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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 Request for the formal submission of material related to the Fabrication of evidence” (ICC-01/14-01/18-2611)”, ICC-01/14-01/18-2624-Conf, 12 August 2024

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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 request for the formal submission of material related to the Fabrication of evidence (“Request”).¹ Specifically, Trial Chamber V (“Chamber”) should reject the formal submission of 166 proposed items for the reasons set out below and in Annex.

2. The Prosecution defers to the Chamber’s discretion regarding the formal submission of 80 proposed items, subject to the additional observations provided for each one in Annex.² The Prosecution further notes that the Chamber has already ruled on the submission of the remaining 17 items included in the Annex to the Request.³

II. CONFIDENTIALITY

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

III. SUBMISSIONS

4. The Prosecution opposes the submission of items that fall into three broad categories (i) items related to material that is not in evidence and falls outside the scope of this case; (ii) items that constitute extrinsic evidence of a collateral matter; and (iii) a re-issued birth certificate.

¹ ICC-01/14-01/18-2611-Conf.

² Note that the Prosecution considers that Investigation Reports (see entries 4-20 in part 2 of the Annex) and correspondence from sections of the Court submitted by the Defence are generally testimonial in nature, as they were clearly created and provided for the purposes of the case (see ICC-01/14-01/18-1910-Anx1-Red, p. 10; ICC-01/04-01/07-2635, paras 42-49; ICC-01/14-01/18-1359, paras 15-16; ICC-01/05-01/13-2275-Red, p. 141, footnote 693). Should the Chamber find that any such document may not be testimonial, Annex (column “Prosecution’s position”) reflects the Prosecution’s additional observations on each.

³ See entry 89 in part 1 of the Annex and entries 29-34, 49, 52, 54-55, 69, 72-75, and 81 in part 2 of the Annex.

5. General arguments for each of these categories are elaborated in this filing below. Due to the volume of the Request, item-specific observations are additionally set out in Annex.⁴

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

6. The Prosecution opposes the formal submission of 83 items that relate exclusively to material that is not in evidence and falls outside the scope of this case. Of these 83 items (i) 58 relate to P-2620⁵; (ii) nine relate to P-2582⁶; (iii) ten relate to both P-2582 and P-2620⁷; (iv) four relate to P-2582 and/or P-2620 and P-2580,⁸ and; (v) two relate to P-2620 and P-2638.⁹

7. P-2582, P-2620, P-2580, and P-2638 are not witnesses in this case and have provided no evidence to the Court in these proceedings.

8. The 83 items mentioned above are submitted by the Defence for the purposes of demonstrating an alleged collusion between these individuals to falsify evidence in order to take advantage of the [REDACTED] and benefit from [REDACTED]. While these are serious allegations, they do not fall within the scope of the present case in as far as they concern individuals whose evidence does not form part of the case record and is not being relied on to substantiate the charges against the Accused.

9. Furthermore, the 83 items sought to be submitted fall outside the time frame related to the charges. As acknowledged by the Defence, the alleged misconduct they demonstrate relates to the activities these individuals would have engaged in for the

⁴ See column “Prosecution’s position”.

⁵ See entries 24, 26, 29-30, 37-38, 43-44, 46-47, 54, 56, 58-62, 64, 67, 75-76, 78-82, 91, 98, 115, 117, 122-123, 158-159, and 161-172, 176-177 in part 1 of the Annex and entries 17-18, 41, 50-51, 59-61, and 70-71 in part 2 of the Annex.

⁶ See entries 74, 125-127, 136, and 129 in part 1 of the Annex and entries 10, 14, and 77 in part 2 of the Annex.

⁷ See entries 11, 13, 15, 25, 53, 55, 68, 114, 130, and 132 in part 1 of the Annex.

⁸ See entries 112, 174-175, and 179 in part 1 of the Annex.

⁹ See entries 173 in part 1 of the Annex and entry 11 in part 2 of the Annex.

purposes of benefitting from [REDACTED]. Thus, they also do not have any bearing on the [REDACTED] that took place earlier, in 2014, when the Court's investigations related to this case had not yet begun.

10. Finally, the credibility of P-2582, P-2620, P-2580, or 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".¹⁰ The 83 items are thus *prima facie* irrelevant and any assessment of the purported misconduct by P-2582, P-2620, P-2580, and P-2638, that they allegedly demonstrate would be subject to entirely separate proceedings.

B. Items that constitute extrinsic evidence of a collateral matter

11. The Prosecution opposes the formal submission of 82 items that constitute extrinsic evidence of collateral matters. Of these 82 items (i) six are TikTok videos posted by [REDACTED]¹¹; (ii) 73 are items tendered with the aim of demonstrating a relationship between P-2475 and [REDACTED], and with P-2582 and/or P-2620¹²; and (iii) three items allegedly relate to benefits received by P-2475.¹³

12. As elaborated below, this information constitutes extrinsic evidence related to collateral issues of only marginal relevance and their submission should be rejected for that reason. Apart, their submission should be rejected as largely cumulative to evidence already before the Chamber.

13. The collateral evidence rule requires that:

¹⁰ See Article 74(2) of the Statute.

¹¹ See entries 1 and 48-52 in part 1 of the Annex.

¹² See entries 2-10, 14, 16-23, 27-28, 31-36, 39-42, 45, 57, 63, 65-66, 69-73, 77, 84-88, 92-97, 116, 118-121, 128, 131, 134-135, 137-140, 142, 150-152, 155, 157, and 160 in part 1 of the Annex and entry 40 in part 2 of the Annex.

¹³ See entries 147, 149, and 154 in part 1 of the Annex.

“the answers given by a witness to questions put to him [or her] in cross-examination concerning collateral facts must be treated as final. They may or may not be accepted by the [trier of fact], but the cross-examiner must take them for better or worse, and cannot contradict them by other evidence.”¹⁴

14. Although not binding on the Chamber, the rule has been considered favourably by other Chambers of the Court, recognising it as a “sound general rule, based on the desirability of avoiding a multiplicity of issues.”¹⁵ Indeed, Trial Chamber V(A) in the *Ruto and Sang* case acknowledged its “good sense” in “bringing an end to litigation”, and recommended “a place for it in the practice and procedures of this Court”.¹⁶

a. TikTok videos posted [REDACTED]

15. As previously stated,¹⁷ TikTok videos allegedly posted [REDACTED], constitute extrinsic evidence of a collateral matter, namely the Witness’s purported health condition, and use of a smartphone, prior to his testimony.¹⁸ The videos appear to be proffered for the sole purpose of showing that the Witness used a smartphone in spite of the Victims and Witnesses Unit (“VWU”) recommendations to the contrary, and in an attempt to impugn the reasons why VWU permitted P-2475 to [REDACTED], wherein the Defence speculates that he “was reading and rereading” his *own statement*. However, as the Defence observes, the videos show [REDACTED] “lip-syncing to music; putting on different outfits; exercising in what appears to be the [REDACTED] gym and dancing [REDACTED]”¹⁹ — *not* reading his statement.

16. When arguing that [REDACTED] retained possession of his witness statement (per his request) and was reading and rereading it [REDACTED], on account of his being too unwell to attend the Court premises for the familiarisation and statement-

¹⁴ ICC-01/09-01/11-1776-Red, para. 18 and its footnote 25.

¹⁵ ICC-01/09-01/11-1776-Red, para. 18 and its footnote 26.

¹⁶ ICC-01/09-01/11-1776-Red, para. 18.

¹⁷ ICC-01/14-01/18-2227, para. 3.

¹⁸ See entries 1 and 48-52 in part 1 of the Annex.

¹⁹ See entries 1 and 48-52 in part 1 of the Annex.

reading procedure”,²⁰ the Defence fail to acknowledge that [REDACTED] was allowed to commence his statement-reading procedure on [REDACTED] 2022 [REDACTED] *on the initiative of the VWU*, not of the Witness. As VWU explained:

[REDACTED].²¹

17. Furthermore, the relevance of these six short videos (half of which comprise of slide-shows of undated photographs²²) to the Witness’s health condition *at the time* the request [REDACTED] would have been approved by VWU, is negligent at best. In this regard, it is also worth noting additional information provided by VWU (but omitted from the Request) that [REDACTED].²³

18. Regarding the Defence’s assertion that P-2475 was using a smartphone [REDACTED] “against VWS instructions”, it is notable that [REDACTED].²⁴

19. Thus, given that the videos go to proof of a collateral matter, they are inherently of limited significance to the proceedings, if at all, and their probative value, if any, is at best marginal.

b. Items tendered to demonstrate a relationship between P-2475 and [REDACTED], and with P-2582 and/or P-2620

20. The 73 items submitted with the aim of demonstrating a relationship between P-2475 and [REDACTED], and with P-2582 and/or P-2620²⁵ constitute extrinsic evidence

²⁰ See entries 1 and 48-52 in part 1 of the Annex.

²¹ [REDACTED].

²² See entries 49 (CAR-D29-0008-0078), 50 (CAR-D29-0008-0080), and 51 (CAR-D29-0008-0081) in part 1 of the Annex.

²³ [REDACTED].

²⁴ ICC-01/05-01/13-207-Conf, para. 15.

²⁵ See entries 2-10, 14, 16-23, 27-28, 31-36, 39-42, 45, 57, 63, 65-66, 69-73, 77, 84-88, 92-97, 116, 118-121, 128, 131, 134-135, 137-140, 142, 150-152, 155, 157, and 160 in part 1 of the Annex and entry 40 in part 2 of the Annex.

of a collateral matter, namely that these four individuals know one another and were in periodic contact *after* the relevant timeframe and events at issue.

21. These items have limited substantive value, with the vast majority comprising of brief exchanges about topics entirely unrelated to the case, such as family matters, [REDACTED] issues between P-2475 and [REDACTED], health concerns, photos, and ‘comments’ frequently consisting of nothing more than emojis. None of the 73 items (which also fall outside the time frame of the case) have any bearing on the substance of the evidence provided by P-2475 in relation to his experience during the relevant time frame of 2013-2014. They fail to demonstrate any alleged collusion involving P-2475 to fabricate evidence together with the so-called ‘conspirators’, as the Defence asserts.

22. Furthermore, P-2475’s acquaintance and contact with P-2582 in particular is not, in itself, sinister, nor should it come as a shock. Both were included in the [REDACTED],²⁶ [REDACTED]²⁷. P-2475 also testified that he spoke to P-2582 in the context of [REDACTED]²⁸ and acknowledged knowing her and her siblings.²⁹ It is thus not surprising that they would be in touch [REDACTED]. Moreover, such ordinary and expected contact only attenuates the marginal relevance of their communications in the first place, contrary to the Request.

23. As explained by VWU in this respect,

[REDACTED].³⁰

24. Given that the 73 items in question go to proof of a collateral matter, namely that P-2475, [REDACTED], P-2582, and P-2620 know one another and are in periodic

²⁶ See CAR-OTP-2071-0279, [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

contact, they are inherently of limited significance to the proceedings, if at all, and their probative value, if any, is at best marginal.

c. Items related to benefits received by P-2475

25. The Defence assessment of the relevance of three items³¹ allegedly related to benefits received by P-2475 from [REDACTED],³² [REDACTED],³³ are purely speculative and do not provide any indication of the fabrication of evidence whatsoever.

26. As such, the Defence make a speculative leap when asserting that a photograph posted on Facebook by P-2475 depicting him [REDACTED], demonstrates that “financial support for P-2475 played an important role in the reason why he gave false testimony to benefit from [REDACTED]”.³⁴ Similarly, “pictures of P-2475 [REDACTED]”, or the opportunity of “[REDACTED]” are a reflection of [REDACTED]. They are not, in and of themselves, evidence of a Witness’s malicious motive, nor do they provide any evidence in relation to the credibility of a Witness’s testimony under oath.

27. The Defence’s observations on an e-message received by P-2475 from a family member seeking the former’s help [REDACTED] to “have the same benefits as P-2475”, are equally speculative. To begin with, there is no reference to [REDACTED] anywhere in the message, which only refers to [REDACTED]. In addition, the message is dated 10 June 2020, far outside the time frame of the charges in this case and does not *prima facie* refer to the [REDACTED].

³¹ See entries 147, 149, and 154 in part 1 of the Annex.

³² See entries 149 (CAR-D29-0020-2006), and 154 (CAR-D29-0020-4556) in part 1 of The Annex.

³³ See entry 147 (CAR-D29-0020-0611) in part 1 of the Annex.

³⁴ See entry 149 in part 1 of the Annex.

C. Re-issued birth certificate at CAR-D29-0013-0095

28. The Prosecution opposes the formal submission of a birth certificate at CAR-D29-0013-0095.³⁵ This item is a copy of page 0428 of item CAR-D29-0001-0426, the submission of which was opposed by the Prosecution.³⁶ It is a birth certificate of [REDACTED], re-issued on 22 April 2022, pursuant to the '*Jugement de Reconstitution D'Acte de Naissance*' issued by the '*Tribunal de Grande Instance de [REDACTED]*'. This document is specific to a contested issue in this case and, given the date of its re-issue (shortly prior to the commencement of P-2475's testimony), it appears to have been created and obtained for the purpose of not merely Court proceedings, but for this trial particularly. Moreover, it was initially provided to the Defence by the purported father of [REDACTED] (aka '[REDACTED]', a child concededly in Yekatom's Group³⁷), following a *procès-verbal* that was conducted by the Defence on 25 May 2022 (during the course of P-2475's examination-in-chief), further demonstrating that it is derived from evidence that is testimonial in nature.³⁸

29. In addition, information provided in the re-issued birth certificate is unreliable and lacks probative value. As explained at page 0429 of item CAR-D29-0001-0426, the original birth certificate was lost and attempts to locate its '*souche*' from the archives proved fruitless. Thus, the request for a re-issued birth certificate was apparently supported by a '*Certifica d'âge Apparent*', as opposed to any official contemporaneous record. Furthermore, there seems to be no indication of how the *Certificat d'âge apparent* was obtained. It is therefore entirely unclear how the relevant date of birth was substantiated for the purposes of the birth certificate re-issued only in April of 2022.

³⁵ See entry 37 in part 2 of the Annex.

³⁶ See OTP e-mail of 06 June 2022 at 21:00.

³⁷ See [REDACTED].

³⁸ See CAR-D29-0001-0426, at 0426-0427.

IV. RELIEF SOUGHT

30. For the above reasons, the Chamber should reject the Request in respect of the 166 opposed items. The Prosecution otherwise defers to the Chamber's discretion regarding the formal submission of another 80 items, but requests that its observations, as set out per item in Annex are given due consideration.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 18th day of September 2024
At The Hague, The Netherlands