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**International
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Date: **11 January 2022**

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-2084 pursuant to Rule 68(3)’ (ICC-01/14-01/18-1210-Conf)”,
ICC-01/14-01/18-1237-Conf, 10 January 2022**

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-2084 pursuant to Rule 68(3)'¹ ('Request').
2. The Request should be denied. The tendered witness statement of P-2084 ('Statement') contains allegations that are central to core issues in the case, in relation to materially disputed issues. Further, the estimated time that would be saved should the Request be granted is minimal, and in any event does not outweigh the undue prejudice that would be engendered by the introduction of the Statement under Rule 68(3). Lastly, [REDACTED] involving P-2084 affect the reliability of certain aspects of the Statement, which further militates against the granting of the Request.

APPLICABLE LAW

3. 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.

4. 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 determining whether it is not prejudicial to or inconsistent with the rights of the accused or with the

¹ [ICC-01/14-01/18-1210-Conf](#). A public redacted version is also available [ICC-01/14-01/18-1210-Red](#). On 20 December 2021, the Chamber granted an extension of the deadline to respond to the Request, to 20 January 2022; see, Email from Trial Chamber V to Parties and Participants, 20 December 2021 at 09.26.

fairness of the trial generally, to allow for the evidence in question to be introduced under Rule 68 (3).²

5. 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

I. The Statement contains allegations that are central to core issues in the case, in relation to materially disputed issues.

6. As conceded in the Request, the Statement contains allegations regarding the presence of child soldiers in Mr Yekatom's group and the forcible displacement of the Muslim population along the PK9-MBAIKI axis – a number of which are central to core issues in this case and are materially disputed.

A. Allegations regarding child soldiers

7. The Statement contains extensive, highly prejudicial allegations as regards the presence of child soldiers within Mr Yekatom's group, which relate directly to material elements of the disputed charge comprising Count 29.⁴
8. In the Statement, P-2084 alleges *inter alia* that he witnessed children with the Anti-Balaka in PISSA and MBAIKI on 30 January 2014, and that these children were aged 10 upwards, and were armed and wearing *gris-gris*; and that children

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 ('Gbagbo & Blé Goudé Judgment'), para. 71.

³ *Prosecutor v. 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 See [ICC-01/14-01/18-1210-Conf](#), paras 2, 9, 11. A public redacted version is also available [ICC-01/14-01/18-1210-Red](#).

were among the Anti-Balaka when they were maintaining security in PISSA.⁵ He expresses confidence in his ability to assess their ages correctly.⁶ Further, he implicates Mr Yekatom by name, claiming that ‘there were children amongst his ranks’ – an allegation that goes directly to Mr Yekatom’s charged acts and conduct under Count 29.⁷

9. However, while P-2084 does claim to have directly witnessed the presence of children amongst the Anti-Balaka in PISSA and MBAIKI as set out above, he makes further claims of which the source of his information remains unclear – for instance, that ‘children from BIMBO to PISSA joined the Anti-Balaka’; that ‘[a]t first there were many children among the Anti-Balaka’; that ‘[t]he very young children, for instance the 10 year olds did small jobs, gathering intelligence, fetching water and so on’; and that ‘UNICEF and ESF negotiated with YEKATOM to release the children to be reintegrated in society’.⁸
10. Nor can it simply be assumed that P-2084 was a direct witness of these particular allegations, in the absence of further specificity. In this respect, the Chamber will recall the recent testimony of P-0876 who, before the Chamber, clarified prejudicial allegations made during his interview regarding Mr Yekatom’s acts and conduct by repeatedly and consistently stating that he had not in fact directly witnessed the conduct in question and that he had merely heard it on the radio.⁹ While the Prosecution sought to impugn the credibility of P-0876 on this point, the fact remains that Prosecution investigators failed to sufficiently enquire as to the source of these allegations during his interview.¹⁰

⁵ [CAR-OTP-2094-0968](#), para. 87.

⁶ [CAR-OTP-2094-0968](#), para. 87.

⁷ [CAR-OTP-2094-0968](#), para. 87.

⁸ [CAR-OTP-2094-0968](#), paras 87, 89.

⁹ See T-085, 44:18-47:24; T-087, 17:6-18:10; and T-089, 4:23-5:18.

¹⁰ See [CAR-OTP-2046-0324](#), p. 0342; [CAR-OTP-2046-0473](#), p. 0481-0482; and [CAR-OTP-2046-0267](#), p. 0273-0274.

11. Further caution regarding P-2084's claims is warranted, given his reliance on information 'supplied' to him by [REDACTED],¹¹ [REDACTED]. The Prosecution submission that P-2084's proposed evidence is corroborated by [REDACTED] should be assessed in this light.¹²
12. As the Chamber and Parties are aware, the validity of the ESF demobilisation ceremonies and lists is disputed. Specifically, it is the Defence's case that the individuals on the lists were not child soldiers, were not part of Mr Yekatom's group, and/or were not under 15 years old at the time of the events; and that Mr Yekatom and ESF representatives, [REDACTED], were aware of this fact, and participated in the 'demobilisation' project with the aim of securing financial support for these individuals and for ESF from relevant civil society actors. [REDACTED], his personal interest in claiming the legitimacy of the project is self-evident.
13. Highly relevant in this regard is the recent testimony of Prosecution witness P-0876, who denied the presence of child soldiers among the Anti-Balaka and stated, '[the demobilisation projects were] a scam, otherwise it was an attempted scam to make money on the back of those small children, those innocent children who never participated in any military mobilisation.'¹³
14. As the Chamber will recall, P-0876 further stated, in relation to the NGOs tasked with receiving and administering UNICEF funding:

They are given money. UNICEF receives money and UNICEF distributes that money to the NGOs [...]. But in any case, those who received those funds must justify the reality of their actions and their operations. [...] I can only point out that there was indeed a huge gap between what was announced and what we saw in the field.¹⁴

¹¹ [CAR-OTP-2094-0968](#), para. 89.

¹² Cf. [ICC-01/14-01/18-1210-Conf](#), para. 12. A public redacted version is also available [ICC-01/14-01/18-1210-Red](#).

¹³ T-087, 25:10-12; see also T-087, 29:5-7 ('I am shocked because children were being used, children who were not child soldiers at all, and they were being presented as child soldiers.')

¹⁴ T-087, 28:3-11.

15. P-2084 stated that it was [REDACTED] (which notably P-2084 had not himself seen).¹⁵ In this regard, it should be noted that [REDACTED] interview with Prosecution investigators took place in March 2018 and thus preceded that of P-2084 by seven to nine months.¹⁶ Nor is it speculative to suggest that [REDACTED], P-2084's wider recollection of the 2014 events – not least given that four of the five interview sessions over which P-2084's statement was taken, occurred after the arrest and transfer to the Court of Mr Yekatom, itself the subject of extensive media coverage within the Central African Republic.¹⁷
16. [REDACTED] prospective evidence is itself strongly disputed. Further, P-2084's evidence, to the effect that he never saw [REDACTED], should be seen in the context of the evidence of P-2083. Specifically, P-2083 told Prosecution investigators that [REDACTED] – this is despite P-2083's role [REDACTED].¹⁸
17. The fact that [REDACTED] informed Prosecution investigators that he was 'not prepared to give evidence in court as to [the information provided in his interview]', which he appears to have maintained even after having been informed of the possibility of testifying with protective measures, raises concerns about the reliability of [REDACTED] statement itself, and by extension, about the reliability of the information that [REDACTED] provided to P-2084.
18. In addition, P-2084's relationship with [REDACTED] – gives rise to the need for further caution in the Chamber's assessment of the Statement and by extension, the Request.

¹⁵ [CAR-OTP-2094-0968](#), para. 87.

¹⁶ [CAR-OTP-2071-0259-R03](#), p. 0259.

¹⁷ P-2084's interview took place over the following days: 26 October 2018, 28-29 November 2018, and 3-4 December 2018; see, [CAR-OTP-2094-0968](#), p. 0968; Mr Yekatom was arrested in CAR on 29 October 2018 and transferred to the Court on 17 November 2018.

¹⁸ [CAR-OTP-2110-0333-R01](#), paras 20-21, 24, 26.

19. First, the fact that [REDACTED] would represent an interest on the part of P-2084 to legitimise the project; and more broadly, to provide a false account as regards the existence of child soldiers in LOBAYE, including among Mr Yekatom's group.
20. Second, the fact that [REDACTED], raises the possibility of additional witness contamination. The Defence strongly disputes the account of [REDACTED]. Notably, Prosecution investigators do not appear to have inquired as to when and how P-2084 was informed that [REDACTED]; and as such, the risk remains that P-2084 [REDACTED].¹⁹
21. Lastly, the manner of use of the term 'children' and 'child soldiers' in the Statement gives rise to ambiguity as to whether the individuals referred to comprise 'child soldiers' for the purposes of the Rome Statute. For instance, whereas P-2084 stated that [REDACTED]²⁰ – [REDACTED].²¹ Likewise, P-2084 refers to 'children' participating in a ceremony at the PISSA town hall, but states that 'all' of these children were 'over 15 years old'.²² P-2084's statement that 'while still in the Anti-Balaka they were called child soldiers' is also unclear in meaning.²³
22. In light of the above – specifically, the lack of clarity as regards the source of P-2084's allegations regarding child soldiers; the extent to which these allegations may have been contaminated by other Prosecution witnesses; and as well as the critical ambiguity in the terminology employed by P-2084 – the introduction of the Statement via Rule 68(3) would unduly prejudice these proceedings. P-2084 should be called to testify *viva voce* in full, and to clearly provide the source(s) of his information, further details regarding the nature and timing of his

¹⁹ [CAR-OTP-2094-0968](#), para. 93.

²⁰ [CAR-OTP-2094-0968](#), para. 93.

²¹ Article 8(2)(e)(vii) of the Statute prohibits 'Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities'.

²² [CAR-OTP-2094-0968](#), para. 91.

²³ [CAR-OTP-2094-0968](#), para. 89.

conversation(s) with Prosecution witnesses, and to precisely define any and all reference to ‘children’ and ‘child soldiers’. Nor should the burden of leading this highly relevant information be shifted onto the Defence – the responsibility of clarifying this information lay with Prosecution investigators at the time; their failure to do so means that it now properly lies with Prosecution lawyers.

B. Allegations regarding forcible displacement along the PK9-MBAIKI axis

23. In a similar vein, the Statement contains highly prejudicial, disputed allegations as regards the displacement of the Muslim population along the PK9-MBAIKI axis, which relate to no less than three charges brought against Mr Yekatom.²⁴
24. Specifically, P-2084 alleges that Muslims fled from villages such as BIMON, KAPOU, BOSSONGO, PISSA and MBAIKI along the PK9-MBAIKI axis, because of the Anti-Balaka advance along that axis, and their fear of revenge reprisals of the Anti-Balaka against the Muslim civilians²⁵ – notably employing language that mirrors the charge as confirmed by Pre-Trial Chamber II in its Confirmation Decision,²⁶ and the submissions as set out in the Prosecution’s Trial Brief.²⁷ He further alleges that Muslims left MBAIKI to avoid being killed by the Anti-Balaka;²⁸ and that had they not left, the Anti-Balaka would have attacked them and many people would have died.²⁹
25. P-2084 further alleges that, at a 30 January 2014 meeting at the Sainte Jeanne-d’Arc Church in MBAIKI [REDACTED], Mr Yekatom, and representatives from Sangaris, UNHCR, and the Danish Refugee Council, ‘a decision was taken to have the Muslims leave for their security’;³⁰ and further, that at that meeting,

²⁴ Counts 24-25, and 28.

²⁵ [CAR-OTP-2094-0968](#), para. 64.

²⁶ [ICC-01/14-01/18-403-Conf-Corr](#), p. 106. A public redacted version is also available [ICC-01/14-01/18-403-Red-Corr](#).

²⁷ [ICC-01/14-01/18-723-Conf](#), para. 467 and fn. 1180. A public redacted version is also available [ICC-01/14-01/18-723-Red](#).

²⁸ [CAR-OTP-2094-0968](#), para. 66.

²⁹ [CAR-OTP-2094-0968](#), para. 67.

³⁰ [CAR-OTP-2094-0968](#), para. 66.

Mr Yekatom publicly stated that ‘it would be better if [the Muslims] left to avoid bloodshed’.³¹ These disputed allegations relate to material elements of the relevant charges, including the *mens rea* of Mr Yekatom.³²

II. The estimated time saved would be minimal and outweighed by the prejudicial effect of the formal submission of the Statement.

26. As conceded in the Request, the Prosecution’s estimate as to the time saved should the Request be granted amounts to a mere two hours – i.e. little more than one session.³³
27. Contrary to the Request, the projected shortening of the testimony of P-2084 by two hours is negligible; and in any event, is far from ‘considerable’.³⁴ By way of comparison, the Defence recalls that Chamber’s most recent decision on Prosecution Rule 68(3) requests involved time savings of seven hours (for P-0992), five hours (for P-0446); three hours (for P-0888 – which request was unopposed); and six hours (for P-0889).³⁵
28. Further recalling that the aim underlying the Rule 68(3) procedure is the promotion of the expeditiousness of the proceedings;³⁶ the Defence respectfully submits that it cannot be reasonably argued that the projected time-saving of a mere two hours would meaningfully advance this cause.

³¹ [CAR-OTP-2094-0968](#), para. 67.

³² See, *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.

³³ [ICC-01/14-01/18-1210-Conf](#), paras 14, 16. A public redacted version is also available [ICC-01/14-01/18-1210-Red](#).

³⁴ *Contra*, [ICC-01/14-01/18-1210-Conf](#), para. 17. A public redacted version is also available [ICC-01/14-01/18-1210-Red](#). See where Trial Chamber X found that estimated time savings of 1 hour and ten minutes was ‘negligible’, *Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2) of the Rules, [ICC-01/12-01/18-1267-Red](#), 17 February 2021, paras 6-9; see also, where Trial Chamber I found that estimated time savings of 2.5 hours was ‘relatively limited’, *Prosecutor v Gbagbo & Blé Goudé*, Decision on the “Prosecution’s application to conditionally admit the prior recorded statement and related documents in relation to Witness P-0045 under rule 68(3)”, [ICC-02/11-01/15-789](#), 2 February 2017, para. 9.

³⁵ See [ICC-01/14-01/18-1226-Conf](#), paras 12, 15, 20, 23, 25, 28 and 30.

³⁶ See [Gbagbo & Blé Goudé Judgment](#), paras 60-61.

29. In any event, what little might be gained in expeditiousness would not outweigh the prejudice that would be occasioned to Mr Yekatom's fair trial rights by the introduction of the Statement via Rule 68(3).³⁷

III. [REDACTED] in relation to P-2084 militate against the admission of the Statement.

30. In the Statement, [REDACTED] regarding P-2084 – which he denied – were put to him by Prosecution investigators.³⁸

31. P-2084 was [REDACTED].³⁹ [REDACTED].⁴⁰

32. While the existence [REDACTED] do not *per se* preclude the formal submission of their evidence under Rule 68(3) or affect their reliability, in the particular circumstances, it is submitted that [REDACTED] comprise a further factor militating against the granting of the Request.

33. Specifically, given the nature and subject of certain of P-2084's claims in the Statement, as well as their surrounding circumstances, their reliability is particularly susceptible to being affected by broader [REDACTED].

34. For instance, whereas P-2084 claims in the Statement that abandoned Muslim houses in MBAIKI 'were entered by the local population and the Anti-Balaka elements'⁴¹ – itself an allegation relevant to Counts 24-25 and 28 in these proceedings – the Chamber will recall Prosecution witness P-0475, who recently gave evidence that during the crisis, [REDACTED].⁴² [REDACTED].

35. In a similar vein, the circumstances surrounding P-2084's evidence in relation to alleged child soldiers, the ESF 'demobilisation' project, and his relationship(s)

³⁷ See [Gbagbo & Blé Goudé Judgment](#), para. 62.

³⁸ [CAR-OTP-2094-0968](#), para. 97.

³⁹ See Annex A, [CAR-OTP-2092-1536](#), p. 1536.

⁴⁰ See Annex A, [CAR-OTP-2092-1536](#), p. 1536-1537.

⁴¹ [CAR-OTP-2094-0968](#), para. 69.

⁴² See [CAR-OTP-2104-0116-R03](#), para. 66; see also T-091, 5:5-12.

and interaction(s) with [REDACTED] likewise give rise to potential motivation for P-2084 to provide an untruthful account of these particular issues.

CONFIDENTIALITY

36. This response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed forthwith.

RELIEF SOUGHT

37. For the above reasons, the Defence respectfully requests that the Chamber:

DENY the Request.

RESPECTFULLY SUBMITTED ON THIS 11TH DAY OF JANUARY 2022

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

Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands