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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 Consolidated Response to the “Yekatom Defence Request for leave to Add 7 Items to its List of Evidence” (ICC-01/14-01/18-2633) and to the “Yekatom Defence Request for the Formal Submission of Miscellaneous Items from the Bar Table” (ICC-01/14-01/18-2661)”, ICC-01/14-01/18-2667-Conf, 3 September 2024

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) opposes, in part, the Yekatom Defence’s request for leave to add seven items to its List of Evidence (“Request to amend the LoE”).¹ Specifically, Trial Chamber V (“Chamber”) should reject the request to add CAR-D29-0024-0006, an Investigation Report relating to P-2583. The Prosecution defers to the Chamber’s discretion regarding the addition of the remaining six proposed items.

2. The Prosecution also opposes, in part, the Yekatom Defence’s request for the formal submission of miscellaneous items (“Miscellaneous Bar Table Request”).² Specifically, the Chamber should reject the formal submission of 10 proposed items for the reasons set out below and in the Annex. The Prosecution defers to the Chamber’s discretion regarding the formal submission of the remaining 25 proposed items, subject to the additional observations provided in the Annex.³

3. This consolidated response is submitted in accordance with the Chamber’s instructions of 16 August 2024.⁴

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential”, as it responds to filings of the same classification. A public redacted version will be submitted as soon as practicable.

¹ ICC-01/14-01/18-2633-Conf.

² ICC-01/14-01/18-2661.

³ See column “Prosecution’s position”.

⁴ See Chamber’s e-mail sent to the parties and participants on 16 August 2024 at 16:03, suggesting that consolidated responses are filed to both Defence requests in the interests of efficiency.

III. SUBMISSIONS

A. The Chamber should reject the request to add CAR-D29-0024-0006

5. To justify the addition of CAR-D29-0024-0006 (an Investigation Report related to P-2583), the Defence must demonstrate its “prospective *significance* in light of the charges brought against the accused and the rest of the available evidence”.⁵ However, the item in question not only lacks significance, but is *prima facie* irrelevant to the proceedings.

6. *First*, the Defence’s assertion that “[t]his item bears relevance for the adjudication of the case as it relates to the identification of former Prosecution witness, P-2583”⁶ is incorrect. P-2583 is not, and never was, a Prosecution witness. His statement was disclosed on 9 November 2020 pursuant to Rule 77 of the Rules only.⁷ He was never included in the Prosecution’s List of Witnesses⁸ and his evidence does not form part of the record in this case. This alone should be dispositive of the Defence’s request.

7. *Second*, there is no clear indication that P-2583 and [REDACTED] (who is mentioned in one of the ESF lists⁹) are indeed the same individual. While the Investigation Report suggests that P-2583 “also goes by the surname [REDACTED]”,¹⁰ it does not indicate that the [REDACTED] contacted by the Defence is the same individual as [REDACTED] who appears on one of the ESF’s lists.

8. *Third*, even assuming *arguendo* that P-2583 is the same individual as [REDACTED], this link would be of no additional value to the proceedings. The Defence allegation that [REDACTED] took part in the ESF demobilisation programme

⁵ ICC-01/14-01/18-989-Conf, para. 5 (emphasis added).

⁶ ICC-01/14-01/18-2633-Conf, para. 20.

⁷ See Pre-Trial Rule 77 package 21, dated 9 November 2020.

⁸ See ICC-01/14-01/18-724-Conf-AnxB.

⁹ See CAR-OTP-2115-0369.

¹⁰ ICC-01/14-01/18-2661-Conf-AnxA, entry 17.

despite not having been a member of YEKATOM's Group, is based on D29-6036's testimony,¹¹ which is already in the case record. Whether [REDACTED] also happens to go by another name (in this case of P-2583), is of no additional value to the proceedings and, furthermore, is cumulative to information provided by D29-6036.¹² As stated above, P-2583 is not a witness, nor is his evidence before the Chamber.

9. *Finally*, it is also notable that evidence provided by D29-6036 about [REDACTED] is, in any case, superficial and lacks probative value. Just over four minutes¹³ of D29-6036's four-day¹⁴ testimony were dedicated to eliciting information relating to this individual. D29-6036 confirmed that he knew '[REDACTED]' in 2013-2014, when "the Seleka and the Anti-Balaka were in the locality",¹⁵ clarifying that "at a given point of time [unclear when exactly, or for how long] he was also selling mechoui".¹⁶ D29-6036 was asked only one question in relation to [REDACTED] alleged membership in the Anti-Balaka, namely "[REDACTED]", to which D29-6036 simply answered "[REDACTED]".¹⁷ However, just because D29-6036 did not *see* [REDACTED] within the ranks of the Anti-Balaka, in no way negates that he was within the ranks of the Anti-Balaka at another point during the relevant timeframe. The probative value of any evidence provided by D29-6036 in relation to '[REDACTED]' is further weakened by the absence of any details about the Witness's basis of knowledge regarding him and his activities at the time.

10. Should the Chamber authorise the addition of CAR-D29-0024-0006 to the Defence's LoE, its formal submission is also opposed by the Prosecution, for lack of *prima facie* relevance, as described above.

¹¹ See ICC-01/14-01/18-T-[REDACTED].

¹² See ICC-01/14-01/18-T-[REDACTED]; see also ICC-01/14-01/18-2633-Conf, para. 21.

¹³ See ICC-01/14-01/18-T-[REDACTED].

¹⁴ See ICC-01/14-01/18-T-[REDACTED].

¹⁵ See ICC-01/14-01/18-T-[REDACTED].

¹⁶ See ICC-01/14-01/18-T-[REDACTED].

¹⁷ See ICC-01/14-01/18-T-[REDACTED].

B. The Chamber should reject the formal submission of 10 proposed items

11. The Prosecution opposes the submission of items falling into four broad categories, namely those (i) related to material that is not in evidence and falls outside the scope of this case; (ii) constituting extrinsic evidence of a collateral matter; (iii) testimonial in nature; and (iv) lacking the requisite relevance and reliability.

12. General arguments for each of these categories are elaborated below. Item-specific observations are additionally set out in the Annex.¹⁸

a. Items related to material not in evidence and outside the scope of this case

13. The Prosecution opposes the formal submission of six items that relate exclusively to material that is not in evidence and falls outside the scope of this case. Of these six items (i) five relate to P-2620 and/or to P-2638,¹⁹ and (ii) one relates to P-2583,²⁰ and is addressed in detail at paragraphs 5-10 above. P-2620, P-2638, and P-2583 are not witnesses in this case and have provided no evidence to the Court in these proceedings.

14. The Defence submits the five items related to P-2620 and/or P-2638 to ostensibly demonstrate alleged collusion to falsify evidence to take advantage of the Court and [REDACTED]. However, as previously stated,²¹ these allegations do not fall within the scope of the case in as far as they concern individuals whose evidence does not form part of the case record and is not relied on to substantiate the charges against the Accused. They also do not have any bearing on the ESF demobilisation programme that took place in 2014, as they manifestly concern conduct occurring thereafter.

¹⁸ See column "Prosecution's position".

¹⁹ CAR-D29-0011-0002, CAR-OTP-2119-0909, CAR-OTP-2123-0071, CAR-OTP-2121-2578, and CAR-OTP-2119-0906.

²⁰ CAR-D29-0024-0006.

²¹ See, *inter alia*, ICC-01/14-01/18-2624-Conf, para. 8.

15. The Prosecution reiterates its prior submissions²² that the credibility of P-2620 and P-2638 is not material to this case and cannot be considered by the Chamber for the purposes of its final deliberations, insofar as it may only base its decision on “evidence submitted and discussed before it at the trial”.²³ These five items are thus *prima facie* irrelevant and any assessment of the purported misconduct they may demonstrate would be subject to entirely separate proceedings.

b. Item that constitutes extrinsic evidence of a collateral matter

16. The Prosecution opposes the formal submission of one item, CAR-D29-0016-0086, which constitutes extrinsic evidence of a collateral matter.²⁴ This item is tendered with the aim of demonstrating a relationship between P-2475 and P-2620.

17. In this specific instance, the submitted item is a screenshot of P-2620’s Facebook account, tendered for the purposes of demonstrating that previously public content has been removed from her profile two days after the conclusion of P-2475’s testimony. However, the Defence claim that it “shows that P-2620 removed previous public content from her account *following her contact with P-2475*”²⁵ is as speculative as it is irrelevant.

18. *First*, there is no indication that P-2620 removed previously public content from her account *because* of any contact she may have had with P-2475 upon the conclusion of his testimony. Thus, this alleged causal link is a purely speculative one.

19. *Second*, updates to privacy settings or publicly available content applied to a private Facebook profile of an individual who is not a witness in this case and whose

²² See, *inter alia*, ICC-01/14-01/18-2624-Conf, para. 10.

²³ See Article 74(2) of the Statute.

²⁴ It is a well-recognised principle that extrinsic evidence on a collateral matter may not be introduced for the purpose of impeaching credibility. See the Prosecution’s previous submissions regarding the collateral evidence rule in general at ICC-01/14-01/18-2624-Conf, paras. 13-14; see also ICC-01/09-01/11-1776-Red, para. 18 and its footnotes 25-26.

²⁵ ICC-01/14-01/18-2661-Conf-AnxA, entry 24.

evidence is not before the Chamber, is not relevant to the proceedings – and in any case, not ‘significant’. Furthermore, this item (that also falls outside the timeframe of the case) has no bearing on the substance of P-2475’s testimony in relation to his experience during the relevant time frame of 2013-2014, nor does it demonstrate any alleged collusion involving P-2475 to fabricate evidence together with the so-called ‘conspirators’, whatsoever. Moreover, it would be fundamentally unfair to discredit P-2475 with material following his testimony without having given him the opportunity to respond to any allegation stemming from it.

c. Items that are testimonial in nature

20. The Prosecution opposes the formal submission of two items²⁶ that are testimonial in nature. While, as previously stated,²⁷ the Prosecution considers that Investigation Reports are generally testimonial, the two Investigation Reports in question are manifestly so.

21. The Chamber previously recalled that

“a statement can be considered a prior recorded testimony if the person when providing the statement understands that they are ‘providing information which may be relied upon in the context of legal proceedings’, namely when they are questioned in the capacity of a witness in the context of or in anticipation of legal proceedings. Further, when materials can be ‘viewed as fitting within the definition of a prior recorded statement’, ‘[s]uch materials are indeed testimonial in nature and they cannot be recognised as submitted through the “bar table”’.”²⁸

22. Here, the Investigation Report at CAR-OTP-2135-0921 summarises the content of a call between P-0965 and an investigator. It specifically provides that “P-0965 was informed and understood that any information he provides may be shared with the

²⁶ CAR-OTP-2135-0921 and CAR-D29-0024-0005.

²⁷ ICC-01/14-01/18-2624-Conf, footnote 2.

²⁸ ICC-01/14-01/18-1359, para. 16 (internal citations omitted).

parties to the proceedings at the ICC".²⁹ Thus, P-0965 clearly understood that he was 'providing information which may be relied upon in the context of legal proceedings' during the call. He was also 'questioned in the capacity of a witness in the context of (...) [the present] proceedings'.

23. Similarly, the Investigation Report at CAR-D29-0024-0005, which provides information about the Defence's certification meeting with D29-6049, includes an indication made by the Witness in relation [REDACTED] described in his statement,³⁰ that is testimonial in nature.

24. Moreover, the two Investigation Reports in question were clearly created and provided for the purposes of the case. They also detail the content of discussions between parties to the proceedings and witnesses in this case.

d. Item that lacks the requisite relevance and reliability

25. The Prosecution opposes the formal submission of CAR-OTP-2115-0285 (P-2460's Notebook relating to events that took place in [REDACTED]). As previously stated,³¹ the Notebook is of mere marginal relevance, which only arose in relation to the Defence's examination of D29-3014 on a purely collateral matter.

26. The Notebook, which recounts certain events that took place in [REDACTED] in 2013-2014, lacks the requisite relevance and reliability, and has no bearing on the case against YEKATOM specifically, as described in detail in the Prosecution's prior submission regarding this item, incorporated herein.³² Thus, the request for its submission should be rejected.

²⁹ CAR-OTP-2135-0921, para. 2.

³⁰ CAR-D29-0024-0005, last paragraph.

³¹ ICC-01/14-01/18-2643-Conf, para. 3.

³² ICC-01/14-01/18-2643-Conf, paras. 6-8.

IV. RELIEF SOUGHT

27. For the above reasons, the Chamber should reject the Request to add CAR-D29-0024-0006 to the Defence's LoE. It should also reject the Miscellaneous Bar Table Request in respect of the 10 items opposed. The Prosecution otherwise defers to the Chamber's discretion regarding the addition of the remaining six proposed items to the Defence's LoE and the formal submission of the remaining 25 items, but requests that its observations, as set out per item in the Annex, are given due consideration.



Karim A. A. Khan KC, Prosecutor

Dated this 17th day of September 2024
At The Hague, The Netherlands