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**International
Criminal
Court**

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Date: **19 April 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-1490 pursuant to Rule 68(3)’ (ICC-01/14-01/18-1351-Conf)”,
19 April 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. Victor-Louis Lapointe Saint-Pierre
Ms. Sabine Bayssat

Counsel for Mr. Ngaïssona

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

Legal Representatives of Victims

Mr. Dmytro Suprun

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

Legal Representatives of Applicants

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-1490 pursuant to Rule 68(3)” (“Request”).¹
2. The Request should be denied given that P-1490 provides substantial information about several central issues of the case and extensive allegations regarding the acts and conduct of Mr Yekatom.
3. The uncorroborated allegations contained in the witness’s statement and its apparent lack of reliability further militate in favor of a *viva voce* testimony which would allow the Chamber and the Parties to receive a natural and spontaneous account from the witness.

PROCEDURAL BACKGROUND

4. 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
5. On 10 November 2020, the Prosecution included P-1490 in its list of witnesses, expecting him to testify on, *inter alia*, the arrival of the Anti-Balaka in BOEING in December 2013 and their searches for Muslims, leading to the displacement of most Muslims from their homes; the position of Mr Yekatom as chief of the Anti-Balaka in Boeing; and [REDACTED]’s abduction and torture by Mr

¹ [ICC-01/14-01/18-1351-Conf](#); Public redacted version: [ICC-01/14-01/18-1351-Red](#).

² [ICC-01/14-01/18-685](#), para. 25.

³ *Ibid*, para. 31.

Yekatom and his elements at the Yamwara school.⁴ He is expected to testify as a direct witness and [REDACTED] of these two events.

6. On 7 April 2022, the Prosecution submitted its Request. A public redacted version was notified on the same day.⁵

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 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).⁶

⁴ [ICC-01/14-01/18-724-Conf-AnxA](#), page 29, Witness #42.

⁵ [ICC-01/14-01/18-1351-Conf](#) and [ICC-01/14-01/18-1351-Red](#) respectively.

⁶ *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

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.⁷

SUBMISSIONS

I. On the key issues of the case, including acts and conduct of Mr Yekatom, present in P-1490's prior recorded testimony

11. P-1490's statement contains information central to core issues in the case and relates to no less than 7 counts brought against Mr Yekatom. It also provides information in relation to Mr Yekatom's alleged contributions to the charged crimes, as well as contextual elements.

a) Allegations regarding Counts 1, 2 & 3

12. The Prosecution relies on P-1490's statement in its Trial Brief to support Count 1, alleging that "YEKATOM, who had agreed with MOKOM to participate in the offensive, moved his troops from KALANGOI via PROJET to attack BOEING, including the BOEING market".⁸
13. P-1490 describes the arrival of the Anti-Balaka in the Boeing area.⁹ He specifies that the Anti-Balaka were looking for Muslim civilians in the Boeing area, and that he was directly asked to point out the Muslims' location.¹⁰ In that regard, the witness claims that 'they were threatening and it was clear that they came to hurt the Muslims in the neighbourhood'.¹¹

introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", [ICC-02/11-01/15-744](#), 1 November 2016, para. 71.

⁷ *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.

⁸ [ICC-01/14-01/18-723-Conf](#), para. 396, fn. 1019; Public redacted version: [ICC-01/14-01/18-723-Red](#).

⁹ [CAR-OTP-2121-2788-R03](#), para. 29.

¹⁰ [CAR-OTP-2121-2788-R03](#), paras. 30-33.

¹¹ [CAR-OTP-2121-2788-R03](#), para.30.

14. P-1490 further explains that the attack of the Boeing market occurred on the same day, alleging that the Anti-Balaka killed all the Muslims merchants including Hassan “*délégué*”.¹²

b) Allegations regarding Counts 4, 5 and 8

15. The witness explains that while entering the Boeing area, the Anti-Balaka started to chase away the Muslims civilians¹³ which caused them to hide and flee towards the airport.¹⁴ He alleges that the Anti-Balaka roamed the neighborhood specifically looking for the Muslims civilians and their houses.¹⁵ The witness states that he did not want to designate the Muslims house, because the Anti-Balaka would have killed them.¹⁶
16. P-1490 gives examples of his Muslims neighbours, [REDACTED] and [REDACTED] who decided to leave the Boeing area because they feared the arrival of the Anti-Balaka. The witness specifies that the house of one of them was destroyed by the Anti-Balaka a few days after the attack as part of the destruction of all the Muslims’ houses in the area.¹⁷
17. P-1490 also mentions that after the Boeing market attack, he alleges that he saw Anti-Balaka erecting checkpoints because their goal was to enter in the PK5 area, and claims to have heard them saying that they were going to kill all the Muslims there.¹⁸
18. The witness also directly alleges that Mr Yekatom stole two motorcycles from an individual in Boeing because he was Muslim.¹⁹

¹² [CAR-OTP-2121-2788-R03](#), paras 38-39.

¹³ [CAR-OTP-2121-2788-R03](#), para. 29.

¹⁴ [CAR-OTP-2121-2788-R03](#), para 33.

¹⁵ [CAR-OTP-2121-2788-R03](#), para 31.

¹⁶ [CAR-OTP-2121-2788-R03](#), para. 31.

¹⁷ [CAR-OTP-2121-2788-R03](#), paras 33-36.

¹⁸ [CAR-OTP-2121-2788-R03](#), para. 49; see also para. 128.

¹⁹ [CAR-OTP-2121-2788-R03](#), para. 119.

19. Finally, P-1490 alleges that during the crisis, the Muslims could not enter the Boeing area because the Anti-Balaka would cover the entire zone and provides evidence concerning the obstruction of the access to the Boeing Muslims cemetery by the Anti-Balaka.²⁰
20. It is the above-described allegations that the Prosecution is relying on in its Trial Brief to support Counts 4 and 5, specifically referring to P-1490 and alleging that “in BOEING, they threatened [REDACTED] for information on where Muslim houses were located”.²¹

c) Allegations regarding Count 6

21. P-1490 further alleges that the Boeing Mosque was completely destroyed by the Anti-Balaka, and that the field it was built on is now completely empty.²² Although the witness states that he does not know which Anti-Balaka group destroyed the Boeing Mosque, this allegation remains prejudicial as the witness seems to suggest that the Anti-Balaka in Boeing were led by Mr Yekatom.²³

d) Allegations regarding Mr Yekatom’s essential contributions to the crimes and on contextual elements

22. P-1490’s statement comprises extensive prejudicial allegations directly relating to Mr Yekatom’s acts and conduct, and his alleged promotion of acts of brutality. Much of P-1490’s statement is dedicated to the torture that Mr Yekatom’s allegedly [REDACTED], as well as to his alleged general violent behaviour.²⁴ P-1490 specifically states that [REDACTED].²⁵ In addition, P-1490 relates the alleged [REDACTED] at the Yamwara base, and describes

²⁰ [CAR-OTP-2121-2788-R03](#), para. 128.

²¹ [ICC-01/14-01/18-723-Conf](#), para. 401, fns 1031 and 1033.

²² [CAR-OTP-2121-2788-R03](#), para. 137.

²³ [CAR-OTP-2121-2788-R03](#), paras 53, 55.

²⁴ [CAR-OTP-2121-2788-R03](#), paras 64-69, 81 97.

²⁵ [CAR-OTP-2121-2788-R03](#), para. 69.

[REDACTED] by Mr Yekatom's elements.²⁶ The Prosecution relies on those assertions as acts underlying Counts 11 to 16, allegedly committed at the Yanwara School, and to support its claim that Mr Yekatom "housed and trained his elements at the YAWARA School Base, and used it as a place to detain, abuse, torture and kill prisoners".²⁷

23. Further, P-1490 is expected to testify about Mr Yekatom's contributions to the charged crimes.²⁸ The Prosecution is relying on his allegations in its Trial Brief to support its claim that "Mr Yekatom prepared Anti-Balaka attacks and advances, and participated and led his group in the execution of these attacks and advances"; and that "Mr Yekatom issued orders to Anti-Balaka members, including patently illegal instruction".²⁹ To support this latter claim, the Prosecution specifically refers to P-1490 in the main body of its Trial Brief, alleging that Mr Yekatom "[REDACTED] in front of his elements at the YAMWARA School Base".³⁰
24. In addition, P-1490's statement contains prejudicial allegations in relation to other aspects of Mr Yekatom's alleged contributions to the charged crimes, i.e. the organisation and the structure of the group³¹ and Mr Yekatom's command thereof.³² P-1490 also provides evidence about the identity of the group and its members, which affects the contextual elements of the charged crimes.³³

²⁶ [CAR-OTP-2121-2788-R03](#), paras. 71-81.

²⁷ [ICC-01/14-01/18-723-Conf](#), para. 444.

²⁸ [ICC-01/14-01/18-724-Conf-AnxA](#), page 29, Witness #42.

²⁹ [ICC-01/14-01/18-723-Conf](#), para. 369, fn. 961 and para. 374, fn. 970.

³⁰ [ICC-01/14-01/18-723-Conf](#), para. 369.

³¹ [CAR-OTP-2121-2788-R03](#), paras 30, 53.

³² [CAR-OTP-2121-2788-R03](#), paras 55, 58, 61, 92.

³³ [CAR-OTP-2121-2788-R03](#), paras 30, 54, 62

II. The profound inconsistencies in the narrative of P-1490 and the importance of preserving the fairness of the trial

25. P-1490 met with Prosecution investigators on [REDACTED]. During his interview, the witness stated that he [REDACTED], and provided a detailed account of his experience in this regard.³⁴
26. In January 2020 and, notably, after Mr Yekatom's high-profile arrest and transfer to the Court, P-1490 met Prosecution investigators for the second time.³⁵ On this occasion, P-1490 flagrantly changed his narrative and stated [REDACTED], and flatly denied being abducted and tortured by the Seleka.³⁶
27. The Chamber should, in the conduct of its analysis of the Request, take into account that the incident described, which is directly used by the Prosecution to support Mr Yekatom's alleged contribution, relies on precarious and inconsistent recollection of the events.³⁷ In this regard, it is significant to note that during his second interview, Prosecution investigators emphasized themselves that the witness did not raise [REDACTED] during his first interview.³⁸ The justification given by the witness, i.e. that this inconsistency was the result of an interpretation issue, is deeply unconvincing.³⁹
28. The Defence first notes troubling similarities between P-1490's narrative [REDACTED] during his first interview and his second meeting with the Prosecution; specifically, the time period, the reason for [REDACTED]; all of which reinforce the impression that the witness simply changed the alleged

³⁴ [CAR-OTP-2046-0650-R01](#) at 0652-0653.

³⁵ [CAR-OTP-2121-2777-R02](#) (Screening note); [CAR-OTP-2121-2788-R03](#) (Statement).

³⁶ [CAR-OTP-2121-2788-R03](#), para. 45.

³⁷ *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.

³⁸ [CAR-OTP-2121-2788-R03](#), para 124.

³⁹ [CAR-OTP-2121-2788-R03](#), para 125.

perpetrators of his previous account following the arrest and transfer of Mr Yekatom to the Court.

29. In the same vein, during his screening interview, P-1490 in fact expressly mentioned Mr Yekatom, but not as the individual [REDACTED]; to the contrary, P-1490 states that the Anti-Balaka “patrolled the [Boeing] area to protect the population from Seleka attacks. The Anti-Balaka leaders were ‘RHOMBOT’ and ‘Coeur de Lion’ who was later killed”.⁴⁰ Therefore, it is not only his narrative of [REDACTED] that fundamentally shifted, from [REDACTED], but also P-1490’s perception and description of Mr Yekatom that was completely transformed during his second interview.
30. In the circumstances, it is also notable that, according to his own statement, the witness is motivated both by his own experience as a victim and his wish for an end to impunity – in other words, that he wishes for punishment to be meted out by the Court.⁴¹
31. The Defence highlights that no other Prosecution witness corroborates P-1490’s narrative about this incident.
32. On this basis alone, in-full *viva voce* testimony is warranted, so as to allow the Chamber the opportunity to carefully assess the witness’s credibility while he recounts this contested, uncorroborated incident.
33. In light of the above, the Defence submits that the inconsistencies and the contradictions emphasised above strongly militate against the admission of his statement under Rule 68(3). The statement’s obvious lack of reliability would

⁴⁰ [CAR-OTP-2046-0650-R01](#) at 0653.

⁴¹ [CAR-OTP-2121-2788-R03](#), para. 19.

affect the fairness of the Trial should his statement be admitted into evidence via Rule 68(3).⁴²

34. The interests of justice would be better served by an entirely *viva voce* testimony of P-1490, which would preserve the principle of orality and further the Chamber's previously stated position on the importance of genuine in-court testimony. In this regard, the Defence respectfully recalls that 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 the trial generally".⁴³

III. The Prosecution argument that the submission of the statement will save in-court time

35. The Defence submits that the prospective time saved should the request be granted is negligible when relative to the importance of this witness's evidence, as well as its manifest lack of reliability, as demonstrated above. Moreover, to get a full and spontaneous account from the witness on the attack of 5 December and the fleeing of Muslims from the Boeing area, as well as the witness's alleged kidnapping by Mr Yekatom and his elements, the Defence will likely need to go over the events with the witness which, in addition to nullifying any time saved from the Prosecution's direct examination, effectively reverses the role of presentation of evidence between the Prosecution and the Defence, contrary to the purpose underlying Rule 68(3).

⁴² *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.

⁴³ *Ibid*, para. 69.

CONCLUSION

36. This Prosecution's application, is yet another example of the Prosecution's attempt to submit pursuant to Rule 68(3) a prior recorded testimony of a witness contradicting himself on highly prejudicial allegations brought against Mr Yekatom. The admission of P-1490's prior statement will contribute to concretising the Chamber's concern on the impact that this extensive use of applications pursuant to Rule 68(3) has on principles of orality and publicity as well as the rights of the accused.⁴⁴ In circumstances such as this witness, Mr Yekatom's should be in a position to watch, analyse and observe his accuser in full by listening rather than reading the witness' evidence entirely *viva voce* as to fully observe the witness' demeanor and not only during cross examination.
37. In light of the above, the Defence respectfully requests the Chamber to find that submission of P-1490's Prior Statement and its associated exhibits 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. A *viva voce* testimony should be favoured in these conditions, especially with the reliability concern arising from P-1490's Prior Statement. Consequently, the Chamber should reject the Prosecution's Request.

CONFIDENTIALITY

38. 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.

⁴⁴ [ICC-01/14-01/18-685](#), para. 21.

RELIEF SOUGHT

39. For the above reasons, the Defence respectfully requests Trial Chamber V to:
DENY the Request.

RESPECTFULLY SUBMITTED ON THIS 19TH DAY OF APRIL 2022



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands