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**International
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Court**



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Date: **7 November 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***

Confidential

**Prosecution's response to "Yekatom Defence Motion for directions regarding
reliance on prior statements (ICC-01/14-01/18-1637-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 KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé

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. Trial Chamber V (“Chamber”) should dismiss the “Yekatom Defence Motion for directions regarding reliance on prior statements”¹ (“Motion”).

2. *First*, the Motion amounts to a *de facto* request for reconsideration of the “Initial Directions on the Conduct of the Proceedings” (“Decision”)² and subsequent oral rulings. The Decision, supplemented by the Chamber’s guidance provided in the course of the proceedings, reveals no error in reasoning, nor is reconsideration required to prevent an injustice. Moreover, the Motion fails to make or substantiate any such claim.

3. *Second*, should the Chamber decide that the Motion is not a request for reconsideration, the Office of the Prosecutor (“Prosecution”) considers that the Decision and subsequent oral rulings provide sufficient direction, including on the use of prior statements during the examination of fully *viva voce* witnesses. The supplementary directions sought are unnecessary, particularly before a Chamber comprised of professional judges. Moreover, they would unduly place a restriction on a Party’s ability to efficiently present evidence, result in the loss of valuable court time, and adversely affect the Chamber’s truth-finding function.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis* of the Regulations of the Court (“RoC”), this Request is filed as “Confidential”, as it responds to a filing of the same designation.

¹ ICC-01/14-01/18-1637-Conf.

² ICC-01/14-01/18-631.

III. SUBMISSIONS

A. The Motion does not meet the standard for reconsideration

- i. The Chamber's guidance on the questioning of witnesses and use of prior statements during testimony*

5. The Chamber has issued all the necessary guidance in relation to the questioning of witnesses and the use of their prior statements during testimony, including during the questioning of witnesses by the examining party testifying fully *viva voce* — *i.e.*, not pursuant to rule 68(3) of the Rules of Procedure and Evidence ("Rules").

6. *First*, The Decision clearly states:

"[i]n particular, the Presiding Judge will not regulate the questioning of witnesses in the abstract. The necessity or propriety of any particular question will be dealt with on a case-by-case basis, noting the Presiding Judge's obligations under Rule 88(5) of the Rules and Regulation 43 of the Regulations."³

There is no ambiguity in the process as articulated, nor any demonstrable basis to depart from it; even more so, given the stage of the proceedings — having advanced to some 48 witnesses into the presentation of the Prosecution's case-in-chief.

7. *Second*, supplementary guidance addressing the specific issue on the use of prior statements during a witness's examination-in-chief, including a *viva voce* non-rule 68(3) witness, was provided by the Chamber, and extensively discussed. Notably, during the testimony of P-1339, the Presiding Judge stated:

"we have established that – and this is practice in any Chamber here at the Court, that when a witness (...) says something here in the courtroom that does not comport with what the witness has said in the statement (...) I think *we have a duty, any counsel and the judges, we have to establish the truth* to ask the witness why is that so. And *to do that, you read, of course, what the witness has said.*"⁴

³ ICC-01/14-01/18-631, para. 4.

⁴ ICC-01/14-01/18-T-154-Conf-Eng ET, p. 55, l. 1-6 [emphasis added].

8. Upon objections raised by the Defence during the recent examination-in-chief of P-1839, the same instruction was again provided. The Presiding Judge repeated:

“I have said several times, many times even, when we have a live witness and (...) like in this case we have extensive statements from the investigation phase and *if there are contradictions or if there are problems with the recollection of the witness, it can be put to the witness* and then the Chamber in the end will have to decide what is credible and what is not credible. That’s our task.”⁵

ii. *The standard for reconsideration*

9. The Court’s jurisprudence recognises a Chamber’s power to reconsider its own decisions upon request of the Parties or *proprio motu*. However, reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated, or if necessary to prevent an injustice.⁶ The existence of new facts may also be relevant to the Chamber’s assessment in this regard.⁷

10. The Motion should be dismissed *in limine*, as it does not meet the above-mentioned legal test for reconsideration. It fails to show any clear error of reasoning in the Decision or the further guidelines provided by the Chamber, as mentioned at paragraphs 6-8 above, nor does it demonstrate that reconsideration is warranted to avoid an injustice. Instead, the Motion simply re-litigates previous, and extensively discussed, Defence objections, that were either (i) addressed with supplementary guidance provided during the course of the proceedings⁸ or (ii) overruled,⁹ by the Chamber.

⁵ ICC-01/14-01/18-T-171-Conf-Eng RT, p. 5, l. 7-14 [emphasis added].

⁶ See; *inter alia*, ICC-02/04-01/15-468, para. 4; ICC-01/05-01/13-1282, para. 8; ICC-01/04-02/06-519, para. 12; ICC-01/04-01/06-2705, para. 18; and ICC-01/09-01/11-1813, para. 19.

⁷ Ibid.

⁸ See; *inter alia*, ICC-01/14-01/18-T-154-Conf-Eng ET, p. 55, l. 1-6 and p. 56-57, l. 24-16; ICC-01/14-01/18-T-155, p. 37, l. 12-18 and p. 40-41, l. 25-7; ICC-01/14-01/18-T-171-Conf-Eng RT, p. 5, l. 7-14, p. 11, l. 9-19, and p. 13-14, l. 18-7.

⁹ See; *inter alia*, ICC-01/14-01/18-154, p. 58, l. 17-25; ICC-01/14-01/18-T-171-Conf-Eng RT, p. 11, l. 4-20.

B. The supplementary directions sought are unnecessary and would unduly impede a Party's ability to present evidence and the Chamber's truth-finding function

11. Defence requests that the Chamber issues further directions on the use of prior statements during the testimony of *viva voce* non-rule 68(3) witnesses, by requiring that (i) the calling party attempts to refresh the witness's memory through key words or phrases, before relying on a witness's prior statement; (ii) the calling party seeks leave to rely on specific lines or passages of a witness's prior statement, after establishing that the witness either "specifically stated that they no longer recall a fact", or that "the witness's *viva voce* evidence of a fact is inconsistent with their prior statement", and (iii) after reading the prior statement the witness is asked, in a neutral manner "whether their memory is refreshed" and what "their recollection of events" is, or "to explain the inconsistency"¹⁰ ("supplementary directions sought").

12. As previously stated, the supplementary directions sought are unnecessary, place an undue restriction on a Party's ability to present evidence in court, and may result in the loss of valuable court time. Pursuant to regulation 43 of the RoC, the Chamber has wide latitude in managing the questioning of witnesses at trial and has properly exercised this function in issuing the Decision and the necessary supplementary guidance.

13. Moreover, the Defence request is largely based on speculative and unsubstantiated arguments. For instance, the Defence claim:

"unrestricted access by a calling Party on a prior statement may have the unintended effect of disincentivizing a witness from attempting to provide natural and spontaneous answers on the basis of their recollection – including for fear of digressing from their prior statement."¹¹

¹⁰ ICC-01/14-01/18-1637-Conf, para. 5.

¹¹ ICC-01/14-01/18-1637-Conf, para. 9.

The Defence further speculates that:

“given the nature of proceedings before the Court, (...) witnesses are likely to feel a degree of influence or pressure to refrain from deviating from their prior statements and from failing to meet the unspoken expectations of a calling party; even more so, those of authority figures such as the Prosecutor.”¹²

These statements wrongly assume that witnesses are likely to blindly agree to anything quoted from their prior statements, and ignores multiple examples where, on the contrary, witnesses clarified, provided additional details, or gave more nuanced answers relating to a specific topic.¹³ Moreover, they ignore the very foundation of the witness ‘familiarisation’ regime and protocols that is well-entrenched in the Court’s practice across all Trial Chambers, during the course of which witnesses frequently review and correct their prior statements shortly before testifying. The premise underpinning the Motion’s contention that reference to the prior statement in the course of examination — that spontaneity may be lost — is logical fallacy, particularly when viewed in the context of the Court’s witness familiarisation paradigm.

i. The current practice of using a prior statement to refresh memory or address an inconsistency is appropriate

14. The current practice of using a prior statement to refresh the memory of a witness, or to address an inconsistency between their *viva voce* testimony and information provided in the prior statement, is fair and effective for the determination of the truth.

15. There is nothing inappropriately suggestive about using a witness’s own prior statement to refresh memory on a specific topic or to clarify an inconsistency. The absence of any possible undue suggestiveness in the use of a prior statement is even

¹² ICC-01/14-01/18-1637-Conf, para. 28.

¹³ See; *inter alia*, ICC-01/14-01/18-T-154-Conf-Eng ET, p. 59-60, l. 25-5; ICC-01/14-01/18-T-155-Conf-Eng ET, p. 40, l. 7-14.

stronger where the witness confirms their careful review, consideration, correction thereof (during a recent familiarisation process), and further affirms the accuracy and truthfulness of the statement under oath.

16. *First*, normatively, prior statements are recorded in full compliance with the Court's statutory framework, in accordance with rules 111 or 112. Questioning conducted pursuant to rule 112 captures the *exact words* of the witness by virtue of an audio or video recording. Statements recorded pursuant to rule 111 are *read over, corrected if necessary, and signed by the witness* upon completion.

17. *Second*, as noted, in accordance with the Familiarisation Protocol,¹⁴ shortly before the commencement of testimony, witnesses have the opportunity to read over and to make corrections to their prior statement(s).¹⁵ As the Chamber is aware, this occurred on numerous occasions throughout the proceedings.

18. *Third*, at the start of testimony, a witness is usually asked, once again, to confirm the accuracy and completeness of the prior statement(s). Thus, information contained in a witness's prior statement is of no secret to that witness, who is the *source* of it, and who has been provided the opportunity, at least twice, to re-read, correct, *and* confirm its accuracy.

19. The Defence's assertion that the Prosecution conflates a fully *viva voce* witness's confirmation of the accuracy and completeness of their prior statement with requirements of rule 68(3) in an attempt to elevate the statement to the status of sworn testimony,¹⁶ misunderstands the Prosecution's position. To be clear, putting aspects of a witness's own statement to them where they have read and affirmed its accuracy and completeness, including under oath, does not give rise to *unfair* suggestiveness. Moreover, addressing memory gaps, contradictions, or inconsistencies between the witness's *viva voce* testimony and his prior statement is necessary to establish the truth.

¹⁴ See ICC-01/14-01/18-677-Anx1.

¹⁵ See ICC-01/14-01/18-677-Anx1, section 2.6.

¹⁶ ICC-01/14-01/18-1637-Conf, para. 49.

This was clarified by Prosecution counsel when stating “[t]he issue here isn’t the veracity of the statement. It’s a question of the veracity of the witness’s testimony”.¹⁷ Furthermore, this issue was also addressed by the Presiding Judge, who asserted:

“So it’s perfectly clear, and we will do that in all future, when we have witnesses in this courtroom, if witnesses show lack of memory, we refer them back to the witness statement. If we might have some contradiction or seem to have detected a contradiction, we can address that too.).”¹⁸

20. When assessing the use of prior statements during testimony, it is also important to note the significant passage of time that often takes place between the events in question, the timing of the witness’s interview, and their eventual testimony. It is inevitable that when witnesses are asked to recall events that happened almost a decade ago, they will not always recall the same details of those events. They may forget certain aspects or events on one occasion and remember them on another. Sometimes witnesses are able to state that they have forgotten something, while on other occasions *they may not be aware that they have done so*. One purpose of the formal, certified recording of a witness’s recollection in the form of a prior statement, is to guard against the failure of memory caused by the lapse of time, including the lapse of time between the date when the statement is taken, and the date of the witness’s testimony. This time gap alone is often several years.

21. This point was aptly addressed by P-1339 who, after being confronted with an inconsistency with his prior statement, noted:

“[b]efore answering, I’d like to say that I am a human being. I may have made a statement today and then forget it six years later. We are talking about *six years*, not six weeks or six days. And in clarifying my previous statements, I may use different pathways, routes to get to the same goal.”¹⁹

¹⁷ ICC-01/14-01/18-T-155-Conf-Eng ET, p. 39, l. 17-18; *See also* ICC-01/14-01/18-T-154-Conf-Eng ET, p. 56, l. 3-18.

¹⁸ ICC-01/14-01/18-T-154-Conf-Eng ET, p. 56-57, l. 25-6.

¹⁹ ICC-01/14-01/18-T-154-Conf-Eng ET, p. 59, l. 2-5; *See also, inter alia*, P-0965: ICC-01/14-01/18-T-062-Conf-Eng CT, p. 11, l. 19-22; P-0446: ICC-01/14-01/18-T-096-Conf-Eng ET, p. 38, l. 2-4 and ICC-01/14-01/18-T-098-Conf-Eng ET, p. 44, l. 11-15.

In the context of this specific witness, it is worth noting that his statement was taken in October/November 2016 (about three years after the events in question), while his testimony took place only in September 2022 (*nine* years after the events, and almost *six* years after his statement was taken). His situation is typical of witnesses called to testify in these types of cases. The question here devolves on whether any *unfair* suggestiveness arises from the use of the prior statements in such context. The answer is plainly, none does.

22. The objection to leading questions is that they may induce a witness to adopt evidence about which they have no real knowledge or which has been suggested to them by the examining lawyer – and moreover, that is extraneous to their *own* knowledge and understanding. This objection does not apply to factual propositions expressed in the witness's own words in their prior statement(s). Although in common law jurisdictions a witness's own statement would be excludable barring exceptions to the hearsay rule²⁰ – intended to protect jurors from potentially unreliable information, no such justification applies before this Chamber of professional judges as the triers of fact.

23. Furthermore, the procedure currently in place ensures that important details and clarifications are sought from the witness during their testimony, as opposed to being artificially excluded due to the witness's momentary inability to recall a specific event, otherwise preserved in their own earlier account; details that may often be lost due to the unfamiliar setting of a courtroom, or after hours (sometimes days), of questioning about events transpiring years ago. This approach ensures that the Chamber has the most accurate version of the witness's evidence before it.

24. The exercise of taking evidence in a trial is not a game of memory or recall from which the Parties should seek to *profit*, but of establishing the truth. Thus, when an important omission or inconsistency between the witness's prior statement and

²⁰ For instance, as a past recollection recorded, a prior inconsistent statement, in-Court testimony, or for the purpose of refreshing recollection.

his/her *viva voce* testimony becomes apparent, Counsel's exploration of it during questioning is not only appropriate, but may be necessary to assist the Chamber in its statutory duty. Likewise, it would equally be unfair to deprive a witness of the opportunity, when testifying under oath, to address prior inconsistencies and contradictions, unnecessarily restricting the examining Party's ability to bring important details to light.

IV. CONCLUSION

25. For the above reasons, the Chamber should dismiss the Motion, as it does not meet the standard for reconsideration. Alternatively, reject the supplementary directions sought, as they would unduly restrict a Party's ability to present evidence, and impede the Chamber's statutory truth-finding function.



Karim A. A. Khan KC, Prosecutor

Dated this 7th day of November 2022

At The Hague, The Netherlands