

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 11 July 2024

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

**Prosecution's Consolidated Response to "Yekatom Defence Request for the
Formal Submission of Telecommunication Related Material"
(ICC-01/14-01/18-2562-Conf), 28 June 2024 and Request for Reconsideration**

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") defers to Trial Chamber V ("Chamber") in the disposition of the Yekatom Defence's 'Request for the Formal Submission of Telecommunication Related Material'. Relatedly however, the Prosecution seeks the Chamber's reconsideration of its 6 June 2024 email Decision on Submitted Materials for D30-4864 ("6 June Submission Decision") recognising the formal submission of CAR-D29-0004-3912, CAR-D29-0004-3913, CAR-D29-0004-3918, CAR-D29-0004-3920, and CAR-D29-0004-3922 comprising so-called guides to the Yekatom Defence's production of certain Call Sequence Tables ("CST Guides").¹

2. The 6 June Submission Decision arises from a clear error of reasoning and its reconsideration is necessary to avoid an injustice – *i.e.*, the Chamber's improper reliance on inadmissible evidence in evaluating the reliability and weight of CSTs and related evidence submitted by the Yekatom Defence, including the evidence sought to be tendered through its present Request.

II. CONFIDENTIALITY

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

III. SUBMISSIONS

A. Deference

4. As noted, the Prosecution defers to the Chamber regarding the submission of the three documents proposed in the Request. However, insofar as the Chamber may rely on the so-called Defence CST Guides² in evaluating their probative value and weight

¹ See ICC-01/14-01/18-2562-Conf ("Request").

² ICC-01/14-01/18-2562-Conf, para. 7.

on both a *prima facie* basis and in respect of its ultimate determination regarding its Article 74 decision, it is appropriate that the Chamber reconsider its 6 June Submission Decision finding that the Defence CST Guides “are not testimonial in nature.”³

B. Reconsideration of the 6 June Submission Decision is warranted

5. It is well-settled that a Chamber may (and indeed should) reconsider its prior decision where it admits of a clear error of reasoning, and reconsideration is moreover necessary to prevent and injustice.⁴

6. The 6 June Submission Decision does not set out the Chamber’s reasoning in determining that the Defence-authored CST Guides submitted in respect of the testimony of D30-4864 are not testimonial. As such, the 6 June Submission Decision lacks sufficient reasoning⁵ which, independently of, and in addition to the conclusion reached, constitutes a clear error. Without reconsideration, this error will be further compounded and result in an injustice, given the Chamber’s stated intention to rely on the CST Guides in evaluating evidence; namely that, “it will be aided by the purely technical explanations contained therein in its consideration of both the CST as well as D30-4864’s testimony.”⁶

i. The 6 June Submission Decision evinces a clear error of reasoning

7. The Chamber has previously acknowledged that when a tendered document is ‘testimonial’, this may operate as a “procedural bar” to its submission. Specifically, it has applied the Appeals Chamber’s precedent, holding that “[e]vidence which is testimonial in nature is [...] inadmissible [...] when not elicited orally or when the

³ See Chamber Email of 6 June 2024, at 12:58.

⁴ See e.g., ICC-01/12-01/18-1335-Conf-Red, para. 5; ICC-01/04-02/06-611, para. 12; and ICC-01/04-02/06-605, para. 7.

⁵ See e.g. ICC-01/14-01/21-111-Red, para. 41, 43; see also ICC-01/05-01/08-3636-Red, para. 51.

⁶ See Chamber Email of 6 June 2024, at 12:58 (providing, “[h]aving examined the CST Guides, the Chamber considers that they are not testimonial in nature and it will be aided by the purely technical explanations contained therein in its consideration of both the CST as well as D30-4864’s testimony”). As such, the Decision expressly establishes and accepts that the CST Guides were prepared and tendered for *evidential purposes* in this case..

conditions for the introduction of the prior recorded testimony specifically provided for in the Court's applicable law are not met".⁷

8. The Chamber has further defined 'testimonial' evidence as comprising "[s]tatements ... produced in the context of or in anticipation of legal proceedings."⁸ Thus, it has held that

"a statement can be considered a prior recorded testimony if the *person when providing the statement understands that they are 'providing information which may be relied upon in the context of legal proceedings'* [...] Further, when materials can be 'viewed as fitting within the definition of a prior recorded statement', '[s]uch materials are indeed testimonial in nature'.⁹

9. Here, the CST Guides comprise, not only representations prepared in specific contemplation of legal proceedings, but proceedings before this Court, and indeed in respect of this particular trial. Moreover, they are documents not merely prepared at the direction of the Defence, but authored in relevant part by a lawyer among the Accused's legal team. Specifically, the indicated 'Source Identity' for the CST Guides — whose authorship is not presented in the texts of the documents — indicate Jason Antley, whose name has appeared on Defence filings, who has appeared in Court before the Chamber, and who has questioned witnesses pursuant to a grant of audience.¹⁰

10. The Prosecution does not consider that the Defence's assiduous avoidance of revealing the author of the CST Guides in anyway shields them from a determination that they are testimonial in nature. It is not because Defence Counsel or their Assistant is not named as a 'witness' in a List of Witnesses that his/her declarations submitted as and for evidence in the case are 'non-testimonial'. Indeed, it is hard to conceive of an

⁷ ICC-01/14-01/18-631, paras. 55-56; see ICC-01/05-01/13-2275-Red, para. 581.

⁸ ICC-01/14-01/18-2199-Red.

⁹ ICC-01/14-01/18-1359, para. 16 (internal citations omitted) (emphasis added).

¹⁰ See e.g. ICC-01/14-01/18-1025-Anx1-Red (authorising Mr Antley's appearance in Court on the basis that he would be "best placed to question [P-2193]").

understanding of the term 'testimonial' in the context of rule 68(1) more at odds with its recognised purpose.

11. It is incontestable that the CST Guides were produced and tendered by the Yekatom Defence: (a) *as evidence* in its own right — this is distinguishable from a submission or argument advanced by a Party, which does not constitute evidence; and (b) to be relied on as such by the Chamber in its evaluation of the Defence CSTs and/or other telecommunication evidence otherwise appropriately introduced into the record of the case.

12. While the CST Guides may be properly considered by the Chamber as *arguments* on the evidence in the record of the case advanced by the Defence, that is wholly different from receiving them for an *evidentiary* purpose. Insofar as the CST Guides attempt to explain the Defence's actions and the circumstances that have direct bearing on the telecommunications evidence tendered, they were developed and tendered for such purpose.

13. In any case, regardless of whether they provide "purely technical explanations"¹¹ or comprise real or demonstrative evidence, does not exempt them from being *testimonial* in nature. The Appeals Chamber has clarified that "[t]he dispositive consideration is rather that the item of *evidence* in question is presented with a view to proving or disproving any fact in issue before a chamber."¹² It is undeniable that the CST Guides were developed for the purpose of proving the reliability and accuracy of the Defence-created CSTs. The Prosecution notes that this does not preclude the Chamber's consideration of them as a Defence *argument or submission* on the evidence in the record. However, what is clear is that their introduction *as evidence* is necessarily subject to rule 68, for which the legal criteria was not met.

¹¹ See Chamber Email of 6 June 2024, at 12:58.

¹² ICC-01/05-01/13-2275-Red, p. 141, footnote 693 (emphasis added).

IV. CONCLUSION

14. For the reasons above, the Prosecution respectfully defers to the Chamber in respect of the three items submitted, and requests that the Chamber reconsider its 6 June Submission Decision.



Karim A. A. Khan KC, Prosecutor

Dated this 11th of July 2024

At The Hague, The Netherlands