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Date: **19 October 2023**

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

Yekatom Defence Response to the 'Prosecution's Request for Judicial Notice pursuant to Article 69(6)' (ICC-01/14-01/18-2134)

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. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby responds to the 'Prosecution's Request for Judicial Notice pursuant to Article 69(6)' ('Request').[1]

2. The Request should be denied. Article 69(6) of the Statute, which empowers a chamber to take judicial notice of 'facts of common knowledge', is not a suitable legal basis for the introduction of the transcript and audio-visual material of Mr. Maxime Mokom's unsworn statement given during the confirmation of charges hearing in his case (collectively, 'Unsworn Statement Material').

SUBMISSIONS

3. While the Prosecution, in the Request, claims that it does not seek judicial notice of the truth or falsity of the Unsworn Statement Material, this claim is belied by its submissions on the latter's purported relevance: i.e. that it is 'inherently material' given Mr. Mokom's alleged responsibility for the charged crimes committed by the Anti-Balaka in BANGUI and BOSSANGOA from at least 5 December 2013 through at least the end of April 2014, arising from his *de facto* and *de jure* role as the Anti-Balaka's Coordinator for Operations.[2] Given the manner in which the Prosecution thus intends to rely on the Unsworn Statement Material, the Request must be properly understood as an attempt to have this testimonial material introduced for the truth of its content.

4. Indeed, in the circumstances, the very suggestion that the content of the Unsworn Statement Material can be meaningfully divorced from its truth or falsity is a misconception.

[1] ICC-01/14-01/18-2134.
[2] ICC-01/14-01/18-2134, paras 2-3.

5. In his unsworn statement, Mr. Mokom spoke about the creation of the Anti-Balaka, including the purported motivation behind it, and his role therein;[3] the Seleka coup and regime, and the atrocities committed thereunder;[4] and the whereabouts and movements of Mr. Mokom during the events.[5]

6. As the Chamber is well aware, these comprise live issues, lying at the heart of the Prosecution case in these proceedings. In the Prosecution's Document Containing the Charges, Mr. Mokom is among the four named members of the so-called 'Strategic Common Plan' who are alleged to have instrumentalized the Anti-Balaka, resulting in the charged crimes.[6] In the Prosecution's Pre-Trial Brief, reference is made to Mr. Mokom over 100 times.[7] The trial record in these proceedings duly contain extensive references to Mr. Mokom, and his alleged role within the Anti-Balaka.

7. In such circumstances therefore, the distinction that the Prosecution purportedly seeks to draw – i.e. between **what Mr. Mokom said** in his unsworn statement, and **the fact that Mr. Mokom said what he said** in his unsworn statement – cannot be drawn in a meaningful manner; in any event, in a manner that could allow the Unsworn Statement Material to be introduced via article 69(6).[8]

8. This is further evidenced by the inherently contradictory positions taken in the Request: i.e. the Prosecution submission, on the one hand, that the Unsworn Statement Material is 'inherently material to these proceedings'; and on the other, its claim that the Unsworn Statement Material is 'not dispositive of the charged offences or the Accused's criminal responsibility'.[9]

[3] ICC-01/14-01/18-2134-Anx, 37:11-12; 39:9-15.
[4] Ibid., 37:15-38:1; 38:16-39:8.
[5] Ibid., 38:10-13.
[6] ICC-01/14-01/18-282-Conf-AnxB1, paras 2-4.
[7] ICC-01/14-01/18-723-Conf.
[8] Compare, *Prosecutor v Bemba et al.,* Decision on Prosecution Request for Judicial Notice, ICC-01/05-01/13-1473, 9 November 2015 ('Bemba Article 69(6) Decision'), para. 7.
[9] ICC-01/14-01/18-2134, paras 2 and 4.

9. The paucity of argument in the Request as to what 'facts' within the Unsworn Statement Material the Prosecution intends to rely on, or the specific purpose for which the Prosecution intends to rely on them, also speaks volumes as to the impossibility of meaningfully divorcing the content of the Unsworn Statement Material from its truth or falsity. In this respect, the Request illustratively contrasts with a Prosecution article 69(6) motion filed in *Bemba et al.*, requesting that judicial notice be taken of witness testimony transcripts in the *Bemba* case, and in which the Prosecution notably provided concrete submissions as to their relevance:

> The Proposed Facts provide important context for the charges, in that they establish, inter alia: (i) the existence of the Main Case; (ii) the composition of Bemba's Defence team, including Kilolo's and Mangenda's roles in it; (iii) the dates and time of witnesses' testimonies, including their order of appearance, variations and/or modifications thereof – which had a direct impact on the timing of the alleged coaching and is further relevant to the alleged alignment of witnesses' evidence by the Accused; and (iv) the contents of the witness evidence, without prejudging their truthfulness.[10]

10. The Request should therefore be seen for what it is: an attempt to introduce through the back door highly relevant testimonial material, from a central figure in the Prosecution's case theory in these proceedings.

11. The Request is thus in fact doubly prejudicial: not only does the Prosecution seek to circumvent the fair trial safeguards enshrined within the legal framework applicable to testimonial evidence; it requests that the Unsworn Statement Material be accorded not merely evidentiary status, but the status of judicially noticed facts – thereby imposing a burden on the Defence to disprove its content.

[10] *Prosecutor v Bemba et al.,* Prosecution Request for a Judicial Notice, Pursuant to Article 69(6) of the Rome Statute, ICC-01/05-01/13-1339, 5 October 2015 ('Bemba Article 69(6) Request') para. 7.

12. The Prosecution's reliance on jurisprudence from the *Bemba et al.* case is thus misplaced, in that it is materially distinguishable in at least two additional respects.[11]

13. First, the *Bemba et al.* proceedings concerned article 70 offences: specifically, offences against the administration of justice involving 14 witnesses who testified in the *Bemba* proceedings. It was in that specific context that the Prosecution successfully requested that Trial Chamber VII take judicial notice of transcripts and associated audio-visual material of the testimonies of certain *Bemba* case witnesses ('*Bemba* Material').[12]

14. Indeed, it would have been contrary to judicial economy to require the Prosecution in the *Bemba et al.* proceedings to recall the *Bemba* case witnesses, simply to have them confirm that they did indeed testify in the *Bemba* case, on specific day(s) and time(s); and that that they did indeed say what they said in their respective prior testimonies – all of which comprises information that is 'plainly evident from the ICC's official court records'.[13] In this respect, the Prosecution's recourse to article 69(6) in *Bemba et al.* was arguably in line with the purpose of that provision, as previously set out by the Appeal Chamber: i.e. 'to avoid the need to introduce evidence going to the proof of facts that are already notorious'.[14]

15. Second, the *Bemba* Material had a particular relevance to the *Bemba et al.* proceedings: one that arose specifically from the nature and subject matter of 'auxiliary' article 70 proceedings. As set out above, this relevance was concretely pled by the Prosecution in those proceedings; and subsequently, in its judgment, Trial Chamber VII held:

[11] ICC-01/14-01/18-2134, paras 2-3.
[12] See, Bemba Article 69(6) Request, paras 1, 4.
[13] See, Bemba Article 69(6) Decision, para. 7.
[14] See, *Prosecutor v Bemba et al.*, Decision on Mr Bemba's "Request for Judicial Notice", ICC-01/05-01/13-2159, 17 May 2017, para. 8

> The testimonial evidence concerning the merits of the [*Bemba*] Case has only been considered in so far as it shows that illicit pre-testimony witness coaching was in fact reflected in the testimony before [the *Bemba* Trial Chamber]. However, the truth or falsity of the testimonies concerning the merits of [the *Bemba*] Case has not been assessed by this Chamber.[15]

16. Critically, and as this extract illustrates, the specific relevance of the *Bemba* Material was independent of, and was unaffected by, the truth or falsity of its content. In other words, the content of the *Bemba* material could be meaningfully divorced from its truth or falsity and remain relevant to the *Bemba et al.* proceedings; this, as both a function of i) the inherent and specific relevance of 'main case' testimonial material to auxiliary article 70 proceedings; and ii) the fundamental difference in subject matter – i.e. the charges and their underlying factual allegations – between the *Bemba* and *Bemba et al.* proceedings.

17. The *Bemba et al.* jurisprudence should thus be understood as support for an exceptional application of article 69(6) to otherwise testimonial material, limited to i) the specific context of auxiliary article 70 proceedings,[16] and ii) only where the content of such testimonial material can meaningfully be divorced of its truth or falsity, in a manner that does not adversely affect its relevance.

18. The same cannot be said for the Request.

19. The Prosecution's interpretation of article 69(6) thus cannot be sustained. Indeed, should the Request be granted, in the event that the charges in *Mokom* are confirmed, there would be little to prevent the Prosecution from eventually introducing, in these proceedings, transcripts of *Mokom* case witness testimony – a substantial proportion of which can be expected to relate directly to matters

[15] See, *Prosecutor v Bemba et al.*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, 19 October 2016, para. 194.
[16] See e.g., *Prosecutor v Gicheru*, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(3), ICC-01/09-01/20-223, 16 November 2021, paras 31-32.

going to the heart of the Prosecution case theory in these proceedings – wholesale, en masse, and untested by Mr Yekatom, contrary to his fundamental fair trial rights.

RELIEF SOUGHT

20. In light of the above, the Defence respectfully requests that the Chamber:

DENY the Request.

RESPECTFULLY SUBMITTED ON THIS 19th DAY OF OCTOBER 2023

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