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**International
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Court**

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

Date: **5 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 Response to the Yekatom Defence Request for Leave to Reply to the
"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",
ICC-01/14-01/18-2341-Conf (ICC-01/14-01/18-2343-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
Ms Sarah Bafadhel

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamai
Ms Marie-Hélène Proulx
Ms Despoina Eleftheriou

Legal Representatives of Victims

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

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****States Representatives****Amicus Curiae****REGISTRY**

Registrar

Mr Osvaldo Zavala Giler

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 reject the Yekatom Defence's latest request for leave to reply.¹ The Request is meritless and should be summarily dismissed.

2. Neither of the two proposed issues warrants a reply, as both arise from a discussion of the applicable law regarding the submission of evidence pursuant to Rule 68(2)(a) of the Rules of Procedure and Evidence ("Rules"). All matters argued by the Prosecution in its response to the underlying Defence's Rule 68(2)(a) request² are consistent with the established case law and practice of the Court and, as such, should have been anticipated.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, 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

4. The Request should be rejected. As explained below, the two proposed issues could have been anticipated. Moreover, the Request impermissibly advances substantive arguments addressing the Prosecution's Response.

A. First Issue – withholding P-5010's prior statements

5. The Response squarely addressed the relevant factors related to the legal criteria necessary to the Chamber's assessment of the submission of the transcript of P-5010's interview under Rule 68(2)(a). It is implausible that the Defence did not anticipate this.

¹ ICC-01/14-01/18-2343-Conf ("Request").

² ICC-01/14-01/18-2341-Conf ("Response").

6. Be that as it may, although the underlying Rule 68(2)(a) Request fails to address the Court's jurisprudence on the submission of an interview conducted under the Court's standardised Contact Protocol, a discussion in the Prosecution's Response could hardly be unexpected. Indeed, it was incumbent on the Prosecution to address the deficiencies of the legal basis advanced in the Rule 68(2)(a) Request.

7. Clearly, whether the Prosecution had been made aware of "the fact and context (if not the nature) of the witness's apparent three prior statements"³ before his interview is directly relevant to the opportunity it had to question P-5010 under the Contact Protocol. It bears directly on the salient issue — the *meaningfulness* of that opportunity — as compared to the circumstances of a trial. P-5010 was uncertain as to whether any of his three prior statements given to the Defence had been recorded, and did not rule this out.⁴ In the Prosecution's view, such an audio recording constitutes an "acknowledged" statement for all intents and purposes, and its unavailability a factor affecting the nature and scope of the interview. There is no reason that the Rule 68(2)(a) Request did not anticipate and address this issue.

8. Equally, the Defence's contentions regarding arguments in the Prosecution's Response that it perceives as impugning its professionalism⁵ do not merit a reply. *First*, as noted, the Prosecution's observations on P-5010's prior statements go directly to the meaningfulness of its opportunity to question the witness under the Contact Protocol. Counsel was present when P-5010 stated that he had given the Defence three statements: "I gave three statements."⁶ To the extent that he confirmed that the statements also covered the same subject matter as that of the interview, their unavailability to the Prosecution – for whatever reason – is a legitimate factor for the

³ ICC-01/14-01/18-2341-Conf, para. 10.

⁴ See CAR-D29-0009-0618-R01, lines 7-19 (P-5010 notes, "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).

⁵ ICC-01/14-01/18-2343-Conf, para. 6.

⁶ CAR-D29-0009-0618-R01, lines 7-19 (emphasis added).

Chamber to take into consideration. The purported First Issue⁷ thus should have been anticipated.

9. *Second*, the Parties' disagreement about the scope or propriety of disclosure is not unusual. A founded disagreement — a posture taken by the Defence on several occasions against the Prosecution — does not *per se* impugn a Party's 'professionalism'. Such is the case here, where the witness did not rule out the possible existence of an audio recording of his three previous statements. A reply is simply unwarranted on this basis.

B. Second Issue – the requirement of disclosing prior statements

10. The Second Issue⁸ is based on a misreading of the Response, which the Defence erroneously suggests argues that:

“for the condition of the parties to have “had the opportunity to examine the witness during the recording” to be met, previous statements of a witness needs to be disclosed.”⁹

11. Rather, the Response asserts that an interview conducted under the Contact Protocol is *prima facie* distinguishable from the circumstances attending the questioning of a witness at trial by a non-Calling Party. *First*, while the Contact Protocol contains no disclosure requirements in relation to the interview of a Defence witness, the Chamber has clarified that disclosure of their prior statements (at least as regards their prospective trial testimony) is required under Rule 78. *Second*, the ordinary sequence of examination at trial is important, where the Defence would normally have led or submitted the witness's testimony before their examination by the Prosecution. Both of these factors are material considerations in determining the

⁷ ICC-01/14-01/18-2343-Conf, para. 3.

⁸ ICC-01/14-01/18-2343-Conf, para. 5.

⁹ ICC-01/14-01/18-2343-Conf, para. 8.

‘meaningfulness’ of the Prosecution’s opportunity to question P-5010 under the Contact Protocol, as compared to the trial.

12. A reply cannot be justified on the basis of an erroneous characterisation of a response. Nevertheless, even if the characterisation were correct in this case – which it is not – the Request fails to show how and why the Defence could not have anticipated the argument, in view of the applicable law.

C. The Request impermissibly advances substantive submissions

13. Finally, the Defence’s attempt to once again advance substantive submissions in a request for leave to reply without obtaining the Chamber’s prior authorisation,¹⁰ is objectionable.

14. The Defence’s assertion that “no such previous statement exists in the case of P-5010”¹¹ is a factual claim directed toward the substantive arguments made in the Response. The further contention that the issue is “moot”¹² leaves no doubt about the Defence’s intention to do so. Notwithstanding, neither the underlying Rule 68(2)(a) Request, nor the substantive arguments the Defence now puts forward address whether an *audio recording* of P-5010’s three prior interviews was made, to any extent.¹³

15. In any event, to the extent that the Request proffers substantive arguments, it is subject to dismissal on this basis alone, as the Chamber has noted in other circumstances.¹⁴

¹⁰ The Prosecution notes the Yekatom Defence’s previous breach of Regulation 24(5) of the Regulations of the Court by filing a substantive Reply without *prior* authorisation to the Prosecution’s and CLRV’s responses to its request for an extension of page limits (*see* Yekatom Defence email to Trial Chamber V, dated 15 November 2023, at 17:09).

¹¹ ICC-01/14-01/18-2343-Conf, para. 8.

¹² ICC-01/14-01/18-2343-Conf, para. 8.

¹³ *Contra* ICC-01/14-01/18-2343-Conf, para. 3 (asserting a “flawed misinterpretation of P-5010’s interview by [the OTP]”).

¹⁴ *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”).

IV. CONCLUSION

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



Karim A. A. Khan KC, Prosecutor

Dated this 5th day of February 2024

At The Hague, The Netherlands