

**Cour
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**International
Criminal
Court**

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

Date: **25 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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public with Confidential Annex A

**Public Redacted Version of the “Yekatom Defence Response to the
Prosecution’s “Request for the Submission of Evidence from the Bar Table
regarding the
recruitment and use of child soldiers”, 1 April 2022, ICC-01/14-01/18-1346”,
25 April 2022**

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. Alfred Rombhot Yekatom (“Defence”) hereby responds to the Prosecution’s “Request for the Submission of Evidence from the Bar Table regarding the recruitment and use of child soldiers” (“Request”).¹
2. After a thorough review of the material, the Defence provides in the present response its position on the 49 items included in the Prosecution’s Request. The Defence opposes the submission of 32 items, a specific and individual reasoning for each item is developed in Annex A for the Chamber’s future assessment. The submission of the remaining 17 items is not opposed.
3. In addition, the Defence develops below its request for an immediate intervention of the Chamber on the issue of the submission of items annexed to a witness statement or intrinsically linked to witnesses scheduled to testify when the content is linked to his proposed testimonial evidence.

PROCEDURAL HISTORY

4. On 23 February 2022, in accordance with the Initial Directions on the Conduct of Proceedings, the Prosecution provided the Defence with a list of 49 items that it sought to submit through a “Bar Table” motion dedicated to the topic of child soldiers.²
5. On 24 March 2022, as part of the *inter partes* discussion, the Defence provided the Prosecution with its position on the 49 items; indicating that it was not opposing to the submission of 17 items, and providing its general reasoning for the opposition to the remaining 32 items.³

¹ [ICC-01/14-01/18-1346](#)

² Email from the Prosecution to the Defence dated 23 February 2022 at 16:53.

³ Letter ARY-2022-0205 dated 24 March 2022.

6. On 1 April 2022, the Prosecution filed its “Request for the Submission of Evidence from the Bar Table regarding the recruitment and use of child soldiers”.⁴
7. On 4 April 2022, the Defence sought an extension of the deadline to respond to the Request to 25 April 2022,⁵ which was granted on the same day.⁶

APPLICABLE LAW

8. Article 64 (1) of the Rome Statute states that :

The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

9. Article 69(4) of the Rome Statute states that :

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.

10. Rule 64 of the Rules of Procedure and Evidence states that :

- (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.

⁴ [ICC-01/14-01/18-1346](#).

⁵ Email from the Defence to the Chamber dated 4 April 2022 at 14:01.

⁶ Email from the Chamber to the Parties dated 4 April 2022 at 15:26.

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

SUBMISSIONS

11. The Defence is cognizant of the current Chamber's position to the effect that it will "only recognise the participants' formal submission of evidence" during the trial phase, with a subsequent assessment of the "evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgement pursuant to Article 74(2) of the Statute".⁷ This principle is however provided with some degree of flexibility for specific situations that warrant an intervention of the Chamber which "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".⁸
12. The Defence contends that, in light of the Prosecution's Request, an immediate intervention of the Chamber is required in order to safeguard both the fairness and the expeditiousness of the trial. While the Defence will address in Annex A its position on the 49 items, with the relevant and specific argumentation for each of the 32 items for which submission is opposed, it will develop in the present core of the response its position on particular issues that necessitate an immediate ruling by the Chamber while assessing the opportunity of the Prosecution's Request.

⁷ [ICC-01/14-01/18-631](#), para. 53.

⁸ *Ibid*, para. 59.

I. On the Prosecution's category of "Documents related to Prosecution trial witnesses"

13. The Defence objects to the formal submission of all 9 items⁹ of this category on the basis of procedural bars and submits that an immediate ruling of the Chamber is necessary to preserve the fairness and expeditiousness of the trial.
14. P-2620, P-2582 and P-2475 are all alleged child soldiers formerly part of Mr. Yekatom's group according to the Prosecution.¹⁰ The opposed documents comprise (i) P-2620's birth certificate annexed to her statement;¹¹ (ii) birth certificates of P-2582¹² and her siblings¹³ provided to the Prosecution by P-2582's [REDACTED] following P-2582's interview where she "[REDACTED]";¹⁴ and (iii) various documents¹⁵ collected by a Prosecution intermediary (P-2580) with the aim to "prove the age/dob of [...] P-2475".¹⁶
15. The nine above described documents were provided by the witnesses in the context of a witness prior recorded testimony in order to support the information on the age they claim to have had and which could be relied upon in the context of the proceedings against Mr. Yekatom. Those documents are not only intrinsically related to the witness's account, namely his or her age at the time of the charges, but they also form part of the elements of crime regarding Count 29.
16. It is clear that they are part of the prior recorded testimony of witnesses and indispensable for the full comprehension and assessment of the witnesses statements.

⁹ CAR-OTP-2121-2595 ; CAR-OTP-2126-0413 ; CAR-OTP-2126-0414 ; CAR-OTP-2126-0415 ; CAR-OTP-2126-0416; CAR-OTP-2128-1197 ; CAR-OTP-2128-1201 ; CAR-OTP-2128-1202 ; CAR-OTP-2128-1203.

¹⁰ [ICC-01/14-01/18-724-Conf-AnxA](#), page 33 witness #54, page 34 witness#57, page 35 witness #58.

¹¹ CAR-OTP-2121-2595; *See also* CAR-OTP-2121-2567-R06, para. 11.

¹² CAR-OTP-2126-0415.

¹³ CAR-OTP-2126-0413, CAR-OTP-2126-0414, CAR-OTP-2126-0416.

¹⁴ *See* CAR-OTP-2126-0385-R02.

¹⁵ CAR-OTP-2128-1197, CAR-OTP-2128-1201, CAR-OTP-2128-1202.

¹⁶ CAR-OTP-2128-1203-R03.

17. Further, given that the Prosecution will have to address the age of the witnesses during its examination based on those documents, it is contrary to the judicial economy and superfluous to allow their introduction through this bar table. In the *Ruto & Sang* case, Trial Chamber V(A) ruled, concerning the testimonial nature of a document, that “a ‘bar table’ motion should not be used in a manner which would be duplicative of the Rule 68 of the Rules procedure”.¹⁷ The Defence contends that this precedent applies in the present instance where the documents for which formal submission is sought are part of, or should be considered as part of, the prior recorded testimony of P-2620, P-2582 and P-2475. As such the Prosecution’s attempt to introduce them through the Request should be found as circumventing the proper Rule 68 procedure, especially in light of the Prosecution’s Rule 68(3) application for both P-2620 and P-2582.¹⁸
18. In addition, and in contradiction with the Prosecution’s assertion that “these items corroborate other documentary and testimonial evidence”,¹⁹ the Defence recalls that the age of the alleged former child soldiers is a contested issue particularly in light of the various contradictory information on their age present in the material disclosed by the Prosecution in this case.²⁰ Regarding Witness P-2475, his date of birth mentioned in the documents for which submission is sought, does not even correlate with the one provided by the witness during his interview.²¹ For Witness P-2620, the Defence emphasized numerous inconsistencies on her date of birth through its previous submissions.²² In particular the Defence recalls its disclosure violation motion

¹⁷ *Prosecutor v. Ruto & Sang*, [Decision on the Prosecution’s Request for Admission of Documentary Evidence](#), ICC-01/09-01/11-1353, 10 June 2014, paras 86, 88.

¹⁸ [ICC-01/14-01/18-1283-Conf](#); [ICC-01/14-01/18-1261](#); See also [ICC-01/14-01/18-724-Conf-AnxA](#), page 33 witness #54, page 35 witness #58.

¹⁹ [ICC-01/14-01/18-1346](#), para. 24.

²⁰ See for general instances, P-2082 : CAR-OTP-2109-0452-R02, para.45; P-2251 : [ICC-01/14-01/18-T-043-CONF-FRA](#), pages 64, Ins.10-18; P-0808 : [ICC-01/14-01/18-T-072-FRA](#), p. 68-69.

The Defence also highlights that [REDACTED].

²¹ See CAR-OTP-2128-1197 at 1198 indicating [REDACTED] in CAR-OTP-2110-0556-R06, para. 11.

²² [ICC-01/14-01/18-1305-Conf](#), para. 28, Public redacted version : [ICC-01/14-01/18-1305-Red](#) ; [ICC-01/14-01/18-1318-Conf](#), Public redacted version : [ICC-01/14-01/18-1318-Red](#).

following the Prosecution's failure to disclose the entirety of P-2620's victim application form and its appended un-redacted version of her proof of identity, through which the Defence specifically underlined the discrepancies of her identifying information.²³ As for Witness P-2582, the Defence also refers to its previous submissions on contradictory information regarding her age as developed in P-2084 and P-2582 responses to the Prosecution's Rule 68(3) application.²⁴

19. The contested nature of the issue, coupled with the numerous discrepancies as regards to the age and date of birth of alleged former child soldiers, militates in favour of the Prosecution seeking the submission of those nine items through their respective witnesses. This will allow the Chamber and Parties to be in possession of the best available information on those documents and their potential deficiencies when providing arguments on their probative value and relevance. Indeed, the nine documents are so intrinsically linked to the witnesses that only a confrontation between their testimony and the documentary evidence can shed light on their true relevance, reliability and probative value.
20. In addition, the Defence contends that submitting evidence which can be considered as part of a prior recorded testimony through a "Bar Table" application affects the fairness of the proceedings. Indeed, to properly inform the Chamber on potential issues affecting the probative value or reliability of documents linked to a witness, the Defence would have to unveil specific information about its strategy on the examination of the witness. The Prosecution should be barred from trying to obtain, through the Defence's responses to the Request, leads on the Defence examination of important witnesses scheduled to testify against Mr. Yekatom.

²³ [ICC-01/14-01/18-1318-Conf](#), paras 41-43.

²⁴ [ICC-01/14-01/18-1237-Conf](#), para. 21 ; [ICC-01/14-01/18-1306-Conf-Exp](#), paras 35-36.

21. Finally, as it stands, with the Prosecution's attempts to introduce those documents through a "Bar Table Motion", the Defence response to such a request will be limited and lacunar. In order to safeguard the right of Mr. Yekatom to raise an effective defence, enshrined in Article 67(e) of the Statute, the Defence would have to make new submissions on the Request at a later stage of the trial, once the Defence's investigations will be completed and at the end of the Prosecution's case once all witnesses will have testified. Such a process would go against the principle of judicial economy as it would put the burden on the Defence to twice raise arguments on the same Request and for the Chamber to analyse multiple argumentative documents from the Parties.
22. As demonstrated above, requests for submission of evidence directly or intrinsically linked to a witness through a "Bar Table" motion, as the Prosecution did for the nine above mentioned documents, affect both the fairness and expeditiousness of the trial. In light of the emerging pattern of the Prosecution trying to submit through "Bar Table" motion items that fall into this category, the Defence is of the view that an immediate ruling of the Chamber on this issue is necessary as it will guide the future Prosecution's requests and, should the Chamber rule against those type of submission, will be in the interest of justice and judicial economy as it will deter the Prosecution from adopting such approach in the future.
23. In light of the above, the Defence respectfully requests the Chamber to make a ruling on the issue and to reject the Prosecution's Request for submission of the nine items. Denying the Prosecution request would not cause any prejudice as the Prosecution will have the opportunity to test and tender them during the witness's testimony.

II. On the Prosecution's category of "Video footage and related transcripts and translations"

24. The Defence also objects the submission of eight items classified under the category “Video footage and related transcripts and translations”.²⁵ For three of those items, the opposition relates to the assessment of their relevance, reliability and probative value;²⁶ as a consequence they are only included in Annex A for the Chamber’s assessment of evidence during its deliberation on the Article 74 judgement. However for the remaining five items,²⁷ the Defence submits that an immediate ruling of the Chamber is necessary in order to preserve the expeditiousness and fairness of the proceedings.
25. Indeed, the Defence notes that the five items consist of two videos²⁸ produced and provided to the Prosecution by P-1819 and P-2587, both journalists, and the respective transcriptions and/or translations of those videos. The video bearing ERN CAR-OTP-2120-0305 is specifically discussed in P-2587’s statement where she provides the context and details about its production.²⁹ The second video, bearing ERN CAR-OTP-2065-3843 is an integral part of P-1819’s prior recorded testimony as part of a paragraph on the numerous videos provided by the witness.³⁰ As both P-1819 and P-2587 are scheduled to appear as Rule 68(3) witnesses,³¹ the Defence respectfully refers to its arguments in paragraphs 15 to 17 which militate in favour of an intervention of the Chamber and rejection of the Prosecution’s Request in relation to the five items.
26. In addition, the Prosecution’s argument explaining that the videos are “exceptionally” being submitted via a bar table due to “the large volume of material on the Prosecution’s List of Evidence provided by P-1819 in particular”³² should be disregarded. Indeed, the Defence recalls that no

²⁵ See Annex A.

²⁶ CAR-OTP-2122-9074 ; CAR-OTP-2127-7077 ; CAR-OTP-2127-7096.

²⁷ CAR-OTP-2065-3843 ; CAR-OTP-2107-3077 ; CAR-OTP-2118-4772 ; CAR-OTP-2118-5668 ; CAR-OTP-2120-0305.

²⁸ CAR-OTP-2065-3843 and CAR-OTP-2120-0305.

²⁹ See CAR-OTP-2120-0211-R02, paras. 41-44.

³⁰ See CAR-OTP-2065-0003-R01, para. 165.

³¹ [ICC-01/14-01/18-724-Conf-AnxA](#), page 44 witnesses #87 and #88.

³² [ICC-01/14-01/18-1346](#), para. 19.

procedural bars or impediments to the submission of a large amount of annexes of a witness through a Rule 68(3) application were found in this very case; as an example more than 8000 items were submitted through witness P-1577,³³ compared to the 440 documents of P-1819 present on the Prosecution's List of Evidence.³⁴

27. Finally, the Prosecution's submissions already raised the eventuality of using those items during the testimonies of P-1819 and P-2587.³⁵ The Defence is of the view that in light of the fact that P-1819 and P-2587 are the author of the videos they will be able to provide relevant additional information that will be crucial for the assessment of their relevance, reliability and probative value. Defence submissions on those criteria at this stage, i.e. in advance of the witnesses' testimony, would be premature and could lead to additional necessary submissions in the future. In light of the principle of judicial economy and of the expeditiousness of the trial imperative, the Defence contends that an immediate intervention of the Chamber is necessary to reject the submission of the 5 items and rule, for future Prosecution's Bar Table, that this mode of submission is unsuitable for documents that are either annexes or intrinsically linked to the prior recorded testimony of a witness who has not yet appeared before the Chamber.

CONFIDENTIALITY

28. The present response is filed on a confidential basis due to references to potential identifying information of witnesses. A public redacted version is being filed simultaneously.

³³ See Chamber's email dated 21 June 2021 at 16:56.

³⁴ [ICC-01/14-01/18-1346](#), fn. 16.

³⁵ [ICC-01/14-01/18-1346](#), para. 19.

RELIEF SOUGHT

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

CONSIDER the Defence submissions included in Annex A;

RULE that documents annexed or intrinsically linked to a witness statement are barred from submission through a “Bar Table Motion”;

REJECT the Prosecution’s arguments in relation to the probative value and relevance of the 32 documents opposed within Annex A;

REJECT the submission of the following items: CAR-OTP-2121-2595; CAR-OTP-2126-0413; CAR-OTP-2126-0414; CAR-OTP-2126-0415; CAR-OTP-2126-0415; CAR-OTP-2128-1197; CAR-OTP-2128-1201; CAR-OTP-2128-1202; CAR-OTP-2128-1203; CAR-OTP-2065-3843; CAR-OTP-2107-3077; CAR-OTP-2118-4772; CAR-OTP-2118-5668; CAR-OTP-2120-0305.

RESPECTFULLY SUBMITTED ON THIS 25th DAY OF APRIL 2022



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