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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 Response to the Yekatom Defence Request for leave to appeal the ‘Decision on Yekatom Defence Request for the Exclusion of Allegedly Fabricated Evidence’ (ICC-01/14-01/18-2460-Conf)’ - ICC-01/14-01/18-2468-Conf”,
ICC-01/14-01/18-2480-Conf, 3 May 2024

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Yekatom Defence’s Request for leave to appeal¹ the “Decision on Yekatom Defence Request for the Exclusion of Allegedly Fabricated Evidence” (“Impugned Decision”).²

2. None of the three issues for which certification to appeal is sought constitutes an appealable issue within the meaning of article 82(1)(d). Moreover, the remaining cumulative criteria for an interlocutory appeal under article 82(1)(d) are not met. Instead the Request simply reargues the Defence’s position in its article 69(7) Request for Exclusion³ and prior submissions, which the Chamber has thoroughly considered and rightly rejected.

II. CONFIDENTIALITY

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

III. SUBMISSIONS

4. The Defence seeks leave to appeal the Impugned Decision in relation to three issues proposed for certification:

- i) whether the Chamber erred in fact and law in its assessment of the evidence and argumentation regarding the Prosecution’s violation of article 54(1), due to an improperly narrow application of its powers and responsibilities vis-à-vis review of the Prosecution’s compliance with its duties (“First Issue”);

¹ ICC-01/14-01/18-2468-Conf (“Request”).

² ICC-01/14-01/18-2460-Conf (“Impugned Decision”).

³ ICC-01/14-01/18-2240-Conf (“Request for Exclusion”).

- ii) whether the Chamber erred in law in finding that the Prosecution's obligation to investigate exonerating circumstances was 'limited to the investigation stage' ("Second Issue"); and
- iii) whether the Chamber erred in fact and law in finding that there was no causal link between the Prosecution's violation of article 54(1) and the obtaining of the impugned fabricated evidence ("Third Issue").

A. No appealable issue arises from the Impugned Decision

5. While presented as an application for leave to appeal, the Request simply rehashes the same failed positions advanced in the Request for Exclusion and in prior Defence submissions before the Chamber.⁴ It is in essence a re-argument — one made notwithstanding the Chamber's consideration of those proffered in the Request for Exclusion, but upon its further invitation to the Defence to provide fulsome submissions in granting a substantial extension of the page limits to do so.⁵ The suggestion that in such circumstances, the Chamber did not sufficiently consider the Defence's arguments is at best inaccurate and self-serving. With that said, the Request fails to present an appealable issue, as explained below.

⁴ See *e.g.* ICC-01/14-01/18-2195-Conf (observing that "the Defence raised on multiple occasions its attention to the existence of an alleged collusion scheme, both in oral and written submissions").

⁵ See Email of Trial Chamber V, 15 November 2023, at 14:51 ("Having considered the submissions by the participants, the Single Judge is of the view that, irrespective of the merits of a prospective request, given the extent of the issues that the Yekatom Defence expects to raise, there exist exceptional circumstances pursuant to Regulation 37(2) of the Regulations of the Court warranting a certain extension of the page limit. The Single Judge thus grants an extension of up to 50 pages"); see also the Defence's substantive submissions on the issue contained in its request for an extension of pages — Email of Yekatom Defence, 15 November 2023 at 12:33 (596 words arguing the grounds of the exclusion motion); Email of Yekatom Defence, 15 November 2023 at 10:47 (543 words arguing the grounds of the exclusion motion). See also ICC-01/14-01/18-2111-Conf, para. 8 (alleging for example, the collusive nature of the Witnesses [P-2582, P2620, and P-2475] conduct for a fraudulent purpose"); see also ICC-01/14-01/18-2195-Conf (observing that "the Defence raised on multiple occasions its attention to the existence of an alleged collusion scheme, both in oral and written submissions").

The First Issue

6. The First Issue does not arise from the Impugned Decision as it is premised on a mischaracterisation of the Chamber's findings. The Defence merely advances a disagreement with the Chamber's factual determinations.

7. Specifically, the Chamber's finding that it has "a very limited role in reviewing whether the Prosecution complied with its duties under article 54(1)"⁶ did not result in a "fatally flawed"⁷ conclusion. Rather, the Chamber properly found that "the Prosecution did not fail to effectively investigate exonerating circumstances within the meaning of Article 54(1) of the Statute."⁸ The Request misapprehends the Impugned Decision, and takes the Chamber's assessment of its "limited role" out of context. When describing its understanding of its role, the Chamber merely recalled the Prosecution's responsibility to conduct investigations independently, responsibly, and consistently with article 54, acknowledging the exceptional nature of judicial controls over such investigations.⁹ Nowhere in the Impugned Decision did the Chamber suggest that it would not properly assess the Defence's allegations or review the Defence's evidence. Moreover, the Chamber specifically engaged with the Defence's position, reviewed the evidence and arguments advanced, and found that they fell short of the required legal threshold.¹⁰

8. By mischaracterising the Impugned Decision, the Defence fails to identify an appealable issue. Instead, the Request expresses a mere disagreement with the Chamber's factual conclusions. On this basis, the First Issue fails.

⁶ Impugned Decision, para. 16.

⁷ Request, para. 14.

⁸ Impugned Decision, para. 49. *Contra* Request, para. 14.

⁹ Impugned Decision, para. 16.

¹⁰ Impugned Decision, paras. 18-41.

The Second Issue

9. The Second Issue does not arise from the Impugned Decision, as it is similarly premised on a mischaracterisation of the Chamber's legal findings. Contrary to the Defence's submission,¹¹ the Impugned Decision does not hold that the Prosecution's obligation to investigate exonerating circumstances is limited to the investigation phase *before* the commencement of the trial¹² — although it reasonably observes that the focus of investigations *during* trial is on proving the confirmed charges and eliciting evidence to prove its case theory.¹³

10. The Chamber noted that (practically) the Prosecution cannot investigate endlessly and that this necessarily must be understood in contextualising its statutory duties during the course of trial. Contrary to the Defence's understanding, the Impugned Decision neither states nor implies that article 54 does not apply in the conduct of further investigations *during* a trial. Rather, the Impugned Decision found that, in the absence of any fact known to the Prosecution triggering an obligation to further investigate, there could be no article 54 violation in respect of evidence later uncovered, and on which the Defence's allegations rely.¹⁴

11. The Second Issue does not arise from the Impugned Decision as it is predicated on a misconstruction of the Chamber's reasoning and findings. Moreover, the arguments the Defence advances merely disagree with the Chamber's factual determinations. As such, the Second Issue fails.

¹¹ Request, para. 16.

¹² Impugned Decision, paras. 27-28.

¹³ See Impugned Decision, para. 28.

¹⁴ See Impugned Decision, paras. 19, 51.

The Third Issue

12. The Third Issue merely advances the Defence's disagreement with the Impugned Decision in respect of the Chamber's determination that there is no causal link between any alleged article 54 violation and the evidence adduced at trial.¹⁵ The suggestion that, because the Chamber "made no specific reference to these specific arguments [alleging a causal chain of events linking the violation of article 54 to the disputed evidence] in the Exclusion Motion"¹⁶ does not negate the Chamber's consideration thereof. To the contrary, the Chamber's finding that the evidence was "obtained" in the course of proceedings before it,¹⁷ necessarily differentiated the Defence's contentions that it was obtained elsewhere or by unlawful means. The Impugned Decision did not ignore the Defence's arguments as the Request suggests¹⁸ – instead, it merely rejected them as without merit.

13. The Defence's contentions that the Chamber "erred" or that the Impugned Decision "indicates a flawed understanding of legal causation"¹⁹ are unfounded and wrong. They attempt (unsuccessfully) to disguise the Defence's mere disagreement as a legally appealable issue.

14. The Impugned Decision correctly holds that the burden of proof in respect of a challenge under article 69(7) is on the Defence, and that in this case the Defence did not meet its burden. Contrary to the Request, the Impugned Decision did not turn on the Chamber's "finding that there was no causal link ... in the form of a 'backstop'."²⁰ Rather, the Impugned Decision expressly provides that "[i]n any event, *the Defence fails to demonstrate a causal link* between the alleged violations under Article 67(2) of

¹⁵ *Contra* Request, para. 28.

¹⁶ Request, para. 28.

¹⁷ Impugned Decision, para. 23.

¹⁸ Request, para. 28.

¹⁹ Request, para. 29.

²⁰ Request, para. 33.

the Statute and the collection of the Allegedly Fabricated Evidence.”²¹ The Defence’s assertion that the Chamber demonstrated “flawed reasoning”²² in concluding that there was no causal link²³ is inconsequential, since that finding was not determinative of the Request for Exclusion. The Defence’s assertions merely reflect its disagreement. As such the Third issue fails.

B. The cumulative article 82(1)(d) criteria are not met

15. As is well established, article 82(1)(d) criteria are cumulative. The failure to fulfil any one inevitably requires that an application for leave to appeal be rejected. As there are no appealable issues within the meaning of article 82(1)(d), as demonstrated above, the Request should be dismissed on this basis alone.

16. In any event, even assuming *arguendo* that one or more of the proposed issues is appealable — which they are not — the Defence fails to demonstrate that the two remaining cumulative criteria are met.

17. *First*, as concerns the fairness of the proceedings, the Request fails. The Impugned Decision recalls that the issues raised by the Defence will be taken into account to determine whether and to which extent rely on the disputed evidence. Specifically, the Chamber reiterated its assurance that:

“it has taken due notice of the submissions in the present Request and during its opening statements, which all touch upon the standard evidentiary criteria of this evidence, and will duly examine them. This decision is by no means an indication whether, and to what extent, the Chamber will ultimately rely on the Allegedly Fabricated Evidence in its judgment.”²⁴

²¹ Impugned Decision, para. 53 (emphasis added).

²² Request, para. 30.

²³ Impugned Decision, , para. 46.

²⁴ ICC-01/14-01/18-2460-Conf, para. 55.

18. *Second*, as concerns the expeditious conduct of the proceedings, the argument that the matter will arise in respect of an ultimate issue on appeal is unavailing for three reasons: (a) it is clearly speculative; (b) if in the Court’s legal framework matters under article 69(7) were to be always ruled upon by the Appeals Chamber prior to the assessment of the evidence stage,²⁵ the Statute would allow for direct appeal without leave in respect of any article 69(7) decision, which it does not; and significantly (c): as the Impugned Decision was rendered on the basis of Defence’s failure to meet one of two required prongs for the disposition of an article 69(7) request,²⁶ the engagement of the Appeals Chamber in resolution of the first prong would not expedite the proceeding since as it would not dispose of the second prong under article 69(7). The question of whether the alleged violation casts substantial doubt on the reliability of the evidence, or whether its submission would be antithetical to and would seriously damage the integrity of the proceedings²⁷ would still need to be resolved.

19. The Request overlooks this significant issue, unsurprisingly. Although the Impugned Decision did not reach this second prong, the Request for Exclusion could not reasonably meet this threshold in any case. To the extent the disputed evidence bears on the recruitment of children under 15 years of age in YEKATOM’s group, it is not unreliable nor does its submission affect the integrity of the proceedings. Indeed, this is demonstrated by the statements of [REDACTED],²⁸ including as obtained

²⁵ Request, paras. 38-39.

²⁶ ICC-01/14-01/18-2460-Conf, para. 49; *see also* paragraphs 9-10 acknowledging the two prong test. Specifically that “[o]nly if such violation [of the Statute or internationally recognized human rights] has been found, does a chamber need to consider whether (a) ‘[t]he violation casts substantial doubt on the reliability of the evidence’; or (b) ‘[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’.” The evidence concerned is inadmissible in case of an affirmative answer to either of these two questions”) (internal citations omitted).

²⁷ *See* ICC-01/05-01/13-2275-Conf, para. 280.

²⁸ *See* [REDACTED] (P-2013 states “[t]he children] were from 10 to 16-17 years old, both boys and girls”); [REDACTED] (P-2013 states “[s]ome of the children were under the age of 18, while others were below 15. I would not know how many of them were under the age of 18 or 15. They had no weapons. YEKATOM gave an order for the children not to touch weapons and [REDACTED]” ... “[REDACTED] YEKATOM [REDACTED] saw the children at the bases” ... “[t]he children lived among the elements [] They would then play amongst themselves” ... “[REDACTED] the objectives of the ESF were to protect children and to ensure that children should not be in armed groups. [REDACTED] he could do something about the children in the Anti-Balaka”) (emphasis added). *See* [REDACTED] (P-1972 states “[t]here were about 5 boys under the age of 18 at the [REDACTED] ... I believe all of these boys were under the age of 15. I cannot remember their names as they were all divided into various sections. I can tell that they were under the age of 15 because of their attitude and

[REDACTED] witness admitting that children as young as 14 years old were at YEKATOM's [REDACTED]bases.²⁹

20. *Third*, and by the same token, the Defence's further arguments concerning the need to settle the disposition of the exclusion of evidence³⁰ cannot stand either in respect of the expeditious conduct of the proceedings or regarding the outcome of the trial. Both arguments are speculative and ignore the limited – but dispositive – basis on which the Chamber rejected the Request for Exclusion.

IV. CONCLUSION

21. For the reasons above, the Prosecution requests that the Chamber reject the Request.



Karim A. A. Khan KC, Prosecutor

Dated this 4th day of June 2024.
At The Hague, The Netherlands

conduct and also their physical appearance ... The children were already in the Anti Balaka [REDACTED] I did not get to learn their history or where they had come from" ... YEKATOM was aware that the boys [referencing the 5 boys] were in the Anti Balaka" ... "One of the children [REDACTED] he was under the age of 15. I do not know his exact age but I think he could have been above 11 years at the time" ... "He was a fighter and was engaged in operations in the bush just like all the other adult elements [REDACTED]" (emphasis added).

²⁹ [REDACTED] (emphasis added).

³⁰ Request, paras. 38-43.