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**International
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Date: **16 May 2023**

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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Public Redacted Version of “Response to the Common Legal
Representative’s Joint Request for the Formal Submission of P-0925’s
Additional Expert Report and Associated Material pursuant to Rule 68(3) of
the Rules of Procedure and Evidence, ICC-01/14-01/18-1848-Conf, 26 April
2023”, 12 May 2023, ICC-01/14-01/18-1865-Conf**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr. Yekatom (“Defence”) hereby responds to the *Common Legal Representatives’ Joint Request for the Formal Submission of P-0925’s Additional Expert Report and Associated Material pursuant to Rule 68(3) of the Rules of Procedure and Evidence* (“Joint Request”) and opposes the introduction through Rule 68(3) of the Rules of Procedure and Evidence (“Rules”) of the “Additional Report” and “Associated Material” (together “Material”) as requested by the CLRVs.¹
2. The Defence submits that the Joint Request should be rejected *in limine* as the Common Legal Representatives of Victims (“CLRVs”) have no legal basis to bring such a request.
3. Alternatively, and in any event, the Defence contends that the Additional Report does not meet the requirements for expert evidence as it contains new evidence which the CLRVs are not permitted to present; and further, that it usurps the functions of the Chamber.
4. Finally, the Material is not appropriate in its substance for submission through Rule 68(3).

PROCEDURAL HISTORY

5. On 9 July 2020, during the first status conference, the Chamber instructed the Parties to envisage appointing joint experts.²
6. On 16 July 2020, the Chamber issued its *Decision Setting the Commencement Date of the Trial* thereby ordering the Prosecution to disclose its evidence,³ and to

¹ [ICC-01/14-01/18-1848-Conf](#).

² ICC-01/14-01/18-T-012-ENG ET, line 15.

³ [ICC-01/14-01/18-589](#), para. 10.

communicate its final list of witnesses and its list of evidence (“LoE”) by 9 November 2020.⁴

7. On 26 August 2020, the Chamber issued the *Initial Directions on the Conduct of the Proceedings* (“Initial Directions”).⁵
8. On 9 November 2020, P-0925 was indicated as witness number 74 on the LoE⁶ and his expert report, *i.e.* CAR-OTP-2127-6805 (“First Report”), was disclosed.⁷
9. The same day, the Prosecution filed the *Joint Submission on Experts*⁸ notably indicating that CLRVs had indicated their agreement to jointly retain P-0925 and intended to provide him with additional instructions.⁹
10. On 19 January 2021, the Prosecution filed a request for the formal submission notably of P-0925’s expert report into evidence pursuant to Rule 68(3).¹⁰
11. On 1 February 2021, the Defence responded to the Prosecution’s Request of 19 January 2021, requesting the Chamber to “defer its decision unless and until there is a finding of guilt and a sentencing hearing, if any”¹¹ stating that

the Defence fails to see the necessity for an intervention by P-0925 during the initial presentation of evidence of the Prosecution as the content of his testimony and report will have no value in the context of determining the guilt or innocence of the accused who is presumed innocent.¹²

12. On 10 March 2021, the Chamber granted the Prosecution’s request to submit P-0925’s report and associated documents through Rule 68(3) and rejected the Defence’s request to postpone its decision.¹³

⁴ [ICC-01/14-01/18-589](#), para. 14.

⁵ ICC-01/14-01/18-631.

⁶ [ICC-01/14-01/18-724-Conf-AnxA](#), p. 39.

⁷ See Pre-Trial INCRIM package 64 09 November 2020.

⁸ [ICC-01/14-01/18-719-Conf](#).

⁹ [ICC-01/14-01/18-719-Conf](#), paras. 7-8.

¹⁰ [ICC-01/14-01/18-834-Conf](#); ICC-01/14-01/18-834-Red.

¹¹ [ICC-01/14-01/18-864-Conf](#); Public redacted version ICC-01/14-01/18-864-Red.

¹² [ICC-01/14-01/18-864-Conf](#), para. 12.

¹³ [ICC-01/14-01/18-907-Conf](#); Public redacted version [ICC-01/14-01/18-907-Red](#).

13. On 24 March 2021, the Common Legal Representatives of the Other Crimes sent a letter to witness P-0925 providing him with “Additional Instructions”.¹⁴
14. On 28 April 2021, the Common Legal Representatives of the Former Child Soldier sent a letter to witness P-0925 providing him with “Additional Instructions”.¹⁵
15. On 30 March 2023, the CLRVs received the Additional Report.¹⁶
16. On 12 April 2023, the CLRVs sent an email to the Chamber and the Parties, indicating that they had consulted with the Prosecution and had agreed to call P-0925 jointly, and that “unless otherwise ordered by the Chamber” they would disclose the Additional Report on 24 April 2023 (“Correspondence to the Chamber”).¹⁷
17. On 24 April 2023, the CLRVs disclosed the letters sent to P-0925.¹⁸
18. On 26 April 2023, the Common Legal Representatives of Victims filed the Joint Request seeking the formal submission of the Material.¹⁹

APPLICABLE LAW

19. Article 69(3) of the Rome Statute:

The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.²⁰

20. Rule 68(3) of the Rules states:

If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded

¹⁴ See CAR-V44-00000002.

¹⁵ See CAR-V45-00000002.

¹⁶ See Email sent from the CLRVs to the Chamber and the Parties on 12 April 2023 at 17.06.

¹⁷ Email sent from the CLRVs to the Chamber and the Parties on 12 April 2023 at 17.06.

¹⁸ See V44 and V45 Disclosure package 1.

¹⁹ [ICC-01/14-01/18-1848-Conf.](#)

²⁰ Article 69(3) of the Rome Statute.

testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

21. Regulation 44 of the Regulations of the Court:

1. The Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar. The Chamber has discretion to allow the introduction of expert evidence from persons who are not on the list of experts.

2. The Chamber may direct the joint instruction of an expert by the participants.

3. On receipt of the report prepared by an expert jointly instructed, a participant may apply to the Chamber for leave to instruct a further expert.

4. The Chamber may proprio motu instruct an expert.

5. The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report.

SUBMISSIONS

22. The Joint Request should be rejected *in limine* as the CLRVs have no legal basis to submit it (A). Secondly, and in any event, the Additional Report does not meet the requirements for expert evidence (B). Finally, the Material is inappropriate for submission through Rule 68(3) (C).

23. As a preliminary note, and in light of the Joint Request, the Defence reiterates its previous submissions on the pertinence for the Chamber to hear expert witness P-0925 before it issues its judgment on the charges against Mr. Yekatom.²¹

²¹ See [ICC-01/14-01/18-864-Conf](#), para. 12.

A. The Joint Request should be rejected *in limine*

24. The procedure set out in this case specifically provides for the obligations and rights of the Parties and Participants in relation to the manner by which they are to present evidence and/or introduce evidentiary material on the record. It is the Defence's position that there is no basis which allow the CLRVs to seek submission of the Material under Rule 68(3).
25. Firstly, the CLRVs were not instructed by the Chamber to jointly instruct P-0925 in accordance with Regulation 44 of the Regulations of the Court. Secondly, the CLRVs failed to seek leave to present evidence. Thirdly, the Material does not consist of Prosecution's evidence and if it did, other procedural violation would militate against the Joint Request.
 - i) *Regulation 44 of the Regulation of the Court is not applicable*
26. Regulation 44 provides for different rules regarding expert evidence, two of which are relevant with regard to the role of the CLRVs in general: (i) that a Chamber can instruct the participants to jointly instruct a designated expert,²² (ii) that upon receipt of the report of a jointly instructed expert, the participants can apply to the Chamber for leave to instruct a further expert.²³
27. P-0925 was not jointly instructed by the Defence and the Prosecution, therefore the latter procedure is not applicable to the case at hand.²⁴
28. With regard to the former procedure, it is the Defence contention that the Chamber did not instruct the CLRVs to instruct P-0925 jointly or not.

²² Regulation 44 (2).

²³ Regulation 44 (3).

²⁴ *The Prosecutor v. Bosco Ntaganda*, Decision on the request of the Legal Representatives of Victims regarding joint instruction of experts, 13 April 2015, [ICC-01/04-02/06-554](#), para. 8.

29. Firstly, unlike what is indicated by the CLRVs in the Joint Request,²⁵ during the first status conference, the Chamber directed the Parties, not the Participants, to streamline the evidence and attempt to present joint experts:

The Chamber would be particularly interested in hearing from **the parties** whether they can envisage joint experts - **joint experts, not joint instruction, joint experts** – on certain more neutral, not evidence-related topics [emphasis added].²⁶

30. The Chamber specifically indicated it was not instructing the Parties to submit joint instructions.

31. Secondly, the CLRVs correctly note in their procedural history²⁷ that the *Decision Setting the Commencement Date of the Trial* also set the deadline for the joint submission was once again referring solely to the parties:

By the same deadline, **the parties** are also expected to file their joint submissions on joint experts, **if any**, as instructed during the Status Conference.²⁸

32. These instructions by the Chamber specifically mentioned the Parties as opposed to the Participants. Additionally, the Chamber's instructions clearly provide for the possibility that the Parties would not have agreed upon a joint expert through the words "if any".

33. These decisions by the Chamber did not amount to directing the CLRVs to either jointly appoint an expert with the Prosecution or to instruct an expert witness whether with the Prosecution or amongst themselves. The CLRVs have not been instructed to instruct P-0925. This is somewhat acknowledged by the CLRVs which do not explicitly claim or reference such instruction whether in the Joint Request or in their Correspondence to the Chamber.

²⁵ [ICC-01/14-01/18-1848-Conf](#).

²⁶ ICC-01/14-01/18-T-012, p. 42, lines 15 – 17.

²⁷ [ICC-01/14-01/18-1848-Conf](#), para. 4.

²⁸ [ICC-01/14-01/18-589](#), para. 17.

ii) *The CLRVs failed to seek leave to present evidence*

34. The absence of instruction from the Chamber under Regulation 44(2) implies that the CLRVs needed to seek leave to present evidence. Having failed to do so, they do not as of today have permission to present evidence in the case.
35. The Chamber in the Initial Directions specifically provided for the order in which the evidence would be presented and under which condition the CLRVs could present evidence, if any:

Subject to Articles 64(6)(b) and 69(3) of the Statute, the trial will be organised into: (i) presentation of evidence by the Prosecution; (ii) any presentation of evidence by the CLRV, **should leave to do so be granted**, in an order to be decided by the CLRV amongst themselves; and (iii) any presentation of evidence by the Defence, in an order to be decided by the Defence teams between themselves.²⁹

36. This is common practice before this Court and article 69(3) of the Statute has been interpreted as affording the possibility to the representatives of participating victims to present evidence with leave from the Chamber.³⁰
37. Indeed, the CLRVs would have had to justify any such request seeking presentation of evidence. In the *Ongwen* case, the Single Judge noted that:

Additional evidence above and beyond what has already been elicited in the course of the Prosecution's evidence presentation will be permitted only when it is clearly justified.³¹

38. More specifically, in the *Lubanga* case, the Trial Chamber I applied this procedural requirement in the context of instructions to expert witnesses and

²⁹ [ICC-01/14-01/18-631](#), para. 16 [emphasis added].

³⁰ *The Prosecutor v. Dominic Ongwen*, [Preliminary Directions for any LRV or Defence Evidence Presentation](#), 13 October 2017, ICC-01/04-01/15-1021, para. 2 i); *The Prosecutor V. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on LRVs requests to present evidence and views and concerns](#), 9 December 2021, ICC-01/12-01/18-2063-Red; *The Prosecutor v. Germain Katanga*, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, paras 52, 83; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, [Decision on the participation of victims in the trial proceedings](#), ICC-02/05-03/09-545, para. 24.

³¹ *The Prosecutor v. Dominic Ongwen*, [Preliminary Directions for any LRV or Defence Evidence Presentation](#), 13 October 2017, ICC-01/04-01/15-1021, para. 2 i)

ruled that “ if a participant wishes to instruct an expert he or she should request the leave of the Chamber.”³²

39. It results that announcement made by the CLRVs to join the Prosecutor in his designation of an expert, and its ensuing unilateral announcement of their intent to provide separate instructions³³ does not amount to such a request, nor has it created an exemption to seek leave to instruct P-0925.
40. The CLRVs’ failure to seek leave results in the impossibility for the Defence to be heard on the appropriateness of the justification of the request, as well as on the procedural modalities which would have governed such presentation of evidence. Proceeding as they are, the CLRVs are disregarding not only the instructions of the Chamber, but also circumventing the whole framework in place which is meant to ensure fairness of the proceedings and to protect the rights of the accused.
41. Specifically, had the CLRVs duly requested and been granted leave to present evidence in this case, they would have been bound by various rules and the Chamber’s instructions. In other cases before the Court, the participants were required to provide a list of witnesses and a list of evidence before a set deadline.³⁴ Not abiding by these deadlines can result in the preclusion of the submission of certain items.³⁵
42. The breach of these procedural safeguard is prejudicial Mr. Yekatom’s right to have adequate time and facilities to prepare his defence. The Defence was not on notice that the Material was to be used with P-0925, it has had extremely limited time to familiarizes itself with the Material, has had no opportunity to

³² *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the procedures to be adopted for instructing expert witnesses](#), 10 December 2007, ICC-01/04-01/06-1069.

³³ [ICC-01/14-01/18-719-Conf](#), paras 7 and 8.

³⁴ *The Prosecutor v. Dominic Ongwen*, [Preliminary Directions for any LRV or Defence Evidence Presentation](#), 13 October 2017, ICC-01/04-01/15-1021, para. 2 i)

³⁵ See for example *The Prosecutor v. Dominic Ongwen*, [Decision on Defence Request to Deny the Use of Items from the CLRV List of Evidence](#), ICC-02/04-01/15-1241, para. 12.

ask for redaction lift off all the redactions that fall outside the Redaction Protocol clear rules, further disclosure or request for clarification prior to the filing of the Joint Request. Just as an example the Additional Report mentions 63 victim applications and the Defence has been disclosed only 60 so far.³⁶

43. It is also the Defence's view that, should they have wished to seek leave to instruct P-0925, the CLRVs should have done so prior to the deadline imposed by the Chamber to the Parties with regards to the joint submissions, i.e. 9 November 2020. The simple announcement of their intention to further instruct P-0925 did not meet this requirement.
44. Instead, the Material that the CLRVs are now attempting to tender have been made available to the Defence two years and four months after the deadline set for the submission on joint experts, and over two years into these trial proceedings; and this, without any justification for such a substantial delay.
45. In addition, it does not appear that the CLRVs tried to take any steps to try and avoid these delays. To the contrary, the CLRVs waited until March³⁷ and April³⁸ 2021 to provide P-0925 with "Additional instructions". These additional instructions did not include the transmission of any documents to P-0925. Instead, it appears from the metadata that 60 of the 63 victim application forms were transmitted by the CLRVs to P-0925 more than one year later, in June 2022, i.e. six months after the initial deadline given to P-0925 by the CLRVs to produce the Additional Report.³⁹ These documents were unavailable to the Defence until a few days prior to the CLRV Request, i.e. in April 2023, and remain redacted in part.

³⁶ CAR-V44-00000001, p. 11.

³⁷ See CAR-V44-00000002

³⁸ See CAR-V45-00000002.

³⁹ See CAR-V44-00000002, p. 003; CAR-V45-00000002, p. 002.

iii) The Material is not merely an extension of the First Report

46. The CLRVs argue that the Materials is an “extension” of P-0925’s First Report and, as such, are seeking their submission.
47. The Defence takes issue with this qualification with regard to the substance of the Material. The CLRVs chose to separately instruct the witness and provided him with a completely new set of material to inform him for the Additional Report.⁴⁰
48. In any event, the presentation of evidentiary material can be sought by the Prosecution and the CLRVs, but at different stages. If it is the position of the CLRVs that the Material is in fact part of the presentation of evidence of the Prosecution, then it follows that the Material should have been disclosed before the disclosure deadline of 9 November 2020, not in April 2023,⁴¹ and that it should be on the LoE. In addition, the Prosecution did not request their inclusion in accordance with Regulation 35.⁴²
49. Considering the absence of legal basis for the Joint Request and the multi-faceted nature of the procedural breach by the CLRVs, the Joint Request should be rejected *in limine*.

B. The report is not appropriate for submission into evidence

50. Even if the CLRVs were afforded the possibility to present evidence during the Prosecution’s presentation of evidence, the Additional Report is not suitable for submission into evidence.
51. Firstly, the Defence takes issue with the fact that the Report contains extracts of victims application forms, which themselves contain new and prejudicial

⁴⁰ See CAR-V44-00000003 to CAR-V44-000000063 and CAR-V45-00000003.

⁴¹ V45 Disclosure package 1; V44 Disclosure Package 1.

⁴² [ICC-01/14-01/18-589](#), para. 16.

information which should not be introduced onto the evidentiary record by the CLRVs.

52. Secondly, the Defence takes issue with the fact the Additional Report contains factual and legal conclusion regarding P-2475's testimony. The Additional Report goes beyond "understanding or determining an issue of a technical nature that is in dispute",⁴³ and it usurps the function of the Chamber.

i) The CLRVs should not be permitted to introduce evidence which aims to prove the elements of the crimes charged.

53. The Chamber clearly delimited the role of the CLRVs during the presentation of evidence by the Prosecution:

The CLRV's questioning is limited to matters relevant to the personal interests of the victims. This may, for instance, include questions about harms which **the witness personally suffered or harms of other victims which the witness observed**.⁴⁴

54. Additionally, in accordance with Article 66(2), the onus of proving the guilt of the Accused lies with the Prosecution.⁴⁵ It further emanates from the jurisprudence of the Court that even during their presentation of evidence "the Legal Representatives should not attempt to 'elicit evidence which aims to prove the elements of the crimes charged or [the Accused]'s role in their commission'".⁴⁶

55. Victims application forms are an independent form of evidentiary material collected for the purpose of the trial before the Court, meet a lower evidentiary threshold i.e. *prima facie*, which goes to "the requirements for participation in the proceedings have been satisfied."⁴⁷

⁴³ *The Prosecutor v. Bosco Ntaganda*, [Decision on defence preliminary challenges to prosecution's expert witnesses](#), 9 February 2016, ICC-01/04-02/06-1159, para. 7.

⁴⁴ ICC-01/14-01/18-631, para. 19 [emphasis added].

⁴⁵ *The Prosecutor v. Dominic Ongwen*, [Preliminary Directions for any LRV or Defence Evidence Presentation](#), 13 October 2017, ICC-02/04-01/15-1021, para. 2 (ii)

⁴⁶ *Le Procureur c. Dominic Ongwen*, [Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation](#), 26 avril 2018, ICC-02/04-01/15-1248, para. 13.

⁴⁷ [ICC-01/14-01/18-338](#), para. 28.

56. It is the Defence submission that, by seeking submission of a report which contains extracts of victim application forms, the CLRVs are attempting to do indirectly what they are not allowed to do directly.
57. Indeed, some of the chosen extracts go far beyond the description of harm suffered by the alleged victims, and instead consist of elements of a crime with which Mr. Yekatom is charged , and/or specifically go to the acts and conduct of Mr. Yekatom as alleged: “[REDACTED]”,⁴⁸ “[REDACTED]”⁴⁹ “[REDACTED]”⁵⁰, “[REDACTED]”⁵¹ “[REDACTED].”⁵²
58. Allowing such evidence to enter the record would not be consistent with the rights of the Mr. Yekatom, and in particular his right to have adequate time and facilities to prepare his defence as provided for in Article 67(1)(b) of the Rome Statute. Indeed, the forms were only recently disclosed to the Defence and the identity of the applicants are redacted, preventing any meaningful and timely investigations into these prejudicial allegations by the Defence.
59. Further, the Defence notes the Single Judge remark in the *Ongwen* case that “the Chamber is not provisionally inclined to hear victims present unsworn, non-evidentiary ‘views and concerns’ before its Judgment.”⁵³ This is all the more true when such presentation is made without the Defence having the opportunity to examine such views. Indeed, it is to be noted that there are example in this case of participating victims who either denied having filled a victim application form⁵⁴ or changed the account they had provided in their application.⁵⁵

⁴⁸ CAR-V44-00000001, p. 026, Victim a/15286/20.

⁴⁹ CAR-V44-00000001, p. 026, Victim a/15318/20.

⁵⁰ CAR-V44-00000001, p. 028, Victim a/15305/20.

⁵¹ CAR-V44-00000001, p. 029, Victim a/15413/20.

⁵² CAR-V44-00000001, p. 056, Victim a/15434/20.

⁵³ *The Prosecutor v. Dominic Ongwen*, [Preliminary Directions for any LRV or Defence Evidence Presentation](#), 13 October 2017, ICC-01/04-01/15-1021, para. 2 i)

⁵⁴ See P-2620: CAR-OTP-2123-0057-R03, para. 73.

⁵⁵ See P-2583: CAR-OTP-2123-0003-R02, paras 190, 192, 193.

60. In this context, the Joint Request amounts to an attempt by the CLRVs to bring new⁵⁶ and prejudicial evidence onto the trial record, and as such should be rejected.

ii) Conclusions on P-2475's testimony usurp the function of the Chamber

61. While the Defence concedes that it could have been appropriate under specific circumstances for an expert report to contain extracts of transcripts of the case,⁵⁷ the Additional Report usurped the function of the Chamber by emitting legal and factual conclusions using witness testimony. However, it is the jurisprudence of the Court that "the content of the proposed expert report or testimony must not usurp the functions of the Chamber as the ultimate arbiter of fact and law."⁵⁸

62. Yet, the Report contains the expert's factual and legal conclusions on P-2475's live testimony, qualifying P-2475 multiple times as a child soldier, e.g. "[REDACTED]"⁵⁹ or "[REDACTED]",⁶⁰ "[REDACTED]", "[REDACTED]".⁶¹ Some conclusions are prejudicial as they consist of alleged underlying facts or elements of crimes charged against Mr. Yekatom, e.g. "[REDACTED]",⁶² "[REDACTED]"⁶³ "[REDACTED]".⁶⁴

⁵⁶ See *The Prosecutor v. Dominic Ongwen*: ICC-02/04-01/15-T-175-Red-ENG WT, p. 11, lines 14 to 21.

⁵⁷ See for example *The Prosecutor v. Bosco Ntaganda*, [Decision on defence preliminary challenges to prosecution's expert witnesses](#), 9 February 2016, ICC-01/04-02/06-1159, para. 30.

⁵⁸ *The Prosecutor v. Bosco Ntaganda*, [Decision on defence preliminary challenges to prosecution's expert witnesses](#), 9 February 2016, ICC-01/04-02/06-1159, para. 8; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the Sang Defence Application to Exclude Expert Report of Mr. Herve Maupeu](#), 7 August 2013, ICC-01/09-01/11-844, para.13.

⁵⁹ CAR-V44-0000001, p. 035.

⁶⁰ CAR-V44-0000001, p. 062.

⁶¹ CAR-V44-0000001, p. 035.

⁶² CAR-V44-0000001, p. 036.

⁶³ CAR-V44-0000001, p. 007.

⁶⁴ CAR-V44-0000001, p. 007.

63. These factual conclusions assume the credibility of the witness,⁶⁵ which is inadequate and is one of the reason for which an expert cannot substitute his opinion to the one of Chamber.
64. In addition, the introduction of the Additional Report into evidence would transform P-2475's allegations into assertions which the Defence could only examine if it undertook the lengthy process of confronting the expert with evidence contradicting on P-2475's testimony on his status as a child soldier, which would be unjustifiably contrary to the expeditiousness of the proceedings.

C. The Material is not appropriate for submission through Rule 68(3)

65. In the Joint Request, the CLRVs submit that P-0925 is a qualified expert, that the Material meets the standards of relevance, reliability and probative value and that other factors militate in favour of the introduction of the Material pursuant to Rule 68(3).⁶⁶
66. The prejudice which would arise from the admission into evidence of the Additional Report greatly outweighs its relevance or probative value, and that a number factors militate against its submission pursuant to Rule 68(3).

i) The Additional Report does not meet the admissibility criteria

67. In the *Ruto* case, Trial Chamber V(A) ruled the following:

When admitting expert reports into evidence, the same admissibility criteria as for any other kind of evidence must be satisfied. In this connection, this Chamber will examine the admissibility of evidence by assessing its relevance, determining its probative value and weighing this probative value against its potentially prejudicial effect.⁶⁷

⁶⁵ See *The Prosecutor v. Bosco Ntaganda*, [Decision on defence preliminary challenges to prosecution's expert witnesses](#), 9 February 2016, ICC-01/04-02/06-1159, para. 31.

⁶⁶ [ICC-01/14-01/18-1848-Conf.](#)

⁶⁷ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the Sang Defence Application to Exclude Expert Report of Mr. Herve Maupeu](#), 7 August 2013, ICC-01/09-01/11-844, para. 14.

68. Firstly, expert P-0925 is meant to testify on trauma. In this context, the relevance of his testimony is limited to an area which is not meant to assist the Chamber in the determination of the guilt or innocence of the accused. In the *Ongwen* case, this same expert testified during the presentation of evidence by the LRVs and Trial Chamber IX stated in the Trial Judgment that

The Chamber notes his evidence, but also observes that it does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established.⁶⁸

69. Furthermore, the Chamber already granted the Prosecution's request for submission through Rule 68(3) of P-0925's First Report with the stated relevance to "assess the extent of harm and damage caused to victims of these crimes [child soldiering, forcible displacement, rape, and sexual violence]".⁶⁹ The CLRVs' role in these proceedings require the CLRVs to justify how the evidence they intend to present is different from what has been elicited by the Prosecution.⁷⁰ Yet, the CLRVs failed to explain the relevance which specifically relates to the Additional Report as opposed to P-0925 expected testimony and First Report.⁷¹

70. The need to justify the relevance of the Additional Report is exacerbated by the prejudice it creates notably due to the inclusion within it of extract of victims application forms which contrary to what the Additional Report purports,⁷² do not consist of "verbatim accounts of victims".⁷³

71. Secondly, with regard to the probative value of the Report, the CLRVs and P-0925 failed to provide the method of selection of the 63 victim applications used for the purpose of the report. The Additional Report even contains an odd

⁶⁸ *The Prosecutor v. Dominic Ongwen*, [Trial Judgment](#), 4 February 2021, ICC-02/04-01/15-1762-Red, para. 600.

⁶⁹ [ICC-01/14-01/18-907-Conf](#).

⁷⁰ *The Prosecutor v. Dominic Ongwen*, [Preliminary Directions for any LRV or Defence Evidence Presentation](#), 13 October 2017, ICC-01/04-01/15-1021, para. 2 i)

⁷¹ See [ICC-01/14-01/18-1848-Conf](#), para. 20.

⁷² CAR-V44-00000001, p. 8.

⁷³ See footnote 54 and 55 above.

reference stating that “*we collected statements [...] from 63 applications forms for participation.*”⁷⁴ Considering that the Defence does not have in its possession any other victim applications other than a handful of the dual status victims and could not oppose the recounting of other participating victims, this lack of transparency is highly affecting the probative value of the Additional Report.

72. In addition, the names on the 63 victims applications are redacted and not available to the Defence. So long as this information remains confidential and the Defence is prevented from investigating the victims’ applications due to redactions and/or late disclosure, the probative value of a report based on and containing excerpts of these applications is outweighed by its prejudicial effect.⁷⁵ Any meaningful investigations start with the identity of the individual, without which the Defence cannot verify any claims whatsoever made by that individual. In this case, the identify which is also the source of the expert, is redacted on each and every application.
73. Also, one of the criteria an expert has to comply with is that “at all times, the expert is obliged to testify with utmost neutrality and objectivity.”⁷⁶ The Defence contends that the pre-selection of the victims application forms by the CLRVs affect P-0925’s ability to testify with neutrality and objectivity.⁷⁷ Further, his use of P-2475’s testimony to contextualise his report⁷⁸ and provide factual conclusion unrelated to his expertise are also indicative in relation to the required neutrality and objectivity.

⁷⁴ CAR-OTP-V44-00000001, p. 011 [emphasis added].

⁷⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the confirmation of charges](#), 30 September 2008, ICC-01/04-01/07-717, para. 141.

⁷⁶ *The Prosecutor v. Bosco Ntaganda Situation*, [Decision on defence preliminary challenges to prosecution’s expert witnesses](#), 9 February 2016, ICC-01/04-02/06-1159, para. 9.

⁷⁷ See CAR-V44-00000063-001.

⁷⁸ See CAR-V44-00000001, p. 7 and 37.

74. Finally, the specific extracts used in the Report are extremely prejudicial to Mr. Yekatom. They consist of extracts of victims application forms which, if accepted for the truth of their content, would constitute evidence of elements of crimes charged against Mr. Yekatom.⁷⁹ Meanwhile, and as previously mentioned, the Material and the underlying victim application forms have been disclosed only very recently to the Defence. Due to the redactions they contain and the fact that P-0925 has no first-hand knowledge of their content, there will be no real opportunity for the Defence to examine P-0925 on those excerpts.
75. When balancing those criteria it is clear that the submission of the Additional Report pursuant to Rule 68(3) would unduly prejudice Mr Yekatom's rights to a fair trial.

ii) Other factors militate against the introduction of the Additional Report

76. In conducting its analysis under Rule 68 (3), the Chamber may take into account a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.⁸⁰
77. The portions of the Additional Report which pertain to the conclusion of the expert in relations to P-2475's testimony,⁸¹ and the ones which contain excerpts of witness application forms⁸² concern issues materially in dispute, concerning core issues of the case, and directly referring to the acts and conducts of Mr. Yekatom. Yet, and as mentioned above,⁸³ the Defence would be extremely limited in examining the witness on these very portions.

⁷⁹ See para. 58 above.

⁸⁰ *Prosecutor v. Bemba Gombo*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"](#), 3 May 2011, ICC-01/05-01/08-1386, para 78.

⁸¹ See para. 62 above.

⁸² See para. 57 above.

⁸³ See paras. 59, 64, 72 and 74 above.

78. Indeed, in the present circumstances the possibility by the Defence to examine P-0925 do not alleviate in anyway the prejudicial nature of the Additional Report's content which goes to core issues of the case materially in dispute. The extracts of victims application forms integrated in the Additional Report, as mentioned above in paragraph 55, are in effect testimonial evidence of crimes allegedly committed by Mr. Yekatom. As P-0925 is not the primary source of those testimonies, the Defence is deprived of its possibility to confront the witness on their credibility.
79. Finally, the CLRVs argue that the submission of the Material would allow for the expeditiousness of the proceedings, yet fail to provide the time estimations.⁸⁴ This factor alone simply cannot prevail over each and every other considerations.
80. The Defence recalls that Rule 68 is an exception to the principle of orality consecrated by Article 69(2) of the statute; due to this exceptional nature Rule 68(1) provides that the Chamber must ensure that this submission is not be prejudicial to or inconsistent with the rights of the accused. The Defence submits that the absence of any meaningful examination of P-0925 on those issues by the Defence constitute an infringement to Mr. Yekatom's trial rights, and as such warrants the rejection of the CLRV's request.

CONFIDENTIALITY

81. The present request is filed on a confidential basis due to the classification of the submission it responds to. A public redacted version of the document will be filed in due time.

⁸⁴ [ICC-01/14-01/18-1848-Conf](#), para. 25.

RELIEF SOUGHT

82. In light of the above, the Defence respectfully requests Trial Chamber V to:

REJECT the Joint Request.

RESPECTFULLY SUBMITTED ON THIS 16th DAY OF MAY 2023

A handwritten signature in blue ink, appearing to read 'Mylène Dimitri'.

Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands