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**International
Criminal
Court**

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Date: **18 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 the
“Prosecution’s Request for the Formal Submission of the Prior Recorded
Testimony of P-1595 pursuant to Rule 68(3)”, 15 December 2021, ICC-01/14-
01/18-1217-Conf’, 18 January 2022, ICC-01/14-01/18-1252-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-1595 pursuant to Rule 68(3)” (“Request”).¹
2. The Defence contends that it is in the interests of justice that P-1595 provide his testimony fully *viva voce*. The position and location of P-1595 during the conflict is relatively important and unique, he is also one of the first witnesses scheduled to testify before the Court in relation to the events that occurred on the PK9-MBAIKI axis during the 2013-2014 conflict, which increases the interest for all parties and participants to hear his full testimony. In addition, the statement of P-1595 contains several prejudicial allegations against Mr. Yekatom. The minimal time, two hours, that would be saved during the examination-in-chief by the submission of P-1595’s statement pursuant to Rule 68(3) does not outweigh the undue prejudice that would result from it, nor does it outweigh the advantages of hearing P-1595 fully *viva voce*. Consequently, the Defence argues that 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

¹ [ICC-01/14-01/18-1217-Conf.](#)

² [ICC-01/14-01/18-685](#), para. 25.

³ *Ibid*, para. 31.

4. On 15 December 2021, the Prosecution filed its Request for the Formal Submission of the Prior Recorded Testimony of P-1595 pursuant to Rule 68(3).⁴ A public redacted version of the Request was filed the same day.⁵
5. On 17 December 2021, the Defence requested an extension of the deadline to respond the Request until 14 January 2022,⁶ which was granted by the Single Judge on 20 December 2021.⁷
6. On 8 January 2022, the Defence requested a second extension of four days of the deadline in order to respond the Request to 18 January 2022;⁸ this request was granted by the Single Judge on 10 January 2022.⁹

APPLICABLE LAW

7. 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.

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.¹⁰
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

⁴ [ICC-01/14-01/18-1217-Conf.](#)

⁵ [ICC-01/14-01/18-1217-Red.](#)

⁶ E-mail from the Defence to the Chamber dated 17 December 2021 at 14:37.

⁷ E-mail from the Chamber to the Parties dated 20 December 2021 at 09:27.

⁸ E-mail from the Defence to the chamber dated 8 January 2022 at 11:50.

⁹ E-mail from the Chamber to the Parties dated 10 January 2022 at 14:12.

¹⁰ *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.

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).¹¹

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.¹²

SUBMISSIONS

11. The Defence will first argue that the interests of justice would best be served by a fully *viva voce* testimony of P-1595 before the Court (I) ; then, it will be argued that the statement of P-1595 contains allegations that make it unsuitable for submission pursuant to Rule 68(3) (II).

I. A fully *viva voce* testimony of P-1595 would advance the interests of justice

12. 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.¹³ 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.

¹¹ *Ibid*, para. 71.

¹² *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.

¹³ See [ICC-ASP/12/37/Add.1](#), Annex II.A, para. 5.

13. The Defence argues that the interests of justice would best be served by a fully *viva voce* testimony of P-1595 in light of his particular importance to the charges related to the PK9-MBAIKI axis and of the negligible time saved, should his prior recorded statement be submitted under Rule 68(3).

A. On the importance of P-1595's evidence

14. According to his role and activities before and during the events, P-1595 is [REDACTED] for the PK9-MBAIKI axis, which relate to no less than five charges brought against Mr Yekatom.¹⁴ Indeed, P-1595 is a [REDACTED] prior to and during the events;¹⁵ the Defence further underlines that P-1595 [REDACTED] of the PK9-MBAIKI axis scheduled to testify.¹⁶ Additionally, P-1595 was also [REDACTED],¹⁷ [REDACTED]¹⁸ [REDACTED] which is described as a sports club "[REDACTED]".¹⁹
15. His knowledge of this particular town is all the more important in light of the fact that MBAIKI is highly relevant to the case. MBAIKI is indeed the capital of the Lobaye prefecture, where Mr. Yekatom's group allegedly "took over a number of villages" and "continued this pattern of crimes and threats".²⁰ MBAIKI is also the town where "nearly all Muslims in Mbaïki were evacuated by Chadian forces".²¹
16. P-1595's proposed evidence is related to how "people lived alongside each other without any trouble" in "one united society" before the events.²² In his statement he also describes the period during which the Seleka were in MBAIKI

¹⁴ Counts 24-28.

¹⁵ [CAR-OTP-2104-0274-R02](#), paras. 12, 18.

¹⁶ The Defence notes that [REDACTED].

¹⁷ [CAR-OTP-2104-0274-R02](#), para. 11.

¹⁸ *Ibid*, para. 12.

¹⁹ *Ibid*, para. 22.

²⁰ [ICC-01/14-01/18-403-Conf-Corr](#), para. 139.

²¹ [ICC-01/14-01/18-403-Conf-Corr](#), para. 139.

²² [CAR-OTP-2104-0274-R02](#), paras. 20-22.

under two different commands, including crimes he directly witnessed²³ and interactions he had with the Seleka.²⁴ P-1595's statement also covers the beginning of the animosity between Christians and Muslims,²⁵ how the Muslims started living in fear²⁶ and how P-1595 tried himself to calm the situation, for example by [REDACTED].²⁷ Finally, P-1595 also provides information on the killing of the Deputy Mayor of MBAIKI, Mr Dido Saleh, which is specifically charged in Counts 26-27.²⁸

17. In the Decision on the confirmation of charges, Counts 24 and 25 were confirmed "in the context of the Anti-Balaka's advance through and takeover of villages along the PK9-Mbaïki Axis"²⁹ and throughout the fact that "many Muslims fled their villages *in fear* [emphasis added]".³⁰ In the Prosecution's Trial Brief, what "caused MBAIKI's Muslim population to flee *en masse*" is "the increasingly hostile environment towards Muslims that YEKATOM's Group perpetuated and heightened".³¹
18. Due to the terminology employed by the Pre-Trial Chamber for those charges and what seems to be the Prosecution case on PK9-MBAIKI axis, the feeling of the population and especially its fear played a central role. The fear is a subjective feeling that can be only analysed in an holistic manner. Therefore, all the elements contributing to the reason of the departure of the Muslims from their villages to MBAIKI and from MBAIKI to Chad or other places are not only background information³² but become themselves central to core issues of the charges.

²³ *Ibid*, paras. 23-34.

²⁴ *Ibid*, paras. 25-26, 31-32.

²⁵ *Ibid*, para. 28.

²⁶ *Ibid*, para. 36.

²⁷ *Ibid*, paras. 37-39.

²⁸ *Ibid*, paras. 95-99.

²⁹ [ICC-01/14-01/18-403-Conf-Corr](#), p. 105.

³⁰ [ICC-01/14-01/18-403-Conf-Corr](#), para. 139.

³¹ [ICC-01/14-01/18-723-Conf](#), para. 469.

³² [ICC-01/14-01/18-1217-Conf](#), paras. 2, 12.

B. On the advantages of a *viva voce* testimony for P-1595

19. The Defence notes that out of the 11 “crime base witnesses for the PK9-MBAIKI axis”,³³ only one, P-1666, is currently scheduled to provide his full testimony in court.³⁴
20. The PK9-Mbaiki axis is an important subject of this case linked to six different Counts, out of the 21 brought against Mr Yekatom. The Defence argues that it is in the interest of justice to have multiple witnesses providing their account, on the alleged events that occurred on the PK9-MBAIKI axis, fully *viva voce*. This mode of testimony will allow the Chamber, Parties, Participants and the public to have a better understanding of the events that transpired in these locations. This better understanding will, in turn, enhance the ability of the Chamber to perform its truth-seeking function.
21. It is submitted that this understanding of the events cannot be achieved with the full *viva voce* testimony of only one witness. The provision of mainly written evidence, with limited in-court examination, will not enable to grasp the exact extent of both the context and specific alleged events. This is all the more so in light of the multiple deficiencies that appear to be present in the statement written in English,³⁵ deficiencies which *prima facie* might also be present in that of P-1595.³⁶
22. Consequently, and in light of the specificities of P-1595 as described above, the Defence contends that it is in the interest of justice to hear P-1595’s testimony, the first witness that will testify on the PK9-MBAIKI axis, fully *viva voce*. The Request should thus be denied.

³³ [ICC-01/14-01/18-724-Conf-AnxA](#), p. 35-39, witnesses # 60 to 71.

³⁴ The Defence did not take into account witness P-2196, scheduled as a live witness, as his current participation in the trial is unclear following the information provided by the Prosecution.

³⁵ See the previous Defence submission in relation to the English statements [ICC-01/14-01/18-1203-Red](#), para. 29.

³⁶ See as an example [CAR-OTP-2104-0274-R02](#), para. 58, where a sentence was not fully written down in the statement “COEUR de LION’s real name.”.

C. On the negligible reduction of the examination in chief should the Request be granted

23. The Prosecution in its Request indicates that a submission of P-1595's statement pursuant to Rule 68(3) would reduce its examination from four to two hours.³⁷ A reduction of the examination by the calling party of only two hours can be considered as negligible or "relatively limited" as Trial Chamber I found in the Gbagbo & Blé Goudé case.³⁸
24. In light of the position and importance of P-1595, as demonstrated above, the Defence contends that a mere additional two hours to his examination by the Prosecution is not excessive and does not cause undue delay to the trial.
25. The Defence further submits that should P-1595's recorded testimony be submitted under Rule 68(3), the Defence examination of the witness would inevitably be extensively increased in light of the numerous rumours that are present in his written statement and that will need to be addressed.³⁹
26. In light of all the above, the Defence submits that the balance of interests between the negligible time saved in the examination by the calling party, compared to the advantages that would result from the fully *viva voce* testimony of P-1595, tip in favour of the latter. Consequently, the Defence respectfully requests the Chamber to deny the Prosecution's Request.

II. The content of P-1595's statement is not suitable for submission under Rule 68(3)

27. The Defence argues that parts of the content of P-1595's prior recorded testimony militate against its submission pursuant to Rule 68(3).

³⁷ [ICC-01/14-01/18-1217-Conf](#), paras. 15, 17; Public Redacted Version : [ICC-01/14-01/18-1217-Red](#).

³⁸ *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.

³⁹ [CAR-OTP-2104-0274-R02](#), paras. 36, 41-42, 58, 73.

28. P-1595's prior recorded testimony deals extensively with core issues of the case such as the charges of displacement, forced transfer and deportation. Indeed, P-1595 describes the organisation of the evacuation of the Muslims from the villages around MBAIKI to MBAIKI⁴⁰ and the fact that the Muslims started moving from PISSA, BANGUI-BOUCHIA, BOUCHIA, MBATA, BATALIMO, MOUGOMBA, ESCADE, BAKANDOU, NDOLOBO, BOUKOKO, BOBOUA and BOUAKA to MBAIKI as fear increased.⁴¹ He also gives a variety of causes to explain why the Muslims left MBAIKI.⁴²
29. The witness also provides details about the killing of Mr Saleh which is subject to two specific charges of murder.
30. The Defence submits that these extensive references to core issues of the case militate in favour of the rejection of the Request and the fully *viva voce* testimony of P-1595 before the Chamber.
31. Moreover, P-1595 relayed in his statement prejudicial rumours about Mr Yekatom, indicating that they "heard that the crimes [*in the various villages mentioned above*] were being committed by the elements of RAMBO".⁴³ He further indicated, without any substantiation and in total opposition with the witness direct contact with Mr Yekatom,⁴⁴ that "he was known for one thing, that is killing people".⁴⁵
32. The Defence contends that the vagueness and dubious foundations of P-1595's allegations against Mr Yekatom would, should his statement be tendered pursuant to Rule 68(3), be prejudicial to the right of the accused. The Defence would have the burden to cover with the witness these rumours made against

⁴⁰ *Ibid*, para. 44.

⁴¹ *Ibid*, paras. 66-70.

⁴² *Ibid*, paras. 83-86, 90-93.

⁴³ *Ibid*, para. 41.

⁴⁴ *Ibid*, paras. 74, 78-79, 81.

⁴⁵ *Ibid*, para. 73.

Mr Yekatom in his statement of which their minimal probative value is outweighed by their prejudicial effect, and further are detrimental to his integrity and morality.

33. It is submitted that, in light of the content of P-1595's statement and the rumours mentioned above, the advantages of a fully *viva voce* testimony, specifically that it "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",⁴⁶ are necessary. This mode of testimony will allow the Chamber and Parties to immediately clarify and assess with P-1595 the foundation of his allegations, especially due to the information contained in his statement to the effect that he "never bothered to check the source of the rumours".⁴⁷
34. In light of the relevance of P-1595's statement to central issue of the case and of the prejudicial information it contains, the Defence respectfully requests the Chamber to deny the Prosecution's Request.

CONFIDENTIALITY

35. The present response is filed on a confidential basis corresponding to the classification of the Request and due to the presence of identifying information of P-1595. A public redacted version is being filed simultaneously.

RELIEF SOUGHT

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

REJECT the Request.

⁴⁶ [ICC-01/14-01/18-685](#), para. 33.

⁴⁷ [CAR-OTP-2104-0274-R02](#), para. 36.

RESPECTFULLY SUBMITTED ON THIS 18th DAY OF JANUARY 2022



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