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No. ICC-01/14-01/18

Date: 12 February 2024

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 Request for Leave to Reply to the Prosecution
Response to the Request for the Introduction of D29-5010's Prior Recorded
Testimony pursuant to Rule 68(2) of the Rules**

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 Ngäissona*, having regard to Regulations 24(5) and 34(c) of the Regulations of the Court, issues this ‘Decision on the Yekatom Defence Request for Leave to Reply to the Prosecution Response to the Request for the Introduction of D29-5010’s Prior Recorded Testimony pursuant to Rule 68(2) of the Rules’.

1. On 22 January 2024, the Yekatom Defence (the ‘Defence’) filed a request for formal submission pursuant to Rule 68(2)(a) or, alternatively, 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’) of the prior recorded testimony of D29-5010 (the ‘Request’).¹
2. On 1 February 2024, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request, opposing it in its entirety (the ‘Prosecution Response’).²
3. On 2 February 2024, the Defence requested leave to reply to the Prosecution Response, arguing that it contains two issues that ‘could not have been anticipated’ in the Request (the ‘Request for Leave to Reply’).³ The Defence seeks to reply to the following issues: (i) the Prosecution’s allegation that the Defence is withholding the disclosure of statements provided by D29-5010, arguing that it is founded on a flawed misinterpretation of D29-5010’s interview and that it is a serious allegation against the professional obligations of the Defence (the ‘First Issue’);⁴ and (ii) the Prosecution’s apparent assertion that under Rule 68(2)(a) of the Rules, for the parties to have ‘had the opportunity to examine the witness during the recording’, previous statements of a witness need to be disclosed, arguing that this position unduly limits the scope of Rule 68(2)(a) of the Rules (the ‘Second Issue’).⁵

¹ Yekatom Defence Request for the introduction of CAR-D29-P-5010’s prior recorded testimony pursuant to Rule 68(2) of the Rules, ICC-01/14-01/18-2319-Conf (with confidential Annex A).

² Prosecution’s Response to Yekatom Defence Request for the Introduction of CAR-D29-P-5010’s recorded testimony pursuant to Rule 68(2) of the Rules, ICC-01/14-01/18-2341-Conf.

³ Yekatom Defence Request for Leave to Reply to the “Prosecution’s Response to Yekatom Defence Request for the Introduction of CAR-D29-P-5010’s recorded testimony pursuant to Rule 68(2) of the Rules”, ICC-01/14-01/18-2341-Conf, ICC-01/14-01/18-2343-Conf, para. 2.

⁴ Request for Leave to Reply, ICC-01/14-01/18-2343-Conf, paras 3-7.

⁵ Request for Leave to Reply, ICC-01/14-01/18-2343-Conf, para. 8.

4. On 5 February 2024, the Prosecution responded to the Request for Leave to Reply, requesting that it be dismissed (the ‘Prosecution Response to the Request for Leave to Reply’).⁶ It submits that the two proposed issues could have been anticipated, as they arise from a discussion of the applicable law regarding the submission of evidence pursuant to Rule 68(2)(a) of the Rules and all matters argued in the Prosecution Response are consistent with the established case law and practice of the Court.⁷ It also argues, in relation to the First Issue, that the Defence’s contentions regarding arguments in the Prosecution Response perceived as impugning its professionalism do not merit a reply.⁸ In relation to the Second Issue, it submits in particular that it is based on a misreading of the Prosecution Response.⁹ The Prosecution further argues that the Request for Leave to Reply impermissibly advances substantive arguments.¹⁰
5. According to Regulation 24(5) of the Regulations, ‘a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated’.
6. Taking into account fairness to the Defence and its request to set the record straight publicly, the Single Judge considers it appropriate to allow the Defence to make submissions in relation to the First Issue. The Defence may thus file a reply by 15 February 2024.
7. Turning to the Second Issue, the Single Judge does not consider it to be a new issue that the Defence could not reasonably have anticipated. Moreover, the Single Judge finds that the Chamber will not be assisted by the Defence’s submissions on this issue, noting that it pertains to matters of legal interpretation and that it appears to be based on a misrepresentation of the Prosecution

⁶ Prosecution Response to the Yekatom Defence Request for Leave to Reply to the “Prosecution’s Response to Yekatom Defence Request for the Introduction of CAR-D29-P-5010’s recorded testimony pursuant to Rule 68(2) of the Rules”, ICC-01/14-01/18-2341-Conf (ICC-01/14-01/18-2343-Conf), ICC-01/14-01/18-2344-Conf, paras 1, 4, 16.

⁷ Prosecution Response to the Request for Leave to Reply, ICC-01/14-01/18-2344-Conf, paras 2, 4-7, 12.

⁸ Prosecution Response to the Request for Leave to Reply, ICC-01/14-01/18-2344-Conf, paras 8-9.

⁹ Prosecution Response to the Request for Leave to Reply, ICC-01/14-01/18-2344-Conf, paras 10-12.

¹⁰ Prosecution Response to the Request for Leave to Reply, ICC-01/14-01/18-2344-Conf, paras 4, 13-15.

Response.¹¹ Further, the Single Judge notes the Defence's submission that no previous statement exists in the case of D29-5010,¹² which renders the Second Issue moot.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

PARTLY GRANTS the Request for Leave to Reply with regard to the First Issue;

ORDERS the Defence to file a reply by 15 February 2024;

RECLASSIFIES the Request for Leave to Reply, ICC-01/14-01/18-2343-Conf, to public;

ORDERS the Prosecution to seek reclassification or to file a public redacted version of the Prosecution Response to the Request for Leave to Reply, ICC-01/14-01/18-2344-Conf, within one week of notification of this decision;

ORDERS the Defence and the Prosecution, respectively, to file public redacted versions of the Request, ICC-01/14-01/18-2319-Conf, and the Prosecution Response, ICC-01/14-01/18-2341-Conf, within two weeks of notification of this decision.

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



Judge Bertram Schmitt
Single Judge

Dated 12 February 2024

At The Hague, The Netherlands

¹¹ See Prosecution Response to the Request for Leave to Reply, ICC-01/14-01/18-2344-Conf, paras 10-12.

¹² See Request for Leave to Reply, ICC-01/14-01/18-2343-Conf, para. 8.