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**International
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Court**

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

Date: **27 September 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 ‘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)”, ICC-01/14-01/18-1079-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. Defence Counsel for Mr Alfred Rombhot Yekatom ('Defence') hereby respond to the 'Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-0306 pursuant to Rule 68(3)' ('Request').¹
2. It is submitted that the Request should be denied.
3. The importance of the Statement of P-0306 ('Statement'), when considered alongside the personal circumstances of P-0306 and the manifest lack of reliability of his evidence, militates against its admission pursuant to Rule 68(3).

APPLICABLE LAW

4. Rule 68(3) of the Rules of Procedure and Evidence ('Rules') states:

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.

5. A Chamber's assessment as to whether prior recorded testimony may be introduced under Rules 68(3) should be made on a case-by-case basis where the factors to be considered may vary per witness.²
6. A Chamber must carry out an individual assessment of the evidence sought to be introduced under Rule 68(3), based on the circumstances of each case, which includes analysing the importance of this evidence in light of the

¹ [ICC-01/14-01/18-1057-Conf](#).

² *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.

charges and other evidence presented or intended to be presented; this assessment is part and parcel of the analysis a Chamber must undertake in determining whether it is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally, to allow for the evidence in question to be introduced under Rule 68 (3).³

SUBMISSIONS

7. The Defence submits that the introduction of the Statement and Associate Exhibits through Rule 68(3) would be prejudicial to Mr Yekatom's rights and the fairness of the proceedings.
8. At the outset, it is submitted that the evidence of P-0306 is important, in light of the charges and other evidence presented or intended to be presented. As the Prosecution states, P-0306 is a '[REDACTED] Anti-Balaka insider' who allegedly participated in the 5 December attack on Bangui.⁴ He describes the attack itself and its alleged organisation; and more broadly, he provides evidence regarding the creation, organisation and leadership of the Anti-Balaka.⁵ It is submitted that in principle, evidence taken from [REDACTED] insider witnesses carries an inherent level of importance that *prima facie* renders it inappropriate to tender under Rule 68(3).⁶
9. Moreover, the evidence of P-0306 is manifestly lacking in reliability.
10. Witness P-0306 [REDACTED] when the Statement was taken, having been [REDACTED].⁷

³ *Prosecutor v Gbagbo and Ble Goude*, [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.

⁴ [ICC-01/14-01/18-1057-Conf](#), para. 2.

⁵ [ICC-01/14-01/18-1057-Conf](#), paras 2-3.

⁶ See, *Prosecutor v Šešelj*, IT-03-67-T, [Redacted Version of the "Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89\(F\), 92 bis, 92 ter and 92 quarter of the Rules of Procedure and Evidence"](#) Filed Confidentially on 7 January 2008, 21 February 2008, paras 39-40.

⁷ [REDACTED]

11. His circumstances in this regard inherently impact the reliability of his Statement. [REDACTED] may be improperly motivated to ‘cooperate’ with authorities by providing false evidence in criminal proceedings with a view to obtaining benefits, [REDACTED].⁸ This inherent impact is reflected in ICC jurisprudence establishing that information relating to [REDACTED], as a category, is considered potentially exculpatory evidence subject to disclosure under Article 67(2).⁹
12. In this regard, the evolution in P-0306’s conduct towards Prosecution investigators and in his responses to their questions, across the three interviews conducted in [REDACTED] 2015, [REDACTED] 2018 and [REDACTED] 2019, is highly relevant.
13. In his [REDACTED] 2015 interview, which took place [REDACTED] (and which the Prosecution has not tendered in its Request), P-0306 refused to cooperate with investigators, for instance claiming that [REDACTED] but instead [REDACTED]¹⁰; and otherwise refusing to respond to investigators’ questions, which led to the termination of the interview after only 27 minutes.¹¹ By contrast, in his [REDACTED] 2018 and [REDACTED] 2019 [REDACTED] interviews, P-0306 spoke to investigators for a total of seven days.¹²
14. Moreover, at the end of his [REDACTED] 2018 interview, [REDACTED], P-0306 inquired as to what the investigators ‘thought’ of [REDACTED], and appeared to be under the mistaken impression that Prosecution investigators were themselves judges;¹³ and he further stated that he spoke to investigations

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ Apparently, the name of his father; see, [CAR-OTP-2002-4495](#), 4506.

¹¹ See, [CAR-OTP-2118-0446-R02](#), 0449-0450; 0455-0456.

¹² Specifically, for the periods [REDACTED] 2018 and [REDACTED] 2019.

¹³ [CAR-OTP-2118-0679-R02](#), 0685-0689.

in order that [REDACTED] and so that he could [REDACTED].¹⁴ Notably, in his 2019 interview, he suggested to investigators that he has been [REDACTED], and that he is [REDACTED].¹⁵

15. Also notable is the fact that at the start of his 2019 interview, which took place subsequent to the arrests of Messrs Yekatom and Ngaïssona, P-0306 himself expressly stated that his interview ‘will relate to [Mr Ngaïssona] whom you have arrested at the ICC’;¹⁶ and on the second day of that interview, he similarly sought to dictate the subject matter of the questioning, stating at the outset that, ‘today is the day when I will take each of his accomplices and give you [their] work, the roles they played’.¹⁷ In fact, the 2019 interview appears to have taken place at the express request of P-0306, transmitted to the Prosecution through his lawyer.¹⁸
16. In addition, the Statement of P-0306 is riddled with inconsistencies, both internal and otherwise. While the Defence concedes that inconsistencies in a witness’s evidence are typically a matter for cross-examination, it is submitted that the scale and nature of such inconsistencies can attain a level such that the introduction of that evidence via Rule 68(3) would be nonetheless contrary to the integrity and fairness of the proceedings, the opportunity to cross-examine notwithstanding.
17. It is submitted that this is such a case. P-0306’s lack of credibility is such that during his interviews Prosecution investigators repeatedly suggested to P-0306, both directly and indirectly, that his responses were untruthful or at least not entirely truthful.¹⁹ Indeed, in principle, it is submitted that where the

¹⁴ [CAR-OTP-2118-0690-R02](#), 0700.

¹⁵ [CAR-OTP-2118-4813-R04](#), 4828; [CAR-OTP-2118-4830-R03](#), 4832-4833; [CAR-OTP-2118-4956-R02](#), 4958-4959; [CAR-OTP-2118-4961-R02](#), 4962-4963.

¹⁶ [CAR-OTP-2118-4791-R04](#), 4793.

¹⁷ [CAR-OTP-2118-4861-R04](#), 4863.

¹⁸ [CAR-OTP-2118-4791-R04](#), 4793.

¹⁹ See e.g., [CAR-OTP-2118-0590-R02](#), 0611 (‘Si on veut être honnête, je crois qu’il y a certaines choses que tu m’as menti, mais c’est des petites choses.’) ; 0616-0619 (‘Moi je te crois mais le restant du monde te croit pas

truthfulness of a witness's responses is repeatedly directly or indirectly called into question by investigators, that any corresponding transcript or statement is *prima facie* unsuitable for admission under Rule 68.

18. In a similar vein, the reliability of the Associated Exhibits is tainted by the internally contradictory explanations provided by P-0306 as to their provenance. For instance, P-0306 stated that document CAR-OTP-2120-0599 was written 'well before' their previous meeting in [REDACTED] 2018,²⁰ and subsequently, that it was written prior to [REDACTED] 2015.²¹ Yet it was only once investigators pointed out that the document expressly states that [REDACTED], that the witness stated that the document was in fact written after his 2018 interview.²²
19. In the circumstances therefore, it is submitted that the evidence of P-0306 should be heard *viva voce* in full and under the Chamber's oversight, so as to enable the Chamber to hear a natural and spontaneous account of P-0306's evidence, to directly and closely observe his reactions, demeanour and composure, and to immediately seek any clarifications.²³
20. Lastly, denial of the Request would not cause undue prejudice to the Prosecution. The estimated time difference of eight hours between P-0306's *viva voce* testimony in full and the proposed limited examination-in-chief²⁴ is not unreasonable in the circumstances as set out above, and in any event does not outweigh considerations of the integrity and fairness of these proceedings.

[...] Mon voisin, te croit pas'); [CAR-OTP-2118-0621-R02](#), 0633 ('des fois, tu me dis pas toujours la vérité. Quand je demande des points précis.');

²⁰ [CAR-OTP-2118-4791-R04](#), 4806-4807.

²¹ [CAR-OTP-2118-4813-R04](#), 4822-4823.

²² [CAR-OTP-2118-4813-R04](#), 4822-4824.

²³ [ICC-01/14-01/18-685](#), para. 33.

²⁴ [ICC-01/14-01/18-1057-Conf](#), paras 20, 22.

21. Should the Chamber be minded to grant the Request, the Defence requests that the transcript of P-0306's [REDACTED] 2015 Interview (CAR-OTP-2118-0446-R02) be admitted, so as to enable the Chamber to assess the evolution of P-0306's conduct towards Prosecution investigators and by extension, his credibility. In this respect, the Defence also recalls the Chamber's previous ruling that 'it is the prior recorded testimony as a whole that is submitted pursuant to Rule 68(3) of the Rules' and therefore that 'no piecemeal approach shall be applied'.²⁵

CONFIDENTIALITY

22. This response is filed on a confidential basis corresponding to the classification of the Request.

RELIEF SOUGHT

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

DENY the Request;

or, should the Chamber be minded to grant the Request, to:

ADMIT the transcript of P-0306's [REDACTED] 2015 Interview (CAR-OTP-2118-0446-R02).

RESPECTFULLY SUBMITTED ON THIS 27th DAY OF SEPTEMBER 2021



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²⁵ [ICC-01/14-01/18-907](#), para. 16.