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

Date: **23 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-1704 pursuant to Rule 68(3)”,
ICC-01/14-01/18-1176-Conf, 16 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-1704, 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”).¹ P-1704’s prior recorded testimony comprises his 12 June 2017 Witness Statement (“Prior Statement”)² and its associated exhibits.³ 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 one hour, elaborating specific issues raised therein, and other matters highly relevant to the case.

2. P-1704 [REDACTED] the YAMWARA School incident, perpetrated by YEKATOM and the elements under his command (“YEKATOM’s Group”) [REDACTED]. Through recounting the crimes committed during this incident, his evidence is relevant to YEKATOM’s Group’s targeting of the Muslim civilian population, the location of the Group’s bases in BANGUI, and YEKATOM’s command and control over his elements.

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.⁴

¹ ICC-01/14-01/18-631, para. 58.

² CAR-OTP-2054-1136.

³ 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.

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

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.

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

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

⁷ 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,⁸ its submissions in its first request for the formal 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)

8. The Prior Statement may be deemed formally submitted under rule 68(3). P-1704 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 directly to the crimes alleged at counts 11-16 as part of the YAMWARA School incident, and YEKATOM's Group's perpetration of these crimes. As such, 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 intent to target Muslim civilians pursuant to a criminal organisational policy between September 2013 and December 2014.

10. P-1704's Prior Statement comprises 14 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.

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').

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.

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

- P-1704 was [REDACTED] residing in BANGUI at the time of events.
- The witness refers to the crimes committed by the Seleka in BANGUI in 2013, and to the Anti-Balaka's arrival on 5 December 2013.
- He describes roadblocks established by the Anti-Balaka in BANGUI, including in [REDACTED].
- The witness recounts [REDACTED] by the Anti-Balaka and detained and tortured at the YAMWARA School.
- He describes the disappearance of one detainee [REDACTED] after being tortured and stabbed.
- He identifies the perpetrators of these crimes as YEKATOM and members of his Group, including Freddy OUANDJIO ("*Coeur de Lion*") and [REDACTED].
- The witness recounts the abductees' handing over to the [REDACTED] who then [REDACTED] released them [REDACTED].

12. P-1704's proposed evidence on the abduction and mistreatment of the group, as well as the beating and killing of [REDACTED] is corroborated by, *inter alia*, the evidence of [REDACTED] and P-1839. His proposed evidence on YEKATOM's command and control over his Group is corroborated by, *inter alia*, the evidence of P-1339, P-1521, P-1819, P-2232, P-1786, and P-2084. Finally, his proposed evidence on the commission of crimes by YEKATOM and his Group against the Muslim population is corroborated by, *inter alia*, P-1339, P-2475, P-1839, and P-2233.

C. Associated Exhibits

13. The Prosecution tenders two associated exhibits for formal submission. These comprise the single annex to the Prior Statement and another document mentioned therein, 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. As an integral part of the Prior Statement, each exhibit is directly relevant to and probative of material issues in dispute, and their submission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-1704'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-1704'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",¹¹ the Prosecution has carefully reviewed its two-hour estimate given for P-1704 in its Final Witness List.¹² The Prosecution considers that it can reduce its estimate to one hour. This estimated supplemental examination of P-1704 takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel,

¹¹ ICC-01/14-01/18-685, para. 36.

¹² ICC-01/14-01/18-724-Conf-AnxA, p. 26.

interpretation considerations,¹³ 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-1704'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 three hours to present – three times as long.

E. Balance of interests

19. The projected shortening of P-1704's in-court-testimony by two thirds is "considerable", and on balance the introduction of P-1704'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.

¹³ 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).

IV. CONCLUSION

20. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the Prior Statement of P-1704 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.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan QC, Prosecutor

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