamber may take into account a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.¹¹

SUBMISSIONS

I. On the unreliability of P-0487's statement

11. Rule 68(3) of the Rules of Procedure and Evidence states that "the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony". This provision, in practice, signifies that the calling party asks witnesses whether or not they object to their statements or transcribed statements to be used as evidence in the case, but also whether or not their content is true to the best of their recollection.
12. The Defence contends that P-0487's prior recorded testimony is unsuitable for a Rule 68(3) submission due to the unreliability of its content. Those issues of coherence and reliability were apparent to the investigators who confronted P-0487 with numerous discrepancies in his statement during his interview and also prompted the Prosecution's Senior Trial Lawyer to meet P-0487 on [REDACTED] 2017 to tell him that "there is information in his first statement that does not add up with the results of our investigation" and that "[h]e was also informed that [REDACTED]. He was advised to consult with his lawyer if he is willing to provide an additional statement".¹²

¹¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, [ICC-01/05-01/08-1386](#), para 78.

¹² CAR-OTP-2127-3527-R01.

13. Indeed, the investigators confronted P-0487 with investigations which they conducted on telecommunication data which *“ne correspond pas avec les choses que vous avez ... partagées avec nous aujourd’hui”*,¹³ including on central issues such as the 5th of December 2013 attack,¹⁴ and with discrepancies between what P-0487 previously said and other sources of information.¹⁵ This prompted the Prosecution to ask P-0487 *“en savant [phon.] tout cela, c’est si vous êtes prêt à donner une déclaration véridique, totale de votre ... euh ... de façon volontaire, ou ... si vous souhaitez terminer l’entrevue”*,¹⁶ thus conceding that P-0487 was untruthful during at least part of his first interview in 2016.
14. Nevertheless, despite these confrontations and reminders about the importance of stating the truth, P-0487’s behaviour throughout the rest of his 2018 interview did not change and was met with scepticism from the investigators.
15. A prime example is the repeated denials by P-0487 that he was not [REDACTED] despite being confronted with contemporaneous documents in which [REDACTED].¹⁷ Instead, and despite his unequivocal use of [REDACTED],¹⁸ P-0487 appeared to downplay his role [REDACTED].¹⁹ On this issue, the witness was also directly confronted by the investigators and was informed that his statement was lacking coherence.²⁰
16. The witness tendency to systematically downplay his role was noticed and voiced by the investigators who told P-0487 [REDACTED].²¹

¹³ CAR-OTP-2076-0435-R02, page 0437.

¹⁴ CAR-OTP-2076-0556-R02, page 0561.

¹⁵ CAR-OTP-2076-0438-R02, page 0440.

¹⁶ CAR-OTP-2076-0438-R02, page 0440.

¹⁷ CAR-OTP-2076-0212-R02, page 0222. See also CAR-OTP-2076-0227-R02, pages 0228-0230 and page 0239; CAR-OTP-2076-0241-R01, page 0250.

¹⁸ CAR-OTP-2084-1307.

¹⁹ CAR-OTP-2076-0441-R02, page 0442.

²⁰ CAR-OTP-2076-0441-R02, page 0465.

²¹ CAR-OTP-2076-0467-R02, page 0469.

17. P-0487 incoherent explanations on some events appeared to have exasperated the investigators and prompted the following exchange:

[REDACTED]²²

18. It is submitted that those examples shows that even after the Prosecution confronted P-0487 with the necessity of saying the truth for his second interview, the witness continued with his pattern of providing information that is unconvincing, even to the investigators. It can only be noted that P-0487 both interviews, in 2016 and 2018, suffers from serious reliability issues.
19. The Defence argues that all the above-mentioned issues with the reliability of P-0487's prior recorded testimony should preclude its submission pursuant to Rule 68(3). Indeed, it has been demonstrated that P-0487 contradicted himself, downplayed his role and provided false information during its interview with the Prosecution, who confronted him about it. In those circumstances asking P-0487 at the beginning of his testimony to confirm that the content of his prior recorded testimony is true to the best of his recollection, under oath, would only result in putting on the trial record evidence that the Prosecution itself finds untrue. Moreover, should P-0487 admits that numerous portions of his transcribed statement are untrue and needs to be corrected, the time-saving objective of a Rule 68(3) submission would be defeated as the Prosecution would have to go over the entire interview with the witness in order to identify the sections that needs to be corrected.
20. Consequently, in those circumstances, the Defence respectfully requests the Chamber to find that it would not be in the interest of justice, nor of the truth-seeking function of the Chamber, to have P-0487's deficient prior recorded testimony submitted in the case record, and to reject the Prosecution's Request.

²² CAR-OTP-2076-0516-R02, page 0541.

II. On the content of P-0487's statement which is unsuitable for a formal submission pursuant to Rule 68(3)

21. The Defence also contends that the content P-0487's prior recorded testimony, which goes to the acts and conduct of Mr. Yekatom on core issues of the case, is unsuitable for a formal submission pursuant to Rule 68(3).
22. Indeed, while P-0487's mentions a variety of subjects in his interviews with the Prosecution, it should be noted that some of them directly relate to the charges of the case. Such is the case of the Yamwara School Base incident, with P-0487 claiming [REDACTED].²³ Another example is the brief mention by the witness that minors joined the Anti-Balaka,²⁴ assertion which could be supportive of Count 29.
23. More prevalent than direct mentions of incidents which are part of the charges are the constant incriminating accusations made against Mr. Yekatom's behaviour, as well as the one of his group, that can be found throughout P-0487's transcripts. The witness effectively avers that Mr. Yekatom's behaviour changed when he became, per P-0487's words, a warlord;²⁵ explaining that he became undisciplined and no longer respected anybody.²⁶
24. This behaviour would materialise, on the ground, with Mr. Yekatom and his men brutalizing the population by stealing, torturing or killing;²⁷ crimes which were also committed by [REDACTED] who would allegedly assassinate members of the population.²⁸ More generally P-0487 always listed Mr. Yekatom

²³ CAR-OTP-2076-0495-R02, pages 0507-0508 ; CAR-OTP-2076-0516-R05, pages 0534-0535.

²⁴ CAR-OTP-2076-0168-R01, page 0176.

²⁵ CAR-OTP-2076-0441-R02, page 0457.

²⁶ CAR-OTP-2076-0441-R02, page 0460.

²⁷ CAR-OTP-2076-0272-R01, page 0282 ; CAR-OTP-2076-0146-R02, pages 0156-0160 ; CAR-OTP-2076-0516-R05, page 0524.

²⁸ CAR-OTP-2076-0120-R01, page 0125 ; CAR-OTP-2076-0146-R02, page 0160.

as an Anti-Balaka who would commit crimes,²⁹ against both Muslims and Christians.³⁰

25. While some of the alleged crimes attributed to Mr. Yekatom by P-0487 might not be directly linked to charged crimes of the case, they nevertheless paint the image of a brutal man which is used by the Prosecution to further its allegations that Mr. Yekatom “set an example for his elements through his own commission of indiscriminate acts of brutality, which promoted similar violent conduct throughout his Group. He was notorious for killing both Muslims and his own men when they opposed him”; general behaviour which is relied on by the Prosecution as Mr. Yekatom’s essential contributions to the charged crimes.³¹
26. As demonstrated above, that P-0487’s prior recorded testimony bears some importance to events or issues that are central to the case. Should the Request be granted, the Defence would find itself in a position where it would be obliged to go over all the assertions made by the witness in order for the Chamber to be properly informed about their potential lack of reliability. This would prejudice the Defence as it would effectively reverse the onus placed on the Prosecution to present their case against Mr. Yekatom; instead of selecting and developing specific and relevant issues for the case, the Prosecution would be in a position to pick and chose at the dusk of the trial the ones that fit the best their case among the numerous allegations that can be found throughout P-0487’s prior recorded testimony.
27. To the contrary, should the Request be rejected, the Defence would be in a position to properly examine P-0487 and investigate the specific issues raised by the Prosecution during its direct examination. This approach would ensure

²⁹ CAR-OTP-2076-0556-R02, page 0570 ; CAR-OTP-2076-0227-R02, page 0238.

³⁰ CAR-OTP-2076-0495-R02, page 0504.

³¹ [ICC-01/14-01/18-723-Red](#), para. 369, fn. 958; paragraph part of Chapter VI, C (b) titled “*YEKATOM prepared Anti-Balaka attacks and advances, and participated and led his Group in the execution of these attacks and advances*” in the chapter “*YEKATOM’S CONTRIBUTIONS*”.

the respect of the right of Mr. Yekatom “to raise defences and to present other evidence” enshrined in Article 67(e) of the Statute, right that cannot be fully upheld when the Defence is confronted with a myriad of accusations that each need to be addressed. Consequently, it should be found that formal submission of P-0487’s prior recorded testimony pursuant to Rule 68(3) would be prejudicial and inconsistent with the rights of Mr. Yekatom, situation which is in contradiction with the principles laid out in Rule 68(1).

28. In light of the above, the Defence submits that the Chamber should reject the Prosecution’s Request due to the content of P-0487’s prior recorded testimony and of the prejudice caused to Mr. Yekatom should it be formally submitted pursuant to Rule 68(3).

III. Formal Submission of P-0487’s statement pursuant to Rule 68(3) would not be in the interests of justice

29. In its “Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules”, the Chamber found that the discretion of a party on whether or not use Rule 68 of the Rules “is not absolute, but subject to judicial oversight”.³² When exercising its judicial oversight, the Chamber must take into account its “obligations under Regulation 43 of the Regulations”³³ which invests the Presiding Judge with the duty of ensuring that the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth.
30. As demonstrated above, P-0487’s testimony contains various allegations which are either uncorroborated or manifestly false, as noted by the Prosecution during their interview with the witness. As it stands the prior recorded testimony of P-0487 is comprised of 37 transcripts³⁴ amounting to

³² [ICC-01/14-01/18-685](#), para. 24.

³³ *Ibid*, para. 25.

³⁴ This number excludes three transcripts which consists only of a “sound check”: CAR-OTP-2076-0014-R01, CAR-OTP-2076-0016-R01, CAR-OTP-2076-0323-R02.

approximatively 560 pages. The Defence stresses that the formal submission of this material would be in total contradiction with the sole purpose of Rule 68(3): enhance the efficiency of the proceedings by reducing the duration of hearings. Indeed, this purpose of Rule 68(3) is part of an overall aim to ensure judicial economy during the trial as a whole; and, while the formal submission of P-0487's prior recorded testimony could tentatively save six hours of hearing for the examination-in-chief,³⁵ the necessity for the Defence to go over every subject during its own examination, even the ones *prima facie* only remotely connected to the charged crimes, would largely compensate, or even exceed, the time saved during the examination-in-chief.

31. It is further submitted that the weight given to the perspective of cutting the examination in chief from nine to three hours is counterbalanced by the importance of P-0487 to the case in light of his unique position in relation to the events.
32. Indeed, as detailed by the Prosecution in its Request, P-0487 is expected to provide evidence about the events that occurred both in Bangui in December 2013 and on the PK9-Mbaïki axis in 2014.³⁶ The witness is thus expected to testify about the majority of the case, both temporally and geographically, advanced by the Prosecution against Mr. Yekatom.
33. Moreover, it is reminded that witnesses testified that P-0487 was allegedly [REDACTED],³⁷ and was [REDACTED].³⁸ His overall importance during the events also transpires from [REDACTED] in which P-0487 is [REDACTED],³⁹ before being personally acknowledged by [REDACTED].⁴⁰ More recently, [REDACTED] talked extensively about P-0487 who would have allegedly

³⁵ ICC-01/14-01/18-1595-Red, paras 17-19.

³⁶ ICC-01/14-01/18-1595-Conf-AnxB, pages 13-15.

³⁷ [REDACTED]

³⁸ [REDACTED]

³⁹ [REDACTED]

⁴⁰ [REDACTED].

[REDACTED]. Consequently, and irrespective of the veracity of those allegations, it can only be concluded that P-0487's both importance and proximity with the group ensure that he had a unique position in relation to the events compared to other witnesses.

34. While the ability of a witness to provide unique and distinctive evidence compared to other witnesses is not *per se* an obstacle to the introduction of a prior recorded statement pursuant to Rule 68(3); the Defence notes that this factor has been specifically taken into account in other cases of the Court to reject such submissions and order a fully *viva voce* testimony.⁴¹ The Defence contends that it should be recognized that the intrinsic specificities of P-0487's expected testimony and position during the events weight in favor of his evidence being heard fully *viva voce*.
35. Finally, the Defence wishes to highlight that P-0487 provides in his prior recorded testimony serious accusations against various individuals or entities. As an example, he alleges that France disguised Seleka from the Mbororo ethnicity as peacekeepers and put them in vehicles before they go commit crimes; the investigators indicated that "*ces informations ou même les accusations ... ces accusations que vous venez de faire sont ... sont très graves*" before voicing their surprise with the fact that P-0487 only has one source for this information and asking him if he has other corroborative evidence.⁴² However, and despite this example of an accusation made by P-0487 during his interview founded on lacunar evidence, it can be noted that the Prosecution did not systematically challenged P-0487 about his sources of information when he made other accusations, including against Mr. Yekatom. In those circumstances, the advantages of a fully *viva voce* testimony would best serve the Regulation 43

⁴¹ *Prosecutor v. Abd Al Rahman*, Decision on the Prosecution's tenth application to introduce prior recorded testimonies under Rule 68(3), 4 April 2022, [ICC-02/05-01/20-660-Red](#), paras 13-15, 22.

⁴² CAR-OTP-2076-0241-R01, pages 0242-0243.

obligation of ensuring a fair and effective presentation of evidence for the determination of the truth, as it would allow the Judges and Parties to closely monitor the behavior of the witness and immediately seek clarification when needed.

36. In light of the above, the Defence argues that the interests of justice the truth-seeking function of the Chamber would best be served by hearing the entirety of the testimony of an important witness, such as P-0487, fully *viva voce*.

IV. Request for an expedited decision

37. The Defence respectfully requests the Chamber to issue its decision on the Prosecution's Request on an expedited basis.
38. The Defence notes that in the last Prosecution's anticipated witness order⁴³ P-0487 is witness number 51 and, given the pace of the proceedings, could be testifying during the last block of witnesses of 2022 scheduled to begin on 17 November 2022.
39. The Defence recalls that it did not oppose the Prosecution's request to submit Rule 68(3) applications on a rolling basis, 45 days before a witness is scheduled to testify, provided that they are submitted as soon as practicable.⁴⁴ As the Chamber noted this approach allowed "for the distribution of the workload associated with these applications over an extended time period, thereby easing the burden on the participants and the Chamber".⁴⁵ In the case of the present Request, it is submitted that the period of time between the upcoming decision by the Chamber and the beginning of P-0487's in-court testimony should be given particular attention.

⁴³ Email from the Prosecution to the Chamber and Parties dated 3 October 2022 at 17:13.

⁴⁴ ICC-01/14-01/18-663, para. 27.

⁴⁵ ICC-01/14-01/18-685, para. 18.

40. Indeed, while well within the 45-days deadline to submit its application, it should be noted that the Request was notified on 4 October 2022 for a probable in-court testimony around end of November / first half of December 2022. In light of the relevance of witness P-0487 in the case against Mr. Yekatom, of the voluminous nature of his evidence, and of the important impact that the upcoming decision will have on its preparation, the Defence respectfully requests the Chamber to order that a minimum of ten working days is given to the Defence between the notification of the decision and the beginning of P-0487's in-court testimony. This will enable the Defence to reorganise its examination plan and questions therein taking into account the Chamber's decision.

CONFIDENTIALITY

41. The response is filed on a confidential basis corresponding to the classification of the Request and due to the presence of identifying information of P-0487. A public redacted version is being filed simultaneously.

RELIEF SOUGHT

42. In light of the above, the Defence respectfully requests Trial Chamber V to:

REJECT the Request, and;

ORDER the in-court appearance of P-0487 to begin a minimum of ten working days after the issuance of the decision on the Prosecution's Request.

RESPECTFULLY SUBMITTED ON THIS 19th DAY OF OCTOBER 2022



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