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**International
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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 with Public Annex A

**Public Redacted Version of “Yekatom Defence Response to
Prosecution’s Rule 68(2)(b) Applications (ICC-01/14-01/18-710-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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1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence”) respectfully respond to the *Prosecution’s Request the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b) (“Request”)*.¹

SUBMISSIONS

2. The Defence takes notice that all tendered materials are intended to prove the requisite contextual elements to war crimes and crimes against humanity.
3. The Defence does not oppose the formal submission of the prior recorded testimony of P-2324, P-2326, P-1871, P-0289, P-2132, and P-2393 as well as the associated exhibits.
4. The Defence does not oppose the formal submission of the exhibits associated with the witness statements of P-2325, P-1773 and P-1864. However, the Defence seeks the exclusion, the inclusion and the limitation on the use of certain paragraphs therein.

A. P-2325

5. In paragraph 75 of his statement, P-2325 recalls the following encounter:

[REDACTED].²
6. The Defence opposes the formal submission of this paragraph because its low probative value is outweighed by the prejudice caused in case of submission.³
7. This paragraph is tendered to demonstrate, *inter alia*, Mr. Yekatom’s command of an Anti-Balaka group located in the Lobaye prefecture along the Bangui-Mbaïki axis during the time relevant to the charges between September 2013

¹ [ICC-01/14-01/18-710-Conf](#), with Confidential Annex A and Confidential Annex B.

² [ICC-01/14-01/18-710-Conf-AnxB](#), p. 85, re-producing CAR-OTP-2100-2386, para. 75.

³ *Prosecutor v. Ruto & Sang*, [Decision on the Prosecution’s Request for Admission of Documentary Evidence](#), ICC-01/09-01/11-1353, 10 June 2014, para. 16.

and December 2014.⁴ This, in turn, serves to prove that the contextual elements of the confirmed war crimes and crimes against humanity exist.⁵

8. In other words, the Trial Chamber needs to determine whether the level of organisation of Anti-Balaka from September 2013 to December 2014 can sustain the finding of an armed conflict and a widespread attack against the civilian population.
9. In this regard, paragraph 75 of the statement is of little or no significance to the Chamber's determination.⁶ *First*, the encounter was very brief. P-2325 did not recognise the person. Nor could P-2352 confirm his claims as to his identity, his position [REDACTED], or [REDACTED]. It is unclear if the person was indeed [REDACTED]. *Second*, even assuming the claims were accurate, the encounter was in 2016. It cannot retroactively affect the assessment of whether Mr. Yekatom had control over this area two years prior. The probative value of this paragraph is very slim.
10. By contrast, paragraph 75 has the capacity to prejudice the Chamber's fair assessment of the issues in the case, and infringe upon Mr. Yekatom's right to prepare for the defence.⁷ Its formal submission would open up the end timeframe of evidential relevance by over a year. As a result, the Defence would need to adduce counter-evidence – testimonial or documentary – in order to challenge the allegation and the inference. The amount of additional yet unnecessary information would cumulate before the Chamber, inevitably eroding the efficiency of the proceedings.

⁴ [ICC-01/14-01/18-710-Conf-AnxA](#), p. 4, referring to the paragraphs of the Confirmation Decision to which the evidence relates, *inter alia*, [ICC-01/14-01/18-403-Conf-Corr](#), para. 65. On the other hand, the Prosecution's Trial Brief contains no reference to paragraph 75 of the statement.

⁵ [ICC-01/14-01/18-403-Conf-Corr](#), paras 67-74.

⁶ *Prosecutor v. Katanga*, [Decision on the Prosecutor's Bar Table Motions](#), ICC-01/04-01/07-2635, 17 December 2010, para. 35.

⁷ Article 69(4) of the Statute as interpreted by *Prosecutor v. Ruto & Sang*, [Decision on the Prosecution's Request for Admission of Documentary Evidence](#), ICC-01/09-01/11-1353, 10 June 2014, para. 16; *Prosecutor v. Lubanga*, [Corrigendum to Decision on the Admission of Four Documents](#), ICC-01/04-01/06-1399-Corr, 20 January 2011, para. 31.

11. In light of the above, paragraph 75 should be excluded.
12. Should the Chamber find the probative value of paragraph 75, albeit minimal, warrants the formal submission, the Defence argues, in alternative, that this paragraph amounts to a peripheral but concrete reference to Mr. Yekatom.⁸ Accordingly, it requests that the Chamber refrain from considering this paragraph to establish Mr. Yekatom's acts and conduct, especially regarding his control over the Anti-Balaka groups in the Lobaye prefecture, for the purpose of its final judgment.⁹

B. P-1773

13. In paragraph 29, P-1773 describes the information he received about the Anti-Balaka using violence, such as destroying bridges and killing passengers, to prevent the free circulation of Muslims after 5 December 2013, including between Mbaïki and Bangui. P-1773 learnt that:

[REDACTED].¹⁰

14. The Defence opposes the formal submission of this excerpt because its low probative value is outweighed by the prejudice caused in case of submission.
15. As shown in the excerpt above, P-1773 explained that he heard this from someone whose identity he cannot recall, on an unknown date, and through unknown means. It is unclear how removed P-1773 is from the source of the information, or how reliable the source was in the first place. Consequently, the excerpt provides no assistance in the Chamber's determination as to whether, and to what extent, this allegation supports, for example, the purported widespread nature of the attack against the Muslim population or

⁸ *Prosecutor v. Ongwen*, [Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), ICC-02/04-01/15-596-Red, 18 November 2016, para. 13.

⁹ *Prosecutor v. Ongwen*, [Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), ICC-02/04-01/15-596-Red, 18 November 2016, para. 13.

¹⁰ [ICC-01/14-01/18-710-Conf-AnxB](#), p. 93, re-producing CAR-OTP-2064-0063, para. 29.

the alleged wrongdoings which may have led to the displacement along the PK9-Mbaïki area.¹¹

16. Similarly, P-1773 did not identify any individual or group of Anti-Balaka as the culprits. Nor did he clarify whether the mentioned destruction of the bridge occurred on the PK9-Mbaïki axis or in other vast areas he mentioned, or at which location(s) it occurred.
17. Considering that Mr. Yekatom is alleged to have had control over the Lobaye prefecture ergo responsible for the crimes committed therein,¹² the Defence ought to adequately explore the claims of wrongdoings within this geographical area. However, the vagueness of paragraph 29, especially that around the time, deprived the Defence of the means to effectively investigate the allegation contained in the tendered excerpt or produce on-point rebutting evidence.
18. As such, the inclusion of this excerpt would place an unfair burden on Mr. Yekatom in preparing for his defence. This prejudice is disproportionately high to the comparatively slim probative value of the excerpt itself.
19. In light of this, the excerpt of paragraph 29 as reproduced above should be excluded.

C. P-1864

i) *Paragraphs 13 and 23*

20. The *Request* contains a typographical error.¹³ It transpired from the *inter partes* consultation that the Prosecution intended to seek the exclusion of paragraph 23 rather than paragraph 13 of P-1864's statement, whilst paragraph 13 is

¹¹ See, e.g., [ICC-01/14-01/18-723-Conf](#), para. 470 ("YEKATOM's Group established checkpoints at PK9 [...] in their advance towards MBAIKI. Armed elements regulated movement and targeted Muslims, preventing their circulation. They confiscated cattle and goods, and exacted illegal "tolls" part of which YEKATOM personally collected.").

¹² See, e.g., [ICC-01/14-01/18-403-Conf-Corr](#), paras. 55, 139; [ICC-01/14-01/18-723-Conf](#), paras. 309, 479.

¹³ Annex A.

meant to be tendered. The Defence does not oppose to this request.

21. To alleviate the Prosecution's workload and avoid a corrigendum, the Defence undertook to inform¹⁴ the Chamber accordingly and request the inclusion of paragraph 13 and the exclusion of paragraph 23, as the Prosecution intended.

ii) Paragraph 16

22. In paragraph 16, P-1864 describes the information relayed to her through telephone by a third party who was purportedly in Cattin on 5 December 2013 in the morning. The witness was told that:

[REDACTED].¹⁵

23. The Defence opposes the formal submission of this paragraph because its low probative value is outweighed by the prejudice caused in case of submission.
24. The neighbourhoods and the landmark mentioned by the third party cover a vast area in Bangui. Given the circumstances on 5 December 2013 and the status of the third party in question, it is unlikely that the relayed information was his personal knowledge gained by visiting each and every location. It is unclear how removed P-1864 was from the actual source of the information or how reliable the received information was.
25. P-1864 has declined to meet with the Defence.¹⁶ Due to this lack of the opportunity to examine the witness on the above matters, the inclusion of paragraph 16 would unfairly prejudice the Defence.
26. Whilst the parties may choose how to present their evidence and are not

¹⁴ The Ngaïssona Defence has also been informed in time.

¹⁵ [ICC-01/14-01/18-710-Conf-AnxB](#), p. 112, reproducing CAR-OTP-2064-0860, para. 16.

¹⁶ Email from Prosecution Senior Trial Lawyer on 25 June 2020 entitled "RE: ARY-2020-0137 Request to interview OTP witnesses (Rule 68(2))". The chain of correspondence can be made available to the Chamber upon instruction.

necessarily bound by the best evidence rule,¹⁷ the Defence submits that the inclusion of a paragraph with such low probative value would unnecessarily encumber the casefile and undermine the efficiency of evidence assessment.

27. In light of the above, paragraph 16 should be excluded.

iii) Paragraphs 49-50

28. In paragraphs 49 and 50 of the statement, P-1864 describes being stopped and searched at Anti-Balaka checkpoints at the PK9 which were manned by armed Anti-Balaka. P-1864 states that:

[REDACTED]

[REDACTED]¹⁸

29. The Defence opposes the formal submission of these paragraphs as they go to proof of the acts and conduct of Mr. Yekatom.

30. In the *Bemba et al.* case, the Chamber rejected the admission of a prior recorded testimony on the basis that *the Prosecution* attributes the acts and conduct contained in the testimony to the accused, even though he was not expressly mentioned by the witness.¹⁹

31. In the excerpt at bar, although Mr. Yekatom is not referred to by name, the checkpoints described are clearly what were allegedly by the Prosecution under Mr. Yekatom's control, and where Mr. Yekatom and his armed elements allegedly targeted Muslims and exacted illegal "tolls".²⁰ Thus,

¹⁷ *Prosecutor v. Bemba et al.*, [Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence](#), ICC-01/05-01/13-1820, 20 April 2016, paras 9 and 10.

¹⁸ [ICC-01/14-01/18-710-Conf-AnxB](#), pp. 117-118, reproducing CAR-OTP-2064-0860, paras. 49-50.

¹⁹ *Prosecutor v. Bemba et al.*, [Decision on Prosecution Request to Add P-242 to its Witness List and Admit Prior recorded Testimony of P-242 Pursuant to Rule 68\(2\)\(b\) of the Rules](#), ICC-01/05-01/13-1430, 29 October 2015, para. 8.

²⁰ See, e.g., [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 343 and fn. 713 citing, in particular, **P-1824**: CAR-OTP-2094-1803-R01, paras. 25-26 ("[REDACTED]"); [ICC-01/14-01/18-723-Conf](#), paras. 325, 361, 378, 415, 462, 463, 470 ("YEKATOM's Group established checkpoints at PK9 [...] in their advance towards MBAIKI. Armed elements regulated movement and targeted Muslims, preventing their circulation. They confiscated cattle and

paragraphs 49 and 50 are clearly submitted primarily to prove the acts and conduct of Mr. Yekatom.²¹

32. Meanwhile, the Defence disputes such allegations. It trusts the evidence will show that at least one of the checkpoints was not under Mr. Yekatom's control. Again, since the witness declined to meet with the Defence, it is unable to further explore, for example, the identity of the Anti-Balaka at the checkpoints and their affiliation.
33. On balance, the formal submission of paragraphs 49 and 50 of P-1864's statement would be highly prejudicial. It should therefore be rejected.
34. Should the Chamber find otherwise, the Defence similarly requests,²² as an alternative, that the Trial Chamber refrains from considering these paragraphs for the acts and conduct of Mr. Yekatom in its final judgment.

CONFIDENTIALITY

35. The present response is filed on a confidential basis as it contains sensitive information that may lead to the identification of the witnesses. Annex A is also classified as confidential as it is *inter partes* consultation in nature. Public redacted versions are submitted simultaneously.

CONCLUSION

36. In light of the above, the Trial Chamber is respectfully requested to:

- Regarding the tendered statement of P-2325:

goods, and exacted illegal "tolls" part of which YEKATOM personally collected."), 476, 477, and 481. See also, [ICC-01/14-01/18-403-Conf-Corr](#), para. 129, fns. 305 and 315.

²¹ See *Prosecutor v. Ntaganda*, [Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68\(2\)\(b\)](#), ICC-01/04-02/06-1715-Red, 12 January 2017, para. 10, finding that the expression of acts and conduct of the accused "refers to the personal acts and omissions of the accused, which are described in the charges against him or her or *which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged*" (emphasis added).

²² See, *supra*, para. 25.

EXCLUDE paragraph 75 or, **IN THE ALTERNATIVE, REFRAIN** from considering this paragraph for the acts and conduct of Mr. Yekatom in the Trial Chamber's final judgment;

- Regarding the tendered statement of P-1773:

EXCLUDE paragraph 29;

- Regarding the tendered statement of P-1864:

EXCLUDE paragraphs 16 and 23;

INCLUDE paragraph 13;

EXCLUDE paragraph 49 or, **IN THE ALTERNATIVE, REFRAIN** from considering this paragraph for the acts and conduct of Mr. Yekatom in the Trial Chamber's final judgment.

RESPECTFULLY SUBMITTED ON THIS 16TH DAY OF NOVEMBER 2020



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