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

Date: **23 December 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**

**with Confidential Annexes A and B**

**Public Redacted Version of “Prosecution’s Request for the Formal Submission of  
the Prior Recorded Testimony of P-0446 pursuant to Rule 68(3)”, ICC-01/14-01/18-  
1112-Conf, 20 September 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-0446, in accordance with rule 68(3) of the Rules of Procedure and Evidence (“Rules”) and the “Initial Directions on the conduct of the proceedings” (“Request”).<sup>1</sup> P-0446’s prior recorded testimony comprises the transcribed statement of the witness’s two interviews on 12 to 16 May 2016 and 1 and 3 August 2018 (“Prior Statement”) and 14 associated exhibits.<sup>2</sup> Should the Chamber deem the Prior Statement formally submitted, the Prosecution further requests leave to conduct a limited examination-in-chief, currently estimated at approximately four hours, elaborating specific issues raised therein, and other matters highly relevant to the case.

2. P-0446 [REDACTED]. His Prior Statement discusses: (i) the creation and origins of the Anti-Balaka; (ii) the Seleka’s commission of crimes in BANGUI; (iii) the emergence of the Anti-Balaka movement, its organisation and structure, including the alleged split between “North” and “South” groups; (iv) the preparation and execution of the Anti-Balaka’s 5 December 2013 attack of BANGUI; (v) Anti-Balaka meetings, including at NGAISSONA’s compound [REDACTED]; (vi) the Anti-Balaka’s use of weapons, *gris-gris*, membership ID badges; (vii) the creation and functioning of the Anti-Balaka Military Police; and (viii) the leadership roles of both NGAISSONA and YEKATOM within the Anti-Balaka.

3. Granting the Request would reduce the presentation of the Prosecution’s examination-in-chief and help to streamline the proceedings. Moreover, it would not

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<sup>1</sup> ICC-01/14-01/18-631, para. 58.

<sup>2</sup> 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.

unfairly prejudice the Defence, as the witness will be fully available for cross-examination and any inquiry by the Chamber itself.<sup>3</sup>

4. 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.<sup>4</sup> Additionally, mindful of the concerns regarding the amount of written evidence to be tendered,<sup>5</sup> 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.<sup>6</sup>

5. 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 interview transcripts, and the corresponding associated exhibits. It also identifies the relevant paragraphs of the Confirmation Decision to which the witness' evidence relates and, where applicable, any charged incidents the witness discusses.

6. Due to the length of the Prior Statement,<sup>7</sup> a summary thereof, organised by topic, is attached at *Confidential Annex B* to facilitate the Parties', Participants', and Chambers' understanding of its content, and to more easily identify its relevance and probative value ("Summary"). The Summary is not tendered for formal submission, rather, it clearly and concisely sets out the substance of the transcripts comprising the Prior Statement hereby tendered.

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<sup>3</sup> 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").

<sup>4</sup> ICC-01/14-01/18-685, para. 34; See ICC-02/11-01/15-744, para. 69 ("*Gbagbo and Blé Goudé Appeals Decision*").

<sup>5</sup> See ICC-01/14-01/18-685, para. 31, 32.

<sup>6</sup> 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).

<sup>7</sup> The Prior Statement comprises 28 interview transcripts totalling approximately 616 pages.

## 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 a witness 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,<sup>8</sup> its submissions in its first request for the formal submission of prior recorded testimony under rule 68(3),<sup>9</sup> and in its first and second requests for the formal submission of prior recorded testimony under rule 68(2)(b).<sup>10</sup>

### 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-0446 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. It goes to the proof of the contextual elements for war crimes and crimes against humanity, in particular the Anti-Balaka being an organised armed group between September 2013 and December 2014 (“Relevant Period”). It also describes NGAISSONA’s role

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<sup>8</sup> 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’).

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

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

within the Anti-Balaka notably as a political leader, and the commission of crimes by YEKATOM's group, notably in BANGUI and on the MBAIKI axis.

11. P-0446's Prior Statement comprises 616 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 establishes the following:

- P-0446 [REDACTED].
- He recounts the circumstances of the Seleka coup of 24 March 2013, and the Seleka's subsequent widespread commission of crimes in BANGUI.
- While the Seleka were in power, [REDACTED].
- He discusses the origins of the Anti-Balaka movement as self-defence groups emerged spontaneously in reaction to the Seleka crimes.
- He recounts [REDACTED] Anti-Balaka from around the country including ANDJILO, MOKPEM, and 12 PUISSANCES who were gathered behind a hill. He discusses [REDACTED].
- He describes the 5 December 2013 attack of BANGUI, its military objectives and leadership. He claims the goal was not to seize power but to get DJOTODIA to resign. He further indicates that MOKOM coordinated operations from ZONGO and that it was planned by KONATE and ANDJILO. [REDACTED].
- He describes the structure of the Anti-Balaka movement:
  - There was a unified structure under the Coordination, led by NGAISSONA and his deputies WENEZOUÏ and KONATE, and other advisors such as NGAYA. P-0446 also places Maxime MOKOM in a leadership position, and indicates there was also a Chef d'Etat Major

such as Richard BEJOUANE and Oliver FEISSONA (“FEISSONA”) who provided instructions to Anti-Balaka groups.

- He describes how each Anti-Balaka group had its own commander and deputy.
- He details there was a Secretariat, based at NGAISSONA’s father’s house, which would publish official documents such as mission orders or press releases. The Secretary was Judicael OROFE, who was assisted by NGAYA.
- P-0446 further describes that a split emerged in May 2014 between “North” and “South” Anti-Balaka branches. NGAISSONA was a leader of the North group. YEKATOM and WENEZOUÏ were leaders of the South group.
- P-0446 describes the Anti-Balaka’s commission of crimes against the Muslim population in BANGUI, such as pillaging and the destruction of mosques in BANGUI. He also describes protecting Muslims civilians, including participating [REDACTED].

13. P-0446’s proposed evidence is corroborated by, *inter alia*, the evidence of P-2251, P-0808, P-2475, P-1819, and P-0884. His evidence on the Anti-Balaka’s command structure at the time of the 5 December 2013 attack of BANGUI is corroborated by, *inter alia*, the evidence of P-2251, P-0487, P-0992, P-0808, P-0889, and P-1521.

### C. Associated Exhibits

14. The Prosecution tenders 14 associated exhibits for formal submission, as set out in Confidential Annex A. P-0446 provided 13 of these documents to investigators during his Prior Statement: [REDACTED].<sup>11</sup>

15. P-0446 discussed all of the associated exhibits during his Prior Statement, which thereby form an integral part of the testimony itself.<sup>12</sup> As such, their admission pursuant to rule 68(3) would further be the most efficient and effective way to manage P-0446's evidence.

### 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-0446'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",<sup>13</sup> the Prosecution has carefully reviewed its four-hour estimate given for P-0446 in its Final Witness List.<sup>14</sup> The Prosecution considers that it cannot further reduce the estimate of four hours. This estimated supplemental examination of P-0446 takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,<sup>15</sup> and accounts for the prospect of appropriate redirect examination.

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<sup>11</sup> Please note that this document was already recognised as formally submitted via P-2251.

<sup>12</sup> ICC-01/14-01/18-907-Conf, para. 13.

<sup>13</sup> ICC-01/14-01/18-685, para. 36.

<sup>14</sup> ICC-01/14-01/18-724-Conf-AnxA, p. 23.

<sup>15</sup> 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).



18. A lesser amount of time would not provide the Prosecution with a reasonable opportunity to develop, explain, or clarify, limited facets of P-0446'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, including those parts relating to 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 nine hours to present – a significantly longer period.

#### **E. Balance of interests**

20. The projected shortening of P-0446's in-court-testimony by more than half is "considerable", and on balance the introduction of P-0446'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 the fact that the Prior Statement is supported and corroborated by other evidence to be tested at trial, warrants its 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-0446 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 of this witness as indicated above.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a small dot.

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**Karim A. A. Khan QC, Prosecutor**

Dated this 23<sup>rd</sup> day of December 2021  
At The Hague, The Netherlands