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**International
Criminal
Court**

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

Public

Public redacted version of “Yekatom Defence Response to the “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”, ICC-01/14-01/18-1203-Conf, 7 December 2021

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-1704 pursuant to Rule 68(3)” (“Request”).¹
2. The Defence contends that the Request, should it be granted, would greatly prejudice the rights of Mr. Yekatom due to the content of P-1704’s statement which is both at the core of an important issue of the case, namely the Yamwara School Base incident, and subject to contradictions and inconsistencies. In addition, the admission of P-1704’s statement pursuant to Rule 68(3) would not serve the interests of justice. For those reasons, the Request should be denied.

PROCEDURAL BACKGROUND

3. On 16 October 2020, Trial Chamber V (“Chamber”) issued its “Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules” in which it *inter alia* recalled that *viva voce* testimony should be the default mode of testifying,² and held that Rule 68 (3) may not be used without limits, noting that when considered against the specific circumstance of a case, its use might be disproportionate.³
4. On 10 November 2020, the Prosecution included Witness P-1704 in its Final Witness List, indicating that he will testify on key issues of the case in the so-called “Incident YAMWARA”, such as “the role of YEKATOM, Freddy OUANDJO (Coeur de Lion) and [REDACTED] at the Anti-Balaka base at the

¹ [ICC-01/14-01/18-1176-Conf.](#)

² [ICC-01/14-01/18-685](#), para. 25.

³ *Ibid*, para. 31.

YAMWARA School, including in [REDACTED]”, and “the Anti-Balaka’s torture of [REDACTED], Saint Cyr, and others at the YAMWARA School”.⁴

5. On 13 January 2021, the Defence filed its “Notification Pursuant to Rule 79 of the Rules of Procedure and Evidence”, indicating its intention to raise an alibi in relation the Yamwara School Base incident.⁵
6. On 16 November 2021, the Prosecution filed its Request for the Formal Submission of the Prior Recorded Testimony of P-1704 pursuant to Rule 68(3).⁶
7. On 17 November 2021, the Defence requested the Chamber to extend the time limit to respond to the Request until 7 December 2021,⁷ which was granted by the Chamber on 19 November 2021.⁸

APPLICABLE LAW

8. Rule 68(3) of the 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.

9. A Chamber’s assessment as to whether prior recorded testimony may be introduced under Rule 68(3) should be made on a case-by-case basis where the factors to be considered may vary per witness.⁹
10. 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,

⁴ [ICC-01/14-01/18-724-Conf-AnxA](#), p. 29, witness n°43.

⁵ [ICC-01/14-01/18-818-Conf](#), para. 11. A public redacted version is also available [ICC-01/14-01/18-818-Red](#).

⁶ [ICC-01/14-01/18-1176-Conf](#). A public redacted version is also available [ICC-01/14-01/18-1176-Red](#).

⁷ Email from the Defence to the Chamber dated 17 November 2021 at 19:16.

⁸ Email from the Chamber to the Defence dated 19 November 2021 at 16:27.

⁹ *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.

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 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).¹⁰

11. 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.¹¹

SUBMISSIONS

12. The Defence will first address the crucial importance of the content of P-1704's statement to the charges (I), before addressing the fact that an admission of this witness's prior recorded testimony pursuant to Rule 68(3) would not serve the interest of justice (II).

I. On the crucial importance of the content of P-1704's statement to the charges

13. Firstly the Defence will argue that the content of P-1704's statement relates extensively to issues that are at the core of the case (A), subsequently the disputed nature of the content of this statement will be developed (B).

¹⁰ *Ibid*, para. 71.

¹¹ *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.

A. The content of P-1704's statement relates extensively to core issues of the case

14. The Defence underlines the importance of P-1704 to the “Yamwara School Base incident”, subject of Counts 11-17, when seven persons were allegedly stopped on 24 December, held captive, some of them beaten and one killed.¹²
15. Indeed, as described by the Prosecution in its Request,¹³ P-1704 [REDACTED]. In its statement, which is almost entirely dedicated to this incident,¹⁴ the witness discusses the arrest of the group, and specifically describe how Mr. Yekatom was allegedly present,¹⁵ how Mr. Yekatom allegedly ordered for Saint Cyr Lapo to be tied up and then his ear cut off,¹⁶ he also alleges that Mr. Yekatom was present when [REDACTED].¹⁷
16. In addition to discussing the material elements of the alleged crime, P-1704 also makes claims in his statement about a potential motive, in indicating that “[REDACTED]”¹⁸ and that “[REDACTED]” when they were torturing him.¹⁹
17. P-1704 effectively avers not only that Mr. Yekatom was present during the Yamwara School Base incident, but that he directly ordered the torture of Saint Cyr Lapo by one of his elements, in what appears to be a crime allegedly motivated by the perceived religion of the victims. The Prosecution relies on this statement to argue the criminal responsibility of Mr. Yekatom to the effect that “he told his elements that their targets were not just Seleka members, but

¹² [ICC-01/14-01/18-403-Corr-Red](#), paras. 114-117.

¹³ [ICC-01/14-01/18-1176-Conf](#), para. 2.

¹⁴ The Defence notes that out of the 57 paragraphs of the statement, if the procedural paragraphs are excluded, the Yamwara School Base incident is discussed in 40 of them (paragraphs 21 to 61). See [CAR-OTP-2054-1136-R03](#).

¹⁵ [CAR-OTP-2054-1136-R03](#), para. 32.

¹⁶ *Ibid*, paras. 37-38.

¹⁷ *Ibid*, para. 38.

¹⁸ *Ibid*, para. 35.

¹⁹ *Ibid*, para. 38.

Muslims — “foreigners” to be ‘slaughtered’, ‘exterminated’, or at the least, that ‘had to leave’, including women and children”.²⁰

18. By virtue of his status as a crime base witness who, in addition, was an alleged victim of a charged crime, his recollection of the events will potentially bear a great weight in the assessment of this event by the Chamber. Indeed, the importance of P-1704’s evidence was made clear in the Decision on the confirmation of charges where Pre-Trial Chamber II made numerous references to his statement in its determination on the factual findings of the Yamwara School incident.²¹ Notably, P-1704 was the only witness cited by Pre-Trial Chamber II in its findings to the effect that “Yekatom then ordered his subordinates to tie up Saint Cyr Lapo N’Gomat, who proceed to tie his arms behind his back and together with his feet, and to beat him with brake cables and a bamboo stick”²² and that “Ouandjio also stabbed Saint Cyr Lapo N’Gomat in his neck with a knife”.²³

19. The Defence contends that it is undeniable that assertions made by P-1704 directly go to the acts and conduct of Mr. Yekatom in core issues of the case as well as Mr. Yekatom’s *mens rea*. The Defence argues that the extensiveness of those references to acts and conduct of an accused,²⁴ as well as those direct references to Mr. Yekatom’s alleged *mens rea*,²⁵ militate in favour of the Request being rejected.

²⁰ See [ICC-01/14-01/18-723-Red](#), para. 376 with P-1704 quoted in fn. 980; see also, para. 385, fn. 1000, citing para. 376 in relation to Mr Yekatom’s alleged intent and knowledge, and specifically his alleged “persecutory intent”.

²¹ [ICC-01/14-01/18-403-Corr-Red](#), paras. 114-117 and associated footnotes.

²² [ICC-01/14-01/18-403-Corr-Red](#), para. 115, fn. 281.

²³ *Ibid*, para. 115, fn. 283.

²⁴ See [ICC-01/14-01/18-1088-Conf](#), para. 14, for a consideration of the extensiveness of the acts and conduct mentioned when determining whether a Rule 68(3) is appropriate.

²⁵ See also, *Prosecutor v. Al Hassan*, [Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68\(2\)\(b\) of the Rules, 15 November 2021](#), ICC-01/12-01/18-1924, para. 16.

B. The content of P-1704's statement is contradicted and inconsistent with other evidence

20. The Defence further submits that P-1704's important allegations made against Mr. Yekatom are inconsistent or contradicted by other evidence.
21. Indeed, while P-1704 claims that Mr. Yekatom was present at the Yamwara School base when the abductees arrived and throughout their detention, the Defence recalls that on 13 January 2021 it notified the parties and participants of its intention to raise an alibi regarding this particular incident to the effect that Mr. Yekatom was not present and did not return to the Yamwara School until [REDACTED].²⁶ It is submitted that the presence of the Defence's alibi notice favours P-1704 providing his testimony fully *viva voce*.
22. Moreover, the Defence notes several inconsistencies between the account of the events by P-1704 and those of other Prosecution witnesses. A prime example of such inconsistencies relates to P-1704's claim that a girl mutilated Saint Cyr Lapo after that "[REDACTED]";²⁷ whereas witness P-1839 indicated that [REDACTED] who cut Saint Cyr Lapo's ear upon instruction by Coeur de Lion²⁸ and that Mr. Yekatom was not present when it happened.²⁹ This directly contradicts P-1704's information about Mr. Yekatom's presence, his *mens rea* and his alleged criminal conduct.
23. Inconsistencies also exist with the statements of P-1716 and P-1705, [REDACTED]. As an example P-1716 only mentions Coeur de Lion as individual 'who appeared to be in charge' being present during the incident,³⁰ and does not mention Mr. Yekatom; he also never mentions in his statement P-1704's assertions to the effect that Coeur de Lion stabbed Saint Cyr in the neck with a knife, despite talking extensively about him. Mention of this

²⁶ [ICC-01/14-01/18-818-Conf](#), para. 11.

²⁷ [CAR-OTP-2054-1136-R03](#), para. 38.

²⁸ P-1839: [CAR-OTP-2072-0731-R01](#), p. 0755, lines 846-861.

²⁹ P-1839: [CAR-OTP-2122-6900-R01](#), p. 6910-6911, lines 346-385.

³⁰ P-1716: [CAR-OTP-2053-0062-R03](#), p. 0069, paras 40-44.

alleged stabbing is also notably absent from P-1705's statement.³¹ Another notable absence in P-1705's statement relates to the claim by P-1704 that, after some of the abductees were asked where they lived, "[REDACTED]" before "[REDACTED]";³² yet in his statement, P-1705 never mentions [REDACTED], instead merely stating that [REDACTED] and that "[l]ater, just after sunset [REDACTED]".³³

24. Those inconsistencies and direct contradictions further demonstrate the lack of reliability of P-1704's account regarding the proper recollection of the events by P-1704, including on the most salient issue of the presence and orders of Mr. Yekatom. The Defence contends that in the specific case of P-1704 – specifically, given the importance of his statement in relation to the alleged acts and conduct of Mr. Yekatom, given the alibi notice of the Defence on the subject of his statement, and given the inconsistencies or contradictions between his statement and other evidence, including but not limited to that of P-1839 – the admission of said statement under Rule 68(3) would unduly prejudice Mr. Yekatom.

25. The Defence further recalls the advantages of testimony given fully viva voce, namely that:

Not only is the testimony given under oath and under the Chamber's oversight, it further enables the Chamber and the accused to hear natural and spontaneous accounts from witnesses, to directly and closely observe their reactions, demeanour and composure, and to immediately seek clarifications under the Chamber's oversight.³⁴

It is submitted that those advantages, in the specific circumstances surrounding the statement of P-1704 as set out above, are especially important and necessary in order to ensure that the Chamber is granted, to the fullest

³¹ P-1705: [CAR-OTP-2053-0086-R04](#).

³² [CAR-OTP-2054-1136-R03](#), paras 45-46.

³³ P-1705: [CAR-OTP-2053-0086-R04](#), paras 41-42.

³⁴ [ICC-01/14-01/18-685](#), para. 33.

extent, the opportunity to perform its credibility-assessment and truth-seeking function of the Chamber on an important issue of the case; and thus further militate in favour of this witness being heard fully *viva voce* and the denial of the Request.

II. The admission of P-1704's statement pursuant to Rule 68(3) would not serve the interests of justice

26. Article 69(2) of the Statute provides that “[t]he testimony of a witness at trial shall be given in person” and thus establishes the principle of orality for the proceedings at the International Criminal Court. Rule 68(3), despite the provision that the witness “is present before the Trial Chamber” constitutes an exception to this principle, and should thus only be used with caution, and under the condition that it is not prejudicial or inconsistent with the rights of the accused.

27. The Defence submits that the balance of interests, between any advantages of an admission under Rule 68(3) of P-1704's prior statement and his testimony fully *viva voce*, favours the latter.

28. *First*, it is important to note the witness “category” into which P-1704 falls. P-1704 is a crime base witness, [REDACTED], of an event which constitutes a multi-charge incident of this case. Nor could his evidence be considered as “technical” which could warrant a Rule 68(3) application.³⁵ His evidence consists of his account of the Yamwara School incident. As [REDACTED] an event subject of seven different counts and in light of the truth seeking function of the Chamber, the Defence contends that in the specific instance of P-1704, a fully *viva voce* testimony, with its advantages as previously detailed in paragraph 25, would best serve both the interest of justice and the

³⁵ See the Presiding Judge intervention that Rule 68(3) could be useful when the evidence provided by a witness can be considered as “technical”. [ICC-01/14-01/18-T-082-CONF-ENG ET](#), p. 43-44 lines 25-3.

preservation of Mr. Yekatom's rights, even more so when some of the information provided by the witness is contested as demonstrated above.

29. *Second*, the Defence reiterates its concern in relation to the number of witnesses who recanted information contained in their previous recorded testimony, particularly where their statement were originally written in English,³⁶ as is the case for P-1704.³⁷ The Defence can only note that this pattern has since continued with P-1521 who, when given an opportunity to see his statement or when his attention was drawn to specific paragraphs of the said statement, noted "facts that didn't correspond to the chronology",³⁸ that there might have been a "distortion" between what he said and what was put in his statement regarding Mr. Yekatom's coordinating the Boeing attack,³⁹ or that he didn't remember mentioning information that found itself in his statement.⁴⁰ The Defence is of the view that this matter should further weigh in favour of a cautious approach in relation to Rule 68(3) applications on statements that are highly prejudicial and directly relate to the acts and conduct of an accused. The Defence is of the view that the undue prejudice to the rights of an accused in such a situation, where incorrect or inaccurate information might be present in a statement due to translations errors, is so grave that the procedural requirement of Rule 68(3), *i.e* the witness not objecting to its submission, is insufficient to mitigate this concern.

30. *Finally*, the Defence notes the Prosecution's submission that should the Request be granted, its examination of P-1704 would be reduced from three hours to one hour.⁴¹ The Defence argues that in light of the importance of P-1704 to the charges brought against Mr. Yekatom, and in light of the principle

³⁶ See the Defence argument in [ICC-01/14-01/18-1181-Red](#), para. 38.

³⁷ The Defence notes that English is not a language that P-1704 either speak or write, see [CAR-OTP-2054-1136-R03](#), p. 1136.

³⁸ P-1521: [ICC-01/14-01/18-T-080-CONF-ENG ET](#), p. 27-28, lines 23-1.

³⁹ P-1521: [ICC-01/14-01/18-T-081-CONF-ENG ET](#), p. 65-66, lines 24-24.

⁴⁰ P-1521: [ICC-01/14-01/18-T-082-CONF-ENG ET](#), p. 32, lines 8-23.

⁴¹ [ICC-01/14-01/18-1176-Red](#), paras 16, 18.

of orality, an economy of merely two hours, i.e. less than two hearing sessions, is not sufficient to justify the Rule 68(3) Request of the Prosecution, the purpose of which is solely to expedite the proceedings. An examination of three hours, as anticipated by the Prosecution,⁴² is not excessive and does not put an undue burden on the schedule of the trial given the specific circumstances of P-1704. It is submitted that when confronted with highly prejudicial evidence [REDACTED] is in the interests of justice interest to hear the witness fully *viva voce* and take the time necessary to have a clear picture of the events.

CONCLUSION

31. The Defence developed in its response that P-1704's statement relates almost entirely to crucial events of the trial, namely the Yamwara School incident, the subject of Counts 11-17. It has also been demonstrated that information contained in this statement is subject to inconsistencies or contradictions with evidence from other witnesses. When assessing the specific situation of P-1704 and his statement, and further, given the Defence's alibi notice, it is submitted that the advantages of a fully *viva voce* testimony would serve the interests of justice, specifically the preservation of Mr. Yekatom's rights and the truth-seeking function of the Chamber. The Defence contends that all those factors militate in favour of the rejection of the Prosecution's Request.

CONFIDENTIALITY

32. The present response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version is being filed simultaneously.

⁴² *Ibid*, para. 18.

RELIEF SOUGHT

In light of the above, the Defence respectfully requests Trial Chamber V to:

REJECT the Prosecution Request.

RESPECTFULLY SUBMITTED ON THIS 7th DAY OF DECEMBER 2021



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