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**International
Criminal
Court**

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

Date: **29 January 2024**

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 Response to the Yekatom Defence 'Consolidated Request for Leave to
Reply to Responses to the 'Request for the Exclusion of Fabricated Evidence'
(ICC-01/14-01/18-2326-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. Trial Chamber V ("Chamber") should reject the Yekatom Defence's "Consolidated Request for Leave to Reply to Responses to the 'Request for the Exclusion of Fabricated Evidence'"¹ ("Request"). The Request is without merit and should be summarily dismissed.

2. *First*, none of the four 'discrete issues' identified in the Request require elaboration that would in any way assist the Chamber in its determination of the underlying request to exclude evidence ("Exclusion Request"). *Second*, the suggestion that the issues raised in the Prosecution's response to the Exclusion Request are new is unpersuasive. Rather, all matters argued by the Prosecution in its response to the Exclusion Request were not only well known to the Defence beforehand, but are otherwise consistent with the established case law and practice of the Court.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this document is filed as "Confidential" because it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. None of the four discrete issues is new or could not have been anticipated

i. Issue One

4. As regards the consideration of "substantial non-impugned evidence",² the Court's jurisprudence clear in that article 69(7)(a) may entail a determination of the reliability of the impugned evidence. The determination of the reliability of evidence for procedural purposes is obviously not restricted to submitted or admitted evidence,

¹ ICC-01/14-01/18-2326-Conf.

² ICC-01/14-01/18-2326-Conf, para. 3(a).

but rather extends to any and all relevant facts and circumstances placed at the disposal of the Chamber. For the Defence to argue that it could not have anticipated that the Prosecution would demonstrate why the impugned evidence — regardless of the circumstances of its acquisition — is reliable in respect of article 69(7)(a) is at best implausible, given the nature of the applicable legal test.³

ii. Issue Two

5. The Defence's statement that "excluding material under article 69(7) is not limited to the four walls of the courtroom"⁴ is just that. The provision is unambiguously and expressly a rule of admissibility before this Court - period. Moreover, the Defence's position does not elucidate or clarify any principle of law or present any nuanced interpretation potentially helpful to the Chamber's determination of the Exclusion Request. Nor, does it address any factual points raised in the Response.

6. Apart, the Defence cannot argue in good faith that the *scope* of article 69(7) is a matter it could not anticipate the Prosecution would argue. Notably, in the Prosecution's response to the Defence's request for the extension of page limits, it referenced various elements limiting the scope of article 69(7) when arguing it should be rejected because the prospective Exclusion Request was predicated on the Defence's untenable assumptions about the scope of the provision.⁵

iii. Issue Three

7. The claim that "[t]he Prosecution's narrow interpretation of the causal link voids the Trial Chamber's power"⁶ is unavailing as a justification to file a reply. The

³ See ICC-01/04-01/06-1981, paras. 45-46 ("whether '[t]he violation casts substantial doubt on the *reliability* of the evidence' (article 69 (7) (a) of the Statute") (emphasis added).

⁴ ICC-01/14-01/18-2326-Conf, para. 3(b).

⁵ See Prosecution Email Response to Request for Extension of Page Limits, dated 15 November 2023, at 09:01 (noting the untenable assumptions on which the prospective request for exclusion was predicated at points (1) – (4)).

⁶ ICC-01/14-01/18-2326-Conf, para. 3(c).

requirement of a causal link between a violation of the Statute and the procurement of evidence as a predicate to the application of article 69(7) is not new and could have been anticipated.

8. The Court's jurisprudence on the requirement of a causal link was noted in May 2021, in the *Al Hassan* case.⁷ To suggest that the issue is 'new', or that it could not have been anticipated that the Prosecution would argue this fundamental legal criterion in responding to the Exclusion Request, is not convincing. Indeed, the claim is further belied by a reference to a 'causal link' advanced in the Exclusion Request.⁸

iv. Issue Four

9. The Defence's position that "Article 69(7) does not qualify the type of material to be excluded and extends to oral and sworn statements,"⁹ is not an issue. Rather, it underscores the Defence's misconception of the scope and purpose of article 69(7), which addresses the method or manner in which evidence is *obtained* – not its nature or its content. Thus, falsehoods provided in testimony under oath in contravention of article 69 or article 70 are not necessarily "obtained by means" of a violation of the Statute. There is no automatic equivalence, and this is hardly controversial.

10. In any event, the Defence cannot reasonably suggest that the issue is one that could not be anticipated, as this too was noticed in the Prosecution's response to the Defence's request for a page extension.¹⁰

B. Reply to the CLR1's Response is unwarranted

11. A reply to the CLR1's suggestion that the Exclusion Request is effectively a subterfuge for a so-called 'no case to answer' application, is unnecessary.

⁷ ICC-01/12-01/18-1475-Red, para. 33

⁸ ICC-01/14-01/18-2240-Conf, para. 126.

⁹ ICC-01/14-01/18-2326-Conf, para. 3(d).

¹⁰ See Prosecution Email Response to the Yekatom Defence's 'Request for Extension of Page Limits', dated 15 November 2023, at 09:01 (noting the untenable assumptions on which the prospective request for exclusion was predicated at points (1) – (4)).

12. The characterisation of the Exclusion Request is firmly within the Chamber's authority and discretion to determine, irrespective of how any given Party or Participant (including its proponent) may frame it. Moreover, the position taken by the CLR1 could have been anticipated by the Defence, given that the former joined in the Prosecution's response to the request for extension of page limits, which noted in relevant part:

"[while] assailing the credibility of witnesses is entirely appropriate within the context of their trial testimony which, as noted, has already been challenged and received by the Chamber ... – doing so after the fact is appropriate only when authorised procedurally, expressly or implicitly. This may occur in the context of ... a so-called '*no case to answer*' proceeding, for instance."¹¹

C. The Request impermissibly advances substantive submissions

13. The Prosecution notes and objects to the Defence's attempt to make further submissions via the present Request without having obtained the Chamber's prior authorisation.¹² The Request should be dismissed on this basis alone, as the Chamber has noted in other circumstances.¹³

14. Finally, having filed a 50-page request, together with a further 80 pages of annexes (including 30 pages containing impermissible submissions in violation of Regulation 36(2)(b)), and having raised the same factual issues in the Exclusion

¹¹ Prosecution Email Response to Yekatom Defence's 'Request for Extension of Page Limits', dated 15 November 2023, at 09:01 (emphasis added).

¹² The Prosecution notes the Yekatom Defence's previous breach of Regulation 24(5) of the Regulations of the Court by filing a substantive Reply without *prior* authorisation to the Prosecution's and CLRV's responses to its request for an extension of page limits (*see* Yekatom Defence email to Trial Chamber V, dated 15 November 2023, at 17:09).

¹³ *See* Trial Chamber V Email to the Parties and Participants, dated 21 July 2023, at 15:28 (noting the "parties may not file submissions of a substantive nature ... without prior leave from the Chamber to reply pursuant to Regulation 24(5) of the Regulations" and that "by already making substantive submissions in its request for leave to reply ... [a Party] fail[s] to comply with Regulation 24(5) of the Regulations (*see* ICC-01/14-01/18-517, para. 13), and that the request for leave to reply ought to be dismissed on this basis").

Request as previously advanced,¹⁴ the Defence has had an ample opportunity to make its case. Thus, the reply sought is unnecessary and unjustifiable in the circumstances.

IV. CONCLUSION

15. For the reasons above, the Prosecution respectfully requests that the Request be summarily dismissed.



Karim A. A. Khan KC, Prosecutor

Dated this 29th day of January 2024

At The Hague, The Netherlands

¹⁴ *See e.g.*, ICC-01/14-01/18-2195-Conf, para. 10 (noting, the Defence having “raised on multiple occasions its attention to the existence of an alleged collusion scheme, both in oral and written submissions”).