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**No. ICC-01/14-01/18
Date: 9 November 2022**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Yekatom Defence Motion for Directions Regarding Reliance on
Prior Recorded Testimonies for Non-Rule 68(3) Witnesses**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2), (8)(b) and 67 of the Rome Statute and Regulation 43 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Yekatom Defence Motion for Directions Regarding Reliance on Prior Recorded Testimonies for Non-Rule 68(3) Witnesses’.

I. Procedural history and submissions

1. On 27 October 2022, the Yekatom Defence requested the Chamber to issue ‘directions establishing the applicable procedures for reliance by a calling party on a *viva voce* non-Rule 68(3) witness’s prior statement during their testimony’ (the ‘Non-Rule 68(3) Witnesses’ and the ‘Request’). In particular, it requests that the following directions be adopted (the ‘Sought Directions’):¹

That before relying on a witness’s prior statement, the calling party must first attempt to refresh the witness’s memory by using key words or phrases in relation to the fact that the calling party seeks to elicit (‘First Direction’).

That the calling party must seek leave to rely on a witness’s prior statement, after it is established that i) the witness has specifically stated that they no longer recall a fact that is referred to in their prior statement; or that ii) the witness’s *viva voce* evidence of a fact is inconsistent with their prior statement. In both cases, leave must be sought in respect of a specific line or passage of the prior statement, and where leave is granted, the calling party must not read (or have shown to the witness) any more than is strictly necessary to i) refresh the witness’s memory on the specific fact that the calling party has sought to elicit, or ii) set out the prior inconsistent statement (‘Second Direction’).

That, after the calling party has read from the prior statement:

(in the case of memory refreshing) the witness be asked in a neutral, non-suggestive manner as to i) whether their memory is refreshed; and ii) following the refreshing of their memory, their recollection of the events or circumstances in question; or,

(in the case of a prior inconsistent statement) that the witness be asked in a neutral, non-suggestive manner to explain the inconsistency (‘Third Direction’; collectively, ‘Sought Directions’).

2. It submits that adopting the Sought Directions would be in the interests of justice to ‘ensure that the Chamber retains control over the use of prior statements, and

¹ Yekatom Defence Motion for directions regarding reliance on prior statements, ICC-01/14-01/18-1637-Conf, paras 1, 5, 70.

by extension, ensure that this use remains consistent with the fair and expeditious conduct of the proceedings'.²

3. On 4 November 2022, the Ngaïssona Defence indicated that it fully supports and joins the Request.³
4. On 7 November 2022, the Office of the Prosecutor (the 'Prosecution') responded to the Request (the 'Response'). It argues that the Request amounts to a '*de facto* request for reconsideration' of the 'Initial Directions on the Conduct of the Proceedings' (the 'Initial Directions')⁴ and subsequent oral rulings by the Chamber, and that the standard for reconsideration has not been met. Should the Chamber not consider the Request to be a reconsideration request, the Prosecution submits that the Sought Directions are unnecessary, *inter alia*, in light of the Initial Directions and oral rulings given by the Chamber.⁵

II. Analysis

5. The Single Judge recalls the Initial Directions, which state that the questioning of witnesses would not be regulated in the abstract, but that the necessity or propriety of any particular question would be dealt with on a case-by-case basis, noting the Presiding Judge's obligations under Rule 88(5) of the Rules of Procedure and Evidence and Regulation 43 of the Regulations.⁶ Furthermore, he recalls the guidance given by the Chamber on numerous occasions with regard to the *limited* use of prior recorded testimonies with Non-Rule 68(3) Witnesses,⁷ which in his

² Request, ICC-01/14-01/18-1637-Conf, para. 2.

³ Email from the Ngaïssona Defence, 4 November 2022, at 12:36.

⁴ Initial Directions, 26 August 2020, ICC-01/14-01/18-631.

⁵ Prosecution's response to "Yekatom Defence Motion for directions regarding reliance on prior statements (ICC-01/14-01/18-1637-Conf)", ICC-01/14-01/18-1655-Conf, paras 1-3.

⁶ Initial Directions, ICC-01/14-01/18-631, para. 4.

⁷ *See for example*, transcripts of hearings, 22 July 2022, ICC-01/14-01/18-T-058-ENG, p. 34, line 13 – p. 35, line 21 (The Presiding Judge directed counsel for Mr Ngaïssona to put the prior recorded testimony to the witness to expedite the process); p. 65, lines 6-13 (The Presiding Judge indicated that there is more 'leeway' for the non-calling party to show a prior recorded testimony to witnesses); 16 November 2021, ICC-01/14-01/18-T-077-ENG, p. 41, lines 19-22 (The Presiding Judge directed Prosecution counsel that for Non-Rule 68(3) Witnesses the prior recorded testimony may be used 'if it is established that the witness does not recall any more or if there are - this is in principle - [...] there seem to be some contradictions'); 30 November 2021, ICC-01/14-01/18-T-081-ENG, p. 40, lines 4-11 (The Presiding Judge directed Prosecution counsel that 'when we refer the witness to the former statement, it should be specifically to the point he does not recall, or a point which appears to be contradictory to what he said in the statement with regard to what he said here in the courtroom. Although there is some leeway, of

view sufficiently addresses all issues raised by the Yekatom Defence. The Single Judge sees neither a reason to reconsider these directions nor a need to issue further directions at this point.

6. For the sake of clarity, he also emphasises that prior recorded testimonies will not be considered as sworn evidence in their *entirety* merely because Non-Rule 68(3) Witnesses accept to stand by them, as alleged by the Yekatom Defence.⁸ Rather, these prior recorded testimonies will only be considered for the deliberations on the judgment where the Chamber allowed their use, and only with regard to those limited portions which have entered the record of the case by way of reading and/or showing to a witness.
7. In light of these directions, and to retain the necessary flexibility under Regulation 43 of the Regulations and ensure the expeditiousness and fairness of the proceedings, the Single Judge does not consider it appropriate to adopt the Sought Directions. Accordingly, the Request is rejected.

course, [...] in how much we read out because of context [...]); 25 February 2022, ICC-01/14-01/18-T-100-ENG, p. 32, lines 13-15 (The Presiding Judge encouraged Prosecution counsel to have the witness read through a portion of his prior recorded testimony after he could not remember certain aspects); 1 September 2022, ICC-01/14-01/18-T-151-ENG, p. 37, lines 18-22 (The Presiding Judge directed Prosecution counsel that the prior recorded testimony should only be displayed to the witness when the witness ‘says he doesn’t know anymore or there are contradictions that can be solved.’ He further indicated that he prefers that, before displaying the prior recorded testimony, counsel attempt to resolve the question at hand ‘orally’); 2 September 2022, ICC-01/14-01/18-T-152, p. 16, lines 2-15 (The Presiding Judge directed Prosecution counsel to only display that portion of the prior recorded testimony on the witness’s screen which formed the basis of the present discussion, but not to display other non-relevant paragraphs); p. 65, lines 19-23, p. 83, line 16 – p. 84, line 5 (The Presiding Judge stated, during the Prosecution’s examination, that there are two main reasons for confronting Non-Rule 68(3) Witnesses with their prior recorded testimonies, namely to refresh their memory or to resolve contradictions); 6 September 2022, ICC-01/14-01/18-T-154-ENG, p. 54, line 25 – p. 55, line 10 (The Presiding Judge stated, during the Prosecution’s examination, that ‘it is practice in any Chamber here at the Court, that when a witness says something [...] here in the courtroom that does not comport with what the witness has said in the statement, [...] we have a duty, any counsel and the judges, we have to establish the truth to ask the witness why is that so. And to do that, you read, of course, what the witness has said.’), p. 56, line 24 – p. 57, line 16 (The Presiding Judge stated that ‘when we have witnesses in this courtroom, if witnesses show a lack of memory, we refer them back to the witness statement. If we might have some contradiction or seem to have detected a contradiction, we can address that too. [...] It is preferable [...] to introduce such questions not as if what has been said in the statement must definitely be the truth so - - because it’s not a Rule 68(3)’ and gave concrete guidance with regard to the question that led to the objections by the Yekatom Defence during P-1339’s testimony. He further emphasised again that it is the Chamber’s duty to clarify discrepancies.); 28 October 2022, ICC-01/14-01/18-T-171-Conf-ENG RT, p. 5, lines 7-14 (The Presiding Judge stated in the context of P-1839’s testimony that ‘we have extensive statements from the investigation phase and if there are contradictions or if there are problems with the recollection of the witness, it can be put to the witness and then the Chamber in the end will have to decide what is credible and what is not credible.’).

⁸ Request, ICC-01/14-01/18-1637-Conf, para. 53.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request; and

ORDERS the Yekatom Defence and the Prosecution to file public redacted versions of the Request, ICC-01/14-01/18-1637-Conf and the Response, ICC-01/14-01/18-1655-Conf, respectively, within one week of notification of this decision.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt

Single Judge

Dated this 9 November 2022

At The Hague, The Netherlands