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Pénale
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**International
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Court**

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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-ÉDOUARD NGAÏSSONA**

Public

**Response by the Common Legal Representatives of the Victims of the Other
Crimes to the Prosecution's "Request for the Submission of Evidence from the Bar
Table regarding the Prevalence of Sexual and Gender Based Violence"**

Source: Common Legal Representatives of Victims of Other Crimes

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

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I. INTRODUCTION

1. The Common Legal Representatives of the Victims of the Other Crimes (the “CLR”) support the Prosecution’s Request for the submission of evidence from the bar table regarding the prevalence of sexual and gender based violence (the “Request”).¹ The CLR agree with the Prosecution that the submission of the 140 items of evidence from the bar table (the “Bar Table Items”), in accordance with articles 64(9)(a), 69(3) and 69(4) of the Rome Statute (the “Statute”), rule 63(2) of the Rules of Procedure and Evidence (the “Rules”), and the Initial Directions on the Conduct of Proceedings (the “Initial Directions”)², comprising of the evidence relevant to the prevalence of sexual and gender based violence (the “SGBV”) in the CAR during and prior to the charged period, in particular the SGBV committed by the Anti-Balaka, are relevant and probative for the Trial Chamber’s (the “Chamber”) determination of the live issues of the present case. Indeed, said submission will ensure the expeditiousness of the proceedings while fully respecting the rights of the Accused, pursuant to articles 64(2) and 69(4) of the Statute.

2. Moreover, the CLR submit that said evidence will further assist the Chamber in assessing the nature, complexity and extent of the victimisation of the participating victims they represent. In addition, the admission of the Bar Table Items may also be valuable to the determination of the appropriate form and amount of reparations to be ultimately awarded to the victims of SGBV, should the Accused be convicted.

¹ See the “Request for the Submission of Evidence from the Bar Table regarding the Prevalence of Sexual and Gender Based Violence” [No. ICC-01/14-01/18-1233](#), 5 January 2022 (the “Request”).

² See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber V, Presiding Judge), [No. ICC-01/14-01/18-631](#), 26 August 2020 (the “Initial Directions”).

II. PROCEDURAL BACKGROUND

3. On 26 August 2020, the Presiding Judge of the Chamber issued the Initial Directions.³

4. On 4 January 2022, the Prosecution filed its Request.⁴ In response to the request made by the Defence for Mr Ngaïssona,⁵ the Chamber extended the deadline for filing responses to the Request to 11 February 2022.⁶

III. SUBMISSIONS

5. The Presiding Judge held in the Initial Directions the following:

“[...] In accordance with the established practice of other chambers, this Chamber will adopt the so-called ‘Submission Approach’. Consequently, it will not rule on the admissibility of each item of evidence during the course of the proceedings. Rather, the Chamber will assess the standard evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgment pursuant to Article 74(2) of the Statute. It may, however, not necessarily discuss these aspects in the judgment itself for every item submitted. During trial, the Chamber will accordingly only recognise the participants’ formal submission of evidence. [...] Nonetheless, [...] the Court’s legal framework contains a number of exclusionary rules, including procedural bars, obstacles and preconditions, which require the Chamber to rule on the admissibility of evidence prior to its assessment of evidence for the purposes of Article 74 of the Statute. [...] In this regard, the Presiding Judge notes, for instance, the procedural bars included in Article 69(7) of the Statute and Rule 63(3) of the Rules (evidence obtained in violation of the Statute or of

³ *Ibid.*

⁴ See the Request, *supra* note 1.

⁵ See the email sent by the Defence for Mr Ngaïssona on 10 January 2022 at 16:47.

⁶ See the email sent by the Chamber on 11 January 2022 at 14:47.

internationally recognised human rights), as well as in Rule 71 of the Rules (evidence of the prior or subsequent sexual conduct of a victims or witness). [...] Moreover, [evidence which is testimonial in nature is inadmissible] when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court's applicable law are not met. [...] [Lastly, the Chamber] retains its discretion to rule on any other admissibility related issues upfront, when appropriate, particularly if so required in order to ensure the fairness and expeditiousness of the trial".⁷

6. As for the procedure for the submission of evidence, the Presiding Judge instructed that (i) the participants may submit evidence in writing through a bar table application which shall contain a short description of the item (and/or relevant portions therein) and a short description of its asserted relevance and probative value pursuant to rule 64(1) of the Rules; and (ii) before submitting the application, the tendering participant shall inquire whether the opposing participant consents or objects.⁸ The Presiding Judge stressed that this information should be provided to *"assist the Chamber later in its holistic assessment of the evidence during the deliberation of the judgment"*.⁹

7. Moreover, in the *Ongwen* case, within the meaning of the *"Submission Approach"*, Trial Chamber IX held that it would have generally recognised the formal submission of evidence when submitted formally by the participants during trial while deferring broader considerations of the standard evidentiary criteria, and relevance and probative value, in particular, until deliberation.¹⁰ Trial Chamber IX further stressed that this general approach does not involve making any relevance, probative value or potential prejudice assessments at the point of submission of the evidence –

⁷ See the Initial Directions, *supra* note 2, paras. 52-59.

⁸ *Idem*, paras. 61-62.

⁹ *Idem*, para. 61.

¹⁰ See the "Decision on Prosecution Request to Submit Interception Related Evidence" (Trial Chamber IX), [No. ICC-02/04-01/15-615](#), 1 December 2016, paras. 4-5.

not even on a *prima facie* basis.¹¹ Therefore, only when procedural bars are raised, the chamber would have ruled upfront on certain issues related to the admissibility of evidence.¹²

8. In the Request, the Prosecution submits the following six categories of the Bar Table Items:

- a. CAR government documents (40 items): Documents originating from or involving the CAR government, including the Bozize government prior to its overthrow in March 2013;
- b. International organisations and NGO documents (45 items), including international accords, and reports published by NGOs, United Nations agencies and other international organisations;
- c. Media articles and footage (27 items), including media reports by both the CAR media and the international media;
- d. Reports (14 items), including the ones produced by local victims' collectives;
- e. Documents belonging to an Anti-Balaka figure (four items), including documents found on his hard drive; and
- f. Documents provided by Prosecution's trial witnesses (10 items).¹³

9. Having comprehensively reviewed the content of the Request, the details provided in its Annex and the relevant documents, the CLRV consider that the submission of the Bar Table Items does not raise any procedural bars enshrined in the Statute or in the Rules. Nor is there any need for the Chamber to exceptionally consider standard evidentiary criteria at this point of the submission of the evidence since no

¹¹ *Idem*, para. 7.

¹² See the "Decision on Defence Request for Leave to Appeal the Decision Recognising Interception Related Evidence as Submitted" (Trial Chamber IX), [No. ICC-02/04-01/15-641](#), 20 December 2016, para. 8.

¹³ See the Request, *supra* note 1, para. 6.

such determination is presently required in order to ensure the fairness and expeditiousness of the trial proceedings.

10. In addition, on the specific types of the Bar Table Items, the CLRV note the following. The Prosecution is seeking the submission of certain documents, including (i) evidence of the Anti-Balaka's commission of and/or participation in SGBV crimes at any time *prior to the charged acts of sexual violence*, which also goes to Mr Ngaïssona's knowledge of the Anti-Balaka's intention to commit such crimes and the awareness of the group that such crimes would occur in the ordinary course of events; (ii) evidence of a more general nature demonstrating the link between the armed conflict and the commission of SGBV crimes in the CAR, including in *prior conflicts*, which goes to the foreseeability of the Anti-Balaka's commission of and/or participation in SGBV crimes; and (iii) evidence of the Seleka's widespread perpetration of SGBV, mainly *prior to the charged period*, which shows the foreseeability that the Anti-Balaka would commit the same crimes in the ordinary course of events.¹⁴

11. The CLRV posit that the Prosecution sufficiently explains in the Request the relevance of said items, even if they re-count the events that transpired prior to the charged events. As held by Trial Chamber IX in the *Ongwen* case, the fact that evidentiary items submitted through a bar table motion may be technically falling outside the temporal scope of the case does not constitute a procedural bar preventing the recognition of said items.¹⁵ Indeed, the fact that something occurred outside the temporal scope of the attacks does not make it automatically irrelevant for the charged crimes since issues related to the temporal scope of certain items concern the relevance of the materials, which is in turn part of the Chamber's final evidentiary assessment when deliberating its judgment.¹⁶

¹⁴ See the Request, *supra* note 1, para. 9(i), (ii) and (iv).

¹⁵ See the "Decision on Prosecution's Request to Submit 1006 Items of Evidence" (Trial Chamber IX), [No. ICC-02/04-01/15-795](#), 28 March 2017, para. 7.

¹⁶ *Ibid.*

12. Furthermore, the Prosecution is submitting via bar table nine documents which were provided by trial witnesses to the investigators of the Office of the Prosecutor when giving their signed statements.¹⁷ As again held by Trial Chamber IX in the *Ongwen* case, there is no procedural bar impeding the submission of materials associated with Prosecutions' witnesses since the formal submission of materials severable from a witness's rule 68(2)(b) or 68(3) statement or in-court testimony does not prejudice the Defence.¹⁸ Indeed, the exact mechanism through which attendant materials are submitted is immaterial because the manner of submission does not lead to them being considered any differently by the Chamber in its deliberations.¹⁹ Documentary evidence introduced through an in-court witness or as materials associated with a rule 68(2)(b) or 68(3) statement remains documentary evidence since the manner of introduction does not transform it into testimonial evidence.²⁰ Thus, there exist no procedural bars that would preclude the submission of said nine documents.

13. Additionally, the Prosecution is submitting certain reports produced by local CAR victims' collectives aiming at surveying the victims of events, monitoring human rights violations and gathering data. The Prosecution argues that none of these items are testimonial in nature (eventually precluding their submission) since the victims in question were not providing information in the context of legal proceedings.²¹ Nor were they collected by law enforcement authorities but by non-governmental organisations in the course of their mandate.²²

14. The CLRV agree with the Prosecution that these reports are not testimonial in nature. In contrast, Trial Chamber IX in the *Ongwen* case, rejected the Prosecution's

¹⁷ See the Request, *supra* note 1, para. 10(6).

¹⁸ See the "Decision on Prosecution's Request to Submit 1006 Items of Evidence", *supra* note 15, para. 13.

¹⁹ *Idem*, para. 14.

²⁰ *Ibid.*

²¹ See the Request, *supra* note 1, para. 11.

²² *Ibid.*

request to submit via bar table statements from alleged victims of the crimes taken by the Ugandan police. Indeed, such statements - purportedly transcribed by law enforcement authorities during their investigation (affixing the signature or thumb prints of the victims who apparently understood that they were providing information which may be relied upon in the context of legal proceedings, namely when questioned in the capacity as a witness in the context of or in anticipation of legal proceedings) - are to be considered as prior recorded statements in accordance with the established jurisprudence of the Court.²³ As such, they were not allowed to be submitted through a bar table motion. In this specific instance, the reports produced by those local CAR victims' collectives cannot be assimilated to testimonial statements and thus can be submitted.

15. Lastly, the CLRV observe that the submission of the Bar Table Items is not prejudicial to the Defence of Mr Yekatom and Mr Ngaïssona. As held by Trial Chamber IX in the *Ongwen* case, the ultimate prejudice which the Defence may suffer depends on the nature of the material and how said material is discussed during trial. Therefore, undue prejudice determinations at the point of submission can only be done reliably for items for which it is immediately apparent that they cannot be fairly relied upon for any purpose.²⁴ Having conducted a detailed review of the Request, its Annex and the documents concerned, the CLRV posit that none of the Bar Table Items compels the conclusion at this juncture that the Chamber cannot fairly rely upon them for its determination of the case.

16. Furthermore, the CLRV contend that the Defence will not be prejudiced because: (i) the Bar Table Items have been timely disclosed by the Prosecution, thus ensuring the rights of the Accused related to notice and trial preparation;²⁵ (ii) in the

²³ See the "Decision on Prosecution's Request to Submit 1006 Items of Evidence", *supra* note 15, paras. 18-20.

²⁴ See the "Decision on Prosecution Request to Submit Interception Related Evidence", *supra* note 10, paras. 10-11.

²⁵ *Idem*, para. 25.

Request and its Annex, the Prosecution provides a comprehensive description and itemised assessment of relevance and probative value of each piece of evidence, together with the indication of their incriminatory character;²⁶(iii) the Defence of Mr Yekatom and Mr Ngaïssona have at present the opportunity to advance any objections or observations on any of the Bar Table Items which in turn the Chamber will take into account in its final assessment of the evidence;²⁷ (iv) the Defence also has the right to examine the Prosecution's witnesses in relation to the Bar Table Items or, in its turn, call witnesses and submit exculpatory evidence throughout the trial;²⁸ and (v) the submission of the Bar Table Items does not relieve the Prosecution of its burden of proof or shift that burden to the Defence since the method of submission of documentary evidence has no bearing on how the Chamber will eventually evaluate the evidence.²⁹

17. The CLRV posit that granting the Request will be in line with the Chamber's duty to ensure the expeditiousness of the proceedings pursuant to article 64(2) of the Statute. Indeed, the recognition of the Bar Table Items will obviate the need to call more witnesses to attest to the authenticity of said items and shorten the overall length of the examination of witnesses during the already lengthy trial. This course of events will also allow for the reduction of time needed for the trial to be conducted, therefore responding to the interest of victims in expeditious proceedings.

18. Finally, the submission of the Bar Table Items will further assist the Chamber in assessing the nature, complexity and extent of the victimisation suffered by the participating victims. In addition, the admission of the items may also be valuable for the determination of the appropriate form and amount of reparations to be ultimately awarded to the victims of SGBV should the Accused be convicted.

²⁶ *Idem*, para. 24.

²⁷ *Idem*, para. 11.

²⁸ *Idem*, para. 23.

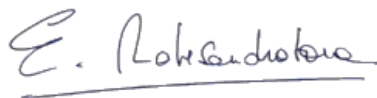
²⁹ See the "Decision on Prosecution's Request to Submit 1006 Items of Evidence", *supra* note 15, para. 49.

IV. CONCLUSION

19. For the foregoing reasons, the Common Legal Representatives of the Victims of the Other Crimes respectfully request the Chamber to grant the Request.



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Common Legal Representatives
of the Victims of Other Crimes

Dated this 11th day of February 2022

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle (France) and Saint Louis (Senegal)