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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 *PROSECUTOR* v. *ALFRED YEKATOM* AND
*PATRICE-EDOUARD NGAÏSSONA***

Public

**Public redacted version of ‘Prosecution Response to the Yekatom Defence ‘Request for the Exclusion of Fabricated Evidence’ (ICC-01/14-01/18-2240-Conf)’,
ICC-01/14-01/18-2313-Conf, 18 January 2024**

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Yekatom Defence’s request to exclude evidence (“Request”).¹ Notwithstanding the serious allegations raised in the Request, it is readily apparent that the Defence’s invocation of article 69(7) is legally flawed and procedurally untenable.

2. *First*, the Request does not fall within the scope of article 69(7). The Defence fails to establish that the testimony and other evidence for which it seeks exclusion (“Impugned Evidence”)² was obtained or otherwise introduced into the case record by *means* of a violation of the Statute or an internationally recognised human right. Rather, as explained below, the Prosecution’s investigation was reasonable and satisfied article 54(1).

3. *Second*, assuming *arguendo* that the Impugned Evidence was obtained by means of a violation of the Statute, this neither casts substantial doubt on its reliability on the whole, nor would its retention in the record for the Chamber’s assessment undermine the integrity of the proceedings. Two factors are dispositive: (a) substantial non-impugned evidence supports Count 29 consistently with the Impugned Evidence, including the Accused’s admission in having negotiated the demobilisation of 153 children from his Anti-Balaka group and further written commitment not to *re-recruit* them, as well as other information and evidence provided by members of his [REDACTED]; and (b) the Chamber – composed of professional judges – is able to assess and appropriately weigh the evidence and witnesses before it in context and holistically in determining what is true and what is not, as it has done throughout these proceedings. There is no basis on which to deprive the Chamber of its statutory authority and duty to freely assess evidence which it has already properly determined should be before it. And, contrary to the Request, there are no grounds to question the Chamber’s competence to discharge its discretion appropriately and fairly.

4. *Third*, failing its characterisation under article 69(7), the Request presents an article 69(4) issue, and should be so construed. In that respect, it requires the Chamber’s reconsideration of

¹ ICC-01/14-01/18-2240-Conf.

² See ICC-01/14-01/18-2240-Conf (comprising the “the evidence of OTP witnesses P-2475, P-2018, and P-1974, and CLRV1 Witnesses P-0001 and P-0002, including associated exhibits ... and relevant items formally introduced through bar table motions or formally submitted items related to P-2620 and P-2582”).

its prior determinations on the formal submission of the Impugned Evidence. However, the Request fails to satisfy the applicable legal criteria.³

II. CONFIDENTIALITY

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

III. SUBMISSIONS

A. The Impugned Evidence was not Obtained by Unlawful Means

6. Without minimising the seriousness of the allegations raised, evidence is not excludable under article 69(7) merely because a breach of the Statute ‘*results in*’ the production of untruthful, unreliable — or, as contended — “false evidence.”⁴ Instead, the exclusion of evidence under article 69(7) contemplates a substantially higher threshold. The provision thus requires that the challenged evidence was procured unlawfully,⁵ namely that it was “*obtained by means of* a violation of this Statute or internationally recognized human right[].”⁶

7. The Court’s consistent jurisprudence requires that “the party bringing the motion under Article 69(7) of the Statute bears the burden of showing that the criteria for the exclusion of evidence has been met.”⁷ In accordance with the plain wording of the Statute, this entails demonstrating at the outset that the challenged evidence was obtained through unlawful means.⁸ The Appeals Chamber thus confirms:

³ Apart, the Request attempts to circumvent the 15 November 2023 Decision granting an extension of page limits “of up to 50 pages.” In fact, Annex A — a so-called “Chronology” — consists of 30-pages of the Defence’s interpretation of events and patently argumentative footnotes amounting to ‘submissions’, contrary to Regulation 36(2)(b) of the Regulations (“RoC”) (providing that “[a]n appendix shall not contain submissions”); *see also* ICC-01/12-01/18-1467, para. 36 (holding that “portions of an annex that constitute ‘summaries’ or ‘synthesis’ of evidence, *which reflect, at least to some extent, the parties’ interpretation of circumstances*, rather than a purely objective representation of facts, are contrary to this provision”) (emphasis added), and ICC-01/05-01/13-2275-Red, para. 778 (precluding supplemental submissions contained in an annex).

⁴ *See* ICC-01/14-01/18-2240-Conf, paras. 2, 128-129, 135-136.

⁵ ICC-01/05-01/13-2275-Anx, para. 33 (Sep. Op. Judge Henderson) (observing that “[t]he Trial Chamber in *Lubanga* suggests that the purpose of the exclusionary rule is, *inter alia*, to discipline or deter unlawful conduct by the Prosecution”).

⁶ *See* Article 69(7); *see also* ICC-01/05-01/13-2275-Red, para. 280 (noting that the “conditions of the chapeau of article 69(7) of the Statute” must be met before advancing to the “second step”).

⁷ ICC-01/12-01/18-1475-Red, para. 37.

⁸ *See* Article 69(7); *see also* ICC-01/05-01/13-2275-Red, para. 280 (noting that the “conditions of the chapeau of article 69(7) of the Statute” must be met before advancing to the “second step”).

“the fact that evidence was obtained by means of a violation of the Statute or internationally recognised human rights is a necessary pre-condition for the exclusion of such evidence under this legal basis.”⁹

8. The Request fails to meet this threshold. Instead, the Defence erroneously contends that the presence of alleged false information among the Impugned Evidence demonstrates that the *means* by which it was obtained violate the Statute. This logic is unpersuasive.

1. *Article 54(1) was not breached*

9. The Prosecution has consistently and properly discharged its statutory obligations under article 54(1) in good faith, competently, and reasonably in the circumstances.

10. It goes without saying that every investigation faces difficulties, and that none is perfect. This is especially true in respect of the many serious challenges involved in the investigation of international crimes, particularly in active conflict areas. As is well-known, some 80% of the territory of the Central African Republic (“CAR”) was outside the government’s control¹⁰ during the investigative period. It also bears recalling that the Prosecution is not in the same position as the Defence in terms of its capacity to operate on the ground within the defendants’ strongholds and with respect to areas and individuals where he has continued to exert influence (including, among political constituents and supporters).¹¹

11. The Prosecution is also [REDACTED].

12. Notably, in the investigation and prosecution of this case, by 2021, [REDACTED] security incidents had been reported to the Victims and Witness Unit, including [REDACTED].¹² Security incidents were also linked to YEKATOM and to his supporters.¹³

⁹ ICC-01/05-01/13-2275-Red, para. 351.

¹⁰ See ICC-01/14-01/18-495-Red3, para. 25 (noting that “given his position as a member of the CAR parliament during his arrest, [YEKATOM] would continue to exercise influence over his supporters in his immediate and extended community in the CAR”).

¹¹ See ICC-01/14-01/18-495-Red3, para. 25 (noting “the statements by the CAR authorities concerning the activities of Mr Yekatom’s supporters in the area under their control. The Chamber also notes that the CAR authorities consider 80% of the CAR territory to be under the control of armed groups forming part of the Anti-Balaka.”) (emphasis added); see also ICC-01/14-01/18-137, para. 18 (“[t]he Chamber agrees with the Prosecutor that the possibility of members of the Anti-Balaka assuming government positions only increases the capacity of Yekatom’s and Ngaïssona’s supporters to identify, locate and compromise witnesses” and recalling that “nearly 80% of the territory of the CAR is still under the control of armed groups, including the Anti-Balaka”); see also ICC-01/14-01/18-1-Red, para. 22.

¹² Prosecution email to Trial Chamber V and the Parties, dated [REDACTED].

¹³ See ICC-01/14-01/18-757-Conf-Red, paras. 20-22.

13. In this context, the Defence’s assertions that the Prosecution “improperly delegated its investigative duties to ESF-affiliated intermediaries”,¹⁴ relied on P-1974 and P-2018 “in a manner contrary to its statutory obligations”¹⁵; and “practically funnelled its early investigations through ESF-affiliates [REDACTED] (P-2018) and [REDACTED] (P-1974), and thereby recklessly created conditions for the witness co-contamination and collusion that would eventuate”¹⁶ are baseless.¹⁷

14. In fact, the Prosecution played no role — direct or indirect — in any alleged conspiracy or plan to produce or obtain fabricated or untruthful evidence, and rejects the Request’s assertions to that effect. Moreover, the Defence is aware that the Prosecution engaged [REDACTED] intermediary [REDACTED].¹⁸ He was engaged in accordance with the Court’s guidelines concerning the use of intermediaries with one task — [REDACTED],¹⁹ [REDACTED].²⁰ To the extent that the provenance of these documents later appeared questionable during the proceedings, the Prosecution made clear that it did not rely on them to any extent well-over a year ago, as the Request concedes.²¹

15. [REDACTED] was never tasked with, or responsible for, producing any Prosecution witness in this case, and when alerted by the Defence of the mere possibility of alleged misconduct, the Prosecution acted immediately [REDACTED]. Having sought the Defence’s cooperation in respect of the latter,²² it is notable that the Defence declined to provide any additional information [REDACTED].²³ This exchange is omitted from the correspondence presented at Annex B to the Request.

¹⁴ ICC-01/14-01/18-2240-Conf, p. 21, Item B.

¹⁵ ICC-01/14-01/18-2240-Conf, para. 8.

¹⁶ ICC-01/14-01/18-2240-Conf, para. 60.

¹⁷ See e.g. ICC-01/14-01/18-2240-Conf, para. 53, 56, 69, 87, 89, 93, 98, 109, 136 (arguing in effect that the OTP “would have” uncovered misconduct); see also, ICC-01/14-01/18-2240-Conf, para. 4 (speculating that “[h]ad the OTP respected basic investigative principles and exhibited due diligence, the array of misconduct would have been evidence [*sic*] at the early stages of its investigation”).

¹⁸ Note that [REDACTED] was not a Prosecution intermediary, *de jure* or *de facto*. *Contra* ICC-01/14-01/18-2240-Conf, paras. 4, 28, 52, 63. [REDACTED]. Note further that “[n]ot everyone who carries out these functions in cooperation with an organ or unit of the Court or Counsel will be considered intermediaries for the purposes of the [Intermediary] Guidelines, see Guidelines Governing the Relations between the Court and Intermediaries, March 2014, Section 1, p. 6 (“Intermediary Guidelines”), <https://www.icc-cpi.int/sites/default/files/GRCI-Eng.pdf>, last visited, 17 January 2024.

¹⁹ [REDACTED].

²⁰ See Intermediary Guidelines, sections 2-4.

²¹ ICC-01/14-01/18-2240-Conf, para. 83.

²² Note, Prosecution email to Yekatom Defence, dated [REDACTED] responding to the Defence’s [REDACTED] at ICC-01/14-01/18-2240-Conf, AnxB, p.3 (noting, *inter alia*, “[REDACTED]”) (available on request).

²³ Note, Yekatom Defence email to the Prosecution, dated [REDACTED] (available on request).

16. Notably, the Request lacks any allegation of the Prosecution’s actual (or even constructive) awareness of any concerted effort by any witness or intermediary to deceive it or the Court.²⁴

17. In denigrating the Prosecution’s investigation, the Request also ignores the procedural safeguards meticulously applied during the evidence gathering process, and in the context of the trial. For instance, the Impugned Evidence comprises statements taken pursuant to rules 111 and/or 112, interviews were conducted in accordance with normal procedures and domestic requirements, affirmed trial testimony received under the supervision of the Chamber, and documentary evidence tendered (and duly contested) in accordance with the Court’s established practice and procedures.

18. The Defence therefore fails to show conduct in breach of article 54(1) or otherwise amounting to an actionable ‘violation’ within the meaning of article 69(7).

2. There is no causal link between the alleged violation and the evidence gathered

19. Even if the Prosecution’s conduct amounted to a breach of article 54(1) — which it does not — the Request fails to demonstrate that it was the *means* by which the Impugned Evidence was obtained.

20. *First*, the Defence’s interpretation of article 69(7) suggests that it applies *ipso facto* whenever a statutory failure *results in* the introduction of untruthful or even unverified evidence, is inverted and inconsistent with the Court’s jurisprudence. Not every breach of the Statute constitutes a “violation” within the meaning of article 69(7), as the Appeals Chamber has confirmed in addressing alleged violations of Part 9 of the Statute.²⁵ It is clear that a Chamber’s exercise of discretion to assess the relevance, probative value, and weight of evidence is broad, under rule 63(2) and article 69(4). Thus, for instance, where a witness

²⁴ See ICC-01/04-01/06-1981, para. 47; see also ICC-01/12-01/18-1475, para. 34 (noting, *inter alia*, the analytical significance of whether the Prosecution had the “power to prevent any improper or illegal activity”). See also ICC-01/05-01/13-1854, paras. 65, 68-69 and ICC-01/05-01/13-1948, paras. 33, 36-37, 39 ; and see ICC-01/05-01/13-2275-Anx, para. 33-34 (Sep. Op. Judge Henderson).

²⁵ See *e.g.*, ICC-01/05-01/13-2275-Red, para. 318 (the Appeals Chamber noting for instance “breaches of Part 9 of the Statute do not constitute per se violations of the Statute for the purpose of exclusion of evidence under article 69 (7) of the Statute”). Similarly, at para. 332 (noting that “violation of national law in the collection of evidence does not constitute *per se* a violation of the Statute or internationally recognised human rights within the meaning of article 69 (7) of the Statute”).

breaches their ‘solemn undertaking’ under article 69(1),²⁶ *without more*, does not subject their testimony to exclusion under article 69(7) for a violation of the Statute. Rather, this is a commonplace evidentiary factor routinely assessed by the Court’s Trial Chambers. The situation here is not different.

21. As Trial Chamber X has observed:

“[t]he chapeau of Article 69(7) of the Statue provides that the provision applies where evidence was ‘obtained *by means of* a violation’ (emphasis added). The Chamber observes that this, by its plain wording, requires not only a breach of the Statute or internationally recognised human rights but also, and importantly, *a causal link between the violation and the gathering of the evidence.*”²⁷

Trial Chamber III has similarly recognised this critical relationship between the violation and the procurement or obtaining of the challenged evidence.²⁸

22. The Defence contends that the Prosecution’s alleged breach of article 54(1) through *inter alia*, “a consistent pattern of wilful negligence”²⁹ and “refus[al] to meaningfully test its evidence”,³⁰ resulted in “the Conspirators [being] able to engage, effectively unchecked, in witness interference, evidence fabrication, and collusion for personal gain.”³¹ However, these blanket assertions are unsubstantiated.

23. But even if true, they are insufficient to demonstrate an actual ‘causal link’ between the Prosecution’s conduct and the superseding and independent alleged criminal acts of the Conspirators in producing untruthful evidence.

3. *The alleged Prosecution failures do not amount to obtaining evidence ‘by means of’ a violation of the statute*

24. Article 69(7)’s operative language — “by means of”³² — implies conduct at least directed towards an illegality. In the *Lubanga* case, Trial Chamber I’s recognition of ICTY jurisprudence observing that, “domestic exclusionary rules are based, in part, on the principle

²⁶ See also Rule 66 of the Rules.

²⁷ ICC-01/12-01/18-1475-Red, para. 33 (citation omitted) (emphasis added).

²⁸ See ICC-01/09-01/20-284-Red2, para. 45.

²⁹ ICC-01/14-01/18-2240-Conf, paras. 55.

³⁰ ICC-01/14-01/18-2240-Conf, paras. 54.

³¹ ICC-01/14-01/18-2240-Conf, paras. 55.

³² See Meriam Webster Dictionary, Phrases, defining the expression ‘by means of’ as “*through the use of*”, at <https://www.merriam-webster.com/dictionary/means>, last visited 11 January 2024 (emphasis added).

of discouraging and punishing *over-reaching* law enforcement”,³³ is consonant with this understanding.

25. Thus, even taken at face value, the Request fails to explain how a Prosecution failure to detect an alleged ‘conspiracy’ to fabricate evidence apparently intended, *inter alia*, to mislead the Prosecution’s investigation,³⁴ amounts to an unlawful means of procuring evidence. The distinction between a ‘breach’ of the Statute and its ‘violation’ as a means of obtaining evidence is not semantic. It is legally consequential to the disposition of the Request. As the Request does not substantiate that the Prosecution’s alleged omissions were directed at unlawfully procuring the Impugned Evidence, or were used as an unlawful means of obtaining it, it does not satisfy the Defence’s burden to establish the Prosecution’s ‘violation’ of the Statute for article 69(7) purposes. The Defence’s unfounded assertion that “it is reasonable to conclude that OTP’s failure to test its case – was *intentional*, as part of a single-minded and overly narrow focus to support its case theory in relation to Count 29”,³⁵ cannot salvage the Request.

26. *Second*, to the extent the Impugned Evidence also comprises testimony and documents submitted during the course of trial, it is not ‘obtained’ by means of a violation of the Statute. Rather, it comprises evidence lawfully procured under the Court’s regulatory framework. The Request thus appears to alternatively advance a theory of derivative exclusion — to the effect that the Impugned Evidence is excludable because it is tainted by illegality, namely: the alleged Conspiracy — known as the ‘fruit of the poisonous tree’ doctrine. The Request fails to provide any legal basis for the application of this doctrine under article 69(7). Notably, Trial Chamber VII in the *Bemba et al.* case specifically rejected this rationale for the exclusion of evidence.³⁶ Likewise, Trial Chamber I declined to apply the doctrine in the *Lubanga* case.³⁷

27. Even if article 69(7) might encompass the exclusion of derivative evidence, the Impugned Evidence on the whole is not tainted, having been obtained in accordance with the Court’s procedures at trial, subject to examination and/or contest by the Defence. The Defence

³³ See ICC-01/04-01/06-1981, paras. 45-46 (citing *Prosecutor v. Brđanin*, Case No IT-99-36-T, Decision on the Defence ‘Objection to Intercept Evidence’, 3 October 2003, para. 63).

³⁴ Notably the ESF demobilisation ceremony took place in PISSA and MBAIKI on 4 and 5 August 2014 on the basis of lists of children established *prior*. The Prosecution’s Article 53(1) Report opening the investigation in the present Situation was issued on 24 September 2014. When the ESF activities and lists were developed, it could not have been known to the so-called ‘Conspirators’ what, if anything, the Prosecution investigation would entail.

³⁵ ICC-01/14-01/18-2240-Conf, para. 146 (emphasis added).

³⁶ See ICC-01/05-01/13-1948, paras. 32-33; ICC-01/05-01/13-1963, para. 20 (rejecting the fruit of the poisonous tree rationale as a basis for exclusion under article 69(7)).

³⁷ See ICC-01/04-01/06-1981, paras. 45-46.

therefore fails to show that the Impugned Evidence was obtained by means of a violation of the Statute.

B. The Impugned Evidence is not excludable

28. Assuming *arguendo* that the Impugned Evidence was obtained by means of an omission amounting to a violation of article 54(1), the Request still fails. The Impugned Evidence is not excludable because the Defence cannot satisfy the additional legal requirements.

29. The Appeals Chamber has held, where the conditions of the *chapeau* of the provision are met:

“the second step is to consider whether ‘[t]he violation casts substantial doubt on the reliability of the evidence’ (article 69 (7) (a) of the Statute) or [t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’ article 69 (7) (b) of the Statute).”³⁸

30. Here, the alleged violation does not cast substantial doubt on the reliability of the Impugned Evidence taken as a whole; nor, would its admission seriously damage the integrity of the proceedings.

1. The Impugned Evidence is reliable

31. The Impugned Evidence is reliable concerning the presence of children under 15 years in YEKATOM’s Group.

32. Although there is no doubt that certain aspects of the Impugned Evidence suggests that the administration of the *Enfants sans frontières* program (“ESF”) was flawed, this does not mean that *all* of its participants, as well as the ESF program and related documents are unreliable in their totality. At its highest, the Impugned Evidence suggests that *some* participants in the ESF program may not have been previously recruited into YEKATOM’s Group. However, this does not mean that *all* were not; nor does it contradict that children under 15 were otherwise enlisted. To that extent, the Impugned Evidence remains consistent with other extrinsic evidence.

³⁸ ICC-01/05-01/13-2275-Red, para. 280 ; ICC-01/12-01/18-1475-Red, para. 31; *see also* ICC-01/09-01/20-284-Red2, para. 44.

33. Thus, the Request’s assertion that *all* evidence by “ESF-affiliated individuals” is unreliable and that “the 2014 ESF Programme was fraudulent”³⁹ on the whole, is not persuasive. The Request names [REDACTED] individuals as “Conspirators”, [REDACTED].⁴⁰ The Defence’s blanket position on reliability, is contradicted by its own continued reliance on birth certificates issued by officials in PISSA for instance, aware of the Town Hall’s problematic practices.⁴¹ Contrary to the Request, these are matters appropriately before the Chamber to weigh and assess.

34. Moreover, the Defence does not categorically refute the presence of children in YEKATOM’s Anti-Balaka Group in 2013/2014. Instead, the Request tries to thread the needle, asserting that the alleged conspiracy undermines the ostensible truth, presented *alternatively* as: (a) “that the ‘former child soldier’ participants were not child soldiers”; or (b) they were “not part of Mr Yekatom’s group”; or (c) “and/or [they] were not under 15 years old at the time of the events.”⁴² However, substantial aspects of these Defence contentions also form part of the testimony which comprises the Impugned Evidence. P-2475 testified that he believed that not all the children at MBAIKI were in the Anti-Balaka or child soldiers.⁴³ Similarly, P-1974, P-2018, and P-2476 — testified that not all children in the ESF lists were under age 15.⁴⁴ Importantly, the program had no interest in differentiating between children under 18 and those under 15 other than in determining their placement in respect of their intended schooling.⁴⁵

35. Thus, the Defence’s position is already reflected in the Impugned Evidence in contradiction of its claim that the same is fabricated.⁴⁶

³⁹ ICC-01/14-01/18-2240-Conf, para. 7.

⁴⁰ See ICC-01/14-01/18-2240-Conf, para. 3. Of the [REDACTED] individuals listed as “Conspirators”, the [REDACTED]. The evidence of the other listed persons was not called or is otherwise relied on by the Prosecution.

⁴¹ ICC-01/14-01/18-2240-Conf, para. 17 (noting the issuance of false birth certificates [REDACTED] to obtain relocation); see also e.g., ICC-01/14-01/18-T-233-Conf-Eng-CT2, p. 54, l. 10 – p. 55, l. 6 (noting that PISSA Town Hall engaged in a practice of issuing false certificates – “[i]n other words, sometimes the rules are bent”).

⁴² ICC-01/14-01/18-2240-Conf, para. 7 (emphasis added).

⁴³ ICC-01/14-01/18-T-130-Conf-Eng CT, p. 62, l. 12-17, p. 63, l. 1-7, p. 64, l. 22-25; ICC-01/14-01/18-T-131-Conf-Eng ET, p. 46, l. 18-20, p. 78, l. 4-8.

⁴⁴ P-1974: CAR-OTP-2068-0222, at 0231, para. 61; P-1974: ICC-01/14-01/18-T-227 ET, p. 81, l. 22; P-2018: ICC-01/14-01/18-T-222-Conf-Eng-ET, p. 30, l. 9-14; P-2476: ICC-01/14-01/18-T-214-Conf-Eng-ET, p. 7, l. 5-10.

⁴⁵ See e.g., P-2082: ICC-01/14-01/18-T-218-CT, p. 25, l. 18-23; P-1974: ICC-01/14-01/18-T-225-Conf-Eng-ET, p. 22, l. 1-8, and p. 22, l. 22 – p. 23, l. 8.

⁴⁶ See Section 1 (a) *infra* (referencing the disclosed statements of YEKATOM Group [REDACTED] P-2013 and P-1792), *contra* ICC-01/14-01/18-2240-Conf, paras. 54, 60, 131, 145. (charging that the OTP “funnelled its investigation through ESF and ESF-affiliates”).

36. In addition, the allegations implicating YEKATOM and his Group in the recruitment of children under 15 were also reasonably verified and substantiated. The Defence is aware that the accounts provided by P-2018 and P-1974 regarding ESF's efforts to demobilise children within YEKATOM's Group and the presence of children under 15 within the Group were confirmed, including by YEKATOM's subordinate [REDACTED].⁴⁷ This fact is omitted from the Request, which wrongly claims that Prosecution "was wilfully blind to the manifest indicia of misconduct and unreliability of its witnesses and evidence" or engaged in "a consistent pattern of wilful negligence."⁴⁸

37. The Impugned Evidence is also consistent with other evidence on the record, including independent insider information.

a. Independent insider information is consistent with the Impugned Evidence

38. In the course of its investigations, the Prosecution obtained pertinent information from the Accused's subordinates P-2013 and P-1792 confirming that children under the age of 15 had been recruited into YEKATOM's Group and in their charge, consistent with information provided by ESF officials.

i. P-2013

39. On 27 February 2018, the Prosecution screened [REDACTED] (P-2013).⁴⁹ P-2013 served in YEKATOM's Group [REDACTED]⁵⁰ [REDACTED].⁵¹ He was [REDACTED]. During his screening, P-2013 stated in relevant part:

- "[REDACTED] children who had been child soldiers with the armed groups";⁵²

⁴⁷ *Contra* ICC-01/14-01/18-2240-Conf, para. 54 (*inter alia*) (asserting that the Prosecution has "steadfastly refused to undertake even the most elementary of steps to verify or authenticate the accounts of the 'former child soldiers'").

⁴⁸ ICC-01/14-01/18-2240-Conf, paras. 4 and 55.

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

- “[REDACTED] a list of the children who were reintegrated. There were many of these children...”,⁵³
- “[The children] were from 10 to 16-17 years old, both boys and girls”,⁵⁴
- “Some of these children are still in the bush, but some of them are back in their villages [REDACTED]. The goal of the project was to bring the children to MBAIKI, because it was a sort of capital in the area. The schooling for these children is also being done in MBAIKI. ESF also tried to locate their parents”,⁵⁵ and
- “... first they put the children into a centre in MBAIKI where they were accommodated.”⁵⁶

40. The Defence has been in possession of P-2013’s Screening Note since 3 September 2019.⁵⁷

41. P-2013’s account of the relevant events accords with the statements and testimony of P-1974, P-2018, P-2475, and P-2476.

42. The Prosecution also interviewed P-2013 on 7 – 14 April 2018, where he confirmed the information provided during his screening, elaborating on the details. However, the Prosecution believes that [REDACTED].⁵⁸ Nevertheless, his statement unequivocally confirms the presence of children under 15 in YEKATOM’s Group, and further bears directly on the context, reasonableness, and diligence of the Prosecution’s discharge of its investigative responsibilities.

43. P-2013 statement provides, in relevant part:

⁵³ [REDACTED]; P-2082: ICC-01/14-01/18-T-217-Conf-Eng-ET, p. 20, l. 22-p. 22, l. 7, p. 25, l. 17-23, p. 26, l. 19-21 (confirming the Anti-Balaka’s direct involvement in confirming the list of children); P-2018: ICC-01/14-01/18-T-222-Conf-Eng-ET, p. 78, l. 11-20 (confirming the Anti-Balaka’s verification of the children listed)

⁵⁴ [REDACTED]; P-2082: ICC-01/14-01/18-T-218-Conf-Eng-ET, p. 44, l. 18-19 [REDACTED]; *see also* CAR-OTP-2109-0452, at 0461, para. 45, at 0466, para. 73; P-1974: CAR-OTP-2068-0222, at 0232, para. 67 (noting that the youngest child was around 10 years old); *see also e.g.* CAR-OTP-2071-0279, at 0280, entry 40 (“*Liste des EAGFA – ENA CTO de MBAIKI*”).

⁵⁵ CAR-OTP-2071-0197, 0200-0201; Note, CAR-OTP-2128-1373 (signed by YEKATOM on 4 August 2014, indicating « *ces enfants [(153) enfants associés au mouvement] son identifiés dans les localités Pissa, Mbata, Batalimo, et Mongounba* »)

⁵⁶ CAR-OTP-2071-0197, 0200-0201.

⁵⁷ The Screening Note was provided in Pre-Confirmation INCRIM package 23, 3 September 2019.

⁵⁸ *See* CAR-OTP- 2074-3011 (detailing, *inter alia*, [REDACTED]. *See also* CAR-OTP-2074-3015, ([REDACTED])). *See e.g.* ICC-01/14-01/18-1-Red, para. 22 (wherein Pre-Trial Chamber II “notes that Yekatom is a CAR MP and retains strong influence over his (former and current) Anti-Balaka subordinates, in particular in Lobaye Prefecture, which could allow him to reach, intimidate, or harm (potential) witnesses, their families or other individuals cooperating with the Court”) (emphasis added).

- “There were children in the Anti-Balaka in PISSA and SEKIA bases ... The children were already there [REDACTED]. I did not find out how long they had been there. I do not know how they joined the Anti-Balaka or where they came from exactly”;⁵⁹
- “Many of [the children] were from the provinces where the Anti-Balaka movement started and a few of them were from the surrounding communities. Some of them were orphans and others had their families killed or were separated from their parents by the Seleka and they decided to join the movement ... [REDACTED];⁶⁰
- “Some of the children were under the age of 18, while others were below 15. I would not know how many of them were under the age of 18 or 15. They had no weapons. YEKATOM gave an order for the children not to touch weapons [REDACTED];”⁶¹
- “[REDACTED]. Some of these children knew YEKATOM from his time in the bush and they greeted him. ... [REDACTED]”;⁶² and
- “The children lived among the elements. Some, especially the older ones, dressed in military uniforms. They wore gris-gris. Some of the children enjoyed being amongst the elements, for example being at the barricades. However they were not searching vehicles or manning the barricades. The children were not given any tasks to do. They were given food which they would cook and eat. They would then play amongst themselves.”⁶³

P-2013’s statement was provided to the YEKATOM Defence on 13 June 2019.⁶⁴

44. Subsequently, P-2013 was interviewed by the YEKATOM Defence on 23-24 November 2019. In his interview with the Defence, P-2013 confirmed the circumstances in which [REDACTED],⁶⁵ including that there were children at the PISSA and SEKIA bases;⁶⁶ that the children ranged in age between 14 and 17 years old;⁶⁷ that YEKATOM came every two or three days to SEKIA and also visited other bases at BATALIMO and BOUCHIA;⁶⁸ and that [REDACTED].⁶⁹ His signed Defence statement, thus confirms significant parts of his Prosecution interview. The Prosecution was alerted on [REDACTED],⁷⁰ [REDACTED].

⁵⁹ CAR-OTP-2075-1751, 1759, para. 33 (emphasis added).

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED]; see P-2018: ICC-01/14-01/18-T-222-Conf-Eng-ET, p. 36, l. 19-p. 37, l. 1 [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED]. The Statement was provided in Pre-Confirmation INCRIM package 11, 13 June 2019.

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED] (noting, “YEKATOM would visit the various Anti-Balaka camps where the children were from time to time”).

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

45. P-2013's information tracks the narratives and evidence provided by P-1974, P-2018, P-2475, and P-2476 in important aspects. His account of [REDACTED] (*i.e.*, YEKATOM's Group) also corresponds directly and/or circumstantially with the evidence adduced through Prosecution witnesses in Court. In particular, P-2013 stated:

- “[REDACTED] ”;⁷¹
- “[REDACTED] the objectives of the ESF were to protect children and to ensure that children should not be in armed groups. [REDACTED]”;⁷²
- “[REDACTED]”;⁷³
- “the ceremony in PISSA on the 4th August when the children were brought there. YEKATOM was present with some other elements”;⁷⁴ and
- “[REDACTED] ”.⁷⁵

ii. P-1972

46. P-2013 is not the only insider in YEKATOM's Group to confirm the presence of children among its ranks. The Prosecution also interviewed [REDACTED] (P-1792).⁷⁶ During his interview, P-1792 stated:

- “I can confirm that there were some children within the Anti-Balaka movement, in particular at the YAMWARA School base and in SEKIA. In my understanding, a child is someone under the age of 18.”⁷⁷
- “There were about 5 boys under the age of 18 at the YAMWARA School ... I believe all of these boys were under the age of 15. I cannot remember their names as they were all divided into various sections. I can tell that they were under the age of 15 because of

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED]; *see also* CAR-OTP-2128-1373 (agreement to discharge and to not re-recruit 153 children associated with the Anti-Balaka, identified at BATALIMO, MBATA, MONGOUMBA and PISSA, signed by YEKATOM, dated 4 August 2014); P-1974: ICC-01/14-01/18-T-227-Conf-Eng-ET, p. 60, l. 2-18 and P-1974: ICC-01/14-01/18-T-228-Conf-Eng-ET, p. 31, l. 3-5 (noting that the list of children was provided by the Anti-Balaka); P-2018: ICC-01/14-01/18-T-222-Conf-Eng-ET, p. 56, l. 7-14 (confirming that the Comzones provided the lists of children); P-2018: ICC-01/14-01/18-T-224-Conf-Eng-ET, p. 3, l. 2-4 (“It was the Anti-Balaka who [REDACTED]”).

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

their attitude and conduct and also their physical appearance ... The children were [REDACTED] I did not get to learn their history or where they had come from.”⁷⁸

47. Once again, this information comes directly from a member of YEKATOM’s [REDACTED] during the relevant period. Like P-2013, P-1792 attests to the presence of children under 15 in YEKATOM’s Group. Although he does not state that these children were present in SEKIA – his statement is consistent with P-2013 insofar as it confirms that there were children based there. Moreover, and importantly, it is also consistent with the narratives and evidence of Prosecution witnesses in respect of Count 29 included in the Impugned Evidence.

48. For instance, P-1792 stated that:

- “YEKATOM was aware that the boys [referencing the 5 boys] were in the Anti Balaka because when he inspected the elements he did it section by section in the military style. It would have been obvious to him that they were children”; ⁷⁹
- “In general their duties were the same as everyone else: two days manning the barrier and two days cooking. This applied to men, women and children. In the case of being attacked everyone was expected to take part in the defence. The children did not have automatic weapons but had hunting guns and machetes”; ⁸⁰
- “One of the children was [REDACTED] he was under the age of 15. I do not know his exact age but I think he could have been above 11 years at the time. He was very small and he was always trying to impose authority on civilians. He was frequently overstepping his authority in a childish way [REDACTED]”; ⁸¹ and
- “He [the child under 15] was a fighter and was engaged in operations in the bush just like all the other adult elements [REDACTED].” ⁸²

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED]; P-2476: CAR-OTP-2114-0149, at 0154, para. 35 (“I was not given a firearm. I had a large kitchen knife with me to defend myself and the base”); P-2476: ICC-01/14-01/18-T-213-Conf-Eng-CT, p. 22, l. 2-3 (“We had knives as our weapons. We didn’t have war arms or firearms. As our weapons, we had knives”); P-2082: CAR-OTP-2109-0452, 0463, para. 52 (noting, “[t]he younger ones [REDACTED] were taught to handle guns using sticks by the leaders of their groups”).

⁸¹ See CAR-OTP-2075-1743, 1745, para. 13 (emphasis added).

⁸² See CAR-OTP-2075-1743, 1745, para. 14 (emphasis added) ; see (P-1974): ICC-01/14-01/18-T-227-Conf-Eng-ET, p. 14, l. 24-p. 15, l. 4 (noting, that many children informed ESF they had joined the Anti-Balaka from 5 December 2013 when the Anti-Balaka attacked BANGUI); CAR-OTP-2068-0222, at 0226, para. 20.

P-1792's statement thus confirms, not only the presence of children under 15 in YEKATOM's Group, but their roles as 'child soldiers',⁸³ their participation in operations, and YEKATOM's actual knowledge of these circumstances. Again, in this respect, it is information demonstrably consistent with, and supportive of the reliability of the Impugned Evidence.

1. P-1792's statement was duly disclosed to the Defence in July 2020.⁸⁴ The Request makes no mention of it.

49. In addition to the above, as regards the role of ESF, P-1792 further provided the following information:

- "I know that Non-Governmental Organisations like *Enfants Sans Frontières (ESF) and UNICEF worked towards getting the Children out of the Anti-Balaka movement*. ... [REDACTED]";⁸⁵
- "[REDACTED]";⁸⁶
- "[REDACTED] UNICEF with the aim of seeking authorisation from YEKATOM to get children out of the Anti-Balaka ... because he was the commander";⁸⁷ and
- "[REDACTED] a list of children was presented to UNICEF. I do not know who prepared the list ... However *not all the children on the list* were in the Anti-Balaka or were associated with the Anti-Balaka ... *Some parents took advantage of the initiative and asked YEKATOM to include their children on the list so that they could benefit from the training*. I know this because [REDACTED]. I believe YEKATOM agreed to include the children in the reintegration programme because he wanted to enhance his reputation in the area and because he was looking to be a candidate for election as a Member of Parliament."⁸⁸

50. P-1792's information is consistent with the Impugned Evidence. It bears on the assertions made in the Request regarding the "fraudulent nature of the 2014 ESF Programme,"⁸⁹ and establishes as the presence of children under 15 years in YEKATOM's Group notwithstanding.

⁸³ See also CAR-OTP-2075-1743, 1746 (noting that children were trained by Comzones, treated as adults, subject to discipline as elements, and manned road barriers).

⁸⁴ The Statement of P-1792 was provided in Pre-Trial INCRIM package 40, 13 July 2020.

⁸⁵ [REDACTED]; P-2018: ICC-01/14-01/18-T-222 ET, [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

⁸⁹ ICC-01/14-01/18-2240-Conf, paras. 27, 54, 59, 64, 67, 125.

And, even if some children may not have been previously recruited, again, it is clear that others were.

b. Other extrinsic evidence is consistent with the salient aspects of the Impugned Evidence on Count 29

51. Other evidence confirms that children under 15 were enlisted in the Anti-Balaka, including YEKATOM's Group and thus the reliability of the Impugned Evidence and the adequacy of the Prosecution's investigations.

52. Count 29 is not limited to children identified in connection with the ESF program.⁹⁰ the Confirmation Decision places no such limit on its scope. Nor, does it circumscribe YEKATOM's contributions. Rather, the Confirmation Decision⁹¹ broadly charges:

“(vii) conscription, enlistment and use of children under the age of fifteen years to participate actively in hostilities, pursuant to and prohibited by article 8(2)(e)(vii) of the Statute, for the conscription and/or enlistment of children into his group at various locations, including Boeing, Sekia and Pissa along the PK9- Mbaïki axis and in Batalimo along the Pissa-Mongoumba axis, and the assignment of a variety of tasks to them, such as, inter alia, participating in hostilities, including the 5 December 2013 Attack, between at least December 2013 and August 2014, as set out in paragraphs 359-360 of the DCC and paragraphs 144-152 of the present decision (Count 29)”;⁹²

It moreover provides that YEKATOM's contributions consisted in:

“... (iv) conscripting and/or enlisting children under the age of fifteen years into his group and using them to assist him in the camp-bases, giving orders for them to be stationed at barriers and checkpoints as well as to actively participate in hostilities.”⁹³

Evidence and information extrinsic to the Impugned Evidence, such as including that of P-2084, P-5015, P-1962, P-0808, P-1839, and P-1339 confirms that, contrary to the Defence's contentions,⁹⁴ children under 15 were recruited into YEKATOM's Group irrespective of the underlying purpose,⁹⁵ and apart from ESF's activities.

⁹⁰ ICC-01/14-01/18-2240-Conf, AnxB (Prosecution email to the Yekatom Defence, dated 14 July 2023 noting “[REDACTED]”).

⁹¹ ICC-01/14-01/18-403-Corr-Red (“Confirmation Decision”).

⁹² ICC-01/14-01/18-403-Corr-Red, p. 105.

⁹³ ICC-01/14-01/18-403-Corr-Red, p. 105.

⁹⁴ See e.g. ICC-01/14-01/18-2240-Conf, para. 7.

⁹⁵ The Statute imposes no ‘purpose’ requirement with regard to enlisting children into an armed group. Thus, their enlistment – even temporarily – in pursuit of a political, military, or criminal objective of the group, does not negate a culpable act of recruitment.

ii. P-2084

53. The Prosecution interviewed Roger OKOA-PENGUIA (P-2084) in November 2018. He stated:

- “On 30th January 2014 I saw children in the towns of PISSA and, MBAKI who were with the Anti Balaka. The children were armed with knives and machetes, wearing gri-gris. The children were amongst the adult Anti-Balaka when they were maintaining security in PISSA. These children were aged from 10 upwards and were part of the Anti-Balaka. The very young children, for instance the 10 year olds did small jobs, gathering intelligence, fetching water and so on. As a father and grand-father I can estimate accurately the ages of the children that I saw. Children from BIMBO to PISSA joined the Anti-Balaka. At first there were many children amongst the Anti-Balaka, but later they were released. I never asked YEKATOM why there were children amongst his ranks, nor did I ask him or them about their ages.⁹⁶

P-2084’s statement is probative of, and consistent with P-1974’s testimony that he observed children between nine and 15 years at the Anti-Balaka checkpoint at PISSA⁹⁷ and P-2018’s confirmation of children under the age of 15 years old at roadblock there.⁹⁸ It is also consistent with P-1974’s observation of six children “at the SEKIA checkpoint [who] told me that they were Anti-Balaka. ... I estimated there ages to be between 10-18 years old.”⁹⁹

iii. P-5015

54. Such observations are not unusual or unique. In fact, YEKATOM’s first Defence witness Guerrino PERIN’s (P-5015) testimony is also consistent with these narratives, in describing the Anti-Balaka’s enlistment of ‘*petits enfants*’ based on his personal encounter with them at a road block on the MBAIKI – BODA axis. P-5015 explained how Anti-Balaka youths used small children within the Group:

⁹⁶ CAR-OTP-2094-0968, 0985, para. 87; see P-2476: ICC-01/14-01/18-T-213-Conf-Eng-CT, p. 48, l. 22-23 (confirming that certain children wore gris gris); P-2018: ICC-01/14-01/18-T-222-Conf-Eng-ET, p. 24, l. 8-13 (same).

⁹⁷ See ICC-01/14-01/18-T-227-Conf-Eng-ET, p. 22, l. 3-22 ; see also CAR-OTP-2068-0222, at 0228, para. 36.

⁹⁸ See ICC-01/14-01/18-T-222-Conf-Eng-ET, p. 23, l. 10-11, p. 23, l. 19-p. 24, l. 4, p. 24, l. 18-23, p.25, l.6-14.

⁹⁹ See CAR-OTP-2068-0222, at 0227, para. 35; see ICC-01/14-01/18-T-227-ET, p. 19, l. 1-p. 20, l. 6, p. 21, l. 24-p. 22, l. 2.

- “those who were responsible for the checkpoints, they're not the ones who are going to open it, they're going to lift up the wood, but they send children, ... they are the ones who go and take the wood away when they've seen you ... ”¹⁰⁰
- “When I say small children, they are running around everywhere and they were the ones who were doing the work of taking away the roadblock, but they weren't the ones who were commanding, it was the other ones [the youth] who were sitting behind their houses.”¹⁰¹
- “... to carry out the manual work of lifting up the wood, they sent children. These children would run to take it away. So what age the child had, what age the others had, I couldn't say that. The children have 10 years, 12 years, the ones who are running around.”¹⁰²

55. P-5015's observations are not connected to the Impugned Evidence, yet they align with the salient aspects thereof demonstrating that the Anti-Balaka recruited children under the age of 15 years old. As such, it also bolsters the reliability of that evidence with regard to YEKATOM's Group along with the sufficiency and reasonableness of the Prosecution's investigative actions and decisions in discharging its statutory obligations. The Defence's assertions to the contrary are speculative and unsubstantiated.

iv. P-1962 and P-0808

56. The evidence of other Anti-Balaka [REDACTED] is also consistent with the group's ubiquitous practice of recruitment of children. Thus, [REDACTED] (P-1962) and Anti-Balaka National Coordination Political Advisor Alfred NGAYA (P-0808), both provide evidence probative of Count 29 and in-line with the Impugned Evidence. P-1962 particularly describes [REDACTED] Anti-Balaka's undertaking to relinquish [REDACTED] children associated with the group between the ages of eight to 14.¹⁰³

57. Similarly, P-0808 – who appeared on behalf of the Anti-Balaka National Coordination at the 5 August 2014 demobilisation ceremony in MBAIKI — stated “I learned that there were children associated with ROMBHOT's group.”¹⁰⁴ He also admitted that “[t]here were certainly

¹⁰⁰ ICC-01/14-01/18-T-256-Eng-ET, p. 15, l. 6-9.

¹⁰¹ ICC-01/14-01/18-T-256-Eng-ET, p. 15, l. 16-21; P-1974: ICC-01/14-01/18-T-227-Conf-Eng-ET, p. 20, l. 18-p. 21, l. 11 (similarly observing children between 10-14 at an Anti-Balaka barrier).

¹⁰² ICC-01/14-01/18-T-256-Eng-ET, p. 17, l. 20-25.

¹⁰³ See CAR-OTP-2107-6808, 6823 (emphasis added).

¹⁰⁴ CAR-OTP-2093-0010, 0034, para. 136 (noting further, “I reported to NGAISSONA after the ceremony, and we discussed it with the Coordination”, at 0034, para. 130).

children in the Anti-Balaka in other provinces.”¹⁰⁵ And, he explained how “[t]he Anti-Balaka would then take them in, feed them and give them little jobs to do ... They would eat together and sleep together. They could be aged from 8-15 years old.”¹⁰⁶

v. P-0888

58. Anti-Balaka National Coordination member Vivien BEINA (P-0888) similarly provided evidence tending to show that underage children were present in YEKATOM’s Group during the relevant period, which is consistent with the Impugned Evidence. P-0888 confirmed seeing children in the Anti-Balaka “with [his] own eyes”, and recounted how one of his uncle’s children joined YEKATOM’s Group.¹⁰⁷ While he could not recall the exact age of the child, he approximated their age to be around 16 or 17, but added that there were “similar cases” of children who became associated with YEKATOM’s Group.

59. P-0888 confirmed that the presence of children in armed groups was an “open secret”, and that “wherever there were armed groups, uncontrolled children joined those groups and stayed with them.”¹⁰⁸ He added:

- “[i]f I am telling you about children in the armed groups, well, because Rombhot, when he was in his base, when I arrived at his base, at his residence, I saw at least five, six children ... these were children that had fled violence and he was protecting them in his house. He *fed them and they were under his guardianship.”¹⁰⁹

60. While P-0888’s evidence is not dispositive of Count 29 – it is probative thereof, and conforms with the narrative and testimony revealed in the investigation and trial, including salient aspects of the Impugned Evidence. As such, it too demonstrates the reliability of the Impugned Evidence, and contradicts the Defence’s central assertion that it is wholly unreliable and fraudulent. Moreover, it undermines the Defence’s contrived claim that the Prosecution’s alleged failings were ‘intentional’¹¹⁰ in respect of obtaining fabricated evidence to falsely implicate YEKATOM in the recruitment of children under 15.

¹⁰⁵ CAR-OTP-2093-0010, 0035, para. 137; *see also e.g.*, P-0889 [REDACTED] CAR-OTP-2122-8146, at 8184-8185, l. 1338-1371 (describing a 13 to 14 year old in the ranks [REDACTED]).

¹⁰⁶ CAR-OTP-2093-0010, 0035, para. 138 (emphasis added).

¹⁰⁷ *See* ICC-01/14-01/18-T-120-Conf-Eng-CT2, p. 76, l. 1-24.

¹⁰⁸ *See* ICC-01/14-01/18-T-120-Conf-Eng-CT2, p. 77, l. 5-17.

¹⁰⁹ ICC-01/14-01/18-T-120-Conf-Eng-CT2, p. 78, l. 12-20.

¹¹⁰ ICC-01/14-01/18-2240-Conf, para. 146.

vi. P-1839 and P-1339

61. [REDACTED] (P-1839), a member of YEKATOM's Group, testified under oath to children being in the ranks of the Group at the YAMWARA School base, describing one as "an element",¹¹¹ "[REDACTED]",¹¹² and approximately "11, 12 years old."¹¹³ Another member of the Group, [REDACTED] (P-1339), similarly estimated the same child as being around 14 or 15.¹¹⁴ Again, this evidence underscores the reliability of the Impugned Evidence.

62. Finally, as noted above, YEKATOM himself executed an agreement to demobilise children in his Anti-Balaka Group on 4 August 2014 at a ceremony in PISSA. Notwithstanding the Defence's early protestation regarding his signature on the document,¹¹⁵ the signing is recorded on video.

63. The agreement, signed by YEKATOM in his claimed capacity as « *premier responsable du Haut Commandement des Anti-Balaka de la Zone Sud* » provides as follows:

« Reconnaiss et prends la ferme résolution de libérer cent cinquante trois (153) enfants associés au mouvement. Ces enfants sont identifiés dans les localités : Pissa, Mbata, Batalimo et Mongoumba.

*Conformément à la Résolution 1612 du Conseil de Sécurité des Nations - Unies, établissant les six (6) graves violations des Droits de l'enfant, dont le recrutement, je prends l'engagement de les libérer et de ne plus ré-enrôler dans l'avenir ».*¹¹⁶

64. The contents of this voluntary undertaking and effective admission by the Accused are consistent with the salient aspects of the Impugned Evidence, the information yielded in the course of the Prosecution's deliberative and careful investigation of Count 29; and indeed, the non-impugned evidence adduced and submitted during the course of trial.

2. Retention of the Impugned Evidence is neither antithetical to nor seriously damages the integrity of the proceedings

65. The Defence fails to establish that the nature of the infirmities alleged in the Request are such that they pose a danger that the Chamber's mere consideration of the Impugned Evidence is antithetical to and would seriously damage the integrity of these proceedings. Contrary to

¹¹¹ ICC-01/14-01/18-T-170- Conf-Eng-ET, p. 67, l. 5-8.

¹¹² ICC-01/14-01/18-T-172-Conf-Eng-ET, p. 54, l. 16-25 (notably, [REDACTED]).

¹¹³ ICC-01/14-01/18-T-170-Conf-Eng-ET, p. 68, l. 6-13; see ICC-01/14-01/18-T-171-Conf-Eng-CT, p. 6, l. 2-3.

¹¹⁴ ICC-01/14-01/18-T-155-Conf-Eng-ET, p. 32, l. 18-23.

¹¹⁵ See e.g. ICC-01/14-01/18-T-032-Conf-Eng-CT3, p. 92, l. 22 – p. 94, l.12.

¹¹⁶ See CAR-OTP-2128-1373.

the Request, the Impugned Evidence is appropriately before the Chamber to assess its reliability and weight.

66. The Chamber's consideration of the Impugned Evidence as a whole does not present any heightened risk to the integrity of the proceedings, much less that it would be antithetical or seriously damaging.

67. *First*, the Chamber is comprised of experienced professional judges. As such, it is perfectly able to assess and weigh the Impugned Evidence concerning Count 29 holistically, and in the context of other credible and reliable evidence before it.

68. As 'triers of fact' in international courts, professional judges are in a markedly different position from lay juries, which require much greater safeguards concerning the submission of evidence. There is no reason for the Chamber to screen itself from the Impugned Evidence in view of its article 74 deliberations, or to preclude its considered evaluation in the circumstances, particularly given its competing obligations.¹¹⁷ Thus, the Court has previously recognised that:

“[u]nlike situations where submitting marginally relevant or prejudicial material may unduly compromise the proceedings, such as when these materials are introduced in trials where fact-finding is done by a jury, *these issues do not apply when professional judges are evaluating the evidence presented.*”¹¹⁸

Similarly, the ICTY Appeals Chamber has observed that:

“Judges of the Tribunal, as professional judges, are able to weigh evidence and consider it in its proper context, or when applicable, to disregard any particular piece of evidence they have heard or read. Furthermore, they are required to write a reasoned decision, which is subject to appeal.”¹¹⁹

69. The professionalism of the Court's judiciary has also been noted in other contexts such as in determining matters of disqualification, particularly:

¹¹⁷ See article 64(9) and Rule 63(2) (authorising the Chamber's consideration “to assess freely all evidence submitted).

¹¹⁸ ICC-01/05-01/13-1285, para. 12 (emphasis added), see ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 8 March 2018, para. 599 (cited with approval by the Appeals Chamber).

¹¹⁹ See *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 31 (internal citations omitted).

“it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.”¹²⁰

70. *Second*, virtually all of the issues raised in the Request concerning alleged infirmities in the Impugned Evidence have been brought to the Chamber’s attention through previous filings and during the examination of witnesses in Court.¹²¹ The Chamber is already fully conversant with the issues, given that the Defence has previously advanced them, and will account for this in its evaluation of the Impugned Evidence.

71. The Defence’s suggestion that the Impugned Evidence may have “contaminate[d] genuine and probative evidence in the minds of the judges”,¹²² is ill founded.¹²³ The argument that the exclusion of the Impugned Evidence would somehow prevents the Chamber’s exposure to it is unpersuasive. As Trial Chamber IX reasoned in the context of carrying out admissibility determinations: “if this contention were true the Chamber would be tainted in the process of ruling on the admissibility of the evidence”¹²⁴ in the first place. Granting the Request here would not allay a similar concern.¹²⁵

72. There is no basis to discount the Chamber’s express and repeated assurances during the course of trial that it will duly consider all of the evidence before it holistically and in its proper context. Indeed, this the appropriate course in the circumstances.

73. In sum, the Defence has failed to show that the Impugned Evidence should be excluded under article 69(7).

C. The Request fails to establish grounds for reconsideration of the Chamber’s prior determinations on the submission of the Impugned Evidence

74. As shown above, the Request is not truly grounded in an article 69(7) issue. Rather, it raises a challenge of the standard evidentiary criteria under article 69(4). Having raised the same challenges before, the Request attempts to recharacterise them under article 69(7)

¹²⁰ See e.g. ICC-01/05-01/13-511-Anx, para. 18; see also ICC-01/12-01/18-398-AnxI, para. 19 (internal citations omitted).

¹²¹ See ICC-01/14-01/18-2195-Conf, para. 10.

¹²² ICC-01/14-01/18-2240-Conf, para. 150.

¹²³ See *contra* *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 269.

¹²⁴ See ICC-02/04-01/15-1546, para. 32.

¹²⁵ ICC-01/14-01/18-2240-Conf, para. 150 (arguing that “evidential debris has ample opportunity to contaminate genuine and probative evidence in the minds of the judges”).

circumventing the requirements for the Chamber’s reconsideration of its prior determinations on the submission of the Impugned Evidence.

75. In essence, the Defence argues that the Impugned Evidence should not be accepted because it is “untruthful or unreliable”¹²⁶ as the product of an alleged Conspiracy.¹²⁷ That evidence may be untruthful or unreliable attends to the Chamber’s discretionary power to determine its admissibility¹²⁸ or, under the ‘Submission Approach’,¹²⁹ the “standard evidentiary criteria (namely the relevance, probative value and potential prejudice).”¹³⁰ The Chamber has already accepted and/or recognised the formal submission of the Impugned Evidence in accordance with its Initial Directions on the Conduct of the Proceedings, on the basis that no procedural bar applies.¹³¹ Moreover, having done so, the Chamber has not revisited the matter, fully aware of the issues raised anew in the Request. Indeed, the Chamber recently noted that the Defence has:

“[REDACTED].”¹³²

76. As such, the Request requires the Chamber’s reconsideration of its prior determination to defer its assessment of the standard evidentiary criteria regarding the Impugned Evidence. Yet, it does not meet the well-established threshold for reconsideration, namely, that “a clear error of reasoning has been demonstrated or [] it is necessary to prevent an injustice.”¹³³ The retention of the Impugned Evidence in the case record — subject to the Chamber’s ultimate evidential assessment — presents no new circumstance amounting to an injustice absent reconsideration; nor, does the Request demonstrate that the Chamber otherwise erred in its prior determination to recognise and/or accept its formal submission.

¹²⁶ See ICC-01/14-01/18-2240-Conf, para. 129.

¹²⁷ See ICC-01/14-01/18-2240-Conf, para. 3.

¹²⁸ See ICC-01/14-01/18-631, para. 53; *see also* Article 69(4)

¹²⁹ See ICC-01/14-01/18-631, para. 53 (noting that, [c]onsequently, it will not rule on the admissibility of each item of evidence during the course of the proceedings).

¹³⁰ See ICC-01/14-01/18-631, para. 53; *see also* Article 69(4)

¹³¹ See ICC-01/14-01/18-631, paras. 54-55, 57.

¹³² See *e.g.*, ICC-01/14-01/18-2195-Conf, para. 10 ([REDACTED]) (emphasis added); *contra* ICC-01/14-01/18-2240-Conf, para. 6 (claiming that the Defence was only in a position to present the Request “at this juncture”).

¹³³ ICC-01/14-01/18-2068, para. 4 (internal citations omitted).

IV. CONCLUSION

77. For the reasons above, the Prosecution respectfully requests that the Request be denied.

A handwritten signature in blue ink, appearing to be 'K.A.A. Khan', with a horizontal line underneath the signature.

Karim A. A. Khan KC, Prosecutor

Dated this 12th day of February 2024

At The Hague, The Netherlands