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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

**Prosecution's Consolidated Request for Leave to Reply to the YEKATOM and
NGAISSONA Defence's Responses to the Prosecution's Request for the Formal
Submission of the Prior Recorded Testimony of P-0954 pursuant to Rule 68(3),
(ICC-01/14-01/18-1145-Conf-Corr) (ICC-01/14-01/18-1146-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. The Prosecution requests leave to reply to the YEKATOM and NGAISSONA Defence's Responses to the Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-0954 pursuant to Rule 68(3) ("Responses").¹

2. A limited and focused reply addressing the legal positions advanced in the Responses would assist Trial Chamber V ("Chamber") in the proper determination of the relevant issues, and is otherwise in the interests of justice. These comprise: (1) the relevance of corroboration in determining whether prior recorded testimony may be formally submitted pursuant to rule 68(3) of the Rules of Evidence and Procedure ("Rules"); (2) the scope and assessment of inconsistencies between the prospective written evidence and other information in determining the question of formal submission; and (3) the significance of 'core' allegations in determining the formal submission of prior recorded testimony.

3. A reply in relation to the proposed issues would assist the Chamber in its resolution of the Request by clarifying the facts and applicable law, as well as the determinative factors regarding the disposition of such applications going forward.

II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(1) of the Regulations of the Court ("RoC"), this submission is classified as "*Confidential*" as it concerns filings of the same designation. A public redacted version will be filed as soon as practicable.

¹ See ICC-01/14-01/18-1145-Conf-Corr ("YEKATOM Defence Response"), ICC-01/14-01/18-1146-Conf ("NGAISSONA Defence Response"). See also, ICC-01/14-01/18-1137-Conf (Prosecution Request).

III. SUBMISSIONS

5. The Responses misinterpret and misunderstand the nature and purpose of rule 68(3). If leave is granted, the Prosecution will address the following issues as emerge from the Defence's contentions:

(1) *The relevance of corroboration in determining whether the prior recorded testimony may be formally submitted pursuant to rule 68(3)*²

- Whether corroboration of a prior recorded testimony is a requirement for recognition of its formal submission under rule 68(3).³
- Conversely, whether rule 68(3) compels a witness's prospective testimony to be received fully *viva voce* in the absence of corroboration.

(2) *The scope and assessment of inconsistencies between the prospective written evidence and other information in determining the question of formal submission*⁴

- Whether and to what extent the Chamber may take into account inconsistencies or contradictions between the prior recorded statement and other extraneous information in determining whether it can be formally submitted under rule 68(3).⁵

² See YEKATOM Defence Response, paras. 20-22, and NGAISSONA Defence Response, para. 7.

³ See ICC-01/14-01/18-907-Conf, para. 14 (noting that, "[...] depending on the relevant circumstances, the Chamber may consider, *inter alia*, whether the evidence relates to issues that are not materially in dispute, whether the evidence is not central to core issues in the case or whether it is corroborative of other evidence. The Chamber is mindful that such factors have been explicitly provided for as guiding the Chamber's discretion with regard to the introduction of prior recorded testimonies under Rule 68(2)(b) of the Rules, but not under Rule 68(3) of the Rules. The Chamber considers that this implies that greater discretion is afforded to trial chambers in respect of applying Rule 68(3) of the Rules."

⁴ YEKATOM Defence Response, paras. 23-27.

⁵ See ICC-01/14-01/18-685, para. 29 (noting that, "[...] Rule 68(2) of the Rules provides that a chamber, in certain narrow and exhaustively listed instances, may allow the introduction of previously recorded testimony of a witness who is not present before the trial chamber. Rule 68(3) of the Rules, in contrast, allows the introduction of previously recorded testimony when a witness is present before the chamber, provided that the witness 'does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber

(3) *The significance of 'core' allegations in determining the formal submission of prior recorded testimony*⁶

- Whether material allegations regarding the acts and conduct of the Accused in the prior recorded statement entails the preclusion of formal submission under rule 68(3) given the Defence's opportunity to examine the witness on these issues in court,⁷ and availability of other mitigating factors, such as additional time to examine the witness.

6. A reply focused on these limited and discrete matters will distil the salient issues before the Chamber, and assist the fair and considered determination of the Request.

IV. RELIEF SOUGHT

7. For the above reasons, the Chamber should permit a consolidated reply to the YEKATOM and NGAISSONA Defence's Responses to the Prosecution Request.



Karim A. A. Khan QC, Prosecutor

Dated this 28th day of October 2021

At The Hague, The Netherlands

have the opportunity to examine the witness during the proceedings'. No further restrictions are imposed with regard to the instances under which Rule 68(3) of the Rules may be used."

⁶ See YEKATOM Defence Response, paras. 11-18, and NGAISSONA Defence Response, para. 6.

⁷ ICC-01/14-01/18-907-Conf, para. 24.