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**International
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Court**

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

Date: **28 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 the “Yekatom Defence Response to the
‘Prosecution’s Request for the Formal Submission of the Prior Recorded
Testimony of P-1716 pursuant to Rule 68(3)’ (ICC-01/14-01/18-1316-Conf)”, 28
March 2022**

Source: Defence for Mr. Alfred Rombhot Yekatom

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr. Karim Asad Ahmad Khan
Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Ms. Mylène Dimitri
Mr. Thomas Hannis
Ms. Anta Guissé
Mr. Florent Pages-Granier

Counsel for Mr. Ngaïssona

Mr. Geert-Jan Alexander Knoops
Ms. Richard Omissé-Namkeamaï
Ms. Marie-Hélène Proulx

Legal Representatives of Victims

Mr. Dmytro Suprun

Legal Representatives of Applicants

Mr. Abdou Dangabo Moussa
Ms. Elisabeth Rabesandratana
Mr. Yaré Fall
Ms. Marie-Edith Douzima-Lawson
Ms. Paolina Massidda

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

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-1716 pursuant to Rule 68(3)”¹ (“Request”).
2. The request should be denied in light of the importance of the most salient subject of P-1716’s statement, the Yamwara School Base incident, [REDACTED]. [REDACTED] during an incident which is one of the central issues of the case against Mr Yekatom, it is submitted that a *viva voce* account from P-1716 would best serve the interests of justice and further the truth-seeking function of the Chamber.

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-1716 in its list of witnesses, expecting this individual to testify on core issues of the case, namely the Yamwara School Base incident.⁴ He is expected to testify as [REDACTED] alongside [REDACTED],⁵ [REDACTED],⁶ [REDACTED]⁷ and [REDACTED].⁸

¹ [ICC-01/14-01/18-1316-Conf.](#)

² [ICC-01/14-01/18-685](#), para. 25.

³ *Ibid*, para. 31.

⁴ [ICC-01/14-01/18-724-Conf-AnxA](#), page 30, Witness #45.

⁵ *Ibid*, page 29, Witness #43

⁶ *Ibid*, page 29, Witness #41

⁷ *Ibid*, page 28, Witness #37

⁸ *Ibid*, page 27, Witness #34

5. On 16 March 2022, the Prosecution's Request and its Public Redacted Version were notified.⁹

APPLICABLE LAW

6. 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.

7. 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.

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).¹⁰
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

⁹ [ICC-01/14-01/18-1316-Conf](#) and [ICC-01/14-01/18-1316-Red](#) respectively.

¹⁰ *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, para. 71.

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.¹¹

SUBMISSIONS

10. The Defence first notes that the evidence of P-1716 is self-evidently central to core issues in the case – specifically, the alleged ‘Yamwara School Incident’. This witness’ importance to the Prosecution’s case on the Yamwara School Base incident transpires from the Prosecution’s Trial Brief, in which this witness’s statement is cited in support of [REDACTED],¹² [REDACTED],¹³ the fact that Saint Cyr Lapo was never seen again after the events,¹⁴ [REDACTED],¹⁵ and Coeur de Lion’s intervention [REDACTED].¹⁶
11. This incident is one of the main issues of the Prosecution case against Mr. Yekatom, with no less than 7 charges,¹⁷ out of a total of 20, directly linked to it. The importance and gravity of those 7 charges to this case would also extend to the future Article 74 judgement and the quantum of a potential sentence should the Chamber convicts Mr. Yekatom for all or part of the Yamwara School Base incident. As [REDACTED], P-1716’s statement, like that of [REDACTED], could bear prospective significance with regard to this incident.¹⁸ In the circumstances therefore, the Chamber has to be “extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of

¹¹ *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.

¹² [ICC-01/14-01/18-723-Conf](#), para. 445, fn. 1134.

¹³ *Ibid*, para. 447, fn. 1140.

¹⁴ *Ibid*, para. 447, fn. 1142.

¹⁵ *Ibid*, para. 448, fn. 1144.

¹⁶ *Ibid*, para. 449, fn. 1146.

¹⁷ See [ICC-01/14-01/18-403-Conf-Corr](#), pages 104-107, Counts 11 to 17.

¹⁸ [ICC-01/14-01/18-1317-Conf](#), para. 27.

the trial generally”; the Defence recalls that this must be the Chamber’s “overriding concern”.¹⁹

12. Secondly, the Defence wishes to underline that the factual basis of the Yamwara School Base incident also favours a *viva voce* testimony of P-1716. Indeed, as its name suggests, this incident occurred in a limited geographical location, during very limited time period of only a few hours between 24 and 25 December 2013, before the abductees left the Yamwara School. A witness testimony entirely dedicated to this event will by essence be limited, focusing only on what allegedly occurred at the Yamwara School base between the 24th and 25th of December; such a testimony will be devoid of any issues which could be deemed as “technical”, which would better fit the purpose of submission of prior recorded testimony under Rule 68(3).²⁰
13. More generally, it can be noted that P-1716 is not expected to testify about an attack such as that of the 5th of December 2013 which involved multiple groups, locations and entailed much ‘background’ information. To the contrary, P-1716 [REDACTED] is only going to testify about [REDACTED], on a very localised incident. It is in the interests of justice to hear in full the *viva voce* accounts of such witnesses, even more so when compared to the valuable court time which is used on various documents such as phone books, which has prompted the Presiding Judge to state that a Rule 68(3) application would have been better suited in the instance.²¹
14. The Chamber previously held, when rejecting the principle of Witness Preparation, that “a witness’s recollection of the events should be first tested

¹⁹ *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, para. 69.

²⁰ See the Presiding Judge intervention that Rule 68(3) could be useful when the evidence provided by a witness can be considered as “technical”. [ICC-01/14-01/18-T-082-CONF-ENG ET](#), p. 43-44 lines 25-3.

²¹ P-2232 : [ICC-01/14-01/18-T-076-CONF-FRA ET](#), page 29, lns. 16-21.

during the hearing in order to preserve the principle of immediacy”.²² It is submitted that, in light of the expected testimony of P-1716 on a relatively non complex and straightforward incident, hearing this witness fully *viva voce* would preserve the principle of immediacy and further the Chamber’s previously stated position on the importance of genuine in-court testimony.

15. The Defence also argues that the Chamber will be better enlightened by a fully *viva voce* testimony of P-1716 on this incident. This will enable the Chamber to hear a natural and spontaneous account of the facts that occurred during the Yamwara School Base incident, which will allow for a better comparison and assessment of the reliability of the evidence, [REDACTED]. This opportunity to have a better understanding of the underlying facts of one of the most salient issues of the case directly goes to the Chamber’s truth-seeking function.
16. Thirdly, the Defence notes the Prosecution’s submission that, should the Request be granted, it would reduce its examination of P-1716 from 4 hours to 1.5 hours.²³ It is submitted that the prospective time saved, i.e. 2.5 hours, is negligible when compared to the importance of this witness’s evidence as demonstrated above. Moreover, in order to get a full and spontaneous account of what transpired at the Yamwara School during the alleged incident, the Defence will have to go over the events with the witness which, in addition to nullifying any hypothetical time saved from the Prosecution’s direct examination, effectively reverses the role of presentation of evidence between the Prosecution and the Defence. This is not the purpose of Rule 68(3). Using the extra 2.5 hours to hear the evidence of this extremely relevant witness in full is warranted, especially in light of the fact that, as underlined by the

²² [ICC-01/14-01/18-677](#), para. 23.

²³ [ICC-01/14-01/18-1316-Conf](#), paras. 16, 18.

Presiding Judge, the Prosecution “often uses several hours to question witnesses on what appears not to be the most relevant” aspect of this case.²⁴

17. The Defence further underlines that, in addition to P-1716, [REDACTED], [REDACTED]²⁵ and [REDACTED],²⁶ are expected to testify following a submission of their testimonies pursuant to Rule 68(3). Should the Prosecution’s requests be granted for all three witnesses it would collectively save a total of 6.5 hours of hearings, i.e less than two days of hearings. It is submitted that this time saved on crucial witnesses of a core issue of the case is negligible, specially when put in balance with the right of Mr Yekatom to fully hear and observe the *viva voce* evidence of witnesses testifying on core charges. It militates in favour of the rejection of the Request when the current pace of proceedings is taken into account. Indeed, the scheduling of each block has allowed parties to always organize their respective examination within the proposed time frame. Recalling that each block always has a small remainder of available time, the addition of 2.5 hours would therefore not negatively affect the expeditiousness. Those favourable circumstances, as Trial Chamber VI ruled, should be taken into account when assessing the opportunity to formally submit P-1716’s statement pursuant to Rule 68(3).²⁷

CONCLUSION

18. The Defence recalls the Chamber’s observation prior to the start of the Trial in relation to the Prosecution’s intended use of Rule 68(3) applications. The Chamber noted that the Prosecution anticipated to submit applications pursuant to Rule 68 for about 83% of the witnesses on its Provisional Witness List and underlined that this figure appeared to be rather unprecedented at

²⁴ [ICC-01/14-01/18-T-082-CONF-ENG ET](#) page 28, lns. 12-16.

²⁵ Request granted by the Chamber, see [ICC-01/14-01/18-1317-Conf](#), page 14.

²⁶ Request pending, see [ICC-01/14-01/18-1176-Conf](#) and [ICC-01/14-01/18-1203-Conf](#).

²⁷ *Prosecutor v. Ntaganda*, [Decision on Defence request under Rule 68\(3\) of the Rules for admission of prior recorded testimony of Witness D-0017](#), 22 November 2017, ICC-01/04-02/06-2124, para. 9.

the Court.²⁸ The Chamber further underlined the “potential impact this extensive use may have on the principles of orality and publicity, as well as the rights of the accused”. The Defence respectfully submits that if Rule 68(3) is used with witnesses whose evidence is localized and central to the case such as that of P-1716, the potential impact predicted by the Chamber on the principles of orality and publicity as well as on the rights of the accused will remain a concern.

19. In light of the above, the Defence respectfully requests the Chamber to find that submission of P-1716’s statement pursuant to Rule 68(3) would not be appropriate in light of its content, which is limited but nevertheless crucial to a core issue of the case, and of the negligible time that would be saved, which does not appear necessary in this case. Consequently, the Chamber should reject the Prosecution’s Request.

CONFIDENTIALITY

20. 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

21. For the above reasons, the Defence respectfully requests that the Chamber:
DENY the Request.

RESPECTFULLY SUBMITTED ON THIS 28TH DAY OF MARCH 2022



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands

²⁸ [ICC-01/14-01/18-685](#), para. 21.