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**International
Criminal
Court**

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

Date: 14 August 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 Response to the Yekatom Defence's Request for Reconsideration of the Chamber's Decision regarding the introduction of D29-P-6042 pursuant to Rule 68(2)(b) of the Rules, ICC-01/14-01/18-2598-Conf (ICC-01/14-01/18-2616-Conf)

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. Trial Chamber V ("Chamber") should reject the Yekatom Defence's request for reconsideration¹ of the Chamber's decision regarding the introduction of D29-P-6042 pursuant to Rule 68(2)(b) of the Rules ("Decision").² The Request does not satisfy the requisite criteria for the Chamber's reconsideration. In particular, it fails to (a) demonstrate a clear error of reasoning in the Decision; (b) set forth a new fact or argument warranting consideration; and (c) substantiate any injustice that arises in the absence of the reconsideration sought.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(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. No Clear Error of Reasoning

3. The Request does not demonstrate a clear error of reasoning in the Chamber's rejection of the Defence's submission of D29-P-6042's statement as prior recorded testimony, pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules"). Indeed, the Chamber acted well-within its discretion in declining the formal submission of the statement, particularly given the Defence's express intention not to exclude evidence of acts or conduct contained within it. As the Decision notes:

"[t]he Chamber is of the view that the reference made to the fact that the witness did not see '*ROMBHOT se déplacer avec des enfants*' touches upon the acts and

¹ ICC-01/14-01/18-2616-Conf ("Request").

² ICC-01/14-01/18-2598-Conf.

conduct of the accused. As such, it does not consider that the witness's statement is suitable for introduction under Rule 68(2)(b) of the Rules."³

4. The rationale underpinning the Decision could not be clearer, and conforms to the text of Rule 68(2)(b), which proscribes the submission of prior written testimony that goes to proof of the acts or conduct of an accused. That the Chamber did not agree with the Defence's characterisation of such evidence as presented in D29-P-6042's statement or its significance, does not make unreasonable its determination that it is not merely peripheral, or that the resultant exclusion of the proposed testimony demonstrates an error of judgement.

B. No New Facts

5. The Request attempts to recast the Defence's change in *strategy* as a change in *circumstance* to fit within the Court's jurisprudence allowing a Chamber to reconsider a prior decision. The effort however, is misguided and unavailing.

6. The notion that a Chamber may consider new facts or arguments after the rendition of a decision is relevant to assess if it demonstrates clearly erroneous reasoning or its impact results in an injustice.⁴ Here however, the facts are not new — it is only the Defence's tack that is. Nothing prevented the Defence from arguing in its initial application that the Chamber consider parsing the formal submission of D29-P-6042's statement. It argued the opposite – notwithstanding that it now claims that the introduction of the non-acts or conduct evidence “is necessary to respect the right of Mr Yekatom to present an effective defence, and prevent an injustice resulting from the exclusion of the totality of D29-P-6042's evidence.”⁵ It moreover chose not to request the Chamber to consider parsing the submission of the witness's statement in the first instance, fully aware that “the Chamber has previously introduced partial

³ ICC-01/14-01/18-2598-Conf, para. 31.

⁴ See ICC-01/12-01/18-734, para. 11 (noting that “[n]ew facts and arguments arising since the decision was rendered may be relevant to [assess whether reconsideration is necessary to prevent an injustice]”. See also, ICC-01/12-01/18-1335-Conf-Red, para. 5.

⁵ ICC-01/14-01/18-2616-Conf, para. 2.

Rule 68(2)(b) statements which exclude portions ... deemed to go to the acts and conduct of the accused.”⁶

7. Contrary to the Request, the Defence does not advance a “new fact”.⁷ Rather it seeks to correct a tactical mistake, conceding that

*“after careful consideration, the Defence hereby notifies that it has determined that the rights of Mr Yekatom would be preserved with the introduction of D29-P-6042’s prior recorded testimony with the exception of paragraphs 29 and 39, which the Defence no longer intends to rely on.”*⁸

However, while the Court has the power to reconsider its decisions at the request of the parties or *proprio motu*, “[t]rial Chambers have nevertheless determined that [it] is exceptional and *should only* take place if a clear error of reasoning has been demonstrated or if it is *necessary* to do so to prevent an injustice.”⁹ Reconsideration is not designed to fix a Parties’ own strategic miscalculation.

C. No Resultant Injustice or Prejudice

8. The Defence’s contention that, in the circumstances, reconsideration “is warranted in the present situation as [*sic*] the Decision as it stands, with the exclusion of the entirety of D29-P-6042’s statement, would create an injustice to the detriment of Mr Yekatom’s right to present an effective defence,”¹⁰ is equally unavailing. The assertion is moreover conclusory and incorrect.

9. It is noticeable that the Defence does not assert that the Decision causes ‘prejudice’. In fact, the Decision does not, because it neither excludes the witness nor their written evidence definitively. The Decision attends specifically to the submission

⁶ ICC-01/14-01/18-2616-Conf, para. 8 *et seq.*

⁷ *Contra* ICC-01/14-01/18-2616-Conf, para. 15 (arguing, *inter alia*, that “[t]his express notification of the Defence, that it will not rely upon paragraphs 29 and 39 in light of the Chamber’s characterisation of paragraphs 29 and 39, constitute a new fact that warrant consideration).

⁸ ICC-01/14-01/18-2616-Conf, para. 13.

⁹ ICC-01/12-01/18-734.

¹⁰ ICC-01/14-01/18-2616-Conf, para. 21.

of the statement as prior recorded testimony under Rule 68(2)(b), as distinguished from any other provision under subdivision (2) or (3).

10. Given that the Yekatom Defence has not yet rested its case, and that the Chamber's rejection of the submission of D29-P-6042's written testimony is not dispositive of the introduction of the witness's evidence, the Defence's claim that the Decision creates an injustice without reconsideration is baseless. This is even more so, absent any attempt by the Defence to call the witness under a different mode, such as *viva voce* or under Rule 68(3). As the Request does not assert that the witness is 'unavailable', the Decision does not foreclose these options. In this sense, the assertion that an injustice will result if the Decision is not reconsidered is also premature and unfounded.

11. The Request manifestly fails to demonstrate sufficient grounds for the Chamber's reconsideration of the Decision.

IV. CONCLUSION

12. For the above reasons, the Chamber should reject the Request in its entirety.



Karim A. A. Khan KC, Prosecutor

Dated this 14th day of August 2024

At The Hague, The Netherlands