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**International
Criminal
Court**

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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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public with confidential Annex A

Public Redacted Version of the “Corrected version of the “Yekatom Defence Response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0954 pursuant to Rule 68(3)”, 25 October 2021, ICC-01/14-01/18-1145-Conf”, ICC-01/14-01/18-1145-Conf-Corr

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. Defence Counsel for Mr. Alfred Rombhot Yekatom (“Defence”) hereby respond to the *Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0954 pursuant to Rule 68(3)* (“Request”).¹
2. The Defence submits that the Request should be denied in light of the importance of P-0954’s statement and its manifest lack of corroboration, on key issues of the proceedings, all of which militate against the admission of the statement pursuant to Rule 68 (3) of the Rules of Procedure and Evidence (“Rules”).

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 Witness P-0954 in its Final Witnesses List, indicating that he will testify on key issues of the case such as “Incident BOEING/CATTIN”, “Incident PK9-MBAIKI axis”, or “Incident YAMWARA”.⁴
5. On 12 October 2021, the *Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0954 pursuant to Rule 68(3)* was filed.⁵

¹ [ICC-01/14-01/18-1137-Conf.](#)

² [ICC-01/14-01/18-685](#), para. 25.

³ *Ibid*, para. 31.

⁴ [ICC-01/14-01/18-724-Conf-AnxA](#), page 17 witness n°10.

⁵ [ICC-01/14-01/18-1137-Conf.](#)

APPLICABLE LAW

6. 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.

7. 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.⁶

8. 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 fairness of the trial generally, to allow for the evidence in question to be introduced under Rule 68 (3).⁷

9. 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.⁸

⁶ *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.

⁷ *Ibid.*, para. 71.

⁸ *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.

SUBMISSIONS

10. The Defence argues that the Prosecution's Request should be rejected due to the importance of P-0954's statement as regards key issues of the case including: the alleged acts and conduct of Mr. Yekatom (I); the fact that it is often un-corroborated or even contradicted by other evidence in the case (II); and the fact that its admission under Rule 68(3) would not meaningfully expedite the proceedings (III).
 - I. **On the key issues of the case, including acts and conduct of Mr. Yekatom developed in P-0954's statement**
11. The Defence is cognizant of the Chamber's position that "references to the accused's acts and conduct do not *per se* constitute an obstacle to the introduction of prior recorded testimony pursuant to Rule 68(3) of the Rules".⁹ However, it is argued that the extensiveness of the references to Mr. Yekatom's acts and conduct in P-0954's statement, which is sometimes in direct relation with a charged crime, is such that its admission would be detrimental to Mr. Yekatom's rights.
12. While an arithmetical analysis of the content of P-0954's statement is not in itself sufficient to establish its importance for the case, the Defence nevertheless finds revealing the fact that throughout its 21 pages, the name "Yekatom" appears 69 times. Out of the 97 substantive paragraphs of the statement, the name of Mr. Yekatom appears in 32 paragraphs, i.e. one third of them.¹⁰ Notwithstanding the importance of those mentions, which will be demonstrated below, it can only be noted that one of the most salient subjects of the statement, if not the most salient subject, of P-0954's statement is Mr. Yekatom himself.

⁹ See as an example [ICC-01/14-01/18-1114-Conf](#), para. 14.

¹⁰ The Defence excluded for the purpose of this calculation the "Procedure" and "Closing Procedure", those corresponds to the portion of the statement that the Prosecution does not seek to rely on (see [ICC-01/14-01/18-1137-Conf-AnxA](#)).

13. One aspect of the importance of P-0954's statement to key issues of the case relates to his direct incrimination of Mr. Yekatom on charged crimes of the case. Indeed, P-0954 directly incriminates Mr. Yekatom on the Yamwara incident (Counts 11, 12, 13, 15 & 16) claiming that "Yekatom was present and he ordered the killing" before allegedly telling P-0954 that the "soldier [*that was killed*] was a traitor".¹¹ An alleged confession of the crime by Mr. Yekatom to Witness P-0954 is used by the Prosecution in its Trial Brief to allege "[Mr. Yekatom's] involvement in and knowledge of the crime".¹²
14. The witness also directly implicates Mr. Yekatom on the charges of displacement (Count 25) and forcible transfer / deportation (Count 24). He alleges that Mr. Yekatom attacked Muslims and that almost no Muslims were left in the area under his control.¹³ This highly prejudicial and impactful allegation was directly cited by Pre-Trial Chamber II in support of its factual findings on the PK9-Mbaïki axis charges in the Decision on the Confirmation of Charges.¹⁴
15. Moreover, in relation to the latter two charges, the Defence submits that P-0954's testimony is crucial to the determination of whether certain areas around the PK9 bridge were under the control of Mr. Yekatom or of another Comzone. Namely, P-0954 indicates that he [REDACTED],¹⁵ and that [REDACTED].¹⁶ The location of the various bases of Comzones in this area is an important contested issue as some witnesses describe allegedly being stopped in this area, having their phone searched for "Muslims names" and allege that some people were killed.¹⁷

¹¹ [CAR-OTP-2048-0171-R02](#), para. 86.

¹² [ICC-01/14-01/18-723-Conf](#), para. 456, fn. 1153.

¹³ [CAR-OTP-2048-0171-R02](#), paras. 95-96.

¹⁴ [ICC-01/14-01/18-403-Corr-Red](#), para. 134, fn. 313.

¹⁵ [CAR-OTP-2048-0171-R02](#), paras. 59-61.

¹⁶ [CAR-OTP-2048-0171-R02](#), paras. 26, 62.

¹⁷ P-1864: [CAR-OTP-2064-0860-R02](#), paras. 50-52.

16. It should also be underlined that during the 5 December 2013 attack, P-0954 was [REDACTED], an area close to Boeing, and claims to have been in contact with Mr. Yekatom in relation to the fighting.¹⁸ The [REDACTED], localisation and communication of P-0954 with Mr. Yekatom on such a crucial event, directly linked to Counts 1, 2, 3, 4 and 5, is another example that this witness does not merely provide general background information about the conflict, but information regarding Mr. Yekatom's acts and conduct that goes to the core of this case.
17. In addition, P-0954 indicates that Mr. Yekatom suggested that [REDACTED] should be destroyed;¹⁹ attacked Gendarmerie outposts multiple times²⁰ erected roadblocks without permission;²¹ attacked Muslims in villages to take weapons;²² shot a FACA officer;²³ killed multiple people such as his own elements and a young man from Petevo;²⁴ and also pillaged and robbed people.²⁵ All of these serious allegations depict an image of a brutal man, without any morality and ready to commit any crime for his benefit. The Prosecution relies on these allegations to plead that Mr. Yekatom "set an example for his elements through his own commission of indiscriminate acts of brutality, which promoted similar violent conduct throughout his Group. He was notorious for killing both Muslims and his own men when they opposed him"; a number of these allegations are by extension relied on by the Prosecution as Mr. Yekatom's essential contributions to the charged crimes.²⁶

¹⁸ [CAR-OTP-2048-0171-R02](#), paras. 33-34.

¹⁹ [CAR-OTP-2048-0171-R02](#), para. 42.

²⁰ [CAR-OTP-2048-0171-R02](#), paras. 56-57, 78.

²¹ [CAR-OTP-2048-0171-R02](#), para. 74.

²² [CAR-OTP-2048-0171-R02](#), para. 78.

²³ [CAR-OTP-2048-0171-R02](#), para. 85.

²⁴ [CAR-OTP-2048-0171-R02](#), paras. 87-88.

²⁵ [CAR-OTP-2048-0171-R02](#), para. 92.

²⁶ [ICC-01/14-01/18-723-Red](#), para. 369, fn. 958; see also, Chapter VI, C, (b).

18. In light of the above, the Defence contends that P-0954's statement contains extensive references to Mr. Yekatom's acts and conduct²⁷ on core and contested issues of the case, which militates in favour of a *viva voce*, under oath in-full, testimony of the witness. Admission under Rule 68 (3) of the statement would go against the principle of orality and greatly prejudice the rights of Mr. Yekatom despite the possibility for the Defence to cross-examine the witness.

II. On the lack of corroboration and contradiction of P-0954's statement

19. The Defence submits that the lack of corroboration (A), or sometimes direct contradiction of evidence of other witnesses (B), apparent in P-0954's statement militate against its submission under Rule 68(3).

A. On the lack of corroboration of P-0954's statement

20. As a preliminary remark, the Defence wishes to reiterate its objection to the manner in which the Prosecution argues that corroboration has been demonstrated by simply listing P-numbers, without any reference to specific portion of the relevant transcripts or statements.²⁸
21. The Defence notes that several important allegations, mentioned in the previous section, appear not to be corroborated by other witnesses. Such is the case of the alleged threat professed by Mr. Yekatom during [REDACTED],²⁹ despite the fact that several other Prosecution witnesses claim to have attended.³⁰
22. The Defence also contends that several other assertions made by P-0954 do not seem to be corroborative of other witnesses' evidence, such as an alleged

²⁷ See [ICC-01/14-01/18-1088-Conf](#), para. 14, for a consideration of the extensiveness of the acts and conduct mentioned when determining whether a Rule 68(3) is appropriate.

²⁸ See, [ICC-01/14-01/18-1097-Red](#), para. 9.

²⁹ [CAR-OTP-2048-0171-R02](#), para. 42.

³⁰ *Inter alia*, [REDACTED].

attack on the Mbaiki gendarmerie by Mr. Yekatom,³¹ or the shooting of a Colonel.³²

B. On the false information or contradictions to P-0954's statement

23. *First*, information provided by P-0954 is contradicted by the statements of other witnesses, including on key issues of the case. An illustration of such a discrepancy relates to P-0954's description of the "Yamwara incident" where he alleges that "Yekatom's people attacked [REDACTED]", that the "[REDACTED] was slaughtered on the spot" "some metres from the car", a killing where Mr. Yekatom was present and which he ordered.³³
24. This information is contradicted by several witnesses, such as [REDACTED],³⁴ [REDACTED],³⁵ which was the location of the alleged subsequent murder of Saint-Cyr Lapo.³⁶ P-0954 is also contradicted by [REDACTED] who indicated that Mr. Yekatom was not present at the time of the alleged killing.³⁷
25. These inconsistencies also extend to the conduct of Mr. Yekatom not directly linked to a charge, such as the alleged murder of a "young man from Petevo" of which P-0954 claims to have been informed by [REDACTED] who "had seen the kidnapping [REDACTED]".³⁸ The Defence contends that "[REDACTED]" mentioned by P-0954 is none other than [REDACTED]. Contrary to the assertion of P-0954 that [REDACTED] was a direct witness, [REDACTED] indicated that he "heard from another person who worked at the kiosk" about the kidnapping.³⁹

³¹ [CAR-OTP-2048-0171-R02](#), para. 78.

³² [CAR-OTP-2048-0171-R02](#), para. 85.

³³ [CAR-OTP-2048-0171-R02](#), para. 86.

³⁴ [REDACTED]

³⁵ [REDACTED]

³⁶ [REDACTED]

³⁷ [REDACTED]

³⁸ [CAR-OTP-2048-0171-R02](#), para. 88.

³⁹ [REDACTED]

26. Further, the Defence underlines false information provided by P-0954, namely his proclamation without any conditional or mention of uncertainty, that Mr. Yekatom “was born in Brazzaville”,⁴⁰ which comprises erroneous information given that he, in fact, was born in Bimbo, as mentioned by his Warrant of Arrest and all subsequent important filings.⁴¹ Other personal information mentioned by the witness in the same paragraph also does not reflect the truth.⁴² On its own, this example illustrates the necessity to have the full testimony of P-0954 *viva voce*, as his statement contains assertions, made about one of the accused without any indication of doubt, that are undeniably false.
27. In light of those examples, it can only be noted that P-0954’s statement contains information directly contradicted by other witnesses specifically mentioned by P-0954, which should lead to a cautious approach on any information provided by this witness. The Defence contends that lack of corroboration, in conjunction with contradictory and/or false information, of substantive parts of P-0954’s statement, including information directly linked to charged crimes and key contested issues of the case, militate in favor of a full *viva voce* testimony. This mode of testimony will allow the Chamber and parties to “hear a natural and spontaneous account from the witness, to directly and closely observe his reactions, demeanour and composure, and to immediately seek clarifications”,⁴³ various advantages that will allow for a better understanding of the evidence that the Prosecution will elicit from P-0954, thus contributing to enhance the determination of the truth and truth-seeking function of the Chamber.

III. On the limited impact on the celerity of the proceedings

⁴⁰ [CAR-OTP-2048-0171-R02](#), para. 78.

⁴¹ See as examples [ICC-01/14-01/18-1-Red](#), page 3; [ICC-01/14-01/18-282-AnxB1-Red2](#), para. 20.

⁴² Such as the origin of his parents or the history of his name.

⁴³ [ICC-01/14-01/18-685](#), para. 33.

28. The Prosecution anticipates an examination of four hours should the Rule 68(3) application be granted,⁴⁴ and seven hours in the alternative.⁴⁵
29. Even if the direct examination of P-0954 were to be effectively extended by three hours (i.e. two sessions), it is submitted that given the substance of the expected testimony of P-0954 and his importance to the conduct of Mr. Yekatom, whether on specific charged crimes or in the timeframe of the charges, the anticipated additional time to the direct examination of the witness is not excessive.
30. It is recalled that in a previous Rule 68(3) application for Witness P-0306, which was denied, the Prosecution estimated that it would “require at least 12 hours” for its direct examination;⁴⁶ however in the event, per the Defence’s calculations, the examination in chief lasted for less than 9.5 hours, without taking into account the time spent on technical issues or other topics not directly linked to the questioning of the witness.⁴⁷
31. The Defence is fully aware of the importance of the expeditiousness of the conduct of the proceedings, hence the different propositions it made when issues arose in the scheduling of witnesses, including waiving some of its rights in specific instances to enable the trial to move forward.⁴⁸ However, in the present situation of P-0954, the Defence argues that the rights of Mr. Yekatom should not be jeopardized for a limited and hypothetical economy of at most two hearing sessions.

CONCLUSION

⁴⁴ [Request](#), para. 16.

⁴⁵ [Request](#), para. 18.

⁴⁶ [ICC-01/14-01/18-1057-Red](#), para. 22.

⁴⁷ Calculation done on transcripts T-064, T-065 and T-066.

⁴⁸ See [ICC-01/14-01/18-T-067-CONF-ENG](#), page 4, lines 1-11.

32. As demonstrated above, the statement provided by witness P-0954 contains extensive allegations regarding the charged acts and conduct of Mr. Yekatom on issues that are both contested and go to the core of the case. Moreover, important information contained in the statement has been identified as uncorroborated or even contradicted by other witnesses. Given the negligible anticipated time gained, especially compared to the impact on Mr. Yekatom's rights, the Defence contends that all of those elements militate in favour of the rejection of the Request.

CONFIDENTIALITY

33. The Response is filed on a confidential basis corresponding to the classification of the Prosecution's Request. A public redacted version will be filed in due course.

RELIEF SOUGHT

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

REJECT the Prosecution Request.

RESPECTFULLY SUBMITTED ON THIS 21st DAY OF MARCH 2022



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