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

Date: **11 June 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***

Public

**Public redacted version of "Prosecution's Response to the Ngaïssona Defence
Request to exclude evidence or, alternatively, to recall Prosecution witness P-2657
(ICC-01/14-01/18-2300-Conf)",
ICC-01/14-01/18-2325-Conf , 24 January 2024**

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. The Office of the Prosecutor (“Prosecution”) opposes the Ngaïssona Defence request to exclude evidence or, alternatively, to recall Prosecution witness P-2657.¹ The Request is premature and should be dismissed on that basis alone. In the alternative, the requested relief should be rejected as unnecessary to secure the Accused’s fair trial rights and contrary to the interests of justice.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential”, as it responds to a filing of the same designation, and because it contains details of witness testimony heard in private session. The Prosecution will file a public redacted version as soon as practicable.

III. SUBMISSIONS

A. The Request must fail because it is premature

3. The Request is premature and should not be entertained at this point in proceedings. Far from there being no other legal avenue available to introduce the statement of P-3177,² the Defence could have taken any or all of the following steps:

- i. call P-3177 in its own case, by summons if necessary;
- ii. seek to introduce P-3177’s statement under rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”);

¹ ICC-01/14-01/18-2300-Conf (“Request”).

² See Request, para. 12.

iii. should the above steps be unsuccessful due to unavailability, seek to introduce the statement under rule 68(2)(c) of the Rules;

iv. in any scenario, invite the Chamber to request submission of the statement of its own motion under articles 69(3) and 64(6)(d) , should it consider this necessary for the determination of the truth.³

4. None of these avenues have been attempted by the Defence.

5. To the extent that the Defence means to argue that there is no way to bring in the paragraph of interest alone, this is rightly the case. As the Defence acknowledges,⁴ the paragraph cannot be severed for introduction from the rest of the statement. Consideration of the selected paragraph in isolation would divorce it from the broader context of the statement, and would offend the Chamber's truth-seeking function.

B. Alternatively, the requested relief should be rejected

a. Equivalence of the identity evidence

6. At the outset, it is not even clear that P-3177 and P-2657 are referring to the same person. The Request speculates on the equivalence of the identities of the persons referenced. This is reason enough to reject the relief sought by the Defence. There is nothing to indicate that only one Anti-Balaka element from OUHAM-BAC (nick)named [REDACTED] exists. Further, P-3177's evidence on the timing of [REDACTED] death is hardly equivocal, premised as it is with the words "*si mes souvenirs sont exacts*".⁵ P-3177's assertion is further put in doubt by other evidence on the case record from P-0966 suggesting that an Anti-Balaka (nick) named

³ See ICC-01/05-01/08-1023, para. 5; ICC-02/11-01/15-205, para. 12; ICC-01/05-01/13-1285, para. 5.

⁴ See Request, para. 20.

⁵ P-3177: [REDACTED].

[REDACTED] may have participated in the 5 December 2013 attack on BOSSANGO.⁶

7. However assuming, *arguendo*, that P-3177 and P-2657 are referring to the same [REDACTED], the Request should still fail for the following reasons.

b. Main relief: exclusion of all evidence on P-2657's rape

8. The exclusion of all evidence relating to the rape of P-2657 is an extreme and unnecessary measure for which there is no basis in the Court's legal framework, and would in any case run contrary to the Chamber's truth-seeking function.

9. *First*, it is unclear, and the Defence has not attempted to explain, why the exclusion of *all* evidence on P-2657's rape is necessary to secure the Accused's fair trial rights. Indeed, the volume of the evidence on P-2657's rape – running to 20 pages in the Defence's annex⁷ - only serves to underscore the strength of the Prosecution's evidence on this event. It consists not only of P-2657's direct account of the rape, but the "complaint" evidence of three other witnesses (P-2049, P-2462, and P-2453). This complaint evidence – while not direct evidence of the rape itself – rebuts any claim of recent invention and as such strengthens P-2657's sworn testimony about her rape. To exclude evidence of her serious victimisation peremptorily from consideration in the Chamber's ultimate factual determinations would be a grave injustice.

10. *Second*, even limitedly excluding P-2657's evidence on the identity of the perpetrator of the rape would artificially deprive the Chamber of pertinent evidence and be against the interests of justice. As argued above,⁸ it is not even clear that P-3177 and P-2657 are referring to the same person. Whether or not it can be concluded that there was only one Anti-Balaka from OUHAM-BAC with the (nick)name

⁶ [REDACTED].

⁷ See Annex I to the Request.

⁸ See *above*, para. 6.

[REDACTED] is a matter best left to the Chamber's determination. The Chamber should be free to take all relevant evidence into account in a holistic manner, without artificial exclusions, in deciding whether to credit some or all parts of P-2657's account.

11. *Third* and relatedly, apart from article 69(7) which the Defence does not invoke,⁹ there is no basis in the Court's legal framework to exclude witness testimony. The Defence's appeal to the Chamber's broad powers under article 64(2) to exclude witness testimony is unavailing and unsupported by the case law of this Court. The Defence's reference to the *Al Hassan* case is merely to the argumentation contained in a defence application in that case,¹⁰ which was ultimately rejected by Trial Chamber X.¹¹ Further, its appeal to the Chamber's broad powers under article 64(2) amounts to an attempt to relitigate the Chamber's established approach to the submission of evidence in the case. The Chamber has already accepted the testimonial evidence in accordance with its Initial Directions on the Conduct of the Proceedings, on the basis that no procedural bar applies.¹² As such, the Request requires the Chamber's reconsideration of its prior determination to defer its assessment of the "standard evidentiary criteria (namely the relevance, probative value and potential prejudice)".¹³

c. Alternative relief: recall of P-2657

12. The recall of P-2657 is unnecessary to secure the Accused's fair trial rights, cannot be expected to advance proceedings in any way, and risks (further) re-traumatisation of a vulnerable victim.¹⁴ The Defence appears to make two erroneous assumptions in this respect. *First*, it erroneously assumes that recall is the only way to introduce the new information onto the case record.¹⁵ This is wrong because i) as argued above, there

⁹ See Request, para. 23.

¹⁰ See Request, fn. 13, citing to ICC-01/12-01/18-2295-Red, para. 17.

¹¹ See ICC-01/12-01/18-2344-Red.

¹² See ICC-01/14-01/18-631, para. 54-55, 57.

¹³ See ICC-01/14-01/18-631, para. 53.

¹⁴ See Vulnerability Assessment of P-2657: Email from VWS sent 25/02/22 11:41.

¹⁵ See Request, para. 26.

are other avenues available;¹⁶ and ii) in any case, counsel merely putting information to a witness does not amount to introduction of that information.

13. *Second*, implicit in the Defence's arguments is the assumption that, in order to impugn P-2657's credibility, it is required to put the new information to her, *i.e.* that another witness claims that [REDACTED] was killed on [REDACTED] September 2013. Leaving aside that the claim is less than unequivocal,¹⁷ there is no such requirement to confront P-2657 with this information. In contrast to the *ad hoc* tribunals, there is no procedural requirement of confrontation built into the Court's legal framework. Nor has the Chamber, in its power to regulate proceedings, imposed any such requirement.¹⁸ Even at the ICTY, for instance, where Rule 90(H)(ii) required a degree of confrontation during cross-examination,¹⁹ that requirement was restricted to putting "... the nature of the case of the party... which is in contradiction of the evidence given by the witness." As the ICTY Appeals Chamber confirmed, it is sufficient for the cross-examining party to put the "general *substance* of its case conflicting with the evidence of the witness". It went on to state that, "if it is obvious in the circumstances of the case that the version of the witness is being challenged, there is no need for the cross-examining party to waste time putting its case to the witness."²⁰

14. It is the Court's consistent case law that "judicial economy demands that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature."²¹ In the current case, the circumstances are unconvincing. Even if recall were granted on the basis of the

¹⁶ See above, para. 3.

¹⁷ See above, para. 6.

¹⁸ Cf the approach taken by Trial Chamber X in *Al Hassan*: ICC-01/12-01/18-789-AnxA, para. 51.

¹⁹ Rule 90(H)(ii) of ICTY Rules of Procedure and Evidence / Rule 90(G)(ii) of the ICTR Rules of Procedure and Evidence: "In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness."

²⁰ *Prosecutor v. Momčilo Krajišnik*, Appeal Judgment, Case No IT-00-39, 17 March 2009, para. 368.

²¹ ICC-01/05-01/08-2924-Red, para. 35, cited in ICC-01/05-01/08-3154-Red, para. 27; ICC-01/05-01/08-3186-Red, para. 18; ICC-01/04-02/06-1791-Red, para. 10; ICC-01/12-01/18-2344-Red, para. 34.

Defence's desire (rather than obligation) to put P-3177's account to P-2657, it would not advance proceedings. In its approach to P-2657's examination, the Defence has already put questions to her about her knowledge of [REDACTED],²² the utterances made by [REDACTED] who raped her,²³ as well as their appearance/attire.²⁴ It is unclear why the Defence would expect to receive different answers now, whether in relation to [REDACTED] or to the circumstances of the rape more generally. And, to the extent that it does not expect to receive different answers now – *i.e.* that recall is requested purely to comply with as assumed yet unsupported procedural obligation – recall is an entirely unnecessary use of the Court's time and risk factor for (re)traumatisation of the witness.

C. No breach of Prosecutor's article 54(1) obligations

15. Finally, the Prosecutor has not breached any obligation under article 54(1), as asserted in the Request.²⁵ The statement was properly obtained in the course of an ongoing investigation, and disclosed without delay to the Defence. The Prosecution had no reason to anticipate that interviewing P-3177 – or any other witness with knowledge of the BOSSANGO crime-base – would elicit disclosable information as to the perpetration of P-2657's rape. Article 54(1) is not so broad as to require *all* potential witnesses who may have pertinent information on a crime-base incident to be interviewed. This would be entirely unfeasible, absent infinite time and resources.

²² [REDACTED].

²³ **P-2657:** T-105 CT, p. 27, l. 24-p. 29, l. 23.

²⁴ **P-2657:** T-105 CT, p. 29, l. 24-p. 30, l. 1.

²⁵ *See* Request, para. 15, 24.

IV CONCLUSION

16. For the foregoing reasons, the Request should be rejected.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 11th day of June 2024

At The Hague, The Netherlands