

**Cour
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**International
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Court**

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Date: **9 April 2021**

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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of "Prosecution's Request for the Formal Submission of the
Prior Recorded Testimony of P-0975 pursuant to Rule 68(3)",
(ICC-01/14-01/18-950-Conf), 9 April 2021**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests the formal submission of the prior recorded testimony of witness P-0975, in accordance with rule 68(3) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the conduct of the proceedings” (“Directions”).¹ P-0975’s prior recorded testimony comprises the witness’s statement of 12 August 2016 (“Prior Statement”), and its associated exhibits.² Should the Chamber deem the Prior Statement formally submitted, the Prosecution further requests leave to conduct a limited examination-in-chief, estimated currently to take no longer than two hours, elaborating specific issues raised therein, and other matters highly relevant to the case.

2. P-0975 is an Anti-Balaka insider, who provides evidence, *inter alia*, on (i) the presence and activities of the Anti-Balaka in GOBERE in 2013, including [REDACTED] and [REDACTED]; (ii) [REDACTED] in Anti-Balaka attacks on ZERE, NDJO, BOBALA, BOBAN, BOGANLI, BOGOIN, and the 5 December 2013 attack on BANGUI; (iii) the preparation and execution of the 5 December attack, and the subsequent demobilisation of the troops involved therein; and (iv) the role of the Anti-Balaka National Coordination and NGAISSONA’s role as the National Coordinator.

3. P-0975 further provides evidence of the contextual elements for war crimes and crimes against humanity; in particular, the Anti-Balaka’s being an organised armed group, and their attacks on ZERE, NDJO, BOBALA, BOBAN, BOGANLI, BOGOIN, BERBERATI, BOUAR, CARNOT, and BANGUI, as part of the widespread Anti-Balaka attack carried out between September 2013 and December 2014 (“Relevant

¹ ICC-01/14-01/18-631, para. 58.

² See ICC-01/05-01/08-1386, paras. 79-81 (“Bemba Appeals Decision”), confirming that written witness statements can be introduced as “previously recorded testimony”. See also ICC-01/09-01/11-1938-Red-Corr, paras. 30-33, analysing the term “previously recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para. 136; ICC-01/05-01/08-886, para. 6; ICC-01/04-01/06-1603, para. 18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362.

Period”) in the western Central African Republic (“CAR”), as set out in the Pre-Trial Chamber’s 11 December 2019 Decision on Confirmation of Charges.³ The Prior Statement further describes the position of the Anti-Balaka leadership within the framework of the group, as well as NGAISSONA’s role during the Relevant Period. The Prior Statement is thus *prima facie* relevant to and probative of material issues at trial.

4. Granting the Request would reduce the presentation of the Prosecution’s examination-in-chief and help to streamline the proceedings. Moreover, it would not unfairly prejudice the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber itself.⁴

5. Having taken note of the Chamber’s guidance, the Prosecution has carefully assessed the Prior Statement to provide the Chamber with the information necessary to conduct the required case-by-case assessment.⁵ Additionally, mindful of the concerns regarding the amount of written evidence to be tendered,⁶ the Prosecution has identified portions in the Prior Statement on which it does not seek to rely, which may assist the Chamber’s assessment of the relevant and contested issues, and reduce (as much as possible) the volume of extraneous material in the case, as a whole.⁷

6. The relevance and probative value of the Prior Statement is set out in a brief summary of the salient issues, along with the associated exhibits or documents, and the sources of other corroborative evidence. *Confidential Annex A* (a Summary Chart) lists the relevant statement and the corresponding associated exhibits. It also identifies

³ See ICC-01/14-01/18-403-Conf-Corr, paras. 64, 70, *et seq.*, and pp. 111, 107.

⁴ See Rule 68(3); *see also* ICC-01/14-01/18-685, para. 29 (noting that, other than the specific requirements of the witness’s presence and absent objection to the introduction of the prior statement, “[n]o further restrictions are imposed with regard to the instances under which Rule 68(3) of the Rules may be used”).

⁵ ICC-01/14-01/18-685, para. 34; *See* ICC-02/11-01/15-744, para. 69 (“*Gbagbo and Blé Goudé Appeals Decision*”).

⁶ *See* ICC-01/14-01/18-685, para. 31, 32.

⁷ Consistent with the Chamber’s decision: ICC-01/14-01/18-907-Conf, para. 16 (even though the entire Prior Statement as a whole is submitted).

the relevant paragraphs of the Confirmation Decision to which the Witness's evidence relates and, where applicable, any charged incidents the Witness discusses. *Confidential* Annex B contains the Prior Statement itself, with grey highlights identifying the portions on which the Prosecution does not seek to rely. The associated exhibits are available to the Defence and the Trial Chamber in e-Court.

II. CONFIDENTIALITY

7. Pursuant to regulation 23*bis*(1) of the Regulations of the Court ("RoC"), this Request and its annexes are filed as "Confidential", as they contain information concerning witnesses which should not be made public. A "Public Redacted" version of the Request will be filed as soon as practicable.

III. SUBMISSIONS

A. Applicable Law

8. The Prosecution incorporates by reference its summary of the applicable law set out in paragraphs 4 to 8 of its observations on its intended approach to rule 68(3) in the presentation of its case,⁸ its submissions in its first request for the formal submission of prior recorded testimony under rule 68(3),⁹ and in its first and second requests for the formal submission of prior recorded testimony under rule 68(2)(b).¹⁰

⁸ ICC-01/14-01/18-655 ("Rule 68(3) Observations"); *see also*, ICC-01/14-01/18-710-Conf, para. 8 (identifying the relevant jurisprudence on the nature of 'prior recorded testimony').

⁹ ICC-01/14-01/18-750-Conf, paras. 8-12, 23, 27-33.

¹⁰ ICC-01/14-01/18-710-Conf, paras. 47-49; ICC-01/14-01/18-744-Conf, paras. 36-40.

B. The Prior Recorded Testimony fulfils all Requirements of Rule 68(3)

9. The Prior Statement may be deemed formally submitted under rule 68(3). P-0975 will attest to its accuracy; he will be present in court; and will be available for examination by the Defence, Participants, and the Chamber.

10. As described below, the Prior Statement is highly relevant and probative. In addition to the issues described above at paragraph 2, the Prior Statement goes to proof of the nature and extent of the widespread attack carried out by the Anti-Balaka against the Muslim civilian population during the Relevant Period as a part of the contextual elements of Crimes against Humanity and War Crimes, under articles 7 and 8, respectively. It provides evidence of the campaign of retributive violence committed by the Anti-Balaka against Muslims perceived to be associated with the Seleka in towns and villages in western CAR, pursuant to a criminal organisational policy,¹¹ particularly in ZERE, NDJO, BOBALA, BOBAN, BOGANLI, BOGOIN, and BANGUI in 2013. P-0975's evidence further bears on the identity of the Anti-Balaka as an 'organisation' or 'group' involved in the commission of the article 7 widespread attack.

11. P-0975's Prior Statement of 12 August 2016 comprises approximately 11 pages. There are no agreements as to facts contained in the charges, documents, the expected testimony of witnesses, or other evidence pursuant to article 69 which bear on the Prior Statement.

12. The witness's Prior Testimony consists of the following:

- P-0975 is an Anti-Balaka insider [REDACTED]. As [REDACTED] several Anti-Balaka attacks in the western provinces in late 2013, including the 5 December

¹¹ See ICC-01/14-01/18-403-Conf-Corr, paras. 64, *see further* pp. 107, 111 (referencing paragraphs 90-114 of the Document Containing the Charges - ICC-01/14-01/18-286-Conf-AnxB1).

2013 attack on BANGUI. He later [REDACTED] before sending them back to BOUCA on [REDACTED].

- The witness provides evidence on the emergence, structure, and organisation of the Anti-Balaka in GOBERE, [REDACTED]. He reports the presence of FACA who provided military training to the GOBERE group, consisting of self-defence techniques, and the use and assembling of weapons.
- P-0975 provides evidence on (i) the strategy and aim of [REDACTED] in the attacks on ZERE, NDJO, BOBALA, BOBAN, BOGANLI, and BOGOIN in 2013, as well [REDACTED]; (ii) the descent [REDACTED], through the villages BOGANGOLO, GBOZO, and DAMARA; and (iii) the 5 December 2013 Anti-Balaka attack on BANGUI, including the coordination of several attack groups, and [REDACTED].
- P-0975 describes NGAISSONA's role as a National General Coordinator, which included (i) organising regular meetings with Anti-Balaka chiefs; (ii) providing financial contributions to the Anti-Balaka, including P-0975 after the 5 December 2013 BANGUI attack; and (iii) negotiating the release of detained ComZones.
- The witness describes the role of the Anti-Balaka National Coordination in 2014, which included (i) using the Anti-Balaka movement to obtain political advantage, such as to obtain ministerial roles and to return BOZIZE to power; (ii) issuing operational orders to initiate checkpoints; and (iii) keeping contact with the Anti-Balaka elements in BANGUI and the western provinces.
- The witness further provides evidence on the structure and organisation of the Anti-Balaka, including (i) the reporting system between the National Coordination and the local ComZones; and (ii) the role played by Anti-Balaka leaders, including ANDJILO, KONATE, and FEISSONA.

13. P-0975's proposed evidence is corroborated by, *inter alia*, the evidence of P-0446, P-0458, P-0801, P-0808, P-0884, P-0888, P-0889, P-0966, P-1074, P-1521, P-1779, P-1786, P-2012, P-2027, P-2232, P-2251, P-2556, P-2602, P-2658, and P-2841, as well as by documentary evidence included in the Prosecution's List of Evidence,¹² in relation to (i) the emergence and organisation of the Anti-Balaka in GOBERE and their participation in the coordinated 5 December BANGUI attack; and (ii) NGAISSONA's leadership over the Anti-Balaka.

C. Associated Exhibits

14. The Prosecution tenders two associated exhibits for formal submission, set out at Confidential Annex A, namely : (i) a signed waiver of right to be assisted by legal counsel during his article 55(2) statement (Annex A);¹³ and (ii) an Anti-Balaka statement [REDACTED] and other Anti-Balaka leaders, upon which the witness comments.¹⁴

15. The items tendered with this application are assessed as indispensable to the comprehension of the Prior Statement, or would otherwise diminish its probative value if excluded. As tendered, the associated exhibits avoid flooding the Parties, Participants, and the Chamber with material that is superfluous or tangential to the import of the witness's testimony, while assisting the Chamber in its assessment of the relevant evidence in its article 74 decision. As an integral part of the Prior Statement, each exhibit is directly relevant to and probative of material issues in dispute, and their admission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-0975's evidence.

¹² See for example CAR-OTP-2068-0123; CAR-OTP-2001-5365; CAR-OTP-2041-0783; CAR-OTP-2076-1083, from [00:25:00] to [00:25:19] and its transcript CAR-OTP-2087-8960, at 8974, 1.481-489; CAR-OTP-2076-1082, from [00:20:18] to [00:22:11] and its transcript CAR-OTP-2087-8944, at 8952-8953, 1.300-341; CAR-OTP-2072-1814-R01, at 1818-1819, 1.126-180; CAR-OTP-2042-2467, from [00:25:01] to [00:28:05] and its transcript CAR-OTP-2107-1489; CAR-OTP-2082-0646, from [00:06:30] to [00:07:05] and its transcript and translation CAR-OTP-2127-4519 and CAR-OTP-2127-4611; CAR-OTP-2023-2935, from [00:00:00] to [00:07:55] and its transcript CAR-OTP-2107-1521; CAR-OTP-2066-1601, at 1738.

¹³ CAR-OTP-2031-7896.

¹⁴ CAR-OTP-2006-1210.

D. A supplementary examination-in-chief is necessary and appropriate

16. Although the Prior Statement is comprehensive, a limited and focused supplemental examination-in-chief to clarify and elaborate P-0975's testimony would be beneficial to the proper adjudication of the issues arising from the charges.

17. Mindful of the Chamber's direction concerning the need to "streamline its questioning considerably",¹⁵ the Prosecution has carefully reviewed its two-hour estimate given for P-0975 in its Final Witness List.¹⁶ The Prosecution considers that it cannot further reduce the estimate of two hours. This estimated supplemental examination of P-0975 takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,¹⁷ and accounts for the prospect of appropriate redirect examination.

18. A lesser amount of time would not provide the Prosecution with a reasonable opportunity to develop, explain, or clarify, limited facets of P-0975's evidence through the use of some of the associated exhibits, other documents, or as concerns other relevant evidence. The limited examination requested is necessary not only to fully understand and contextualise the Prior Statement, in particular as regards the Accused's acts and conduct, but also to advance the Chamber's fundamental truth-seeking function.

19. Alternatively, in the absence of the formal submission of the Prior Statement under rule 68(3), the Prosecution estimates that the witness's testimony on direct examination would require at least four hours to present – twice as long.

¹⁵ ICC-01/14-01/18-685, para. 36.

¹⁶ ICC-01/14-01/18-724, AnxA, p. 43.

¹⁷ See e.g., ICC-01/14-01/18-T-1-ENG ET, p. 6 ln. 18-25; see ICC-01/14-01/21-T-1-ENG ET, p. 3 ln. 14-22, p. 4 ln. 20-22 (noting practical complications involved in the live in-Court interpretation).

E. Balance of interests

20. The projected shortening of P-0975's in-court-testimony by half is "considerable", and the Prosecution submits that, on balance, the introduction of P-0975's Prior Statement under rule 68(3) is appropriate. Moreover, there is no resulting prejudice. The Chamber's and the Parties' interests in advancing this large and complex case efficiently, good trial management, the expeditious conduct of the proceedings, and that the Prior Statement is supported and corroborated by other evidence to be tested at trial, warrants their formal submission in the fair exercise of the Chamber's broad discretion.

IV. CONCLUSION

21. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the Prior Statement of P-0975 together with its associated exhibits as set out at Annex A, subject to the fulfilment of the further conditions of rule 68(3). Should the Chamber do so, it should further grant the Prosecution leave to conduct a limited examination-in-chief, as indicated above.



Fatou Bensouda, Prosecutor

Dated this 9th day of April 2021
At The Hague, The Netherlands