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**No. ICC-01/14-01/18
Date: 1 November 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Ninth Prosecution Submission Request from the Bar Table and
Request for Reconsideration of the Email Decision on CAR-OTP-2053-0576**

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 Ngaïssona*, having regard to Articles 64(2) and (9), 69 and 74(2) of the Rome Statute (the ‘Statute’) and Rules 63 and 64 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Ninth Prosecution Submission Request from the Bar Table and Request for Reconsideration of the Email Decision on CAR-OTP-2053-0576’.

I. Procedural history

1. On 1 June 2023, the Chamber rejected the submission of item CAR-OTP-2053-0576, finding it to be testimonial in nature.¹
2. On 27 June 2023, the Office of the Prosecutor (the ‘Prosecution’) (i) sought formal submission of 66 items, including documents originating from the United Nations and media articles (the ‘Items’ and the ‘Request for Submission’, respectively); and (ii) requested the Chamber to reconsider its decision on the submission of item CAR-OTP-2053-0576 ‘as necessary to prevent an injustice’ (the ‘Request for Reconsideration’; together, the ‘Request’).²
3. On 14 July 2023,³ the Yekatom Defence opposed the submission of some of the Items as well as the Request for Reconsideration, and provided its position on each of the Items (the ‘Yekatom Defence Response’).⁴

¹ See Decision on Submitted Materials for P-1813, email from the Chamber, 1 June 2023, at 10:28.

² Prosecution’s Ninth Application for the Submission of Evidence from the Bar Table and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576, ICC-01/14-01/18-1947-Conf (with one confidential annex, ICC-01/14-01/18-1947-Conf-Anx).

³ The Single Judge granted an extension of time to respond until 14 July 2023 for the Yekatom Defence, and until 18 August 2023 for the Ngaïssona Defence. See Decision on the Defence Requests for Extension of Time to Respond to Bar Table Applications, 4 July 2023, ICC-01/14-01/18-1960.

⁴ Response to “Prosecution’s Ninth Application for the Submission of Evidence from the Bar Table and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576”, ICC-01/14-01/18-1978-Conf) (with confidential Annexes A-C, ICC-01/14-01/18-1978-Conf-AnxA, ICC-01/14-01/18-1978-Conf-AnxB, ICC-01/14-01/18-1978-Conf-AnxC).

4. On 18 August 2023, the Ngaïssona Defence responded, opposing the submission of a number of the Items, opposing the Request for Reconsideration, and providing its position on each of the Items (the ‘Ngaïssona Defence Response’).⁵

II. Analysis

A. The Request for Reconsideration

5. The Chamber will first consider the Request for Reconsideration as its determination will also affect its consideration of the Request for Submission of a number of the Items.
6. The Prosecution argues that ‘absent reconsideration, the resultant exclusion of the document from evidence will unjustly impact the proceedings’.⁶ The Prosecution submits that item CAR-OTP-2053-0576 is not testimonial.⁷ It further argues that due to the contents of the item having been discussed and used during the examination of a witness, ‘its exclusion would adversely and unnecessarily affect the Chamber’s truth-finding function’.⁸
7. The Yekatom Defence, in turn, argues that the Prosecution does not substantiate how the Chamber’s truth-finding function is adversely affected and has failed to show a clear error of reasoning.⁹ The Ngaïssona Defence joins these arguments,¹⁰ and adds that the Prosecution could have requested leave to appeal the decision on item CAR-OTP-2053-0576 when it was rendered.¹¹

⁵ Defence Response to the “Prosecution’s Ninth Application for Submission of Evidence from the Bar Table and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576” ICC-01/14-01/18-1947-Conf, ICC-01/14-01/18-2036-Conf (with confidential Annex 1, ICC-01/14-01/18-2036-Conf-Anx1).

⁶ Request, ICC-01/14-01/18-1947-Conf, para. 52.

⁷ Request, ICC-01/14-01/18-1947-Conf, paras 11-45.

⁸ Request, ICC-01/14-01/18-1947-Conf, para. 53.

⁹ Yekatom Defence Response, ICC-01/14-01/18-1978-Conf, paras 69-70.

¹⁰ Ngaïssona Defence Response, ICC-01/14-01/18-2036-Conf, para. 47.

¹¹ Ngaïssona Defence Response, ICC-01/14-01/18-2036-Conf, para. 49.

8. At the outset, the Chamber recalls that reconsideration of a decision is exceptional and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.¹²
9. In the view of the Chamber, the submissions of the Prosecution on an assumed ‘statutory bias’ to receive evidence and that admission or submission under Article 69 of the Statute may only be appropriately curtailed when evidence ‘*definitively* falls into a limiting category’,¹³ exhibit no more than an obvious disagreement of the Prosecution with the Chamber’s assessment of the nature of item CAR-OTP-2053-0576.
10. The Chamber is equally not convinced by the argument that the items concerned, including item CAR-OTP-2053-0576, do not ‘unequivocally qualify as prior recorded testimony’ and that therefore their submission would be governed by Article 69 of the Statute instead of the *lex specialis* of Rule 68 of the Rules.¹⁴ The Chamber has clearly outlined the reasons for which it considered item CAR-OTP-2053-0576 to be testimonial in nature, leading it to exclude its submission other than through the procedural avenue of Rule 68 of the Rules. Further, whether or not this item was discussed with a witness in court does not change the character of this item and, for this reason, has no bearing on the Chamber’s decision to exclude it. Similarly, the Chamber is not persuaded that its truth-seeking obligation in this instance would justify recognising this item as formally submitted. Furthermore, the assessment of the Chamber as referenced in the Request in relation to another item is inapposite, as it concerned an item of an obviously different nature.¹⁵ Considering that, on the basis of the above, the Prosecution does not outline how reconsideration of the Chamber’s decision would be ‘necessary to prevent an injustice’, nor demonstrate that the Chamber committed a clear error of reasoning, the Request for Reconsideration is rejected.

¹² Decision on the Ngaïssona Defence Request for Reconsideration of the Further Directions on the Conduct of the Proceedings, 29 August 2023, ICC-01/14-01/18-2068, para. 4 *with further references*.

¹³ See Request, ICC-01/14-01/18-1947-Conf, para. 12.

¹⁴ Request, ICC-01/14-01/18-1947-Conf, paras 13-16.

¹⁵ See Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), 12 April 2022, ICC-01/14-01/18-1359 (the ‘Decision on the First Prosecution Submission Request’), paras 18-19.

11. The question of whether specific items may be ‘testimonial in nature’, thereby precluding their introduction ‘from the bar table’, will be considered in the following section.

B. The Request for Submission

12. The Chamber recalls the applicable law for submission of evidence from the bar table.¹⁶ Accordingly, the Chamber notes the participants’ arguments on the relevance and probative value of the Items, including potential prejudice to the accused, and defers their consideration under its deliberation pursuant to Article 74(2) of the Statute. At this stage, the Chamber will only consider whether the Items are subject to any statutory exclusionary rules, including procedural bars, obstacles, and preconditions.¹⁷
13. Further, the Chamber notes that item CAR-OTP-2001-0256 has already been recognised as formally submitted.¹⁸ The Chamber therefore need not rule on it again.

1. Items which may be ‘testimonial in nature’

14. The Chamber will first assess the nature of a number of items regarding which there is dispute as to whether they are to be considered ‘testimonial’.
15. The Yekatom Defence requests the Chamber to reject submission of 14 items on the same basis as item CAR-OTP-2053-0576,¹⁹ namely their being testimonial in nature,²⁰ and another two items which comprise documents compiling testimonial evidence.²¹

¹⁶ Decision on the First Prosecution Submission Request, ICC-01/14-01/18-1359, paras 10-12 *referring to* Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, paras 53-54, 62.

¹⁷ Decision on the Fourth Prosecution Submission Request from the Bar Table (Recruitment and Use of Children), 24 May 2022, ICC-01/14-01/18-1428, para. 5.

¹⁸ Decision on Submitted Materials for P-2625, email from the Chamber, 27 June 2023, at 11:42.

¹⁹ See Yekatom Defence Response, ICC-01/14-01/18-1978-Conf, para. 2.

²⁰ CAR-OTP-2045-0287; CAR-OTP-2045-0452; CAR-OTP-2045-0525; CAR-OTP-2045-0536; CAR-OTP-2045-0559; CAR-OTP-2045-0561; CAR-OTP-2045-0563; CAR-OTP-2045-0569; CAR-OTP-2045-0581; CAR-OTP-2048-0109; CAR-OTP-2048-0129; CAR-OTP-2053-0567; CAR-OTP-2053-0645; CAR-OTP-2101-0340.

²¹ CAR-OTP-2088-1198; CAR-OTP-2088-1230.

16. In this regard, the Chamber notes that a number of the items at issue are clearly of the same nature as item CAR-OTP-2053-0576, in that (i) they concern individuals interviewed by the UN High Commissioner for Human Rights International Commission of Inquiry for the Central African Republic; (ii) the notes are heavily based on factual descriptions provided by these individuals; and (iii) the individuals explicitly gave informed consent that the information provided may be shared with international and regional courts, including the Court.²² In this light, and bearing in mind its rejection of the Request for Reconsideration, the Chamber is of the view that these items are equally ‘testimonial in nature’, and therefore cannot be introduced via a bar table application. Thus, the Chamber rejects the submission of these items.²³
17. Similarly, the Chamber notes that some of the Items clearly originate from the same process as those discussed in the preceding paragraph, even though they do not specifically mention the Court as regards the informed consent to sharing the information provided. However, the Chamber considers that this is not sufficient to turn such documents from being testimonial in nature to not so. The documents were clearly compiled for the purposes of recording the factual descriptions provided by the interviewed individuals, for the investigation commission mentioned above. Finding that these items are also ‘testimonial in nature’, the Chamber rejects their submission.²⁴
18. Further in this context, the Chamber notes that the Yekatom Defence objects to the submission of item CAR-OTP-2045-0452 on the basis of it being testimonial in nature,²⁵ while the Ngaïssona Defence argues that it is ‘usurping the Chamber’s fact-finding function’.²⁶ The Prosecution submits in this regard that the concept of ‘usurpation’ arises in relation to expert evidence, that the item is not expert evidence and that, in any event, its submission cannot reasonably be characterised

²² See also Decision on Submitted Materials for P-1813, email from the Chamber, 1 June 2023, at 10:28.

²³ CAR-OTP-2045-0287; CAR-OTP-2045-0525; CAR-OTP-2045-0559; CAR-OTP-2045-0563; CAR-OTP-2045-0569; CAR-OTP-2045-0581; CAR-OTP-2048-0129; CAR-OTP-2053-0567; CAR-OTP-2101-0340.

²⁴ CAR-OTP-2045-0536; CAR-OTP-2045-0561; CAR-OTP-2048-0109; CAR-OTP-2053-0645.

²⁵ Yekatom Defence Response, ICC-01/14-01/18-1978-Conf, para. 2, n. 4.

²⁶ Ngaïssona Defence Response, ICC-01/14-01/18-2036-Conf, paras 12-17.

as usurping the Chamber's fact-finding function based on the totality of the evidence submitted.²⁷

19. As regards the Yekatom Defence's argument, the Chamber is of the view that this item can be distinguished from items similar to item CAR-OTP-2053-0576 in that it does not contain notes of specific interviews with individuals but appears to result from the review of various sources of information. The Chamber thus considers that this document is not 'testimonial in nature'. As regards the Ngaïssona Defence's argument, the Chamber notes that while the document contains what appears to be an analysis and assessment of certain material, this does not mean that the Chamber, composed of professional and independent Judges, will rely on the assessment given at face value. Not having identified any other procedural bar, the Chamber therefore recognises it as formally submitted.
20. In addition, there are other items which, according to the Prosecution, originate from the UN High Commissioner for Human Rights and contain 'interview notes'.²⁸ According to the JEM code, they appear to have been provided by the UN Office of Legal Affairs. Having reviewed these items, and in contrast to the interview notes of the investigation commission discussed above, the Chamber is of the view that the items do not specify the circumstances or context in which the individuals concerned provided their accounts, nor the purpose or mandate of the UN High Commissioner when compiling these accounts.²⁹ Accordingly, the Chamber considers that the items are not 'testimonial in nature' and therefore recognises them as formally submitted.
21. Finally, the Ngaïssona Defence objects to the submission of item CAR-OTP-2053-0546, arguing that it is testimonial in nature.³⁰ The document indicates a 'source', yet the item itself merely outlines the supposed 'official' and 'unofficial' structure of Anti-Balaka in a certain region, as well as a remark about the non-existing structure of Seleka in that area. On this basis, the Chamber considers

²⁷ Request, ICC-01/14-01/18-1947-Conf, para. 10.

²⁸ See Annex to the Request, ICC-01/14-01/18-1947-Conf-Anx, pp. 12-14 in relation to CAR-OTP-2088-1198; CAR-OTP-2088-1230; CAR-OTP-2088-1375; CAR-OTP-2088-1423; CAR-OTP-2088-1437; CAR-OTP-2088-1473; CAR-OTP-2088-1485; CAR-OTP-2088-1493.

²⁹ See Decision on Submitted Materials for P-2049, email from the Chamber, 23 August 2022, at 08:32.

³⁰ See Annex 1 to the Ngaïssona Defence Response, ICC-01/14-01/18-2036-Conf-Anx1, pp. 19-20.

that there is not sufficient information to conclude that it is testimonial in nature. It therefore recognises its formal submission.

2. *Other items*

22. The Chamber notes that both Defence teams oppose the submission of a number of the Items on the basis of their being insufficiently probative, insufficient reliability and/or their probative value being outweighed by a potential prejudicial effect.³¹ As recalled above, the Chamber will take these arguments into account in the context of its deliberations pursuant to Article 74(2) of the Statute. Not having identified any procedural bars to these items' submission, the Chamber therefore recognises them as formally submitted.
23. Further, the Ngaïssona Defence opposes the submission of some items, arguing that they are 'usurping the Chamber's fact-finding function'.³² The Yekatom Defence also objects to one of these items on the basis of it being insufficiently probative and any probative value being outweighed by its prejudicial effect.³³ As outlined above, the Chamber is of the view that the mere fact of documents containing an analysis and assessment of information, and potentially even the author's views on the legal characterisation of certain facts cannot be considered as 'usurping' the Chamber's functions. In the view of the Chamber, this matter rather relates to the question of the probative value, if any, the Chamber may give those items once it considers such matters. Having identified no other procedural bar to the submission of these items, the Chamber therefore recognises them as formally submitted.
24. As regards the Ngaïssona Defence's observation that item CAR-OTP-2092-3257 has already been recognised as submitted in a different form, namely in item

³¹ See Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1978-Conf-AnxA, pp. 3-6, 8-9, 11, 25-26, 29, and Annex 1 to the Ngaïssona Defence Response, ICC-01/14-01/18-2036-Conf-Anx1, pp. 4, 6, 9-10, 19, 21, 32-33, 36 in relation to CAR-OTP-2001-0310; CAR-OTP-2001-0363; CAR-OTP-2001-0409; CAR-OTP-2001-0446; CAR-OTP-2001-1075; CAR-OTP-2020-0019; CAR-OTP-2053-0538; CAR-OTP-2077-0486; CAR-OTP-2110-0899; CAR-OTP-2110-0911; CAR-OTP-2110-0941; CAR-OTP-2020-0228.

³² See Annex 1 to the Ngaïssona Defence Response, ICC-01/14-01/18-2036-Conf-Anx1, pp. 11-12, 23, 33 in relation to CAR-OTP-2045-0300; CAR-OTP-2088-1179; CAR-OTP-2110-0963.

³³ See Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1978-Conf-AnxA, pp. 30-31 in relation to CAR-OTP-2088-1179.

CAR-OTP-2023-0032, at 0171, the Chamber considers that the former appears to be an extract of the latter. Not having identified any procedural bars to the submission of item CAR-OTP-2092-3257, the Chamber recognises it as formally submitted.

25. Finally, the Ngaïssona Defence objects to the submission of items CAR-OTP-2051-0479 and CAR-OTP-2084-0305, arguing that they are outside the temporal scope of the charges.³⁴ The Yekatom objects to the latter for the same reason, and to the former submitting that it lacks probative value.³⁵
26. As regards item CAR-OTP-2051-0479, the Chamber notes that it concerns a reporting period of July to October 2016 and events that took place in 2016. Item CAR-OTP-2084-0305 covers a reporting period between April and July 2015 and, while also mentioning the Bangui Forum which has repeatedly been mentioned in the evidence before the Chamber, events from 2015. The Chamber recalls in this regard that even though facts falling outside the temporal scope of the charges may be relied upon to prove facts and circumstances described in the charges,³⁶ both items concern events that took place in 2015 and 2016, respectively, and do not form part of the factual allegations in the present case. Therefore, the Chamber is not convinced that the items are *prima facie* relevant to the issues at trial and accordingly rejects their submission.³⁷
27. Having reviewed the remainder of the Items, there appear to be no procedural bars to their submission. The Chamber therefore recognises them as formally submitted.

³⁴ Annex 1 to the Ngaïssona Defence Response, ICC-01/14-01/18-2036-Conf-Anx1, pp. 17-18, 22.

³⁵ Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1978-Conf-AnxA, pp. 23-24, 29-30.

³⁶ See Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial, 29 October 2020, ICC-01/14-01/18-703-Conf (public redacted version dated 30 October 2020, notified on 2 November 2020, ICC-01/14-01/18-703-Red), para. 51.

³⁷ See also Decision on the Eighth Prosecution Submission Request from the Bar Table (Audio-Visual Material), 12 September 2023, ICC-01/14-01/18-2092-Conf (public redacted version notified the same day, ICC-01/14-01/18-2092-Red), para. 18.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request for Reconsideration;

REJECTS the submission of items CAR-OTP-2045-0287; CAR-OTP-2045-0525; CAR-OTP-2045-0536; CAR-OTP-2045-0559; CAR-OTP-2045-0561; CAR-OTP-2045-0563; CAR-OTP-2045-0569; CAR-OTP-2045-0581; CAR-OTP-2048-0109; CAR-OTP-2048-0129; CAR-OTP-2051-0479; CAR-OTP-2053-0567; CAR-OTP-2053-0645; CAR-OTP-2084-0305; CAR-OTP-2101-0340;

PARTLY GRANTS the Request for Submission;

RECOGNISES as submitted the following items:

CAR-OTP-2001-0172;	CAR-OTP-2045-0452;	CAR-OTP-2088-1817;
CAR-OTP-2001-0263;	CAR-OTP-2051-0743;	CAR-OTP-2088-1840;
CAR-OTP-2001-0294;	CAR-OTP-2053-0538;	CAR-OTP-2088-1850;
CAR-OTP-2001-0310;	CAR-OTP-2053-0546;	CAR-OTP-2091-0488;
CAR-OTP-2001-0363;	CAR-OTP-2077-0486;	CAR-OTP-2092-3257;
CAR-OTP-2001-0379;	CAR-OTP-2079-1170;	CAR-OTP-2110-0899;
CAR-OTP-2001-0409;	CAR-OTP-2088-1179;	CAR-OTP-2110-0911;
CAR-OTP-2001-0446;	CAR-OTP-2088-1198;	CAR-OTP-2110-0941;
CAR-OTP-2001-0463;	CAR-OTP-2088-1230;	CAR-OTP-2110-0963;
CAR-OTP-2001-0789;	CAR-OTP-2088-1375;	CAR-OTP-2127-4059;
CAR-OTP-2001-0797;	CAR-OTP-2088-1423;	CAR-OTP-2127-4061;
CAR-OTP-2001-1043;	CAR-OTP-2088-1437;	CAR-OTP-2127-4062;
CAR-OTP-2001-1075;	CAR-OTP-2088-1473;	CAR-OTP-2127-4063;
CAR-OTP-2019-3120;	CAR-OTP-2088-1485;	CAR-OTP-2127-4086;
CAR-OTP-2020-0019;	CAR-OTP-2088-1493;	CAR-OTP-2127-4094;
CAR-OTP-2020-0228;	CAR-OTP-2088-1572;	CAR-OTP-2127-4124;
CAR-OTP-2045-0300;	CAR-OTP-2088-1811;	

ORDERS the Registry to reflect that these items have been so recognised in the JEM code; and

ORDERS the Prosecution, the Yekatom Defence and the Ngaïssona Defence to file public redacted versions of the Request, ICC-01/14-01/18-1947-Conf, the Yekatom Defence Response, ICC-01/14-01/18-1978-Conf, and the Ngaïssona Defence Response, ICC-01/14-01/18-2036-Conf, respectively, within one week of notification of this decision.

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

 Judge Péter Kovács	 Judge Bertram Schmitt Presiding Judge	 Judge Chang-ho Chung
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Dated 1 November 2023

At The Hague, The Netherlands