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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
'Yekatom Defence Third Consolidated Request for Leave to amend its Witness and
Evidence Lists and for formal submission of prior recorded testimony via Rule
68(2)(b), 8 July 2024 (ICC-01/14-01/18-2581-Conf)",
ICC-01/14-01/18-2583-Conf, 10 July 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, in part, the Yekatom Defence’s ‘Third Consolidated Request for Leave to amend its Witness and Evidence Lists and for formal submission of prior recorded testimony via Rule 68(2)(b)’.¹ The Prosecution notes that this Request effectively follows the presentation of YEKATOM’s case in chief, with his last witness appearing before the Court only a week ago. Nevertheless, aside from the untimeliness of the Request as concerns the additions to the witness and evidence lists sought, Trial Chamber V (“Chamber”) should reject the proposed formal submission of D29-6048’s 10 and 27 June 2024 statements (“Statements”) pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”), for failure 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

A. The Request is untimely

4. The arguments advanced by the Defence in respect of the timing of the Request are not persuasive. While the Request devotes several pages to justify the manifest delay, the fact of the matter is that, D29-6048’s evidence is directed toward impugning the testimony of a Prosecution witness – P-2475 whose evidence was notified to the Yekatom Defence nearly four years ago in 2020 and who testified nearly two years ago

¹ ICC-01/14-01/18-2581-Conf (“Request”).

in this case.

5. Contrary to the Request, its timing is not “reasonable in the context of these proceedings.”² Nor, is the Defence’s effort to add D29-6048 to its List of Witnesses analogous to the Chamber having granted a Prosecution request to add a witness after having called 13 witnesses. There is an obvious distinction between the Prosecution having sought leave (a) to add a witness to *replace* another who withdrew his cooperation,³ and whose significance “as a whole is [] limited”⁴ and (b) to add such a witness with more than 80% of its in-Court presentation of witnesses still to come — versus the present circumstances. Here, the Defence now seeks to add a new substantive and material witness⁵ practically *after* the presentation of its case in chief. The Request similarly fails in attempting to compare the present situation to the disposition of the Ngaissona’s recent requests to add witnesses, which the Defence concedes occurred “in the midst of its evidence presentation”⁶ — not *after* it.

6. Nevertheless, subject to the above, the Prosecution defers to the Chamber’s determination on the proposed addition of D29-6048 to the Defence’s List of Witnesses and the addition of the attendant documents to its List of Evidence at this very late stage.

B. The Statements may not be formally submitted pursuant to Rule 68(2)

1. The Statement involves core issues that are materially in dispute

7. Apart from the Request’s undeniable untimeliness, the proposed Statements also go to core issues that are materially in dispute,⁷ warranting D29-6048’s appearance in

² See ICC-01/14-01/18-2581-Conf, para. 13.

³ ICC-01/14-01/18-1118-Conf, para. 10.

⁴ ICC-01/14-01/18-1118-Conf, para. 11.

⁵ See ICC-01/14-01/18-2581-Conf, para. 26 (noting the uniqueness of the proposed Statements, “to suggest that D29-6048’s evidence is merely repetitive of other Defence witnesses, or that it covers aspects that have already been treated, would therefore be to fail to correctly appreciate both the nature and probative value of her evidence”).

⁶ ICC-01/14-01/18-2581-Conf, para. 13.

⁷ See *e.g.*, ICC-01/05-01/08-1386, para. 78.

Court for examination by the Parties and Participants pursuant to rule 68(3), at a minimum.

8. *First*, the Statements bear on the substance of the crimes charged under Count 29.⁸ By its terms, the content of D29-6048's evidence necessarily involves core issues that are materially in dispute. Indeed, the Defence asserts particularly, that "[t]he prospective evidence of D29-6048 is significant in light of the charges brought against Mr Yekatom."⁹ The Defence asserts that the Statements "fundamentally contradict[] the incriminating allegations made by P-2475"¹⁰ – a witness who the Defence itself characterises as "of central importance"¹¹ in respect of charged operations and attacks carried out by YEKATOM and Anti-Balaka elements under his command and control,¹² who is corroborated and supported in this regard by other evidence.

9. The Yekatom Defence's contention that P-2475's evidence "materially underpins the quasi-entirety of the charges and modes of liability brought against Mr Yekatom"¹³ demonstrates exactly *why* the request to introduce D29-6048's Statements to impugn P-2475's evidence pursuant to rule 68(2)(b) is wholly unsustainable. Of course, this is not lost on the Yekatom Defence, whose strategy to obliquely assail the credibility of P-2475 in the Request and to set up a straw man argument by, *inter alia*, grossly overstating his significance to the case against YEKATOM, is as unavailing as it is transparent. With that said, and despite that P-2475's testimony concerning the acts and conduct of YEKATOM and his Anti-Balaka Group regarding the charged crimes is corroborative and supportive of substantial independent evidence — including from other insiders in YEKATOM's [REDACTED] — it is clear that D29-6048 should

⁸ ICC-01/14-01/18-2581-Conf, para. 21.

⁹ ICC-01/14-01/18-2581-Conf, p. 11.

¹⁰ ICC-01/14-01/18-2581-Conf, para. 22.

¹¹ ICC-01/14-01/18-2581-Conf, para. 24.

¹² See ICC-01/14-01/18-2581-Conf, para. 24 (noting the witness's evidence in respect of "three of the four 'crime bases', before and during the 5 December attack in BOEING and CATTIN, and in the context of the group's advance down the PK9-MBAIKI Axis").

¹³ ICC-01/14-01/18-2581-Conf, para. 24.

be required to appear for examination on core matters that are manifestly contested.

10. Beyond this, D29-6048's proposed Statements add to the Yekatom Defence's claims alleging "fraudulent nature of the ESF demobilisation programme."¹⁴ As noted previously,¹⁵ the Yekatom Defence cannot plausibly assert that its persistent allegations impugning the whole of the ESF programme as a fraud in relation to the charges under Count 29 is not a core issue and materially in dispute. The Defence has previously argued as much, and is not relieved from their prior assertions simply because it has changed posture from an opponent to a proponent of a rule 68 request.¹⁶ Moreover, as the Prosecution has previously observed, to the extent that the Defence's claims that the facts underpinning Count 29 derive from fraud and, as such, may appropriately found the presentation of rebuttal evidence, the proposed Statements cannot be considered as addressing merely peripheral or insignificant issues.¹⁷

2. The Statement is not sufficiently reliable

11. To the extent that D29-6048's Statements go "to the broader allegation as to the presence of child soldiers in Mr Yekatom's group generally, brought under Count 29",¹⁸ it is unreliable and untenable. The Prosecution incorporates its submissions regarding the statements of [REDACTED], who independently confirm: (a) the presence of children within YEKATOM's Group, including under age 15,¹⁹ at not only the PISSA base, but at SEKIA,²⁰ MBAIKI, and at the YAMWARA School;²¹ and (b) [REDACTED] effort to demobilise the children in YEKATOM's Group, including those [REDACTED].²²

¹⁴ See ICC-01/14-01/18-2581-Conf, para. 20.

¹⁵ See ICC-01/14-01/18-2578-Conf, para. 17.

¹⁶ See ICC-01/14-01/18-1475-Red, paras. 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).

¹⁷ See ICC-01/14-01/18-2578-Conf, para. 17, fn. 23.

¹⁸ See ICC-01/14-01/18-2581-Conf, para. 21.

¹⁹ CAR-OTP-2123-0536, at 0546-0547, paras. 83-84 (confirming the presence of children of 14 years of age); see also CAR-OTP-2075-1743, 1745, para. 11 (confirming the presence of at least five children under age 15).

²⁰ See CAR-OTP-2075-1743, 1744, para. 8.

²¹ See CAR-OTP-2075-1743, 1745, para. 10.

²² See ICC-01/14-01/18-2578-Conf, paras. 9 *et seq.*

12. Considering the information possessed by the Defence in respect of the charges under Count 29, including as asserted by [REDACTED], the suggestion that D29-6048's testimony as bears on that count is sufficiently reliable is untenable. As previously noted,²³ neither the Defence – nor the Chamber – in evaluating the reliability of the proposed Statements can simply set aside the declarations of [REDACTED] in respect of the presence of children in the Group and [REDACTED] with ESF.

13. The request to recognise the formal submission of D29-6048's evidence under rule 68(2)(b) must fail. The Prosecution notes however, that the Yekatom Defence does not oppose presenting D29-6048 pursuant to rule 68(3).²⁴

IV. CONCLUSION

14. For the reasons above, the Chamber should reject the Request in respect of the proposed formal submission of D29-6048's Statements under rule 68(2)(b). In all other respects, the Prosecution defers to the Chamber's discretion.



Karim A. A. Khan KC, Prosecutor

Dated this 26th of July 2024
At The Hague, The Netherlands

²³ See ICC-01/14-01/18-2578-Conf, para. 12.

²⁴ See ICC-01/14-01/18-2578-Conf, para. 5.