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

Date: 17 November 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 *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-1647 pursuant to Rule 68(3)",  
17 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. The Office of the Prosecutor (“Prosecution”) requests the formal submission of the prior recorded testimony of witness P-1647, 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”).<sup>1</sup> P-1647’s prior recorded testimony comprises his 6 April 2017 Witness Statement (“Prior Statement”)<sup>2</sup> and its associated exhibits.<sup>3</sup> 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-1647 was an Anti-Balaka member under YEKATOM’s command (“YEKATOM’s Group” or “Group”), who was appointed in early 2014 as [REDACTED]. He gives evidence on the structure and organisation of YEKATOM’s Group, YEKATOM’s control over his Group, the Group’s takeover of the PK9-MBAIKI axis and crimes committed there, and the Group’s involvement in the attack on BODA.

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 unfairly prejudice the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber itself.<sup>4</sup>

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<sup>1</sup> ICC-01/14-01/18-631, para. 58.

<sup>2</sup> CAR-OTP-2060-0654.

<sup>3</sup> 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.

<sup>4</sup> 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. 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.<sup>5</sup> Additionally, mindful of the concerns regarding the amount of written evidence to be tendered,<sup>6</sup> 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.<sup>7</sup>

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 lists the relevant portions of the Prior Statement being tendered for formal submission, and the corresponding associated exhibits. It also identifies the relevant paragraphs of the Confirmation Decision to which the witness's evidence relates. *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, 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.

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<sup>5</sup> ICC-01/14-01/18-685, para. 34; See ICC-02/11-01/15-744, para. 69 ("*Gbagbo and Blé Goudé Appeals Decision*").

<sup>6</sup> See ICC-01/14-01/18-685, para. 31, 32.

<sup>7</sup> 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).

### 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,<sup>8</sup> its submissions in its first request for the formal submission of prior recorded testimony under rule 68(3),<sup>9</sup> and in its first and second requests for the formal submission of prior recorded testimony under Rule 68(2)(b).<sup>10</sup>

#### 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-1647 will attest to its accuracy; he will be present in court; and he 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 structure and organisation of YEKATOM's Group, to YEKATOM's control over his Group, and to crimes committed by the Group along the PK9-MBAIKI axis. It also provides evidence of the contextual elements of war crimes and crimes against humanity, in particular the Anti-Balaka being an organised armed group, and its intention to target Muslim civilians pursuant to a criminal organisational policy between September 2013 and December 2014.

10. P-1647's Prior Statement comprises 15 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.

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<sup>8</sup> 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').

<sup>9</sup> ICC-01/14-01/18-750-Conf, paras. 8-12, 23, 27-33.

<sup>10</sup> ICC-01/14-01/18-710-Conf, paras. 47-49; ICC-01/14-01/18-744-Conf, paras. 36-40.

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

- P-1647 is [REDACTED]; he describes the persecution of FACA by the Seleka upon their arrival.
- He was present in BANGUI for the Anti-Balaka's attack of 5 December 2013, and recounts their attack upon the area of the National Assembly.
- He describes joining YEKATOM's Group [REDACTED].
- The witness gives details on the structure and organisation of the Group, including YEKATOM's control (including disciplinary control) over his elements, and the Group's financing through checkpoints. [REDACTED].
- He further describes the training given to members of the Group, both internally and externally (including IHL training).
- He recounts the Group's successive attack of towns and areas on the PK9-MBAIKI axis, including PK9, SEKIA, NDANGALA, BIMBO, KAPOU, and PISSA.
- The witness describes how the Seleka had already left MBAIKI and other areas ahead of the Group's arrival. He further describes how the Muslim civilian population in MBAIKI was afraid of the Anti-Balaka and evacuated within one week of their arrival.
- He recounts [REDACTED] the Anti-Balaka's attack of BODA.
- The witness refers to a [REDACTED], after which time [REDACTED] left the Group.

12. P-1647's proposed evidence on the structure and organisation of YEKATOM's Group, including training and funding through tolls, is corroborated by, *inter alia*, the evidence of P-1719, P-1839, P-0487, P-1339, P-1819 and P-1786. His proposed evidence on YEKATOM's command and control over his Group, including disciplinary action, is corroborated by, *inter alia*, the evidence of P-1339, P-1839, P-0954, P-0487, P-0974, P-1858, P-1786 and P-1819. His proposed evidence on YEKATOM Group's successive takeover of towns along the PK9-MBAIKI axis is corroborated by, *inter alia*, P-1339, P-1786, P-1839, P-1858, P-1558, P-0954 and P-1719. Finally, his proposed evidence of the Group's attack on BODA is corroborated by, *inter alia*, P-1962, P-1339, P-2138, P-1786.

### **C. Associated Exhibits**

13. The Prosecution tenders two associated exhibits for formal submission. Together they comprise the single annex to the Prior Statement, as listed in Confidential Annex A.

14. The items tendered with this application are assessed as indispensable to the comprehension of the Prior Statement, or would otherwise diminish its probative value if excluded. As tendered, the associated exhibits avoid flooding the Parties, Participants, and the Chamber with material that is superfluous or tangential to the import of the witness's testimony, while assisting the Chamber in its assessment of the relevant evidence in its article 74 decision. Each exhibit is an integral part of the Prior Statement and their submission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-1647's evidence.

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

15. The Prior Statement is brief. A limited and focused supplemental examination-in-chief would thus clarify and elaborate P-1647's testimony, and 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",<sup>11</sup> the Prosecution has carefully reviewed its four-hour estimate given for P-1647 in its Final Witness List.<sup>12</sup> The Prosecution considers that it can reduce its estimate to two hours. This estimated supplemental examination of P-1647 takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,<sup>13</sup> 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-1647'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 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 six hours to present – three times as long.

#### **E. Balance of interests**

19. The projected shortening of P-1647's in-court-testimony by a third is "considerable", and the Prosecution considers on balance that the introduction of P-1647'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

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<sup>11</sup> ICC-01/14-01/18-685, para. 36.

<sup>12</sup> ICC-01/14-01/18-724-Conf-AnxA, p. 14.

<sup>13</sup> 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).



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-1647 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.



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**Karim A. A. Khan QC, Prosecutor**

Dated this 17<sup>th</sup> day of November 2021  
At The Hague, The Netherlands