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**International
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Court**

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Date: **21 November 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Public Redacted Version of the ‘Yekatom Defence Response to the
“Prosecution’s Request to present Additional Evidence for potential
Sentencing”, 6 September 2024, ICC-01/14-01/18-2679-Conf’, 13 September
2024, ICC-01/14-01/18-2693-Conf**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr Yekatom (“Defence”) hereby opposes, in part, the “Prosecution’s Request to present Additional Evidence for potential Sentencing”.¹ Specifically, Trial Chamber V (“Chamber”) should reject the Prosecution’s request for submission of the written statements of former Prosecution witnesses P-2013 and P-1792 (“Written Statements”) for the purposes of potential sentencing.² With regard to the Prosecution’s request for the submission of a video recording of the National Assembly incident,³ the Defence defers to the Chamber’s discretion.
2. The Written Statements, both of which are obtained from former Prosecution witnesses who were dropped in the main case, concern core allegations for which Mr Yekatom is charged with under Count 29 and as such, necessarily overlap with evidence which is already on the record. In this respect, the Prosecution offers no cogent basis as to why the Written Statements should be considered for sentencing purposes given the Chamber’s prior direction under Article 76(1).
3. Further, even if the Chamber considered that the Written Statements did not overlap with evidence which is already on the record, the evidence of both P-2013 and P-1792 must be heard *viva voce* so that their evidence is properly tested, irrespective of the application of the Rule 68 framework to evidence submitted for potential sentencing. Both accounts clearly concern the acts and conduct of Mr Yekatom and/or speak to issues which are materially in dispute, including serious allegations concerning the fabrication of evidence related to the ESF programme. The fact that the Prosecution has now changed its mind and has

¹ ICC-01/14-01/18-2679-Conf.

² CAR-OTP-2075-1751, CAR-OTP-2123-0536, and CAR-OTP-2075-1743.

³ CAR-OTP-2093-0830.

decided to rely on the evidence of P-2013 and P-1792 for sentencing purposes does not remove the Defence's right to examine such witnesses and to put their evidence to proof as it would have done had these witnesses been called during the course of the trial.

PROCEDURAL BACKGROUND

4. On 18 July 2024, Trial Chamber V ("Chamber") issued its "Decision on the Sentencing Procedure and Amended Directions on the Conduct of the Proceedings" ("Sentencing Procedure Decision") deciding to render any potential decision on sentencing pursuant to Article 76 of the Statute simultaneously with its judgement under Article 74 and setting a calendar for sentencing.⁴ *Inter alia*, the Chamber set the deadline for parties and participants to file any requests to present additional evidence for potential sentencing by 6 September 2024.⁵
5. On 6 September 2024, the Prosecution filed its request to present additional evidence for potential sentencing, *inter alia* requesting the submission of the written statements of P-2013 and P-1792 for potential sentencing arguing that they "provide direct *prima facie* evidence relevant to the Chamber's determination of the gravity of Count 29 and/or the manner of its commission, and the extent of the damage caused, in particular the harm caused to the child victims" ("Request").⁶

SUBMISSIONS

⁴ ICC-01/14-01/18-2600.

⁵ ICC-01/14-01/18-2600, para. 5.

⁶ ICC-01/14-01/18-2679-Conf, paras. 1, 3.

A. The Written Statements are not unique

6. The Prosecution argues that the Written Statements are unique and that they are not subsumed by the existing trial record, nor unduly cumulative.⁷ In making this argument, the Prosecution falsely characterises its reliance on the Written Statements.
7. It is incontestable that the Written Statements relate to core issues as they bear directly on the substance of the crimes charged under Count 29. Moreover, they bear on the Defence's extensive submissions on the fabricated evidence related to Count 29, particularly with regard to the ESF program. In fact, the Prosecution has previously acknowledged this point, explicitly stating that it cannot be plausibly asserted that the "serious allegations impugning ESF's role in respect of the charges arising under Count 29 [are] not a core issue".⁸
8. Considering that the Prosecution has consistently maintained the existence of children under 15 years in Mr Yekatom's group and the reliability of the evidence related to the ESF program,⁹ P-2013 and P-1792's evidence is hardly "unique". In fact, the Prosecution has repeatedly attempted to rely on these individuals **during trial proceedings** despite not having called them as witnesses in a feigned attempt to impugn the Defence's posture on the matter.¹⁰ The Request itself is therefore no more than a last-ditch attempt by the Prosecution to put untested material before this Chamber.
9. Indeed, if the Written Statements were truly unique then it raises the question as to why the Prosecution exercised its discretion in dropping both P-2013 and P-1792 during the presentation of its own case given that both concern highly

⁷ ICC-01/14-01/18-2679-Conf, para. 8.

⁸ ICC-01/14-01/18-2578-Conf, paras. 14-17. See also ICC-01/14-01/18-2583-Conf, paras. 8-10.

⁹ See *inter alia* ICC-01/14-01/18-2313-Conf, paras. 31 *et seq.*, ICC-01/14-01/18-2578-Conf, paras. 9-12, ICC-01/14-01/18-2583-Conf, paras. 11-13.

¹⁰ ICC-01/14-01/18-2313-Conf, paras. 38-50, ICC-01/14-01/18-2480-Conf, para. 19, ICC-01/14-01/18-2578-Conf, paras. 9-12, ICC-01/14-01/18-2583-Conf, paras. 11-12.

contested allegations and having taken several statements from both individuals.¹¹ In the absence of any such explanation, the Trial Chamber is entitled to make the logical conclusion that the Written Statements are not truly unique and are therefore neither suitable nor necessary for submission for sentencing purposes in accordance with Article 76(1).¹²

B. If the Written Statements are truly unique then they should be tested

10. The Prosecution cannot have it both ways. If the Written Statements provide truly unique, and credible, evidence then the witnesses must be called irrespective of whether the Rule 68 framework applies at the sentencing stage. Both statements pertain to core issues related to Count 29 and are now being introduced by the Prosecution in order to protract the overall sentence that Mr Yekatom may potentially serve. In such circumstances, the relevant sentencing factor – be it under Article 78 or Rule 145 – must be established to the criminal standard of proof.¹³ Accordingly, and contrary to the Prosecution’s submissions,¹⁴ the Defence would be significantly prejudiced by the introduction of the Written Statements without examination given the purpose for which they are tendered.
11. According to the Prosecution, the Written Statements are necessary to the Chamber’s assessment of the gravity of Count 29 and/or the manner of its commission, and the extent of harm inflicted on the recruited children as victims.¹⁵

¹¹ The Defence highlights that the Prosecution has spent over 21 hours interviewing P-1792 (as reflected on the cover page of witness statements CAR-OTP-2064-0822-R01, CAR-OTP-2069-0003-R01, and CAR-OTP-2075-1743-R01) and 17 hours interviewing P-2013, resulting in a statement with barely 10 pages of substantive content (CAR-OTP-2075-1751-R01).

¹² ICC-01/14-01/18-2600-Conf, para. 4.

¹³ Trial Chamber I, *The Prosecutor vs. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, [ICC-01/04-01/06-2901](#), 10 July 2012, para. 33.

¹⁴ Request, para. 17.

¹⁵ ICC-01/14-01/18-2679-Conf, para. 8.

12. Previous Chambers have measured the gravity of the crime by assessing *in abstracto* the constitutive elements of the crime and the mode of liability as well as *in concreto* the particular circumstances of the case looking at the degree of harm caused by the crime and the culpability of the perpetrator. In this regard, a Chamber will base itself primarily on the findings in the judgement.¹⁶
13. It follows from the above that the Chamber's assessment of the gravity of the crime is premised on main case evidence meaning that the burden of proof is the same as during the trial phase, requiring evidence to be proven beyond a reasonable doubt.
14. The Defence further notes that Trial Chamber VI, in its analysis of the gravity of the crimes of which Mr Ntaganda was convicted, took into account only the damage and harm that in its assessment was proven *beyond reasonable doubt* and could be directly linked to the crimes and culpable behaviour of Mr Ntaganda.¹⁷ The same chamber emphasised, in response to an argument in relation to the scale of the crime that the number of victims on which the Chamber made specific findings did not reflect the full extent of the recruitment and use of child soldiers, that it could only rely on findings which it had made *beyond a reasonable doubt* on the basis of the evidence before it.¹⁸
15. Moreover, the jurisprudence of this Court suggests that certain facts may reasonably be considered under more than one category. What matters is not the specific category in which a factor is placed, but that the Trial Chamber identifies all relevant factors, ensuring that no single factor is relied upon more

¹⁶ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Sentencing judgment, [ICC-01/04-02/06-2442](#), 7 November 2019, para. 11 (hereinafter "*Ntaganda* Sentencing Judgment"). See also Appeals Chamber, *The Prosecutor vs. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", [ICC-01/04-01/06-3122](#), 1 December 2014, paras. 40, 62 (hereinafter "*Lubanga* Sentencing Appeal Judgment").

¹⁷ *Ntaganda* Sentencing Judgement, para. 49, footnote 145. The Defence further notes that Trial Chamber VI considered the harm and the impact of the crimes under its gravity assessment.

¹⁸ *Ntaganda* Sentencing Judgement, para. 182. In this regard, see also Trial Chamber I, *The Prosecutor vs. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, [ICC-01/04-01/06-2901](#), 10 July 2012, para. 50.

than once.¹⁹ In this regard, the Appeals Chamber has explained that the gravity of the crime, the extent of the damage caused, the degree of participation of the convicted person mentioned in Rule 145(1)(c) and the aggravating circumstances listed in Rule 145(2)(b) are not “neatly distinguishable and mutually exclusive categories”.²⁰ In the same vein, previous Chambers have considered Rule 145(1)(c) factors as relevant to their assessment of the gravity of the crime²¹ or to show the existence of aggravating and mitigating circumstances.²²

16. The possibility that factors not considered in the Chamber’s assessment of gravity may be taken into account separately as aggravating circumstances, in which case the Chamber would need to be convinced of their existence beyond a reasonable doubt,²³ further underscores that P-2013 and P-1792’s evidence must be tested in order for the Chamber to make a determination of the gravity of Count 29 to the same criminal standard of proof. P-2013 and P-1792 must therefore be heard *viva voce*, allowing the Defence the opportunity to properly

¹⁹ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, [ICC-01/05-01/13-2276-Red](#), 8 March 2018, para. 112; *Lubanga* Sentencing Appeal Judgment, para. 85; *Ntaganda* Sentencing Judgement, para. 13.

²⁰ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”, [ICC-01/05-01/13-2276-Red](#), 8 March 2018, para. 112.

²¹ *Lubanga* Sentencing Appeal Judgment, paras. 61-66; Trial Chamber I, *The Prosecutor vs. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, [ICC-01/04-01/06-2901](#), 10 July 2012, para. 33; *Ntaganda* Sentencing Judgement, para. 16. See also Trial Chamber II, *The Prosecutor v. Germain Katanga*, Decision on Sentence pursuant to article 76 of the Statute, [ICC-01/04-01/07-3484-tENG-Corr](#), 23 May 2014, paras. 44-69.

²² Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, [ICC-01/05-01/08-3399](#), 21 June 2016, para. 13; Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, [ICC-01/12-01/15-171](#), 27 September 2016, para. 69; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Sentence pursuant to Article 76 of the Statute, [ICC-01/05-01/13-2123-Corr](#), 22 March 2017, para. 22.

²³ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Sentence, [ICC-02/04-01/15-1819-Red](#), para. 53; *Ntaganda* Sentencing Judgement, para. 17.

test their evidence before the Trial Chamber in order for this burden to be discharged.²⁴

17. In this regard, the Defence recalls that there are serious credibility issues in relation to both P-2013 and P-1792.
18. Rather than leading P-2013 and P-1792's evidence during the main case, the Prosecution chose not to call these witnesses²⁵ despite now averring that their evidence – which goes to core allegations under Count 29 – is “unique”. Although the Prosecution has failed to articulate the reasons for not calling either witness during the course of its case, the reasonable inference is that there are serious questions concerning the reliability and credibility of P-2013 and P-1792's respective testimonies which would not pass muster under examination.
19. The Prosecution's attempt to now introduce these statements for the purposes of potential sentencing without it being tested is all the more alarming in light of the Defence's repeated and consistent submissions on the fabrication of evidence that has tainted Count 29,²⁶ and is completely contrary to the determination of the truth.
20. In this regard and more specifically in relation to P-1792, the Defence recalls that he is a central figure in the account of P-2582 – another dropped Prosecution witness – who claimed that P-1792: (i) was the head of [REDACTED],²⁷ (ii) had violently [REDACTED]²⁸ and (iii) [REDACTED].²⁹ The Chamber is aware that it is the Defence's position that P-2582 – along with

²⁴ The Defence recalls that whilst P-2013's statement derives from the Defence's interview pursuant to the Contact Protocol this is not considered to be sufficient to allow a party a meaningful opportunity to examine a witness under circumstances approximating a trial see ICC-01/14-01/18-2405-Conf, para. 15.

²⁵ The Defence notes that although the Prosecution relied on P-2013 and P-1792 in the Document Containing the Charges particularly to argue that Mr Yekatom enlisted children under the age of 15 into his group (ICC-01/14-01/18-282-Conf-AnxB1, see paras. 359-361), the witnesses were not included in its Final List of Witnesses (ICC-01/14-01/18-724-Conf-AnxA).

²⁶ See *inter alia* ICC-01/14-01/18-2240-Conf; ICC-01/14-01/18-2611-Conf; ICC-01/14-01/18-2673-Conf.

²⁷ CAR-OTP-2117-0060-R01.

²⁸ CAR-OTP-2117-0605-R05.

²⁹ CAR-OTP-2127-3960-R02.

others – has fabricated her account in order to financially benefit from these proceedings.³⁰ It is P-2582's conduct, along with others, which compromises the Prosecution's case on Count 29.

21. Tellingly, the Prosecution has refuted the Defence's submission by relying on P-1792's (and P-2013's) statements³¹ in a contrived effort to undermine the Defence's position on the matter by essentially claiming that irrespective of whether P-2582, and/or others, had fabricated their accounts, there was still "substantial non-impugned evidence [supporting] Count 29".³² The Defence must therefore be afforded its right to examine P-1792 and P-2013 in order to further disprove the Prosecution's contention which is of relevance to the Chamber's determination of the gravity of Count 29.³³

C. The statements of P-2013 and P-1792 do not meet the admissibility criteria under Rule 68(2)(b) should the Chamber be minded to apply the Rule 68 framework

22. The Prosecution's request is entirely premised on the fact that the Rule 68 framework does not apply for sentencing purposes. However, and noting the Prosecution's position that it does not intend to call either P-2013 or P-1792,³⁴ should the Chamber decide that the procedural prerequisites of Rule 68 apply, the Defence submits that Written Statements fail to satisfy the admissibility criteria under Rule 68(2)(b).
23. According to Rule 68(2)(b) of the Rules, the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony: (i) goes to proof of a matter other than the acts and conduct of the accused and (ii) is

³⁰ See ICC-01/14-01/18-2240-Conf.

³¹ ICC-01/14-01/18-2313-Conf, paras. 38-50, ICC-01/14-01/18-2480-Conf, para. 19, ICC-01/14-01/18-2578-Conf, paras. 9-12, ICC-01/14-01/18-2583-Conf, paras. 11-12.

³² ICC-01/14-01/18-2313-Conf, para. 3.

³³ The Defence is preparing a disclosure request in relation to both P-1792 and P-2013 following the Prosecution's reliance on the same for sentencing purposes.

³⁴ ICC-01/14-01/18-2679-Conf, para. 17.

accompanied by a declaration by the testifying person, witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in Rule 68(2)(b)(ii) and (iii) of the Rules. In determining whether the introduction of prior recorded testimony falling under Rule 68(2)(b) of the Rules may be allowed, the Chamber shall consider several factors, including those listed in sub-rule (i) of this provision.³⁵

24. It is uncontestable that the Written Statements concern the acts and conduct of Mr Yekatom as described in the confirmed charges or which are otherwise relied upon by the Prosecution to establish the accused's criminal responsibility for the crimes charged.³⁶ Indeed, and as argued above, the core of P-2013 and P-1792's testimonies bear directly on Mr Yekatom's conduct within the specific context of the charged offences under Count 29. Moreover, they discuss Mr Yekatom's conduct with regard to his movement along the PK9 axis as charged under Counts 24 to 28.
25. On the one hand, P-2013's statements discuss the alleged structure and chain of command within Mr Yekatom's group, his presence at bases located in [REDACTED], the existence of children as young as 14 years old and their roles at the [REDACTED] bases and barricades under his command, and Mr Yekatom's involvement with the NGO ESF to demobilise children under his command.³⁷
26. On the other, P-1792's statement details the presence of children under the age of 15 years old at [REDACTED] who reportedly had the same duties as other members of the group, with Mr Yekatom allegedly aware of this. The statement

³⁵ ICC-01/14-01/18-1833-Conf-Corr, paras. 17-20.

³⁶ ICC-01/14-01/18-1833-Conf-Corr, para. 28.

³⁷ CAR-OTP-2075-1751, paras. 21, 22, 25, 28, 30, 31, 32, 33-37, 40, and 41; CAR-OTP-2123-0536, paras. 23, 27, 39, 41, 43, 47, 47, 63, 77-83, 85, 91-94.

also mentions Mr Yekatom's alleged order to [REDACTED] and his agreement to demobilise children from the Anti-Balaka in cooperation with ESF.³⁸

27. It follows from the above that the Written Statements contain significant references to Mr Yekatom's acts and conduct particularly relating to his intent and knowledge in relation to Count 29 which cannot be considered as merely peripheral or incidental. As previously argued by the Prosecution and conceded by the Chamber, "evidence regarding the presence or absence of children with Yekatom in his deployments especially is prohibited under Rule 68(2)(b)".³⁹

CONFIDENTIALITY

28. This Response is filed on a confidential basis as it responds to a filing of the same designation. A public redacted version will be filed in due course.

RELIEF SOUGHT

29. In light of the above, the Defence respectfully requests Trial Chamber V to:
- REJECT** the request for submission of the Written Statements for potential sentencing.

³⁸ CAR-OTP-2075-1743, paras. 8, 10, 11, 12, 13, 15, 18-19, 22, 23.

³⁹ See the Prosecution's Response to the "Second Defence Consolidated Request for Leave to add items to its List of Evidence, P-6046 & P-6042 to its List of Witnesses and submit their prior recorded testimony pursuant to Rule 68(2)(b)", ICC-01/14-01/18-2578-Conf, para. 8 and the Chamber's Decision on the Yekatom Defence Requests for Leave to Add Six Witnesses and Submission under Rule 68(2)(b) of the Rules, ICC-01/14-01/18-2598-Conf, para. 31, citing ICC-01/14-01/18-2578-Conf, paras. 5-8. The Defence further recalls the Chamber's decision, in relation to a Prosecution Rule 68(3) request, in which it ruled that P-2018's testimony needed to be heard *viva voce* due to the prospective content of his testimony in relation to certain matters concerning Count 29 see ICC-01/14-01/18-1743-Conf, para. 24.

RESPECTFULLY SUBMITTED ON THIS 21st DAY OF NOVEMBER 2024



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