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**International
Criminal
Court**

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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 leave to amend its List of Evidence to add CAR-OTP-2115-0285 (ICC-01/14-01/18-2617)""", 19 August 2024, ICC-01/14-01/18-2643-Conf

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The Office of the Prosecutor

Mr Karim A. A. Khan KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Ms Marie-Hélène Proulx
Ms Lauriane Vandeler

Legal Representatives of Victims

Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Yekatom Defence’s request for leave to amend its List of Evidence to add CAR-OTP-2115-0285,¹ a notebook provided by [REDACTED] (“Notebook”). The Request provides no justification for the Defence’s recalcitrance in obtaining the Notebook upon a properly motivated request.² Unfortunately, the Request appears to be yet another last ditch effort by the Defence to justify and excuse an obvious strategic mistake.³

I. CONFIDENTIALITY

2. 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.

II. SUBMISSIONS

3. *First*, it is incumbent on the Defence not merely to establish the Notebook’s *relevance* to the case, but that it is actually of ‘significance’ in order to justify its addition to the List of Evidence (“LoE”). Here, the Notebook is of mere marginal relevance, which only arose in relation to the Defence’s examination of D29-3014 on a collateral matter.

4. *Second*, the Notebook’s significance is undermined by the Defence’s failure to make any request for its inspection or disclosure,⁴ despite its awareness of the Notebook existence since the 24 December 2021 disclosure of [REDACTED] statement wherein it is expressly referenced (“Draft Statement”). The Defence moreover, chose

¹ ICC-01/14-01/18-2617 (“Request”).

² See ICC-01/11-01/11-392-Red-Corr, para. 40 (requiring disclosure requests to be “specific enough both in terms of what is sought by the Defence and the reasons why disclosure of the [...] material appears necessary”).

³ See ICC-01/14-01/18-2627-Conf, para. 7.

⁴ See CAR-OTP-2118-9860, disclosed to the Defence on 21 December 2021 through Rule 77 package 68.

not to do so in full knowledge of the scope of its intended examination of P-1962 and D29-3014, whether through lack of interest or ordinary diligence.⁵ Either way, its own conduct belies any claim that the Notebook was prospectively material or presently ‘significant’ to the Chamber’s determination of the truth or the resolution of the charges in this case.

A. The Defence should not be allowed to add the Notebook to its List of Evidence

5. The Defence should not be allowed to add the Notebook to its LoE. The document, which recounts certain occurrences in BODA between 2013 and 2014 is not “significant[] in light of the charges brought against the accused and the rest of the available evidence.”⁶ The addition of the Notebook does nothing to advance or assist the Chamber in its truth seeking functions,⁷ not the least of which, because the events in BODA have no bearing on the case against YEKATOM specifically.

6. Contrary to the Defence’s overstated contentions,⁸ the Notebook is not *necessary* to establish the inter-religious tensions in BODA, as the Defence has been aware of [REDACTED] description of the armed clashes between Muslims and non-Muslims in BODA for almost three years.⁹ Additionally, the Request does not demonstrate why a reference to peace-building meetings held by CAR government officials in BODA and D29-3014 calling a meeting with the Christian population in mid-September 2014, are of any relevance to the charges against YEKATOM. The charges against YEKATOM effectively end with the events taking place in MBAIKI through February 2014. Moreover, absent any reference to the Anti-Balaka in the context of the meetings

⁵ See ICC-01/05-01/13-177, para. 10 (noting the basic principle that “[w]hilst the Prosecutor is under a strict obligation to provide the Defence with the entirety of the materials it considers relevant ... the Defence cannot abdicate its duty and responsibility to examine such materials, which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor”).

⁶ See ICC-01/14-01/18-989-Conf, para. 5; see also ICC-01/14-01/18-1301-Conf, para. 14 (noting the necessity to establish the “prospective significance of the items” sought to be added to a Party’s LoE).

⁷ ICC-01/14-01/18-1301-Conf, para. 13.

⁸ Request, para. 21.

⁹ CAR-OTP-2118-9860, at 9864, 9868-9869, 9873-9874, paras. 25-28, 49-50, 53-55, 57, 77, 79.

referenced in the Request, their importance to the case is not demonstrably 'significant'.

7. While the Defence may seek to use the Notebook to bolster D29-3014's narrative of calling for peace-building in BODA¹⁰ – even if possible, this has nothing to do with YEKATOM, who was not involved in that narrative. In any case, the Defence's blatant attempt to salvage D29-3014's credibility through "indirectly"¹¹ demonstrating his involvement in outreach efforts with the Christian community to the exclusion of the Muslim community in BODA is not consequential to any material aspect of the charges warranting the Notebook's late inclusion in the LoE.

8. Moreover, the reliability of the information contained in the Notebook is questionable, given [REDACTED] admission to having rewritten the entries a month prior to his Prosecution interview, based on notes contained in a separate Notebook held by a certain [REDACTED]"¹² [REDACTED] further clarified that the entries in pages 1 and 2 were taken from a typed document written [REDACTED], while the entries in page 3 onwards come from the notes taken by [REDACTED].¹³ In the absence of the original Notebook and its authors, it is impossible to determine the reliability of the information contained therein, and therefore establish its *significance* (not mere relevance) to the case.

B. The Prosecution has not violated its disclosure obligations

9. The Prosecution is not in breach of its disclosure obligations. Contrary to the Defence's contention,¹⁴ the fact that the Draft Statement was considered material to the

¹⁰ Request, para. 23 (arguing that Notebook *indirectly* corroborates D29-3014's testimony on his peace-building efforts in BODA).

¹¹ Request, para. 23.

¹² CAR-OTP-2118-9860, at 9877, para. 100.

¹³ CAR-OTP-2118-9860, at 9877, para. 101.

¹⁴ Request, para. 33.

preparation of the Defence does not automatically render the Notebook provided during the course of the interview also material.

10. The Appeals Chamber has clarified that “the right to disclosure is not unlimited and which objects are ‘material to the preparation of the defence’ will depend upon the specific circumstances of the case”.¹⁵ Contrary to the Request,¹⁶ the Appeals Chamber has further held in the *Bemba et al* case that “while this assessment should be made on a *prima facie* basis, rule 77 of the Rules does not mandate the automatic disclosure of *any* particular class of documents in the abstract – contrary, for example, to the provision of rule 76 of the Rules.”¹⁷ Consequently, the Prosecution is only required to disclose items upon completing an independent assessment of their materiality.

11. The assumption on which the Defence arguments rely misunderstands the well-established notion of associated documents. To be clear, the Notebook is not an associated document of the Draft Statement. Its mere mention in the latter is not sufficient to render it *part thereof*. Rather, an ‘associated document’ is one that is “*necessary to read and understand [a statement]*.”¹⁸ The Notebook is not such, nor does it form “an inseparable and indispensable part of the witness's [statement]”¹⁹ or is such that its exclusion renders the Draft Statement in any way less comprehensible or of lesser probative value.²⁰

¹⁵ ICC-02/05-03/09-501, paras. 39, 42; ICC-01/05-01/13-2275-Red, para. 55.

¹⁶ See Request, para. 33 (suggesting that the definition of the prior recorded testimony -including statement and associated document – should apply for the purpose of the assessment of Rule 77 materiality)

¹⁷ ICC-01/05-01/13-2275-Red, para. 641.

¹⁸ ICC-01/09-01/11-1938-Red, para. 33 (emphasis added).

¹⁹ *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on the Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92bis (Witnesses for Sarajevo Municipality), 15 October 2009, para. 11

²⁰ See ICC-01/04-02/06-1029, para. 23 (noting that associated documents must be “used and explained by [the witness in their] prior recorded testimony and are necessary to understand [the witness’s] testimony”); see also ICC-01/09-01/11-1938-Red-Corr, para. 33 (defining associated exhibits as “use[d] or explain[ed] [by the witness] in the prior recorded testimony” and “necessary to read and understand the prior recorded testimony being introduced”); see also ICC-01/04-02/06-1653, para. 23; ICC-02/05-01/20-559-Red, para. 33. See also, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on the Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Witnesses for Sarajevo Municipality), 15 October 2009, para. 11; *Prosecutor v. Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92ter, 22 February 2007, p. 3; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant

12. Appropriately assessed independently, the Notebook did not meet the criteria of materiality warranting disclosure at any point before the Defence elicited the collateral evidence of D29-3014 concerning his alleged peace-promoting actions in BODA. Insofar as this was misleading as to the witness's credibility, it was addressed appropriately by the Prosecution on cross-examination. Up until then, the content of the Notebook referenced had no relevance whatsoever to the case.

13. Moreover, the recent disclosure of the Notebook to the Defence at its request, cannot reasonably found the basis for the late addition of the material to the LoE. As noted, the Defence lack of diligence for literally three years in failing to put forward even a single founded request for the disclosure of the Notebook cannot amount to a Prosecution failure. If the Defence is prejudiced — which it is not — this is a direct result of its failure to examine the evidence duly disclosed, on which it could have reasonably acted as early as three years ago. Moreover, nothing precluded the Defence from calling [REDACTED] as a witness, if it genuinely considered his Notebook to be material for its preparation. As noted, the Defence's own conduct belie its self-serving claim that the item is material, to dilute the consequence of its failed litigation strategy.

C. The Request attempts to disguise a tactical mistake

14. *First*, the Request appears to be an attempt by the Defence to salvage the credibility of D29-3014, whose testimony was thoroughly impeached during the course of his cross-examination. The Chamber should note that during his testimony, the witness refused to acknowledge his son Habib SOUSSOU's membership in the Anti-Balaka in BODA, claiming that he only recently learnt of it from the YEKATOM Defence²¹ – while at the same time, admitting his awareness of international sanctions placed against his son in the context of his leadership of the Anti-Balaka in BODA.²²

to Rule 92bis, 2 October 2008, para. 16 ; and *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92ter, 10 February 2009, para. 5.

²¹ T-274-ENG ET, p. 22, l. 12-p. 23, l. 8, p. 23, l. 20-p. 24, l. 3.

²² T-274-ENG ET, p. 25, l. 25-p. 28, l. 1.

D29-3014 also denied having telephone contacts with Habib SOUSSOU, Maxime MBONDJO (“MBONJO”), and YEKATOM during the relevant period,²³ before acceding to such contacts upon being confronted with Call Data Records establishing the same.²⁴

15. *Second*, as noted the Request is self-serving, in its transparent attempt by the Defence to recuperate its lack of diligence in preparing for P-1962’s testimony over two years prior to its 12 July 2024’s disclosure request of the Notebook.²⁵ As a basis of the disclosure request, the Defence referred to various inconsistencies between the Draft Statement and P-1962’s evidence.²⁶ The Defence reiterated these purported inconsistencies, adding more details in the Request,²⁷ without explaining how they relate to the disclosure of the Notebook. The Notebook does not mention P-1962 or even Habib SOUSSOU, and it does not contain entries regarding the Anti-Balaka leadership in BODA. This clearly shows the Defence’s intention to use the Request improperly to belatedly present ostensible contradictions that it failed to elicit during its cross-examination of P-1962 and in its subsequent submissions.

16. Despite being in possession and aware the information contained in the Draft Statement for a lengthy period, the Defence never addressed any supposedly clear inconsistencies between P-1962’s testimony and the Draft Statement. In fact, in questioning of P-1962, the Defence seemingly acknowledged that Habib SOUSSOU was part of FACA members of YEKATOM’s Group who left BANGUI for BODA through MBAIKI,²⁸ and that Habib SOUSSOU was one of the Anti-Balaka leaders with

²³ T-274-ENG ET, p. 8, l. 22-p. 9, l. 3 (denying any phone contacts with MBONJO), p. 8, l. 9-17, p. 17, l. 12-19 (denying phone contacts with Habib SOUSSOU when the latter was in BODA or BANGUI), p. 25, l. 3-4, p. 28, l. 22-25, p. 29, l. 10-13 (denying phone contacts with YEKATOM).

²⁴ T-274-ENG ET, p. 15, l. 2-16 (confronted with evidence of his contacts with Maxime MBONJO), p. 24, l. 4-11, 19-p. 25, 2, p. 29, l. 14-p. 30, l. 5 (confronted with his contacts with YEKATOM).

²⁵ Annex B to the Request, p. 2.

²⁶ Annex B to the Request, p. 2.

²⁷ Request, para. 35.

²⁸ T-141 ENG CT, p. 14, l. 9-p. 15, l. 25.

elements under his command.²⁹ Nowhere did the Defence use the Draft Statement to confront P-1962 with any of the contradictions listed in paragraph 35 of the Request.

17. In reality, the Defence's failure to cross-examine P-1962 effectively on these inconsistencies indicates that it did not adequately review the Draft Statement before examining P-1962, despite ample time to do so. Defence cannot now use the Request – which concerns a document of *marginal* relevance to this case – as a backstop to propound arguments before the Chamber in an effort to correct its strategic failure.

III. CONCLUSION

18. For the above reasons, the Prosecution respectfully requests that the Request be rejected.



Karim A. A. Khan KC, Prosecutor

Dated this 30th day of August 2024
At The Hague, The Netherlands

²⁹ T-141 ENG CT, p. 17, l. 11-19.