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**International
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Court**

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Date: **21 December 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 the
‘Prosecution’s Request for the Formal Submission of the Prior Recorded
Testimony of P-1811 pursuant to Rule 68(3)’, ICC-01/14-01/18-1204-Conf”,
20 December 2021, ICC-01/14-01/18-1224-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. The Defence for Mr. Alfred Rombhot Yekatom (“Defence”) hereby responds to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1811 pursuant to Rule 68(3)” (“Request”).¹
2. The Defence contends, as it did in relation to the Prosecution’s pending Rule 68(3) application for P-1704,² that the Request, should it be granted, would greatly prejudice the rights of Mr. Yekatom due to (i) the content of P-1811’s statement which touches upon the core of an important issue of the case, namely the Yamwara Base incident, and; (ii) the lack of reliability of P-1811’s statement which is affected by possible bias and witness contamination. In addition, the admission of P-1811’s statement pursuant to Rule 68(3) would not serve the interests of justice. In light of these considerations, 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,³ 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.⁴
4. On 10 November 2021, the Prosecution included P-1811 in its Final Witness List. An analysis of the “Summary” and “Expected relevance of testimony to the charges” of P-1811 shows that her entire testimony will be in relation to the

¹ [ICC-01/14-01/18-1204-Conf.](#)

² [ICC-01/14-01/18-1203-Conf.](#) A Public redacted version is also available [ICC-01/14-01/18-1203-Red.](#)

³ [ICC-01/14-01/18-685](#), para. 25.

⁴ *Ibid*, para. 31.

alleged Yamwara School incident, including [REDACTED], “the torture of Saint Cyr by the Anti-Balaka [REDACTED]”; and “the presence of Yekatom at the Anti-Balaka bases [REDACTED]”.⁵

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 incident.⁶
6. On 7 December 2021, the Prosecution filed its Rule 68(3) application for witness P-1811.⁷ A public redacted version of the application was notified the same day.⁸

APPLICABLE LAW

7. 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.

8. 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
9. 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

⁵ [ICC-01/14-01/18-724-Conf-AnxA](#), p. 29, witness n°41.

⁶ [ICC-01/14-01/18-818-Conf](#), para. 11. A public redacted version is also available [ICC-01/14-01/18-818-Red](#).

⁷ [ICC-01/14-01/18-1204-Conf](#).

⁸ [ICC-01/14-01/18-1204-Red](#).

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.

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

10. 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

11. Article 69(2) states that “the testimony of a witness at trial shall be given in person”, establishing the principle of orality at the International Criminal Court. As Rule 68(3) constitutes an exception to this fundamental principle, safeguards were put in place, both in Rule 68(1) and Article 69(2), to the effect that this disposition should not be used if prejudicial or inconsistent with the rights of the accused.
12. In the context of this cautious approach to an exception to a fundamental principle of criminal proceedings, the Defence contends that P-1811’s prior recorded testimony should not be admitted under Rule 68(3) as its content relates to disputed and core issues of the case as well as the acts and conduct of Mr. Yekatom (I); content the reliability of which is contested due to the presence of an alibi notice, perceivable bias and potential witness contamination (II); and finally, that the interests of justice would best be served by a fully *viva voce* testimony of P-1811 (III).

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.

I. The content of P-1811's statement is unsuitable for a submission via Rule 68(3)

13. The Defence argues that the content of P-1811's prior recorded testimony militates in favour of the rejection of the Prosecution's Request and a testimony fully *viva voce* of this witness.
14. As highlighted by the Prosecution in its Request, P-1811's statement is "highly relevant"¹² and goes to the "[a]ccused's acts and conduct"¹³ in relation to the Yamwara School incident, subject of Counts 11-17.
15. Indeed, P-1811 [REDACTED] during the abovementioned incident and specifically alleges [REDACTED],¹⁴ [REDACTED],¹⁵ [REDACTED],¹⁶ and the presence of Mr. Yekatom at the location of the abduction.¹⁷ P-1811's prior recorded testimony provides key information on the material elements of the alleged crimes charged as part of the Yamwara School incident.
16. Additionally, while [REDACTED], P-1811 nevertheless seems to also provide an alleged motive to the torture and killing of Saint-Cyr Lapo, in claiming that [REDACTED].¹⁸ This claim goes directly to the alleged discriminatory intent behind the charged crimes.
17. By virtue of P-1811's position in relation to the Yamwara School incident, her prior recorded testimony is susceptible to be heavily relied upon by the Prosecution, and in turn by the Chamber, in relation to the underlying Counts attached to this incident. In this regard, it is notable that in the Decision on the confirmation of charges issued by Pre-Trial Chamber II where P-1811 was cited on numerous occasions in the factual findings on this issue, including on crucial

¹² [ICC-01/14-01/18-1204-Red](#), para. 9.

¹³ *Ibid*, para. 17.

¹⁴ [CAR-OTP-2058-0003-R03](#), paras. 23-26

¹⁵ *Ibid*, paras. 26, 33, 40.

¹⁶ *Ibid*, para. 35.

¹⁷ *Ibid*, para. 38.

¹⁸ *Ibid*, para. 36.

issues for the accused such as the fact that “Yekatom was in charge of the Yamwara School base”¹⁹ and that “Saint Cyr Lapo N’Gomat was then taken away and has not been seen since”.²⁰

18. In light of the content of P-1811 statement and the importance of this witness on the acts and conduct of Mr. Yekatom in relation to Counts 11-17, the Defence argues that the Request should be denied and that the witness’s evidence should be elicited entirely *viva voce*.

II. The reliability of P-1811’s statement is contested

19. The Defence is of the view that the contested nature of P-1811’s prior recorded testimony militates, in the specific circumstances of this witness, in favour of hearing the testimony of the witness fully *viva voce* and, consequently, of the rejection of the Prosecution’s Request.
20. *First*, the Defence wishes to underline a visible bias in this witness statement. Indeed, P-1811 is [REDACTED],²¹ [REDACTED]. While this [REDACTED] is not sufficient in itself to demonstrate bias, the content of P-1811’s statement definitely gives ground to this possibility. A bias against the Anti-Balaka movement is manifestly present in P-1811’s contextualisation of the life during the crisis, the witness specifically indicating that there was no distinction between Muslims and non-Muslims and that “life was beautiful” up until the arrival of Anti-Balaka.²² An assertion which is in total opposition with the vast majority of the evidence of the case which clearly points to the creation of a rift between the Muslim and Christian population following the arrival of the Seleka and the documented mass human rights abuses that the Seleka regime

¹⁹ [ICC-01/14-01/18-403-Corr-Red](#), para. 113.

²⁰ *Ibid*, para. 115.

²¹ [CAR-OTP-2058-0003-R03](#), para. 17.

²² *Ibid*, paras. 12-13.

oversaw.²³ This fact was also pointed out by Pre-Trial Chamber II, which found that the Seleka subjected “the (mainly non-Muslim) civilian population to attack and atrocities”;²⁴ and more recently, in the *Said* case it found that “there was a Seleka organisational policy to target individuals perceived to support Mr Bozizé. Specifically, the evidence shows that (i) Christians [...] were repeatedly victimised by the Seleka”.²⁵ P-1811’s bias regarding the actions of the Seleka and Anti-Balaka is of significant relevance as this witness’s prior recorded statement relates to the discriminatory intent behind some of the alleged crimes committed during the so called “Yamwara School incident”.²⁶

21. As the existence of possible bias is an important factor in the assessment of the credibility of a witness,²⁷ the Defence contends that the abovementioned indicia of its existence with P-1811 militate in favour of her testimony to be held fully *viva voce*.
22. *Second*, the Defence [REDACTED] witness contamination is likely in relation to the witnesses of the Yamwara School incident.²⁸ Indeed, P-1811 [REDACTED].²⁹ Moreover, [REDACTED],³⁰ which further increase the likelihood of witness contamination.
23. *Third*, 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 late in the evening of the 24th December 2013.³¹ While P-

²³ See as an example P-0291 testimony, [ICC-01/14-01/18-T-051-CONF-FRA ET](#), p. 29-30, lines 19-7. A public redaction version is also available [ICC-01/14-01/18-T-051-Red-FRA WT](#).

²⁴ [ICC-01/14-01/18-403-Corr-Red](#), para. 61.

²⁵ *Prosecutor v. Said Abdel Kani*, Decision on the confirmation of charges against Mahamat Said Abdel Kani, 9 December 2021, [ICC-01/14-01/21-218-Red](#), para. 63.

²⁶ See paragraph 16 above.

²⁷ *Prosecutor v. Katanga*, Judgment pursuant to Article 74 of the Statute, 7 March 2014, [ICC-01/04-01/07-3436](#), para. 85.

²⁸ [REDACTED]

²⁹ [REDACTED]

³⁰ [REDACTED]

³¹ [ICC-01/14-01/18-818-Red](#), para.11

1811 doesn't specify exactly the temporal scope of [REDACTED],³² the Defence nevertheless contends that the existence of the alibi notice militates in favour of P-1811's narrative of the Yamwara School incident to be heard fully *viva voce*.

24. *Finally*, oral elicitation of P-1811's evidence is all the more necessary in light of her refusal to meet the Defence.³³ While it was her right to refuse such an interview, the Defence nevertheless contends that in the specific circumstances deriving from the subject of P-1811 testimony, namely the Yamwara School incident, this refusal militates in favor of the witness providing her version of this incident *viva voce*. Indeed, had the Defence been given an opportunity to meet P-1811 it would have been able to discuss with her key issues and address specific topics, such [REDACTED] Mr. Yekatom's presence, which do not transpire from the statements given the absence in the record of any questions put to her by the investigators on this matter. The incompleteness of crucial and potentially incriminating evidence in a prior recorded testimony is prejudicial to Mr. Yekatom. Should it be submitted under Rule 68(3,) it would force the Defence to seek clarification on every allegation contained in the written testimony of the witness.³⁴
25. A fully *viva voce* testimony of P-1811 will enable the Defence for Mr. Yekatom to hear for the first time the specific questions by the calling party and the answers provided, together with a natural and spontaneous account from this witness as well as to observe her reactions and demeanor while doing so. This

³² [CAR-OTP-2058-0003-R03](#), para. 38, with P-1811 only indicating [REDACTED].

³³ Email from the Prosecution to the Defence dated 28 February 2020 at 11:14. Available upon request.

³⁴ As an example, see the recent in-court testimony of P-0876 in which he was asked for the first time during his examination-in-chief the source of the information to the effect that in the zone allegedly under Mr. Yekatom's control "there were many cases of unnecessary killings and exactions and that there was even some genocide" ([ICC-01/14-01/18-T-085-CONF-ENG](#) ET, p. 46, lines 4-16). Had this information not been elicited during its examination-in-chief, the Defence would have had to enquire for the first time about the subject during its own examination of the witness to clarify his written prior recorded testimony, the knowledge of this information was crucial and permitted the Defence to only make P-0876 confirms that he only heard about those crimes over the radio ([ICC-01/14-01/18-T-087-CONF-ENG](#) ET, p. 17, lines 17-23). The importance of this information was demonstrated by the Prosecution's attempt to re-examine P-0876 on the specific topic ([ICC-01/14-01/18-T-089-CONF-ENG](#) ET, p. 5-8, lines 19-8).

will enable the Defence to better assess her evidence, its reliability, and adjust its own examination of the witness accordingly. Such a comprehensive assessment of P-1811's narrative of the Yamwara School incident will not be possible if her written statement is submitted under Rule 68(3), with the Prosecution only conducting a "limited and focused supplemental examination-in-chief".³⁵

III. The interests of justice would not be advanced by the submission of P-1811's statement under Rule 68(3)

26. The Defence argues that the advantages of a Rule 68(3) submission of P-1811's prior recorded testimony are minimal, and that it is in the interests of justice to hear the testimony of this witness fully *viva voce*.
27. At the outset the Defence recalls the advantages of a testimony *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.³⁶

28. Those advantages are all the more important in light of the status of P-1811 as a crime base witness, [REDACTED] of an event which constitutes a multi-charge incident of this case.
29. In addition, the Defence submits that the examination time that would be spared by the Prosecution for P-1811, should the Request be granted, would be minimal. Indeed, the Prosecution indicated that this examination would only be reduced from three to one hour,³⁷ meaning that this economy of two hours would shorten the testimony by a little more than a single session.³⁸ In light of

³⁵ [ICC-01/14-01/18-1204-Red](#), para. 15.

³⁶ [ICC-01/14-01/18-685](#), para. 33.

³⁷ [ICC-01/14-01/18-1204-Red](#), paras. 16, 18.

³⁸ The Defence considered for this assertion that one session is equivalent to 1h30, which is currently the norm in the proceedings.

the principle of orality enshrined by Article 69(2) and of the importance of P-1811's evidence to several charges as well as her evidence on the acts and conduct of the accused, the Defence is of the view that the admission of her prior recorded testimony under Rule 68(3) would not serve the interests of justice. Moreover, the current estimation by the Prosecution of an examination of three hours for P-1811 is not excessive and does not unduly burden the scheduling of the trial; by way of comparison, an examination of three hours (or two sessions) is the amount of time taken for Witness P-0475³⁹ who was arguably relevant for a narrower number of charges of this case.

30. As the witness does not provide what could be considered as background information, nor does P-1811 provides "technical" information,⁴⁰ which better fit the purpose of submission of prior recorded testimony under Rule 68(3), the Defence contends that the Prosecution Request should be denied.

CONFIDENTIALITY

31. The present response is filed on a confidential basis corresponding to the classification of the Request and due to references to identifying information of P-1811. A public redacted version is being filed simultaneously.

RELIEF SOUGHT

32. In light of the above, the Defence respectfully requests Trial Chamber V to:
- REJECT** the Prosecution's Request;

³⁹ [ICC-01/14-01/18-T-090-CONF-ENG ET](#), p. 1-63.

⁴⁰ 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.

RESPECTFULLY SUBMITTED ON THIS 21th DAY OF DECEMBER 2021

A handwritten signature in blue ink, appearing to read 'Mylène Dimitri'.

Me Mylène Dimitri

Lead Counsel for Mr. Yekatom

The Hague, the Netherlands