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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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Yekatom Defence Request for the Introduction of D29-5010's
Prior Recorded Testimony pursuant to Rule 68(2)(a) or, alternatively, 68(2)(b) of
the Rules**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, having regard to Articles 64(2), 67(1) and 69 of the Rome Statute, and Rules 68(1), (2)(a) and (2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Request for the Introduction of D29-5010’s Prior Recorded Testimony pursuant to Rule 68(2)(a) or, alternatively, 68(2)(b) of the Rules’.

I. Procedural history

1. The Chamber recalls the procedural history as set out in its ‘Decision on the Prosecution Request for Extension of Time to Respond to [the Yekatom Defence’s] Current and Prospective Requests under Rule 68(2)(b) and 68(3) of the Rules’.¹
2. On 14 November 2023, in response to a request from the Yekatom Defence (the ‘Defence’) explaining *inter alia* that the transcripts of D29-5010’s interview were not yet available,² the Chamber granted an extension of time for the Defence to submit a request pursuant to Rule 68 of the Rules with regard to D29-5010.³
3. On 17 November 2023, the Defence, in accordance with the time limit set by the Chamber,⁴ filed its List of Evidence,⁵ which did not include the transcripts of D29-5010’s interview.
4. On 22 January 2024, the Defence filed a request for formal submission of the prior recorded testimony of D29-5010 pursuant to Rule 68(2)(a) or, alternatively, 68(2)(b) of the Rules (the ‘Rule 68(2)(a) Request’, the ‘Rule 68(2)(b) Request’ and, jointly, the ‘Request’).⁶ The Defence further requests leave to add

¹ 30 November 2023, ICC-01/14-01/18-2229, paras 1-4.

² Email from the Defence, 14 November 2023, at 13:02.

³ Email from the Chamber, 14 November 2023, at 15:04. The Chamber notes that the Prosecution did not oppose the extension request (*see* email from the Prosecution, 14 November 2023, at 13:58).

⁴ Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence), 29 May 2023, ICC-01/14-01/18-1892, para. 21(i).

⁵ Yekatom Defence’s List of Witnesses and Evidence, ICC-01/14-01/18-2212-Conf (with confidential Annexes A, B, C and D). *See, in particular*, Annex D, ICC-01/14-01/18-2212-Conf-AnxD, which contains the List of Evidence.

⁶ 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 (public redacted version notified on 21 February 2024, ICC-01/14-01/18-2319-Red) (with confidential Annex A, ICC-01/14-01/18-2319-Conf-AnxA), paras 1-2, 11, 27.

D29-5010's prior recorded testimony to its List of Evidence (the 'List of Evidence Request').⁷

5. On 1 February 2024, the Office of the Prosecutor (the 'Prosecution') responded to the Request, opposing it in its entirety (the 'Prosecution Response').⁸
6. On 15 February 2024, after being granted leave to do so,⁹ the Defence filed a reply to the Prosecution Response.¹⁰

II. Analysis

A. List of Evidence Request

7. The Chamber recalls the applicable law for requests to add items to the list of evidence, as previously set out.¹¹
8. The Chamber notes that the transcripts of D29-5010's interview¹² were not available at the time the Defence's List of Evidence was filed.¹³ Further noting that the Defence acted swiftly to obtain the relevant material as soon as possible and that the relevant items were disclosed promptly upon receipt,¹⁴ as well as the fact that the interview was conducted by the Prosecution, in the presence of the

⁷ Request, ICC-01/14-01/18-2319-Red, paras 1, 27.

⁸ 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.

⁹ 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, 12 February 2024, ICC-01/14-01/18-2354; 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, 2 February 2024, ICC-01/14-01/18-2343. This request was opposed by the Prosecution, *see* 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), 5 February 2024, ICC-01/14-01/18-2344.

¹⁰ Yekatom Defence 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-01/14-01/18-2364.

¹¹ *See* Decision on the Prosecution Request to Add Six Email Threads to its List of Evidence, 6 May 2021, ICC-01/14-01/18-989-Red, paras 5-6; Decision on the Yekatom Defence First Request for Leave to Add an Item to its List of Evidence, 5 December 2023, ICC-01/14-01/18-2241, para. 4. *See also* the jurisprudence referenced therein.

¹² CAR-D29-0009-0583; CAR-D29-0009-0599; CAR-D29-0009-0613.

¹³ Email from the Defence, 14 November 2023, at 13:02.

¹⁴ *See* email from the Defence, 14 November 2023, at 13:02; Request, ICC-01/14-01/18-2319-Red, paras 8-9; Yekatom Defence Communication of the Disclosure of Evidence on 10 January 2024 and 17 January 2024, 18 January 2024, ICC-01/14-01/18-2308 (with confidential Annex A).

Defence, the Chamber considers that no undue prejudice arises in the circumstances and finds it appropriate to grant the List of Evidence Request.

B. Rule 68(2)(a) Request

9. Under Rule 68(2)(a) of the Rules, the Chamber may allow the introduction of the prior recorded testimony of a witness not present before the Chamber if '[b]oth the Prosecutor and the defence had the opportunity to examine the witness during the recording'.
10. In interpreting the requirements under this provision, the Chamber agrees that 'the opportunity to examine the witness must be a meaningful one, mirroring as far as possible the parties' right to question the witness during his or her testimony during the trial proceedings'.¹⁵

1. Submissions

11. The Defence submits that the prior recorded testimony of D29-5010 fulfils the requirements of Rule 68(2)(a) of the Rules. In particular, it argues that (i) it was present during the entirety of the Prosecution's interview with D29-5010 and was in a position to question the witness further should it have deemed necessary; (ii) no further questioning by the Defence is necessary, especially in light of the corroborative nature of D29-5010's evidence, and the rights of Mr Yekatom are fully preserved by the submission of this evidence; and (iii) the Prosecution was provided with a meaningful opportunity to examine D29-5010 in full.¹⁶
12. The Prosecution opposes the Rule 68(2)(a) Request.¹⁷ It submits that D29-5010's prior recorded testimony, which is the result of an interview conducted by the Prosecution pursuant to the 'Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant' (the 'Contact Protocol'),¹⁸ does not meet the requirements for introduction under Rule 68(2)(a) of the Rules. According to

¹⁵ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Submit the Prior Recorded Testimony of D-0036 and related documents pursuant to Rule 68(2)(a) of the Rules, 13 November 2019, ICC-02/04-01/15-1665, para. 8.

¹⁶ Request, ICC-01/14-01/18-2319-Red, paras 11-18.

¹⁷ Prosecution Response, ICC-01/14-01/18-2341, paras 1, 22.

¹⁸ Annex 5 to Decision on Protocols at Trial, 8 October 2020, ICC-01/14-01/18-677-Anx5.

the Prosecution, the parties did not have a meaningful opportunity to examine the witness, submitting *inter alia* that (i) the Contact Protocol does not contemplate or authorise the interview of witnesses under circumstances approaching that of a trial; (ii) the Prosecution did not have the benefit of receiving the witness's direct evidence in advance of its questioning; and (iii) the Defence had no right to intervene in the interview in the presence of D29-5010, nor to conduct any examination of the witness.¹⁹

2. *The Chamber's determination*

13. The Chamber notes that D29-5010's prior recorded testimony consists of three transcripts of an interview conducted by the Prosecution with the witness, in the presence of the Defence and an interpreter, pursuant to the Contact Protocol.²⁰ The Defence did not ask any questions to the witness or otherwise intervene in the interview.
14. The Chamber considers that the Contact Protocol does not envision the conduct of interviews in circumstances akin to the questioning of witnesses during a trial. Moreover, the Chamber notes that in the specific circumstances at hand the Prosecution did not have the opportunity to question the witness after having had access to the witness's evidence, as would otherwise be the case in the context of questioning during trial proceedings. In addition, considering the limitations to the role of the calling party in interviews pursuant to the Contact Protocol,²¹ the Defence was not in a position to ask any questions to the witness or to test the statements of the Prosecution, as it would have been possible in the courtroom.
15. Therefore, although the Prosecution and the Defence were both present during D29-5010's interview, the participants' opportunity to question the witness was not a meaningful one.

¹⁹ Prosecution Response, ICC-01/14-01/18-2341, paras 1-2, 6-15.

²⁰ Annex A to the Request, ICC-01/14-01/18-2319-Conf-AnxA, which contains CAR-D29-0009-0583, CAR-D29-0009-0599 and CAR-D29-0009-0613. *See* Request, ICC-01/14-01/18-2319-Red, paras 1, 4, 13; Prosecution Response, ICC-01/14-01/18-2341, para. 2.

²¹ *See* Contact Protocol, ICC-01/14-01/18-677-Anx5, para. 39.

16. In light of the above, the Chamber finds that D29-5010's prior recorded testimony cannot be introduced pursuant to Rule 68(2)(a) of the Rules.

C. Rule 68(2)(b) Request

17. The Chamber incorporates by reference the applicable law as previously set out regarding Rule 68(2)(b) of the Rules.²²

1. Submissions

18. The Defence submits that, alternatively, the prior recorded testimony of D29-5010 fulfils the requirements of Rule 68(2)(b) of the Rules.²³ In particular, it argues that the prior recorded testimony goes to proof on subjects other than the acts and conduct of the accused.²⁴ According to the Defence, the testimony instead relates to the background of the conflict in the Lobaye region, D29-5010's experience of what occurred on the PK9-Mbaïki axis when he travelled to Bangui, and his knowledge of other individuals who lived in Mbaïki. While the Defence acknowledges that the witness also provides evidence as to the meeting organised by Bishop Rino (D29-5015) in the Mbaïki church, where D29-5010 saw Mr Yekatom, it submits that this limited mention of the accused does not preclude the submission of D29-5010's evidence under Rule 68(2)(b) of the Rules, especially as the meeting and the 'assurances to the Muslim community' provided by Mr Yekatom during said meeting are part of the Prosecution case as pleaded and led.²⁵
19. According to the Defence, (i) the prior recorded testimony is of corroborative nature; (ii) it has sufficient indicia of reliability; and (iii) it is unnecessary for D29-5010's evidence to be further tested through an oral examination, especially as it consists entirely of the witness's interview with the Prosecution who had the

²² Corrected version of First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules, 17 April 2023, ICC-01/14-01/18-1833-Conf-Corr (original decision and public redacted version thereof notified on 6 April 2023) (public redacted version of the corrigendum notified on 18 April 2023, ICC-01/14-01/18-1833-Corr-Red), paras 16-47.

²³ Request, ICC-01/14-01/18-2319-Red, paras 19, 25.

²⁴ Request, ICC-01/14-01/18-2319-Red, para. 20.

²⁵ Request, ICC-01/14-01/18-2319-Red, paras 15, 20.

opportunity to fully test his evidence, and its introduction under Rule 68(2)(b) of the Rules would not prejudice the rights of the accused.²⁶

20. The Prosecution opposes the Rule 68(2)(b) Request.²⁷ According to the Prosecution, D29-5010's evidence does not meet the criteria of Rule 68(2)(b) of the Rules, as it goes to Mr Yekatom's acts and conduct and involves core issues that are materially in dispute and of significance for the Chamber's determination, discussing notably the accused's position and authority in the Anti-Balaka, as well as his intent and knowledge in relation to the charged crimes.²⁸

2. *The Chamber's determination*

21. Witness D29-5010 was [REDACTED] at the relevant time, [REDACTED].²⁹
22. During his interview with the Prosecution,³⁰ the witness describes, *inter alia*, the meeting organised by Bishop Rino (D29-5015) in Mbaïki on 10 January 2014, which Mr Yekatom attended with his group; the arrival of the Anti-Balaka in Mbaïki, which the witness states happened on the same day as the meeting, and the departure of the Seleka three days prior to that; the location of the Anti-Balaka bases in the town; the presence of checkpoints between Mbaïki and Bangui; the meeting '*Coeur de Lion*' held at the Mbaïki town hall, during which he said that 'they're not here to fight the Muslim community, people should not be afraid', and his death in Boda after that meeting, with the witness stating that he does not know whether he was in the same group as Mr Yekatom; the evacuation of the Muslim population from surrounding areas from Mbaïki; the reason Djido Saleh decided to stay in Mbaïki and information the witness received, via a phone call from [REDACTED], about the death of Djido Saleh and the alleged perpetrators of the killing.
23. In relation to Mr Yekatom, the witness states that he only saw him once, during the Mbaïki meeting on 10 January 2014; that he heard that, before arriving in

²⁶ Request, ICC-01/14-01/18-2319-Red, paras 21-24.

²⁷ Prosecution Response, ICC-01/14-01/18-2341, paras 1, 22.

²⁸ Prosecution Response, ICC-01/14-01/18-2341, paras 1, 3, 6, 16-21.

²⁹ CAR-D29-0009-0583, at 0588-91; *see also* at 0595-96. *See also* Request, ICC-01/14-01/18-2319-Conf, para. 15.

³⁰ CAR-D29-0009-0583, CAR-D29-0009-0599 and CAR-D29-0009-0613.

Mbaïki, Mr Yekatom came from Bangui and was based in Pissa with his group; that, at the time of the Mbaïki meeting, Mr Yekatom was the chief of the Anti-Balaka; and that Mr Yekatom said that ‘he came to protect both communities’, banned all violence against the Muslim community and ‘vowed to protect them and he did it’.³¹ As to Mr Ngaïssona, the witness only mentions that he does not know much about him.³²

24. The Chamber notes that the witness gives direct evidence on Mr Yekatom’s alleged role within the Anti-Balaka and statements during the meeting in Mbaïki. In light of this information, and noting the Prosecution’s objections in this regard,³³ the Chamber considers that D29-5010’s prior recorded testimony touches upon the acts and conduct of the accused and is thus not suitable for introduction under Rule 68(2)(b) of the Rules.
25. Accordingly, the Chamber rejects the introduction of D29-5010’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules.
26. The Chamber notes that this does not prevent the Defence from calling the witness should it deem appropriate.

³¹ CAR-D29-0009-0583, at 0587-88, 0596-97; CAR-D29-0009-0599, at 0599-0600, 0605, 0609-10.

³² CAR-D29-0009-0583, at 0584.

³³ Prosecution Response, ICC-01/14-01/18-2341, paras 16-21.

FOR THESE REASONS, THE CHAMBER HEREBY

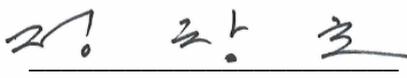
GRANTS the List of Evidence Request; and

REJECTS the Rule 68(2)(a) Request and the Rule 68(2)(b) Request.

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



Judge Péter Kovács

Judge Bertram Schmitt
Presiding Judge

Judge Chang-ho Chung

Dated 12 March 2024

At The Hague, The Netherlands