

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **14 January 2022**

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-2453 pursuant to Rule 68(3)", 13 January 2022,
ICC-01/14-01/18-1247-Conf**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan QC
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Landry Omissé-Namkeamaï
Ms Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests the formal submission of the prior recorded testimony of witness P-2453, 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”).¹ P-2453’s prior recorded testimony comprises his 7 June 2019 Witness Statement (“Prior Statement”)² and its associated exhibits.³ 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 two hours, elaborating specific issues raised therein, and other matters highly relevant to the case.

2. P-2453, was a Muslim resident of BOSSANGO. He provides information about, *inter alia*, (1) the emergence of the Anti-Balaka in the BOSSANGO region in 2013, (2) their commission of attacks (in September 2013) in ZERE, BOWAYE, OUHAM-BAC, KORO MPOKO, and BOSSANGO targeting Muslim civilians, (3) the 5 December 2013 Anti-Balaka attack of BOSSANGO and their commission of crimes against Muslim civilians, (4) the leaders of these Anti-Balaka attacks DEDANE (presumably, ‘Danboy DEDANE’) and Florent KEMA (“KEMA”), and (5) the forcible displacement of the Muslim civilian population of BOSSANGO and surrounding villages as a consequence of the Anti-Balaka’s violence.

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

¹ ICC-01/14-01/18-631, para. 58.

² CAR-OTP-2111-0415.

³ 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.⁴

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.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

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 Witness Statement and the corresponding associated exhibits. It also identifies 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

6. 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

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).

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

7. 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

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

8. The Prior Statement may be deemed formally submitted under rule 68(3). P-2453 will attest to its accuracy; he will be present in court; and will be available for examination by the Defence, Participants, and the Chamber.

9. As described below, the Prior Statement is highly relevant and probative. It bears evidence of the emergence of the Anti-Balaka in the BOSSANGO region in 2013, their attack of Muslim civilians in nearby villages and in BOSSANGO in September 2013, and their attack of BOSSANGO on 5 December 2013. The Witness reports on the crimes committed and discusses the forcible displacement of the Muslim population of BOSSANGO and surrounding villages. It also 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, and its intent to target Muslim civilians

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.

pursuant to a criminal organisational policy between September 2013 and December 2014 (“Relevant Period”).

10. P-2453’s Prior Statement of 7 June 2019 comprises 23 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.

11. The witness’s Prior Statement consists of the following:

- P-2453 was a Muslim resident of BOSSANGOA and [REDACTED]. He took refuge at *Ecole de la liberté* following the Anti-Balaka’s 17 September 2013 attack of BOSSANGOA, and remained there until his evacuation to CHAD on 14 February 2014. [REDACTED].
- He recounts the emergence of the Anti-Balaka in the BOSSANGOA region in 2013, noting the presence of FACA elements among them, including DEDANE and KEMA.
- He discusses Anti-Balaka attacks in the BOSSANGOA region in September 2013, targeting Muslim civilians in ZERE, BOWAYE, OUHAM-BAC, KORO MPOKO, and BOSSANGOA.
- He provides evidence of the Anti-Balaka’s 5 December 2013 attack of BOSSANGOA, and reports on crimes committed during and in the aftermaths of the attack on the Muslim population and its properties. KEMA and DEDANE led the attackers.
- Finally, he recounts the forcible displacement of the Muslim population from BOSSANGOA and its surrounding villages due to the Anti-Balaka’s violence. He describes the living conditions and situation regarding Muslim refugees at *Ecole de la liberté* in BOSSANGOA, and their subsequent evacuation to CHAD.

12. P-2453's proposed evidence is corroborated by, *inter alia*, the evidence of P-2049, P-2200, P-2462, P-2657, and P-2658, regarding Anti-Balaka attacks in the BOSSANGO region, and their targeting of the Muslim civilian population prior to their 5 December 2013 BOSSANGO attack. His evidence on the 5 December 2013 BOSSANGO attack and the Anti-Balaka's commission of crimes against the Muslim population and destruction of properties is corroborated by P-0966, P-1577, P-2049, P-2200, P-2462, P-2657, and P-2658. His evidence on KEMA's leadership of the Anti-Balaka is corroborated by, *inter alia*, P-0287, P-0966, P-1521, and P-2269. Last, his evidence regarding the forcible displacement of the Muslim population of BOSSANGO and surrounding villages due to the Anti-Balaka's violence is corroborated notably by P-0287, P-2049, P-2200, P-2462, P-2652, P-2657, and P-2658.

C. Associated Exhibits

13. The Prosecution tenders two associated exhibits for formal submission, as set out at *Confidential Annex A*, namely: (i) a photograph of P-2453's back, showing injuries that he received following [REDACTED]; and (ii) a work certificate and an employment contract related to [REDACTED].

14. The items tendered with this application are assessed as indispensable to the comprehension of the Prior Statement, or would otherwise diminish their 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-2453's evidence.

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

15. Although the Prior Statement is comprehensive, a limited and focused supplemental examination-in-chief to clarify and elaborate P-2453's testimony would be beneficial to the proper adjudication of the issues arising from the charges.

16. Mindful of the Chamber's direction concerning the need to "streamline its questioning considerably",¹¹ the Prosecution has carefully reviewed its two-hour estimate given for P-2453 in its Final Witness List.¹² The Prosecution considers that it cannot further reduce the estimate of two hours. This estimated supplemental examination of P-2453 takes into consideration the *realistic* pace of the proceedings, including the presentation of documentary evidence in court as facilitated by Court personnel, interpretation considerations,¹³ and accounts for the prospect of appropriate redirect examination.

17. A lesser amount of time would not provide the Prosecution with a reasonable opportunity to develop, explain, or clarify, limited facets of P-2453's evidence through the use 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, but also to advance the Chamber's fundamental truth-seeking function.

18. 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 around 4 hours to present.

¹¹ ICC-01/14-01/18-685, para. 36.

¹² ICC-01/14-01/18-724-Conf-AnxA, p. 32.

¹³ 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

19. The projected shortening of P-2453's in-court-testimony by half is "considerable", and the Prosecution considers on balance that the introduction of P-2453'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 its formal submission in the fair exercise of the Chamber's broad discretion.

IV. CONCLUSION

20. For the foregoing reasons, the Prosecution requests the Chamber to deem formally submitted the Prior Statement of P-2453 together with its associated exhibits as set out at Annex A, noting those on which the Prosecution intends to rely, 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.



Karim A. A. Khan QC, Prosecutor

Dated this 14th day of January 2022
At The Hague, The Netherlands