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No.: ICC-01/14-01/18

Date: 7 April 2022

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***

Public

**Public redacted version of “Prosecution’s response to “Yekatom Defence Motion for Partial Reconsideration of ‘Eleventh Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0954, P1811, and P-0966’ (ICC-01/14-01/18-1317-Conf)”,
ICC-01/14-01/18-1325-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. Pursuant to Trial Chamber V's ("the Chamber") 22 March 2022 Order,¹ the Prosecution hereby responds to the YEKATOM Defence's motion for reconsideration² of the Chamber's Decision provisionally permitting the introduction of P-0954's prior recorded testimony under rule 68(3) of the Rules ("Decision").³ The Motion should be dismissed. The Decision does not demonstrate any error in reasoning, nor is reconsideration required to prevent an injustice.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(2) of the Regulations of the Court ("RoC"), this Request is filed as "Confidential", as it responds to a filing of the same designation.

III. SUBMISSIONS

3. The Motion should be dismissed *in limine*. Contrary to the Defence's allegations, the Decision is fully in conformity with the Court's established jurisprudence regarding the application of rule 68(3) of the Rules of Procedure and Evidence ("Rules"). Moreover, it is sufficiently reasoned and appropriately balances the nature of the witness's prior testimony, in particular as concerns the Accused's acts or conduct.

4. *First*, as noted, the Motion fails to show any clear error of reasoning in the Decision or that reconsideration is warranted to avoid an injustice.⁴ It manifestly fails to meet the legal test for reconsideration. Instead, the Motion simply repackages

¹ See email from Trial Chamber, 22 March 2022, at 10:35, titled "Order shortening deadline to respond to the Yekatom Defence's Request for Reconsideration ICC-01/14-01/18-1321-Conf".

² See ICC-01/14-01/18-1321-Conf ("Motion").

³ ICC-01/14-01/18-1317-Conf.

⁴ Trial Chambers have the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute. Trial chambers have nevertheless determined that reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment. *See; inter alia*, ICC-02/04-01/15-468, para. 4; ICC-01/05-01/13-1282, para. 8; ICC-01/04-02/06-519, para. 12; ICC-01/04-01/06-2705, para. 18; and ICC-01/09-01/11-1813, para. 19.

arguments advanced by YEKATOM in response to the Prosecution's rule 68(3) motion, and effectively contends that the Chamber's rejection of them amounts to errors in reasoning.

5. Regarding the witness's evidence on the YAMWARA School Incident, the Chamber took note that: "[REDACTED]".⁵ The Chamber similarly took note of the Defence's arguments that this incriminating evidence goes to core and contested issues of the case.⁶ However, as is well established in the Court's jurisprudence, Chambers are afforded broad discretion under rule 68(3).

6. *Second*, that prior recorded testimony may go to the acts or conduct of an accused or to a core issue in the case is but one of several criteria that a Chamber may appropriately consider. As the Appeals Chamber has held, in the exercise of their broad discretionary power, Trial Chambers can allow the introduction of prior recorded testimony that bears on issues materially in dispute, that are central to core issues of the case, or that may be uncorroborated.⁷ This broad discretion is also well-established practice in the jurisprudence of other international Tribunals applying rules similar to rule 68(3).⁸

7. YEKATOM's disagreement with the Chamber's determination, that P-0954's evidence concerning his acts and conduct do not constitute an obstacle to the introduction of his prior recorded testimony pursuant to rule 68(3), does not amount to abuse of discretion. In the present case, and as shown in the paragraph above, the

⁵ ICC-01/14-01/18-1317-Conf, para. 15 (emphasis added).

⁶ ICC-01/14-01/18-1317-Conf, paras. 12, 16, as follows: [REDACTED].

⁷ ICC-02/11-01/15-744, paras. 68-69, (in particular, "[i]n the Appeals Chamber's view, this implies that greater discretion was intended to be accorded in respect of the application of rule 68 (3) of the Rules" and "[i]n this respect, the Appeals Chamber, in its previous judgment, did not per se preclude the introduction of prior recorded testimony under rule 68 (3) of the Rules which related to issues that were materially in dispute, central to core issues of the case or were uncorroborated. The factors listed were factors that the Appeals Chamber stated may be taken into account by a Chamber in reaching its decision.")

⁸ See e.g., *Prosecutor v. Popović, et al*, Case No. IT-05-88-T, Order to Summon Momir Nikolić, 10 March 2009 (reflecting the Trial Chamber's summoning of a witness to appear pursuant to Rule 92 *ter* of the ICTY Rules of Procedure and Evidence (the equivalent of rule 68(3)), whose evidence comprised a written statement of facts asserting Popovic's awareness and participation in the alleged common plan to murder the men and boys of Srebrenica – a core issue in that genocide trial).

Chamber exercised its discretion judiciously, having considered all of the relevant factors, *inter alia*, the Defence's multiple arguments,⁹ the breadth of P-0954's prior statement,¹⁰ and the countervailing interests to receive his evidence under rule 68(3).

8. *Finally*, there is no prejudice to the Accused or injustice here. The Defence's contentions advanced to the contrary are unsubstantiated. YEKATOM will have an opportunity to fully cross-examine P-0954 in Court on any points of his statement, including on his involvement and responsibility, as well as other witnesses of the YAMWARA School Incident, *inter alia*, P-1704¹¹ or P-1811.¹²

IV. RELIEF SOUGHT

9. For the above reasons, the Chamber should dismiss the Motion for reconsideration.



Karim A. A. Khan QC, Prosecutor

Dated this 7th day of April 2022
At The Hague, The Netherlands

⁹ ICC-01/14-01/18-1317-Conf, paras. 12, 13, 16.

¹⁰ ICC-01/14-01/18-1317-Conf, para. 15.

¹¹ CAR-OTP-2054-1136, at 1142-1143, paras. 31-37.

¹² CAR-OTP-2058-0003, at 0009-0010, paras. 38-40.