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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

**Public redacted version of 'Yekatom Defence Response to the
"Prosecution's Request for the Formal Submission of the Prior Recorded
Testimony of P-2419 pursuant to Rule 68(3)", 13 April 2022, ICC-01/14-
01/18-1360-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-2419 pursuant to Rule 68(3)” (“Request”).¹
2. The Defence submits that the Request should be rejected in light of the numerous references to acts and conduct of Mr Yekatom on core issues of the case made in P-2419’s statement. The unreliability and uncorroborated nature of this statement, in conjuncture with the interests of justice, also militate against its submission pursuant to Rule 68(3) of the Rules.

PROCEDURAL HISTORY

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 added P-2419 in its Final List of Witnesses, indicating that he is expected to testify on the “Incident PK9-Mbaiki axis” and “Yekatom’s contributions” topics.⁴
5. On 13 April 2022, the Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2419 pursuant to Rule 68(3) was notified.⁵ A public redacted version of the Request was notified the same day.⁶

¹ [ICC-01/14-01/18-1360-Conf](#). A public redacted version is also available: [ICC-01/14-01/18-1360-Red](#).

² [ICC-01/14-01/18-685](#), para. 25.

³ *Ibid*, para. 31.

⁴ [ICC-01/14-01/18-724-Conf-AnxA](#), pages 36-37, witness #63.

⁵ [ICC-01/14-01/18-1360-Conf](#).

⁶ [ICC-01/14-01/18-1360-Conf](#).

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. 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.⁷
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).⁸
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.⁹

⁷ *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.

⁸ *Ibid.*, para. 71.

⁹ *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

- I. On the content of P-2419's statement which goes to core issues of the case, *mens rea* and acts and conduct of Mr Yekatom**
10. The Defence objects to the submission of P-2419's prior recorded testimony pursuant to Rule 68(3) as its content extensively relates to core issues of the case, *mens rea* and the acts and conduct of Mr Yekatom and his elements.
 11. Indeed, as mentioned by the Prosecution in its Request¹⁰ and Final List of Witnesses¹¹ P-2419's relates to the PK9-Mbaïki axis and more particularly to the events unfolding in the village of Bimon. Pre Trial Chamber II highlighted the importance of this locality when it confirmed a number of charges relating to the displacement and forced transfer of population "in the context of the Anti-Balaka's advance through and takeover of villages along the PK9-Mbaïki Axis (including Sekia, Ndangala, Bimon, Kapou, Bossongo, Pissa, Mbaïki)"¹², which was recognised by the Trial Chamber Decision in its assessment of victims participation¹³.
 12. In this context, it can only be noted that P-2419's relates directly to core issues of the case as he, himself, states he left BIMON because he was Muslim and following an attack on the village.¹⁴
 13. It should also be noted that P-2419's statement goes over the acts and conduct of Mr Yekatom and his men as he alleges they killed a number of Muslims in the Lobaye prefecture, *ie.* YOMBO, BANGUI-BOUCHIA, GBOUNDOKORO, ETAT-UNIS, and fought against a group of Mbororo.¹⁵ The statement also contains potentially incriminating evidence regarding Mr Yekatom's *mens rea* when P-2419's describes how Mr Yekatom promoted the individuals who

¹⁰ [ICC-01/14-01/18-1360-Conf](#), paras. 2, 9, 11.

¹¹ [ICC-01/14-01/18-724-Conf-AnxA](#), pages 36-37, witness #63.

¹² [ICC-01/14-01/18-403-Corr-Red](#), pages 104-105, Counts 24 and 25.

¹³ [ICC-01/14-01/18-1104](#), para. 36.

¹⁴ [CAR-OTP-2112-0036-R03](#), para. 120.

¹⁵ [CAR-OTP-2112-0036-R03](#), paras 20, 23, 25, 26-29.

targeted Muslims during the attack of Bimon as chiefs.¹⁶ P-2419 mentions that Anti-Balaka searched houses to find Muslims,¹⁷ searched for Muslims names in people's phones¹⁸ and would beat anybody who was collaborating with Muslims.¹⁹ All those elements go directly to Mr Yekatom's *mens rea* as P-2419 states that Mr Yekatom introduced himself in Bimon as the "Chief of the Anti-Balaka"²⁰.

14. The statement of P-2419 also contains potentially incriminating evidence regarding Mr Yekatom's contribution to the charged crimes, especially when P-2419 describes that he directly saw Mr. Yekatom give to the chiefs he had just appointed (i) military weapons; (ii) a zone of responsibility and (iii) a stack of military shirts and trousers in order to be distributed to civilians.²¹ P-2419 also described how a child of about 10 years old joined Mr. Yekatom's group²² along with 60 or more people whom were selected and later divided within three groups in accordance with Mr. Yekatom's instructions.²³
15. It is the Defence positions that all those facts mentioned by P-2419's in his statement are susceptible to be used by the Chamber not only in its determination of whether or not Mr Yekatom is guilty regarding Counts 24 and 25 but also in its analysis of Mr Yekatom's *mens rea* and contribution to the charged crimes. In light of the importance of those elements, which are not merely background information or contextualising the events, the Defence is of the view that they should be elicited orally before the Chamber and under its oversight. Consequently, the Defence respectfully request the Chamber to deny the Prosecution's Request.

¹⁶ [CAR-OTP-2112-0036-R03](#), paras. 51, 44-48, 93-94, 97.

¹⁷ [CAR-OTP-2112-0036-R03](#), para. 107.

¹⁸ [CAR-OTP-2112-0036-R03](#), para. 110.

¹⁹ [CAR-OTP-2112-0036-R03](#), para. 120.

²⁰ [CAR-OTP-2112-0036-R03](#), para. 87.

²¹ [CAR-OTP-2112-0036-R03](#), paras. 51, 44-48, 93-94, 97.

²² [CAR-OTP-2112-0036-R03](#), para. 102.

²³ [CAR-OTP-2112-0036-R03](#), para. 101.

II. On the uncorroborated and unreliability of P-2419's evidence

16. The Defence argues that the submission of P-2419's prior recorded testimony pursuant to Rule 68(3) should be barred in light of the inconsistencies with other witnesses' statements and the un-corroboration of a number of P-2419's assertions.
17. As a preliminary matter, regarding the corroboration of P-2419's statement, the Defence once again ²⁴ raises its concern regarding the now established Prosecution's practice of arguing that corroboration has been established by simply listing P-numbers, without any reference to specific portion of the relevant transcripts or statements. Referring to witnesses by P-numbers in general is insufficient in light of the fact that "*Rule 68 of the Rules itself requires that its application is not 'prejudicial to or inconsistent with the rights of the accused'*"²⁵." Such an approach appears to be inconsistent with the statutory rights of the Accused and doesn't allow the Defence to make meaningful responses. The Prosecution should be instructed to refer to specific portions of statements that it deems to be corroborative, alternatively, the Chamber should disregard such argument if not properly substantiated.
18. The Prosecution avers that P-2419's evidence regarding the forcible displacement of population from Bimon is substantiated *inter alia* by the evidence of P-0954, P-1838 and P-2475;²⁶ however it should be noted that both P-2475 and P-0954 do not mention this village in their statement, and that there is only one reference to Bimon in P-1838's statement which does not relate to the displacement of the population as such.²⁷ Similarly, the Prosecution lists a number of witnesses in support of its argument that P-2419's evidence regarding the establishment of checkpoints by Mr Yekatom in the areas of Sekia

²⁴ See, [ICC-01/14-01/18-1097-Red](#), para. 9; [ICC-01/14-01/18-1145-Corr-Red](#), para. 20.

²⁵ [ICC-01/14-01/18-685](#), para. 27.

²⁶ [ICC-01/14-01/18-1360-Conf](#), para. 12.

²⁷ P-1838: [CAR-OTP-2100-0252-R04](#), para. 96.

and Bimon is corroborated;²⁸ however a summary analysis of the statements of those witnesses shows that P-2233 and P-1647 do not mention the establishment of checkpoints in the areas of Bimon, while P-1858 and P-0487 do not even mention Bimon.

19. In light of those facts, the Prosecution's assertions regarding the numerous corroborations of P-2419's statement by other witnesses should be found to be exaggerated and not given any weight when assessing the relevance of the request.
20. Moreover, and in addition to the uncorroborated nature of parts of P-2419's statement, the Defence notes that a substantive amount of the information provided by this witness constitutes hearsays, sometimes without a clear source. Those information for which P-2419 was not a direct eye witness notably extend to assertions that directly link Mr Yekatom to alleged crimes. As an example P-2419 "heard" that a Muslim in Yombo was killed by the Anti-Balaka, with his source indicating that Mr Yekatom was the chief of the Anti-Balaka in Lobaye, thus directly linking the latter to the crime.²⁹ The witness also indicates that he "heard" that "Rambo and his men" killed an unnamed elderly Muslim, the source of this information being a vague "some Muslims from Bangui".³⁰ Similarly, P-2419 does not put any nuance or caveat of reliability regarding his assertion that "Anti-Balaka killed another Muslim in Gboundokoro" and that the culprit were again "Rambo and his men". This is despite the fact that his source of information is "a local Muslim from Gboundokoro, whose name I do not remember".³¹

²⁸ [ICC-01/14-01/18-1360-Conf](#), para. 12.

²⁹ [CAR-OTP-2112-0036-R03](#), para. 20.

³⁰ [CAR-OTP-2112-0036-R03](#), para. 23.

³¹ [CAR-OTP-2112-0036-R03](#), para. 25.

21. The Defence is of the view that tendering those numerous hearsays targeted against Mr Yekatom would prejudice his rights as the Defence would have to examine the witness on each and single one of them due to their incriminating nature; this would divert the Defence's focus from the most relevant parts of P-2419's testimony and considerably increase the duration of its examination which would defeat the underlying purpose of the Rule 68(3) application. This attempt to submit evidence on unsubstantiated hearsay is prejudicial to the accused especially if not provided with the foundation for such allegations. The failure of the Prosecution's investigators to elicit further information regarding the witness hearsay evidence should not result to shifting the burden of proof onto the Defence. As such, the Prosecution's approach is even more questionable given that they recently strongly objected to a line of questioning by the Defence during the testimony of P-0888 on the basis that it was hearsay, when in fact the foundation for this evidence was much more probative.³²
22. [REDACTED].³³ [REDACTED],³⁴ [REDACTED].³⁵ [REDACTED],³⁶ [REDACTED].³⁷ [REDACTED].
23. In light of the important inconsistency in P-2419's account regarding an event [REDACTED], and of the unreliability of parts of the evidence, the Defence contends that this witness prior recorded testimony is not suitable for a submission pursuant to Rule 68(3).

III. On the interests of justice

24. The Defence also argues that formal submission of P-2419's prior recorded testimony pursuant to Rule 68(3) would not be in the interest of justice.

³² ICC-01/14-01/18-T-120-CONF-FRA ET, p.50, l. 1-8; ICC-01/14-01/18-T-122-CONF-ENG RT, p. 56, lines 16-2; ICC-01/14-01/18-T-122-CONF-ENG RT, p. 59, lines 2-6.

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

25. Indeed, as shown above, the evidence of P-2419 relates to the crimes committed on the PK9-Mbaïki axis, area which is an important part of the Prosecution's case against Mr Yekatom with five counts specifically dedicated to those locations. Despite this importance, and as previously noted by the Defence,³⁸ only one witness of the PK9-Mbaïki axis, P-1666, is currently scheduled to provide his testimony fully *viva voce*.
26. In addition and more importantly, P-2419 is also the sole witness, along P-2388, scheduled to testify about the locality of Bimon, which is one of the few villages specifically mentioned by Pre-Trial Chamber II in its Decision on the Confirmation of Charges regarding the geographical scope of the PK9-Mbaïki axis.³⁹ It should be noted that P-2388 is a Rule 68(3) witness⁴⁰ that was scheduled to testify at the end of 2021. However, as the witness [REDACTED] his testimony had to be postponed.⁴¹ His current status and availability are unclear.⁴² Hence, the possibility of P-2419 being the only witness to testify before the court regarding Bimon should be taken into consideration.
27. Moreover, in the event that P-2388 effectively testifies before the Chamber, P-2419 will still be the only direct eyewitness of the alleged arrival of Mr Yekatom in Bimon as well as the attack on Bimon for which he was in position to name the perpetrators individually.⁴³ The only other witness who mentions the attack, *ie.* P-2388, [REDACTED].⁴⁴
28. The Defence is of the view that the unique nature of the evidence provided by P-2419 on the Bimon village and Mr Yekatom's arrival militates in favour of his

³⁸ [ICC-01/14-01/18-1272-Conf](#), para. 9.

³⁹ See [ICC-01/14-01/18-403-Red-Corr](#), page 104.

⁴⁰ [ICC-01/14-01/18-724-Conf-AnxA](#), page 38, witness #69.

⁴¹ Email from the Prosecution dated 11 October 2021 at 10:31.

⁴² Email from the Defence dated 20 April 2022 at 13:01; Email from the Prosecution dated 21 April 2022 at 16:31

⁴³ [CAR-OTP-2112-0036-R03](#), paras. 47, 51-52, 55, 56.

⁴⁴ [REDACTED].

testimony being heard fully *viva voce*.⁴⁵ This mode of testimony would allow the Chamber to have a better grasp of what transpired on the PK9-Mbaïki axis which will further its truth-seeking function.

29. In addition, it should be reminded that Rule 68(3) submissions constitute an exception to the principle of orality, the Defence contends that in the context of an international criminal case, it is important for the public and alleged victims, which cannot be as easily present in the courtroom as it would have if the trial was being held in the Central African Republic, to hear in its entirety the evidence of some witnesses when their it is not expected to have other *viva voce* testimony on specific locations part of the confirmed charges.
30. In light of the (i) Chamber's position that "the Prosecution's projected use of Rule 68 of the Rules appears, *prima facie*, disproportionate in light of the principles of orality and publicity and potentially prejudicial to the rights of the accused"; (ii) the unique location of the locality of BIMON and P-2419's statement thereof; (iii) the high possibility that P-2419 be the sole witness to testify on that locality, the Defence argues that a four hour time that would be saved during the Prosecution examination by the submission of P-2419'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-2419 fully *viva voce*.⁴⁶
31. In light of the above, the Defence contends that the interests of justice would best be served by hearing P-2419's testimony fully *viva voce*, the Prosecution's Request should thus be denied.

CONFIDENTIALITY

⁴⁵ *Prosecutor v. Abd-Al-Rahman*, Decision on the Prosecution's tenth application to introduce prior recorded testimonies under Rule 68(3), 4 April 2022, [ICC-02/05-01/20-660-Red](#), paras-22-23.

⁴⁶ [ICC-01/14-01/18-685](#), para. 32.

32. Pursuant to Regulation 23 *bis* (1) and (2) of the Regulations of the Court, this response is filed *ex parte* available only to the Defence of Mr Yekatom and the Defence of Mr Ngaïssona as it refers to part of the Defence's strategy, as developed in the paragraph 22 of this response.
33. A confidential redacted version and a public redacted version of the response are filed simultaneously.

RELIEF SOUGHT

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

REJECT the Prosecution's Request,

INSTRUCT the Prosecution to refer to specific portions of statements and or transcripts that it deems to be corroborative in its Requests for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(3).

RESPECTFULLY SUBMITTED ON THIS 25th DAY OF APRIL 2022



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