

**Cour
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**International
Criminal
Court**

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

Date: **3 May 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

Public redacted version of “Yekatom Defence Response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1074 pursuant to Rule 68 (3)”, 22 April 2021, ICC-01/14-01/18-963-Conf”, ICC-01/14-01/18-978-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. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully request the Chamber to reject the *Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1074 pursuant to Rule 68 (3)* (the “Request”).
2. The Defence contends that admission of P-1074’s prior recorded testimony pursuant to Rule 68 (3) of the Rules of Procedure and Evidence (the “Rules”) would infringe the rights of Mr. Yekatom in light of the content and lack of corroboration of the witness’ statement. It is submitted that in this instance the prejudice to the Defence is not mitigated by its ability to cross-examine the witness. A holistic approach to the Request, taking into account the limited time saved in the event the admission is granted, in comparison with the prejudice to the Defence, militate in favour of full *viva voce* testimony of P-1074.

PROCEDURAL BACKGROUND

3. On 15 September 2020, the Prosecution filed *Prosecution’s Observations on its intended approach to Rule 68(3) in the presentation of its case*, stating that the Prosecution wishes for the Chamber to encourage Rule 68(3) applications as a measure of expedition.¹ The Defence responded, pointing out that despite the fact that Rule 68(3) applications shorten the Prosecution examination time, they greatly increase Defence cross-examination obligations. While it is not an issue at this stage *per se*, the 200 hours given by the Chamber in the Initial Directions could be insufficient and could result in substantial prejudice to Mr. Yekatom.²

¹ [ICC-01/14-01/18-655](#), para. 15.

² [ICC-01/14-01/18-664](#), para. 6.

4. On 16 October 2020, the Trial Chamber in its *Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules* 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.³

5. 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), increasing the number of witnesses falling under those two categories despite the aforementioned 16 October 2020 decision indicating that the use of Rule 68 applications appeared disproportionate.⁴
6. On 22 April 2021, the Prosecution filed its Rule 68(3) Application for witness P-1074 (the "Request").⁵ A public redacted version of the application was notified on 23 April 2021.⁶

RELEVANT PROVISIONS

7. Article 69 (2) of the Rome Statute (the "Statute") states that :

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 (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.

³ [ICC-01/14-01/18-685](#), para. 32.

⁴ [ICC-01/14-01/18-724-Conf-AnxA](#)

⁵ [ICC-01/14-01/18-963-Conf.](#)

⁶ [ICC-01/14-01/18-963-Red.](#)

8. Rule 68 (1) of the Rules states that :

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.

9. Rule 68 (3) of the Rules states that :

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

10. Article 69 (2) of the Statute enshrines the principle that in-court personal testimony is the rule and consequently the principle of orality.⁷ Rule 68 (3), by allowing the introduction of previously recorded testimony, is an exception to this principle.
11. As an exception to this fundamental principle in criminal proceedings, restrictions and safeguards were tied to the Rule 68 (3) exception. Both Article 69 (2) of the Statute and Rule 68 (1) of the Rules allow the use of Rule 68 (3) only under the condition that it is not prejudicial to or inconsistent with the rights of the accused.
12. Various Chambers have determined criteria that may be used when assessing

⁷ *Prosecutor 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, paras 75-76.

Rule 68 (3) applications; those criteria include *inter alia* “whether the evidence relates to issues that are not materially in dispute, whether the evidence is not central to core issues in the case or whether it is corroborative of other evidence”.⁸

13. The Defence argues that P-1074’s prior recorded testimony should not be admitted pursuant to Rule 68 (3) as the content of his statement is materially in dispute and relates to core issues in the case and refers to alleged acts and conduct of Mr. Yekatom (A); that allegations made by P-1074 are not corroborated by other witnesses (B); and finally that P-1074 *viva voce* testimony would not adversely affect the expeditiousness of the trial (C).

A. On the content of P-1074’s statements

14. The Defence primarily objects to the admission of P-1074’s prior recorded testimony pursuant to Rule 68 (3) in light of the fact that the witness extensively mentions issues that are materially in dispute and at the core of the case, including acts and conduct of Mr. Yekatom.⁹
15. *First*, the witness claims that Mr. Yekatom [REDACTED] and allegedly confessed that he was committing crimes.¹⁰ While this claim is highly disputed and uncorroborated, it is submitted that a confession by its nature is among the most prejudicial categories of evidence that can be brought against an accused; and as such, this alleged confession of itself warrants denial of the Prosecution Request.
16. *Second*, P-1074 mentions in his statement the planning of the 5th December 2013 attack, including sections specifically on the attack on Boeing,¹¹ which

⁸ [ICC-01/14-01/18-907-Red](#), para. 14.

⁹ See, *Prosecutor v Dordevic*, IT-05-87/1-T, [Decision on Prosecution’s Motions for Admission of Evidence Pursuant to Rule 92 ter](#), 10 February 2009 (‘First Dordevic Decision’), para. 15 (ICTY Rule 92 *ter* being the counterpart to Rule 68(3)).

¹⁰ *Ibid*, para. 173.

¹¹ [CAR-OTP-2094-0228-R02](#), paras 60-70.

comprise events at the core of Counts 1, 2, 3, 4, 5 and 8.

17. *Third*, the witness also mentions the alleged control and crimes committed by Mr. Yekatom in Lobaye prefecture,¹² which could be linked to Counts 24, 25 and 28. P-1074 also discusses the murder of the “*maire de Mbaïki*” (Counts 26 and 27), and specifically gives evidence regarding the alleged knowledge of Mr Yekatom indicating regarding this crime that “[REDACTED]”.¹³
18. *Fourth*, P-1074 states that “RAMBO” attacked a government convoy¹⁴ and that atrocities were committed in his zone.¹⁵
19. The Defence submits that all these claims are materially in dispute, at the core of the present case, and go to the acts and conduct of Mr. Yekatom in an incriminatory manner. This critical information should be led in full, under oath and *viva voce* in court as this would allow the “Chamber and the accused to hear a natural and spontaneous account from the witness, to directly and closely observe his reactions, demeanour and composure, and to immediately seek clarifications”.¹⁶
20. The Defence argues that in light of the extent of the incriminatory evidence against Mr. Yekatom contained in P-1074’s statement, the opportunity to cross-examine the witness is not sufficient to mitigate any prejudice caused to the Defence. A spontaneous recollection of these disputed events and information during the course of the hearing, followed by the cross-examination by the Defence, will allow the Chamber to have a better picture of the reliability of the information provided by the witness and consequently preserves the right of Mr. Yekatom to have a fair trial.

¹² *Ibid*, paras 95-97.

¹³ *Ibid*, para. 116; see, [First Dordevic Decision](#), para. 16.

¹⁴ *Ibid*, paras 104-105.

¹⁵ *Ibid*, para. 226.

¹⁶ [ICC-01/14-01/18-964-Conf](#), para. 19.

21. This is especially so given that P-1074 refused to participate in a Defence interview.¹⁷ While it was evidently within P-1074's rights to refuse an interview, the Defence submits that the only remaining meaningful opportunity to assess his ability to provide a consistent account and build up a cross-examination on potential inconsistencies would be during an in-full, *viva voce* examination-in-chief.
22. Finally, the Defence expresses its concern regarding the information provided by the witness during his interview by the Prosecution. Specifically, P-1074 indicated at the time that he did not wish to testify in the case and that he simply wanted to help the Prosecution's investigation.¹⁸ It is the Defence view that it would be inappropriate and inconsistent with the rights of the accused to admit into evidence pursuant to Rule 68 (3) the statement of a witness who, at the time he provided the statement, indicated that he didn't want to testify, and by extension, that he did not wish for his evidence to be led under oath or tested in court. The mindset of the witness at the time of his interview with the Prosecution will have impacted the information he was willing to provide and the manner in which he provided it; which in turn could greatly affect the reliability of the statement.

B. On the lack of corroboration of the content of P-1074's prior recorded testimony

23. The Defence contends that the fact that substantial portions of P-1074's prior recorded testimony are uncorroborated by other witnesses militates in favour of this witness giving his testimony *viva voce*.
24. *First*, as mentioned above, P-1074 mentions an event where Mr. Yekatom allegedly came [REDACTED] and confessed his crimes, during a meeting

¹⁷ Prosecution's e-mail dated 11 February 2020 at 11:22. Available upon request.

¹⁸ [CAR-OTP-2094-0228-R02](#), para. 16.

attended by only three persons: P-1074, Mr. Yekatom and [REDACTED].¹⁹ However, P-0487 never mentions any such meeting in his interview transcripts; nor does the Prosecution include P-0487 among witnesses corroborating P-1074's claims.²⁰ Consequently, as this incriminating evidence, materially in dispute, against Mr. Yekatom can only be elicited from P-1074, it should be heard *viva voce*, which has the advantage of allowing the Chamber and parties to gauge a more "natural and spontaneous account from the witness".²¹ On such specific and incriminating evidence, merely being granted the opportunity to cross-examine the witness would be insufficient to mitigate any prejudice for the Defence; it is paramount that the witness provides his recollection of the alleged meeting orally.

25. *Second*, due to his [REDACTED],²² P-1074 [REDACTED].²³ The Defence argues that the information provided by someone with such a [REDACTED] comes from various sources, [REDACTED],²⁴ which are unavailable to almost all the other witnesses of this case. As such, much of the information provided by P-1074 will not be corroborated by other witnesses, which limits the Chamber's ability to assess its reliability. Consequently, it is the Defence view that a *viva voce* testimony of P-1074 would best serve the interests of justice and prevent any prejudice to the Defence.

C. On the limited impact of the Request on the expeditiousness of the proceedings

26. The Prosecution, in their Request, indicates that it expects to question P-1074

¹⁹ [CAR-OTP-2094-0228-R02](#), paras 172-173.

²⁰ [ICC-01/14-01/18-963-Red](#), para. 12.

²¹ [ICC-01/14-01/18-964-Conf](#), para. 19; see also, *Prosecutor v Dordevic*, IT-05-87/1-T, [Decision on Prosecution's motion for admission of evidence of witness Milan Dakovic pursuant to Rule 92 ter, 13 August 2009](#) ('Second Dordevic Decision'), para. 8, where the fact that a witness was in a 'unique position' to testify as to an issue was a factor militating for in-full *viva voce* examination-in-chief.

²² [ICC-01/14-01/18-724-Conf-AnxA](#), page 42, witness n°81.

²³ See also, *Prosecutor v Stanisic & Zupljanin*, IT-08-91-T, [Decision on Denying Prosecution's Motion for Admission of Evidence of Pedrag Radulovic Pursuant to Rule 92 ter](#), 1 April 2010, para. 10, where the fact that the witness was a 'senior official' comprised a factor militating for in-full *viva voce* examination-in-chief.

²⁴ [CAR-OTP-2094-0228-R02](#), para. 211.

for three hours if the Request is granted, whereas, in the event the Request is rejected, the questioning would last for nine hours.²⁵

27. As the Appeals Chamber had stated multiple times, “while expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements”²⁶ – which, in the case of the present Request, are the fairness of the trial and the principle of orality. The Chamber has also found that a balance between the expeditiousness of the proceedings and the disadvantages of admitting prior recorded testimony under Rule 68 (3) must be carefully assessed.²⁷
28. The Defence contends that the content of P-1074’s prior recorded testimony, and its lack of corroboration, as described above, greatly outweigh the advantage that would result in a reduced examination of only six hours for the Prosecution.²⁸
29. The Defence also argues that an examination of nine hours for a witness of the status of P-1074, [REDACTED],²⁹ who provides “highly relevant and probative” information per the words of the Prosecution,³⁰ is reasonable and does not cause undue delay.

CONFIDENTIALITY

30. This response is being filed on a confidential basis as it responds to a filing bearing the same classification and contains information which might reveal

²⁵ [ICC-01/14-01/18-963-Red](#), paras 16, 18.

²⁶ *Prosecutor v. Gbagbo & 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. 62, citing *Prosecutor 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 55.

²⁷ [ICC-01/14-01/18-964-Conf](#), para. 20.

²⁸ See, [First Dordevic Decision](#), para. 15; [Second Dordevic Decision](#), para. 8.

²⁹ [ICC-01/14-01/18-724-Conf-AnxA](#), page 42, witness n°81.

³⁰ [ICC-01/14-01/18-963-Red](#), para. 9.

the identity of witness P-1074. A public redacted version is being filed simultaneously.

RELIEF SOUGHT

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

REJECT the Prosecution Request seeking admission of P-1074's prior recorded testimony pursuant to Rule 68 (3) of the Rules.

RESPECTFULLY SUBMITTED ON THIS 3RD DAY OF MAY 2021³¹



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³¹ The assistance of Legal interns, Ms Yousra Lamqaddam and Ms Léa Benoit in the research for this motion is gratefully acknowledged.