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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***

Public

Public redacted version of "Prosecution's Response to the "Second Defence Consolidated Request for Leave to add items to its List of Evidence, P-6046 & P-6042 to its List of Witnesses and submit their prior recorded testimony pursuant to Rule 68(2)(b)"(ICC-01/14-01/18-2555-Conf) 26 June 2024",
ICC-01/14-01/18-2578-Conf, 8 July 2024

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) opposes, in part, Yekatom’s ‘Second Defence Consolidated Request for Leave to add items to its List of Evidence, P-6046 & P-6042 to its List of Witnesses and submit their prior recorded testimony pursuant to Rule 68(2)(b)’.¹ Specifically, Trial Chamber V (“Chamber”) should reject the proposed formal submission of D29-6042’s 4 June 2024 statement pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”), as it fails to satisfy the applicable criteria.

2. In all other respects, the Prosecution defers to the Chamber’s discretion regarding the disposition of the Request.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this response 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

4. The proposed submission of D29-6042’s 4 June 2024 Statement (“4 June Statement”) does not satisfy the express requirements of Rule 68(2)(b). The Request admits of three related issues that preclude the introduction of D29-6042’s evidence in this manner, elaborated below.

A. The 4 June 2024 Statement goes to the Accused’s acts or conduct

5. The 4 June Statement concerns the acts and conduct of the Accused YEKATOM. In particular, the references contained therein regarding YEKATOM cannot be characterised as merely “peripheral” or “incidental.” Rather, they concern

¹ ICC-01/14-01/18-2555-Conf (“Request”) (referencing D29-P-6042 and D29-P-6046, respectively). Hereinafter, “D29-6042” and “D29-6046.”

YEKATOM's conduct within the specific context of, not only a contested matter, but the crimes charged *inter alia* under Count 29.

6. The Request provides that D30-6042 describes “the arrival of the Anti-Balaka in Pissa, including Mr. Yekatom, and the fact that they were welcomed by the population.”² Indeed, the 4 June Statement describes YEKATOM's status as Chief among the Anti-Balaka, and his arrival at PISSA along with his elements in 2014.³ D30-6042 further states « [...] *Je n'ai vu aucun enfant. Je n'ai jamais vu d'enfants dans les Anti-Balaka ni vu ROMBHOT se déplacer avec des enfants* »⁴ Although indirect, these assertions broach the Accused's acts or conduct in PISSA and moreover, do so in a manner that bears on YEKATOM's intent and knowledge in relation to Count 29, among others.

7. While D30-6042 claims not to have seen YEKATOM travel with any children, the clear implication of this negative observation in the 4 June Statement - and the reason the Defence advances this claim - is to establish that YEKATOM did not do so in fact — *i.e.*, his conduct. The Request is unavailing in its attempt to circumvent Rule 68(2)(b)'s express terms, requiring that “[t]he prior recorded testimony goes to proof of a matter *other than* the acts and conduct of the accused.”⁵ The Court has interpreted acts or conduct evidence to involve “the personal actions and omissions of the accused” and “those actions of the accused described in the confirmation charges or which are otherwise relied upon by the Prosecution to establish their criminal responsibility for the crimes charged.”⁶

8. Here, YEKATOM's accompaniment of his elements to PISSA necessarily encompasses his acts or conduct. It moreover bears directly on the confirmed charges, which comprise YEKATOM and his elements movements along, and control of, the

² ICC-01/14-01/18-2555-Conf, para. 38.

³ CAR-D29-0009-0748, 0752, para. 28

⁴ CAR-D29-0009-0748, 0753, para. 39.

⁵ See *e.g.* ICC-01/14-01/18-1833-Conf-Corr, para. 26.

⁶ See ICC-01/14-01/18-1833-Conf-Corr, para. 28.

PK9 – Mbaiki axis in targeting and displacing Muslim civilians. PISSA is located precisely on that axis. Thus, YEKATOM's presence and conduct at that location is not merely peripheral.⁷ Similarly, evidence regarding the presence or absence of children with YEKATOM in his deployments especially is prohibited under Rule 68(2)(b).

B. The 4 June 2024 Statement is not sufficiently reliable

9. Although the Yekatom Defence advances the 4 June Statement suggesting that YEKATOM's Group did not comprise children under the age of 15, the Defence itself obtained [REDACTED]⁸ – confirming exactly the opposite – that there were children at the PISSA and SEKIA bases;⁹ that they ranged in age *between 14 and 17 years old*;¹⁰ that YEKATOM came every two or three days to [REDACTED] and also visited other bases at [REDACTED];¹¹ and that [REDACTED] provided a list to ESF of children at the [REDACTED] and PISSA bases.

10. Although inconsistent, this substantially accords with [REDACTED] statement to the Prosecution:

*“There were children in the Anti-Balaka in [REDACTED] bases... The children were already there [REDACTED]. I did not find out how long they had been there. I do not know how they joined the Anti-Balaka or where they came from exactly.”*¹²

11. [REDACTED] statement is corroborated by that of [REDACTED] also known to D29-6042 [REDACTED]¹³. In a statement disclosed to the YEKATOM Defence,

⁷ See ICC-01/14-01/18-T-295-ET-WT, p.48, ln. 23 – p.49, ln. 5. (testimony of D29-5012 bearing on the forcible transfer of the Muslim population in Mbaiki – “*Yekatom and his elements ... the Anti-Balaka were in Pissa, at the very doors of Mbaiki ... what happened in Mbata, in Bangui-Bouchia, the information that the population in Mbaiki had, according to that information, the Anti-Balaka attacked the Muslims -- once again, the Anti-Balaka attacking the Muslims. So that was the information that we were receiving and that truly fed the climate of fear and worry*”).

⁸ [REDACTED].

⁹ CAR-OTP-2123-0536, at 0546-0547, paras. 83-84.

¹⁰ CAR-OTP-2123-0536, at 0546-0547, paras. 83-84 (emphasis added).

¹¹ CAR-OTP-2123-0536, at 0542-0546, paras. 39-44, 52-53, 79-80; P-2082: CAR-OTP-2109-0452, at 0463, para. 53[REDACTED].

¹² CAR-OTP-2075-1751, 1759, para. 33 (emphasis added).

¹³ CAR-D29-0009-0748, 0752, para. 36-38.

[REDACTED] states:

“[REDACTED] confirm that there were some children within the Anti-Balaka movement, in particular at the [REDACTED] base and in [REDACTED]. In my understanding, a child is someone under the age of 18”;¹⁴

“There were about [REDACTED] under the age of 18 at the [REDACTED] ... [REDACTED] *all [REDACTED] were under the age of 15*. [REDACTED] they were all divided into various sections. [REDACTED] they were under the age of 15 because of their attitude and conduct and also their physical appearance ... The children were [REDACTED] in the Anti Balaka [REDACTED] base [REDACTED] did not get to learn their history or where they had come from”;¹⁵ and, *inter alia*,

“YEKATOM was aware that [REDACTED] *were in the Anti Balaka* because when he inspected the elements he did it section by section in the military style. *It would have been obvious to him that they were children.*”¹⁶

12. In view of the information available, it is clear that the proposed 4 June Statement is not sufficiently reliable, particularly when juxtaposed against the statements [REDACTED] within YEKATOM’s Group, who are clearly in a far better position to know about its workings and composition than D29-6042. Moreover, while it is understandable that the Yekatom Defence would seek to tender the 4 June Statement, [REDACTED] assertions cannot simply be ignored by the Defence in advancing the reliability of the proposed prior recorded testimony, without accounting for the glaring contradiction. On this basis alone, the request to recognise the formal submission of D29-6042’s evidence under Rule 68(2)(b) should fail.

C. The 4 June 2024 Statement involves core issues that are materially in dispute

13. D29-6042’s proposed evidence goes to core issues,¹⁷ as elaborated below. Thus, even if the Chamber considers that the 4 June 2024 Statement may qualify as ‘prior

¹⁴ See CAR-OTP-2075-1743, 1744, para. 8 (emphasis added).

¹⁵ See CAR-OTP-2075-1743, 1745, para. 10 (emphasis added).

¹⁶ See CAR-OTP-2075-1743, 1745, para. 11 (emphasis added).

¹⁷ See e.g., ICC-01/05-01/08-1386, para. 78.

recorded testimony', it should require the witness's examination in Court pursuant to rule 68(3), at a minimum.

14. *First*, the 4 June 2024 Statement bears directly on the substance of the offences charged in respect of Count 29. More specifically, it goes to the objective and subjective elements of the commission of the charged crime(s) by the Accused and/or elements under his command and control. By its terms, the content of D29-6042's evidence involves core issues that are materially in dispute.

15. The Defence itself has advanced a similar argument. For instance, in its opposition to the Prosecution's submission of P-1813's prior statements pursuant to rule 68, the Defence noted that, his assertions that he "would see very young boys from 10 years old at the SEKIA and PISSA Anti-Balaka barriers" *inter alia*, were relied on by Pre-Trial Chamber II to confirm the presence of children at the Sekia and Pissa checkpoints.¹⁸ The same applies here because it goes to the same *issue* – albeit that D29-6042's evidence on YEKATOM's conduct is predicated on what he did not see.

16. *Second*, beyond this, D29-6042's prospective evidence goes to the Defence's allegations concerning the alleged "fraudulent nature of the ESF program."¹⁹ Indeed, the Request refers to the "Defence *extensive* submissions on ESF fraudulent scheme",²⁰ as alleged in its opening statements and further in its request for the exclusion of evidence.²¹

17. Moreover, the Prosecution considers that, given the Yekatom Defence's posture on the matter, it cannot plausibly assert that its serious allegations impugning ESF's role in respect of the charges arising under Count 29 is not a core issue that is

¹⁸ See ICC-01/14-01/18-1475-Red, para. 19-20 (contending that "[a]ll those elements are core issue [sic] of the case and materially disputed").

¹⁹ See ICC-01/14-01/18-2555-Conf, paras. 40-42 (noting that the D29-6042's evidence is, *inter alia*, "essential for the Chamber to fully exercise its truth-seeking function) (emphasis added).

²⁰ ICC-01/14-01/18-2555-Conf, paras. 40, fn. 57.

²¹ See ICC-01/14-01/18-2555-Conf, paras. 6 and 12 *citing* ICC-01/14-01/18-2240-Red and ICC-01/14-01/18-2460-Red, the Defence request and Decision rejecting it, respectively.

materially in dispute. In fact, the Defence has notably argued exactly that.²² Moreover, to the extent that the Defence's claims that the facts underpinning Count 29 derive from fraud and thus may properly found the presentation of rebuttal evidence,²³ it cannot be considered merely peripheral or insignificant.

18. To the extent that the 4 June 2024 Statement refers to YEKATOM's and his Group's arrival and presence in PISSA – a base of operations along the PK9 – MBAIKI axis (located practically at the entrance of MBAIKI²⁴), it clearly comprises a core issue.

19. The Defence's failure to address the manifest core issues raised in the proposed 4 June 2024 Statement to any extent is telling, and the Request is thus unpersuasive.

²² See ICC-01/14-01/18-1475-Red, para. 11-12 (arguing that P-1813's statements relate to core issues insofar as they "focus[] on alleged child soldiers in the Lobaye prefecture" in respect of Count 29).

²³ Note the evidence above of P-1792 and P-2013, both of whom had dealings with ESF regarding the presence and demobilisation of children in YEKATOM's Group, including under 15 years of age; see *e.g.* ICC-02/04-01/15-1600, para. 6 (noting that rebuttal is determined by "whether the factual allegations related to the proposed evidence are of significance vis-à-vis the legal issues to be determined in this case, particularly in light of all the other evidence submitted on the record"; see also *dissent* Judge Pangalanan, ICC-02/04-01/15-1600, para. 1, 5 (observing that a request to present rebuttal evidence is "simply a procedural motion where one party, whose evidence has been specifically impugned, seeks the chance to answer and rebut" in "a *bona fide* reply to a fresh challenge that supervened its main presentation of evidence").

²⁴ See ICC-01/14-01/18-T-295-ET WT, p.48, lns. 24-25 (testimony of D29-5012 - "the Anti-Balaka were in Pissa, at the very doors of Mbaiki").

IV. CONCLUSION

20. For the reasons above, the Chamber should reject the Request in respect of the proposed formal submission of D29-6042's 4 June 2024 Statement pursuant to rule 68(2)(b). In all other respects, the Prosecution defers to the Chamber's discretion.

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 19th of July 2024

At The Hague, The Netherlands