

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/18

Date: 22 February 2021

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 Confidential Annex A

Public redacted version of “Yekatom Defence Response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0627 pursuant to Rule 68(3)”, 10 February 2021, ICC- ICC-01/14-01/18-879-Conf”, 22 February 2021

Source: Defence for Mr. Alfred Rombhot Yekatom

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Me Mylène Dimitri

Mr. Thomas Hannis

Counsel for Mr. Ngaïssona

Me Geert-Jan Alexander Knoops

Me Richard Omissé-Namkeamai

Legal Representatives of Victims

Mr. Dmytro Suprun

Mr. Abdou Dangabo Moussa

Ms. Elisabeth Rabesandratana

Mr. Yaré Fall

Ms. Marie-Edith Douzima-Lawson

Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully request the Chamber to partly reject the introduction of P-0627’s prior recorded statements as it would infringe on the rights of Mr. Yekatom and on the fairness of the proceedings.
2. Indeed, an extract of the statements of P-0627 is central to core issues in the case and relates to issue that are materially in dispute at the heart of the charges and are not of a corroborative nature *per se*. In addition, this same prejudicial extract seems to have been directly suggested by the Prosecution’s interviewer during P-0627’s questioning and not elicited through an open ended question. Given P-0627’s position as [REDACTED] the Defence respectfully requests the Chamber to deny the introduction of these excerpts of his prior recorded testimony and requests the Prosecution to lead the witness in chief on that proposed evidence.

PROCEDURAL BACKGROUND

3. On 26 August 2020, the Trial Chamber ordered the Prosecution to submit applications under Rule 68(2) and (3) as soon as possible, latest by 9 November 2020.¹ It also clarified that submitted expert report(s) must satisfy the procedural prerequisites of Rule 68 unless no such objections to the submission are raised.² Furthermore, the Trial Chamber has allowed the Prosecution 400 hours to conduct the direct examination of its witnesses and 200 hours to each Defence to do the cross-examinations.³
4. On 31 August 2020, the Prosecution filed its Provisional Witness List, indicating its intention to call 44 witnesses through Rule 68(2) and 77

¹ [ICC-01/14-01/18-631](#), para. 33.

² [ICC-01/14-01/18-631](#), para. 67.

³ [ICC-01/14-01/18-631](#), paras. 21, 24.

witnesses through Rule 68(3).⁴

5. In its *Request pursuant to Regulation 35 to vary the Time Limit for the Submission of Applications pursuant to Rule 68*, in regard to the Rule 68(3) applications, the Prosecution requested a change of the time limit for it to be not less than 45 days before the scheduled start of the witness' testimony,⁵ to which the Defence did not object.⁶
6. On 15 September 2020, the Prosecution filed its *Prosecution's Observations on its intended approach to Rule 68(3) in the presentation of its case* (the '*Request*') stating that the Prosecution wishes for the Chamber to encourage Rule 68(3) applications as a means of expediting the proceedings.⁷ The Defence response pointed out that despite the fact that the Rule 68(3) applications shorten the Prosecution examination time, it increases greatly the Defence cross-examination obligation. Albeit it is not an issue at this stage *per se*, the 200 hours given by the Chamber in the Initial Directions could be too little and could result in a substantial prejudice to Mr. Yekatom.⁸
7. On 16 October 2020, the Trial Chamber in its *Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules* (the '*Decision*') noted that:

In light of the specific circumstances of this case, and noting the overall number of anticipated applications under Rule 68 of the Rules, namely for 121 out of 145 witnesses (44 of which pursuant to Rule 68(2) of the Rules and 77 pursuant to Rule 68(3) of the Rules), the Chamber considers that the Prosecution's projected use of Rule 68 of the Rules appears, *prima facie*, disproportionate in light of the principles of orality and publicity and potentially prejudicial to the rights of the accused.⁹

⁴ [ICC-01/14-01/18-642-Conf-AnxA](#); [ICC-01/14-01/18-652](#), para. 7.

⁵ [ICC-01/14-01/18-652](#).

⁶ [ICC-01/14-01/18-663](#).

⁷ [ICC-01/14-01/18-655](#), para. 15.

⁸ [ICC-01/14-01/18-664](#), para. 6.

⁹ [ICC-01/14-01/18-685](#), para. 32.

[...]

The Chamber notes that, should the Prosecution decide to indeed submit 121 applications pursuant to Rule 68 of the Rules (and should they be granted), this may impact on the time allocated to the participants.¹⁰

8. The Trial Chamber, in the *Decision*, partly granted the Prosecution's Request, by allowing the Prosecution to "file its Rule 68(2) Applications on a rolling basis, latest by 11 January 2021, and its Rule 68(3) Applications not less than 45 days before the scheduled start of the witness' testimony".¹¹
9. On 10 November 2020, the Prosecution filed its Final Witness List, indicating its intention to call 55 witnesses through Rule 68(2) and 69 witnesses through Rule 68(3).¹²
10. On 10 February 2021, the Prosecution filed its Formal Submission of the Prior Recorded Testimony of P-0627 pursuant to Rule 68(3) (the "*Submission*").¹³ The Defence was notified on the 11 February 2021.

RELEVANT PROVISIONS

Article 67(2) – Rights of the accused

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the Defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 69 (2) – Evidence

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce

¹⁰ [ICC-01/14-01/18-685](#), para. 35.

¹¹ [ICC-01/14-01/18-685](#).

¹² [ICC-01/14-01/18-724-Conf-AnxA](#).

¹³ [ICC-01/14-01/18-879-Conf](#).

(oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

Rule 68 (3) – Prior recorded testimony

3. 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.

ARGUMENT

11. As a preliminary remark, the Defence recalls that in its *Response to the Prosecution's Intended Approach to Rule 68(3)* it underlined the impact on the adequacy of the allocated time for cross-examinations.¹⁴ P-0627's statement is yet another example of how extensive use of Rule 68(3) can greatly impact on the time allocated to the Defence for cross-examination. Whilst the Prosecution's examination time will diminish from at least eight hours¹⁵ to three hours,¹⁶ the Defence will have no choice but to make an exhaustive cross-examination based on the outcome of the examination in chief and the 230 pages¹⁷ of written statement submitted under Rule 68(3). The burden imposed to the Defence will be substantial and consume an important part of the allotted time for cross-examination.
12. The jurisprudence of the Court has consistently held that the Chamber's decision to allow the introduction of prior recorded testimonies is a

¹⁴ [ICC-01/14-01/18-664](#), para. 6.

¹⁵ [ICC-01/14-01/18-879-Conf. para. 17.](#)

¹⁶ [ICC-01/14-01/18-879-Conf. para. 15.](#)

¹⁷ [ICC-01/14-01/18-879-Conf-AnxA.](#)

discretionary power.¹⁸ Not only has this conclusion been upheld in different cases, but it was also partly used as a ground for rejecting a Prosecution's Rule 68(3) request in *Gbagbo & Blé Goudé*.¹⁹

13. In its *Submission*, the Prosecutor asked for the admission of prior recorded testimonies of P-0627 and mentioned that on balance the introduction is appropriate and the prior recorded testimony is supported and corroborated by other evidence to be tested at trial.²⁰
14. When deciding whether or not a Prosecution's Rule 68(3) request should be granted, the Chamber may consider certain factors including: (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.²¹
15. In addition, the Appeals Chamber in *Gbagbo & Blé Goudé*, ruled that a Chamber in its assessment of the possibility of a Rule 68 (3) application "must necessarily analyse the 'importance' of each witness statement in light of the charges and the evidence already presented or intended to be presented before it" with the consequence that "the more important the Chamber

¹⁸ *Prosecutor v. Bemba and al.*, [Decision on Prosecution Rule 68\(2\) and \(3\) Requests](#), 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, paras. 48, 50; *Prosecution v. Ongwen*, [Decision on Prosecution's Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68\(3\) of the Rules](#), 5 December 2016, ICC-02/04-01/15-621, para. 7.

¹⁹ *Prosecutor v. Gbagbo and Blé Goudé*, [Decision on the "Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088"](#), 6 June 2017, ICC-02/11-01/15-950-Red, para. 90.

²⁰ [ICC-01/14-01/18-879-Conf, para. 19](#)

²¹ *Prosecution v. Bemba*, [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 citing the following decisions as examples: *Prosecutor v. Lubanga*, [Decision on the prosecutor's application for the admission of the prior recorded statements of two witnesses](#), 15 January 2009, ICC-01/04-01/06-1603, para. 24; *Prosecutor v. Katanag and Ngudjolo Chui*, [Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts](#), 27 August 2010, ICC-01/04-01/07-2289-Corr-Red, para. 14.

assesses the evidence in question to be, the more likely it is that the Chamber will have to reject any application under this provision".²²

16. In the specific case of P-0627, an analysis through those criteria of an extract of his statement the Prosecution proposes to submit can only result in the conclusion that the subject matters for which he is relied upon are of too much importance for the application of Rule 68(3).
17. In his statements, P-0627 describes how Mr. Yekatom was attacking PK5 which would have been of common knowledge.
18. An application of Rule 68 (3) for Witness P-0627 as sought by the Prosecutor would be inconsistent with the rights of the accused as it would cause great prejudice to Mr. Yekatom. This prejudice derives directly from the core issues materially in dispute addressed in his statements and partly detailed below.
19. P-0627 mentions specifically how [REDACTED].²³ [REDACTED].²⁴
20. The Defence is also concerned about the manner in which this evidence was elicited from the witness. After a careful review of P-0627's transcript, it appears that his answer in relation to Mr. Yekatom's purported attacks on PK5 was given after a direct suggestion by the Prosecution's interviewer himself who stated :

[REDACTED] ²⁵
21. *First*, in light of the excerpts cited above, it is undeniable that P-0627 excerpts are linked to the acts, conduct and intent of Mr. Yekatom and some of his

²² *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. 71.

²³ [CAR-OTP-2102-1391-R01](#), at 1418.

²⁴ [CAR-OTP-2102-1391-R01](#), at 1418.

²⁵ [CAR-OTP-2102-1391-R01](#), at 1418, ln. 943-944.

alleged elements. Moreover, on the basis of those excerpts alone, if believed, Mr. Yekatom could be convicted of Counts 1 and 8.²⁶

22. *Second*, contrary to the Prosecution's submission, this extract is not corroborated by other evidence²⁷ but rather partly contradicted by the witness himself.²⁸
23. The introduction of such damaging testimony through Rule 68(3) is undoubtedly prejudicial and inconsistent with the rights of the accused and the fairness of the trial. On such critical parts of his evidence, P-0627 should testify under oath *viva voce* in court as it would allow the Chamber and participants to "*hear natural and spontaneous accounts from witnesses, to directly and closely observe their reaction, demeanour and composure, and to immediately seek clarification*",²⁹ an aspect all the more important in light of P-0627's key position and role during the events and given the manner in which the evidence was first directly suggested by the Prosecution's interviewer himself. Consequently, submitting such evidence which could have a direct impact on the verdict of the trial through Rule 68(3) would undeniably be inconsistent with the rights of the accused and cause substantial prejudice.³⁰
24. Finally, in light of the number of excerpts the Prosecution proposes to exclude from P-0627's prior recorded testimony, the mere exclusion of the sentence in relation to Mr. Yekatom's alleged attack on PK5 would not prejudice the Prosecution. If the Prosecution so wishes, it can easily question the witness on

²⁶ [ICC-01/14-01/18-403-Conf-Corr](#), pages 105-106.

²⁷ The Defence notes that although the Prosecution claims that the Prior statement is corroborated and supported by other evidence to be tested at trial, no reference is provided therein. ICC-01/14-01/18-879-Conf, par. 19

²⁸ [CAR-OTP-2102-1391-R01](#), at 1417-1418.

²⁹ [ICC-01/14-01/18-685](#), para. 33.

³⁰ *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. 71.

this extract during its estimated three hours of examination in chief without any substantial disruption of its expected length.

CONCLUSION

25. As discussed, the cross-examination of this witness will be significantly more time-consuming than expected by the Chamber. As the Chamber observed, this will impact on the time allocated to the participants.³¹
26. Should the Chamber accept the application under Rule 68(3), there will be a notable impact on the fairness of the Trial. The Defence recalls that, as mentioned by this Chamber in its *Decision*, Rule 68 represents an exception to the rule of orality.³² *Viva voce* testimony should be the default mode of testifying.³³
27. Furthermore, the Defence underlines the Chamber's determination that: "as regards the fairness and integrity of the proceedings, the Chamber considers that a witness' recollection of the events should be first tested during the hearing in order to preserve the principle of immediacy"³⁴ and "[it] is possible that witnesses do not recall information provided by them in their statement or provide different information during their testimony. When that happens, the witness' natural reaction to such inconsistencies would also be significant in examining and evaluating their overall testimony."³⁵
28. Hence, the Chamber should apply its discretionary power and partly reject the submission of the Rule 68(3) application of P-0627 for the highlighted extract

³¹ [ICC-01/14-01/18-685](#), paras. 35-37.

³² [ICC-01/14-01/18-685](#), para. 26.

³³ [ICC-01/14-01/18-685](#), para. 25; *Prosecution v. Bemba*, [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. 76; *Prosecutor v Ruto and Sang*, [Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V\(A\) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony"](#), 12 February 2016, ICC-01/09-01/11-2024, para. 84.

³⁴ [ICC-01/14-01/18-677](#), para. 23.

³⁵ [ICC-01/14-01/18-677](#), para. 24.

submitted in Annex A.

29. The Chamber mentioned the importance of a case-by-case analysis and that it is crucial to assure the fairness of the Trial.³⁶
30. As underlined by the Appeals Chamber, given that the statements are related to issues that are materially in dispute, central to core issues of the case and are uncorroborated, extra vigilance should be exercised before granting the introduction of the prior recorded testimonies such as P-0627's.³⁷

CONFIDENTIALITY

31. This pleading is filed confidentially because it responds to a motion that has been filed confidentially. A public redacted version is being filed simultaneously.

RELIEF SOUGHT

32. In light of the above observations, the Defence respectfully requests the Trial Chamber to:

REJECT the Prosecution's formal submission of the Prior Statements of P-0627 together with their associated exhibits as set out at Annex A.

RESPECTFULLY SUBMITTED ON THIS 22ND FEBRUARY 2021



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Mr. Thomas Hannis
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

³⁶ [ICC-01/14-01/18-685](#), para. 28.

³⁷ *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.