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**International
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Court**

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Date: **29 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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public Redacted Version of the “Yekatom Defence Response to ‘Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0876 pursuant to Rule 68(3)’ (ICC-01/14-01/18-1082-Conf)”, 26 August 2021, ICC-01/14-01/18-1094-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-0876 pursuant to Rule 68(3)' ('Request').¹
2. It is submitted that the Request should be denied.
3. P-0876's transcribed statement ('Statement') contains disputed allegations that are central to core issues in this trial, including in relation to Mr Yekatom's acts and conduct. Further, the Statement is important in light of the charges and evidence presented in these proceedings, given P-0876's former actions and [REDACTED] role as a prominent Anti-Balaka member [REDACTED]. In the circumstances therefore, the admission of the Statement would be unduly prejudicial to Mr Yekatom's fair trial rights and the fairness of these proceedings.

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 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 charges and other evidence presented or intended to be presented; this assessment is part and parcel of the analysis a Chamber must undertake in

¹ [ICC-01/14-01/18-1082-Conf.](#)

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).²

6. In conducting this analysis, a Chamber may take into account a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.³

SUBMISSIONS

7. The Defence submits that the introduction of the Statement through Rule 68(3) would be unduly prejudicial to Mr Yekatom's rights and the fairness of the proceedings.
8. First, the Statement contains allegations relating to issues that are both materially in dispute and central to core issues in this case. As stated in the Request, the Statement alleges *inter alia* the Anti-Balaka's commission of crimes against the Muslim population in Bangui and the provinces by Mr Yekatom's group; and 'provides evidence of the forcible displacement of the Muslim population, as well as of the enclaving of Muslims in the PK5 district of BANGUI'.⁴ P-0876's allegations therefore appear to go to a number of charges against Mr Yekatom, namely Counts 4-5, 8, 24-25 and 28.⁵

² *Prosecutor v. Gbagbo & 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\(3\)"](#), ICC-02/11-01/15-744, 1 November 2016, para. 71.

³ *Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"](#), ICC-01/05-01/08-1386, 3 May 2011, para 78.

⁴ [ICC-01/14-01/18-1082-Conf](#), para. 12.

⁵ [ICC-01/14-01/18-1082-Conf](#), para. 12; see also, [ICC-01/14-01/18-1082-Conf-AnxA](#), p. 1.

9. Further, the Statement contains multiple references to Mr Yekatom's acts and conduct, including allegations that i) Mr Yekatom 'targeted' Muslims; ii) that he 'positioned his group on the Mbaiki-Bangui axis, where no Muslim was allowed to pass'; iii) that he murdered people 'for no reason'; iv) that he himself attacked people at the Muslim cemetery and/or Anti-Balaka members who intervened to stop him;⁶ and v) that he and his group traveled to CARNOT 'where many Muslims were traveling'.⁷
10. Moreover, in the Request, the Prosecution does not demonstrate that these specific allegations are corroborative of other evidence in this case, which itself further militates against the introduction of the Statement under Rule 68(3).⁸
11. The prejudicial effect of introducing the Statement under Rule 68(3) would be further compounded by the fact that certain of P-0876's allegations referencing the acts and conduct of Mr Yekatom remain generalised and vague, such that it is unclear whether they fall within the scope of the charges. In this respect, the prejudicial effect of the introduction into evidence of these ambiguous allegations would therefore outweigh their probative value.⁹
12. For instance, P-0876's evidence regarding alleged 'targeting' of Muslims (misleadingly summarised as 'YEKATOM exclusively targeted the Muslims') remains vague.¹⁰ In this regard, it is notable that in the relevant part of his Statement, P-0876 goes on to allege *inter alia* that i) Mr Yekatom organised robberies and vehicle theft; ii) that it was not only Mr Yekatom, but also 'those' of Mr Ngaïssona, who were responsible; iii) that this alleged conduct

⁶ [CAR-OTP-2046-0324-R01](#), 0342, lines 651-655; [ICC-01/14-01/18-1082-Conf-AnxB](#), para. 144..

⁷ [ICC-01/14-01/18-1082-Conf-AnxB](#), paras 142-145; in this regard, the Defence recalls that the Chamber recently denied a Prosecution Rule 68(3) Request in relation to witness P-0306, finding that references in the prior recorded testimony of witness P-0306 to Mr Ngaïssona's acts and conduct comprised a circumstances that warranted hearing the in-full viva voce testimony of the witness. [ICC-01/14-01/18-1088-Conf](#), paras 14, 16.

⁸ Cf., [ICC-01/14-01/18-1082-Conf](#), para. 13.

⁹ See 69(4) of the Statute, applicable pursuant to Rule 68(1) of the Rules.

¹⁰ [ICC-01/14-01/18-1082-Conf-AnxB](#), para. 142.

did not only target Muslims but also ‘wealthy people’; iv) that an unspecified ‘they’ (*‘ils’*) killed *‘beacuoup plus des musulmans’*; and v) that an unspecified ‘they’ went to NOLA and CARNOT to perpetrate unspecified ‘crimes against Muslims’.¹¹ In other words, P-0876’s evidence is unclear as to whom exactly conducted what form of ‘targeting’ of Muslims, and where such ‘targeting’ took place – and by extension, whether his evidence in this regard actually falls within the temporal, geographical, and material scope of the charges at all.

13. Despite this lack of clarity, the Prosecution intends to interpret these generalised allegations as evidence for the charges brought against Mr Yekatom, specifically grouping them under the heading ‘YEKATOM’s crimes against Muslims’.¹² Introduction of the Statement under Rule 68(3) would thus effectively reverse the burden of proof, as it would oblige the Defence to establish and challenge, through potentially incriminating lines of examination, whether P-0876’s allegations regarding the acts and conduct of Mr Yekatom actually fall within the scope of the charges brought against him. Granting the Request would therefore allow the Prosecution to unfairly capitalise on the ambiguity within these prejudicial allegations – an ambiguity that is itself the result of Prosecution investigators’ decision not to pursue specific details of these allegations during their interview with P-0876.
14. Second, it is submitted that P-0876’s unique role and actions during the relevant period further militate against the introduction of his evidence pursuant to Rule 68(3).

¹¹ [CAR-OTP-2046-0473-R01](#), 0481-0482, lines 305-330.

¹² [ICC-01/14-01/18-1082-Conf-AnxB](#), p. 33.

15. P-0876 is the sole Prosecution witness to have been [REDACTED] prominent Anti-Balaka member, [REDACTED],¹³ at the time of the events relevant to the charges.
16. Further, in addition to being [REDACTED], from the outset of, and throughout, the CAR crisis in 2013-2014,¹⁴ P-0876 claims to have participated in direct dialogue regarding the crisis with a number of key individuals in the Prosecution case, in the immediate lead-up and aftermath of 5 December 2013: namely, [REDACTED].¹⁵
17. Critically, P-0876 claims to have engaged in multiple [REDACTED], with the aim of [REDACTED];¹⁶ and he was subsequently named [REDACTED].¹⁷
18. In this respect, P-0876's evidence regarding the alleged Anti-Balaka 'structure' in the lead-up and immediate aftermath of 5 December 2013, and notably the divisions therein, is uniquely important in light of the charges and other evidence presented. This is especially so in light of the recent *viva voce* (in-full) testimony of P-0884, who during examination in chief expressly denied the existence of such a divide, claiming that there was one Anti-Balaka with one objective: 'the purpose was to drive Djotodia and his mercenaries out'.¹⁸
19. Moreover, in the circumstances, P-0876's status as an Article 55(2) witness also militates against the introduction of his Statement under Rule 68(3). It is submitted that evidence collected from a prominent insider witness, who has been placed on express notice that there exist grounds to believe that he/she has committed crimes within the jurisdiction of the Court, should be treated with a degree of caution at the very least, as a principle.¹⁹ There exists every

¹³ [ICC-01/14-01/18-1082-Conf-AnxB](#), para. 194 ; see e.g., [CAR-OTP-2001-4616](#), 4617.

¹⁴ [ICC-01/14-01/18-1082-Conf-AnxB](#), paras 49-50.

¹⁵ [ICC-01/14-01/18-1082-Conf-AnxB](#), paras 61-70.

¹⁶ [ICC-01/14-01/18-1082-Conf-AnxB](#), paras 59, 71-79.

¹⁷ [ICC-01/14-01/18-1082-Conf-AnxB](#), paras 76-78.

¹⁸ [ICC-01/14-01/18-T-056-CONF-ENG](#), 57:17-21.

¹⁹ [CAR-OTP-2046-0249-R01](#), 0253, lines 127-136.

reason for such a witness to attempt to downplay their potentially incriminating role or actions, and/or to exaggerate or fabricate the role and actions of others, during an interview given under the express threat of potential prosecution.

20. In this respect, it is notable that P-0876's claim that Mr Yekatom was amongst those in the 'pacifist [Anti-Balaka] group' that 'did not want peace' is directly contradicted by Prosecution witness P-0884, who recently testified *viva voce* in full, under the oversight of the Chamber.²⁰ Specifically, P-0884 testified regarding *inter alia* Mr Yekatom's participation in a Christian-Muslim reconciliation ceremony [REDACTED], a video of which was played during his evidence, and Mr Yekatom's subsequent [REDACTED];²¹ as well as Mr Yekatom's attempts to reconcile Muslims and Christians in Boda, in relation to which 'he put in a lot of effort'.²²
21. It is also notable that in the recently tendered prior recorded testimony (described by the Prosecution as 'highly relevant and probative') of P-0808, another Prosecution witness, P-0876 was described as [REDACTED].²³ Further, Prosecution witness P-0884 recently stated during his testimony, [REDACTED].²⁴
22. In the circumstances therefore – specifically, the nature of P-0876's prejudicial allegations against Mr Yekatom, and P-0876's own prominent role in the broader events the subject of these proceedings – it is submitted that the interests of justice would require having P-0876 testify *viva voce* in full, under the Chamber's oversight, so as to enable the Chamber and the Defence to hear natural and spontaneous accounts from him, to directly and closely observe

²⁰ See, [ICC-01/14-01/18-1082-Conf-AnxB](#), para. 91.

²¹ [ICC-01/14-01/18-T-057-CONF-ENG](#), 70:16-75:4; see also, [CAR-OTP-2023-1831](#).

²² [ICC-01/14-01/18-T-057-CONF-ENG](#), 75:5-76:2.

²³ [ICC-01/14-01/18-1087-Conf-AnxB](#), para. 149.

²⁴ [ICC-01/14-01/18-T-058-CONF-ENG](#), 27:19-28 :12.

his reactions, demeanour and composure, and to immediately seek clarifications where necessary.²⁵

23. Lastly, the Defence notes that the Prosecution has estimated that in-full *viva voce* testimony of P-0876 would require ‘at least nine hours’ to present (in comparison with three hours, should the Request be granted).
24. It is submitted that two days of examination-in-chief for a prominent Anti-Balaka insider witness such as P-0876 is entirely proportionate, especially in light of the unique, important, and prejudicial nature of his evidence.
25. Moreover the Defence notes that granting the Request would entail the wholesale introduction of over 300 pages of dense disordered transcript evidence that make up the Statement, which would inevitably clutter the trial record with irrelevant material that the Parties and participants will nonetheless have to revisit and review throughout the course of these proceedings. On the contrary, requiring in-full *viva voce* testimony of P-0876 would ensure that the evidence elicited his examination by the Prosecution would be focussed on only the most relevant and probative evidence of the witness, thereby streamlining the trial record.
26. In addition, a focussed in-full examination by the Prosecution would in turn allow the Defence to limit its own focus on the evidence elicited in therein. On the contrary, should the Request be granted, the Defence would be obliged to question P-0876 on matters arising from both the three hours of ‘supplemental’ examination-in-chief, as well as from the 300-plus pages of the witness’s transcribed interview. The corresponding increase in Defence examination time – whether of P-0876 himself, or of the remaining Prosecution witnesses, in relation to P-0876’s claims – would likely have the effect of at least partially offsetting the additional hours that would be required for in-full

²⁵ See, [ICC-01/14-01/18-685](#), para. 33.

viva voce testimony. In this respect, the Defence recalls the Chamber's previous rulings acknowledging the impact of Rule 68(3) witnesses on Defence examination times.²⁶ Likewise, P-0876's claims made throughout his 300-plus pages of transcripts may require addressing in an eventual Defence case, should one be necessary.

27. As such, in both the short and long run, any purported trial management 'gains' are somewhat illusory, or at the very least substantially reduced, which itself further militates against the granting of the Request.

CONFIDENTIALITY

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

RELIEF SOUGHT

29. In light of the above, the Defence respectfully requests the Chamber to:
- DENY** the Request.

RESPECTFULLY SUBMITTED ON THIS 29th DAY OF NOVEMBER 2021



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²⁶ See, [ICC-01/14-01/18-685](#), para. 35 and fn. 68; see also, [ICC-01/14-01/18-907](#), para. 24.