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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-0291 pursuant to Rule 68(3)”,
(ICC-01/14-01/18-954-Conf), 12 April 2021**

Source: Office of the Prosecutor

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-0291, 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-0291’s prior recorded testimony comprises his 18 March 2016 Witness Statement (“Prior Statement”)² and its associated exhibits:³ eight of the nine annexes to this statement. 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-0291 was [REDACTED]. His Prior Statement discusses: (i) the circumstances of the Seleka coup of 24 March 2013, including BOZIZE’s attempts to resist the Seleka’s offensive through the creation of self-defence militias and anti-Muslim propaganda; (ii) the political and security situation when DJOTODIA was in power, including the Seleka’s structure and its widespread commission of crimes against the non-Muslim population in that period, and (iii) the Anti-Balaka’s military operations in 2013 leading to their 5 December 2013 attack of BANGUI, their leaders and financiers (such as NGAISSONA, who became the Anti-Balaka’s General Coordinator), and their widespread commission of crimes against the Muslim population.

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-2024-0036.

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 or documents, and the sources of other corroborative evidence. *Confidential* Annex A (a Summary Chart) lists the relevant statement and the corresponding associated exhibits. It also identifies the relevant paragraphs of the Confirmation Decision to which the Witness's evidence relates and, where applicable, any charged incidents the Witness discusses. *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 ("RoC"), this Request and its annexes are filed as "Confidential", as they contain information

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).

concerning a 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-0291 will attest to its accuracy; he will be present in court; and 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 goes to the proof of the contextual elements for war crimes and crimes against humanity, in particular the Anti-Balaka being an organised armed group, and its intent to target Muslim civilians pursuant to a criminal organisational policy between September 2013 and December 2014 (“Relevant Period”). It also describes NGAISSONA’s role within the Anti-Balaka notably as a “financier” and political leader.

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.

10. P-0291's Prior Statement of 18 March 2016 comprises 24 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 Testimony establishes the following:

- P-0291 was [REDACTED].
- He recounts the causes and circumstances of the Seleka coup of 24 March 2013, and BOZIZE's attempts to resist the Seleka offensive through anti-Muslim propaganda (saying that the Muslims wanted to take power), the creation of two self-defence militias (including the *Coalition citoyenne d'opposition aux rébellions armées* ("COCORA"), and their distribution of machetes.
- He describes the political and security situation while DJOTODIA was in power, the structure of the Seleka, and its widespread commission of crimes against the non-Muslim population throughout the country.
- He recounts the Anti-Balaka's attack of BANGUI on 5 December 2013, and the Seleka's commission of crimes in retaliation.
- P-0291 discusses the Anti-Balaka's structure and leadership, referring to BOZIZE, his sons, and NGAISSONA, as "financiers" and political leaders of the Anti-Balaka, and how NGAISSONA became the Anti-Balaka's General Coordinator.
- Finally, the witness recounts the Anti-Balaka's widespread commission of crimes in 2014, targeting the Muslim population, as well as the flight of Muslims in large numbers to neighbouring countries.
- P-0291's proposed evidence is corroborated by, *inter alia*, the evidence of P-0461, P-1143, P-1437, P-1584, P-2200, P-2232, and P-2625, as well as by

documentary evidence,¹¹ in relation to BOZIZE and his supporter's creation of the two militias, COCORA and the *Comité d'organisation des actions citoyennes* ("COAC"), before the Seleka coup, their distribution of machetes to the members of these militias, and BOZIZE's anti-Muslim propaganda in that period. His evidence on NGAISSONA's role as a financier of the Anti-Balaka is corroborated by, *inter alia*, the evidence of P-0954, P-0965, P-0992, P-1074, P-2556, and P-2841.

C. Associated Exhibits

12. The Prosecution tenders eight associated exhibits for formal submission. These comprise eight of the nine annexes to the Prior Statement, as listed in Confidential Annex A, namely: (i) [REDACTED] (Annex 1); (ii) a document titled "[l]iste des Anti-Balaka" (Annex 2); (iii) a handwritten list of Anti-Balaka members (Annex 3); (iv) [REDACTED] (Annex 4); (v) P-0291's *curriculum vitae* (Annex 6); (vi) a copy of P-0291's passport (Annex 7); (vii) [REDACTED] (undated) (Annex 8); and (viii) [REDACTED] (Annex 9).

13. Each associated exhibit is annexed to and explained by the witness in his Prior Statement, and thereby forms an integral part of the testimony itself.¹² As such, each exhibit is directly relevant to and probative of material issues in dispute, and their admission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-0291's evidence.

¹¹ See for example CAR-OTP-2001-0172, at 0180, para. 34; CAR-OTP-2054-1362, at 1362.

¹² ICC-01/14-01/18-907-Conf, para. 13.

14. Annex 5 of the Prior Statement is fully redacted pursuant to Pre-Trial Chamber II's decision¹³ and is not tendered. In any case, it is not an 'associated document,' as its exclusion does not affect the understanding of the Prior Statement.¹⁴

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

15. Although the Prior Statement is comprehensive, a limited and focused supplemental examination-in-chief to clarify and elaborate P-0291's testimony 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",¹⁵ the Prosecution has carefully reviewed its two-hour estimate given for P-0291 in its Final Witness List.¹⁶ The Prosecution considers that it cannot further reduce the estimate of two hours. This estimated supplemental examination of P-0291 takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,¹⁷ 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-0291's evidence through the use of some 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

¹³ ICC-01/14-01/18-232-Conf-Exp, para. 68.

¹⁴ The Prosecution does not consider Annex 5 to the Prior Statement sufficiently 'discussed', insofar as being "used and explained by [the witness in their] prior recorded testimony and are *necessary to understand* [the witness's] testimony" - ICC-01/04-02/06-1029, para. 23; *see also* ICC-01/09-01/11-1938-Red-Corr, para. 33 (defining associated exhibits as "use[d] or explain[ed] [by the witness] in the prior recorded testimony" and "*necessary to read and understand the prior recorded testimony being introduced*"); *see also* ICC-01/04-02/06-1653, para.23 (same) (emphasis added).

¹⁵ ICC-01/14-01/18-685, para. 36.

¹⁶ ICC-01/14-01/18-724-Conf-AnxA, p. 41.

¹⁷ *See e.g.*, ICC-01/14-01/18-T-1-ENG ET, p. 6 ln. 18-25; *see* ICC-01/14-01/21-T-1-ENG ET, p. 3 ln. 14-22, p. 4 ln. 20-22 (noting practical complications involved in the live in-Court interpretation).

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 five hours to present – a significantly longer period.

E. Balance of interests

19. The projected shortening of P-0291's in-court-testimony by more than half is "considerable", and on balance the introduction of P-0291'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-0291 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.



Fatou Bensouda, Prosecutor

Dated this 16th day of April 2021

At The Hague, The Netherlands