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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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Fifteenth Decision on the Prosecution Request for Formal Submission of Prior
Recorded Testimony under Rule 68(3) of the Rules concerning Witness P-2353**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, having regard to Articles 64(2), 67(1) and 69 of the Rome Statute (the ‘Statute’), and Rule 68(1) and (3) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Fifteenth Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony under Rule 68(3) of the Rules concerning Witness P-2353’.

I. Procedural history

1. On 10 March 2021, the Chamber issued its first decision under Rule 68(3) of the Rules (the ‘First Rule 68(3) Decision’), in which it set out the applicable law for requests for the introduction of prior recorded testimonies under Rule 68(3) of the Rules.¹
2. On 26 January 2022, the Office of the Prosecutor (the ‘Prosecution’) requested the introduction, under Rule 68(3) of the Rules, of the statement and associated document of P-2353 (the ‘P-2353 Request’).²
3. On 2 February 2022, the Ngaissona Defence indicated that it does not intend to file a response and defers to the Chamber’s discretion.³
4. On 7 February 2022, the Yekatom Defence responded to the P-2353 Request.⁴

¹ Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaissona Defence Motion to Limit the Scope of P-2926’s Evidence, ICC-01/14-01/18-907-Conf (public redacted version notified on 1 April 2021, ICC-01/14-01/18-907-Red).

² Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2353 pursuant to Rule 68(3), ICC-01/14-01/18-1262-Conf (with confidential Annexes A and B) (public redacted version notified the same day, ICC-01/14-01/18-1262-Red).

³ Email from the Ngaissona Defence, 2 February 2022, at 06:39.

⁴ Yekatom Defence Response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2353 pursuant to Rule 68(3)”, 26 January 2022, ICC-01/14-01/18-1262-Conf, ICC-01/14-01/18-1272-Conf (public redacted version notified on 8 February 2022, ICC-01/14-01/18-1272-Red) (the ‘Response to the P-2353 Request’).

II. Analysis

5. The Chamber incorporates by reference the applicable law as set out in the First Rule 68(3) Decision.⁵

1. Submissions

6. The Prosecution seeks to introduce the prior recorded testimony of witness P-2353, comprising one statement and one associated exhibit.⁶ It submits that the introduction of P-2353's prior recorded testimony would help streamline the proceedings, reducing the time for its examination from at least four to two hours.⁷ According to the Prosecution, P-2353's statement is highly relevant and probative,⁸ and corroborated by several witnesses.⁹

7. The Yekatom Defence opposes the P-2353 Request.¹⁰ It submits that the majority of the witness's evidence relates to the PK9-Mbaïki axis, linked to five of the 21 Counts brought against Mr Yekatom, and that given that only one witness is scheduled to provide his full testimony in court, it is in the interests of justice to have multiple witnesses testify fully *viva voce* on this topic.¹¹

8. The Yekatom Defence submits that the witness's statement contains allegations that are central to core issues in the case and relate to materially disputed issues.¹² Particularly, it argues that the statement contains 'extensive, highly prejudicial allegations as regards the alleged acts and conduct of Mr Yekatom, and his elements, and the Anti-Balaka generally' in relation to the alleged dislocation of the Muslim population along the PK9-Mbaïki axis. Additionally, the Yekatom Defence submits that the Chamber must consider in its broader assessment the

⁵ First Rule 68(3) Decision, ICC-01/14-01/18-907-Red, paras 8-16. *See also* Decision on the Yekatom Defence Request for Leave to Appeal the Twelfth Rule 68(3) Decision regarding P-1704, 29 April 2022, ICC-01/14-01/18-1383 (the 'Decision on the Request for Leave to Appeal the Twelfth Rule 68(3) Decision'), paras 4-17.

⁶ P-2353 Request, ICC-01/14-01/18-1262-Red, paras 1, 20; Annex A to the P-2353 Request, ICC-01/14-01/18-1262-Conf-AnxA.

⁷ P-2353 Request, ICC-01/14-01/18-1262-Red, paras 1, 3, 15-18.

⁸ P-2353 Request, ICC-01/14-01/18-1262-Red, para. 9.

⁹ P-2353 Request, ICC-01/14-01/18-1262-Red, para. 12.

¹⁰ Response to the P-2353 Request, ICC-01/14-01/18-1272-Red, paras 1-2, 41.

¹¹ Response to the P-2353 Request, ICC-01/14-01/18-1272-Red, paras 9-10.

¹² Response to the P-2353 Request, ICC-01/14-01/18-1272-Red, para. 12.

acts and conduct of Mr Yekatom's elements, given the extensive and prejudicial allegations made by P-2353.¹³

9. Moreover, the Yekatom Defence submits that there are various indicia of unreliability apparent in the witness's statement 'which would further compound the prejudicial effect of its introduction under Rule 68(3)', given the 'extraordinary degree' to which the statement contains hearsay evidence, the witness's 'apparent readiness to speculate', and 'a degree of personal resentment towards Mr Yekatom' arising from a particular incident. It also argues that these 'low-probative-value claims' are not only of very limited assistance to the Chamber's truth-seeking function, but are also detrimental to judicial economy given the number of 'hearsay and/or speculative claims that are prejudicial enough' to require their being addressed by the Yekatom Defence's examination of the witness in court.¹⁴ Lastly, the Yekatom Defence contends that 'what little might be gained in expeditiousness would not outweigh the prejudice that would be occasioned to Mr Yekatom's fair trial rights by the introduction of the Statement via Rule 68(3)'.¹⁵

2. *The Chamber's determination*

10. In his statement,¹⁶ P-2353 discusses, *inter alia*, (i) the arrival of the Seleka in Mbaïki in March 2013 and crimes allegedly committed against the civilian population; (ii) the Anti-Balaka allegedly killing two individuals in Bangui-Bouchia; (iii) the Anti-Balaka emerging from Bossangoa and Bouca; (iv) the alleged Anti-Balaka attack in Bangui on 5 December 2013 (the 'Bangui Attack'), during which time the witness was in Mbaïki, and the alleged killing of Muslims in Boeing, PK12 and PK5 during the following days; (v) the witness travelling to Bangui on 9 December 2013, seeing 'chaos everywhere'; (vi) [REDACTED]; (vii) Muslims fleeing to Mbaïki from certain locations along the road from Mbaïki to Boda and between Mbaïki and Bangui; and (viii) the evacuation of Muslim civilians from Mbaïki to Chad.

¹³ Response to the P-2353 Request, ICC-01/14-01/18-1272-Red, paras 9, 15-26

¹⁴ Response to the P-2353 Request, ICC-01/14-01/18-1272-Red, paras 29-35.

¹⁵ Response to the P-2353 Request, ICC-01/14-01/18-1272-Red, paras 36-39.

¹⁶ CAR-OTP-2100-0226; CAR-OTP-2122-4377 (French translation).

11. In addition, the Chamber observes that P-2353 makes a number of references to Mr Yekatom, including, *inter alia*, (i) ‘Alfred YEKATOM or RAMBO’ being in charge of the Anti-Balaka in Lobaye, and the witness hearing that Mr Yekatom was involved in the Bangui Attack and was based at that time at PK9, then at Pissa; (ii) the witness hearing that ‘RAMBO’ and his elements were all along the road from PK9 to Mbaïki; (iii) [REDACTED]; (iv) a meeting convened at the church of *St Jeanne d’Arc* in Mbaïki, where the witness was not present, during which ‘RAMBO [...] said that he was there to chase the Seleka and that he would kill anyone hurting or pillaging Muslims’ and that ‘he was in charge of the Anti-Balaka’, and his elements ‘completely disregarding’ what he reportedly said, threatening Muslim civilians, including the witness; (v) the witness never seeing ‘RAMBO’ punish or correct any of his men; and (vi) ‘RAMBO’’s elements doing ‘whatever they felt like’ when he was not around.
12. The Chamber takes note of the Yekatom Defence’s submissions that P-2353’s statement mostly relates to the PK9-Mbaïki axis, and touches on core issues of the case that are materially disputed, such as the Bangui Attack, the alleged dislocation of the Muslim population along the PK9-Mbaïki axis, the killing of Djido Saleh, and the role of Mr Yekatom and his group.
13. However, the Chamber observes that, when referring to the Bangui Attack, the witness indicated in his statement that he was not there at the time, but in Mbaïki, and that he heard about the fighting on the radio and over the phone, stating that ‘[he] was not an eye-witness [himself]’.¹⁷ Similarly, when referring to Mr Yekatom’s alleged involvement in the Bangui Attack, the witness indicated that he learned this ‘from friends in BANGUI and from rumours circulating’.¹⁸ The Chamber further notes that the references to the Bangui Attack itself are particularly limited in the witness’s statement.
14. With regard to the PK9-Mbaïki axis, the Chamber notes that P-2353’s allegations concerning the acts and conduct of Mr Yekatom relate to issues on which several witnesses have already testified or are expected to do so, either fully *viva voce* or

¹⁷ CAR-OTP-2100-0226, at 0231-0232, paras 33-34.

¹⁸ CAR-OTP-2100-0226, at 0233-0234, paras 40, 49.

pursuant to Rule 68(3) of the Rules.¹⁹ It also recalls that references to the accused's acts and conduct do not *per se* constitute an obstacle to the introduction of a prior recorded testimony pursuant to this provision, and that Rule 68(3) of the Rules also does not preclude the introduction of evidence that is central to core issues of the case.²⁰ By the same token, the Chamber does not find it necessary to consider in its 'broader assessment' the acts and conducts of Mr Yekatom's elements, as suggested by the Yekatom Defence.²¹ Moreover, as to the Yekatom Defence's submission that having multiple witnesses providing their account fully *viva voce* on this topic is in the interests of justice, the Chamber recalls that its determination is entirely discretionary, subject to the fulfilment of the requirements set out under this provision.²² It does not find the number of witnesses testifying under either modality to be a determining factor in this instance.

15. In relation to the Yekatom Defence's submissions concerning the unreliability of the witness's statement and the prejudice that would result by introducing his evidence under Rule 68(3) of the Rules on account of the extent of hearsay evidence, the Chamber is unconvinced by these arguments.
16. The Chamber stresses that Rule 68(3) of the Rules contains no requirement that the prior recorded testimony have sufficient indicia of reliability, contrary to other sub-rules of Rule 68 of the Rules. Furthermore, the Chamber is of the view that the fact that the witness possesses a large amount of second-hand information or indirect knowledge about the alleged acts and conduct of Mr Yekatom constitutes a factor that weighs rather in favour of the introduction of his statement under Rule 68(3) of the Rules, in the sense that it is not worthwhile hearing his evidence

¹⁹ See e.g. **P-1595**: transcripts of hearings, 7 March 2022, ICC-01/14-01/18-T-106-CONF-ENG; 8 March 2022, ICC-01/14-01/18-T-107-ENG; **P-2475**: transcript of hearing, 25 May 2022, ICC-01/14-01/18-T-130-CONF-ENG; **P-1647**: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, p. 14, entry 3; **P-1666**: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, pp. 35-36, entry 60; **P-1838**: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, p. 41, entry 79.

²⁰ See Twelfth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1704, P-1528, and P-0314, 14 April 2022, ICC-01/14-01/18-1364-Red, para. 14 and the references cited therein. See also Decision on the Request for Leave to Appeal the Twelfth Rule 68(3) Decision, ICC-01/14-01/18-1383, para. 10 and the references cited therein.

²¹ See Response to the P-2353 Request, ICC-01/14-01/18-1272-Red, para. 26.

²² See Decision on the Request for Leave to Appeal the Twelfth Rule 68(3) Decision, ICC-01/14-01/18-1383, paras 6, 9.

fully live in court. Relatedly, the Chamber is unpersuaded by the submission that hearing P-2353's testimony fully *viva voce* would actually benefit the expeditiousness and judicial economy of the proceedings.

17. To the extent that the witness's statement, including information that is based on indirect knowledge, relates to the acts and conduct of the accused, the Chamber highlights that the Defence will have the opportunity to fully examine the witness in court. The Chamber also notes that it, as well as the participants, may examine the witness on the basis of his knowledge regardless of his mode of testimony, and that it will assess and weigh all of the evidence accordingly in the context of the deliberating on the judgment. Lastly, with regard to the alleged existence of a 'personal resentment towards Mr Yekatom arising from a particular incident, the Chamber notes that P-2353 indicated in his statement that '[he] totally lost confidence in RAMBO and did not believe or trust him' after an incident during which [REDACTED].²³ Furthermore, whereas P-2353 mentioned that '[he] did not completely trust [RAMBO]', the witness also stated that [REDACTED].²⁴ In this regard, the Chamber does not find that the reliability of the statement is challenged to such an extent that it would warrant a full *viva voce* testimony.²⁵
18. In light of the above, the Chamber finds that it is not necessary for P-2353's testimony to be presented orally in its entirety, and considers that the introduction of the prior recorded testimony is not prejudicial to or inconsistent with the rights of the accused.
19. Accordingly, the Chamber grants the Prosecution's request to introduce the statement²⁶ and associated document²⁷ of P-2353's under Rule 68(3) of the Rules.

FOR THESE REASONS, THE CHAMBER HEREBY

²³ CAR-OTP-2100-0226, at 0236-0237, para. 59.

²⁴ CAR-OTP-2100-0226, at 0236, para. 58.

²⁵ See e.g. Fifth Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony under Rule 68(3) of the Rules concerning Witness P-0306, 20 August 2021, ICC-01/14-01/18-1088-Conf, para. 15.

²⁶ CAR-OTP-2100-0226; CAR-OTP-2122-4377 (French translation).

²⁷ CAR-OTP-2100-0242.

DECIDES that, subject to the fulfilment of the legal requirements of Rule 68(3) of the Rules, the prior recorded testimony of Witness P-2353 (CAR-OTP-2100-0226; CAR-OTP-2122-4377 (French translation)), together with its associated document (CAR-OTP-2100-0242) is introduced into evidence.

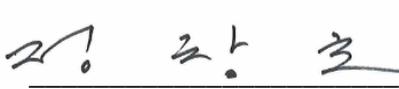
Done in both English and French, the English version being authoritative.



Judge Péter Kovács



Judge Bertram Schmitt
Presiding Judge



Judge Chang-ho Chung

Dated 24 June 2022

At The Hague, The Netherlands