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**Cour
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**International
Criminal
Court**

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Date: 1 February 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's Response to Yekatom Defence Request for the Introduction of CAR-D29-P-5010's recorded testimony pursuant to Rule 68(2) of the Rules

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. Trial Chamber V ("Chamber") should reject the Yekatom Defence's request to introduce witness P-5010's 16 October 2023 statement¹ pursuant to Rule 68(2) of the Rules of Procedure and Evidence ("Rules"). The proposed prior testimony does not meet the requirements to be introduced under either Rule 68(2)(a) or (b).²

2. *First*, rule 68(2)(a) requires that the Prosecution has had an opportunity to examine the witness in circumstances akin to that of a trial. P-5010's interview, conducted pursuant to the Contact Protocol in this case,³ does not satisfy this requirement.

3. *Second*, P-5010's Statement goes to YEKATOM's acts and conduct, and involves core issues that are materially in dispute and of significance for the Chamber's eventual determination of the charges, precluding its submission under rule 68(2)(b) .

4. As such, P-5010 should be called to testify *viva voce* whether in whole or part, so that the veracity and reliability of his claims can be tested through cross-examination under oath before the Chamber.

II. CONFIDENTIALITY

5. 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.

¹ Hereinafter, "Statement".

² ICC-01/14-01/18-2319-Conf ("Request").

³ See ICC-01/14-01/18-156-AnxA ("Contact Protocol").

III. SUBMISSIONS

6. The Appeals Chamber holds that “witness statements may only be introduced under rule 68 ... if the *strict* conditions of that rule are met.”⁴ As explained below, the Request fails to meet the requirements for Statement’s submission under rule 68(2)(a) and (b).

A. The Statement does not meet the requirements of rule 68(2)(a)

7. Although the Statement derives from the Prosecution’s 16 October 2023 interview of P-5010 pursuant to the Contact Protocol, the Defence errs in concluding that there is no procedural bar to its introduction. On the contrary, the introduction of prior testimony under rule 68(2)(a) requires that the *Parties* have had a meaningful opportunity to examine the witness under circumstances approximating a trial. This condition is not satisfied here, where the Statement comprises an interview taking place pursuant to the Court’s standardised Contact Protocol.

8. In denying an application for the submission of prior testimony under rule 68(2)(a) in the *Ongwen* case, Trial Chamber IX held:

“the opportunity to examine the witness must be a meaningful one, mirroring as far as possible the parties’ right to question the witness during his or her testimony during the trial proceedings. Generally, consecutive interviews by the parties do not meet that requirement.”⁵

The Contact Protocol in this case does not contemplate, much less authorise, the interview of witnesses under circumstances approaching that of a trial.

9. As the “Investigating Party” under the Contact Protocol, the Prosecution did not have the benefit of having first received the witness’s direct evidence in advance of its

⁴ ICC-01/05-01/08-1386, para.80.

⁵ ICC-02/04-01/15-1665, para. 8.

questioning, as would have been the case at trial or even in the context of an article 56 procedure.

10. Relatedly, the Prosecution would have been apprised of the fact and context (if not the nature) of the witness's apparent three prior statements made to the Defence, omitted from the summary provided. The Prosecution notes the Chamber's clarification of the Defence's obligation to provide the statements of witnesses it intends to rely on,⁶ and the Defence's previous representation that it had disclosed all such statements.⁷ However, P-5010 stated unequivocally that he had provided previous statements to the Defence which moreover, concerned some of the very subject matter discussed in his interview.

"Mr Vanderpuye: Okay. How many times did you meet with the Yekatom Defence before today?

The Witness: (Interpretation) I met with Yekatom's Defence, this is the fourth time now.

Mr Vanderpuye: Okay. Did you provide a statements to them similar to what we're doing now?

The witness: (interpretation) Yes, I did.

Mr Vanderpuye: And was it recorded?

The witness: (Interpretation) I don't know whether it was recorded, but I met with them and we discussed as we are – just like we are doing, but maybe they recorded it.

Mr Vanderpuye: How many statements did you gave?

The witness : (Interpretation) I gave three statements."⁸

...

"Mr Vanderpuye: Okay. And I take it you discussed some of the things we're discussed today with them; is that right?

The witness (Interpretation) Yes, that's right."⁹

11. It is clear that the *meaningfulness* of the Prosecution's opportunity to question the witness in this context falls far short of that which would have obtained at trial.

⁶ ICC-01/14-01/18-2242.

⁷ ICC-01/14-01/18-2242, paras. 6, 11.

⁸ CAR-D29-0009-0618-R01, lines 7-19 (emphasis added).

⁹ CAR-D29-0009-0619-R01, lines 8-10.

12. Correspondingly, and contrary to the Request, the right to question the witness during the interview under the Contact Protocol were not equivalent to that of a trial as regards the Defence either. For instance, the Defence had no right whatsoever to intervene in the interview in the presence of the witness, nor to conduct any examination. The Defence submissions to the contrary are misguided.¹⁰ Moreover, the scope of the Defence's participation in the process was underscored by the Prosecution without objection at the beginning of the interview:

"Mr Vanderpuye : « Okay. All right. So just to be clear on that, you understand that they [Defence Counsel] represent Mr Yekatom's interests and that they are not your lawyer ; is that right ?

The witness : (Interpretation) Yes, I understood.

Mr Vanderpuye : Okay. And that means that they cannot advise you, they cannot intercede on your behalf during the course of the interview or represent you. Do you understand that ?

Mr Vanderpuye: No worries.

What I said is that they cannot advise you, they cannot represent you and they cannot intercede during the course of the interview.

The witness: « (Interpretation) Yes, I understood."¹¹

13. The above is consistent with the limited role of a Calling Party in attendance during an interview under the Contact Protocol. For instance, paragraph 39 provides:

"In the event that the calling party or participant objects to any part of the procedure followed or any particular line or manner of questioning of the witness, it shall raise the issue with the party or participant conducting the interview *outside of the presence of the witness*. The disagreement shall be recorded and *shall not impede or unduly disrupt the interview*. The party or participant conducting the interview may, in the event of repeated interference by the calling party or participant, adjourn the interview and *apply to the Chamber for leave to conduct it without the presence of the representative of the calling party or participant*."¹²

¹⁰ ICC-01/14-01/18-2319-Conf, para. 14.

¹¹ CAR-D29-009-0583, at 0585, lines 4-10 and 13-16.

¹² ICC-01/14-01/18-156-AnxA, para. 39 (emphasis added).

14. Moreover, the Court's Contact Protocols do not provide for any right for a Calling Party to question its own witness in the context of an interview by the Investigating party. For example, in the *Ongwen* case Trial Chamber IX observed:

"[E]ven when the Prosecution was permitted a representative during the 2016 Defence interviews, *the applicable contact protocol prevented it from being able to ask any questions. Under Rule 68(2)(a) of the Rules, mere presence is clearly insufficient, as explained above, the opportunity to question the witness must be a meaningful one. In the present case, there was no possibility to test the statements by the other party, as it would have been done in the courtroom.*"¹³

15. Rule 68(2)(a) is clearly not satisfied here, and the Request fails on this ground.

B. The Statement goes to YEKATOM's acts and conduct

16. Contrary to the Defence's assertions, P-5010's evidence goes to YEKATOM's acts and conduct, as construed by the Court's jurisprudence.

17. The Chamber has previously found, the term 'acts and conduct of the accused' refers to "personal actions and omissions of the accused" and more specifically, to "those actions of the accused described in the confirmed charges or which are otherwise relied upon by the Prosecution to establish their criminal responsibility for the crimes charged."¹⁴ In subscribing to the same definition, Trial Chamber X in the *Al Hassan* case further clarified that "[p]rior recorded testimony that disprove the acts and conduct of the accused are equally inadmissible under this provision."¹⁵

18. The Statement discusses, *inter alia*, the January 2014 MBAIKI meeting with Bishop Guerrino PERIN, YEKATOM's senior position and position of authority among the Anti-Balaka, his ability to give orders and directions purportedly obeyed

¹³ ICC-02/04-01/15-1665, para 10.

¹⁴ ICC-01/14-01/18-1833-Conf-Corr, para. 28.

¹⁵ ICC-01/12-01/18-2288, para. 7.

by his elements, and his supposed role as a guarantor of the security of the Muslim community.

i. P-5010 discusses YEKATOM's position and authority

19. P-5010 states, for instance:

"Mr Vanderpuye: Let me ask you about this meeting just a bit. When you went to this meeting on 10 January 2014, and you say that's the day that you met Mr Yekatom and the Anti-Balaka, who was in charge of the Anti-Balaka at that time to your knowledge?

The witness: (Interpretation) It was Yekatom, the chief of the Anti-Balaka."¹⁶

ii. P-5010 discusses YEKATOM's intent and knowledge

20. P-5010 claims that YEKATOM did not incite Christians or the Anti-Balaka against the Muslims, and asserts that the Anti-Balaka's role was to protect the Muslim civilian population in MBAIKI. The Statement is not of limited importance nor constitutes a mere peripheral reference to Accused and his acts.¹⁷ Instead, it goes to core aspects of YEKATOM's criminal responsibility for charged crimes.

"The witness: (Interpretation) when the anti-Balaka arrived, they [Muslim civilians] thought that the anti -Balaka were going to attack them. While ROMBHOT who was their leader had already banned all violence against the Muslim community."¹⁸

"Mr Vanderpuye: So one last question. If Mr Yekatom was there to protect the communities, did he protect the Muslim community?

The witness: (Interpretation) he vowed to protect them and he did it. It's only that they were afraid because the contingent came, that's why they left. But he vowed to protect them and he did it."¹⁹

¹⁶ CAR-D29-0009-0596, from 0596, lines 23-25, to 0597, lines 1-11.

¹⁷ See e.g., ICC-01/14-01/18-1833-Red, para. 29.

¹⁸ CAR-D29-0009-0609, lines 3-5.

¹⁹ CAR-D29-0009-0610, lines 10-14.

21. As shown above, the Statement impermissibly goes to proof of YEKATOM's acts and conduct, and patently fails to satisfy the requirements of rule 68(2)(b). The Request thus fails on this ground as well.

IV. CONCLUSION

22. For the above reasons, the Prosecution requests that the Chamber reject the Request in all respects.



Karim A. A. Khan KC, Prosecutor

Dated this 1st day of February 2024
At The Hague, The Netherlands