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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 Submission of the Prior
Recorded Testimony of P-1654 pursuant to Rule 68(2)(c)",
ICC-01/14-01/18-1169-Conf, 8 November 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. Following recent confirmation of the death of P-1654, the Office of the Prosecutor (“Prosecution”) requests the formal submission of his prior recorded testimony in accordance with rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the Conduct of the Proceedings” (“Directions”).¹ As listed in *Confidential Annex A*, P-1654’s prior recorded testimony (“Prior Statement”) comprises the witness’s 26 April 2017 statement² to the Prosecution and one associated exhibit mentioned therein:³ a handwritten complaint P-1654 made to the CAR authorities about [REDACTED] murder.⁴ *Confidential Annex A* also identifies the relevant paragraphs of the Confirmation Decision to which P-1654’s evidence relates. A courtesy copy of P-1654’s recently obtained death certificate is attached as *Confidential Annex B*.

2. The Prior Statement is admissible under rule 68(2)(c) because P-1654 has died, and as detailed below: (i) the Prosecution could not anticipate the need for article 56 measures to obtain his evidence; (ii) the evidence has sufficient indicia of reliability; (iii) the evidence is relevant and probative; and (iv) there is no undue prejudice to either Accused from its submission. The relevance and probative value of the Prior Statement and associated exhibit is set out in more detail below, along with sources of other corroborative evidence.

¹ ICC-01/14-01/18-631, para. 33.

² CAR-OTP-2053-0112.

³ CAR-OTP-2050-0737 (described with a typo in paragraph 47 of his statement as “CAR-OTP-0250-0737”).

⁴ 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.

II. CONFIDENTIALITY

3. 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 a witness which should not be made public. A “Public Redacted” version of the Request will be filed as soon as practicable.

III. SUBMISSIONS

4. The Initial Directions on the Conduct of Proceedings permits the Parties to file rule 68(2)(c) applications beyond the deadline set for the Final Witness List (i.e., 9 November 2020), “should a witness become unavailable”.⁵

5. Rule 68(2)(c) empowers the Chamber to formally recognise the submission of the prior recorded testimony of a witness who has died when: i) the necessity of measures under article 56 of the Statute could not be anticipated; ii) the prior recorded testimony has sufficient indicia of reliability;⁶ iii) the evidence is relevant and probative; and iv) submission is not prejudicial to or inconsistent with the rights of the accused.⁷ As detailed below, P-1654’s Prior Statement meets all of these criteria.

6. Under rule 68(2)(c)(ii), “[t]he fact that the prior recorded testimony goes to proof of acts and conduct of an Accused may be a factor against its introduction, or part of it”.⁸ However, there is no *per se* bar to the introduction of a prior recorded testimony that goes to the acts and conduct of an Accused. In such instances, a Chamber may take into consideration *inter alia*: i) whether the evidence relates to issues that are not

⁵ ICC-01/14-01/18-631, para. 33.

⁶ ICC-01/04-02/06-1029, para. 12.

⁷ ICC-01/12-01/18-1111-Conf, para. 7; ICC-01/05-01/08-1386, para. 78 (“*Bemba Appeals Decision*”).

⁸ See also ICC-01/04-02/06-1029, para. 13.

materially in dispute; ii) whether the evidence is central to the allegations of the case; and iii) whether the evidence is purportedly corroborative.⁹

7. [REDACTED] (P-1654) was a Christian civilian who lived in the BOEING neighbourhood of BANGUI during the conflict. He was a crime-base witness who provided evidence of: (i) YEKATOM's elements' abduction and detention of seven people including [REDACTED]; (ii) YEKATOM's elements' abuse of [REDACTED] and murder of [REDACTED] at the YAMWARA School Base; and (iii) the release of the remaining abductees with the help of the [REDACTED].

8. Although P-1654's Prior Statement goes to YEKATOM's acts and conduct at the YAMWARA School Base, his evidence is not central to allegations in the case and is corroborated by several other Prosecution witnesses including [REDACTED]. His evidence is also corroborated by YEKATOM's own elements P-2233 and P-1839.

a. P-1654 is unable to testify

9. The Prosecution interviewed P-1654 in April 2017. On 11 June 2021, Prosecution investigators met with P-1705, who informed them that [REDACTED] P-1654 had been sick for about a year with [REDACTED] and had died [REDACTED].¹⁰ The Prosecution has since taken investigative steps to confirm P-1654's reported death. Due to COVID-19, as well as security and budgetary restrictions, the Prosecution was only recently able to conduct a further mission to obtain a copy of P-1654's death certificate, received on 23 October 2021¹¹ and attached at Annex B.

b. Article 56 measures could not be anticipated

⁹ ICC-01/05-01/13-1481, paras. 21-22.

¹⁰ CAR-OTP-2134-0139.

¹¹ CAR-OTP-2135-0270; CAR-OTP-2135-0271.

10. P-1654 was interviewed between 26 and 28 April 2017. At that time the witness was approximately [REDACTED] and did not report any serious health issues. After his interview, the Prosecution was only notified of minor health concerns in relation to P-1654. Prior to being informed of P-1654's death, the Prosecution had no reason to suspect or believe that the witness was facing risk of imminent death. For instance, on 28 September 2020, Prosecution representatives contacted P-1654 to update him on his participation in the trial proceedings. The witness reported at that time that he had the flu but otherwise did not report any serious health concerns. When contacted on 8 February 2021 for further update, P-1654 was again not well, but when Prosecution inquired whether it might be serious, [REDACTED] (who was speaking for P-1654), dismissed that possibility and indicated there was a planned a medical appointment. Under such circumstances, the Prosecution had no information within its possession that would prompt consideration of evidence preserving measures under article 56.

c. The tendered evidence is reliable

11. P-1654's Prior Statement is *prima facie* reliable. It is truthful, authentic, and consistent. The Prosecution obtained P-1654's Prior Statement in the ordinary course of its investigation in April 2017.¹² In accordance with rule 111, the witness's factual account was provided voluntarily and signed by him, as well as the investigators conducting the interview.¹³ The Prior Statement was interpreted and read back to him by a qualified interpreter in a language he fully understood. It further contains an express acknowledgement attesting to its voluntariness and the truth of its contents, to the best of the witness's knowledge and recollection.¹⁴ Further, the Prior Statement is internally consistent, and sufficiently corroborated by other evidence in the case.¹⁵

¹² See ICC-01/09-01/11-1938-Red-Corr, para. 66; see also ICC-01/05-01/13-1481-Red-Corr, para. 20.

¹³ ICC-01/05-01/13-1481-Red-Corr, para. 20.

¹⁴ CAR-OTP-2053-0112, at 0119.

¹⁵ See paras. 18 and 20 *infra*.

12. As noted, the Prior Statement is limited to information within the witness's knowledge and experience. He was forthcoming in his interview about his lack of knowledge or lack of memory of certain events.¹⁶ Further, P-1654 gave reasonable and logical explanations in his narrative of events without any apparent embellishments or speculation, stating for example, that when the captives were freed after their abduction, "I was not present when this happened and cannot recall where they were released from".¹⁷

13. In sum, the Prior Statement is reliable in that it i) is signed; ii) was given in the presence of a qualified interpreter; iii) contains an acknowledgement that it is accurate; iv) is internally consistent; and v) is predicated on information within the witness's actual knowledge, in that the witness readily admitted when he did not know certain information.¹⁸

d. P-1654's prior recorded testimony is relevant and probative

14. P-1654's Prior Statement is highly relevant and probative. It primarily goes to proof of the crime-base, particularly i) the charged YAMWARA School Base incident and related counts 11 to 16; and ii) the nature and extent of the widespread attack carried out by the Anti-Balaka against the Muslim civilian population between September 2013 and December 2014, as part of the contextual elements of Crimes against Humanity and War Crimes, under articles 7 and 8, respectively. Specifically, the evidence concerns the Anti-Balaka's campaign of retributive violence committed against Muslim civilians in BOEING pursuant to a criminal organisational policy, as

¹⁶ CAR-OTP-2053-0112, paras. 19, 20, 27, and 46.

¹⁷ CAR-OTP-2053-0112, para. 46.

¹⁸ ICC-01/04-02/06-1205, para. 16.

confirmed.¹⁹ The Prior Statement is thus *prima facie* relevant to and probative of material issues at trial.

15. P-1654's Prior Statement comprises 11 pages: nine typed pages (including the interpreter certification), as well as an associated exhibit, a the two-page handwritten complaint P-1654 made to the local authorities about [REDACTED] murder. 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.

16. The witness's Prior Statement describes the following:

- P-1654 being a Christian civilian who lived in BOEING before and during the conflict;
- The Seleka's takeover of BANGUI in March 2013, and the crimes they committed;
- The Anti-Balaka's arrival in BANGUI in December 2013, and the crimes they committed;
- YEKATOM's elements' abduction of seven people including [REDACTED], and their being taken to the YAMWARA School Base;
- YEKATOM's elements arriving [REDACTED] and ordering P-1654 to meet YEKATOM in the YAMWARA School Base, and being questioned by YEKATOM, and Freddy OUANDJIO (aka "Coeur de Lion) there until [REDACTED];
- One of the abductees, [REDACTED] informing P-1654 that they had cut off [REDACTED];

¹⁹ See ICC-01/14-01/18-403-Conf-Corr, paras. 61, 63-64 and 105-109, *see further* at pp. 105, 107, 109, 111 (referencing paragraphs 90-114 of the Document Containing the Charges - ICC-01/14-01/18-286-Conf-AnxB1).

- Fleeing BOEING with his family in response to YEKATOM's threats [REDACTED].
- [REDACTED] assisting in the release of the remaining abductees; and
- P-1654's subsequently making a criminal complaint to the CAR authorities about the murder of [REDACTED] (the associated exhibit).

17. The Prosecution tenders the sole associated exhibit for formal submission, listed in *Confidential Annex A*: as noted, it is a handwritten criminal complaint made by P-1654 to the CAR authorities about the murder of [REDACTED] by YEKATOM and his elements at the YAMWARA School Base, described in paragraph 47 of his Prior Statement.²⁰ This associated exhibit is indispensable to the comprehension of the Prior Statement, and if excluded, would diminish its probative value.

18. Although relevant and probative, P-1654's statement is limited in its scope. P-1654 did not witness the murder of [REDACTED], but was an eyewitness to other facts surrounding his abduction and detention at the YAMWARA School Base with others. P-1654's Prior Statement thus corroborates the allegation (already proffered through other Prosecution evidence) of the abduction and detention of seven people by YEKATOM's elements – [REDACTED], and one of whom was murdered. As such, the narrow scope of this corroborating evidence avoids any prejudicial effect caused to the Accused in this respect.²¹ Moreover, the references to YEKATOM's alleged acts and conduct are limited, and other witnesses are expected to provide in-court testimony in relation to these issues.²² For example, P-1654's proposed evidence is corroborated by, *inter alia*, the evidence of crime base witnesses [REDACTED] as well as insiders P-2233 and P-1839 in relation to (i) the abduction of seven people by

²⁰ CAR-OTP-2050-0737 (described with a typo in paragraph 47 of his statement as “CAR-OTP-0250-0737”).

²¹ ICC-01/05-01/13-1481, para. 22.

²² ICC-01/05-01/13-1481, para. 21 (noting “As regards the conditions stipulated in Rule 68(2)(c)(ii) of the Rules, the Chamber accepts that the Statement goes to the proof of acts and conduct of Mr Kilolo. However, the Chamber is mindful of the fact that Rule 68(2)(c)(ii) of the Rules does not prevent the introduction of this type of evidence, providing instead that this element ‘may be a factor against its introduction, or part of it’”).

YEKATOM's elements; (ii) their mistreatment and the murder of [REDACTED] by YEKATOM's elements at the YAMWARA School Base; and (iii) the release of the remaining abductees with the help of [REDACTED].

e. Balance of interests

19. Granting the Request advances the interests of justice. By its terms, rule 68(2)(c) does not *per se* unfairly prejudice the Defence in permitting the submission of uncross-examined evidence unrelated to the acts and conduct of the Accused.²³ On the contrary, although rule 68 is an exception to the principle of orality²⁴ and publicity,²⁵ its application “is *per se* generally considered *compatible* with the rights of the accused”²⁶ and indeed all statutory rights because it is express in the Court's procedural framework. Additionally, the Chamber's appropriate exercise of discretion in determining the evaluative criteria as defined in the Rules, among others, serves as a sufficient procedural safeguard against potential prejudice. Similarly, the fact that the Parties can avail themselves of the provision further underscores its inherent neutrality.²⁷ Thus, any claim of prejudice should only be entertained in light of the particular circumstances of the specific witness, their evidence, and the case — not presumptively, nor in the abstract.

20. P-1654's evidence is manifestly relevant to the proper adjudication of salient issues in this case, and its formal submission does not cause any unfair prejudice to the Accused either in respect of the nature of rule 68(2) itself, or as applied in these circumstances.²⁸ Although P-1654's Prior Statement goes to YEKATOM's acts and conduct at the YAMWARA School Base, his evidence is not central to allegations in the case and is largely corroborated by several other Prosecution witnesses including

²³ ICC-01/05-01/13-1478-Red-Corr, paras. 38-39.

²⁴ ICC-01/05-01/08-1386, para. 78.

²⁵ ICC-01/14-01/18-685, para. 25 (referencing articles 64(7) and 67(1)).

²⁶ ICC-01/14-01/18-685, para. 26.

²⁷ ICC-01/09-01/11-1938-Red-Corr, para. 25.

²⁸ ICC-01/09-01/11-1938-Red-Corr, para. 27.

the [REDACTED], and YEKATOM's own elements P-2233 and P-1839 who were present for the abduction, detention, abuse, and murder in question. The Prosecution expects that [REDACTED] will be made available for cross-examination.

21. Here, the Defence retains the right to lead evidence during its direct case, and to avail itself of examining other and related witnesses on the basis of, and concerning, the information contained in P-1654's Prior Statement. Any potential prejudice to the Accused resulting from a prospective conviction on any of the charges that may rely to a 'decisive extent' on P-1654's Prior Statement should be evaluated by the Chamber at the end of the trial, during its assessment of the *weight* to be accorded to his Prior Statement, as foreseen by the Chamber's adoption of the submission regime.²⁹ In that assessment, the Prior Statement should be accorded weight, bearing in mind its probative value and indicia of reliability, as well as the fact that it is corroborative of other documentary evidence and testimony.

22. P-1654's Prior Statement should thus be admitted and the Chamber shall consider to what extent a conviction on any of the charges supported by P-1654's evidence is appropriate on the basis of *all* relevant evidence at the end of the trial.

²⁹ See ICC-01/14-01/18-631, paras. 52-53.

IV. CONCLUSION

23. For the foregoing reasons, the Prosecution requests the Chamber recognise as formally submitted the Prior Statement of P-1654 including its one associated exhibit, listed in Annex A, pursuant to rule 68(2)(c).



Karim A. A. Khan QC, Prosecutor

Dated this 11th day of November 2021
At The Hague, The Netherlands