

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 21 February 2024

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 "Yekatom Defence Request for the introduction of CAR-D29-P-5010's prior recorded testimony pursuant to Rule 68(2) of the Rules", 22 January 2024, ICC-01/14-01/18-2319-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. Counsel for Mr Alfred Rombhot Yekatom ("Defence") hereby requests the formal submission of the prior recorded testimony of CAR-D29-P-5010 pursuant to Rule 68(2)(a) of the Rules. The prior recorded testimony consists of the three transcripts taken on 16 October 2023 during P-5010's interview with the Prosecution, in presence of the Defence.¹ Those transcripts do not contain any associated exhibits or annexes. The Defence also requests leave to add the three transcriptions to its List of Evidence.
2. Alternatively, the Defence requests the submission of the prior recorded testimony of P-5010 pursuant to Rule 68(2)(b) of the Rules.

PROCEDURAL HISTORY

3. On 25 August 2023 the Defence submitted its preliminary list of witnesses, which included CAR-D29-P-5010.²
4. On 16 October 2023, the Prosecution interviewed P-5010. This recorded interview was conducted by the Senior Trial Prosecutor, in presence of the Defence and of a Prosecution Sango-English interpreter.
5. On 14 November 2023, the Defence requested by email an extension of time to submit its Rule 68(2) or Rule 68(3) request with regard to P-5010 as it was awaiting from the Language Services Section ("LSS") the corrected translation/transcription of the recording of the 16 October 2023 interview.³
6. On the same day, 14 November 2023, the Chamber granted the extension request sought by the Defence.⁴

¹ See Annex A containing transcripts CAR-D29-0009-0583, CAR-D29-0009-0599 and CAR-OTP-0009-0613-R01.

² ICC-01/14-01/18-2060-Conf-AnxA, page 3, witness #2.

³ Email from the Defence to the Chamber and Parties dated 14 November 2023 13:58.

⁴ Email from the Chamber to the Parties dated 14 November 2023 15:04.

7. On 17 November 2023, the Defence submitted its Final List of Witnesses, including P-5010, with the caveat that the decision on whether to tender its prior recorded testimony pursuant to Rule 68(2)(b) or Rule 68(3) of the Rules was pending provision of the corrected transcriptions by LSS.⁵
8. On 11 January 2024, the Defence received the corrected transcriptions.⁶ The Defence informed the Chamber of this transmission the same day,⁷ as well as provided the Prosecution with courtesy copies of the documents.⁸
9. On 17 January 2024, the Defence formally disclosed the corrected transcriptions provided by LSS.⁹

APPLICABLE LAW

10. Rule 68(2) of the Rules of Procedure and Evidence *inter alia* states that :

If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:

(a) Both the Prosecutor and the defence had the opportunity to examine the witness during the recording.

(b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. In such a case:

(i) In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question:

- relates to issues that are not materially in dispute;
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- relates to background information;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability.

⁵ ICC-01/14-01/18-2212-Conf-AnxA, page 2, witness #4.

⁶ Email from the Counsel Support Section to the Defence dated 11 January 2024 08:40 (available upon request).

⁷ Email from the Defence to the Chamber and Parties dated 11 January 2024 10:08.

⁸ Email from the Defence to the Prosecution dated 11 January 2024 10:14.

⁹ Trial D29 package 86.

SUBMISSIONS

11. The Defence will first argue that P-5010's prior recorded testimony meets the criteria for a Rule 68(2)(a) submission (A). Alternatively, the submission of the Prior Requested Testimony pursuant to Rule 68(2)(b) is requested (B).
 - A. On the submission of P-5010's prior recorded testimony pursuant to Rule 68(2)(a) of the Rules
12. Rule 68(2)(a) of the Rules provides for the possibility to introduce the prior recorded testimony of a witness if both the Prosecutor and the Defence had the opportunity to examine the witness during the recording. Trial Chamber IX found that for such submission to be granted *"the opportunity to examine the witness must be a meaningful one, mirroring as far as possible the parties' right to question the witness during his or her testimony during the trial proceedings. Generally, consecutive interviews by the parties do not meet that requirement"*.¹⁰
13. The Defence seeks submission of P-5010's prior recorded testimony which consists of an interview conducted by the Prosecution on 16 October 2023. This interview was conducted *inter alia* by the Senior Trial Prosecutor, in the presence of the Defence, and with the assistance of a Sango-English interpreter from the Office of the Prosecutor. The interview was fully recorded¹¹ and a transcription/translation was provided by the LSS through the Counsel Services Section.
14. The Defence was present during the entirety of the Prosecution's interview, and was in a position to ask further questions to the witness following the Prosecution's interview should it have been deemed necessary.

¹⁰ *Prosecutor v. Ongwen*, Decision on Defence Request to Submit the Prior Recorded Testimony of D-0036 and related documents pursuant to Rule 68(2)(a) of the Rules, 13 November 2019, [ICC-02/04-01/15-1665](#), para. 8.

¹¹ The Defence highlights that both the Prosecution and Defence are in possession of audio recordings, while they are not disclosed, they bear ERN CAR-OTP-00002000, CAR-OTP-00002001, CAR-OTP-00002002.

15. During this interview with the Prosecution, P-5010 testified regarding:
- P-5010's [REDACTED];¹²
 - The Mbaiki meeting organised by Mgr Rino (P-5015), in the presence of Mr Yekatom;¹³
 - Mr Yekatom's announcement during the meeting that he came to protect both communities, Muslims and non-Muslims;¹⁴
 - P-5010's limited knowledge of Mr Yekatom noting that the witness only saw him once, i.e., during the meeting organised by Mgr Rino (P-5015);¹⁵
 - The arrival of Anti-Balaka in Mbaiki and the location of Anti-Balaka bases;¹⁶
 - The presence of roadblocks between Mbaiki and Bangui;¹⁷
 - The evacuation of the Muslim's population from Mbaiki;¹⁸
 - A phone call from [REDACTED] to P-5010 whereby the latter was informed of Mr Dijido Saleh's death. During the phone call, [REDACTED] provided P-5010 with information concerning the perpetrators of the killing.¹⁹
16. In light of the information provided by P-5010 during his interview with the Prosecution, the Defence submits that the rights of Mr Yekatom are fully preserved by the submission of the transcriptions/translations of this interview. No further questioning by the Defence is necessary, especially in light of the corroborative nature of P-5010's evidence.²⁰ As such submission of

¹² CAR-D29-0009-0583 from 0588 to 0591.

¹³ CAR-D29-0009-0583 at 0587

¹⁴ CAR-D29-0009-0599 from 0609 to 0610.

¹⁵ CAR-D29-0009-0583 at 0587, 0597 ; CAR-D29-0009-0599 at 0605.

¹⁶ CAR-D29-0009-0583 from 0591 to 0595.

¹⁷ CAR-D29-0009-0599 from 0602 to 0603.

¹⁸ CAR-D29-0009-0599 from 0608 to 0611.

¹⁹ CAR-D29-0009-0613 from 0614 to 0620.

²⁰ See paragraph 21 below.

this witness' evidence pursuant to Rule 68(2)(a) is warranted in the interests of expeditiousness.

17. The Defence also highlights that the Prosecution was put in a position to fully examine P-5010, mirroring its right to examine its right to question the witness during a hearing before the court.²¹ At the time of the interview the Prosecution was aware that P-5010 was on the Defence list of witnesses since August 2023. The Prosecution had ample time to prepare in order to fully question P-5010 on all material elements of his testimony [REDACTED]. He was duly questioned by Prosecution Counsel on material elements of the Prosecution case, including the arrival and presence of Anti-Balaka in Mbaiki, the evacuation of the Muslim population, and the killing of Djido Saleh. The Prosecution – represented by the Senior Trial Prosecutor - was provided with a meaningful opportunity to examine the witness in full and had concluded the interview by indicating *“[w]ell, [REDACTED], I'd like to thank you very much. I don't have any further questions for you. I'd like to thank you once again for your participation and cooperation”*.²²
18. As the content of P-5010's prior recorded testimony originates exclusively from an interview of the Prosecution in the presence of the Defence, it is submitted that the conditions of Rule 68(2)(a) are fulfilled. Consequently, the Defence respectfully requests the Chamber to introduce P-5010's prior recorded testimony pursuant to this provision. The Defence further highlights that, should the Prosecution requests so, it does not oppose to the disclosure and submission of the audio recording of the interview from which the transcriptions/translations originate from.

²¹ *Prosecutor v. Ongwen*, Decision on Defence Request to Submit the Prior Recorded Testimony of D-0036 and related documents pursuant to Rule 68(2)(a) of the Rules, 13 November 2019, [ICC-02/04-01/15-1665](#), para. 8.

²² CAR-D29-0009-0613 at 0620.

- B. Alternatively, on the submission of P-5010's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules
19. Should the Chamber rejects submission of P-5010's prior recorded testimony pursuant to Rule 68(2)(a), the Defence argues that its submission pursuant to Rule 68(2)(b) is warranted in light of its fulfillment of the guidance previously provided by the Trial Chamber.²³
20. Indeed, as detailed above in paragraph 15, P-5010's prior recorded testimony goes to proof on subjects other than the acts and conduct of the accused. P-5010's evidence relates to the background of the conflict in the Lobaye region, the witness' experience of what occurred on the PK9-Mbaiki axis when he travelled to Bangui, and his knowledge of other individuals who lived in Mbaiki. P-5010 also provides evidence as to the meeting organized by Mgr Rino (P-5015) in the Mbaiki church and indicates that this meeting constitutes the only time he saw Mr Yekatom. The Defence contends that this limited mention of the accused does not preclude the submission of the witness prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.²⁴ This is especially so, given that this meeting, as well as the 'assurances to the Muslim community' provided by Mr Yekatom during said meeting, are themselves part of the Prosecution case as pleaded and led.²⁵
21. In the same vein, in-court testimony of P-5010 would also be unnecessary in light of the corroborative nature of his evidence. In particular, Mgr Rino (P-5015) testified extensively during his testimony as to the organisation of the meeting and the attendance of Mr Yekatom;²⁶ and several Prosecution witnesses also testified as regards this meeting and what was discussed, such

²³ ICC-01/14-01/18-1833-Conf-Corr, ICC-01/14-01/18-1907-Conf.

²⁴ ICC-01/14-01/18-1833-Conf-Corr, para. 29.

²⁵ See, ICC-01/14-01/18-723-Conf, para. 468; regarding the Prosecution witnesses heard to date on the meeting, see *infra*, para. 21.

²⁶ **P-5015** : ICC-01/14-01/18-T-254-ENG; ICC-01/14-01/18-T-255-ENG; ICC-01/14-01/18-T-256-ENG.

as *inter alia* P-1595,²⁷ P-1666,²⁸ or P-2041.²⁹ A number of other witnesses also testified as regard the departure of the Muslims from Mbaïki such as *inter alia* P-5015, P-1838,³⁰ P-1666³¹ or P-2354.³² P-5010's second-hand evidence with regard to the killing of Mr Djido Saleh is further corroborated to varying degrees by *inter alia* P-1786,³³ P-1595,³⁴ and documentary evidence.³⁵

22. The purpose of Rule 68(2)(b) is to streamline the proceedings when it is not necessary to examine witnesses while at the same time preserving the fair and expeditious conduct of the proceedings. In light of the content of P-5010's prior recorded testimony and of its corroborative nature, the Defence contends that there is no need for his evidence to be further tested through an oral examination.³⁶ This is especially the case in the present instance as the prior recorded testimony consists entirely of the witness' interview with the Prosecution, which was provided with the opportunity to fully test P-5010's evidence.³⁷
23. Moreover, it is submitted that P-5010's prior recorded testimony has sufficient indicia of reliability as it consists of the transcriptions of a formal interview conducted by the Prosecution in the presence of the Defence. The witness provided his account voluntarily and confirmed having been explained the role of the different parties in the case.³⁸ The witness was assisted during the totality of the interview by an English-Sango interpreter. While the witness did not sign the transcriptions, as is usually done with written statements, the interview was

²⁷ **P-1595** : CAR-OTP-2135-2397, para. 78.

²⁸ **P-1666** : ICC-01/14-01/18-T-232-CONF-FRA at [10:14].

²⁹ **P-2041** : ICC-01/14-01/18-T-230-CONF-FRA ET [09:52:46].

³⁰ **P-1838** : CAR-OTP-2107-6303, para. 102.

³¹ **P-1666** : ICC-01/14-01/18-T-232-CONF-FRA at [10:54].

³² **P-2354** : CAR-OTP-2122-4507 para 63.

³³ **P-1786** : ICC-01/14-01/18-T-197-CONF-FRA ET at [15:50:29].

³⁴ **P-1595** : ICC-01/14-01/18-T-106-CONF-FRA, p.15

³⁵ See CAR-D29-0002-0080.

³⁶ ICC-01/14-01/18-1833-Conf-Corr, para. 37.

³⁷ See also paragraph 17 above.

³⁸ CAR-D29-0009-0583 at 0585.

fully recorded, which assures the reliability of the transcriptions for which submission is sought. Moreover, should the present request be granted, P-5010 will be presented with the transcriptions by the Registry Senior Legal Advisor designated by the Chamber.³⁹

24. Finally, the Defence carefully assessed the content of the evidence and confirms that its submissions through Rule 68(2)(b) of the Rules would not prejudice the rights of Mr Yekatom.
25. In light of the above, the Defence contends that P-5010's prior recorded testimony fulfills the requirements set out by Rule 68(2)(b) of the Rules for their submission.

CONFIDENTIALITY

26. The present request and its Annex A are filed on a confidential basis due to the references to information disclosing the identity of witnesses. A public redacted version will be filed forthwith.

RELIEF SOUGHT

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

GRANT the request to add CAR-D29-0009-0583, CAR-D29-0009-0599 and CAR-OTP-0009-0613-R01 to the Defence's List of Evidence; and

GRANT the request to introduce the prior recorded testimony of P-5010 as set out in Annex A pursuant to Rule 68(2)(a);

Or, alternatively:

GRANT the request to introduce the prior recorded testimony of P-5010 as set out in Annex A pursuant to Rule 68(2)(b).

³⁹ ICC-01/14-01/18-508.

RESPECTFULLY SUBMITTED ON THIS 21ST DAY OF FEBRUARY 2024

A handwritten signature in blue ink, appearing to read 'Mylène Dimitri'.

Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands