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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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public with confidential Annex A

Yekatom Defence Response to the Prosecution's "Request for the Submission of Evidence from the Bar Table regarding the Prevalence of Sexual and Gender Based Violence", 4 January 2022, ICC-01/14-01/18-1233

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr. Yekatom (“Defence”) hereby responds (the “Response”) to the Prosecution’s Request for the Submission of Evidence from the Bar Table regarding the Prevalence of Sexual and Gender Based Violence (the “Request”).¹
2. The Defence opposes the Request in its entirety and submits it should be rejected *in limine* without prejudice for lack of procedural conformity.
3. Alternatively, the Defence opposes the submissions of 31 items through the Request, defers to the Ngaïssona Team with regard to the submission of 92 items and does not oppose to the submission of 17 items.

PROCEDURAL BACKGROUND

4. On 22 October 2021, the Prosecution through *inter partes* correspondence and in accordance with Initial Directions on the Conduct of the Proceedings (“Initial Directions”) ² sought the Defence and the Ngaïssona Defence’s position on a draft bar table motion in relation to 203 INCRIM items.
5. On 20 December 2021, the Ngaïssona Defence submitted its objections to all the 203 INCRIM items.
6. On 23 December 2021, the Defence provided the Prosecution with its position for each individual item.
7. On 4 January 2022, the Prosecution filed its Request asking for the formal submission of 140 INCRIM items.³

¹ [ICC-01/14-01/18-1233](#).

² [ICC-01/14-01/18-631](#), para. 62

³ [ICC-01/14-01/18-1233](#), para. 1.

8. On 10 January 2022, the Ngaïssona Defence requested an extension of time, until 11 February 2022, to respond to the Prosecution's Request.⁴ On 11 January 2022 the Chamber granted the extension of time.⁵

APPLICABLE LAW

9. Article 64 (9) (a) of the Rome Statute:

The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to: (a) Rule on the admissibility or relevance of evidence;

10. Article 69 (4) of the Rome Statute:

The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

11. Rule 64 of the Rules of Procedure and Evidence:

1. Procedure relating to the relevance or admissibility of evidence 1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 137, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

SUBMISSIONS

⁴ Email from the Ngaïssona Defence to the Chamber sent on 10 January 2022 at 16:47.

⁵ Email from the Chamber to the Parties sent on 11 January 2022 at 14:47.

12. The Defence contends that the Prosecution fell short of meeting the procedural requirement of the Initial Directions⁶ in not providing a short description of the probative value for each item it seeks to submit (I).
13. Alternatively, should the Chamber decide not to reject the Request *in limine*, the annex appended to this filing (“Annex A”) identifies for each item (1) the Defence’s position as to their admissibility and (2) the arguments of the Defence in support of its position. Complementary of the annex, the Defence develops specific arguments below in relations to items that should be found inadmissible (II) and items in relation to which the Defence defers to the position of the Ngaissona Defence (III).
14. The Defence notes that the Prosecution has not yet requested the submission of 54 Facebook-related items and 6 Yahoo!-related items which are absent from the annex.⁷ The Defence will address those 60 items once their formal submission is sought by the Prosecution.
15. The Defence also underlines that non-opposition to certain items and deferral to the Ngaissona Defence should not be read as a concession as to their probative value; likewise, as to whether evidence of the “prevalence of conflict-related SGBV in CAR” or prevalence of SGBV perpetrated by the Seleka is probative of the foreseeability of the Anti-Balaka’s commission and/or participation in SGBV crimes.⁸
16. Finally, the Defence notes the *Katanga* Decision which formulated that “if the same item of evidence could also prove another proposition than the one(s) for which it was tendered, the Chamber will not consider the evidence in

⁶ [ICC-01/14-01/18-631](#), para. 62.

⁷ [ICC-01/14-01/18-1233](#), para. 7.

⁸ [ICC-01/14-01/18-1233](#), para. 9.

relation to that additional proposition, unless the parties were given an opportunity to address this aspect of the evidence.”⁹

17. The Defence’s submissions as set out in Annex A are thus made without prejudice to its right to make additional submissions in the event that the Prosecution intends to rely on the tendered documents to prove a proposition other than those specifically set out in the Motion.

I. The Request should be rejected *in limine*

18. In line with long-standing jurisprudence of the Court,¹⁰ the Initial Directions in this case directed the Prosecution to provide within its bar table application a short description of the “asserted [...] probative value” for the items it seeks to submit.¹¹
19. This exercise appears to have been conducted by the Prosecution in other cases before the Court, and has consisted of providing a description of the probative value for *each* item included in the bar table request.¹² Moreover, it has been previously noted that this short or succinct description “should not be understood as deficient or incomplete. Parties are expected to fully litigate the relevance and admissibility of each item of evidence at the time it is submitted.”¹³

⁹ *Le Procureur v. Germain Katanga*, [Decision on the Prosecutor's Bar Table Motions](#), 19 December 2010, ICC-01/04-01/07-2635, para. 17; see also, Rule 64(1).

¹⁰ Katanga & Chui, [Directions for the conduct of the proceedings and testimony in accordance with rule 140](#), 1 December 2009, ICC-01/14-01/18-1665-Corr, para. 101.

¹¹ [ICC-01/14-01/18-631](#), para. 62.

¹² See for example, *The Prosecutor V. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mohamoud*, [Prosecution’s second request for the admission of documentary evidence from the bar table](#), 13 April 2021, ICC-01/12-01/18-1412, para. 14; see also *The Prosecutor V. Paul Gicheru*, [Public redacted version of “Prosecution’s First Bar Table Motion”](#), 19 January 2022, ICC-01/09-01/20-261-Red, para. 2, fn. 6.

¹³ *The Prosecutor v. Laurent Gbagbo And Charles Blé Goudé*, [Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016](#), 9 December 2016, ICC-02/11-01/15-773, para. 38.

20. This is consistent with the fact that the Prosecution has the burden to show *prima facie* relevance and probative value for each item¹⁴ and that the Prosecution has to “make sufficiently detailed and precise submissions, so as to enable the other parties to make informed responses.”¹⁵
21. The Prosecution fell short of meeting this requirement in two aspects. Firstly, it provided its comments on what it labels “reliability” for broad categories of evidence which group individual items that vary in their sources, their appearance and their content. In so doing, the Prosecution proceeds in a way that is contrary to its usual and established practice. Arguments as to reliability of a category of item cannot automatically be extended as a blanket argument applicable to all items falling within that category. The suggestion that documents are sufficiently reliable and can be relied on for the truth of their content solely because they ‘were obtained from a hard drive belonging to Levy YAKETE obtained through a request to the French authorities’¹⁶ is both entirely devoid of merit and a particularly egregious illustration of this unsound Prosecution approach.
22. Secondly, the Prosecution’s arguments on reliability are, in fact, only going to the authenticity of the items and do not address probative value comprehensively. Indeed, paragraph 10 of the Request merely sets out the general sources for each category of items. However, it is the jurisprudence of the Court that “[i]t does not suffice to argue that [the evidence’s] content may be corroborated by other evidence, or that the ‘document’s appearance, contents, substance and consistency with other documents, and other

¹⁴ *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution’s request for admission of documentary evidence](#), 28 March 2017, ICC-01/04-02/06-1838, para. 9; *Le Procureur v. Germain Katanga*, [Decision on the Prosecutor’s Bar Table Motions](#), 19 December 2010, ICC-01/04-01/07-2635, para. 26.

¹⁵ *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution’s request for admission of documentary evidence](#), 28 March 2017, ICC-01/04-02/06-1838, para. 9.

¹⁶ [ICC-01/14-01/18-1233](#), para. 9.

distinctive features satisfy the indicia of reliability for admission’’¹⁷ which is in essence what the Prosecution attempts to do in its Request.

23. This approach leaves the Defence with items for which submission is sought, but for which no probative value has been sufficiently described. This has a direct impact on the integrity of the submission process. It is the Defence’s position that such a procedural issue does not merely pertain to the holistic appreciation of the evidence of the trial according to Article 74, and that this procedural issue should be resolved at this stage of the proceedings.
24. Indeed, bearing in mind the inordinately substantial amount of evidence in this case,¹⁸ a remedy at this stage of the proceedings is warranted to preserve the judicial economy, efficiency and transparency of the proceedings.
25. The Defence therefore requests the Chamber to dismiss *in limine* the Prosecution’s Request without prejudice to the filing of a new request respecting the procedural requirements set out in the Initial Proceedings.

II. Items inadmissible for submission

26. In the alternative, following the Submission Approach adopted in this case,¹⁹ the Defence submits its observations on evidence affected by issues of exclusionary rules²⁰ and on any other objections relating to the admissibility of the evidence.
27. Three key factors need to be assessed when determining the admissibility of evidence through a bar table motion: (i) the *prima facie* relevance to the issues

¹⁷ *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution’s request for admission of documentary evidence](#), 28 March 2017, ICC-01/04-02/06-1838, para. 9.

¹⁸ [ICC-01/14-01/18-1149-Red](#), para. 34.

¹⁹ [ICC-01/14-01/18-631](#), para. 52.

²⁰ [ICC-01/14-01/18-631](#), paras. 53-54.

at trial; (ii) the *prima facie* probative value; and (iii) the prejudicial effect as weighed against the probative value.²¹

28. The jurisprudence of the court has determined that the relevance of an item is established “[i]f the evidence tendered makes the existence of a fact at issue more or less probable.”²² It has further indicated that the “[p]robative value is determined by two factors: the reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case.”²³
29. The Defence firstly submits that the Prosecution did not meet its burden of establishing the probative value for any of the objected items as it merely provided blanket submissions on the source of the categories of items. Furthermore, the Defence provides submissions on types of evidence for which *prima facie* probative value can only be provided through a specific set of information.
30. Finally, for all items of the Request, Annex A sets out the Defence’s position as to its admissibility and the associated argument supporting the objection.

A. The Prosecution did not meet its burden of demonstrating prima facie probative value for the opposed documents

31. The first category of item labelled by the Prosecution as “CAR government documents” includes “[d]ocuments originating from *or involving* the CAR government.”²⁴ The scope of this category is thus broader than documents produced *and* provided by the CAR Government, and the items greatly differ

²¹ [ICC-01/05-01/13-1013-Red](#), para. 8.

²² *Prosecutor v. Germain Katanga*, [Decision on the Prosecutor's Bar Table Motions](#), 19 December 2010, ICC-01/04-01/07-2635, para. 16.

²³ *Prosecutor v. Germain Katanga*, [Decision on the Prosecutor's Bar Table Motions](#), 19 December 2010, ICC-01/04-01/07-2635, para. 18.

²⁴ [ICC-01/14-01/18-1233](#), para. 6, i) [emphasis added].

in nature and are from different governmental bodies or are not from the CAR Government.²⁵

32. Thus, arguing their authenticity in blanket terms, *i.e.* whether the chain of custody indicates it was provided by the CAR Government, whether they include a letterhead, signature or seal, does not equate to arguing their *prima facie* probative value.
33. For example, should CAR-OTP-2092-2739, corresponding to a written draft of a political speech for Prime Minister André Nzapayeke at the National Assembly, be authentic, its content is not per se reliable for any of the issues it discusses.
34. With regard to the second category “International organisation and NGO documents” erroneously labelled in OTP’s Annex as “International governmental documents”²⁶, the Defence contends that the Prosecution did not meet its burden, in merely indicating that “[i]n most cases, these [reports] are publicly available documents from well-known and established organisations, and as such, *prima facie* reliable”.²⁷ Indeed, it should first be noted that the “well-known” status of an organization is not sufficient to establish the reliability of a document, the rejection in the *Ruto & Sang* case of the admissibility of a report originating from Human Rights Watch due to its reliance on “hearsay evidence to a large extent and relying on anonymous sources” being a prime example.²⁸ The generalisation made by the Prosecution with its use of the sentence “in most cases” is equally unconvincing as not all

²⁵ See CAR-OTP-2034-4722 for which the Prosecution’s metadata indicate the item is “from” the “Comite Chretien pour la Lutte contre le Sida”.

²⁶ [ICC-01/14-01/18-1233-Conf-AnxA](#), p. 23.

²⁷ [ICC-01/14-01/18-1233](#), para. 10 (ii).

²⁸ *Ruto & Sang*, [Decision on the Prosecution’s Request for Admission of Documentary Evidence](#), 10 June 2014, ICC-01/09-01/11-1353, para. 43.

reports originate from sources that are “well known”, contrary to the Prosecution’s claim.²⁹

35. The same argument applies to the third category of “Media articles and footage” whereby the Prosecution indicated that the documents are from “reputable sources” without providing information on these individual sources³⁰ and why those sources are reputable.³¹ Moreover, the Defence takes issue with the Prosecution’s arguments that the items in this category are mutually corroborating as it has been clearly establish that for admissibility purposes, “[i]t does not suffice to argue that [the evidence’s] content may be corroborated by other evidence.”³²
36. As to the fourth (“Reports”), fifth (“Documents belonging to Levy YAKETE”) and sixth (“Documents provided by Prosecution trial witnesses”) categories, the Prosecution limited itself to provide a description of the categories, and did not provide any meaningful arguments going to probative value.
37. In line with the jurisprudence of the Court to the effect that “[i]f at the time of tendering an item, the party is unable to demonstrate its relevance and probative value, including with regard to its authenticity, the document cannot be admitted”.³³ The Defence contends that the Prosecution did not meet its demonstrative burden in the Request.

²⁹ See for example CAR-OTP-2002-0039 and CAR-OTP-2031-0157.

³⁰ [ICC-01/14-01/18-1233](#), para. 10, 3).

³¹ See for example CAR-OTP-2087-9426, a picture of an unidentified newspaper.

³² *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution’s request for admission of documentary evidence](#), 28 March 2017, ICC-01/04-02/06-1838, para. 9.

³³ *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution’s request for admission of documentary evidence](#), 28 March 2017, ICC-01/04-02/06-1838, para. 9 ; *Katanga & Chui*, [Decision on the Prosecutor’s Bar Table Motions](#), 17 December 2010, ICC-01/04-01/07-2635, para. 13.

B. Observations per type of evidence

38. The following submissions are to be read in complementary of the objection raised in the Annex for each items.

i) Testimonial evidence

39. The Defence opposes the admission into evidence of two items on the grounds that they consist of testimonial evidence, namely CAR-OTP-2001-3268 and CAR-OTP-2002-0039.

40. Items are testimonial in nature when the person,

providing the statement understands that ‘he or she is providing information which may be relied upon in the context of legal proceedings’, namely when he or she is ‘questioned in the capacity as [a] witness[] in the context of or in anticipation of legal proceedings’³⁴

41. Underlying the prohibition on testimonial evidence is the principle that factual assertions relied on for the truth of their content and made in the context of an investigation into those facts should be heard orally or otherwise be tendered via Rule 68 of the Rules, and not through a bar table motion.

42. Moreover, it is to be noted that contrary to the Prosecution’s assertion,³⁵ testimonial evidence can be collected by other entities than law enforcement authorities and can notably be produced by human rights organisations that have a function to assist persons in their complaints.³⁶

43. CAR-OTP-2002-0039 is a 237-page document purporting to be a “rapport ampliatif” containing “déclaration”³⁷ and “témoignage”³⁸ of individuals as

³⁴ *The Prosecutor V. Dominic Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), 18 November 2016, ICC-02/04-01/15-596-Red, para. 9.

³⁵ [ICC-01/14-01/18-1233](#), para. 11.

³⁶ See for example, *The Prosecutor v. Dominic Ongwen*, [Decision on Defence Request to Submit 470 Items of Evidence](#), 14 November 2019, ICC-02/04-01/15-1670, paras. 9-10.

³⁷ CAR-OTP-2002-0039-R01, p. 0077.

³⁸ CAR-OTP-2002-0039-R01, p. 0077.

well as a “Répertoire des victimes”³⁹ or a list of damages for a number of individuals. For each testimony or declaration, the interviewee provided detailed identifying information, including nationality, profession, current and former living place, telephone number and email. Furthermore, this *interrogation* was in the course of an “investigations sur les crimes contre l’humanité”,⁴⁰ the result of which was intended to be shared to the Office of the Prosecutor. Indeed, those testimonies were compiled specifically for the attention of the ICC Prosecution⁴¹ and were provided directly to the OTP Information Desk on 19 May 2014.⁴²

44. It is apparent on the face of the document that the purpose of the “investigations” and the purpose of the document itself was to be used in the course of judicial proceedings. The extent of the knowledge of the persons providing their accounts on the intended use is not clear, but their knowledge can be inferred from the face of the document. This is supported by the type of information they agreed to share – e.g. some provided their email address or phone number to the so-called “investigator” while other indicated the value of reparations they were seeking. Thus, the testimonies compiled meet the “testimonial evidence” definition as they were given for the purpose of being used in the course of a legal proceedings.
45. CAR-OTP-2001-3268 is document dated September 2014 which appears to consist of a “mémoire” written by the CAR Minister of Justice and addressed to Madame Fatou Bensouda in her capacity as Prosecutor of the ICC. The purpose of the “mémoire” is to thank and assist the Prosecutor following the launch of its investigations in CAR by sharing information relevant to the legal proceedings of this case.

³⁹ CAR-OTP-2002-0039-R01, p. 0087-0273.

⁴⁰ CAR-OTP-2002-0039-R01, p. 0041.

⁴¹ CAR-OTP-2002-0039-R01, p. 0041, 0274.

⁴² See the chain of custody indicated in Ecourt for this document.

46. That the Prosecution now attempts to use it for the truth of its content is self-serving and impermissible.
47. The Prosecution is barred from submitting those two items through a bar table motion as their admission should be sought through Rule 68 of the Rules.

ii) Documents provided by Prosecution witnesses

48. The Defence here raises its concerns regarding the procedural impropriety of tendering documents provided by Prosecution witnesses via the bar table.
49. At the outset, the Prosecution submission that such documents are reliable and authentic because they 'were directly provided by the witnesses to Prosecution investigators when giving their signed statements in accordance with the Statute and Rules, the truth of which was expressly acknowledged and attested to'⁴³ is patently without merit. The 'Witness Acknowledgement' included in signed statements refers expressly to the statement itself and cannot be read as an attestation by the witness to the truth of the content of any and all documents provided by the witness in the course of their interview.
50. The document with ERN CAR-OTP-2057-0911 is the subject of a pending request under Rule 68(2).⁴⁴ The re-tendering of the document from the bar table is superfluous and contrary to judicial economy. Further, the Prosecution puts the cart before the horse in seeking to rely on a Witness Acknowledgement in P-1598's tendered witness statement which is not in fact in evidence. In this regard, unless and until P-1598's witness statement is recognised as formally submitted, the document's relevance and probative value must be assessed on its own merits. The Defence notes with concern that the relevance for which the document is now relied on, i.e. alleged SGBV

⁴³ [ICC-01/14-01/18-1233](#), para. 10(vi).

⁴⁴ See, [ICC-01/14-01/18-1233-Conf-Anx](#), p. 66.

committed by the Anti-Balaka, was not specified in the Prosecution's Rule 68(2) motion in which the document was tendered. The Defence opposes the submission of this document as a matter of principle.

51. The Defence also opposes the Prosecution's tendering of document CAR-OTP-2100-2410 on the basis of its procedural impropriety:⁴⁵ specifically, the fact that the Prosecution did not tender this document, provided by P-2325, along with his witness statement and other associated exhibits tendered under Rule 68(2), instead opting to only now tender it via the bar table.⁴⁶ Whether this is the result of lack of organisation or a deliberate strategizing on the part of the Prosecution, the result is that circumstances potentially relevant to the issue of whether a Prosecution witness should be called to testify were not made available to the Defence at the pertinent time, which would have affected the Defence's position as regards the Rule 68(2) application for P-2325, given the manifest lack of probative value of the document. The Prosecution should be disallowed from tendering such severed documents from its Rule 68(2) applications in a strategic manner, with the aim of improving their odds of success, at the expense of the Parties and Chamber's ability to seek further information regarding the reliability of that document.
52. It is further submitted that documentary evidence produced and prepared by a witness containing a testimonial, personal account of facts – such as notes, journals, or memoirs, as opposed to documents such as photographs, videos, media articles, contemporary business records, certificates, and correspondence – intrinsically linked to the content of that witness's statement, take on a testimonial nature when provided by that witness in the course of an investigation. By severing such documents from witness statements, the non-calling Party and the Chamber is unduly deprived of the

⁴⁵ In addition to the bases set out in the Annex; see, p. 34.

⁴⁶ ICC-01/14-01/18-710-Conf, paras 20-26.

opportunity of testing their reliability through the individual uniquely placed to provide such information, i.e. the individual who produced or prepared such testimonial personal documents. In principle therefore, where such documentary evidence is sought to be relied on for the truth of its content, it should be inseverable from that witness's statement and should not be admitted from the bar table.

iii) Reports

53. Reports originating from various entities such as the United Nations, its affiliated agencies and Non-Governmental Organizations are routinely drafted on issues or conflicts, which are subsequently the subject matter of an international criminal trial. While those documents are useful and powerful tools to assist human rights work and bring public attention to severe issues occurring in remote part of the world, their use as part of criminal proceedings entails a high level of scrutiny to the information they contain. This scrutiny can lead to the discovery of several deficiencies in the methodology or information contained in those reports, issues which led Trial Chamber VI to find that “[w]hile the reliability and probative value of these documents is to be assessed on a case-by-case basis, the Chamber considers that, in most cases, the probative value of these documents is often too low to serve as the only basis for a factual finding. Accordingly, these documents have served mainly as corroboration for other credible and reliable evidence”.⁴⁷
54. After a thorough analysis of the documents for which submission is sought by the Prosecution in its Request, the Defence has identified several documents which can be categorized as “reports” that are inadmissible due to inherent deficiencies greatly affecting their probative value. The Defence addresses the issues affecting the “reports” originating from the United Nations or their

⁴⁷ Ntaganda, [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359, para. 57, fn 132.

affiliated agencies, the issues of the reports drafted by Non-Governmental Organizations or other third parties and the issues of victim collectives.

UN related reports

55. Reports originating from the United Nations and their affiliated agencies are *prima facie* reliable when “such reports emanate from independent observers who were direct observers of the facts being reported”.⁴⁸ However, information can also be obtained from third parties before being included in the report by the drafters; in such instances it has been found that

if the author’s identity and the sources of the information provided are not revealed with sufficient detail, the Chamber is unable to determine whether the contents of the report have been imparted by an eyewitness or some other reliable source. If such particulars are not available, either from the reports themselves or from their author(s), the Chamber cannot assess the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence.⁴⁹

56. It has also been found in relation to documents originating from the United Nations Office of the High Commissioner for Human Rights that “the probative value of the document is limited by reason of the lack of clarity on how the information was collected, the hearsay nature of much of the content and the anonymity of the sources of information”.⁵⁰
57. The Defence contends that some of the reports included by the Prosecution in its Request suffer from the abovementioned deficiencies and do not offer sufficient detail so as to allow the Chamber and Parties to properly assess the reliability of their content. Those issues are all the more an impediment to the probative value of those documents in the absence of UN-related witnesses

⁴⁸ *Katanga & Chui*, [Decision on the Prosecutor’s Bar Table Motions](#), 17 December 2010, ICC-01/04-01/07-2635, para. 29.

⁴⁹ *Ibid.*

⁵⁰ *Ruto & Sang*, [Decision on the Prosecution’s Request for Admission of Documentary Evidence](#), 10 June 2014, ICC-01/09-01/11-1353, para. 44.

who could explain in detail the methodology used for the drafting of the reports, as P-0287 did for those for which he was coordinator.

58. The Defence further notes that the limitation of those reports in the context of criminal proceedings was highlighted in the *Ruto & Sang* case where Trial Chamber V(A) indicated that “OHCHR reports, while compliant with methods suited to the purposes of human rights work, are generally not intended for use in a court of law”.⁵¹

Reports from NGO and other third parties

59. The reports drafted by Non-Governmental Organizations and other third parties are subject to enhanced scrutiny when assessing their probative value especially as they originate from sources that do not enjoy the same standing as the United Nations. It has been ruled that these documents “can be considered *prima facie* reliable if they provide sufficient guarantees of non-partisanship and impartiality” and that “[t]hey should further include sufficient information on their sources and the methodology used to compile and analyze the evidence upon which the factual assertions are based”.⁵²
60. The probative value of such documents has previously been found to be negatively affected due to the presence of “hearsay evidence to a large extent and relying on anonymous sources”⁵³ or when “most of the sources of information are anonymous and there is little or no information provided as to how the evidence was obtained or the methodology of how the facts were gathered”.⁵⁴ Should those deficiencies be present “the Chamber cannot assess

⁵¹ *Ruto & Sang*, [Decision on the Prosecution’s Request for Admission of Documentary Evidence](#), 10 June 2014, ICC-01/09-01/11-1353, para. 44.

⁵² *Katanga & Chui*, [Decision on the Prosecutor’s Bar Table Motions](#), 17 December 2010, ICC-01/04-01/07-2635, para. 30.

⁵³ *Ruto & Sang*, [Decision on the Prosecution’s Request for Admission of Documentary Evidence](#), 10 June 2014, ICC-01/09-01/11-1353, para. 43.

⁵⁴ *Ibid*, para. 45.

the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence”.⁵⁵

61. The Defence argues that items for which submission is sought suffer from those deficiencies and should thus be found inadmissible by the Chamber. Indeed, it should be noted that, contrary to some previous NGO reports,⁵⁶ no witnesses are scheduled to testify regarding the methodology and sources used in the reports which would allow the Chamber and Parties to better assess their reliability.

Reports and associated documents produced by “local CAR victim collectives”

62. The Defence wishes to specifically address the category of documents produced by “local CAR victim collectives” which the Prosecution compiled under the name of the different organizations.⁵⁷ Indeed, because of their provenance and nature, a number of those documents, identified in the Annex, suffer from recurring and systemic deficiencies affecting their probative value, which militates in favour of the rejection of the Prosecution’s Request.
63. It should be underlined that the Prosecution failed in its Request to corroborate its claim that the documents falling under this category are “reliable and authentic”. The Request merely touches upon their provenance, from “non-governmental organisations”, and of their purpose, “monitoring human rights violations, gathering data and reporting”, leaving aside any

⁵⁵ Katanga & Chui, [Decision on the Prosecutor’s Bar Table Motions](#), 17 December 2010, ICC-01/04-01/07-2635, para. 30.

⁵⁶ Such as Witness P-2012 scheduled to testify about “the production of his report “Behind the Headlines: Drivers of Violence in the Central African Republic” (see CAR-OTP-2001-2564)”, see [ICC-01/14-01/18-724-Conf-AnxA](#), page 43, witness #85.

⁵⁷ [ICC-01/14-01/18-1233](#), para. 6.

details which could allow the Chamber to assess whether those documents “bear sufficient indicia of reliability” as claimed in the Request.⁵⁸

64. The Defence in its Annex highlights that (i) most of these documents do not provide any information on the methodology used to reach, interview or compile the information from the alleged victims; (ii) there is a complete anonymity of the alleged victims; (iii) there is no information on the identity of the persons who worked on the documents including an absence of signature attesting to their authenticity; and (iv) there is recurrent omission of crucial information of the alleged crimes such as their dates, locations or alleged perpetrators.
65. The Defence contends that these issues prevent the Chamber or the Parties to establish the unreliability of the content of these documents. The probative value of those documents is irremediably affected, and cannot be cured in the absence of any witnesses who could explain to the Chamber the process used in their creation. Consequently, the Defence submits that the document identified in the Annex should be found inadmissible.

iv) Opinion evidence

66. The Defence contends that some of the documents of which submission is sought by the Prosecution in its Request can be labelled as opinion evidence.⁵⁹
67. Those documents which contain opinion are types of documents not admissible unless they meet specific conditions. It has been previously ruled that “[w]here [documents contain opinion evidence without qualifying their authors as experts] [and] make specific factual assertions about relevant

⁵⁸ *Ibid*, para. 10.

⁵⁹ As detailed in the annex those documents are CAR-OTP-0080-0705, CAR-OTP-2071-2013 and CAR-OTP-2100-2410.

political or military events, they can *only* be admitted *if* it can be shown that the authors have made reliable and objective reports.”⁶⁰

68. As detailed in the Annex, the Defence submits that the documents which can be considered as “opinion evidence” in the Prosecution’s Request do not satisfy the above-mentioned criteria and should be found inadmissible by the Chamber.

v) Open source documents

69. The Defence also notes that many of the items marked as “open source” by the Prosecution are not provided with the complete metadata.⁶¹ The Defence contends that verifiable information on where an item can be obtained should be provided for the purpose of assisting the parties in making submission as to *prima facie* probative value of the documents.⁶²

CONCLUSION

70. For the above reasons mentioned, the Defence opposes the Request and submits it should be rejected *in limine* without prejudice for lack of procedural conformity.
71. Alternatively, the Defence submits that 31 items forming part of the Request do not meet the admissibility requirements, defers to the Ngaissona Team with regard to the submission of 92 items and does not oppose to the submission of 17 items.

CONFIDENTIALITY

⁶⁰ Katanga & Chui, [Decision on the Prosecutor’s Bar Table Motions](#), 17 December 2010, ICC-01/04-01/07-2635, para. 32 [emphasis added].

⁶¹ The field “People/Orgs/Relationships – From” is empty for 14 of the 32 documents.

⁶² *Prosecutor v. Germain Katanga*, [Decision on the Prosecutor’s Bar Table Motions](#), 19 December 2010, ICC-01/04-01/07-2635, para. 24, a).

72. Pursuant to regulation 23bis(1) of the Regulations of the Court , the annex to appended to this filing is classified as “Confidential” as it relates to evidence disclosed *inter partes* and contains information that should not be revealed to the public.

RELIEF SOUGHT

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

REJECT the Request *in limine* without prejudice; and

Alternatively, the Defence respectfully requests Trial Chamber V to:

REJECT in part the Request; and

DECLARE inadmissible the following evidence:

CAR-OTP-0080-0705; CAR-OTP-2001-3268; CAR-OTP-2034-4722; CAR-OTP-2092-1485; CAR-OTP-2092-1488; CAR-OTP-2092-1782; CAR-OTP-2092-1979; CAR-OTP-2092-2739; CAR-OTP-2092-2846; CAR-OTP-2001-1308; CAR-OTP-2001-3138; CAR-OTP-2001-7017; CAR-OTP-2002-0039; CAR-OTP-2022-0375; CAR-OTP-2031-0157; CAR-OTP-2055-1987; CAR-OTP-2061-1592; CAR-OTP-2071-2013; CAR-OTP-2073-0871; CAR-OTP-2110-0905; CAR-OTP-2110-0915; CAR-OTP-2110-0961; CAR-OTP-2110-0967; CAR-OTP-2127-4064; CAR-OTP-2127-6521; CAR-OTP-2050-0888; CAR-OTP-2050-0895; CAR-OTP-2025-0115; CAR-OTP-2033-7906; CAR-OTP-2057-0911; CAR-OTP-2100-2410.

RESPECTFULLY SUBMITTED ON THIS 11TH DAY OF FEBRUARY 2022



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