

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/14-01/18**

Date: **16 March 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 “Yekatom Defence Response to the
“Prosecution’s Request for the Formal Submission of the Prior Recorded
Testimony of P-1858 pursuant to Rule 68(3)”, 15 February 2022, ICC-01/14-
01/18-1281-Conf”, 14 March 2022, ICC-01/14-01/18-1313-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-1858 pursuant to Rule 68(3)" ("Request").¹
2. The Defence submits that the Request should be rejected as the formal submission of P-1858's prior recorded testimony pursuant to Rule 68(3) would be inconsistent with the interests of justice; in addition, the content of P-1858's statement, which is mainly based on rumours, contradicted or erroneous, relates to acts and conduct of Mr. Yekatom on core issues of the case to an extent that, should the Request be granted, it would infringe upon his statutory rights.

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 P-1858 in its list of witnesses, expecting this individual to testify on core issues of the case, such as, *inter alia*, "the 5 December attack on BANGUI", "YEKATOM's involvement in the killing of one of his elements, SEDA, and the killing of General LAPO's child", and "the displacement and security issues faced by the Muslim community due to the actions of YEKATOM and his Group".⁴

¹ [ICC-01/14-01/18-1281-Conf](#); A Public redacted version is also available [ICC-01/14-01/18-1281-Red](#).

² [ICC-01/14-01/18-685](#), para. 25.

³ *Ibid*, para. 31.

⁴ [ICC-01/14-01/18-724-Conf-AnxA](#), page 15, Witness #5.

5. On 15 February 2022, the Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-1858 pursuant to Rule 68(3) was notified.⁵ A Public Redacted Version of the Request was notified the same day.⁶
6. On 16 February 2022, the Defence sought an extension of the deadline to respond to the Request to 14 March 2022,⁷ which was granted the following 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. Regulation 43 of the Regulations of the Court, in relation to the testimony of witnesses, states:

Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to:

- (a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth;
- (b) Avoid delays and ensure the effective use of time.

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-01/14-01/18-1281-Conf.](#)

⁶ [ICC-01/14-01/18-1281-Red.](#)

⁷ Email from the Defence to the Chamber dated 16 February 2022 at 17:18.

⁸ Email from the Chamber to the Parties and Participants dated 17 February 2022 at 16:42.

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).⁹

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.¹⁰

SUBMISSIONS

11. The Defence will first address the content of P-1858's statement which extensively goes on core issues of the case, including to the acts and conduct of Mr. Yekatom (I). The Defence will, in a second time, demonstrate that a number of the allegations contained in the statement are either contradicted, erroneous or only founded on rumours and hearsay (II). Finally, it will be argued that the admission of P-1858's statement pursuant to Rule 68(3) would not allow a presentation of evidence which is fair and effective for the determination of the truth, and consequently contrary to the interests of justice (III).

I. On the key issues of the case, including acts and conduct of Mr. Yekatom developed in P-1858's prior recorded testimony

12. The Defence is cognizant of the Chamber's positions that "while its decision on the introduction of a prior recorded testimony may be guided by, *inter alia*, the question whether the evidence is central to core issues in the case, this factor is

⁹ *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.

¹⁰ *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"](#), 3 May 2011, ICC-01/05-01/08-1386, para 78.

not a requirement pursuant to Rule 68(3) of the Rules” and that “references to the accused’s acts and conduct do not *per se* constitute an obstacle to the introduction of a prior recorded testimony pursuant to this provision”.¹¹ However, the Defence argues that in the case of P-1858 those considerations should be taken into account in the assessment of the Request.

13. The Defence notes that Mr. Yekatom is among the primary subjects of the 24 pages of P-1858’s statement, with the name “Rombhot” being mentioned no less than 78 times. Mr. Yekatom is also the subject of an entire 25 paragraph-long section of the statement,¹² and of a video shown to the witness during his interview in order to obtain his commentary.¹³ While this arithmetical analysis of Mr. Yekatom’s presence in P-1858’s prior recorded testimony is notable of itself, the very prejudicial nature of each of these mentions strongly militates in favour of the denial of the Request.
14. Indeed, the Defence highlights that P-1858 directly links, in his statement, Mr. Yekatom to events that are central to the case, such as the Yamwara School Base incident, with an indication that “[t]he son of FACA General LAPO was killed behind the airport” by his elements,¹⁴ which incident is the subject of Counts 15 and 16.
15. P-1858 also claims, based on rumours, that after the 5 December 2013 attack “Muslims could not go to the areas controlled by ROMBHOT’s elements because they would be killed. Some Muslims who used to live in areas controlled by ROMBHOT managed to run away”.¹⁵ Although this claim is confusing as the investigator did not clarify whether the witness refers to Bangui or another area, nor did the witness clarify the timeframe related to his

¹¹ See as an example [ICC-01/14-01/18-1282-Red](#), para. 12.

¹² [CAR-OTP-2063-0050-R04](#), paras 77-102.

¹³ [CAR-OTP-2063-0050-R04](#), pages 0069-0071, reviewing video [REDACTED].

¹⁴ [CAR-OTP-2063-0050-R04](#), paras 91-92.

¹⁵ [CAR-OTP-2063-0050-R04](#), para. 80.

claim other than stating “after the attack of the 5th December 2013”, it could nevertheless be linked to either the charges of directing attacks against the civilian population, persecution, displacement and forcible transfer in Bangui, and the subject of Counts 1, 4, 5 and 8; or of Counts 24 and 25 in relation to the PK9-Mbaïki axis.

16. Similarly, P-1858 alleges that crimes, such as theft, looting and victimization were being committed by Mr. Yekatom’s elements on at least two checkpoints on the PK9-Mbaïki axis.¹⁶ These allegations are linked to the charges of persecution, displacement and forcible transfer along this axis, subject to Counts 24, 25 and 28,¹⁷ in light of the witness’ claim that “Muslims had fled as they were afraid of the insecurity that was created by ROMBHOT and his elements”.¹⁸
17. P-1858’s statement also contains prejudicial allegations against Mr. Yekatom which are not directly linked to the charges. Such is the case of the claim that one [REDACTED] wanted to leave Mr. Yekatom’s group because he would kill elements that were not obeying and that “elements were killed at the YANWARA School”,¹⁹ which assertions are relied upon by the Prosecution to allege in its Trial Brief that Mr. Yekatom “was notorious for killing both Muslims and his own men when they opposed him” and thus as support for Mr Yekatom’s alleged contributions to the charged crimes.²⁰
18. Generally, it can be noted that P-1858’s statement is riddled with mentions of crimes that were allegedly perpetrated by Mr. Yekatom or his elements. Among those incidents attributed to Mr. Yekatom, the witness details in particular: how he allegedly killed three of his bodyguards;²¹ the murder of an individual

¹⁶ [CAR-OTP-2063-0050-R04](#), para. 50.

¹⁷ [ICC-01/14-01/18-1281-Red](#), para. 9.

¹⁸ [CAR-OTP-2063-0050-R04](#), para. 81.

¹⁹ [CAR-OTP-2063-0050-R04](#), para. 94.

²⁰ [ICC-01/14-01/18-723-Red](#), para. 369, fn. 958.

²¹ [CAR-OTP-2063-0050-R04](#), para. 88.

named [REDACTED];²² an attempted murder of one of his elements named [REDACTED];²³ the kidnapping and mutilation of a FACA [REDACTED];²⁴ and the pillaging of a local Gendarmerie station.²⁵

19. The Defence contends that the number and prejudicial nature of all these alleged incidents which go to the act and conduct of Mr. Yekatom, either on core issues of the case or more generally on his conduct during the 2013-2014 crisis, favour a fully *viva voce* testimony of P-1858. The mere possibility for the Defence to examine P-1858 is not sufficient to alleviate the prejudice that would be induced by the formal submission of his prior recorded testimony pursuant to Rule 68(3). Indeed, in light of the numerous and incriminating nature of the various contested allegations made by P-1858, the Defence would have no other choice than to explore each and every one of them, regardless as to whether they go to core issues or not, not only with P-1858 but also with other witnesses, in addition to the need to conduct specific investigations; this course of action would unduly put a strain on its limited resources.
20. Rejecting the Request would force the Prosecution, which is invested with the onus to present the charges against Mr. Yekatom to the Chamber, to only question P-1858 on the specific incidents that it identified as relevant for the current case. P-1858 would testify “under oath and under the Chamber’s oversight” in a manner that would “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”,²⁶ advantages which become a necessity in light of this witness’s prejudicial evidence against Mr. Yekatom.

²² [CAR-OTP-2063-0050-R04](#), paras 89-90.

²³ [CAR-OTP-2063-0050-R04](#), para. 93.

²⁴ [CAR-OTP-2063-0050-R04](#), paras 95-99.

²⁵ [CAR-OTP-2063-0050-R04](#), paras 100-102.

²⁶ [ICC-01/14-01/18-685](#), para. 33.

21. Consequently, in light of the prejudicial effect that the formal submission of P-1858's prior recorded testimony pursuant to Rule 68(3) would have on the Mr Yekatom's fair trial rights, it is respectfully submitted that the Chamber should reject the Prosecution's Request.

II. On the uncorroborated evidence and lack of reliability of the information included in P-1858's statement

22. The Defence notes that several assertions of P-1858 are refuted and contradicted by other witnesses. As an example: while P-1858 claimed that he "drafted the report that [REDACTED] presented [REDACTED]" [REDACTED], P-0876 denied categorically having presented such a report.²⁷
23. Such is also the case of his claim, used by the Prosecution in its Request,²⁸ that during a meeting at [REDACTED].²⁹ This assertion is totally refuted by other witnesses such as P-0954, [REDACTED], who indicated regarding this meeting that "[REDACTED]" and that Mr. Yekatom [REDACTED].³⁰ P-0876, who attended the meeting [REDACTED], testified under oath before the Court that [REDACTED].³¹ P-0487 himself during his interviews with the Prosecution, never indicates that [REDACTED].³²
24. Another notable contradiction appears when comparing P-1858's and P-0954's statements. While P-1858 claims that on 6 December 2013, P-0954 came to [REDACTED] and said that "[REDACTED]",³³ P-0954 indicates that "[REDACTED]".³⁴

²⁷ P-0876 : [ICC-01/14-01/18-T-086-CONF-FRA ET](#), pages 69-70.

²⁸ [ICC-01/14-01/18-1281-Conf](#), para. 11, pages 6-7.

²⁹ [CAR-OTP-2063-0050-R04](#), para. 57.

³⁰ P-0954 : [CAR-OTP-2048-0171-R02](#), para. 45.

³¹ P-0876 : [ICC-01/14-01/18-T-086-CONF-FRA ET](#), pages 62-64.

³² P-0487 : [CAR-OTP-2076-0130-R02](#), pages 0139-0141.

³³ [CAR-OTP-2063-0050-R04](#), para. 46.

³⁴ P-0954 : [CAR-OTP-2048-0171-R02](#), para. 34.

25. P-1858's broad and unequivocal assertions regarding the impossibility for Muslims to stay and live in areas under Mr. Yekatom's control and that he was the perpetrator of what happened to the Muslims in his area of control³⁵ was contradicted by P-1595, Imam for Mbaïki, who testified before the Chamber that Mr. Yekatom made it clear to the population that his only target was the Seleka, that there was peace in Mbaïki, and that some misbehaving Anti-Balaka were stopped and reminded about Mr. Yekatom's speech about the population that should be let live in peace.³⁶
26. The Defence also underlines that some manifest errors are included in the statement, particularly in the comments made by P-1858 on video [REDACTED].³⁷ As an example, the witness erroneously indicates that he recognizes [REDACTED] at 09:32 but correctly identify him at 36:28, despite the two individuals facial features being totally different. Similarly, the witness specifically accuses an individual named [REDACTED], who would have been the bodyguard of [REDACTED], of killing a Muslim and his son in Combattant. However, P-1858 is incapable of identifying [REDACTED] accurately as the individual he identifies on the footage at 45:53 is not that of [REDACTED].³⁸ Finally, P-1858 also comments that footage at 15:39 depicts President Djotodia showing to Prime Minister Tiangaye Muslim victims of the Anti-Balaka on 5 December 2013; while in reality this scene depicts Peuhls victims on 3 December 2013³⁹ at the Bangui gendarmerie and not at Camp de Roux.⁴⁰
27. The Defence contends that the prevalence of contradicted information and manifest errors in P-1858's statement demonstrate a tendency of this witness, wilfully or not, to provide unreliable information. The lack of reliability of this

³⁵ [CAR-OTP-2063-0050-R04](#), paras 50, 80,

³⁶ P-1595 : [ICC-01/14-01/18-T-106-CONF-FRA ET](#), pages 8-9, 40.

³⁷ [CAR-OTP-2063-0050-R04](#), pages 0069-0071.

³⁸ P-1819 : [CAR-OTP-2065-0003-R01](#), para. 151 ; P-1839 : [CAR-OTP-2122-7107-R01](#), lns 169-180.

³⁹ P-1819 : [CAR-OTP-2065-0003-R01](#), paras 89-99.

⁴⁰ P-0291 : [ICC-01/14-01/18-T-052-FRA ET](#), pages 9-10, lns 21-12.

witness's prior recorded testimony is compounded by the extensive mentions of hearsay and rumours.

28. Indeed, it should be noted that a number of information provided by P-1858, including on core issues of the case, are merely hearsay but nevertheless their prejudicial effect outweighs their probative value. As the witness indicated himself, he heard through rumours, ". as the rumours in BANGUI are running faster than people," that Muslims could not go into areas controlled by Mr. Yekatom because they would be killed,⁴¹ a statement nevertheless relied by the Prosecution in its Request⁴² despite its evident unreliability. P-1858 also only "heard rumours" about people being victimized at checkpoints manned by Mr. Yekatom's elements on the PK9-Mbaiki axis.⁴³ P-1858, was also not a direct witness of a number of allegations on which he gives evidence, including: the killing of the son of General Lapo, which he only heard about from [REDACTED];⁴⁴ the alleged attempted murder of [REDACTED] for which, despite the fact that he only "heard" about it from an unnamed source, he speculated about a possible motive;⁴⁵ the alleged killing by Mr. Yekatom of three of his bodyguard that he also merely "heard" about;⁴⁶ and the alleged killing of an individual named [REDACTED] that he also only "heard about" from a common friend.⁴⁷
29. The Defence argues that the contradictions with other witnesses, errors and heavy reliance on hearsay or rumours in P-1858's prior record testimony, including on the acts and conduct of Mr. Yekatom on core issues of the case, are factors that favour the rejection of the Prosecution's Request. As developed below, the Defence contends that formal submission pursuant to Rule 68(3) of

⁴¹ [CAR-OTP-2063-0050-R04](#), para. 80.

⁴² [ICC-01/14-01/18-1281-Conf](#), para. 11, page 7.

⁴³ [CAR-OTP-2063-0050-R04](#), para. 50.

⁴⁴ [CAR-OTP-2063-0050-R04](#), paras 91-92.

⁴⁵ [CAR-OTP-2063-0050-R04](#), para. 93.

⁴⁶ [CAR-OTP-2063-0050-R04](#), para. 88.

⁴⁷ [CAR-OTP-2063-0050-R04](#), para. 89.

a statement which contains extensive unreliable and contradicted information is against the interests of the justice.

III. Formal submission of P-1858's prior recorded testimony would be against the interests of justice

30. In its "Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules", the Chamber found that the discretion of a party on whether or not use Rule 68 of the Rules "is not absolute, but subject to judicial oversight".⁴⁸ When exercising its judicial oversight, the Chamber must take into account its "obligations under Regulation 43 of the Regulations"⁴⁹ which invests the Presiding Judge with the duty of ensuring that the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth.
31. First, the Defence notes that Witness P-1858 is [REDACTED]; in addition, [REDACTED] with Mr. Yekatom, Witness P-0876 and Witness P-0487.⁵⁰ P-0876 is a witness whose previous recorded testimony was admitted under Rule 68(3) and who already testified before this Court,⁵¹ a Rule 68(3) application is currently pending for [REDACTED]⁵² and another one is expected for P-0487.⁵³ In light of the principle of oral testimony enshrined in Article 69(2) of the Statute⁵⁴ and of the advantages of a *viva voce* testimony,⁵⁵ the Defence argues that it is in the interests of justice to have those two remaining witnesses, who are closely linked and expected to testify about similar relevant events, testify entirely orally before the Chamber in order to better assess their reliability and credibility on the shared events and incidents they are expected to testify on.

⁴⁸ [ICC-01/14-01/18-685](#), para. 24.

⁴⁹ *Ibid*, para. 25.

⁵⁰ [ICC-01/14-01/18-1281-Conf](#), para. 11, page 6.

⁵¹ [ICC-01/14-01/18-1186-Conf](#).

⁵² [REDACTED]

⁵³ [REDACTED]

⁵⁴ See [ICC-ASP/12/37/Add.1](#), Annex II.A, para. 5.

⁵⁵ [ICC-01/14-01/18-685](#), para. 33.

32. Second, as demonstrated in the previous two sections above, P-1858's prior recorded testimony goes to the acts and conduct of Mr. Yekatom on issues that are, for some of them, central to the case. It has also been established that his statement contains numerous rumours and information contradicted by other witnesses. The Defence submits that admitting into evidence P-1858's statement would go against the interests of justice, and more particularly would be against judicial economy. Indeed, should the Request be granted, the case file will automatically contain information that are not only already contradicted by other witnesses or manifestly unreliable, but also erroneous. The Defence will have to dedicate valuable time and resources, including during its own examination of P-1858, to ensure that those information are corrected or clarified by the witness. Submission of P-1858 statement pursuant to Rule 68(3) would not achieve, and instead go against, the purpose of this rule which is to enhance the efficiency of the proceedings. It would be in the interests of justice and judicial economy to hear P-1858's testimony fully *viva voce* as this mode of testimony will allow the parties to immediately seek clarification of any information which might be unclear. In addition, the solemn oath undertaking might alleviate any desire from the witness, as shown in his statement, to provide information for which he is not entirely sure or directly knowledgeable, and would thus have a beneficial filtering effect.
33. Third, the Defence reiterates its concern regarding the potential errors contained in English statements,⁵⁶ a language which P-1858 does not read or speak.⁵⁷ It should be noted that this pattern has continued with some notable corrections/additions, including on the acts of Mr. Yekatom, made by Witness P-1595 to his prior recorded testimony.⁵⁸ While some of those mistakes are noticed and corrected by the witnesses during the reading of their

⁵⁶ See [ICC-01/14-01/18-1181-Red](#), para. 38 ; [ICC-01/14-01/18-1203-Red](#), para. 29.

⁵⁷ [CAR-OTP-2063-0050-R04](#) at 0050.

⁵⁸ P-1595 : [CAR-OTP-2135-2397](#)

“Familiarisation Packages”, a distinct pattern of a non-negligible number of corrections is present and it cannot be excluded that some of those mistakes might not be properly noticed and corrected. The Defence acknowledges that this argument is speculative in nature, however, in the holistic assessment of the Request, the question of the reliability of the English statements ought to be taken into account.

34. In light of all of the above, the Defence contends that in order to ensure a fair and effective presentation of the evidence for the determination of the truth, in accordance with Regulation 43 of the Regulations, it is necessary to hear the testimony of P-1858 fully *viva voce*. Consequently, the Defence respectfully requests the Chamber to reject the Request.

CONFIDENTIALITY

35. This response is filed on a confidential basis corresponding to the classification of the Request and due to references to identifying information of witnesses. A public redacted version will be filed forthwith.

RELIEF SOUGHT

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

RESPECTFULLY SUBMITTED ON THIS 16TH DAY OF MARCH 2022



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