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**International
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Court**

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

Date: **14 November 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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public Redacted Version of “Yekatom Defence Motion for directions regarding reliance on prior statements”, 27 October 2022, ICC-01/14-01/18-1637-Conf

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. Pursuant to Article 64(2) and (8)(b) of the Statute, the Defence for Mr Alfred Rombhot Yekatom ('Defence') respectfully requests that the Trial Chamber 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.
2. The Defence submits that it would be in the interests of justice that the sought directions be issued. They would ensure that the Chamber retains control over the use of prior statements, and by extension, ensure that this use remains consistent with the fair and expeditious conduct of the proceedings. Nor would the sought directions unduly interfere with considerations of due procedural flexibility and a 'case-by-case' approach.

APPLICABLE LAW

3. Articles 64 of the Statute states, in relevant part:

(2) The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

(8)(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner.

SUBMISSIONS

A. Issuing the sought directions would be in the interests of justice.

4. While the general practice of reliance on prior statements in the context of memory refreshing and prior inconsistent statements is established before the Court, the Defence submits that it remains within the power of the Chamber to

issue further directions on the matter as it sees fit, with the aim of ensuring that a calling party's reliance on prior statements does not prejudice the fair and expeditious conduct of the proceedings.

5. To this end, the Defence requests that the Chamber issue the following directions:

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').

i) First Direction

6. It is submitted that it is in the interests of justice to require that a calling party first rely on key words or phrases to 'trigger' a witness's memory as regards a fact, circumstance or event that is discussed in their prior statement, prior to allowing the calling party to refresh their memory.
7. The Chamber has previously held the following, with respect to the relative benefits of receiving *viva voce* testimony:

Not only is the testimony given under oath and under the Chamber's oversight, it further enables the Chamber and the accused to hear natural and spontaneous accounts from witnesses, to directly and closely observe their reactions, demeanour and composure, and to immediately seek clarifications.¹

8. Requiring the use of key words or phrases has the effect of ensuring that the Chamber has the fullest possible opportunity to reap these benefits. It would preserve a degree of naturalness and spontaneity in the witness's account, and would provide the Chamber with more information and context with which to perform its credibility-assessment function. In contrast, where a witness states that they do not remember a fact, circumstance or event, is immediately taken to their prior statement by the calling party, and simply confirms what is read aloud to them, the Chamber is afforded considerably less 'material' with which to perform this critical function, to the detriment of the fairness of the proceedings.
9. Further, unrestricted reliance by a calling party on a prior statement may have the unintended effect of disincentivizing a witness from attempting to provide natural and spontaneous answers on the basis of their recollection – including for fear of digressing from their prior statement. In other words, if a witness ascertains that immediate recourse to the prior statement is available to them, at the slightest indication that the witness has failed to recall a fact, or the slightest divergence from their prior statement, they may be disinclined to attempt to rely on memory, and instead simply 'play it safe' by asking that their memory be refreshed.
10. The Defence notes that in *Ongwen*, the Prosecution filed a request for directions in relation to *inter alia* parties' reliance on prior statements during examination of witnesses, in which it submitted the following:

The Prosecution accepts that the use of previous statements with an apparently forgetful witness should not be the first step in the process of seeking to secure the

¹ [ICC-01/14-01/18-685](#), para. 33

fullest and most accurate account that a witness can give to the Chamber. The rephrasing of the question or the use of names, or 'key-words', by the questioner will often unlock the witness's full recollection.²

11. While that Prosecution request was denied, the Presiding Judge appears to have endorsed such an approach on at least one occasion during those proceedings:

I would stick to the point that it would be good, when it comes to refreshing, to perhaps first try to elicit the information that might have been lost in the actual testimony by drawing out, as I did it before the break, some certain expressions. Or you could say, for example, when I tell you something about a place like that or when you tell your name like that, does that trigger something?³

ii) Second Direction

12. A calling party should not be permitted to rely on a witness's prior statement without the leave of the Chamber; and leave should be sought with respect to the specific line or passage that the calling party seeks to put to the witness.
13. While the Chamber is not bound *per se* by common law rules of procedure, proceedings before the Court remain fundamentally adversarial in nature; and accordingly, throughout these proceedings, the Chamber has regularly deemed certain questions objectionable – including questions deemed improperly 'leading'.⁴ As such, a general prohibition on reliance by a calling party on non-neutral questions, especially in relation to contested and material issues in the case, can be inferred from the conduct of the proceedings to date.
14. In accordance with this general prohibition, the Second Direction would recognise that eliciting evidence by way of unduly suggestive questioning – in this case, by reading from a witness's prior statement – is contrary to the fair

² *Prosecutor v Ongwen*, Prosecution request for the Trial Chamber to make supplementary Directions concerning the use of documents in the course of proceedings, [ICC-02/04-01/15-778](#), 21 March 2017, para. 4.

³ *Prosecutor v Ongwen*, Transcript of hearing of 14 March 2017, [ICC-02/04-01/15-T-53-Red-ENG](#), 32:18-23.

⁴ See e.g., ICC-01/14-01/18-T-166-ENG RT, 99:12-25.

conduct of the proceedings, for which reason it should only be done with the specific consent of the Chamber.⁵

15. Further, the Defence submits that it is the Chamber, and not the calling party, which is best placed to determine whether it has had sufficient opportunity to assess the credibility of a given witness in relation to the information that is sought to be elicited. It thus follows that the Chamber should retain control over the determination as to whether a witness needs their memory refreshed; whether (and to what extent) the witness's *viva voce* account diverges from their prior statement; and/or whether the calling party has made sufficient effort to elicit the information in question.
16. Requiring that leave be sought will also ensure that opposing parties are provided with a meaningful opportunity to make reasoned submissions, if necessary, as regards whether the calling party should be allowed the opportunity to read a witness's prior statement to them, in accordance with the principle of *audi alteram partem*.
17. In the same vein, requiring leave is also in the interests of the expeditious conduct of proceedings, as it will facilitate orderly debate where necessary, and thereby minimise the need for repeated objections that interrupt the calling party's examination, and by extension, the risk of unwelcome tension and friction in the courtroom.⁶ The Defence also notes that, whether or not the Sought Directions are adopted, opposing counsel are often duty-bound to put any such objections on the record.

⁵ See also, ICTY, *Prosecutor v Popović et al.*, Decision on appeals against decision on impeachment of a party's own witness, [IT-05-88-AR73.3](#), 1 February 2008, paras 19-28, where the ICTY Appeals Chamber held that the decision to allow a calling party to put a prior statement to its witness (in the context of a prior inconsistent statement) should lie in the hands of the Trial Chamber, and not the calling party; see also, *Prosecutor v Lubanga*, Decision on the prosecution's "Request on the Manner of Questioning of Witness DRC-OPT-WWWW-0015" and contact by the prosecution with Court witnesses, [ICC-01/04-01/06-2201-Red](#), 1 February 2010, paras 19-21, where Trial Chamber I expressly relieved the Prosecution of "the limits that are traditionally imposed on "examination-in-chief" – i.e. to ask 'neutral' questions and not 'leading questions (i.e. questions framed in a manner suggestive of the answers' – on the basis that the witness in question had changed his account in a 'fundamental' manner.

⁶ See, ICC-01/14-01/18-T-155-CONF-ENG, 40:3-42:11.

18. It is also submitted that leave should be sought specifically in relation to the line or passage of the prior statement that the calling party seeks to put to its witness. This would ensure that material facts that a calling party has not previously attempted to elicit are not read to the witness.
19. In this regard, the recent testimony of P-1339 is an illustrative case in point.
20. During his evidence, P-1339 recounted [REDACTED]. While giving this account, P-1339 spontaneously and expressly stated, [REDACTED].⁷
21. Prosecution Counsel then suggested to P-1339 that his account [REDACTED] as provided in his testimony [REDACTED] differed from that provided during his interview with Prosecution investigators [REDACTED].⁸
22. On that basis, the Presiding Judge gave Prosecution Counsel leave to rely on P-1339's prior statement.⁹ However, Prosecution Counsel proceeded to read out a passage from the prior statement that included the highly prejudicial allegation that [REDACTED]:

[REDACTED]¹⁰
23. In response, P-1339 amended his account [REDACTED].¹¹
24. As argued by the Defence at the time, and as recognised by the Presiding Judge, leave to rely on the prior statement had been granted specifically with respect to the matter of [REDACTED].¹² Whether wilful or otherwise, Prosecution Counsel's reading of a highly prejudicial allegation against Mr Yekatom directly from P-1339's prior statement led to the witness subsequently adopting

⁷ See, ICC-01/14-01/18-T-155-CONF-ENG, 27:15-28:1.

⁸ See, ICC-01/14-01/18-T-155-CONF-ENG, 34:20-34:3.

⁹ See, ICC-01/14-01/18-T-155-CONF-ENG, 35:6-16, 38:13-40:6.

¹⁰ ICC-01/14-01/18-T-155-CONF-ENG, 35:18-22.

¹¹ See, ICC-01/14-01/18-T-155-CONF-ENG, 36:3-13.

¹² See, ICC-01/14-01/18-T-155-CONF-ENG, 35:6-16, 38:13-40:6.

that allegation, and effectively reversing what he had spontaneously and naturally stated in his *viva voce* testimony just minutes prior.

25. The fact that this allegation constituted a prior inconsistent statement does not justify the fact that it was read aloud to P-1339 without the leave of the Chamber. Should Prosecution Counsel have wished to address this inconsistency, further, non-leading, attempts to elicit more information in relation to this incident should have been made. For instance, Prosecution Counsel should have asked P-1339 if [REDACTED].
26. In any event, should the Second Direction have been issued and followed, P-1339's live testimony before the Chamber, and his evidence of a critical aspect of this [REDACTED] – would not have been unduly and irreversibly influenced in a material respect.¹³
27. The importance of requiring leave and prior agreement is further highlighted by the fact that the prior statements of a number of upcoming witnesses – for instance, P-1839, P-0487,¹⁴ and P-2233 – come in the form of substantial interview transcripts, each totalling hundreds of pages in length. Witnesses often further develop, modify, or even reverse their responses provided over the course of their interviews, or in subsequent interviews.¹⁵ Given that these prior statements are transcribed verbatim, what may appear to be a prior inconsistency may in fact be nothing of the sort, depending on which passage is referred to – a risk which is compounded by the sheer volume of these transcripts. In such circumstances, putting to a witness that a given passage in their prior statement is inconsistent with their testimony could in fact be misleading the witness. It thus follows that a cautious approach should be

¹³ See, *Prosecutor v Ongwen*, Decision on Prosecution Request for Further Directions on the Use of Documents During the Questioning of Witnesses, [ICC-02/04-01/15-817](#), 13 April 2017, para. 7.

¹⁴ The Defence notes that a Prosecution Rule 68(3) request in respect of the evidence of P-0487 is currently pending; see, ICC-01/14-01/18-1625-Conf.

¹⁵ Prosecution investigators interviewed P-1839 [REDACTED]; P-0487 [REDACTED]; and P-2233 [REDACTED].

taken: a calling party should not be permitted to unilaterally determine that a witness's testimony has diverged from their prior statement – especially where the prior statements in question (i.e. those of P-1839, P-0487, and P-2233) contain highly prejudicial allegations against Mr Yekatom, and given that undue influence of a witness's live testimony is effectively irreversible.

iii) Third Direction

28. Any questions posed following the reading aloud from a witness's prior statement should be posed in a neutral, non-suggestive manner. In other words, a calling party should be barred from simply reading aloud from a witness's prior statement and posing leading questions on that basis. This is especially the case given the nature of proceedings before the Court, where witnesses are likely to feel a degree of influence or pressure to refrain from deviating from their prior statements and from failing to meet the unspoken expectations of a calling party; even more so, those of authority figures such as the Prosecutor.
29. In addition to being impermissibly leading, this manner of questioning improperly presupposes that information provided in a prior statement is equally probative, and of equal weight, as a witness's *viva voce* testimony.
30. In this regard, the Defence recalls the comments of the Presiding Judge, made during the testimony of P-1339, that 'it is preferable to introduce such questions not as if what has been said in the statement must definitely be the truth [...] because it's not a Rule 68(3) [witness]'.¹⁶
31. Similar directions have been given in *Ongwen*. For instance, having granted a Prosecution request for leave to refresh a witness's memory, the Presiding Judge directed Prosecution counsel as follows: 'without any suggestive approach, please, or absolutely objectively put it to the witness'.¹⁷ Following the

¹⁶ ICC-01/14-01/18-T-154-CONF-ENG, 57:4-6.

¹⁷ *Prosecutor v Ongwen*, Transcript of hearing of 28 March 2017, [ICC-02/04-01/15-T-60-Red-ENG](#), 71:10-72:19.

witness's response (notably, in which they appear to have maintained their *viva voce* position), the Presiding Judge stated:

So, you see, this works, so to speak. This works when you, I think -- of course we do not know exactly because we have followed the procedure that I have suggested, but at least the chance is better that it might turn out something even slightly different if we are to put the question not in a suggestive manner. We don't put [...] the witness in the position to simply confirm what he has said before.¹⁸

32. Again, the testimony of P-1339, regarding [REDACTED], aptly illustrates the necessity of the Third Direction.

33. As the Chamber will recall, the Prosecution attempted to elicit this highly material evidence from P-1339 nine times in total, first asking:

[REDACTED]¹⁹

34. The witness denied [REDACTED], stating:

[REDACTED]²⁰

35. Prosecution Counsel then re-attempted:

[REDACTED]²¹

36. After a Defence objection on the basis that the question had been asked and answered, the Presiding Judge then questioned the witness twice regarding the matter of [REDACTED]:

[REDACTED]²²

37. Prosecution Counsel then made five further attempts to elicit this evidence:

¹⁸ *Prosecutor v Ongwen*, Transcript of hearing of 28 March 2017, [ICC-02/04-01/15-T-60-Red-ENG](#), 73:5-10.

¹⁹ ICC-01/14-01/18-T-154-CONF-ENG, 36:17-19.

²⁰ ICC-01/14-01/18-T-154-CONF-ENG, 37:8-11.

²¹ ICC-01/14-01/18-T-154-CONF-ENG, 37:14-17.

²² ICC-01/14-01/18-T-154-CONF-ENG, 37:21-38:8.

[REDACTED]²³

[REDACTED]²⁴

[REDACTED]²⁵

[REDACTED]²⁶

[REDACTED]²⁷

38. In response, P-1339 repeatedly denied [REDACTED], variously stating:

[REDACTED]²⁸

[REDACTED]²⁹

[REDACTED]³⁰

[REDACTED]³¹

[REDACTED]³²

39. Without seeking prior leave, Prosecution Counsel proceeded to read the following from P-1339's statement: '[REDACTED]'.³³

40. Following a Defence objection, the Presiding Judge suggested that the question be reformulated in a more neutral manner:

[REDACTED]³⁴

²³ ICC-01/14-01/18-T-154-CONF-ENG, 38:19-21.

²⁴ ICC-01/14-01/18-T-154-CONF-ENG, 38:25-39:2.

²⁵ ICC-01/14-01/18-T-154-CONF-ENG, 40:11-13.

²⁶ ICC-01/14-01/18-T-154-CONF-ENG, 53:15-16.

²⁷ ICC-01/14-01/18-T-154-CONF-ENG, 53:21-23.

²⁸ ICC-01/14-01/18-T-154-CONF-ENG, 38:22-24.

²⁹ ICC-01/14-01/18-T-154-CONF-ENG, 39:6.

³⁰ ICC-01/14-01/18-T-154-CONF-ENG, 40:14-41:1.

³¹ ICC-01/14-01/18-T-154-CONF-ENG, 53:17-19.

³² ICC-01/14-01/18-T-154-CONF-ENG, 53:24-54:2.

³³ ICC-01/14-01/18-T-154-CONF-ENG, 54:16.

³⁴ ICC-01/14-01/18-T-154-CONF-ENG, 57:8-11.

41. Yet Prosecution Counsel proceeded to repeat what was essentially the same leading question as previously posed:

[REDACTED]³⁵

42. A Defence objection on the basis that the Presiding Judge's directions were not followed was overruled; and P-1339 responded,

[REDACTED]³⁶

43. The Presiding Judge then questioned the witness:

[REDACTED]³⁷

44. The above example illustrates the necessity of the Sought Directions, and especially the Second and Third Directions.

45. First, contrary to the fair conduct of proceedings,³⁸ Prosecution Counsel impermissibly asked highly leading questions, with the aim of eliciting evidence going directly to multiple charged crimes and modes of liability.³⁹ Instead, the purported prior inconsistency should have been put to P-1339 in a neutral, non-suggestive manner.

46. Second, despite the Presiding Judge's direction to rephrase the impugned question, it was simply repeated; and over Defence objections, P-1339 was permitted to respond.

47. The Defence submits that the lack of clear guidelines as to the proper procedure for reliance on prior statements contributed to the irregular and ultimately prejudicial manner in which this evidence was elicited. It further submits that

³⁵ ICC-01/14-01/18-T-154-CONF-ENG, 57:10-13.

³⁶ ICC-01/14-01/18-T-154-CONF-ENG, 59:6-8.

³⁷ ICC-01/14-01/18-T-154-CONF-ENG, 59:10-24.

³⁸ *Supra*, paras 13-14.

³⁹ [REDACTED].

the above example illustrates the need for directions of general, objective application to be formally issued in the abstract – as opposed to during a witness’s testimony, and during the cut and thrust of oral argument.

B. A *viva voce*, non-Rule 68(3) witness cannot ‘adopt’ their prior statement *in toto* as evidence.

48. During the evidence of P-1339, Prosecution Counsel argued that because, at the commencement of his evidence, the witness accepted that he ‘stood by’ his prior statement,⁴⁰ it therefore followed that Prosecution Counsel was free to rely on P-1339’s prior statement at will, and to ask leading questions regarding the matters discussed therein. Following a Defence objection to this approach, Prosecution Counsel stated,

[Defence Counsel’s objections] ignore the fact that the witness has testified already under oath that the contents of the statement that he made, reviewed, corrected, twice, at the time that it was made and again recently, were accurate and reliable. There’s no -- no possible suggestiveness or inappropriate suggestiveness [...] by the putting the question. [...] It’s confirming specifically what he has already testified to.⁴¹

49. With respect, this argument is misguided. The simple fact that a witness agrees that they ‘stand by’ their prior statement, does not automatically elevate every assertion in that statement to the status of sworn testimony.
50. At the outset, the Defence notes that the Prosecution argument is at apparent odds with Prosecution Counsel’s own comment to P-1339, in which he expressly explained to the witness the distinction between his prior statement and his oral evidence:

Mr Witness, I should [...] tell you something, and that is that your interview statement is not the evidence in this case. Your testimony is. So what you say today and in the next few days is what the evidence is in this case.⁴²

⁴⁰ ICC-01/14-01/18-T-151-CONF-ENG, 15:17-19.

⁴¹ ICC-01/14-01/18-T-154-CONF-ENG, 56:3-12.

⁴² ICC-01/14-01/18-T-151-CONF-ENG, 12:7-9.

51. In such a context, the question 'Do you stand by what you said in your interview and in the corrections that you made?' can only be properly understood as a mere formality. One would be hard-pressed to find a witness who, having gone through the familiarisation and correction process, would respond in the negative.
52. Further, there is a material difference between a witness, on the one hand, accepting that they 'stand by' their prior statement, and on the other, accepting to be henceforth potentially criminally liable should any part of that prior statement turn out to be untrue. It cannot reasonably be suggested that a witness would understand the broader ramifications (presupposed by the Prosecution) of answering the former question in the affirmative. Indeed, it would be deeply unfair to the witness, if not ethically questionable, to proceed on the basis that they have, given the potential consequences at stake for them.
53. That is not to say that a witness cannot adopt specific aspects of their prior statement if and when they are taken to them, i.e. when their memory is refreshed as to specific facts or circumstances, or if they are confronted with a specific prior inconsistent statement. In certain circumstances, it is entirely proper to allow them to do so. Again however, there is a material difference between considering as sworn evidence a witness's adoption of a specific line or passage from their prior statement that is read aloud to them, and considering as sworn evidence a prior statement in its entirety, on the basis that the witness has accepted that they 'stand by' that statement.
54. Any apparent parallels between the Rule 68(3) formalities and the Prosecution's approach ('Impugned Approach') only serve to demonstrate the impropriety of the latter. If the Prosecution wishes to tender a witness's prior statement, so as to 'convert' that prior statement into sworn testimony and evidence, it is free to make a reasoned request, in accordance with the Rule 68 framework. What is

should not be permitted to do however, is to attempt to circumvent that framework, and undermine its inherent protections, which themselves act to ensure that prejudicial and contested material allegations made against an accused in interviews with Prosecution investigators, are elicited in open court, in a neutral and spontaneous manner, and not simply incorporated into the trial record.

55. Further, should the Impugned Approach be accepted as valid, this procedure would logically entirely exempt the Prosecution from posing neutral questions to elicit information in their witnesses' prior statements. In other words, if the content of the prior statement has in fact been transformed into sworn testimony via the Impugned Approach, it is unclear as to what would restrain the Prosecution from simply reverting directly to the prior statement at the very outset of a witness's testimony; or indeed, from simply reading the statement in its entirety onto the trial record. Such a method of direct examination would clearly be untenable; and the fact that the Prosecution has not adopted such a method to date further demonstrates the unsound nature of the Impugned Approach.
56. Nor can it reasonably be argued that Impugned Approach is motivated by the Prosecution's duty to assist the Chamber to establish the truth. The Chamber will recall that, in P-1339's prior statement [REDACTED].⁴³ The Prosecution's duty to assist in establish the truth does not appear to have extended so far as to ensure that this mitigating circumstance was duly elicited – despite it supposedly having been 'sworn' to by P-1339. Indeed, the Impugned Approach should be acknowledged for what it is: an attempt to ensure that the Prosecution's preferred version of events, as elicited by Prosecution

⁴³ CAR-OTP-2041-0754, para. 94.

investigators behind closed doors, makes its way onto the trial record – regardless of whether it accords with a witness's *viva voce* sworn testimony.

57. Another improper aspect of the Impugned Approach lies in the fact that, in attempting to confine a witness to the information provided in their prior statement, it seeks to collapse the boundary between oral testimony before the Chamber, and written records of interviews.

58. As held by His Honour Judge Henderson in *Gbagbo & Blé Goudé*:

There is a fundamental difference between giving sworn testimony in a formal courtroom setting in the presence of the accused and making incriminating allegations in response to questions by investigators for one of the parties.⁴⁴

59. A major aspect of this difference lies in the fact that the Chamber has no control over the manner in which information is elicited during interviews with a party's investigators. By way of example: in witness P-1839's Prosecution interview, she was asked the following arguably problematic questions in her interviews:

[REDACTED]⁴⁵

[REDACTED]⁴⁶

[REDACTED]⁴⁷

60. Notably, for the majority of Prosecution witnesses – including P-1339 – no verbatim interview transcript, or record of questions asked, are available; and as such, the manner in which the information in their prior statement was compiled is unknown to the Defence or the Chamber.

⁴⁴ See, *Prosecutor v. Gbagbo & Blé Goudé*, Corrected Version of Public Redacted Version of Partial Dissent of Judge Henderson, [ICC-02/11-01/15-950-Anx-Red-Corr](#), 23 June 2017, paras 20-22.

⁴⁵ See, CAR-OTP-2122-7067, 7078.

⁴⁶ See, CAR-OTP-2122-6762, 6783.

⁴⁷ See, CAR-OTP-2072-1039, 1058.

61. It is due to this fundamental difference that oral evidence given by a witness, under oath and in person, elicited naturally and spontaneously, should carry more weight than information elicited by a party's investigators – who are themselves not neutral, but have a clear interest in the proceedings – behind closed doors. It is this difference that the principle of orality seeks to preserve; and it is in recognition of this difference that the legal protections governing the admission of prior recorded testimony were established. A simple affirmation by a witness, that they 'stand by' their prior statement, does not nullify this difference; it cannot imbue information contained in a prior statement with the probative value and weight of oral evidence.

C. The Sought Directions would be consistent with a duly 'case-by-case' approach.

62. The Sought Directions would allow the Chamber to retain sufficient control and due flexibility over a party's reliance on prior statements.

63. For instance, where over the course of their testimony, a witness repeatedly experiences good faith difficulty in recalling the information in their prior statement (due to factors such as advanced age or trauma), the Chamber would retain the power to determine the extent of the calling party's obligation to rely on 'trigger' questions, including to reduce it where appropriate, and to issue further directions in this regard. In the same vein, in certain circumstances, the Chamber could direct that additional 'trigger' questions be asked – for instance, where the information in question is highly material and contested.

64. Likewise, the Chamber would retain control over whether any purported 'inconsistency' is sufficient to warrant reliance on a prior statement, and whether further questions should be asked that might shed light on the inconsistency, so that the exact nature and contours of that inconsistency are made clear; or conversely, to eliminate the need to revert to a prior statement.

These determinations would be made on a case-by-case basis, in accordance with the Chamber's assessment and weighing of various relevant factors, including the context in which the purported inconsistency arises, and the materiality and prejudicial effect of the information.

65. More broadly, the Chamber would retain the discretion to balance the interests of expeditiousness and the smooth conduct of witness examination, and the overarching fairness of the proceedings.
66. That being said, the Defence respectfully submits that, while a case-by-case approach has its merits, the interests of flexibility should not outweigh those of ensuring that proceedings are conducted in a fair manner. In this regard, there are potential pitfalls in an overly flexible approach to the use of prior statements by a calling party, given that the relevant factors upon which this determination might lie remain ultimately subjective and variable.
67. For instance, with regard to the perceived 'suggestibility' of a witness, the Defence submits that, in the same way in which a Chamber's opinion of a witness and their credibility may evolve throughout their testimony, a witness's degree of suggestibility may only become apparent as their testimony progresses; or it may only be fully clear once their testimony is completed. In the same vein, the degree of their perceived 'suggestibility' may differ according to the fact, circumstance and/or event that is being elicited.
68. Given that undue influence of a witness's *viva voce* evidence is effectively irreversible, the Defence respectfully submits that it is in the interests of justice that the Chamber's assessment of the relevant factors nonetheless take place within an objective procedural framework. To this end, the Sought Directions would thus ensure a minimum degree of procedural protection with regard to a calling party's reliance on prior statements.

CONFIDENTIALITY

69. The Motion is filed on a confidential basis as it contains references to confidential transcripts. A public redacted version will be filed forthwith.

RELIEF SOUGHT

70. In light of the above, the Defence respectfully requests that Trial Chamber V:
ISSUE the Sought Directions, as set out in paragraph 5 of this Motion.

RESPECTFULLY SUBMITTED ON THIS 14th DAY OF NOVEMBER 2022



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands