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**International
Criminal
Court**

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

Date: **31 January 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 *PROSECUTOR v. ALFRED YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Confidential

**Prosecution Response to the “Ngaïssona Defence Request for Leave to Reply to the
‘Prosecution’s Response to the ‘Ngaïssona Request for the Submission of Expert
Report and Associated Material pursuant to Rule 68(3)’ (ICC-01/14-01/18-2323-
Conf)” (ICC-01/14-01/18-2333-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**

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I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the "Ngaissona Defence's Request for Leave to Reply to the 'Prosecution's Response to the 'Ngaissona Request for the Submission of Expert Report and Associated Material pursuant to Rule 68(3)'"¹ ("Request"). The Request is without merit and should be summarily dismissed.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC"), this document is filed as "Confidential" because it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. The Prosecution's Response does not constitute a 'request'

3. Contrary to the Defence's contentions, the Prosecution's Response² to the underlying Rule 68(3) Request³ does not implicitly amount to a 'request' within the meaning of the Court's regulatory framework.⁴ To substantiate the argument in justification of the leave sought, the Request relies on a self-serving and strained reading of the Prosecution's Response to suggest that it argues that the Chamber should "(a) not permit D30-P-4864 to testify *viva voce* and (b) receive his report pursuant to Rule 68(2)(b)."⁵

¹ ICC-01/14-01/18-2333-Conf.

² ICC-01/14-01/18-2323-Conf.

³ ICC-01/14-01/18-2310-Conf.

⁴ ICC-01/14-01/18-2333-Conf, para. 10 (contending that, "[a]lthough the Prosecution frames its Response as 'observations' and defers to the Chamber, it implicitly makes a request").

⁵ ICC-01/14-01/18-2333-Conf, para. 10.

4. No such language is found in the Prosecution's Response, which is moreover unequivocal in its introductory and closing paragraphs which expressly defer to the Chamber's discretion in determining the Rule 68(3) Request.⁶

5. To argue that a reply is necessary in order to respond to a request that was never actually made is incongruous. The Request is unjustified on its face.

B. Seeking to interview D30-P-4864 is not inconsistent with the Prosecution's Response nor justifies a reply

6. The Defence's secondary contention that "the continued interest of Prosecution to interview D30-P-4864 belies its Response suggesting that no further testimonial evidence is deemed necessary"⁷ is unpersuasive. It appears to be predicated on the assumption that "[t]he opportunity to interview a witness pursuant to the Contact Protocol can be similar to the parties' right to question a witness during his or her testimony during the trial proceedings."⁸ Although the Defence cites the *Ongwen* case for this proposition, in fact, Trial Chamber IX held virtually the opposite in rejecting a request for the submission of evidence pursuant to rule 68(2)(a). There, Trial Chamber IX determined that because statements obtained pursuant to the Contact Protocol are generally consecutive, such interviews do not provide for a meaningful opportunity to examine a witness in circumstances "mirroring as far as possible the parties' right to question the witness during his or her testimony during the trial proceedings."⁹ As such, interviews conducted by the non-Calling Party under the Contact Protocol are *not* similar to the Party's exercise of its right to question a witness at trial. The premise underlying this aspect of the Request is therefore flawed. Thus, the Prosecution's interest in interviewing D30-P-4864 does not speak to the necessity (or not) to hear his

⁶ ICC-01/14-01/18-2333-Conf, paras. 1, 5.

⁷ ICC-01/14-01/18-2333-Conf, paras. 13.

⁸ ICC-01/14-01/18-2333-Conf, paras. 13 (citing ICC-02/04-01/15-1665, para. 8).

⁹ ICC-02/04-01/15-1665, para. 8.

evidence live. Further, the Defence's erroneous understanding of the matter cannot justify a reply.

7. Aside, it is significant that the Contact Protocol in this case does not preclude a non-Calling Party from seeking to interview a Rule 68(2)(b) witnesses. Indeed, the Prosecution has previously made such requests to the Defence in this case, which further belies the Defence's position.

C. The Request impermissibly advances substantive submissions

8. The Prosecution objects to the submissions in the Request going to the merits of the underlying Rule 68(3) Request, namely: (a) the propriety of calling a CDR expert to testify in the case;¹⁰ (b) the impact on the Accused's article 67(1)(e) rights;¹¹ (c) addressing the insufficiency of the Rule 68(3) Request argued in the Prosecution's Response;¹² (d) arguing the benefit of the proposed mode of testimony;¹³ and (e) addressing the impact of the mode of testimony on the expeditious conduct of the proceedings.¹⁴

9. As is well established, substantive submissions may not be made without the Chamber's prior leave. The Defence has simply used the mechanism of seeking to reply to advance arguments and issues that it could have anticipated in the Rule 68(3) Request, and inadequately or altogether failed to address. As the Chamber has noted in other circumstances, proffering substantive arguments in a request for reply without the Chamber's authorisation is grounds for the dismissal of the Request.¹⁵ The same should apply here.

¹⁰ See ICC-01/14-01/18-2333-Conf, para. 15.

¹¹ See ICC-01/14-01/18-2333-Conf, para. 16.

¹² See ICC-01/14-01/18-2333-Conf, para. 17.

¹³ See ICC-01/14-01/18-2333-Conf, para. 18.

¹⁴ See ICC-01/14-01/18-2333-Conf, para. 19.

¹⁵ See Trial Chamber V Email to the Parties and Participants, dated 21 July 2023, at 15:28 (noting the "parties may not file submissions of a substantive nature ... without prior leave from the Chamber to reply pursuant to Regulation 24(5) of the Regulations" and that "by already making substantive submissions in its request for leave to reply ... [a Party] fail[s] to comply with Regulation 24(5) of the Regulations (see ICC-01/14-01/18-517, para. 13), and that the request for leave to reply ought to be dismissed on this basis").

10. Finally, the Defence has had an ample opportunity to make its case. A reply is unnecessary and unjustifiable in the attendant circumstances.

IV. CONCLUSION

11. For the reasons above, the Prosecution respectfully requests that the Request be summarily dismissed.



Karim A. A. Khan KC, Prosecutor

Dated this 31st day of January 2024

At The Hague, The Netherlands