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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 “Yekatom Defence Request for the Formal Submission of Open-source Evidence from the Bar Table (ICC-01/14-01/18-2516) ””, ICC-01/14-01/18-2534-Conf, 18 June 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 Prosecution opposes the YEKATOM Defence's submission of three open-source items ("Three Items")¹ of the 31 items proposed to be introduced from the bar table.² The Prosecution defers to the discretion of Trial Chamber V ("Chamber") for the 28 remaining items³ as further detailed in Annex A.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(2) of the Regulations of the Court ("RoC"), this document 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. Three Items

1. CAR-D29-0002-0046

3. The Chamber should reject the introduction of CAR-D29-0002-0046 via the bar table. The document, submitted for impeachment purposes, was not used during P-2328's cross-examination despite an opportunity to do so and the Defence's anticipation of its possible necessity. *First*, the Defence included this item in its examination list, but clearly made a strategic decision not to show it to the witness or question to him about its content⁴, in particular to "show [P-2328's] fraudulent and controversial behaviour and overall lack of credibility".⁵ The Request provides no plausible alternative explanation for the Defence's choice. It is not sufficient that P-2328 was questioned merely on matters relating to general credibility. His attention was never directed to CAR-D29-0002-0046 and the *specific* allegations now relied on

¹ ICC-01/14-01/18-2516-Conf-AnxA, items 1 (CAR-D29-0002-0046), 32 (CAR-D29-0002-0123), and 33 (CAR-OTP-2001-0241) ("Annex A to Request").

² ICC-01/14-01/18-2516 ("Request").

³ Hereinafter, "Remaining Items".

⁴ See Yekatom Defence List of Material for P-2328 (D29's email sent on 7 July 2021 at 10.33).

⁵ Annex A to Request, item 1, under the 'Relevance' column.

that it contains.⁶ Consequently, P-2328 was not given a fair opportunity to comment or explain the information now sought to be relied on by the Defence to impeach his evidence. The Defence cannot have it both ways. Its strategic choice not to confront the witness directly during his testimony at risk of eliciting an unhelpful response⁷ cannot concurrently be used to launch a challenge to his credibility from a safe distance.

4. *Second*, CAR-D29-0002-0046's probative value for impeachment purposes is marginal, since the Chamber was deprived of an opportunity to receive an explanation, including of the context, from P-2328. Clearly, P-2328 would have been best placed to provide it. Absent this, the document is sufficiently unreliable to draw the adverse inferences the Defence seeks through its submission.⁸

5. Alternatively, if the Chamber formally recognises the submission of CAR-D29-0002-0046, it should decline to consider it for impeachment purposes sought, or to give it any weight when deciding on the guilt or innocence of the Accused in its judgment pursuant to Article 74.

2. CAR-D29-0002-0123

6. The Prosecution opposes the submission of CAR-D29-0002-0123. The document is manifestly speculative, despite the Defence's contention that it is:

“relevant to determine the time frame of the Yamwara School incident [...] clarif[ies] the testimony of [REDACTED] who explains that [REDACTED]. This would indicate that Mr Yekatom arrived after 05:49”.⁹

⁶ *Contra*, ICC-01/14-01/18-T-050-CONF-ENG, p. 23, and 29 (whereby P-2328 was questioned on the content of media articles such as, CAR-D29-0002-0013, and CAR-D29-0002-0042).

⁷ The Defence recognised that this would likely be futile at best, and at worst, would strengthen P-2328's credibility.

⁸ *Contra*, ICC-01/14-01/18-T-050-CONF-ENG, p. 23-24, and 29 (P-2328 refuted the specific allegation in CAR-D29-0002-0013 by Defence Counsel that ‘[...] your nomination was contested by the entire population’ by responding, ‘I was challenged by the armed groups because, quite simply, when I organised the popular consultations, I took measures which made them think that I was going to undermine their security’).

⁹ Annex A to Request, item 30, under the ‘Relevance’ column

7. *First*, the degree of ambient ‘darkness’ is not necessarily indicative of a specific *time*. Rather, it depends on various factors such as cloud coverage, the presence or absence of moonlight and stars,¹⁰ and the extent of artificial lighting in the environment. That information is manifestly lacking. Hence, the proffered inference does not stand. *Second*, the exact timeframe that YEKATOM met [REDACTED] at the YAMWARA School is not relevant to the charges, save the assertion of an alibi defence, which the Defence has previously disavowed.¹¹

8. Thus, the document is not *prima facie* relevant to the charges to the charge. As noted in the *Katanga & Ngudjolo* case, “[i]n order to be admissible, evidence must, to some significant degree, advance the Chamber's inquiries”.¹² Given the minimal potential impact of this item on the issues before it, the Chamber should be reluctant to admit it, as it will not significantly advance its inquiry.¹³

3. CAR-OTP-2001-0241

9. The YEKATOM Defence seeks to rely on this document to “show that the ICC was already watching the events unfold in CAR as early as March 2013.”¹⁴ However, the Request fails to demonstrate any *prima facie* relevance to the contested issues at trial.¹⁵ As such, its submission would only introduce pages of irrelevant material into an already substantial trial record.

10. In any event, should the Chamber find this document relevant, the Prosecution considers that it may take judicial notice of its content under article 69(6).

¹⁰ See P-1811’s statement, CAR-OTP-2058-0003-R05, paras. 41, [REDACTED].

¹¹ See Annex B, email from D29 to the Prosecution sent on 18 September 2023 [REDACTED]. The Prosecution notes that it has yet to receive a new notice of alibi under Rule 79 as of this filing.

¹² ICC-01/04-01/07-2635, para. 34.

¹³ *Ibid*, para. 35.

¹⁴ Annex A to Request, item 31, under the ‘Relevance’ column.

¹⁵ See ICC-01/14-01/18-811-Conf-AnxB-Corr, p.4-5, in particular the YEKATOM Defence’s wholesale rejection of proposed stipulations relating to the contextual elements. *See also*, ICC-01/14-01/18-1467-Conf, footnote 3, (noting that, ‘The Yekatom Defence has not responded as of this filing’).

B. Remaining Items

11. The Prosecution does not oppose the formal submission of the Remaining Items, but invites the Chamber to take into consideration its additional observations provided in Annex A for each one.

IV. RELIEF SOUGHT

12. For the above reasons, the Chamber should reject the Request in respect of the Three Items. The Prosecution otherwise defers to the Chamber's discretion regarding the formal submission of the Remaining Items, but requests that its observations, as set out per item in Annex A, are given due consideration.



Karim A. A. Khan KC, Prosecutor

Dated this 22nd of August 2024
At The Hague, The Netherlands