

**Cour
Pénale
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**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 “Yekatom Defence Response to ‘Prosecution’s
Request for the Formal Submission of the Prior Statements of P-1847’”,
20 July 2023, ICC-01/14-01/18-1994-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 the Formal Submission of the Prior Statements of P-1847' ('Request').¹
2. The Defence opposes the Request with respect to the submission of paragraphs of the prior statements of P-1847 that go to the acts and conduct of Mr Yekatom.
3. The Defence takes no position as for the remainder of the Request.

PROCEDURAL HISTORY

4. On 9 and 30 September 2019, Prosecution witness P-1847 provided two statements and associated documents to the Prosecution ('Statements').²
5. Between 26 March and 30 March 2021, P-1847 testified before the Chamber.
6. On 29 June 2022, the Defence was notified of the "Confidential redacted version of the 'Prosecution Submission on Article 70 Investigation, ICC-01/14-01/18-1310-Conf-Exp, 10 March 2022'".³
7. On 12 July 2022, the Defence filed the 'Yekatom Defence Observations in relation to the "Prosecution's request for non-disclosure under rule 81(2) of materials collected during the investigation of potential offences under article 70", ICC-01/14-01/18-1016-Conf, and the 'Confidential redacted version of the "Prosecution Submission on Article 70 Investigation", ICC-01/14-01/18-1310-Conf-Red'.⁴
8. On 7 July 2023, the Prosecution filed the Request.

¹ ICC-01/14-01/18-1971-Conf.

² CAR-OTP-2061-1534 & CAR-OTP-2122-8251.

³ ICC-01/14-01/18-1310-Conf-Red.

⁴ ICC-01/14-01/18-1509-Conf.

SUBMISSIONS

9. The Defence hereby provides clarifying information on the allegations regarding [REDACTED]; and further, respectfully requests the Chamber to reject the submission of the paragraphs of the Statements that go to the acts and conduct of Mr. Yekatom.

A. Preliminary issue: clarification regarding [REDACTED].

10. The Prosecution alleges that [REDACTED].⁵
11. The Defence does not wish to comment on any allegation [REDACTED] and simply wishes to reiterate its previous observation on the status of the latter with regard to Mr. Yekatom.⁶
12. In the Request, the Prosecution states that according to P-0884, [REDACTED]; [REDACTED]".⁷
13. First, the Defence finds it regrettable that the Prosecution has elected to refer to [REDACTED] by name in its submissions regarding alleged misconduct on the part of [REDACTED], entirely unrelated to [REDACTED]. The Defence resoundingly rejects any attempt to imply that [REDACTED].
14. Prior to the Prosecution's previous submissions, the Defence was not aware that [REDACTED] (as claimed by P-0884).⁸ In light of this information the Defence nevertheless wishes to reiterate the following clarifications [REDACTED]:
 - (1) [REDACTED];⁹

⁵ ICC-01/14-01/18-1971-Conf, para. 50.

⁶ ICC-01/14-01/18-1509-Conf, para. 7 ss.

⁷ See ICC-01/14-01/18-1971-Conf, para. 50, fn 103.

⁸ ICC-01/14-01/18-1016-Conf.

⁹ Administrative documents available upon request.

- (2) [REDACTED] never received any list of Prosecution witnesses during [REDACTED], nor did he receive disclosed statements, [REDACTED]; and
- (3) [REDACTED].

15. The Defence also reiterates that the working protocol within the team has always corresponded to the highest professional standards, and the Defence has been proactive in this regard.

B. Submission of P-1847's prior recorded testimony going to the acts and conduct of Mr Yekatom should be denied.

16. In the Request, the Prosecution concedes that the Statements go to the acts and conduct of Mr Yekatom; and claims to have made 'reasonable efforts to secure all facts known to P-2847'.¹⁰

17. This claim is without merit.

18. During the entirety of the Prosecution's examination of P-1847, the Prosecution asked only two questions regarding Mr Yekatom. Specifically – at the very commencement of his examination – P-1847 was asked whether he knew Mr Yekatom; and whether he was in contact with him 'from time to time'; P-1847 responded that between 2012 and 2014 he was not in contact with Mr. Yekatom, and that he did not know him at the time of the events but had heard of him afterwards.¹¹

19. Despite the fact that the Statements contained allegations as to the acts and conduct of Mr Yekatom, which claims were included in the 'Summary of P-1847's Expected Testimony', this evidence was not elicited from P-1847, nor was the topic of Mr Yekatom broached in any meaningful way.

¹⁰ ICC-01/14-01/18-1971-Conf, Section D.

¹¹ ICC-01/14-01/18-T-022-CONF-FRA, 21:24-22:7.

20. In the present instance, the starting point of the assessment of Rule 68 (2)(d)(i) is whether the Prosecution made 'reasonable efforts [...] to secure from the witness all material facts known to the witness'. This precondition within rule 68(2)(d) recognises the prejudice occasioned to an accused by the introduction of unexamined testimonial evidence, and thus should be strictly applied.
21. The Defence submits that this requirement is self-evidently unmet in relation to the Statement for all material facts relating to Mr. Yekatom.
22. Nor can P-1847's limited responses regarding Mr Yekatom be reasonably considered to constitute a contradiction or deviation with the Statements. In any event, it was incumbent upon the Prosecution to put any purported contradictions to the witness during his testimony, so as to allow him to explain or clarify them.¹²
23. The Prosecution's lack of diligence in making reasonable efforts to secure any material facts known to the witness in relation to Mr. Yekatom warrants the rejection of the submission of those aspects of P-1847's Statement:

As to the arguments that the Chamber should not reward the submitting party for failing to probe deviations in testimony, it is certainly possible that a witness who recants his/her prior recorded testimony in fundamental aspects was not sufficiently prompted by the submitting party to testify on these matters. The diligence in exploring these deviations is relevant when deciding under Rule 68(2)(d)(i) whether 'reasonable efforts have been made [...] to secure from the witness all material facts known to the witness'.¹³

24. The Request does not claim that the Prosecution was unable to elicit evidence on Mr Yekatom's alleged acts and conduct as set out in the Statement; nor does it claim that any attempts were made to do so. Nor could any such claim be

¹² See, *Prosecutor v Ntaganda*, Public redacted version of 'Decision on certain requests related to the admission of the prior recorded testimony of Witness D-0080', [ICC-01/04-02/06-2242-Red](#), 22 February 2018, paras 47-50; see also ICTR, *Prosecutor v Kamuhanda*, Judgement and Sentence, [ICTR-99-54A-T](#), 22 January 2003, para. 268.

¹³ *Prosecutor v Ruto & Sang*, Public Redacted Version of Decision on Prosecution Request for Admission of Prior Recorded Testimony, [ICC-01/09-01/11-1938-Corr-Red2](#), 19 August 2015, para. 42.

reasonably made, not least given that P-1847 completed his evidence on 30 March, i.e. one day earlier than anticipated.¹⁴

25. In the Request, the Prosecution also claims that the Defence ‘had a sufficient opportunity to examine the witness on material aspects’ and further, that the Defence’s decision not to examine the witness ‘given the witness’s disposition does not amount to the diminution or deprivation of a procedural right or opportunity.’¹⁵
26. This claim is without merit.
27. First, the Defence’s decision not to cross-examination P-1847 was not based in any way on the witness’s purported ‘disposition’. Indeed, there was no indication of any ‘disposition’ of the witness, one way or another, with regard to Mr. Yekatom. The Defence elected not to cross-examine P-1847 simply because the Prosecution did not elicit any evidence in relation to Mr Yekatom.
28. Nor can the purported ‘disposition’ of a witness towards an accused be cited to justify failing to attempt to elicit material allegations regarding a co-accused, in the context of a joint trial.
29. In this regard, the suggestion that the Defence ought to have cross-examined P-1847 – a *viva voce* witness, in respect of whom no application for introduction of his prior statement via rule 68 had been made or mooted – on incriminating aspects of his statements not elicited during his examination-in-chief, is entirely misguided, to say the least. This argument is a transparent attempt to reverse the onus within rule 68(2)(d)(i) and can be dismissed as such.
30. Considering that the Prosecution opted not to ask any questions to the witness in relation to the portion of his statement which i) concerned Mr. Yekatom and

¹⁴ See Chamber’s 22 March 2021 email to the Parties.

¹⁵ ICC-01/14-01/18-1971-Conf, para. 72.

ii) concerned certain chapeau elements, the Prosecution cannot now argue that P-1847 was not disposed to give testimony in relation to this evidence specifically.

31. Formal submission of those paragraphs of the Statements at this stage would therefore be contrary to the fairness of these proceedings, and especially Mr. Yekatom's fundamental right to examine witnesses brought against him, under Article 67(1)(e).
32. In addition to the specific paragraphs listed above, relating to Mr. Yekatom and which are prejudicial and for which the introduction is inconsistent with his rights, several other portions of the Statement are also prejudicial.
33. For instance, paragraphs 160, 161 and 224 of the 2017 statement are extremely prejudicial to the chapeau elements of the crimes charged. As the Chamber is aware, the Defence has previously examined witnesses on certain aspects of the chapeau elements, including the alleged 'organisation' (e.g. on the lack of equipment, the lack of means of communications, transport, the absence of structure, etc.) would have been put to the witness by the Defence, for instance to explore the meaning of his claim that '*les groupes d'anti-Balaka étaient très bien organisés*'.¹⁶ The Prosecution failed to elicit the evidence contained in those paragraphs, and therefore they should not be introduced into evidence as the Prosecution did not make any effort, let alone reasonable, to secure this evidence.
34. Lastly, the fact that the Prosecution did not seek to introduce this statement in a timely manner, which would have mitigated the prejudice inherent in introduction of the Statements, including by allowing the Defence to examine

¹⁶ See ICC-01/14-01/18-T-068-CONF-ENG, p. 61; P-2012 : T-026 FRA CT WT from [11:00:13] to [11:02:42]; P-2251 : T-044-CONF-FRA CT from [09:59:50] to [10:03:08]; P-0965 : T-062-CONF-FRA CT at [15:04:02]; P-0306 : T-068-CONF-FRA CT from [15:28:50] to [15:29:21]; P-0446 : T-099-FRA ET WT from [10:44:05] to [10:45:10]; P-1805 : T-118-CONF-FRA ET from [14:51:14] to [15:51:54].

other witnesses on certain material aspects, prior to the end of its case is a lack of diligence on its part, which is contrary to the interests of justice and should thus militate against its introduction. Indeed, the Defence notes that the material cited in support of the Prosecution's Request is in the Prosecution's possession and control between 2021 and 2022 at the latest.¹⁷ Nor can the Prosecution claim that it was obliged to await the end of its investigation to move for the admission of the Statements via rule 68(2)(d), given that any evidence of interference collected subsequently could have been put before the Chamber in supplementary submissions; or otherwise, formed the basis for a request for reconsideration.

35. The untimeliness of the Prosecution's Request deprives the Defence of the opportunity to mitigate those extracts of the Statement, which is an additional factor that warrants the rejection of the Request given the lack of meaningful opportunity to examine the witness.

CONFIDENTIALITY

36. The response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed forthwith.

RELIEF SOUGHT

REJECT the Request in relation to the paragraphs 120, 174, 181, 183, 190 of CAR-OTP-2061-1534-R01 and paragraphs 29, 137 of CAR-OTP-2122-8251-R01.

¹⁷ See metadata of material cited between in footnotes 57 to 134.

RESPECTFULLY SUBMITTED ON THIS 13TH DAY OF OCTOBER 2023



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