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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-0306 pursuant to Rule 68(3)”,
ICC-01/14-01/18-1057-Conf, 9 July 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-0306, in accordance with rule 68(3) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the conduct of the proceedings” (“Directions”).¹ P-0306’s prior recorded testimony comprises the transcribed statement of the witness’s three day interview of [REDACTED] 2018 and of the witness’s four day interview of [REDACTED] 2019 (“Prior Statement”), and its associated exhibits.² Should the Chamber deem the Prior Statement formally submitted, the Prosecution further requests leave to conduct a limited examination-in-chief, estimated currently to take no longer than four hours, elaborating specific issues raised therein, and other matters highly relevant to the case.

2. P-0306 is [REDACTED] Anti-Balaka insider. He provides information on NGAISSONA’s request for [REDACTED] the 5 December 2013 attack on BANGUI. He describes the steps taken in preparation for this attack and NGAISSONA’s role in its organisation. P-0306’s evidence details the Anti-Balaka’s actions in BANGUI on the day of the attack. The witness further provides evidence about [REDACTED]. P-0306’s evidence describes NGAISSONA’s authority and role as the General Coordinator of the Anti-Balaka and knowledge of the group’s commission of crimes.

3. P-0306’s Prior Statement provides evidence about the Anti-Balaka’s creation, organisation, and leadership. The Prior Statement provides evidence forming a part of the contextual elements for war crimes and crimes against humanity; in particular, the Anti-Balaka’s engagement in an armed conflict between September 2013 and

¹ ICC-01/14-01/18-631, para. 58.

² 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.

December 2014 (“Relevant Period”). P-0306’s Prior Statement further describes the position of the Anti-Balaka leadership within the framework of the group (an organisation), as well as the respective role of the Accused during the Relevant Period. The Prior Statement is thus *prima facie* relevant to, and probative of material issues at trial.

4. Granting the Request would reduce the presentation of the Prosecution’s examination-in-chief and help to streamline the proceedings. Moreover, it would not unfairly prejudice the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber itself.³

5. 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.⁴

6. 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.

7. Due to the length of the Prior Statement,⁵ a summary thereof, organised by topic, is attached at *Confidential Annex B* to facilitate the Parties’, Participants’, and Chambers’ understanding of its content, and to more easily identify its relevance and probative value (“Summary”). The Summary is not tendered for formal submission,

³ 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”).

⁴ ICC-01/14-01/18-685, para. 34; *See* ICC-02/11-01/15-744, para. 69 (“*Gbagbo and Blé Goudé Appeals Decision*”).

⁵ The Prior Statement comprises 31 interview transcripts totalling approximately 460 pages.

rather, it clearly and concisely sets out the *substance* of the transcripts comprising the Prior Statement hereby tendered. The transcripts are incorporated by way of reference in the footnotes of the Summary.⁶ To avoid confusion and inaccuracies, each referenced *page* rather than the page and line number, is tendered.

8. Additionally, mindful of the concerns regarding the amount of written evidence to be tendered,⁷ the Prosecution has identified *in grey*, in the Summary the portions of the Prior Statement on which it *does not* intend to rely. The Prosecution does not seek to tender the transcripts referenced in the footnotes of these portions. The associated exhibits are available to the Defence and the Trial Chamber in e-Court.

II. CONFIDENTIALITY

9. 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 concerning witnesses 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

10. 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

⁶ This approach differs from that followed by the Prosecution in ICC-01/14-01/18-879-Conf. Given the higher volume of transcript pages involved, and with the aim of facilitating the reader’s understanding of the witness’s evidence, the Prosecution believes that this new approach is a more efficient to present the substance of the witness’s Prior Statement to the Chamber.

⁷ See ICC-01/14-01/18-685, para. 31, 32.

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’).

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)

11. The Prior Statement may be deemed formally submitted under rule 68(3). P-0306 will attest to its accuracy; he will be present in court; and will be available for examination by the Defence, Participants, and the Chamber.

12. As described below, the Prior Statement is highly relevant and probative. P-0306's evidence bears on the identity of the Anti-Balaka as an 'organisation' or 'group' involved in the commission of the article 7 widespread attack, and establishes the role of NGAISSONA within the organisation's leadership during the Relevant Period. It further goes to proof of the contextual elements for war crimes and crimes against humanity; in particular, the Anti-Balaka's engagement in an armed conflict during the Relevant Period.

13. P-0306's Prior Statement of [REDACTED] 2018 and [REDACTED] 2019 comprises 460 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.

14. P-0306 is [REDACTED] Anti-Balaka insider who took part in the 5 December 2013 attack on BANGUI and [REDACTED] during the Relevant Period.

15. The witness's Prior Statement establishes the following:

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.

- P-0306 provides information on the attacks on [REDACTED], by the Seleka. He explains how [REDACTED] youths fought against the Seleka to defend their village and subsequently formed a self-defence group.
- He describes [REDACTED].
- P-0306 describes how he and his group, along with many others, gathered behind the hills in BANGUI [REDACTED], in preparation for the 5 December 2013 attack. He describes [REDACTED]. The witness explains that, on the eve of the attack, elements were ordered to take up specific locations in preparation for the assault.
- P-0306 describes the unfolding of events on the day of the 5 December 2013 attack on BANGUI. He explains that only a small group of people had weapons at the beginning of the attack and that more weapons were expected to arrive. The witness explains that KONATE was the first one to open fire that day at KASSAI, [REDACTED].
- P-0306 explains that the last fight in BANGUI took place in January 2014. He clarifies that [REDACTED].
- The witness provides information about [REDACTED] from the moment NGAISSONA returned to BANGUI. P-0306 elaborates about NGAISSONA's authority and explains that he was above everyone else, since he was the Coordinator.
- P-0306 explains that [REDACTED]. NGAISSONA promised to provide them with weapons. The witness explains that [REDACTED].
- P-0306 provides information about [REDACTED]
- P-0306 describes [REDACTED].

16. P-0306's proposed evidence is corroborated by, *inter alia*: (i) the evidence of P-0446, P-0808, P-0889, P-0975, P-1521, and P-2027 in relation to the gathering of the

Anti-Balaka behind the BOY-RABE hill in preparation for the 5 December 2013 attack on BANGUI; (ii) evidence of P-0446, P-0889, P-0975, and P-1521 regarding Anti-Balaka's actions on the day of the 5 December 2013 attack on BANGUI, including the attack on Camp KASSAI by KONATE and his group; (iii) the evidence of P-0446, P-0487, P-0808, P-0884, P-0888, P-0889, P-1074, P-1521, and P-2012 in relation to the structure and leadership of the Anti-Balaka, including NGAISSONA's role as National Coordinator; (iv) the evidence of P-0808 and P-1858 on [REDACTED]; and (v) the evidence of P-0801 and P-0889 in relation to [REDACTED]. P-0306's proposed evidence is also corroborated by documentary evidence.¹¹

C. Associated Exhibits

17. The Prosecution tenders several associated exhibits for formal submission, set out at Confidential Annex A. These comprise items detailed with great precision in P-0306's Prior Statement, namely: (1) a video footage containing interviews with Anti-Balaka members, [REDACTED]; (2) a handwritten document describing the circumstances in which P-0306 met [REDACTED] for the first time; (3) a handwritten document describing the dynamics and interactions between [REDACTED] in 2014; (4) a handwritten list containing the names of NGAISSONA's elements; and (5) a handwritten letter in which P-0306 states, *inter alia*, that NGAISSONA was the Anti-Balaka Chief.

18. Each exhibit referenced in the Prior Statement was discussed and may be helpful to contextualise and facilitate its understanding. The items tendered with this application are assessed as indispensable to its comprehension or would otherwise diminish its probative value if excluded. The tendered associated exhibits will assist the Chamber in its assessment of the relevant evidence in its article 74 decision. As an integral part of the Prior Statement, each exhibit is directly relevant to and probative

¹¹ See for example CAR-OTP-2084-1083; CAR-OTP-2084-1020; CAR-OTP-2042-5051; CAR-OTP-2055-1987, at 2134.

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-0306's evidence.

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

19. Although the Prior Statement is comprehensive, a limited and focused supplemental examination-in-chief to clarify and elaborate P-0306's testimony would be beneficial to the proper adjudication of the issues arising from the charges.

20. The Prosecution's four-hour estimated supplemental examination of P-0306¹² takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,¹³ and accounts for the prospect of appropriate redirect examination.

21. A lesser amount of time would not provide the Prosecution with a reasonable opportunity to develop, explain, or clarify, limited facets of P-0306'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, particularly as regards the Accused's acts and conduct, but also to advance the Chamber's fundamental truth-seeking function.

22. 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 12 hours.

¹² ICC-01/14-01/18-724, AnxA, p. 19.

¹³ See e.g., ICC-01/14-01/18-T-1-ENG ET, p. 6 ln. 18-25; ICC-01/14-01/21-T-1-ENG ET, p. 3 ln. 14-22, p. 4 ln. 20-22.

E. Balance of interests

23. The projected shortening of P-0306's in-court-testimony is "considerable", and the Prosecution submits on balance that the introduction of P-0306'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

24. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the Prior Statement of P-0306 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.



Karim A. A. Khan QC, Prosecutor

Dated this 23rd day of September 2021
At The Hague, The Netherlands