

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 3 April 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 "Fourth Defence Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)", 15 December 2023, ICC-01/14-01/18-2267-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') requests the formal submission of the prior recorded testimony of CAR-D29-P-5016, pursuant to rule 68(2)(b) of the Rules of Evidence and Procedure ('Rules') and in accordance with the Trial Chamber's Further Directions on the Conduct of Proceedings,¹ and its addition onto the Defence List of Evidence ('Defence List of Evidence').²
2. The prior recorded testimony of P-5016 comprises the witness statement ('Proposed Rule 68(2)(b) Material').
3. Having been guided by the Trial Chamber's previous decisions concerning rule 68(2)(b) applications submitted by the Prosecution,³ the Defence submits that the Proposed Rule 68(2)(b) Material fulfils the requirements of rule 68(2)(b).
4. The Proposed Rule 68(2)(b) Material does not relate to the charged acts and conduct of the accused and instead concerns the contextual background of the conflict in the Lobaye during the charged period. The Proposed Rule 68(2)(b) Material is cumulative and/or corroborative of other oral testimony concerning similar facts and has been prepared in a reliable manner.
5. Further, the formal submission of the Proposed Rule 68(2)(b) Material best serves the interests of justice in that it will obviate the unnecessary appearances of P-5016. This will undoubtedly expedite these proceedings which is consistent with Mr. Yekatom's rights pursuant to article 67(1)(c) and would not occasion unfair prejudice to the accused.

¹ ICC-01/14-01/18-1892, para. 21(iii).

² ICC-01/14-01/18-2212-Conf-AnxD.

³ ICC-01/14-01/18-1833-Conf-Corr, ICC-01/14-01/18-1907-Conf.

PROCEDURAL HISTORY

6. On 17 November 2023, the Defence requested an extension of time to submit a Rule 68(2) Application for witness P-5016 until 15 December 2023.⁴
7. The same day, Trial Chamber V granted the request of time extension to file the application⁵ and to provide P-5016's statement and associated items.⁶
8. On [REDACTED], P-5016 read-back his statement.
9. On 15 December 2023, the Proposed Rule 68(2)(b) Material was disclosed to the Parties and Participants.⁷

SUBMISSIONS

- A. The Proposed Rule 68(2)(b) Material is correctly identified as 'prior recorded testimony' for the purposes of rule 68(2)(b)
10. The Proposed Rule 68(2)(b) Material comprises of the written statement collected from P-5016 which were either used or explained by the witness and which therefore constitute an integral part of the testimony itself.⁸ Annex A sets out the relevant date and ERN for the statement.
11. As reflected in the Proposed Rule 68(2)(b) Material, P-5016 understood at the time, that the information he provided may be relied upon in the context of legal proceedings,⁹ and that he may be called upon to provide his testimony in public.

⁴ Email from the Defence to Trial Chamber V sent on 17 November 2023, at 14.17.

⁵ Email Decision from the Trial Chamber V sent on 17 November 2023, at 15.56.

⁶ See Clarification Email from Trial Chamber V sent on 22 November 2023, at 11.16 following an request for clarification by the Prosecution *see* Email from the Prosecution to Trial Chamber V sent on 17 November 2023, at 16.27.

⁷ Trial D29 package 84 15 December 2023.

⁸ ICC-01/14-01/18-1833-Conf-Corr, para. 24.

⁹ ICC-01/14-01/18-1833-Conf-Corr, para. 23.

- B. The Proposed Rule 68(2)(b) Material does not relate to matters concerning the charged acts and conduct of the accused
12. The Proposed Rule 68(2)(b) Material does not relate to the charged acts and conduct of the accused as described in the confirmed charges or which are otherwise relied upon by the Prosecution to establish the accused's criminal responsibility for the crimes charged.¹⁰
13. Instead, the Proposed Rule 68(2) Material is limited to undermining the contextual elements of the crimes as alleged by the Prosecution, specifically in relation to the nature and extent of the attack alleged to have been carried out by the Anti-Balaka against the Muslim population.
- C. The Proposed Rule 68(2)(b) Material has been prepared in a reliable manner
14. The Proposed Rule 68(2)(b) Material has sufficient *indicia* of reliability for the purposes of formal submission pursuant to rule 68(2)(b).¹¹
15. The prior record testimony of P-5016 was: (i) taken in the ordinary course of proceedings, (ii) signed by the witness and the investigator(s) conducting the interview, (iii) given voluntarily, (iv) verified by the witness at the time of the statement and, (v) includes information that the witness was given an explanation of the procedure before the ICC and was informed of the significance of providing the statement to the Defence. In this regard, the statement contains an express acknowledgment attesting to the voluntariness and the truth of its contents to the best of the witness' knowledge. Moreover, declarations in accordance with Rule 68(2)(b)(ii) are currently being prepared with the assistance of the Registry and will be submitted in due course.¹²

¹⁰ ICC-01/14-01/18-1833-Conf-Corr, para. 28.

¹¹ ICC-01/14-01/18-1833-Conf-Corr, para. 42.

¹² See Email Decision on Yekatom Defence Request Regarding Certification of Witness Statements, 30 October 2023 [08:55].

16. The statement was obtained in a language understood by P-5016, namely Sango, and was read back by a qualified interpreter assigned by the Registry. In doing so, P-5016 was informed of his right to make corrections and clarifications to his statement.
17. Further, as developed further below, the statement is internally consistent and sufficiently corroborated by other evidence in these proceedings.¹³

D. Overview of the Proposed Rule 68(2)(b) Material

18. In order to assist the Trial Chamber's assessment of the Proposed Rule 68(2)(b) Material, the Defence provides a comprehensive overview of the salient issues arising within the prior recorded testimony for P-5016, as well as a summary of the relevant cumulative and/or corroborating evidence in this case.¹⁴
19. The Proposed Rule 68(2)(b) Material goes to the contextual background of the conflict in CAR including in PISSA and BOSSONGO. In particular, the evidence demonstrates the context in which the Muslim population left BOSSONGO, and undermines the Prosecution's evidence concerning: (i) the alleged location(s) and movement(s) of the Anti-Balaka, and (ii) the alleged identity of victims and/or the circumstances in which victims are alleged to have been killed by Anti-Balaka.
20. Whilst the Defence notes that full consideration of the standard evidentiary criteria is to be deferred to the Chamber's eventual deliberation of its judgment,¹⁵ it is submitted that the Proposed Rule 68(2)(b) Material meets the requisite relevance and probative value threshold as it relates to the nature and extent of the attack alleged to have been carried out by the Anti-Balaka against

¹³ Noting that the Trial Chamber is only obliged to conduct a preliminary assessment of these factors at this stage see ICC-01/14-01/18-1833-Conf-Corr, para. 43.

¹⁴ Noting the Trial Chamber's prior finding that "the prior recorded testimony does not need to be of cumulative or corroborative nature to oral testimony of the same events or facts, but it is sufficient that the oral testimony concerns similar facts" see ICC-01/14-01/18-1833-Conf-Corr, para. 38.

¹⁵ ICC-01/14-01/18-1833-Conf-Corr, para. 15.

the Muslim population as well as the alleged existence of a criminal organisational policy.

a) Production of documentary material

21. The Defence tenders for formal submission P-5016's statement collected on 17 May 2023 and 12 and 14 December 2023, totalling approximately 6 pages.¹⁶ 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 P-5016's statement.
22. The witness' proposed testimony establishes the following:
- P-5016 is [REDACTED];
 - P-5016 explains that there were no safety issues in BOSSONGO during the rule of the Séléka and the Anti-balaka;
 - P-5016 explains that the Muslim population left in 2014 upon request by Muslim leaders and that they were accompanied to PISSA by the Christian population;
 - P-5016 explains the role of [REDACTED] in relation to [REDACTED] and killing of BOSSONGO inhabitants;
 - P-5016 explains that [REDACTED] from BOSSONGO and not Anti-Balaka;
 - P-5016 explains that the Anti-balaka group of Mr. Yekatom was in CENTRAPALM and would move in different localities to ensure safety;
 - P-5016 recalls a barrier in PISSA which was solely manned by gendarmes.

¹⁶ CAR-D29-0009-0576.

23. P-5016's proposed evidence affecting the credibility of the Prosecution evidence is cumulative and corroborative of, *inter alia*, i) Prosecution,¹⁷ Defence,¹⁸ and Chamber¹⁹ witnesses on the fact that certain authorities including Muslim leaders in localities, assisted in coordinating the evacuation of Muslims, ii) of Prosecution²⁰ and Defence²¹ witnesses on the movements of Mr. Yekatom in different localities to ensure safety, and iii) of Prosecution witnesses²² on the presence of gendarmes at checkpoints following Mr. Yekatom's advance on the PK9-MBAIKI axis.
24. There are no associated exhibits accompanying P-5016's statement.
- E. The fairness requirements are weighed in favour of an accused's right to expeditious proceedings where the calling party is the Defence
25. Rule 68(2)(b) was introduced in order to streamline proceedings so as to identify certain situations where it is not necessary to examine witnesses while at the same time preserving the fair and expeditious conduct of the proceedings.²³ This is a delicate balance which forms the centre of rule 68(2)(b) litigation before this Court.
26. In this regard, the Defence recalls the Appeals Chamber's findings in the *Al Hassan* case, namely that rule 68 must be treated as an "exception to the principle of orality as set out in article 69(2)",²⁴ and as such it must be interpreted and applied "in a manner that is consistent with internationally recognised human rights norms".²⁵ This includes the internationally recognised

¹⁷ **P-2389** : CAR-OTP-2122-4458, paras. 66-68.

¹⁸ **P-5015** : ICC-01/14-01/18-T-255-FRA ET, [09:37:23].

¹⁹ **P-0952** : ICC-01/14-01/18-T-252-FRA ET, [13:55:06]

²⁰ **P-1813** : CAR-OTP-2069-0035-R02, par. 71 ; **P-2084** : CAR-OTP-2122-4905-R01, para. 81 ; **P-1647** : CAR-OTP-2050-0654-R02, para. 44 ; **P-1193** : ICC-01/14-01/18-T-126-CONF-FRA ET, page 80 and ICC-01/14-01/18-T-124-CONF-FRA ET, page 22.

²¹ **P-5015** : ICC-01/14-01/18-T-254-FRA ET, [12:46:31].

²² **P-0888** : ICC-01/14-01/18-T-122-CONF-FRA ET, [10:47:33] ; **P-1647** : ICC-01/14-01/18-T-195-FRA ET [12:46:43] ; **P-1839** : ICC-01/14-01/18-T-174-CONF-FRA ET, [10:57:12] and [12:30:02].

²³ ICC-01/14-01/18-1833-Conf-Corr, para. 37.

²⁴ ICC-01/12-01/18-2222 OA4, para. 1.

²⁵ ICC-01/12-01/18-2222 OA4, para. 79.

right of an accused to confront a witness against him/her, as protected under article 67(1)(e) and article 69(2).²⁶ Accordingly, as held by the Appeals Chamber, the criteria set out in rule 68 are “aimed at reducing prejudice to the rights of the accused”.²⁷

27. The rule 68(2)(b) factors are not therefore aimed at reducing any purported internationally recognised right of the Prosecution,²⁸ nor of the CLRV1 as participants in these proceedings, to examine the evidence led by the Defence and must be given full effect so as not to defeat the very objective of rule 68.²⁹
- F. The formal submission of the Proposed Rule 68(2)(b) Material best serves the interests of justice and would not prejudice or be inconsistent with the rights of the accused
28. Relatedly, given the limited impact upon the accused’s right to confront a witness against him/her in these circumstances, it is submitted that the interests of justice are necessarily best served by the introduction of the Proposed Rule 68(2)(b) Material into evidence pursuant to Rule 68(2)(b).
29. The introduction of the Proposed Rule 68(2)(b) Material would undoubtedly safeguard the expeditiousness of these proceedings which is a right of both the accused and victims in these proceedings.
30. Moreover, it will streamline the presentation of the Defence’s case given that it obviates the unnecessary appearance of one witness and minimises cumulative in-court testimony. This undoubtedly would save valuable court time and court

²⁶ ICC-01/12-01/18-2222 PA4, paras 75 -77.

²⁷ ICC-01/12-01/18-2222 OA4, para 79. See also ICC-01/14-01/18-1833-Conf-Corr, para. 27 ‘The purpose of this limitation is to safeguard ‘a fair trial in full equality’, 44 in particular ensuring the accused’s right to confront and examine those persons making direct allegations against them in court’.

²⁸ See e.g. ICC-01/04-02/12-271-Corr OA, paras 253 to 256 in which the Appeals Chamber, whilst addressing arguments concerning the Prosecutor’s right to a fair trial, determined that the fundamental right to a fair trial “first and foremost, inures to the benefit of the accused” and that further, “specific rights entrenched in article 67 (1) of the Statute are specifically tailored to the needs of the accused person”.

²⁹ See also ICC-01/12-01/18-2222 OA4, paras 3 and 55, further cited in ICC-01/14-01/18-1833-Conf-Corr, para 27.

resources which would otherwise be used to facilitate the travel of witnesses to the ICC Headquarters.

CLASSIFICATION

31. This request, as well as Annex A, are filed on a confidential basis as it pertains to confidential material. A public redacted version will be filed in due course.

RELIEF SOUGHT

32. For the foregoing reasons, the Defence respectfully requests that the Chamber to:

GRANT the request to introduce the prior recorded testimony of P-5016 as set out in Annex A, into evidence pursuant to rule 68(2)(b);

GRANT the request to add item CAR-D29-0009-0576 onto the Defence List of Evidence.

RESPECTFULLY SUBMITTED ON THIS 3rd DAY OF APRIL 2024



Me Mylène Dimitri
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