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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

with Confidential Annexes A and B

**Public Redacted Version of “Prosecution’s Request for the Formal Submission of
the Prior Recorded Testimony of P-0889 pursuant to Rule 68(3)”, ICC-01/14-01/18-
1170-Conf, dated 8 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-0889, 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-0889’s prior recorded testimony comprises the written and transcribed statements of the witness’s two interviews on 4 to 8 May 2016 and 7 to 11 July 2020 (“Prior Statement”) and 44 associated exhibits.² 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-0889 was [REDACTED]. His Prior Statement discusses: (i) the creation and origins of the Anti-Balaka; (ii) the Seleka’s commission of crimes in BANGUI; (iii) the emergence of the Anti-Balaka movement, its organisation and structure, including the creation of the Anti-Balaka National Coordination and the roles played by key members of the Coordination; (iv) the preparation and execution of the Anti-Balaka’s 5 December 2013 attack of BANGUI, including the coordination of the troops involved and the provision of weapons and ammunitions used during the attack; (v) Anti-Balaka meetings, including the venues, the attendees, and their frequency; (vi) the Anti-Balaka’s use of membership ID badges, including their production and distribution; and (vii) the leadership roles of both NGAISSONA and YEKATOM within the Anti-Balaka.

¹ ICC-01/14-01/18-631, para. 58.

² 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.

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.³

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

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* (a Summary Chart) lists the interview written statement and transcripts, and the corresponding associated exhibits. It also identifies the relevant paragraphs of the Confirmation Decision to which the witness' evidence relates and, where applicable, any charged incidents the witness discusses.

6. Due to the length of the Prior Statement,⁷ a summary of the transcribed statement, organised by topic, is attached at Confidential Annex B to facilitate the Parties', Participants', and Chambers' understanding of its content, and to more easily

³ 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 ICC-01/14-01/18-685, para. 34; See ICC-02/11-01/15-744, para. 69 ("*Gbagbo and Blé Goudé Appeals Decision*").

⁵ See ICC-01/14-01/18-685, para. 31, 32.

⁶ 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).

⁷ The Prior Statement comprises 21 interview transcripts totalling approximately 697 pages and a 21 pages written statement.

identify its relevance and probative value (“Summary”). The Summary is not tendered for formal submission, rather, it clearly and concisely sets out the substance of the transcripts comprising the Prior Statement hereby tendered. Annex B also contains the 2016 written statement, with grey highlights identifying the portions on which the Prosecution does not seek to rely.

II. CONFIDENTIALITY

7. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), 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.

III. SUBMISSIONS

A. Applicable Law

8. 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

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.

B. The Prior Recorded Testimony fulfils all Requirements of Rule 68(3)

9. The Prior Statement may be deemed formally submitted under rule 68(3). P-0889 will attest to its accuracy; he will be present in court; and will be available for examination by the Defence, Participants, and the Chamber.

10. As described below, the Prior Statement is highly relevant and probative. It goes to the proof of the contextual elements for war crimes and crimes against humanity, in particular the Anti-Balaka being an organised armed group between September 2013 and December 2014 (“Relevant Period”). It also describes NGAISSONA’s role within the Anti-Balaka notably as a political leader, and the commission of crimes by YEKATOM’s group, notably in BANGUI and on the MBAIKI axis.

11. P-0889’s Prior Statement comprises 718 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.

12. The witness’s Prior Testimony establishes the following:

- P-0889 [REDACTED].
- The witness [REDACTED] BOZIZE gave his speech at PK-0 in BANGUI, prior to the 24 March 2013 Seleka coup, telling the population to be vigilant as the “foreigners” were coming to kill them. He also describes how Steve YAMBETE and Levi YAKETE organised the mobilisation of youth in BANGUI through COCORA.
- P-0889 recounts the circumstances of the Seleka coup and the Seleka’s widespread commission of crimes in BANGUI. He recounts that Emotion NAMSIO (“NAMSIO”) and others set up a self-defence group in BOY-RABE to counter the Seleka.

- The witness describes the origins of the Anti-Balaka movement as comprised of self-defence groups that emerged spontaneously in various villages in reaction to the Seleka's crimes.
- He recounts [REDACTED] local Anti-Balaka leaders, including Achille GODONAM, DEDANE, Teophile NDANGBA, Florent KEMA, and facilitating the movement of their troops to BANGUI in preparation of the 5 December 2013 attack.
- He describes the 5 December 2013 attack of BANGUI, its military objectives, and leadership. The witness describes [REDACTED]. He describes how Anti-Balaka from the provinces gathered around BANGUI waiting for reinforcement before launching the 5 December 2013 attack, and identifies YEKATOM, Yvon KONATE, and Rodrigue NGAIBONA (aka ANDJILO) as leading groups that were involved.
- P-0889 describes NGAISSONA's authority over the Anti-Balaka movement. He explains how NGAISSONA ordered the arrest of Anti-Balaka leaders who were committing crimes in BOY-RABE. He also describes how NGAISSONA convinced YEKATOM to dismantle barricades that he had erected along the MBAIKI axis.
- The witness describes the Anti-Balaka's commission of crimes against the Muslim population in BANGUI and the provinces, such as pillaging and the destruction of mosques. He further explains how the Anti-Balaka specifically targeted Muslims whom they believed supported the Seleka, leading the Muslims to massively flee their homes.

13. P-0889's proposed evidence is corroborated by, *inter alia*, the evidence of P-0446, P-0808, P-0876, P-0884, P-0888, P-0954, P-0966, and P-2251.

C. Associated Exhibits

14. The Prosecution tenders 44 associated exhibits for formal submission, as set out in Confidential Annex A. P-0889 provided 28 of these documents to investigators when providing the Prior Statement: a sketch of the BOEING neighbourhood indicating the locations of the Anti-Balaka bases (Annex to his 2016's Statement); [REDACTED]¹¹ [REDACTED]; six satellite images on which P-0889 identified several locations, including the PCU building, the houses of MOKOM, [REDACTED], NGAISSONA and his father, and NGAISSONA's warehouse (Annexes 27 to 32 to his Prior Statement).

15. 12 of the associated documents were shown to P-0889 during his Prior Statement: [REDACTED].

16. Four of the associated documents were extracted from a [REDACTED] phone [REDACTED] from P-0889 and discussed in his Prior Statement: [REDACTED]; two undated WhatsApp audio files extracted from P-0889's phone and their corresponding transcripts and translation; and a WhatsApp SMS message.

17. P-0889 discussed all of the associated exhibits in his Prior Statement, which thereby form an integral part of the testimony itself.¹² As such, their admission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-0889's evidence.

¹¹ Some of the Documents collected by the Prosecution during P-0889's 2016 interview were subsequently annexed to his second statement. To avoid duplication, the Prosecution has only included the original version copied from the witness' computer in 2016.

¹² ICC-01/14-01/18-907-Conf, para. 13.

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

18. Although the Prior Statement is comprehensive, a limited and focused supplemental examination-in-chief to clarify and elaborate P-0889's testimony would be beneficial to the proper adjudication of the issues arising from the charges.

19. Mindful of the Chamber's direction concerning the need to "streamline its questioning considerably",¹³ the Prosecution has carefully reviewed its two-hour estimate given for P-0889 in its Final Witness List.¹⁴ The Prosecution considers that it cannot further reduce the estimate of two hours. This estimated supplemental examination of P-0889 takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,¹⁵ and accounts for the prospect of appropriate redirect examination.

20. A lesser amount of time would not provide the Prosecution with a reasonable opportunity to develop, explain, or clarify, limited facets of P-0889'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.

21. 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 around eight hours to present.

¹³ ICC-01/14-01/18-685, para. 36.

¹⁴ ICC-01/14-01/18-724-Conf-AnxA, p. 23.

¹⁵ 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).

E. Balance of interests

22. The projected shortening of P-0889's in-court-testimony by half is "considerable", and on balance the introduction of P-0889'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 the fact 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

23. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the Prior Statement of P-0889 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.



Karim A. A. Khan QC, Prosecutor

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