

Original: **English**No.: **ICC-01/14-01/18**Date: **2 July 2024****TRIAL CHAMBER V**

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

Public redacted version of "Prosecution's Response to "Ngaïssona Defence Request for Partial Reconsideration of the 'Decision on the Ngaïssona Defence Request to Exclude Evidence or, Alternatively, to Recall Prosecution Witness P-2657' (ICC-01/14-01/18-2521-Conf), issued on 5 June 2024", ICC-01/14-01/18-2522-Conf"

ICC-01/14-01/18-2537-Conf, 20 June 2024

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Ms Marie-Hélène Proulx
Ms Lauriane Vandeler

Legal Representatives of Victims

Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Request for Partial Reconsideration of the ‘Decision on the Ngaiissona Defence Request to Exclude Evidence or, Alternatively, to Recall Prosecution Witness P-2657 (“Request”).¹ The Chamber’s reconsideration of its decision to introduce *proprio motu* the statement of witness P-3177 into evidence pursuant to Rule 68(2)(b) of the Rules (“Introduction Decision”)² is not warranted or justified.

2. *First*, the Request fails to meet the legal threshold for reconsideration. Moreover, the Defence’s dissatisfaction with the result of its own request to introduce a part of P-3177’s statement (“Initial Request”).³ is neither tantamount to a failure of reasoning on the Chamber’s part, nor does it amount to an injustice. *Second*, the Defence’s purported inability to anticipate the Introduction Decision does not equate to unfair prejudice arising in respect of its implementation. Rather the Introduction Decision was a foreseeable outcome of the Defence’s own strategic choice.

II. CONFIDENTIALITY

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

III. SUBMISSIONS

A. Reconsideration is not justified

4. The Request fails to satisfy the well-established threshold conditions for reconsideration. Not only does it fail to show “a clear error of reasoning”, the Defence also does not substantiate that in the absence of reconsideration the implementation

¹ ICC-01/14-01/18-2522-Conf.

² ICC-01/14-01/18-2521-Conf.

³ ICC-01/05-01/08-2300-Conf (*in particular* paras. 12-14, 19-20, and 30).

of the Introduction Decision would result in an injustice.⁴ Moreover, the Request does not assert any new or previously unavailable facts or circumstances which were either unknown or not considered by the Chamber when issuing the Introduction Decision.⁵ Further, the Request identifies nothing in the Decision that was beyond the Chamber's contemplation in introducing P-3177's statement pursuant to rule 68(2)(b).

5. Aside from the speculative contention that "(t)he Chamber did not sufficiently consider the impact that introducing the Statement would have on the Defence's preparation and attempt to close its case",⁶ the Request offers no factual substantiation.

6. The claim that the Chamber issued the Introduction Decision without hearing the parties' views⁷ is misplaced. The Defence's intention to submit P-3177's statement into evidence – albeit partially – was apparent from its Initial Request. There, the Defence sought the introduction of paragraph 37 of P-3177's statement, insisting on the importance of the information contained therein.⁸

7. The Prosecution's position that the full statement may be introduced pursuant to rule 68(2)(b)⁹ – referred to in the Introduction Decision¹⁰ – responded to the Defence's erroneous claim that it was "procedurally barred from requesting the submission of the full statement of [REDACTED], as it is testimonial in nature"¹¹ and that "[s]imilarly, there is no sound procedural avenue that would allow the Defence to tender only the one paragraph in the statement that contains the New Information".¹² The Defence put the matter squarely at issue, within which the Prosecution's response

⁴ ICC-01/14-01/18-2182, para. 8.

⁵ See e.g. ICC-01/05-01/08-1691-Red, para. 17; see also ICC-01/12-01/18-734, para. 11 (noting that "[n]ew facts and arguments arising since the decision was rendered may be relevant to [assess whether reconsideration is necessary to prevent an injustice]").

⁶ ICC-01/14-01/18-2522-Conf, para. 4.

⁷ ICC-01/14-01/18-2522-Conf, paras. 5, 6.

⁸ ICC-01/05-01/08-2300-Conf, paras. 12-14, 19-20, and 30.

⁹ ICC-01/14-01/18-2325-Conf., paras. 3, 5.

¹⁰ ICC-01/14-01/18-2521-Conf, para. 22.

¹¹ ICC-01/05-01/08-2300-Conf, para. 19

¹² ICC-01/05-01/08-2300-Conf, para. 20

was entirely responsive. Thus, it cannot be plausibly argued that the resultant Introduction Decision could not have been anticipated. To the contrary, it was a foreseeable outcome of the relief sought by the Defence in its Initial Request.

8. The Introduction Decision was all the more predictable, given the precedents in this case, in which the Chamber has repeatedly stated its preference to consider the testimony “as a whole” when assessing whether a prior recorded testimony can be introduced pursuant to rule 68.¹³ Consequently, the Defence would have – if not, should have – anticipated the outcome of its Initial Request to introduce one paragraph of P-3177’s statement into evidence; especially following the Prosecution’s submission that “the paragraph cannot be severed for introduction from the rest of the statement”.¹⁴ The Defence’s failure to do so cannot justify a claim of injustice or substantiate any error of reasoning. Accordingly, the Request should fail on this basis alone.

B. The Request fails to establish any prejudice

9. Apart, the Defence likewise fails to demonstrate any prejudice resulting from the Chamber’s introduction of P-3177’s statement pursuant to rule 68(2)(b), much less such serious prejudice so as to undermine the fairness of the proceedings or otherwise amount to an injustice.

10. The Defence had various avenues available to it to mitigate a potentially adverse decision, but chose a strategy which ultimately did not pan out. That is not an issue that owes to any failing of the Chamber. Rather, as noted, the Introduction Decision arises as a consequence of the strategic options that the Defence undertook or failed to, since its Initial Request filed on 15 January 2024.

¹³ ICC-01/14-01/18-1833-Conf, para. 18; ICC-01/14-01/18-907-Red, para. 16.

¹⁴ ICC-01/05-01/08-2325-Conf, para. 5.

11. *First*, following the Prosecution's response to the Initial Request proposing introduction of paragraph 37 of P-3177's statement in isolation,¹⁵ the Defence could have sought leave to reply. Instead, the Defence did not seek such leave to oppose the potential introduction of the entire statement under rule 68(2)(b). *Second*, between the 24 January 2024 Prosecution's response and the 5 June 2024 Introduction Decision, the Defence had ample opportunity to take any of the steps suggested by the Prosecution, including compelling P-3177 to testify in this case. However, it opted against such alternative to the foreseeable introduction of P-3177's statement under rule 68(2)(b). *Finally*, given the risk of an adverse result, the Defence could have withdrawn its Initial Request. The Defence's pursuit of a failed strategy cannot reasonably warrant the Chamber's reconsideration of the Introduction Decision.

12. Moreover, the Defence's claimed prejudice based on the fact that P-3177's statement contains factual issues in dispute in this case is flawed, as none of the factual allegations identified in paragraph 8 of the Request is new. The evidence before the Chamber corroborates P-3177's accounts regarding the Anti-Balaka's use of telephones as a means of communication,¹⁶ the coordinated nature of the Anti-Balaka's attacks in and around BOSSANGO, ¹⁷ and the civilian status of the Anti-Balaka's victims in the BOSSANGO area.¹⁸ The Defence had ample opportunity to conduct an investigation with the aim to contest the evidence before the Chamber. Similarly, the fact that P-3177's statement refers to P-2658 is not new. It is unclear from the Request¹⁹ what aspect of P-3177's statement related to P-2658 could not have been anticipated and addressed during P-2658's testimony.

¹⁵ ICC-01/14-01/18-2325-Conf., para. 5.

¹⁶ CDR communications confirm the use of phones by the Anti-Balaka leadership in BOSSANGO: [REDACTED].

¹⁷ See **P-2658**: CAR-OTP-2126-0012 at 0028, 0030, para. 105, 119-122, CAR-OTP-2135-3476 at 3484, 3487, para. 105, 121; **P-2462**: T-059, p. 48, l. 15-p. 49, l. 14; **P-2453**: CAR-OTP-2111-0415 at 0420-0425, para. 27-46. See also CAR-OTP-2001-0835 at 0875, para. 1; CAR-OTP-2049-0462 at 0501; CAR-OTP-2055-1987 at 2122, 2242; CAR-OTP-2001-2769 at 2787.

¹⁸ See **P-2462**: T-059, p. 35, l. 3-8, p. 36, l. 17-p. 37, l. 8, p. 38, l. 19-24; T-60, p. 10, l. 1-6; **P-2453**: CAR-OTP-2111-0415 at 0429, para. 64-66; T-136, p. 87, l.3-p. 88, l. 15 ; **P-2049**: T-100, p. 72, l. 12-22; T-101, p. 18, l. 23-p. 19, l. 19, p. 20, l. 8-13; **P-2657**: T-103, p. 18, l. 24-p. 19, l. 11, l. 24-p. 20, l. 3.

¹⁹ ICC-01/14-01/18-2522-Conf., para. 8.

13. In any event, the contention relies on pure speculation, which patently fails to substantiate any actual and present risk of prejudice. It is unavailing, and cannot discharge the Defence's well-established burden to satisfy the threshold conditions for reconsideration.

IV. RELIEF SOUGHT

14. For the above reasons, the Request should be rejected.

A handwritten signature in black ink, appearing to be 'K.A.K.', with a horizontal line underneath it.

Karim A. A. Khan KC, Prosecutor

Dated this 2nd of July 2024
At The Hague, The Netherlands