

**Cour  
Pénale  
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**International  
Criminal  
Court**

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No.: ICC-01/14-01/18

Date: 14 April 2022

**TRIAL CHAMBER V**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Péter Kovács  
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF  
THE PROSECUTOR *v.* ALFRED YEKATOM AND  
PATRICE-ÉDOUARD NGAÏSSONA**

**Public**

**Response by the Common Legal Representative of the Former Child Soldiers to  
the Prosecution's "Request for the Submission of Evidence from the Bar Table  
regarding the recruitment and use of child soldiers"**

**Source:** Office of Public Counsel for Victims (CLR1)

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

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## I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the “Legal Representative”) supports the Prosecution’s Request for the submission of evidence from the bar table regarding the recruitment and use of child soldiers (the “Request”).<sup>1</sup> In particular, the submission of the 49 items of evidence from the bar table (the “Bar Table Items”), which comprise of evidence relevant to the Anti-Balaka’s recruitment and use of children, including those under the age of 15, in hostilities during the Relevant Period,<sup>2</sup> are relevant and probative for Trial Chamber V’s (the “Chamber”) determination of the live issues in the present case. This is in accordance with articles 64(9)(a), 69(3) and 69(4) of the Rome Statute (the “Statute”), rule 63(2) of the Rules of Procedure and Evidence (the “Rules”), and the Initial Directions on the Conduct of Proceedings (the “Initial Directions”).<sup>3</sup> Indeed, said submission will ensure the expeditiousness of the proceedings while fully respecting the rights of the Accused, pursuant to articles 64(2) and 69(4) of the Statute.

2. Moreover, the Legal Representative submits that said evidence will further assist the Chamber in assessing the nature, complexity and extent of the victimisation. In addition, the admission of the Bar Table Items may also be valuable to the determination of the appropriate form and amount of reparations to be ultimately awarded to the former child soldiers, should the Accused be convicted.

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<sup>1</sup> See the “Request for the Submission of Evidence from the Bar Table regarding the recruitment and use of child soldiers”, [No. ICC-01/14-01/18-1346](#), 1 April 2022 (the “Request”).

<sup>2</sup> *Idem*, footnote 2, which refers to the Prosecution’s Trial Brief, [No. ICC-01/14-01/18-723-Red](#), 10 November 2020, para. 5, which defines the Relevant Period from September 2013 through December 2014.

<sup>3</sup> See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber V, Presiding Judge), [No. ICC-01/14-01/18-631](#), 26 August 2020 (the “Initial Directions”).

## II. PROCEDURAL BACKGROUND

3. On 26 August 2020, the Presiding Judge of the Chamber issued the Initial Directions.<sup>4</sup>

4. On 1 April 2022, the Prosecution filed its Request.<sup>5</sup> In response to the request made by the Defence for Mr Alfred Yekatom (the “Yekatom Defence”),<sup>6</sup> the Chamber extended the deadline for the Yekatom Defence’s response to the Request to 25 April 2022<sup>7</sup>.

5. On the same date, in response to the Legal Representative’s request,<sup>8</sup> the Chamber clarified that the extension of time for a response to the Request was only granted to the Yekatom Defence.<sup>9</sup>

## III. SUBMISSIONS

6. The Presiding Judge held in the Initial Directions the following:

*“[...] In accordance with the established practice of other chambers, this Chamber will adopt the so-called ‘Submission Approach’. Consequently, it will not rule on the admissibility of each item of evidence during the course of the proceedings. Rather, the Chamber will assess the standard evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgment pursuant to Article 74(2) of the Statute. It may, however, not necessarily discuss these aspects in the judgment itself for every item submitted. During*

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<sup>4</sup> See the Initial Directions, *supra* note 3.

<sup>5</sup> See the Request, *supra* note 1.

<sup>6</sup> See the Email correspondence from the Yekatom Defence to the Chamber on 4 April 2022 at 14:01.

<sup>7</sup> See the Email correspondence from the Chamber to the parties and participants on 4 April 2022 at 15:26.

<sup>8</sup> See the Email correspondence from the Legal Representative to the Chamber on 4 April 2022 at 15:39.

<sup>9</sup> See the Email correspondence from the Chamber to the parties and participants on 4 April 2022 at 16:06.

*trial, the Chamber will accordingly only recognise the participants' formal submission of evidence. [...] Nonetheless, [...] the Court's legal framework contains a number of exclusionary rules, including procedural bars, obstacles and preconditions, which require the Chamber to rule on the admissibility of evidence prior to its assessment of evidence for the purposes of Article 74 of the Statute. [...] In this regard, the Presiding Judge notes, for instance, the procedural bars included in Article 69(7) of the Statute and Rule 63(3) of the Rules (evidence obtained in violation of the Statute or of internationally recognised human rights), as well as in Rule 71 of the Rules (evidence of the prior or subsequent sexual conduct of a victims or witness). [...] Moreover, [evidence which is testimonial in nature is inadmissible] when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court's applicable law are not met. [...] [Lastly, the Chamber] retains its discretion to rule on any other admissibility related issues upfront, when appropriate, particularly if so required in order to ensure the fairness and expeditiousness of the trial".<sup>10</sup>*

7. As for the procedure for the submission of evidence, the Presiding Judge instructed that: (i) the participants may submit evidence in writing through a bar table application which shall contain a short description of the item (and/or relevant portions therein) and a short description of its asserted relevance and probative value pursuant to rule 64(1) of the Rules; and (ii) before submitting the application, the tendering participant shall inquire whether the opposing participant consents or objects.<sup>11</sup> The Presiding Judge stressed that this information should be provided to “assist the Chamber later in its holistic assessment of the evidence during the deliberation of the judgment”.<sup>12</sup> The Chamber recently held that this short description does not prevent the submitting party from making the “same or similar arguments wholesale” for a

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<sup>10</sup> See the Initial Directions, *supra* note 3, paras. 52-59. See also, the “Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence)”, [No. ICC-01/14-01/18-1359](#), 12 April 2022, paras. 10-12 (the “Decision on Prosecution’s First Bar Table Request”).

<sup>11</sup> See the Initial Directions, *supra* note 3, paras. 61-62.

<sup>12</sup> *Idem*, para. 62.

number of items within a certain category of documents, provided that this short description is sufficiently clear and applicable to the item.<sup>13</sup> Furthermore, the Chamber considered this approach to be in the “*interest of efficiency in order not to burden the Chamber and the participants with repetitive submissions*”.<sup>14</sup>

8. Moreover, in the *Ongwen* case, within the meaning of the “Submission Approach”, Trial Chamber IX held that it will generally recognise the formal submission of evidence when submitted formally by the participants during trial, while deferring broader considerations of the standard evidentiary criteria, and relevance and probative value, in particular, until deliberation.<sup>15</sup> Trial Chamber IX further stressed that this general approach does not involve making any relevance, probative value or potential prejudice assessments at the point of submission of the evidence – not even on a *prima facie* basis.<sup>16</sup> Therefore, it is only when procedural bars are raised that the chamber will rule upfront on certain issues related to the admissibility of evidence.<sup>17</sup>

9. In the Request, the Prosecution submits the following five categories of Bar Table Items:

- a. The Central African Republic (the “CAR”) government documents (4 items): Includes official records related to the CAR governmental activities;
- b. International organisation and NGO documents (15 items): Includes published reports by the United Nations (the “UN”) agencies and NGOs;

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<sup>13</sup> See the Decision on Prosecution’s First Bar Table Request, *supra* note 10, para. 8

<sup>14</sup> *Ibid.*

<sup>15</sup> See the “Decision on Prosecution Request to Submit Interception Related Evidence” (Trial Chamber IX), [No. ICC-02/04-01/15-615](#), 1 December 2016 (the “Decision on Interception Related Evidence”), paras. 4-5.

<sup>16</sup> *Idem*, para. 7.

<sup>17</sup> See the “Decision on Defence Request for Leave to Appeal the Decision Recognising Interception Related Evidence as Submitted” (Trial Chamber IX), [No. ICC-02/04-01/15-641](#), 20 December 2016, para. 8.

- c. Video footage and related transcripts and translations (17 items): Includes footage produced by international media and footage provided by the Prosecution witnesses P-1819 and P-2587;
- d. Media articles (4 items): Includes international media articles;
- e. Documents related to the Prosecution trial witnesses (9 items): Includes documents relevant to the determination of the ages of the Prosecution witnesses P-2475, P-2582, and P-2620.<sup>18</sup>

10. Having comprehensively reviewed the content of the Request, the details provided in its Annex and the relevant documents, the Legal Representative posits that the submission of the Bar Table Items does not raise any procedural bars enshrined in the Statute or in the Rules. Nor is there any need for the Chamber to exceptionally consider standard evidentiary criteria at this point of the submission of the evidence since no such determination is presently required in order to ensure the fairness and expeditiousness of the trial proceedings.

11. In addition, as regards the specific types of the Bar Table Items, the Legal Representative notes the following. The Prosecution is seeking the submission of certain documents and videos, including: (i) evidence of a more general nature regarding the widespread extent of the recruitment and use of children in hostilities by the Anti-Balaka; (ii) evidence of the recruitment and use of children in hostilities specifically by Mr Yekatom's Anti-Balaka Group; (iii) evidence regarding the authentication and/or determination of the age of children within Mr Yekatom's group, which includes the Prosecution witness P-2475, and the dual status witnesses P-2582 and P-2620; and (iv) evidence of Mr Yekatom's knowledge pursuant to article 30 of the Statute that children under the age of 15 were conscripted, enlisted and/or used to participate actively in hostilities by elements in his Anti-Balaka group, or that

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<sup>18</sup> See the Request, *supra* note 1, para. 5.

this “*will occur in the ordinary course of events*” regarding his criminal responsibility for count 29.<sup>19</sup>

12. The Legal Representative posits that the Prosecution sufficiently explains in the Request the relevance of said items, even if a limited number of these items post-date the Relevant Period. As held by Trial Chamber VI in the *Ntaganda* case in its discussion of continuous crimes, “*the conduct does not take place at one specific moment in time and the elements of the relevant crimes may therefore be fulfilled during a certain period, which can potentially occur over a prolonged period of time. Continuing crimes are, when the requisite elements are fulfilled, unlawful and remain unlawful over the entire period during which the elements continue to be met*”, such that the jurisprudence from the Court “*have discussed [...] enlisting and conscripting children under the age of 15 as examples of potentially continuing crimes*”.<sup>20</sup> The Appeals Chamber subsequently confirmed Mr Ntaganda’s conviction, which includes those charges relating to conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities.<sup>21</sup> Likewise, Trial Chamber I in the *Lubanga* case held that “*the offences of conscripting and enlisting are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion*”, and that “[t]hese offences are continuous in nature” which “*end only when the child reaches 15 years of age or leaves the force or group*”.<sup>22</sup> Indeed, as submitted by the Prosecution, items that post-date the Relevant Period can still be of relevance to the recruitment and use of children by the Anti-Balaka during the Relevant Period, which form a part of the Chamber’s final evidentiary assessment when deliberating.

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<sup>19</sup> See the Request, *supra* note 1, para. 7. Count 29 is the conscription, enlistment, and active use of children under the age of 15 in hostilities (article 8(2)(e)(vii)).

<sup>20</sup> See the “Judgement” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019, para. 42 (footnotes omitted).

<sup>21</sup> See the “Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2666-Red](#), 30 March 2021, para. 1170.

<sup>22</sup> See the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber I), [No. ICC-01/04-01/06-2842](#), 14 March 2012, para. 618.

13. Furthermore, the Prosecution is submitting via the bar table nine documents which relate to the determination of the age of the dual status witnesses P-2582 and P-2620, and the Prosecution witness P-2475. As held by Trial Chamber IX in the *Ongwen* case, there is no procedural bar impeding the submission of materials associated with the Prosecution's witnesses, and nor does the formal submission of materials severable from a witness's rule 68(2)(b) or 68(3) statement or in-court testimony prejudice the Defence.<sup>23</sup> Indeed, the exact mechanism through which the attendant materials are submitted is immaterial because the manner of submission does not lead to them being considered any differently by the Chamber in its deliberations.<sup>24</sup> Documentary evidence introduced through an in-court witness or as materials associated with a rule 68(2)(b) or 68(3) statement remains documentary evidence since the manner of introduction does not transform it into testimonial evidence.<sup>25</sup> This Chamber has also recently held that *"the mere fact of an item of documentary evidence being related to a request under Rule 68(2) of the Rules which is still under consideration by the Chamber does not, as such, render submission of that item through a different avenue procedurally improper"*.<sup>26</sup> Thus, there exist no procedural bars that would preclude the submission of said nine documents.

14. Additionally, the Prosecution is submitting certain reports produced by the UN agencies and internationally recognised NGOs with a global presence which aim to document the extent and use of child soldiers in the CAR, monitor human rights violations and gather data. The Prosecution argues that these reports were drafted either contemporaneously, or close in time to the events, and before any arrest warrants had been issued in this case, such that the sources of these reports had no interest in the present proceedings<sup>27</sup>, and nor are they testimonial in nature. The Legal Representative concurs with the Prosecution that these reports, the majority of which

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<sup>23</sup> See the "Decision on Prosecution's Request to Submit 1006 Items of Evidence", [No. ICC-02/04-01/15-795](#), 28 March 2017, para. 13 (the "Decision on 1006 Items of Evidence").

<sup>24</sup> *Idem*, para. 14.

<sup>25</sup> *Ibid.*

<sup>26</sup> See the Decision on the Prosecution's First Bar Table Request, *supra* note 10, para. 21.

<sup>27</sup> See the Request, *supra* note 1, para. 15.

were directly downloaded from the relevant NGO or the UN agency websites which are publicly available, encounter no procedural bars to be formally submitted through a bar table motion.

15. Lastly, the Legal Representative observes that the submission of the Bar Table Items is not prejudicial to the Yekatom Defence and the Defence for Mr Ngaïssona. As held by Trial Chamber IX in the *Ongwen* case, the ultimate prejudice which the Defence may suffer depends on the nature of the material and how said material is discussed during the trial, and whether the Chamber relies on such material in its judgement and in what manner.<sup>28</sup> Therefore, undue prejudice determinations at the point of submission can only be done reliably for items where it is immediately obvious that they cannot be fairly relied upon for any purpose.<sup>29</sup> Having conducted a detailed review of the Request, its Annex and the documents concerned, the Legal Representative posits that none of the Bar Table Items leads the Chamber to immediately conclude at this juncture that an undue prejudice determination needs to be made.

16. Furthermore, the Legal Representative contends that the Defence will not be prejudiced because: (i) the Bar Table Items have been disclosed in a timely manner by the Prosecution, thus ensuring the rights of the Accused regarding notice and trial preparation;<sup>30</sup> (ii) in the Request and its Annex, the Prosecution provides a clear description and itemised assessment of the relevance and probative value for each piece of evidence, together with an indication of their incriminatory character;<sup>31</sup> (iii) both Defence teams currently have the opportunity to advance any objections or observations on any of the Bar Table Items, which the Chamber will take into account in its final assessment of the evidence;<sup>32</sup> (iv) the Defence also has the right to examine

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<sup>28</sup> See the Decision on Interception Related Evidence, *supra* note 15, para. 10.

<sup>29</sup> *Idem*, para. 11.

<sup>30</sup> *Idem*, para. 25.

<sup>31</sup> *Idem*, para. 24. See also, the Decision on Prosecution's First Bar Table Request, *supra* note 10, para. 8.

<sup>32</sup> *Idem*, para. 11.

the Prosecution's witnesses in relation to the Bar Table Items or, in its turn, call witnesses and submit exculpatory evidence throughout the trial;<sup>33</sup> and (v) the submission of the Bar Table Items does not relieve the Prosecution of its burden of proof or shift that burden to the Defence since the method of submission of documentary evidence has no bearing on how the Chamber will eventually evaluate the evidence.<sup>34</sup>

17. The Legal Representative posits that granting the Request will be in line with the Chamber's duty to ensure the expeditiousness of the proceedings pursuant to article 64(2) of the Statute. The recognition of the Bar Table Items will obviate the need to call more witnesses to attest to the authenticity of said items and shorten the overall length of the examination of witnesses at trial. This course of conduct will also enable a reduction of time needed for the trial, therefore responding to both the right of the Accused and to the interest of victims to have expeditious proceedings.

18. Finally, the submission of the Bar Table Items will further assist the Chamber in assessing the nature, complexity and extent of the victimisation caused by the Anti-Balaka. In addition, the admission of the items may also be valuable for the determination of the appropriate form and amount of reparations to be ultimately awarded to the former child soldiers should the Accused be convicted.

#### IV. CONCLUSION

19. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to grant the Request.

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<sup>33</sup> *Idem*, para. 23.

<sup>34</sup> See the Decision on 1006 Items of Evidence, *supra* note 23, para. 49.

**RESPECTFULLY SUBMITTED**

A handwritten signature in black ink, appearing to read 'Dmytro Suprun', with a long vertical stroke extending downwards from the bottom of the signature.

Dmytro Suprun  
Common Legal Representative of the Former Child Soldiers

Dated this 14<sup>th</sup> day of April 2022  
At The Hague (The Netherlands)