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**International
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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 with Confidential Annex 1

Public redacted version of '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-01/14-01/18-2036-Conf), filed on 18 August 2023

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. The Defence of Mr Patrice-Edouard Ngaïssona (“Defence”) hereby responds to the Prosecution’s Ninth Application for Submission of Evidence from the Bar Table (“Application”) and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576 (“Request for Reconsideration”).¹
2. For the reasons set out below, the Defence respectfully requests the Chamber to reject, in part, the Application, and to reject the Request for Reconsideration.
3. Further, the Defence provides in confidential Annex 1 to the present Response its item-by-item objections to the 66 items, which the Prosecution wishes to submit before the Chamber.
4. The Defence makes these objections pursuant to rule 64(1) of the Rules of Procedure and Evidence (“Rules”), which are intended to assist the Chamber in its holistic assessment of the evidence during the deliberation of the judgement.²

II. CONFIDENTIALITY

5. In accordance with regulation 23bis(1) of the Regulations of the Court, this response and its annex are filed confidentially as they respond to documents of the same classification and contain confidential information. A public redacted version will be filed in due course.

III. APPLICABLE LAW

6. The Defence incorporates by reference its previous submissions with respect to the applicable law regarding the adjudication of Bar Table motions.³

¹ ICC-01/14-01/18-1947-Conf together with confidential Annex.

² ICC-01/14-01/18-631, para. 62 (« Initial Directions »). As per the Initial Directions, the Defence already provided the Prosecution with its view as to the submission of the items sought to be submitted.

³ ICC-01/14-01/18-1278, paras 6-9.

IV. SUBMISSIONS

7. The present submissions provide the Chamber with a summary of the Defence's objections to the 66 items, which the Prosecution wishes to submit before the Chamber. These objections are not exhaustive. Rather, they present the Chamber with the major procedural bars to submission. For a comprehensive overview of the Defence's objections to the Prosecution's Application, the Defence respectfully refers the Chamber to confidential Annex 1 of the present Response.
8. The Defence contends that the Application should be rejected, in part, as some items listed in the Prosecution's Annex cannot be submitted from the 'bar table' (A).
9. In relation to the Request for Reconsideration, it is the Defence's position that the Prosecution's failed to substantiate its claim for reconsideration in relation to the submission of CAR-OTP-2053-0576 (B).

A. The Prosecution seeks the submission of items which cannot be submitted from the 'bar table'

10. The Defence supports and joins the Yekatom Defence arguments contained in its '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"' ('Yekatom Defence Response') with respect to its submissions on the testimonial nature of the OHCHR COI Documents, and the UN-OLA documents. However, the Defence provides additional arguments for the Chamber to consider in adjudicating the Application.
11. Contrary to the Prosecution's submissions, a number of items cannot be submitted from the 'bar table', either because their submission would usurp the Chamber's fact-finding function (i) or because they are testimonial in nature (ii).

i. The submission of CAR-OTP-2088-1179 would usurp the Chamber's fact-finding function

12. During *inter partes* exchanges, the Defence objected to the submission of CAR-OTP-2088-1179,⁴ specifically [REDACTED], as it would usurp the Trial Chamber's fact-finding function.
13. In its Application, the Prosecution submits that the submission of the item cannot be reasonably characterised as usurping the Chamber's fact-finding function since the concept of 'usurpation' only arises in the Court's case law in relation to expert evidence – which the item is not.⁵
14. Contrary to the Prosecution's contentions, the concept of usurpation of a trial chamber's fact-finding function also arose in relation to non-expert evidence. In particular, Trial Chamber I in *Gbagbo and Blé Goudé* had to determine the scope of the evidence that a Human Rights Watch investigator was eligible to give. It ultimately found that:

"The Blé Goudé Defence is [...] right in noting that Witness P-369 should not be asked to pronounce on the conclusions he drew from his research in Ivory Coast. Only the Chamber has the authority to draw inferences in the context of these proceedings and only on the basis of evidence that has been submitted and discussed before it. Statements of witnesses made to a Human Rights Watch investigator are not before the Chamber in this sense."⁶

15. In the case at hand, CAR-OTP-2088-1179 is an UN-OLA report containing [REDACTED]. [REDACTED].
16. Notwithstanding the minimal probative value of such a report, resulting from its complete lack of listed sources and their anonymity, the Defence respectfully

⁴ Item #38, Category I.

⁵ ICC-01/14-01/18-1947-Conf, para. 10.

⁶ ICC-02/11-01/15-539, para. 6.

submits that it would be wholly inappropriate for the Chamber to consider it in determining the guilt or innocence of Mr Ngaïssona. While there is no procedural bar to submitting the document, the fact that it relates directly to [REDACTED] would mean that the Chamber could potentially rely on [REDACTED]. Article 74 requires that the Chamber “base its decision only on evidence submitted and discussed before it at the trial”. This report should not be considered as evidence under Article 74, but rather the opinion of the United Nations Commission of Inquiry on [REDACTED]. Additionally, this opinion is based on the Commission’s appreciation of material that is not even before the Chamber for its appreciation and thus it cannot be assessed by the Chamber.

17. Accordingly, the submission of CAR-OTP-2088-1179, specifically [REDACTED], should be rejected.

ii. The submission of 20 items of a testimonial nature through the ‘bar table’ is prohibited under the Court’s statutory framework

18. The Prosecution is seeking the submission of 20 items of a testimonial nature by an inappropriate channel of submission.⁷

19. *Preliminarily*, the Prosecution relies on a purported “statutory bias toward receiving all evidence toward establishing the truth” to assert that “it is only when evidence *definitively* falls into a limiting category that its admission or submission under article 69 may otherwise be appropriately curtailed”.⁸

⁷ See the documents listed in email from the Defence to the Chamber and Parties and Participants, dated 28 April 2023, at 15:02. The Defence adds CAR-OTP-2045-0287 (Item #17, Category I) to this list. The Defence originally intended to object to this item through its *inter partes* exchange with the Prosecution. However, through an oversight this item was not included in the Defence’s email. The Defence respectfully requests the Chamber consider the Defence’s request that this item not be submitted.

⁸ ICC-01/14-01/18-1947-Conf, para. 12.

20. In addition to the arguments raised by the Yekatom Defence,⁹ the Defence notes that, although the Prosecution is seeking reconsideration of the Chamber's Decision in respect of CAR-OTP-2053-0576, the Chamber's findings still stand. Even though the item could have arguably been *prima facie* relevant, the Chamber rejected its submission through [REDACTED] due to its testimonial nature, thereby demonstrating the Prosecution's error in arguing the existence of any statutory bias.
21. This decision of the Chamber was consistent with the reasoning adopted in the 'Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence)' ('First Bar Table Decision').¹⁰ In the First Bar Table Decision, while the Chamber did allow the submission of the 'Final Report of the United Nations Commission of Inquiry on the Central African Republic', it specifically noted that "while witness statements have informed the report, these statements are not as such included in the report".¹¹ By making this note, the Chamber suggested that, had the underlying witness statements been included in the report, their decision to allow the submission of it might have been different. Here, the Prosecution is seeking to submit the underlying witness statements that have informed the United Nations Commission's findings, and therefore the Chamber should reject the Prosecution's Application.
22. Besides, when granting the 'First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence)', the Chamber verified in extensive detail whether or not the items were testimonial evidence. In other words, in both the decision refusing to introduce the item CAR-OTP-2053-0576 through witness [REDACTED] and the First Bar Table Decision, the Chamber did not start with the assumption that there was a statutory bias in favour of receiving those two

⁹ See Yekatom Defence Response, paras 22-25 in ICC-01/14-01/18-1978-Conf.

¹⁰ ICC-01/14-01/18-1359.

¹¹ ICC-01/14-01/18-1359, para. 17.

items – arguably *prima facie* relevant –, but rather checked whether or not the conditions of Rule 68 were met.

23. Furthermore, by alleging that it is only when evidence *definitively* falls into a limiting category – here, testimonial evidence – that its submission under Article 69 may otherwise be curtailed, not only does the Prosecution misread the Court’s broad interpretation of ‘testimony’ within the meaning of Rule 68,¹² but it also circumvents the stringent requirements of Rule 68, thus rendering the latter provision meaningless.
24. As a consequence, the Prosecution’s claim that the Court’s procedural architecture favours the admission of all relevant evidence cannot stand for lack of basis in the statutory procedural bars to submission.
25. *Now* turning to the 20 items whose submission is being sought, the Defence argues that it is well-established that:

“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.”¹³

26. In principle, statements given to private persons or entities do not qualify as testimony within the meaning of the Rules of Procedure and Evidence.¹⁴ However, where it was given to a representative of an international organisation with a specific fact-finding mandate, a statement may qualify as testimony if the manner in which it was obtained left no doubt that the information might be used in future legal proceedings,¹⁵ and if the person making the statement understood,

¹² See Yekatom Defence Response, para. 25 in ICC-01/14-01/18-1978-Conf.

¹³ ICC-01/05-01/13-2275-Red, para. 581.

¹⁴ ICC-01/04-01/07-2635, para. 48.

¹⁵ ICC-01/04-01/07-2635, para. 47.

when making the statement, that they were providing information which may be relied upon in the context of legal proceedings.¹⁶

27. Consequently, in order to determine whether evidence qualifies as testimony, trial chambers verify:

- Whether the out-of-court statement was given to a person or body whose mandate includes the collection of evidence for use in judicial proceedings; and
- Whether the person making the statement understood that the information they provided may be relied upon in the context of legal proceedings.

28. The Defence submits that the Prosecution's interpretation of these factors excessively and unjustly narrows the scope of testimonial evidence in such a way that the items it is seeking to submit will inevitably fall outside the scope of testimonial evidence.

29. *First*, the Prosecution contends that a number of 'factual questions' additionally need to be met for an item to qualify as testimonial evidence. Nevertheless, and as pointed out by the Defence of Mr Yekatom, not only does the Prosecution fail to cite any case law in support of this contention, but the said 'factual questions' contradict the Court's case law.¹⁷ As a result, these purported additional 'factual questions' unjustifiably narrow the definition of testimonial evidence.

30. *Second*, the Prosecution makes an unreasonably confined application of the above-mentioned factors to conclude that the items sought to be submitted do not qualify as testimony in the case at hand.

¹⁶ ICC-01/04-01/07-2635, para. 49; ICC-02/04-01/15-795, paras. 18-20; ICC-01/05-01/13-1478-Red-Corr, para. 32.

¹⁷ See Yekatom Defence Response, paras. 32-34 in ICC-01/14-01/18-1978-Conf.

The OHCHR COI documents

31. Among the 20 documents whose submission the Defence opposes, the Prosecution identified that 11 were issued by the Office of the United Nations High Commissioner for Human Rights Commission of Inquiry ('UN OHCHR COI').¹⁸
32. *First*, regarding the specific fact-finding mandate of the international organisation in the case at hand, the Prosecution submits that UN OHCHR COI agents' mandate was not linked to law enforcement authorities' work in the CAR, nor in any other jurisdiction.¹⁹ It is nonetheless rather clear from the terms of the UN OHCHR COI's mandate that it consisted in the collection of evidence intended to be used in judicial proceedings:

"[The Security Council] requests that the Secretary-General rapidly establish an international commission of inquiry [...] in order immediately to investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights in CAR by all parties since 1 January 2013, to compile information, to help identify the perpetrators of such violations and abuses, point to their possible criminal responsibility and to help ensure that those responsible are held accountable."²⁰ [emphasis added]

¹⁸ ICC-01/14-01/18-1947-Conf, para. 32. The items are: CAR-OTP-2045-0559 (Item #22, Category I), CAR-OTP-2045-0561 (Item #23, Category I), CAR-OTP-2045-0563 (Item #24, Category I), CAR-OTP-2045-0569 (Item #25, Category I), CAR-OTP-2045-0581 (Item #26, Category I), CAR-OTP-2048-0109 (Item #27, Category I), CAR-OTP-2048-0129 (Item #28, Category I), CAR-OTP-2048-0546 (Item #32, Category I); CAR-OTP-2053-0567 (Item #33, Category I), CAR-OTP-2053-0645 (Item #34, Category I), CAR-OTP-2101-0340 (Item #50, Category I).

¹⁹ ICC-01/14-01/18-1947-Conf, para. 33.

²⁰ See CAR-OTP-2001-0275, at 0280; see also CAR-OTP-2001-1075, at 1080.

33. As was noted by the Defence of Mr Yekatom, the Prosecution cannot reasonably ignore the actual role and mandate of the UN OHCHR COI as Rule 68(2) Prosecution witness P-0567 [REDACTED].²¹

34. The Defence additionally notes that, in paragraph 33 of its Application, the Prosecution specifically states that “no member of the police participated in or was even present during any of the conversations had with the individuals who provided their personal accounts”.²² However, that circumstance does not change the characterisation of the items as testimony. The presence or involvement of the police in the interviews is only one of the many circumstances which may lead to characterising a testimonial statement,²³ but the Court’s case law reveals, on several occasions, that statements may qualify as testimony even in the absence of any member of the police.²⁴ As a consequence, the Prosecution has misinterpreted the Court’s case law, by adding requirements and therefore excessively restricted it.

35. *Second*, the Prosecution submits that the items are not the statements of the interviewees and that the circumstance that they may be heavily based on factual observations provided by the interviewees does not change their character.²⁵ To the contrary, this last circumstance *does* have an impact on the items’ characterisation as testimony. It is precisely because CAR-OTP-2053-0576, entitled ‘Notes of Interview’, was heavily based on factual observations provided by the interviewees, which they reportedly witnessed personally, that the Chamber found that it was not merely reflecting the drafter’s own understanding

²¹ See CAR-OTP-2059-0084-R04. See also Yekatom Defence Response, paras. 39-40 in ICC-01/14-01/18-1978-Conf.

²² ICC-01/14-01/18-1947-Conf, para. 33.

²³ See ICC-02/04-01/15-795, para. 20; see also ICC-02/04-01/15-1670, paras. 12-13.

²⁴ See ICC-01/09-01/20-299, para. 16; see also ICC-02/04-01/15-1670, paras. 9 and 10.

²⁵ ICC-01/14-01/18-1947-Conf, paras. 35-36.

of the recounted events.²⁶ With respect to the items subject to the Application, the only assessments possibly made by the drafters of the UN OHCHR COI items are limited to the ‘interview reliability’ or the type of alleged violation.²⁷

36. *Third*, the Prosecution submits that the persons making the statements were not expressly made aware of their potential involvement in a legal process as witnesses.²⁸ However, its proposition that the absence of any signature, attestation, adoption or *similia* in the UN OHCHR COI items is fatal to finding that they amount to testimonial evidence,²⁹ is not supported by case law.

37. The Prosecution further submits that the UN OHCHR COI did not consistently address the issue of informed consent, citing CAR-OTP-2048-0129 as an instance where there is “no reference to authorities, or the ICC at all”. However, in its [REDACTED] section, the item expressly mentions [REDACTED].³⁰

38. The Defence additionally highlights that the vast majority of the UN OHCHR COI items expressly refer to the interviewees as ‘witnesses’.³¹ Although this does not, on its own, presume the informed consent of the interviewees, it is another indicia that they were treated as persons providing statements for the purpose of collecting information to be used in future legal proceedings.

The other submitted items

39. Among the 20 documents whose submission the Defence opposes, the Prosecution identified that eight others were also issued by the UN OHCHR, but

²⁶ See the Chamber’s findings in this case in relation to CAR-OTP-2053-0576, in email from Trial Chamber V to the Parties and Participants, dated 1 June 2023, at 10:28.

²⁷ See the Chamber’s findings in this case in relation to CAR-OTP-2053-0576, in email from Trial Chamber V to the Parties and Participants, dated 1 June 2023, at 10:28.

²⁸ ICC-01/14-01/18-1947-Conf, paras. 37-40.

²⁹ ICC-01/14-01/18-1947-Conf, para. 37.

³⁰ CAR-OTP-2048-0129, at 0129.

³¹ See CAR-OTP-2045-0287, CAR-OTP-2045-0559, CAR-OTP-2045-0561, CAR-OTP-2045-0563, CAR-OTP-2045-0569, CAR-OTP-2048-0109, CAR-OTP-2053-0567 and CAR-OTP-2053-0645.

submitted that most of them “were not formally related to the UN OHCHR COI”.³²

40. Regarding the specific fact-finding mandate of the UN OHCHR with respect to these 8 documents, the Prosecution does not provide the context in which the ‘Interview notes’ were taken by the OHCHR. It can nevertheless be inferred from CAR-OTP-2088-1176 that they were taken in the context of the investigations of the UN OHCHR COI. CAR-OTP-2088-1176 appears to be the [REDACTED].³³
41. An example can be found in CAR-OTP-2088-1198. The [REDACTED]. Similarly, the document title of CAR-OTP-2088-1198 is [REDACTED]. Since [REDACTED], it appears that the ‘Interview notes’ were taken as part of the OHCHR’s role in assisting the COI in its mandate.
42. Similar observations can be made with respect to CAR-OTP-2088-1375. The [REDACTED]. Yet again, the document title of CAR-OTP-2088-1375 is [REDACTED]. Since [REDACTED], it confirms that the ‘Interview notes’ were taken as part of the OHCHR’s role in assisting the COI in its mandate.
43. For the sake of conciseness, the Defence respectfully refers the Chamber to confidential Annex 1 to the present Response for further similar examples.
44. The Defence underscores that the OHCHR provided continued technical support to the COI, as was requested by the UN Secretary General when the COI was established.³⁴ What is more, the [REDACTED]. Yet, as demonstrated above, the UN OHCHR COI’s mandate consisted of the collection of evidence intended to

³² ICC-01/14-01/18-1947-Conf, para. 43.

³³ CAR-OTP-2088-1198 (Item #39, Category I), CAR-OTP-2088-1230 (Item #40, Category I), CAR-OTP-2088-1375 (Item #41, Category I), CAR-OTP-2088-1423 (Item #42, Category I), CAR-OTP-2088-1437 (Item #43, Category I), CAR-OTP-2088-1473 (Item #44, Category I), CAR-OTP-2088-1485 (Item #45, Category I), CAR-OTP-2088-1493 (Item #46, Category I).

³⁴ See CAR-OTP-2001-1075, at 1080 and 1084.

be used in judicial proceedings.³⁵ Given the ‘Interview notes’ were taken in the context of the UN OHCHR COI’s work, it is clear that the statements provided in the eight items whose submission is discussed in this section, were given for the purposes to be used in criminal proceedings.

45. Considering that the process for collecting the information contained in these 8 items is the same as the one applicable to the UN OHCHR COI’s items, they should likewise be qualified as items of a testimonial nature.

46. As a consequence of the aforementioned arguments, it is apparent that the submission of 20 items of a testimonial nature is sought by an inappropriate channel of submission. These items can only be submitted through the individuals who made the statements, and pursuant to the provisions of Rule 68 of the Rules of Procedure and Evidence.

B. The standard for reconsideration of CAR-OTP-2053-0576 is not met

47. The Defence fully supports and joins the ‘Yekatom Defence Response’ on the issue of the Prosecution’s Request for Reconsideration of the Decision on the submission of CAR-OTP-2053-0576.

48. The Defence however additionally notes the rather opportune timing for seeking the reconsideration of the Chamber’s Decision in respect of CAR-OTP-2053-0576, now that the testimonial nature of a series of related items is at stake.

49. This Request for Reconsideration is all the more unfortunate that, pursuant to Article 82 of the Rome Statute, the Prosecution had a right to seek leave to appeal the Chamber’s Decision when it was rendered, but chose not to.

³⁵ See paras. 29-32 *supra*.

III. RELIEF SOUGHT

50. In light of the above, the Defence respectfully requests the Chamber to

REJECT in part the Application;

REJECT the Request for Reconsideration;

REJECT the submission of the following items:

CAR-OTP-2001-1075	CAR-OTP-2077-0486
CAR-OTP-2019-3120	CAR-OTP-2084-0305
CAR-OTP-2045-0287	CAR-OTP-2088-1179
CAR-OTP-2045-0536	CAR-OTP-2088-1198
CAR-OTP-2045-0559	CAR-OTP-2088-1230
CAR-OTP-2045-0561	CAR-OTP-2088-1375
CAR-OTP-2045-0563	CAR-OTP-2088-1423
CAR-OTP-2045-0569	CAR-OTP-2088-1437
CAR-OTP-2045-0581	CAR-OTP-2088-1473
CAR-OTP-2048-0109	CAR-OTP-2088-1485
CAR-OTP-2048-0129	CAR-OTP-2088-1493
CAR-OTP-2048-0546	CAR-OTP-2101-0340
CAR-OTP-2051-0479	CAR-OTP-2110-0911
CAR-OTP-2053-0538	CAR-OTP-2110-0941
CAR-OTP-2053-0567	CAR-OTP-2110-0963
CAR-OTP-2053-0645	

TAKE INTO ACCOUNT the Defence's observations contained in the present Response and confidential Annex 1 when the Chamber conducts its holistic assessment of the evidence during the deliberation of the judgement.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized 'N' or similar character, located below the text 'Respectfully submitted,'.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 8 November 2023

At The Hague, the Netherlands.