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**International
Criminal
Court**

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Date: **9 February 2024**

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 Annexes A to C and Public Annex D

**Public Redacted Version of the “Request for the Exclusion of Fabricated
Evidence”, 5 December 2023, ICC-01/14-01/18-2240-Conf**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Mr Karim Asad Ahmad Khan

Mr Mame Mandiaye Niang

Mr Kweku Vanderpuye

Counsel for Mr. Yekatom

Ms Mylène Dimitri

Mr Thomas Hannis

Ms Anta Guissé

Ms Sarah Bafadhel

Mr Gyo Suzuki

Ms Sabine Bayssat

Counsel for Mr. Ngaissona

Mr Geert-Jan Alexander Knoops

Mr Richard Omissé-Namkeamaï

Ms Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun

Mr Abdou Dangabo Moussa

Ms Elisabeth Rabesandratana

Mr Yaré Fall

Ms Marie-Edith Douzima-Lawson

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants (Participation /
Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

Ms Marie O'Leary

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. The fabrication of evidence is the antithesis of the search for truth and the administration of justice required of this Court. It has no place in these proceedings and where uncovered, it must be stamped out. This is uncontroversial.
2. Regrettably, however these proceedings have been the target of a deliberate and concerted effort to present false evidence on the part of OTP witnesses, OTP and Registry intermediaries, alleged ‘former child soldier’ participating victims, and other individuals relied on by the OTP in its investigation and prosecution of Count 29.¹
3. The principal individuals involved in this misconduct include the following individuals (collectively ‘Conspirators’), all of whom are directly/indirectly [REDACTED] to the child soldier demobilisation programme organised by the NGO ‘*Enfants sans frontières*’ (‘ESF’) in 2014 (‘ESF Programme’):
 - i. OTP witness [REDACTED] (P-1974) and OTP witness/Registry intermediary [REDACTED] (P-2018), respectively, [REDACTED]
 - ii. OTP/Registry intermediary [REDACTED] (P-2580), social worker and activity leader who ran the ESF centre in [REDACTED]²
 - iii. Registry intermediary [REDACTED] (P-2638), community liaison for ESF in [REDACTED]³
 - iv. alleged ‘former child soldier’ OTP witnesses and ESF [REDACTED] (P-2475), [REDACTED] (P-2511), [REDACTED] (P-2582) (and [REDACTED]), and [REDACTED] (P-2583)
 - v. alleged ‘former child soldier’ OTP witness [REDACTED] (P-2620), [REDACTED] of ESF employee [REDACTED]; and [REDACTED], OTP witness [REDACTED] (P-2671) and
 - vi. alleged ‘former child soldier’ participating witnesses [REDACTED] (P-0001) and [REDACTED] (P-0002).
4. The systematic collusion amongst this network was by no means an external anomaly. Rather, the Conspirators expanded their scheme and operated with impunity as a direct result of the OTP’s continued investigative failures. This has resulted in the fabrication of substantive evidence concerning Count 29, which continues to be relied upon. Had the OTP respected basic investigative principles and exhibited due diligence, the array of misconduct would have been evident at the early stages of its investigation. Instead, it was wilfully blind to the manifest *indicia* of misconduct and unreliability of its

¹ Charged under article 8(2)(e)(vii) of the Statute, i.e. the war crime of conscription, enlistment and use of children under the age of fifteen years to participate actively in hostilities.

² T-228-CONF-ENG ET [71:17-71:18].

³ T-223-CONF-ENG ET [46:22-47:4].

witnesses and evidence; and was negligent as regards its reliance on formal and *de facto* intermediaries. Due to the OTP's protracted failures in this regard, fundamental rights of Mr Yekatom have been irremediably violated, in a manner that casts substantial doubt on the reliability of the affected evidence and bring the integrity of these proceedings into serious disrepute.

5. Accordingly, pursuant to article 69(7), read in conjunction with articles 54(1)(a), 54(1)(c), 64(2), 67(1)(e), 67(2) and 68(3) of the Rome Statute ('Statute') and rule 64(1) of the Rules of Procedure and Evidence, the Defence for Mr Alfred Rombhot Yekatom ('Defence') respectfully requests that Trial Chamber V exclude the evidence of OTP witnesses P-2475, P-2018, and P-1974, and CLRV1 Witnesses P-0001 and P-0002, including associated exhibits used with these witnesses; and relevant items formally introduced through bar table motions or formally submitted items related to P-2620 and P-2582 ('Fabricated Evidence' and 'Request').⁴
6. This Request is presented at this juncture as it is only having reviewed the full scope of the OTP's investigative failures – some of which only became apparent following the CLRV1's case and during the course of Defence investigations – that the Defence was in a position to take the decision to seek exclusion of the Fabricated Evidence. The Request is sub-divided into the following three parts: **Part I** sets out the existence and scope of the collusion amongst the Conspirators; **Part II** set outs the contours of the OTP's investigative obligations pursuant to article 54(1) as well as the respective investigative failures which amount to violations of articles 54 and 67 the Statute; and **Part III** establishes that the fabricated evidence of P-2475, P-2018, P-1974, P-0001 and P-0002 is inherently unreliable and if admitted, would be antithetical to and would seriously damage the integrity of the proceedings.

SUBMISSIONS

A. Part I: Existence and scope of the collusion amongst the Conspirators

7. As previously submitted, the 2014 ESF Programme was fraudulent, in that the 'former child soldier' participants were not child soldiers, were not part of Mr Yekatom's group and/or were not under 15 years old at the time of the events; and this fraud was

⁴ Annex C sets out an itemised list of material of which the Defence seeks exclusion.

orchestrated and facilitated by *inter alia* [REDACTED] (P-1974) and [REDACTED] (P-2018), with the apparent aim of benefiting from international aid funding.⁵

8. As discussed in detail below, the OTP relied on [REDACTED] (P-1974) and [REDACTED] (P-2018) in their Count 29 investigation (and eventual case) in a manner contrary to its statutory obligations. As a direct result, P-1974 and P-2018 were able to further expand the scope of their original fraud perpetrated in 2014 via the ESF Programme, and gain further illicit personal and professional benefits therefrom, along with their numerous co-conspirators.
9. Following their initial OTP interviews in [REDACTED],⁶ [REDACTED] (P-1974) and [REDACTED] (P-2018) further entrenched themselves in these proceedings via professional opportunities provided by the Registry. In [REDACTED], P-2018 was tasked by the Registry, along with [REDACTED] ESF [REDACTED] (P-2580),⁷ to identify and collect ‘former child soldier’ victims for participation in the proceedings; he was assisted by [REDACTED] ESF [REDACTED] (P-2638).⁸
10. It was in this capacity that the ESF-[REDACTED] conspirators introduced the ‘former child soldier’ conspirators into these proceedings. During the [REDACTED] ‘group meetings’ for ‘former child soldiers’ held by [REDACTED] (P-2018) and Registry personnel, victims forms were completed by [REDACTED] (P-2582), [REDACTED] (P-2583), and [REDACTED] (P-2580’s) son [REDACTED].⁹ Within two weeks, [REDACTED] (P-2638’s) [REDACTED] (P-2620) – assisted by [REDACTED] (P-1974)¹⁰ – and [REDACTED] (P-0001) also completed forms.¹¹
11. A clear fraudulent *modus operandi* can be discerned from these individuals’ forms: specifically, the use of false identities, both for the applicants¹² and for their parents;¹³ the annexed fraudulent ‘proof of identity’ declarations, signed by the same individual,

⁵ See e.g., ICC-01/14-01/18-1237-Conf, paras 12-21; ICC-01/14-01/18-1456-Conf, paras 10-22; ICC-01/14-01/18-1479-Conf, paras 10-16; see also, ICC-01/14-01/18-1142-Conf, para. 12.

⁶ [REDACTED].

⁷ CAR-OTP-00002013.

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED] is listed in P-2620’s application form as her legal representative; and according to VPRS, [REDACTED] and transferred the form to VPRS on his ‘own initiative’ see, [REDACTED].

¹¹ [REDACTED].

¹² The real names of [REDACTED] (P-2620) and [REDACTED] (P-0002) are [REDACTED], respectively. For P-2620 see CAR-D29-0009-0207. For P-0002 see T-248 CONF FRA CT [27:26-28:14; 31:23-32:8]. See also, *infra*, para. 25 (regarding P-0001).

¹³ See *infra*, fn.14 (regarding the false identities of P-0002’s parents) and previous Defence submissions at ICC-01/14-01/18-1959-Conf, para. 16 (regarding the false identity of P-2620’s parents). See also, *infra*, para. 25 (regarding P-0001).

[REDACTED];¹⁴ the fact certain ‘former child soldier’ applicants were in fact children or relatives of [REDACTED] coordinators;¹⁵ and applicants’ subsequent disavowals of their claims in their forms.¹⁶ It can thus be inferred that by this stage the conspiracy was underway, and that [REDACTED] (P-2018), [REDACTED] (P-2580), [REDACTED] (P-2638) and [REDACTED] (P-1974) (‘ESF Conspirators’) were at its centre.

12. OTP interviews with these ‘former child soldiers’ began in this period. When the OTP contacted [REDACTED] (P-2428) for a meeting in [REDACTED], he asked to (and eventually did) discuss it with [REDACTED] (P-2018), whom he claimed was a ‘[REDACTED]’¹⁷. In [REDACTED], further contact between P-2018 and P-2428 followed, along with suspicious attempts by both to conceal this contact from investigators.¹⁸
13. [REDACTED] was interviewed by investigators on [REDACTED]; he falsely claimed *inter alia* to have been forcibly recruited into Mr Yekatom’s group at the age of [REDACTED],¹⁹ and he later conspired with [REDACTED], and [REDACTED] (P-2580) to procure a fraudulent baptism certificate ‘evidencing’ his false date of birth.²⁰ In the meantime, he was rewarded for his false statement and granted relocation out of CAR in [REDACTED].²¹
14. As subsequent OTP interviews were conducted with ‘former child soldiers’ the continuing background presence of [REDACTED] (P-2018) is notable. The day after the conclusion of [REDACTED] (P-2475’s) interview with investigators, both P-2018

¹⁴ Regarding the proof of identity declarations annexed to the forms of P-2620 and P-2582, see previous Defence submissions, at ICC-01/14-01/18-1959-Conf, paras 15-20. Regarding P-0002, see CAR-V45-00000007, p. 5 (proof of identity declaration annexed to his victim application form); and compare, T-247-CONF-FRA CT, 59:18-62:4, where P-0002 denied ever having lived in the [REDACTED]; stated that the ‘chef de quartier’ of his area was ‘[REDACTED]’; denied knowing a ‘[REDACTED]’; did not recognise the latter in a photograph; and stated his parents were named [REDACTED] –which is inconsistent with his proof of identity declaration. The proof of identity declaration annexed to the form of [REDACTED] was also signed by [REDACTED]; see, [REDACTED]. Despite this discernible pattern of misconduct, the OTP has not requested the Registry for an unredacted version of the victim application form of P-2583 (see, Annex B, Email from OTP to Defence, 20 July 2023 at 16:00). As such, the Defence is not in a position to inform the Chamber as to whether attached to P-2583’s form was a ‘proof of identity’ declaration produced by [REDACTED], like those of his co-conspirators P-2620, P-2582, P-0002, and [REDACTED].

¹⁵ Victim application forms were completed by P-2580’s [REDACTED], [REDACTED], and P-2683’s [REDACTED], P-2620 (see *supra*, para 10). See also, *infra*, para. 25 (regarding P-2683’s [REDACTED], [REDACTED] aka [REDACTED] (P-0001))

¹⁶ For P-2583 and P-2620; see, [REDACTED]. For P-0002 see T-248-CONF-FRA ET, 3:26-4:11, 25:6-18). For P-2582 see, ICC-01/14-01/18-1306-Conf-Exp, paras 41-43. See also, *infra*, para. 25 (regarding P-0001).

¹⁷ See *infra*, para. 62.

¹⁸ See *ibid*.

¹⁹ See *infra*, para. 74.

²⁰ [REDACTED].

²¹ [REDACTED]; see ICC-01/14-01/18-2135-Conf, para. 20.

and [REDACTED] (P-2476) met with the OTP.²² Investigators subsequently met [REDACTED] (P-2511) on [REDACTED] (where he presented a fraudulent birth certificate);²³ they also met P-2018 on [REDACTED].²⁴ P-2476 met investigators again on [REDACTED].²⁵

15. In the following months, [REDACTED] (P-2582), [REDACTED] (P-2583) and [REDACTED] (P-2620) were introduced to the OTP; they were escorted to their interviews by their co-conspirator [REDACTED] (P-2580),²⁶ where they provided fictitious accounts of their ‘experiences’ as ‘child soldiers’ in Mr Yekatom’s group.²⁷

16. [REDACTED] accompanying [REDACTED] to her interview was her uncle and co-conspirator, [REDACTED] (P-2638).²⁸ A key²⁹ element of [REDACTED] statement was her claim to have been repeatedly raped by [REDACTED] while in the group, and to have birthed a daughter as a result.³⁰ However, given that [REDACTED] did not in fact have a daughter,³¹ she thus devised a scheme, aided by [REDACTED] (P-2671)³² and [REDACTED] P-2638 [REDACTED] as her fictitious daughter, under the stolen identity of ‘[REDACTED]’,³³ and falsely presented her to investigators.³⁴ The scheme was a success: [REDACTED] and [REDACTED] were granted relocation in [REDACTED].³⁵

17. Meanwhile, [REDACTED] (P-2582’s) [REDACTED] provided investigators with birth certificates for P-2582 [REDACTED], which, as [REDACTED] (P-2084) later admitted,

²² [REDACTED]. The OTP has refused to disclose whether it is aware of any contact between P-2476 and P-2018 on this day, including whether they arrived to or left their meetings with the OTP together. See, Annex B, Email from OTP to Defence, 14 July 2023 at 16:21, p. 7, #14.

²³ [REDACTED]; see also, *infra*, paras 108-109.

²⁴ [REDACTED]. The OTP has refused to disclose whether it is aware of any contact between P-2018 and P-2511 on this day, including whether they arrived to or left their meetings with the OTP together. See, Annex B, Email from OTP to Defence, 14 July 2023 at 16:21, p. 7, #14.

²⁵ [REDACTED]. The OTP has refused to disclose whether it is aware of any contact between P-2476 and P-2018 on this day, including whether they arrived to or left their meetings with the OTP together. See, Annex B, Email from OTP to Defence, 14 July 2023 at 16:21, p.7 #14.

²⁶ The OTP has refused to disclose their ‘Basis for Contact’ in respect of either P-2580 and P-2583; see, Annex B, Email from OTP to Defence, 14 July 2023 at 16:21, p. 11, #27.

²⁷ [REDACTED]. Regarding the manifest unreliability of the accounts of [REDACTED], see *infra*, paras [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED]. As the Chamber is aware, the OTP has attempted to draw a distinction between [REDACTED] and P-2620’s alleged rapist.

³¹ [REDACTED].

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED]. Documents obtained from [REDACTED] and her co-conspirators’ Facebook accounts evidence this scheme: see e.g., Annex A, [REDACTED].

³⁵ [REDACTED]

had been fabricated for the express purpose (subsequently attained)³⁶ of obtaining relocation.³⁷

18. In the meantime, [REDACTED] (P-2475) and [REDACTED] (P-2580) were also conspiring to fabricate evidence. Via Facebook, P-2475 [REDACTED] discussed the fabrication of a baptism certificate indicating a false year of birth (1999).³⁸ This conversation took place on [REDACTED] that OTP intermediary [REDACTED] (P-2580) arrived in [REDACTED], having been specifically tasked by the OTP to procure a [REDACTED] of [REDACTED].³⁹
19. Facebook activity of [REDACTED] (P-2475), [REDACTED] (P-2620) and [REDACTED] (P-2582) demonstrates extensive contact in their relocation country. [REDACTED] and [REDACTED] were mutually aware both of each's relocation, and the reasons thereof, within days of the latter's arrival to the Relocation Country in [REDACTED], if not prior.⁴⁰ In [REDACTED], P-2475 sent an interlocutor photographs of [REDACTED] with [REDACTED].⁴¹ In [REDACTED], when asked by an interlocutor whether he knows P-2620, P-2475 replied that he does.⁴²
20. Throughout [REDACTED], in addition to Facebook contact,⁴³ the three conspirators physically met in the Relocation Country. On one occasion, [REDACTED] (P-2620) used [REDACTED] mobile to send a voice message to a third party.⁴⁴ The relocated conspirators shared photos of their gatherings: a family outing at the [REDACTED];⁴⁵ celebrating [REDACTED];⁴⁶ and celebrating [REDACTED].⁴⁷ Their contact continued in [REDACTED], following [REDACTED].⁴⁸ For instance, when P-2582 was [REDACTED], [REDACTED] (P-2475) visited her.⁴⁹
21. Nor was this extensive contact merely social. Their Facebook activity evidences collusive contact centered around the time of [REDACTED] (P-2475) testimony at the

³⁶ [REDACTED].

³⁷ See *infra*, paras 85-87.

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED] (where [REDACTED] refers to a recent visit to her home by [REDACTED]).

seat of the Court. [REDACTED] ([REDACTED]) [REDACTED].⁵⁰ Four days before his testimony, while P-2475 was reviewing [REDACTED] (unsupervised in his hotel room, contrary to VWU protocol), and while he had surreptitiously retained possession of his mobile phone with internet access, he [REDACTED].⁵¹ Amongst the ‘corrections’⁵² made to P-2475’s statement in this period was his claim to have witnessed [REDACTED];⁵³ and in newly claiming that [REDACTED], P-2475 is unique among all OTP witnesses, bar one: [REDACTED] herself.⁵⁴

22. Once his testimony commenced, [REDACTED] was in contact with [REDACTED].⁵⁵ After the first day of his cross-examination, [REDACTED] arranged a call with [REDACTED].⁵⁶ The next day, within hours of the conclusion of his cross-examination, during which the Defence confronted him with public Facebook material of his relocated co-conspirators,⁵⁷ [REDACTED] had multiple Facebook calls with [REDACTED]; these conversations continued the next day (including on WhatsApp at [REDACTED]’s insistence).⁵⁸ Within [REDACTED] of the conclusion of his evidence, [REDACTED] appears to have made her previously public Facebook status ‘private’, further evidencing an attempt to conceal collusive contact between these individuals.⁵⁹
23. Meanwhile, the ESF-affiliated conspirators [REDACTED] (P-1974), [REDACTED] (P-2018), [REDACTED] (P-2580), and [REDACTED] (P-2638)) continued their misconduct. From [REDACTED] onwards, P-2018 repeatedly requested money from [REDACTED].⁶⁰ [REDACTED] was also in contact with [REDACTED]; and the two appear to be especially close: [REDACTED].⁶¹ On [REDACTED], [REDACTED] left a voice messages for [REDACTED]: she informed him that ‘the people’ have been in touch regarding her anticipated testimony; and she lamented a perceived lack of

⁵⁰ [REDACTED]

⁵¹ [REDACTED]

⁵² Note that another correction involved circumstances of [REDACTED]’s forcible recruitment: whereas he had initially claimed to have been forcibly recruited along with [REDACTED], he subsequently ‘corrected’ his statement and claimed that he had been alone when he was recruited. This correction is notable given that 10 days after the Defence’s meeting with [REDACTED] in [REDACTED], [REDACTED] had received a warning via Facebook about an ongoing ‘investigation’ and was told to stop ‘connecting’ with people from [REDACTED]. See, Annex [REDACTED].

⁵³ [REDACTED]

⁵⁴ [REDACTED]. [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ See, [REDACTED] (where [REDACTED] is confronted with other documents indicating that [REDACTED] was not 12 years old at the time of the events, but 22 years old).

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED]. Regarding the coded language, see *infra*, para. 24.

⁶¹ [REDACTED].

information from him, contrary to their ‘understanding’: [REDACTED]⁶² Over the next few days, she left similar messages for [REDACTED], asking him for ‘news’ and telling him that she is still waiting on the ‘programme’ that they had discussed: [REDACTED].⁶³ The collusive nature of this contact is further evidenced by the fact that both [REDACTED].⁶⁴

24. [REDACTED] saw an apparent increase in the ESF Conspirators’ activity, seemingly coinciding with the testimony of [REDACTED] (P-2475). On [REDACTED] (P-2580) repeatedly requested money from [REDACTED], using identical coded language used by [REDACTED] (P-2018) [REDACTED].⁶⁵ On [REDACTED] (P-2638) asks [REDACTED] (P-2620) to contact [REDACTED] urgently.⁶⁶ Previously, on [REDACTED], [REDACTED] (P-2671) had contacted [REDACTED], referencing a ‘commission’ of [REDACTED] ([REDACTED] (P-2580); and on [REDACTED], P-2620 was informed of a scheduled visit by ‘[REDACTED]’ to her [REDACTED], [REDACTED].⁶⁷

25. Following the successful relocation of his [REDACTED] (P-2620) and his [REDACTED], [REDACTED] (P-2638) sought to secure the same for his [REDACTED], [REDACTED], by having him complete a victim application form, under the false surname ‘[REDACTED]’, with the assistance of [REDACTED] (P-2018).⁶⁸ His form exhibits *indicia* of the fraudulent *modus operandi* adopted by his predecessor co-conspirators:⁶⁹ false names for him and his parents; a fraudulent ‘proof of identity’ form in annex; and his subsequent wholesale disavowal of the content of the form, when confronted with the fundamental inconsistencies arising from it.⁷⁰ Assisting ‘[REDACTED]’ ([REDACTED]) to complete his fraudulent form was P-2018, who had taken [REDACTED] to BANGUI with a group of ‘former child soldier’ prospective participating victims, [REDACTED] P-2638.⁷¹

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ See, e.g. [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ See *supra*, paras 10-11.

⁷⁰ See, T-246-CONF-FRA CT [54:28-62:21] (regarding the fact that his name is not [REDACTED]); [25:13-26:11] (regarding the false names provided for his parents); [27:8-29:5] (regarding the fraudulent ‘proof of identity’ declaration); and [71:12-74:2] (where he claimed that the divergences between his victim application form and testimony were due to his form not having been read back to him once completed; in this regard, [REDACTED].

⁷¹ [REDACTED].

26. [REDACTED] (P-0001) and [REDACTED] (P-0002),⁷² were selected by the CLRV1 to testify during its case.⁷³ CLRV1 Counsel AKEM commissioned the [REDACTED] to produce new birth certificates for both, on the basis of false biographical information – via the highly irregular avenue of [REDACTED].⁷⁴ The source of this false information provided by CLRV1 Counsel remains worryingly unclear.⁷⁵ Further, whereas the justification provided to [REDACTED] for the production of new birth certificates was [REDACTED].⁷⁶
27. As regards motive: while the ESF Conspirators were initially motivated to collude and fabricate evidence to conceal the fraudulent nature of the 2014 ESF Programme, as the OTP and Registry increasingly implicated these conspirators in these proceedings,⁷⁷ another motive crystallised: illicit personal gain.
28. Through the ‘former child soldier’ production factory that these individuals enacted, the OTP, CLRV1 and Registry were supplied with the ‘victims’, ‘witnesses’, and ‘evidence’ that they sought. In exchange, the ESF Conspirators were rewarded with employment: all four secured positions with the Court. [REDACTED] (P-2018) found work as VPRS and *de facto* OTP intermediary.⁷⁸ [REDACTED] (P-2638), initially involved via P-2018’s [REDACTED] VPRS work, acted as the Registry’s [REDACTED] ‘focal point’ for prospective applicants, as well as CLRV1 intermediary.⁷⁹ [REDACTED] (P-2580) was an intermediary for the VPRS, OPCV, and the OTP.⁸⁰ [REDACTED] (P-1974) successfully applied for a legal assistant roster position with the OPCV.⁸¹ As of April 2023, no less than eight ESF personnel were employed by VPRS – including [REDACTED].⁸²

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ Regarding the circumstances of this irregular procedure, see, Email from Defence to TV V and Parties, 26 September 2023 at 9:23 (regarding P-0001); and Email from Defence to TC V and Parties, 3 October 2023 at 10:43 (regarding P-0002). See also, CAR-D29-0016-0136.

⁷⁵ E.g. both denied knowing time of birth and testified that they had not provided such information to Counsel AKEM see, T-246-CONF-FRA CT[14:28-15:3# (regarding P-0001); and T-248-CONF-FRA CT [6:26-7:3] (regarding P-0002); *contra*, CAR-D29-0016-0136, at 0137.

⁷⁶ [REDACTED].

⁷⁷ Regarding the OTP’s improper reliance on these individuals, see *infra*, paras 60-72.

⁷⁸ See e.g., Annex A, 27 February 2018 (P-2018’s motive appears to have been clear from this first interaction with the OTP, when he sought ‘transportation costs’ in exchange for an offer to bring the OTP ‘select children’), 1 March 2018, 25-26 March 2019, 27-28 March 2019, 22 May 2019, 24 June 2021. CAR-OTP-00001381.

⁷⁹ See e.g. Annex A, 22 May 2019, 24 June 2021; and see *supra*, para 25. CAR-OTP-00001381.

⁸⁰ See e.g., Annex A, 27-28 March 2019, 26 August 2019, 18-23 September 2019, 14-19 November 2019, 21-22 November 2019, 13-14 January 2020. CAR-OTP-00001381.

⁸¹ Annex A, 25 February 2020.

⁸² CAR-OTP-00001381.

29. The ‘former child soldier’ conspirators who completed fraudulent victim application forms (and the ESF Conspirators who assisted them) appear to have been motivated by the prospect of receiving victim reparations.⁸³ In addition, [REDACTED] (P-2582), [REDACTED] (P-2620), and [REDACTED] (P-2475) successfully sought relocation and its myriad concomitant benefits. The Facebook accounts of the relocated conspirators demonstrates evidence of their fraudulently obtained gains and opportunities. Within months of his relocation, [REDACTED] sent interlocutors photographs of himself covered in banknotes.⁸⁴ He sent an acquaintance a blueprint of a house he intended to build in [REDACTED], and discussed his plans to buy land in [REDACTED]; he later sent the blueprint to his [REDACTED].⁸⁵ Unsurprisingly, in P-2475’s recently completed victim application form, he specifically requested reparations in the form of a house.⁸⁶ In the same vein, [REDACTED] (P-2582) asked an interlocutor to find her a plot of land to buy in [REDACTED].⁸⁷
30. Their CAR-based co-conspirators also shared in these benefits:⁸⁸ once resettled, [REDACTED] (P-2620) repeatedly transferred money to [REDACTED], her [REDACTED]co-conspirator,⁸⁹ while [REDACTED] (P-2582) referred to money ‘shared’ with hers.⁹⁰ No doubt inspired by the success of his [REDACTED] P-2620’s scheme, [REDACTED] (P-0001) so eagerly requested relocation during his testimony, that he even sought to deny his own school photograph when presented with evidence of his false identity.⁹¹
31. The Conspirators thus successfully carried out a far-reaching scheme to defraud the Court via the systematic fabrication and presentation of false accusations against Mr Yekatom, over a period of years – and of which the exact contours and extent may not come to light.⁹² However, the success of this ESF-orchestrated ‘former child soldier’

⁸³ Regarding the various forms of reparations sought by the conspirators, see, Annex A, [REDACTED].

⁸⁴ [REDACTED].

⁸⁵ Annex A, [REDACTED]; see also, [REDACTED] (where [REDACTED] refers to land that [REDACTED] has bought in CAR).

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ Regarding [REDACTED]’s and [REDACTED]’s attempts to collect money from their co-conspirators, see *supra*, paras 23-24.

⁸⁹ [REDACTED].

⁹⁰ Annex A, 7 September 2021. See also, 21 January 2020 and 24-29 May 2023 (regarding the role of conspirator [REDACTED]).

⁹¹ T-245-CONF-FRA ET [41:7-17] (regarding his wish to be relocated to a country in Africa); [REDACTED].

⁹² See also where the evidence indicates communication and contact between the Conspirators, the content of which the Defence cannot access, e.g. Annex A, 7 May 2022 (emails); 6 May 2021, 24 May 2021 (mobile calls); 1 June 2022, 17 May 2022 (Facebook calls); 4 February 2022, 4 April 2022, 15 May 2022, 2 June 2022, (WhatsApp

production line was not due to any particular sophistication on the part of the Conspirators. In fact, quite the contrary: the scheme was fundamentally crude and blindingly obvious. As the following section will demonstrate, the success of the scheme, including the resultant contamination of the evidentiary record in this case, is first and foremost due to the OTP's consistent failure to meet its statutory investigative obligations throughout the course of these proceedings.

B. Part II: Existence of violations of article 54(1) and articles 67(1)(e) and 67(2)

i) The exclusion of evidence is mandatory once both limbs of Article 69(7) are satisfied

32. The power to exclude evidence is a cornerstone of the Court's ability to both 'protect the accuracy and reliability of the Court's fact-finding by requiring that evidence of questionable credibility be excluded', and safeguard 'the moral integrity and the legitimacy of the proceedings by requiring that the process of collecting and presenting evidence is fair towards the accused and respects the procedural and human rights of all those who are involved in the trial.'⁹³

33. Article 69(7) involves a two-step inquiry, the first of which requires a determination as to 'whether the evidence at issue 'was obtained by means of a violation of th[e] Statute or internationally recognised human rights' ('First Limb').⁹⁴ The second step entails a consideration of 'whether '[t]he violation casts substantial doubt on the reliability of the evidence'⁹⁵ or '[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings' (Second Limb')⁹⁶ The evidence concerned is inadmissible in case of an affirmative answer to either of these two questions as set out in the Second Limb.⁹⁷

34. Where both the First and Second Limbs of article 69(7) are satisfied, this results in a procedural bar to the admission of the Fabricated Evidence. In other words, where these conditions are met, the exclusion of the evidence is non-discretionary.⁹⁸

contact); and 30 May 2022 (in-person meetings). See also, regarding mobile phone contact between P-2580 and other conspirators, Annex A, [REDACTED].

⁹³ Katanga Bar Table Decision, para. 39.

⁹⁴ Bemba et al. AC Judgment, para. 280.

⁹⁵ Article 69(7)(a).

⁹⁶ Article 69(7)(b)

⁹⁷ Bemba et al. AC Judgment, para. 280.

⁹⁸ This is clear from the plain language ('shall be excluded') of Article 69(7). See further Piragoff/Clarke 2022, mn 88: '[a]though Article 69(4) provides for a discretionary rule of exclusion, paragraph 7 stipulates a mandatory rule of exclusion if its conditions are met'. This is not to say that evidence obtained as a result of a violation is automatically excluded given that this would only fulfil the First Limb, *contra* Lubanga Confirmation Decision, para. 84.

ii) *The OTP's investigative failures amount to a violation of article 54(1) thereby satisfying the First Limb of article 69(7)*

i. Contours of the OTP's investigative duties and powers under article 54(1)

35. To demonstrate the existence of statutory violations, it is necessary to examine the contours of the OTP's investigative duties and powers within the statutory framework.

36. Pursuant to article 54(1), the OTP's investigative obligations are three-fold: it must (i) seek to establish the truth; (ii) undertake an effective investigation and prosecution; and, (iii) fully respect the rights of person arising under the Statute. All three factors are obligatory and continuous throughout the course of proceedings.⁹⁹

37. Said duties are further elaborated in the OTP Regulations and the OTP Code; and the latter notably sets out the fundamental rules for OTP staff members including the duty to '[b]e conscious of the purpose of the Court and the crucial role the Office plays in investigating and prosecuting international crimes and in the administration of justice.'¹⁰⁰ These duties and powers are consistent with international standards,¹⁰¹ as well as the various procedural frameworks of domestic civil and common law systems.¹⁰² Given the OTP's role as 'gate-keeper' of international criminal proceedings before the ICC,¹⁰³ and in accordance with article 21(3), due regard must be had to these international standards in any assessment of whether the OTP has met its statutory investigative duties.

A. Objectivity

38. Article 54(1)(a) obliges the OTP to investigate objectively to meet its obligation to seek to establish the truth.¹⁰⁴ This requirement is also enshrined within the OTP Code, which requires the OTP to 'investigate incriminating and exonerating circumstances equally in all steps involved in the planning and conduct of investigative and prosecutorial activities'; 'consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the prosecution'; and 'ensure that all necessary and reasonable enquiries are made'.¹⁰⁵ OTP staff members are further

⁹⁹ Lubanga Disclosure Judgment, para. 52.

¹⁰⁰ OTP Code, p. 4.

¹⁰¹ See e.g. UN Guidelines on the Role of Prosecutors and the IAP Standards.

¹⁰² For overview see., Investigative and Prosecutorial Principles.

¹⁰³ Olásolo 2003.

¹⁰⁴ This has been advanced by the OTP; see, OTP Palestine Request, para. 34. The objectivity requirement is also consistent with article 13(b) of the UN Guidelines on the Role of Prosecutors, section 3 of the IAP Standards, and various domestic frameworks; see Investigative and Prosecutorial Principles.

¹⁰⁵ OTP Code, para. 49. See also, Katanga & Ngudjolo Transcript [72:22].

obligated to report to the Prosecutor all concerns which, if substantiated, would ‘[...] bring the administration of justice into disrepute or constitute a miscarriage of justice.’ Adherence to these obligations is mandatory.¹⁰⁶

39. An objective investigation is made up of various components, the most pertinent of which include the obligation to: (i) investigate incriminating and exonerating circumstances equally which must be conducted ‘comprehensively, in good faith and with integrity’;¹⁰⁷ (ii) investigate independently from external interferences; (iii) seek all relevant evidence in an investigation - whether testimonial or documentary; (iv) avoid tunnel vision by ensuring there is not a single hypothesis which excludes all others; (v) avoid case construction around a named suspect and safeguard against unconscious biases from influencing the direction of the investigation; and (vi) regularly review and test case hypothesis.
40. These categories have been accepted and developed by the OTP,¹⁰⁸ as discerned from the testimony of the OTP ‘investigations team leader’ in *Katanga & Ngudjolo* (‘Katanga OTP Lead Investigator’):
- the OTP systematically seeks to identify ‘potentially exonerating themes’ by ‘critically looking at the evidence [...] and [the OTP] case hypothesis to try and identify what could be potentially exonerating and what [the OTP] need[s] to investigate’;¹⁰⁹
 - the ‘investigation into the potentially exonerating facts and themes is an inseparable part of the rest of the investigation process’;¹¹⁰
 - the process of identifying exonerating themes is ‘augmented and [...] amended with the evidence that comes in and is collected,’ and is thus ‘a continuous evaluation process’ that involves examining the evidence to determine whether ‘there are anything else that [investigators] should be looking at critically from the point of view of exonerating facts’;¹¹¹ and that these themes thus ‘evolve over time’;¹¹²

¹⁰⁶ OTP Code, para. 50.

¹⁰⁷ Ruto Confirmation Decision Dissenting Opinion of Judge Han-Peter Kaul, paras 44, 48.

¹⁰⁸ See also e.g. regulation 35(4) of the OTP Regulations, which requires that ‘[t]he case hypothesis and all plans shall be reviewed and adjusted on a continuous basis taking into consideration the evidence collected.’ Furthermore, the OTP has also espoused these very investigative standards as part of its guidelines for civil society organisations tasked with documenting international crimes and human rights violations see OTP-Eurojust CSO Guidelines. Self-evidently, the OTP must be held to the same investigative standards that it itself demand of civil society organisations.

¹⁰⁹ Katanga & Ngudjolo Transcript [16:7-22] and [32:1-9].

¹¹⁰ Katanga & Ngudjolo Transcript [16:23-17:3].

¹¹¹ Katanga & Ngudjolo Transcript [32:1-9].

¹¹² Katanga & Ngudjolo Transcript [32:25-2].

- the OTP ensures that themes of exoneration are ‘part of the execution of all activities, mainly and most visibly in the preparation for witness interviews and interview outlines’, and further, that ‘when processing the information the potentially exonerating facts are taken into consideration’;¹¹³
- the aim of witness interviews is ‘really to bring the truth to the fore’ and not merely to ‘go through some preconceived plan of what [OTP investigators] want to hear’;¹¹⁴ and that in witness interview outlines, investigators ‘incorporate questions from the exonerating themes, in detail, into that interview outline to ensure that all this information is elicited in an appropriate way’;¹¹⁵
- with respect to evidence review, OTP staff are provided with guidelines specifically aimed at ‘ensuring that all staff involved in the review process understand what the potentially exonerating themes have been in the investigation and how they should be marked as such’; and that with regard to the *Lubanga* investigation, that ‘all the witness statements that were collected in the course of that [...] investigation were reviewed individually’;¹¹⁶
- when, during interviews, a witness provides information about potentially exonerating themes pointing to new witnesses, the OTP ‘absolutely do[es] try and identify and locate any new witnesses or sources which could provide new information or evidence on potentially exonerating themes’.¹¹⁷

41. Further, in *Ruto & Sang*, Trial Chamber V(A) held that where there existed ‘reasonable grounds to believe that information not in the OTP’s possession may be potentially exculpatory’, the OTP was obliged to ‘make reasonable efforts to obtain that information’.¹¹⁸ This obligation continues throughout proceedings including at the trial phase.¹¹⁹

B. Effective investigation

42. Article 54(1)(b) requires the OTP to execute its investigation competently and diligently. This is reflected in paragraph 51 of the OTP Code, which provides that OTP members shall, *inter alia*: (i) act with competence and diligence, make impartial

¹¹³ Katanga & Ngudjolo Transcript [17:8-12].

¹¹⁴ Katanga & Ngudjolo Transcript [26:7-10].

¹¹⁵ Katanga & Ngudjolo Transcript [33:11-13].

¹¹⁶ Katanga & Ngudjolo Transcript [17:19-18:18].

¹¹⁷ Katanga & Ngudjolo Transcript [34:16-18].

¹¹⁸ Ruto Asylum Application Decision, para. 32.

¹¹⁹ E.g., *Lubanga* Disclosure Judgment, para. 52. See further Katanga & Ngudjolo Transcript [17:3-4]; and OTP Ruto Art 54 Response, para. 7.

judgments based on the evidence and consider foremost the interests of justice in determining whether or not to proceed; (ii) fully respect the rights of persons under investigation and the accused and ensure that proceedings are conducted in a fair manner; and (iii) refrain from proffering evidence reasonably believed to have been obtained by means of a violation of the Statute or internationally recognised human rights if the violation casts substantial doubt on the reliability of the evidence or the admission of evidence would be antithetical to and would seriously damage the integrity of the proceedings.

43. Similarly, regulation 24 of the OTP Regulations expressly states that,

[i]n the analysis of information and evidence regarding alleged crimes, the Office shall develop and apply a consistent and objective method for the evaluation of sources, information and evidence. In this context, the Office shall take into account *inter alia* the credibility and reliability of sources, information and evidence, and shall examine information and evidence from multiple sources as a means of bias control.

44. Article 54(1)(b) is also consistent with international investigative standards, which oblige prosecutorial and investigative bodies to verify sources of information provided by witnesses, and to confront witnesses with inconsistencies in their evidence and/or with contradictions of other witnesses.¹²⁰ These requirements have been accepted by the OTP.¹²¹

45. Investigative thoroughness and comprehensive due diligence with regard to the reliability of the available evidence is a fundamental component of the OTP's article 54(1) obligations.¹²² More pertinently, it is a corollary of the OTP's obligation not to knowingly present false or forged evidence, and further, to correct its reliance on any statement or evidence as soon as it becomes aware that the material is incorrect or false. This a strict requirement which demands integrity on the part of the OTP, especially given the scope of its powers to initiate and investigate article 70 offences.¹²³

C. Fair trial rights

46. Article 54(1)(c) establishes that the OTP's investigative obligations are inextricably bound with fundamental fair trial principles and rights, which are further heightened by

¹²⁰ See Investigative and Prosecutorial Principles.

¹²¹ Katanga & Ngudjolo Transcript [17:13-18]: '[w]e question the credibility of information that we receive and we try and corroborate it with multiple sources. We test the reliability of the sources that we use, and we don't take information for granted. We check the origin to the extent possible we can to make sure we understand the nature of it.'

¹²² See also Kenyatta Art 64(4) Decision Concurring Opinion of Judge Christine Van den Wyngaert, para. 4.

¹²³ See also Rule 165 and further, Ntaganda OTP Stay Response, para. 61.

the nature of proceedings before this Court as compared to the *ad hoc* tribunals.¹²⁴ As such, the OTP is ‘conceived in the Statute as an objective truth seeker and not as a partisan lawyer.’¹²⁵ This heightened duty must be understood in the specific context of the crimes that fall within the jurisdiction of the Court: i.e., their scale and multi-faceted complexity, and the manner in which this compounds the inherent investigative disadvantage faced by an accused.¹²⁶

47. The fairness of proceedings is further dictated by an accused’s right to disclosure pursuant to article 67(2),¹²⁷ and correlates to the OTP’s obligation to amend or withdraw charges where the available evidence, including both incriminating and exonerating evidence, does not support an element of the charges pleaded or supports a different charge, or that any charge pleaded otherwise cannot be pursued.¹²⁸

D. Intermediaries

48. Whilst the nature of the OTP’s work may require assistance from third parties including intermediaries, the core functions of its investigative work must only be conducted by the OTP,¹²⁹ and the use of intermediaries is not a substitute for staff for the implementation of the mandate of the Court.¹³⁰ This is clearly set out in the Intermediary Guidelines, which was first and foremost compiled in order to preserve the integrity of the judicial process to the maximum extent possible.¹³¹ In other words, given the central investigative mandate of the OTP, it cannot shirk its obligation to objectively seek the truth, and to conduct comprehensive and diligent investigations, with full respect for the rights of an accused.

¹²⁴ See also Lubanga Witness Familiarisation Decision, para. 45: ‘[t]he ICC Statute has, through important advances, created a procedural framework which differs markedly from the *ad hoc* tribunals, such as, for example, in the requirement in the Statute that the OTP should investigate exculpatory as well as incriminatory evidence, for which the Statute and Rules of the *ad hoc* tribunals do not provide. [...] Therefore, the Statute moves away from the procedural regime of the *ad hoc* tribunals, introducing additional and novel elements to aid the process of establishing the truth’.

¹²⁵ Ruto Confirmation Decision Dissenting Opinion of Judge Han-Peter Kaul, para. 45.

¹²⁶ See Bergsmo/Bekou 2022, mn 2: ‘the main focus of the Court will be to bring to justice those offenders at the highest level of responsibility. Achieving this goal requires considerable investigative effort, involving activities as wide ranging as exhumation of mass graves and conduct of forensic work at such sites, locating and interviewing witnesses throughout the world, and accessing and sifting large volumes of governmental records. The Prosecutor is unable to perform these functions successfully without enlisting the assistance of States. Similarly, if suspects or accused had to prepare their own defence, they would in all likelihood also require the assistance of States to gain access to witnesses or evidentiary material. Suspects and accused before international tribunals and courts, however, generally lack the authority and standing to solicit the assistance of States [...] [t]he result is a clear and binding mandate for the Prosecutor to investigate both sides of the case equally’ (fns omitted).

¹²⁷ Article 67(2). See also Katanga & Ngudjolo Transcript [28:6-8].

¹²⁸ Articles 61(4) and 61(9) and OTP Regulations, regulation 60.

¹²⁹ Intermediary Guidelines, p. 2.

¹³⁰ Intermediary Guidelines, p. 3.

¹³¹ Intermediary Guidelines, p. 3.

49. This position is further supported in several respects. First, the OTP retains oversight both with regard to the selection of intermediaries and the terms under which they are tasked. The Intermediary Guidelines provide clear selection criteria and expressly refer to the need to screen intermediaries for their willingness and ability to *inter alia*: (i) respect the confidentiality of information to which the intermediary might be exposed; (ii) act with integrity and demonstrate respect for the dignity, well-being and privacy of victims/witnesses/accused; (iii) adhere to the policies of and conduct practices in accordance with Court decisions and the applicable law; (iv) adhere to and conduct practices in accordance with the terms agreed as per the contract and with instructions from the relevant organ or unit of the Court or Counsel; and they are also screened for (vi) any reason to believe that associating with the potential intermediary could have negative repercussions for the Court or its activities.¹³²
50. Second, the Intermediary Guidelines further demand that all intermediaries are provided at the earliest opportunity with a copy of the Intermediary Code,¹³³ and are briefed *inter alia* on the general mission of the Court including the rights of the accused and a fair and impartial trial, and the obligations of the OTP and the intermediary regarding the application of good practices.
51. Third, the supervision of any intermediary is continuous. The Intermediary Guidelines expressly refer to the appointment of staff members to supervise the work of the intermediary and the requirement to keep a record of their supervisory methods and actions.¹³⁴ Accordingly, there is a reciprocal responsibility on an intermediary supervisor to ensure that the tasks delegated to the intermediary are conducted consistently with the statutory framework of the Court,¹³⁵ and in no way adversely impact on the fairness and impartiality of the proceedings.¹³⁶
52. It remains the OTP's responsibility to ensure that its reliance on intermediaries is in accordance with the Intermediary Code irrespective of whether the intermediaries' conduct or performance is formalised or not.¹³⁷ Indeed, it would undermine the

¹³² Intermediary Guidelines, p. 8.

¹³³ Intermediary Guidelines, p. 6 in reference to Intermediary Code.

¹³⁴ Intermediary Guidelines, p. 11.

¹³⁵ Intermediary Guidelines, p. 11.

¹³⁶ Intermediary Guidelines, p. 11. The supervision of any intermediary also extends to reports concerning breaches or attempted breaches of the Intermediary Code, either on the part of the intermediary directly or alternative sources; see Intermediary Code, section 8.1.

¹³⁷ Intermediary Guideline, section 1: '[f]or those intermediaries acting outside such contractual relationship, a determination shall be made on a case-by-case basis whether they fall within the present Guidelines. An intermediary may assist an organ or unit of the Court or Counsel on a one-off basis or may cooperate with the

procedural framework applicable to the Court's reliance on intermediaries if an organ could sidestep the protections and safeguards therein simply by opting not to offer contracts to *de facto* intermediaries.¹³⁸ Accordingly, it is for the OTP to ensure and verify that its intermediaries (both formal or *de facto*) have not engaged in activity which, *inter alia*: (i) violates the rights of an accused; (ii) violates the statutory framework of this Court; (iii) amounts to corrupt practices which compromise or appear to compromise the intermediaries' functions; (iv) amounts to abuse or misuse of the intermediaries' relationship with the Court; (v) includes commitments to victims, (potential) witnesses or the Court that the intermediary is not in a position to fulfil; (vi) amounts to harassment, intimidation, pressure, bribery to compel any person to testify or not testify before the Court or to engage or not to engage in any dealings with the Court; or (vii) amounts to deception or knowingly misleading the Court.¹³⁹

ii. The OTP failed to adhere to its investigative obligations pursuant to article 54(1)

53. As noted above, the fraud and misconduct perpetrated by the Conspirators was by no means undetectable. In fact, clear indications of this potentially criminal impropriety would have been apparent to the OTP at the outset of its Count 29-related investigations.
54. Instead, as will be demonstrated below, the OTP fell short of even the most basic investigative and prosecutorial standards. It funneled its investigation through ESF and ESF-affiliates, despite their manifest conflict(s) of interest and repeated improper conduct, and the mounting evidence of the fraudulent nature of the 2014 ESF Programme. It remained indifferent to the glaring *indicia* of unreliability pervading the evidence and witnesses it sought to rely on under Count 29, and steadfastly refused to undertake even the most elementary of steps to verify or authenticate the accounts of the 'former child soldiers', despite multiple irreconcilable inconsistencies in their claims. Even at trial, the OTP has continued to refuse to meaningfully test its evidence under Count 29, no matter how unreliable it appeared, seemingly for fear of eliciting exculpatory testimony from its witnesses and thereby compromising its case.

Court or Counsel over an extended period of time and/or in relation to multiple communications. An intermediary may work with only one organ or unit of the Court or Counsel, or it may have contact with multiple organs and units of the Court or individual Counsel.'

¹³⁸ This is also consistent with the Intermediary Guidelines which acknowledges the fact that engagement with intermediaries incurs rights and duties on the relevant party see Intermediary Guidelines, p. 3.

¹³⁹ Intermediary Code, sections 3.1-3.4, 6.3-6.4 and 7.5. See also section 7.7 which provides: '[a]n Intermediary shall immediately inform the Court if he/she/it perceives an existing or impending conflict of interest affecting his/her/its work with the Court.'

55. This is not a matter of individual failures of due diligence. On the contrary, a consistent pattern of wilful negligence can be recognised, evidencing a clear failure on the part of the OTP to meet its statutory investigative obligations. As a result, the Conspirators have been able to engage, effectively unchecked, in witness interference, evidence fabrication, and collusion for personal gain, at significant financial and reputational expense to the Court, and most importantly, to the detriment of the fairness of these proceedings against Mr Yekatom.

A. There was a heightened need to investigate allegations concerning the fraudulent representation of 'former child soldiers' from the outset

56. The phenomenon of fraud in post-conflict demobilisation programmes for alleged 'former child soldiers' in CAR was one that would have been identifiable to the OTP at the very outset of its investigations. In fact, the OTP would already have been aware of this phenomenon in the wider central African region, given its experience in the *Lubanga* case. In its Judgment, Trial Chamber I cited to an OTP investigator's 2010 deposition in finding that in the neighbouring Democratic Republic of Congo, '[a]t the time of the investigations, UN agencies had received information to the effect that some individuals were falsely presenting themselves at demobilisation centres as former child soldiers from the militias in order to join the reintegration programme.'¹⁴⁰

57. Further, as early as August 2016, the OTP was put on notice of this phenomenon specifically within the context of the CAR conflict by P-0876 who, when interviewed, had informed OTP investigators that children in UN-affiliated demobilisation programmes had been fraudulently presented as former Anti-Balaka child soldiers.¹⁴¹ Had the OTP conducted even basic research into this phenomenon, it would be aware that open-source material corroborates P-0876's statement in this respect and thus demanded further investigation. For instance, an August 2018 *Newsweek* article on child soldiers in CAR states that, '[a]id workers tell Newsweek that, during negotiations, militia commanders attempt to wrest handouts for themselves from international non-profits and list fake children or relatives as combatants in exchange for benefits'.¹⁴²

¹⁴⁰ Lubanga Trial Judgment, para. 147.

¹⁴¹ CAR-OTP-2046-0427, 0450-0452. See also, CAR-OTP-2008-1165 (UNICEF report on demobilisation prepared for 2015 Bangui Forum, in which 'fraud and falsification of birth certificates' is cited as an issue affecting the quality of CAR civil registry records). According to disclosed metadata, this report was received by the OTP in May 2015, directly from the Bangui Forum Technical Committee.

¹⁴² CAR-D29-0002-0326, 0328. See further, CAR-OTP-2093-0045-R01, para. 222 and [REDACTED].

58. Further, in P-2927's expert report on the Anti-Balaka's alleged enlistment and use of child soldiers in CAR in 2013 and 2014,¹⁴³ provided to the OTP on 18 December 2019, she stated:

*vis-à-vis des ONG qui cherchent à négocier la libération des enfants, le nombre des 'enfants soldats' peut être gonflé par les acteurs armés afin de distribuer des ressources à un grand nombre d'éléments jeunes, aussi bien dans leur groupe que dans leurs propres famille et entourage. Les chiffres exacts sont alors difficiles à établir.*¹⁴⁴

59. Five days prior to this expert report, the Defence had also put the OTP on formal notice of its case as regards the fraudulent nature of the ESF Programme.¹⁴⁵ It would be untenable therefore for the OTP, or indeed the CLRV1, to argue that at the start of 2020, it had no notice or awareness of the overwhelming evidence pointing towards this scheme, i.e. the fraudulent presentation of individuals as 'former child soldiers'. The existence of such material demonstrates that the OTP should have been alert to the exonerating theme from the outset, exercised due caution accordingly, and investigated potential lines which tended to establish the fraudulent nature of the ESF programme.

B. The OTP improperly delegated its investigative duties to ESF-affiliated intermediaries without adequate supervision despite their apparent conflict of interest and misconduct

60. Far from duly investigating the exonerating theme of demobilisation programme fraud in the context of the CAR conflict, or at the very least, exhibiting caution in its dealings with individuals affiliated with the ESF Programme, the OTP elected to rely heavily on the latter from the outset. The OTP practically funnelled its early investigations through ESF-affiliates [REDACTED] (P-2018) and [REDACTED] (P-1974), and thereby recklessly created conditions for the witness co-contamination and collusion that would eventuate. Specifically:

- on [REDACTED], during his initial contact with OTP investigators, P-2018 'offered to bring selected [alleged former child soldiers] [REDACTED] if the OTP covers the cost of transportation'.¹⁴⁶
- [REDACTED], [REDACTED] informed investigators that he had been in contact with [REDACTED] 'to arrange the method of selecting and bringing some child soldiers to meet with the OTP'; and investigators informed

¹⁴³ ICC-01/14-01/18-834-Conf, para. 32.

¹⁴⁴ CAR-OTP-2136-1193, 1198.

¹⁴⁵ Annex A, [REDACTED]. See also, ICC-01/14-01/18-1142-Conf, para. 12; ICC-01/14-01/18-1237-Conf, paras 12-21; ICC-01/14-01/18-1456-Conf, paras 10-22; ICC-01/14-01/18-1479-Conf, paras 10-16.

¹⁴⁶ Annex A, [REDACTED].

[REDACTED] that they intended to meet [REDACTED] to discuss ‘what they need’ and to ‘set up an appropriate strategy on how to bring the children over to BANGUI’;¹⁴⁷ and,

- on [REDACTED], investigators contacted [REDACTED], who informed them that he was ‘happy to share with the OTP investigators [REDACTED] concerning the ‘pool’ of prospective child soldiers’; investigators outlined what [REDACTED] would be ‘useful for the investigation’ and they discussed ‘a strategy and criteria for witness selection’.¹⁴⁸

61. Any argument regarding purported logistical difficulties encountered in conducting field investigations, is by no means a defence or justifiable explanation for its failure to address clear and identifiable breaches of the Intermediary Code as soon as indications of their improper conduct began to emerge during the early stages of the investigation.

C. As of 2019, the OTP was aware of clear and identifiable breaches and attempted breaches of the Intermediary Code by P-2018

62. In early 2019, the OTP became aware of repeated improper contact between [REDACTED] (P-2018) and ‘former child soldier’ [REDACTED]. First, after OTP investigators contacted [REDACTED] to arrange an interview, the latter expressed a wish to contact P-2018, [REDACTED]; P-2018 subsequently confirmed to OTP investigators that this contact indeed took place and further offered to take [REDACTED] to his interview with the OTP.¹⁴⁹ [REDACTED].¹⁵⁰ According to the OTP, investigators suspected (correctly) at the time that [REDACTED] was in fact P-2018.¹⁵¹ Notably, over a year prior, P-2018 had received express ‘emphasised’ instructions from the OTP ‘that he was not to contact former child soldiers himself’.¹⁵² It is also notable that in his [REDACTED] interview, [REDACTED] (demonstrably falsely) denied having been in contact with P-2018 since the conclusion of the ESF Programme in 2014.¹⁵³ The OTP was thus at this stage aware not only that P-2018 was in contact with former child soldiers, in direct contravention of investigators’ instructions; but further, that both P-2018 and [REDACTED] were seeking to conceal this contact from the OTP.

¹⁴⁷ Annex A, [REDACTED].

¹⁴⁸ Annex A, [REDACTED].

¹⁴⁹ Annex A, [REDACTED].

¹⁵⁰ Annex A, [REDACTED] (note that this incident coincided with the ‘former child soldiers’ ‘group meetings’ facilitated by P-2018). Note also that during his testimony, [REDACTED], having apparently forgotten this initial cover story, which further demonstrates the collusive nature of their contact; [REDACTED].

¹⁵¹ Ibid. [REDACTED].

¹⁵² Annex A, [REDACTED].

¹⁵³ Annex A, [REDACTED].

63. Cause for caution continued to arise in respect of [REDACTED] (P-2018). On [REDACTED], he disclosed to investigators that he was a VPRS intermediary, and that in this capacity, he had been ‘identifying former “child soldiers” to make VPRS applications’, with an ESF [REDACTED] named [REDACTED] (P-2638)).¹⁵⁴ He also divulged that on [REDACTED], he had conducted two missions in this capacity: first, to ‘find former child soldiers’ in SEKIA, and to ‘explain to them they are considered victims; and further, to collect ‘former child soldiers’ in an ESF [REDACTED] and bring them to the Court’s BANGUI field office, with the aim of having them complete victim application forms.¹⁵⁵ In addition to learning of further contact between P-2018 and ‘former child soldiers’, the OTP thus became aware of the existence of a clear conflict of interest in respect of P-2018’s involvement in the OTP investigation, both as a witness and as a de facto intermediary assisting the investigation.
64. In addition, direct and independently corroborating evidence of the fraudulent nature of the ESF Programme began to emerge during OTP interviews as early as [REDACTED]:
- During his [REDACTED] interview, [REDACTED] told investigators that [REDACTED] had advised him to participate in the ESF Programme despite knowing that he was ‘not part of the Anti-Balaka’; and that ‘[a] lot’ of the participants lied about their ages.¹⁵⁶
 - During her [REDACTED] interview, [REDACTED] (P-2082), [REDACTED], described interacting with an ESF Programme participant who lied about his age ‘[REDACTED]’ and stated that ‘[REDACTED]’.¹⁵⁷
 - During his interview of [REDACTED], [REDACTED] (P-2475) was taken to photographs in reports on the ESF Programme [REDACTED] and indicated to investigators that many of the pictured participants were not in fact former Anti-Balaka and had participated *inter alia* to ‘benefit from the training’.¹⁵⁸
 - During her [REDACTED] interview, [REDACTED] (P-2083) stated that ESF [REDACTED], including [REDACTED], had refused to provide [REDACTED].¹⁵⁹

¹⁵⁴ Annex A, [REDACTED].

¹⁵⁵ Annex A, [REDACTED].

¹⁵⁶ Annex A, [REDACTED].

¹⁵⁷ Annex A, [REDACTED].

¹⁵⁸ Annex A, [REDACTED].

¹⁵⁹ Annex A, [REDACTED].

65. In the same period, inconsistencies between the purported ages of alleged former child soldiers demobilised in August 2014, as indicated in an ESF list provided to investigators by [REDACTED] ('First ESF List'),¹⁶⁰ also began to emerge in OTP interviews with the following alleged former child soldiers:

- In his [REDACTED] interview, [REDACTED] (P-2475) claimed to have been born on [REDACTED] 1999, which would have made him 15 years old during the ESF Programme – as opposed to 16 years old, as indicated on the List.¹⁶¹
- In his [REDACTED] interview, [REDACTED] (P-2476) claimed to have been born on [REDACTED] 1999, which would have made him 15 years old during the ESF Programme – as opposed to 12 years old, as indicated on the List.¹⁶²
- In her [REDACTED] interview, [REDACTED] (P-2582) claimed to have been born on [REDACTED] 2001, which would have made her 13 years old during the ESF Programme – as opposed to 17 years old, as indicated on the List.¹⁶³

66. In light of the emerging evidence of the fraudulent programme perpetuated by ESF in 2014,¹⁶⁴ and of [REDACTED] (P-2018's) involvement [REDACTED], it should have thus become clear to OTP investigators at that point that P-2018 would have been motivated to present fabricated evidence that would conceal this fraud, [REDACTED], so as to i) avoid the risk of potential personal, professional, and criminal consequences, and ii) obtain professional and financial benefit in his capacity as [REDACTED] intermediary.

67. Yet in spite of these converging reasons to distance [REDACTED] (P-2018) from its investigation, the OTP did the opposite, electing instead to escalate its reliance on [REDACTED] and other ESF-affiliated individuals in its preparation of its case under Count 29. For example, [REDACTED], P-2018 met with investigators for the purpose of providing an [REDACTED] containing the names of purported former child soldiers that had been 'allegedly recruited by the Anti-Balaka in BANGUI and the LOBAYE prefecture' ('Second ESF List').¹⁶⁵ Given the over-writable nature of [REDACTED], certain metadata –when the file was last saved, or last modified, and by whom – would

¹⁶⁰ See, CAR-OTP-2071-0279; see also, CAR-OTP-2071-0259, para. 58.

¹⁶¹ See, CAR-OTP-2110-0556, para. 11; compare CAR-OTP-2071-0279, at 0279 (#19).

¹⁶² See, CAR-OTP-2114-0149, para. 11; compare CAR-OTP-2071-0279, at 0280 (#36).

¹⁶³ See, CAR-OTP-2117-0605, para. 12; compare, CAR-OTP-2071-0279, at 0280 (#26).

¹⁶⁴ As set out in Part I.

¹⁶⁵ Annex A, [REDACTED].

have been of critical importance in assessing the reliability of this document, including whether it had been tampered with in anticipation of its use in legal proceedings. However, in another failure of basic investigative diligence, investigators omitted to take the simple step of registering this original metadata, instead overwriting it when saving it to the OTP's evidentiary database¹⁶⁶ – an especially problematic omission as at that stage, the OTP was already aware of the fraudulent nature of the ESF Programme and P-2018's conflict(s) of interest and lack of trustworthiness in his dealings with the OTP.

D. The OTP rewarded clear and identifiable breaches and attempted breaches of the Intermediary Code by P-2580

68. In [REDACTED], [REDACTED] (P-2580) escorted 'former child soldier' witnesses [REDACTED], [REDACTED], and [REDACTED] to their interviews with the OTP; and his intermediary expenses were paid by the OTP.¹⁶⁷ In this regard, at this stage [REDACTED], P-2580 was thus a joint Registry/OTP Intermediary, provided with formal tasks and reimbursement of expenses by the OTP.¹⁶⁸
69. As with the case of [REDACTED] (P-2018), obvious warning signs in respect of [REDACTED] (P-2580) were present from the outset of his involvement in the investigation. Grave reliability issues in the information provided by each of the 'former child soldiers' he had escorted would have been immediately apparent to the OTP interviewers.¹⁶⁹ In fact, investigators expressly raised the radical inconsistencies between the information provided by [REDACTED] and [REDACTED] during the course of their interviews with the OTP versus the claims made in their victim application forms.¹⁷⁰
70. Nor can the OTP claim that it was unable to recognise these warning signs as indications of misconduct on the part of [REDACTED] (P-2580). In *Lubanga*, the Trial Chamber I cited the 'consistent lack of credibility as regards the trial witnesses [Intermediary 143] introduced to investigators', in finding it 'likely that as the common point of contact he persuaded, encouraged or assisted some or all of them to give false testimony'.¹⁷¹ In the

¹⁶⁶ See Annex B, Email from OTP to Defence, 14 July 2023 at 16:21, p. 8, #16.

¹⁶⁷ Annex A, [REDACTED].

¹⁶⁸ Intermediary Guidelines, section 4: 'Reimbursement of expenses, where applicable, is available to contracted intermediaries and, on an exceptional basis, to other intermediaries approved by the Court by way of affidavit. Unapproved intermediaries should not expect or receive any remuneration or reimbursement from any organs or units of the Court or Counsel.'

¹⁶⁹ [REDACTED].

¹⁷⁰ See Annex A, [REDACTED].

¹⁷¹ *Lubanga* Trial Judgment, para. 291.

same vein, radical inconsistencies between the victims application forms and OTP interview statements of a number of the alleged former child soldiers witnesses were also cited by the *Lubanga* Trial Chamber in its finding that it could not rely upon them, in relation to whom it harboured ‘real doubts as to critical aspects of their evidence, in particular their age at the relevant time’; and in its conclusion that ‘[a]lthough other potential explanations exist, the real possibility that Intermediary 143 corrupted the evidence of these four witnesses cannot be safely discounted.’¹⁷²

71. Moreover, in [REDACTED] (P-2580), who had been tasked with accompanying [REDACTED] to a meeting with OTP investigators, brought both [REDACTED] and [REDACTED] to the same meeting, thereby effectively mutually revealing one another’s cooperation with OTP investigators.¹⁷³ Yet P-2580 was seemingly not cautioned or sanctioned for his clear breach of the Intermediary Guidelines and Intermediary Code.¹⁷⁴

72. Despite these warning signs, the OTP went on to further solidify its relationship with [REDACTED] (P-2580) by contracting him as an OTP Intermediary in September 2020, thereby paving the way for him to conspire with [REDACTED] (P-2475) and procure fabricated documents aimed at supporting the latter’s false statement.¹⁷⁵

E. The OTP’s negligent reliance on ESF-affiliated intermediaries is compounded by its failure to competently and diligently investigate its sources

73. Even assuming *arguendo* (however implausibly) that the OTP was unaware of the misconduct of both [REDACTED] (P-2018) and [REDACTED] (P-2580), it remained statutorily obligated to verify the evidence it sought (and still seeks) to rely on, including the source of that evidence; and to confront its witnesses with significant inconsistencies that go directly to the reliability and/or credibility of the evidence. This obligation was regrettably unmet with respect to the evidence of [REDACTED] (P-2475), [REDACTED] (P-2476), [REDACTED] (P-2018) or [REDACTED] (P-1974), which the OTP continues to rely on; nor to that of [REDACTED] (P-2582), [REDACTED] (P-2620) and [REDACTED] (P-2511), each of whom were key Count 29 witnesses, whose tainted evidence has either been formally submitted by the OTP and/or was relied upon in building and pursuing its case against Mr Yekatom.

i. OTP witness [REDACTED] (P-2475)

¹⁷² See e.g., *Lubanga* Trial Judgment, paras 248-249, and 268; 272, 274, and 288; and 291.

¹⁷³ Annex A, [REDACTED].

¹⁷⁴ See Annex B, Email from OTP to Defence, 14 July 2023 at 16:21, pp 3-4, #5. See also, *supra*, paras 48-52.

¹⁷⁵ Annex A, [REDACTED].

74. [REDACTED] (P-2475) was first interviewed by OTP investigators in [REDACTED];¹⁷⁶ following which he was relocated pursuant to the Court's witness protection programme.¹⁷⁷ On [REDACTED], [REDACTED] (having been formally hired as an OTP intermediary) was tasked to travel to [REDACTED] to obtain 'documents that could prove the age/[date of birth]' of P-2475 ('[REDACTED] Mission').¹⁷⁸ [REDACTED] subsequently provided investigators with three documents collected pursuant to the [REDACTED] Mission; of these, two – specifically, a baptism certificate [REDACTED] an academic certificate '[REDACTED] School Certificate' – exhibit obvious signs of tampering.¹⁷⁹
75. First, [REDACTED] (P-2475's) date of birth as indicated on the P-2475 Baptism Certificate had evidently been doctored, i.e., the '4' in '1994', written in blue pen, had been modified to form a '9'.¹⁸⁰
76. Second, on the P-2475 [REDACTED] School Certificate, correction fluid had been visibly applied to the indicated 'academic year' of [REDACTED] (P-2475's) completion of [REDACTED] level, over which '[REDACTED]' was then written in red pen.¹⁸¹
77. The doctoring of the P-2475 [REDACTED] School Certificate was brought to the attention of the OTP by [REDACTED] who, when handing over these documents, claimed to investigators that the [REDACTED].¹⁸² [REDACTED] further (falsely) claimed that both documents reflected the information contained in the [REDACTED], having himself seen these registries.¹⁸³
78. Yet despite these clear signs of tampering – and despite the investigative leads provided by [REDACTED] – the Prosecution failed to timely verify his claims: for instance, by requesting him (or indeed any other individual) to provide photographs of the [REDACTED] registries; or by inquiring with [REDACTED].
79. Less than [REDACTED] weeks after [REDACTED] provided the OTP with the P-2475 Baptism Certificate and [REDACTED] School Certificate investigators conducted a

¹⁷⁶[REDACTED].

¹⁷⁷[REDACTED].

¹⁷⁸ [REDACTED].

¹⁷⁹ [REDACTED]; CAR-OTP-2128-1197, CAR-OTP-2128-1202.

¹⁸⁰ CAR-OTP-2128-1197, 1198. See also, Annex A, 28 September 2022 (where a subsequent OTP investigative mission confirmed the fraudulent nature of this document).

¹⁸¹ CAR-D29-0013-0130, 0131.

¹⁸² CAR-OTP-2128-1203, at paras 9, 16-19. See also, Annex A, 15-16 September 2022 (where a subsequent OTP investigative mission confirmed that [REDACTED]).

¹⁸³ CAR-OTP-2128-1203, paras. 20 and 25.

follow-up video-conference interview with [REDACTED] (P-2475).¹⁸⁴ During this interview, P-2475 was taken to various documents by investigators; notably however, the documents collected by [REDACTED] were not included,¹⁸⁵ and P-2475 was not confronted with the doctored material as per the OTP's investigative obligations.

80. More fundamentally, the OTP did not seek to verify the central claim of [REDACTED] (P-2475) - i.e. that he was a child soldier within Mr Yekatom's group, during the quasi-entirety of the charged events - with its own insider witnesses who would have been in a position to do so.

81. In fact, the record shows that they actively avoided doing so. For example, during the OTP's 2020 interview with its 'star' insider witness P-1839, investigators took her to photographs contained in the ESF Programme report of [REDACTED] ('First ESF Report'), seeking inculpatory evidence in the form of her potential recognition of programme participants as members of Mr Yekatom's group.¹⁸⁶ However, investigators omitted to show her photographs contained in the ESF Demobilisation Programme final report ('Second ESF Report'), which includes a photograph in which [REDACTED] (P-2475) is clearly visible and recognisable – and in which he had expressly recognised himself during his OTP interview (which had taken place [REDACTED] months prior).

¹⁸⁷

82. This is neither a coincidence nor an anomaly. Since the commencement of trial proceedings, the OTP has had multiple opportunities to verify [REDACTED] (P-2475's) central claim to have been a child soldier in Mr Yekatom's group, notably during the testimonies of three insider witnesses: P-1839,¹⁸⁸ P-1647,¹⁸⁹ and P-1786.¹⁹⁰ Yet at no point were any of these three witnesses taken to the above-mentioned photograph of P-2475.

¹⁸⁴ CAR-OTP-2122-9809.

¹⁸⁵ See, CAR-OTP-2122-9819 (OTP Investigation Report stating 'owing to operational reasons outside the control of the investigators it [was] not possible to conclude the further interview and invite the witness to sign the statement after it being read back to him'). There is no indication that said 'operational reasons' were the reason why the OTP failed to verify or authenticate the documents provided by [REDACTED] with [REDACTED]. In any event, there is no reasonable explanation for the OTP's failure to verify or authenticate these documents with [REDACTED] in the ensuing 18 months prior to its tendering these documents from the bar table.

¹⁸⁶ See, CAR-OTP-2122-6900, at 6907-6908 (and again at CAR-OTP-2122-7067, at 7084-7085) where P-1839 was shown photographs in CAR-OTP-2068-0558, at 0562, 0564, 0565. According to [REDACTED], he appears in only one of the photographs shown to P-1839: at [REDACTED], a group photograph in which, notably, [REDACTED]; see, CAR-OTP-2110-0556, para. 199 ('[REDACTED].')

¹⁸⁷ CAR-OTP-2068-0568, [REDACTED]; see, CAR-OTP-2110-0556, para. 205 ('[REDACTED].').

¹⁸⁸ P-1839 testified from 27 October to 3 November 2022.

¹⁸⁹ P-1647 testified from 25 to 27 January 2023.

¹⁹⁰ P-1786 testified from 31 January to 1 February 2023. All three witnesses testified to have joined Mr Yekatom's group in [REDACTED], and to have remained in the group for months.

83. Importantly, these verification opportunities came after [REDACTED] (P-2475's) [REDACTED] testimony during which he falsely claimed *inter alia* to have been born in 1994; after the OTP formally notified the Chamber and Parties that it would not be relying on the P-2475 Baptism Certificate pending an inquiry;¹⁹¹ and after the OTP investigation missions in September 2022, whereby it was confirmed that the P-2475 Baptism Certificate and [REDACTED] School Certificate were indeed fraudulent.¹⁹²
84. In other words, the Prosecution was afforded – and ignored – these clear verification opportunities after it became clear to the OTP that [REDACTED] (P-2475's) sworn evidence as to his date of birth was untruthful; another clear example of the OTP's indifference towards a manifest 'theme of exoneration'.
- ii. Former Prosecution witness [REDACTED] (P-2582)¹⁹³
85. [REDACTED] (P-2582) was first interviewed by OTP investigators on [REDACTED], and subsequently relocated from CAR, pursuant to the Court's witness protection programme.¹⁹⁴ [REDACTED], P-2582's [REDACTED], [REDACTED], provided investigators with 'duplicate' birth certificates for P-2582 ([REDACTED] 2001)¹⁹⁵ [REDACTED], which she claimed had been produced following application to [REDACTED] ('Fraudulent Certificates').¹⁹⁶
86. The OTP failed to undertake rudimentary steps to verify the source of the Fraudulent Certificates. There is no indication that the OTP verified [REDACTED]'s claims with [REDACTED]– their own witness, who during cross-examination admitted to the fraudulent nature of the certificate that [REDACTED], along with ESF-[REDACTED] (P-2580) and [REDACTED], with the aim of securing relocation for [REDACTED] (P-2582) [REDACTED].¹⁹⁷
87. Seemingly, nor did the OTP examine the [REDACTED] town hall archives.¹⁹⁸ Had it done so, it would have discovered i) that the Fraudulent Certificates were inauthentic; and ii) indications that [REDACTED] (P-2580) was involved. According to the archived birth registry counterfoils (i.e. the *souches*), the unique registration numbers

¹⁹¹ See, Email from OTP to TC V and Parties, 6 June 2022 at 21:00.

¹⁹² See, Annex A, 15-16 September 2022, 28 September 2022; the OTP was formally put on notice of the fraudulent nature of P-2475 Baptism Certificate during the Defence's cross-examination of the P-2475; [REDACTED].

¹⁹³ Regarding the impact of the OTP's investigative failures with respect to former OTP witnesses, see *infra*, para. 126.

¹⁹⁴ P-2582 had previously undergone a screening interview; see Annex A, [REDACTED]. See also Annex A, [REDACTED]. Annex A, [REDACTED]; see, ICC-01/14-01/18-2135-Conf, para. 20.

¹⁹⁵ [REDACTED].

¹⁹⁶ Annex A, [REDACTED].

¹⁹⁷ Annex A, [REDACTED].

¹⁹⁸ See, Annex B, Email from OTP to Defence, 14 July 2023 at 16:21, p. 10, #25.

indicated on two of the Fraudulent Certificates correspond to birth certificates for individuals other than [REDACTED] (P-2582) [REDACTED]— one such individual being the son of [REDACTED].¹⁹⁹ Moreover, the archived *souche* birth certificate of one of the [REDACTED], [REDACTED], indicates a date of birth inconsistent with that indicated on his Fraudulent Certificate.²⁰⁰

88. In the same vein, the OTP failed to take basic steps to authenticate [REDACTED] (P-2582's) central claim – her age. For instance, by checking her publicly accessible Facebook account, which indicates that she was born in 1992 and was thus in fact 22 years old during the events.²⁰¹ Or indeed, by examining the [REDACTED] baptism registry, which similarly indicates that she was in fact born on [REDACTED] 1992.²⁰² Again, even setting aside the fact that these steps constitute basic due diligence, there was ample reason to authenticate her claim: not only had investigators received consistent, repeated indications of the ESF Programme fraud by this stage;²⁰³ but moreover, [REDACTED] had specifically told investigators in [REDACTED] that P-2582, [REDACTED], was 16 years old at the time of the events, and therefore was not in fact a child soldier for the purposes of the Statute.²⁰⁴
89. The OTP also failed to investigate fundamental internal and external inconsistencies in a key claim of [REDACTED] (P-2582) [REDACTED] which would have been apparent early on.
90. First, her claim to have been [REDACTED],²⁰⁵ first made in her screening interview of [REDACTED],²⁰⁶ is contradicted by [REDACTED] (P-2580), who stated in his screening interview that in the ESF Programme he 'did not see any girls

¹⁹⁹ Compare, CAR-OTP-2126-0414 (Fraudulent Certificate with registration number '[REDACTED]') with CAR-D29-0013-0138 (archived *souche* certificate with identical registration number, in relation to a different individual); and compare, CAR-OTP-2126-0416 (Fraudulent Certificate with registration number '[REDACTED]') with CAR-D29-0013-0140, at 0141 (archived *souche* certificate with identical registration number, belonging to [REDACTED]). This fact also corroborates [REDACTED] regarding the involvement of [REDACTED] in the production of the Fraudulent Certificates; see [REDACTED]; the Defence also notes that, as the OTP was aware, it was [REDACTED] who had escorted P-2582 to her first OTP interview; see Annex A, [REDACTED]. See also, [REDACTED]; and [REDACTED].

²⁰⁰ Compare, CAR-OTP-2126-0413 (Fraudulent Certificate with DOB [REDACTED] 1996) with CAR-D29-0013-0084 (archived *souche* certificate with DOB [REDACTED] 1981). The Defence has also obtained a national identity card corroborating [REDACTED]'s true DOB: see, CAR-D29-0015-0010; see also, [REDACTED].

²⁰¹ CAR-D29-0016-0060; and CAR-D29-0019-7173, 7181.

²⁰² See, [REDACTED]; CAR-D29-0014-0068, 0069 (at #1524); CAR-D29-0013-0098.

²⁰³ See *supra*, paras 64-65.

²⁰⁴ Annex A, [REDACTED].

²⁰⁵ See, CAR-OTP-2117-0605, paras. 89-101 in particular paras. 99 and 101.

²⁰⁶ Annex A, [REDACTED]. P-2582's inability to recall the name of the 'overall chief of the group' during this screening interview, referring instead to the 'the one who was arrested by the ICC and waiting for trial,' is also noteworthy.

[REDACTED].²⁰⁷ This inconsistency could not have passed unnoticed, as OTP investigator [REDACTED] was present during both screening interviews, which took place a mere three days apart.²⁰⁸

91. Second, in her [REDACTED] interview, [REDACTED] (P-2582) twice misidentified [REDACTED] in video footage shown to her.²⁰⁹ Again, P-2582's inability to correctly identify her [REDACTED] could not have passed unnoticed by Investigator [REDACTED], who was again present during this interview and had in fact interviewed [REDACTED] on three previous occasions;²¹⁰ and moreover, who was also present during the [REDACTED] interview with former OTP witness P-2233, who was shown the same video footage and twice identified the individual, whom P-2582 mistakenly claimed was [REDACTED].²¹¹
92. Yet the OTP did not seek to test [REDACTED] (P-2582's) account by showing her footage or images that actually depicted [REDACTED]— despite the fact that since November 2017, the OTP had been in possession of video footage, filmed during the events, in which [REDACTED] directly addresses the camera.²¹²
93. [REDACTED] (P-2582's) inability to correctly identify [REDACTED] was one among a litany of material inconsistencies that riddled her statement.²¹³ Another inconsistency concerns the killing of Djido SALEH, charged under Counts 26-27 of the OTP case; specifically, her claim to have witnessed Mr Yekatom kill SALEH, along with a Muslim named [REDACTED], with a Kalashnikov rifle while the two were at a MBAIKI petrol station.²¹⁴ This account departs radically from the OTP's own case on the killing of SALEH, as set out in its Document Containing the Charges ('DCC')²¹⁵ – a fact that any

²⁰⁷ Annex A, [REDACTED].

²⁰⁸ According to the metadata of both interviews, [REDACTED], with pseudonym 'A.4 – 0003', was present at both interviews.

²⁰⁹ Annex A, [REDACTED]. See, CAR-OTP-2117-0605, paras 117, 119. Notably, P-2582 also misidentifies the YAMWARA school base when shown the footage.

²¹⁰ [REDACTED].

²¹¹ Annex A, [REDACTED] P-2232 [REDACTED].

²¹² [REDACTED] See, where P-1647 correctly identifies [REDACTED].

²¹³ For purposes of judicial economy, the Defence respectfully refers the Chamber to its submissions on the inconsistencies in the evidence of P-2582 made in response to the OTP's request for formal submission of her witness statement via Rule 68(3); see, [REDACTED], [REDACTED] (on her family members); [REDACTED] (on her nickname within the group), [REDACTED], 44-45 (on her role within the group), 53-58 (on the location of the Yamwara school base), 59-67 (on the location and duration of the fighting during the 5 December Attack), and 48-50 (on the ESF Programme participants).

²¹⁴ CAR-OTP-2117-0605-R05, para. 80.

²¹⁵ See, ICC-01/14-01/18-282-Conf-AnxB1, para. 344: '[O]n 28 February his house was attacked. While SALAH attempted to defend his home, his family managed to flee to safety. Taking flight in fear for his life, SALEH was caught within metres of the local *gendarmerie* and brutally killed.'

diligent investigator would have been aware of during P-2582's interview, given that the DCC was filed [REDACTED] prior.²¹⁶

94. Indeed, of the five witnesses cited in respect of this incident in the DCC or Prosecution Trial Brief, not one mentions the killing of a [REDACTED], or claims that Mr Yekatom was present at the scene, let alone that he shot and killed SALEH himself.²¹⁷ Yet [REDACTED] (P-2582) was not confronted with the fact that substantial aspects of her account were inconsistent with that of multiple other witnesses, nor were her claims ever verified.
95. The OTP was also made aware of objective facts which were inconsistent with its own case theory and should have raised considerable doubt as to [REDACTED] (P-2582's) claims, as well as her trustworthiness. For example, on [REDACTED], the OTP contacted her, having discovered via VWS that she had a [REDACTED], which she had not previously disclosed to the OTP.²¹⁸ Her explanation – i.e. [REDACTED]²¹⁹ – was only further reason to question her claims. First, her explanation was at odds with her claim to have [REDACTED].²²⁰ Second, she had previously stated that [REDACTED] when the group moved to SEKIA – which, on the OTP's own case,²²¹ took place in January/February 2014.²²² In fact, [REDACTED] after this conversation regarding P-2582's [REDACTED] took place, the OTP filed submissions specifying that [REDACTED] – itself a worrying indication that even at the time, the OTP did not appear to find her explanation credible and yet proceeded to rely on the alleged [REDACTED] regardless.²²³
96. Far from conducting follow-up investigations into these manifest inconsistencies, the OTP subsequently sought to amend the charges on the basis of these allegations,²²⁴ following an 'extensive internal evidence review' aimed at 'investigat[ing] and

²¹⁶ See also, ICC-01/14-01/18-1306-Conf-Exp, paras. 68-71.

²¹⁷ ICC-01/14-01/18-282-Conf-AnxB1, fn. 724; and ICC-01/14-01/18-723-Conf, fn. 1200. See also, ICC-01/14-01/18-403-Conf-Corr, fn. 318.

²¹⁸ Annex A, [REDACTED].

²¹⁹ Ibid.

²²⁰ See e.g., ICC-01/14-01/18-723-Conf, para. 487. Note also that she claimed to have left the group [REDACTED] (see, CAR-OTP-2117-0605, paras 102-106).

²²¹ In the DCC (filed 19 August 2019), the OTP alleges that the group commenced its advance to MBAIKI 'on or about 11 January 2014', 'took over' SEKIA 'as they advanced towards MBAIKI' and reached MBAIKI '[o]n or about 30 January 2014'; see, ICC-01/14-01/18-282-Conf-AnxB1, paras. 337-339 and fn. 698.

²²² CAR-OTP-2117-0605, para. 101; see also, paras 89, 45, and 30 ([REDACTED]) and para. 101 ([REDACTED]).

²²³ [REDACTED].

²²⁴ [REDACTED].

verify[ing] the information provided by P-2582'.²²⁵ That this 'extensive internal evidence review' concluded on 27 March 2020 – only [REDACTED] after the OTP's conference call with [REDACTED] (P-2582) regarding her having withheld information about [REDACTED], and during which further manifest inconsistencies about her account emerged – speaks volumes about the poor quality of this review and the overwhelming tunnel vision displayed by the OTP.

97. As was the case for [REDACTED] (P-2475), the OTP's failure to seek verification or authentication, or to investigate manifest exculpatory circumstances, continued into the trial phase of these proceedings. During [REDACTED], the OTP was put on notice that [REDACTED] (P-2582) was not 12, but 22 years old during the events (contrary to her claims, and to the OTP's continued case in this regard)²²⁶ via *inter alia* photographs of the [REDACTED] Baptism Registry.²²⁷ Yet the Defence understands that when the Prosecution subsequently undertook a mission expressly to examine that same registry for information in respect of P-2475, it omitted to do so in respect of P-2582 – in other words, the OTP appears to have avoided collecting exculpatory information that it knew was contained in the very registry they were in the process of examining.²²⁸

iii. Former Prosecution witness [REDACTED] (P-2620)

98. As with [REDACTED] (P-2582), Prosecution investigators would have been aware of serious concerns regarding the reliability of [REDACTED] (P-2620's) claims at the outset of its interactions with her.

99. On [REDACTED] (P-2620) completed a victim's application form ('P-2620 Application Form').²²⁹ During her subsequent OTP interview,²³⁰ she flatly denied various details within her victim application form including in relation to her date of birth and ethnicity,²³¹ as well as the allegations that (i) [REDACTED] (i.e. [REDACTED] (P-2582), whom the latter was unable to correctly identify, as set out above)²³² and [REDACTED]

²²⁵ [REDACTED].

²²⁶ For instance, the OTP continues to rely on P-2582's birth certificate, according to which she was born in 2001 ([REDACTED]); likewise, on a number of witnesses who claim that she was a member of Mr Yekatom's group (e.g. [REDACTED]).

²²⁷ See, [REDACTED]; CAR-D29-0014-0068, 0069 (at #1524); CAR-D29-0013-0100; CAR-D29-0013-0098.

²²⁸ A Defence request for information in relation to P-2582's entries in the baptism registry arising from this mission was opposed by the OTP on the basis that it did not possess any such exculpatory information: [REDACTED].

²²⁹ Annex A, [REDACTED].

²³⁰ Annex A, [REDACTED].

²³¹ CAR-OTP-2123-0057, paras. 75-76.

²³² See *supra*, paras 90-92, 95.

(whom P-2620 now claimed that she did not know),²³³ (ii) she had joined the group voluntarily in [REDACTED] (she now claimed that she did not know ‘[REDACTED]’, had never been there, and did not recall ever saying that she had joined the group voluntarily),²³⁴ and (iii) [REDACTED] while enrolled in the group (she now claimed that she was never [REDACTED]).²³⁵ In fact, when shown the P-2620 Application Form, she claimed outright that she did not recognise it.²³⁶

100. Despite [REDACTED] (P-2620’s) denial of the content in the Application Form, the OTP demonstrated no interest in pursuing the veracity of these claims; instead that it continued to rely on a redacted version of the Form, in which the name of the individual who had assisted her in filling it out was redacted. The identity of this person was an obvious lead to test the veracity of P-2620’s attempts to explain away the myriad inconsistencies between her Form and her statement. Moreover, this lead was available to the OTP, given that Pre-Trial Chamber II had specifically ordered that the OTP be provided with unredacted versions of victim application forms of dual status victim/witnesses such as [REDACTED] (P-2620) – notably, on the basis that such forms ‘may contain exculpatory information’, and expressly citing the OTP’s article 54(1) investigative duties.²³⁷

101. A similar lack of investigative diligence is apparent in respect of [REDACTED] (P-2620’s) key claim that while in the group,²³⁸ she had been repeatedly [REDACTED].²³⁹ ‘[REDACTED]’.²⁴⁰ Yet when P-2620 was shown a photograph featuring [REDACTED] during her interview, she was unable to recognise him. This was despite her claim to have been [REDACTED], where she had remained ‘for a long time’.²⁴¹

²³³ CAR-OTP-2135-2412, at 2412; compare, CAR-OTP-2123-0057, para. 78; note also CAR-OTP-2135-2412, at 2418, where P-2620 had stated that she received weapons training from a ComZone named [REDACTED].

²³⁴ CAR-OTP-2135-2412, at 2412; compare, CAR-OTP-2123-0057, para. 76-77; note also CAR-OTP-2135-2412, at 2418, where P-2620 had stated that the aforementioned weapons training took place in [REDACTED].

²³⁵ CAR-OTP-2135-2412, at 2412; compare, CAR-OTP-2123-0057, para. 79.

²³⁶ CAR-OTP-2123-0057, para. 73. See also, previous Defence submissions on these discrepancies, [REDACTED], paras 22-43.

²³⁷ ICC-01/14-01/18-339, paras 11-12; see also, [REDACTED]. Indeed, not only did the OTP fail to fulfil its investigative obligation by failing to obtain an unredacted version of the form following [REDACTED] (P-2620) interview;²³⁷ it subsequently engaged in protracted *inter partes* litigation concerning a Defence request for lifting of this redaction, rather than diligently requesting that the Registry provide it with an unredacted version of her victim application form.²³⁷ See [REDACTED]. See also, *infra*, paras 115-116.

²³⁸ See, *infra*, para. 106.

²³⁹ CAR-OTP-2123-0057, paras. 21, 28-32; and CAR-OTP-2121-2567, para. 26.

²⁴⁰ CAR-OTP-2123-0057, para. 67. See e.g. [REDACTED]; see also, previous Defence submission at [REDACTED], para. 30, and reference cited therein.

²⁴¹ Annex A, 21-22 November 2019. See also, CAR-OTP-2123-0057, paras 32 and 81; and CAR-OTP-2121-2567, paras 21, 34; according to its metadata, the photograph (at CAR-OTP-2001-8194) dates to January 2014.

102. [REDACTED] (P-2620's) inability to recognise [REDACTED] constitutes an exculpatory circumstance warranting further investigation. At the very least, investigators should have tested this inconsistency using the extensive film footage of the group at its disposal: for instance, the footage of 7 December 2013, in which [REDACTED] is filmed speaking directly into the camera.²⁴² This video features prominently in the OTP's case and has been repeatedly shown at trial during its examination of witnesses.²⁴³ Yet following the OTP's failed attempt to have P-2620 identify [REDACTED] in a photograph, it conspicuously failed to show a single additional piece of film footage or photograph of [REDACTED] to her – including in her [REDACTED] follow-up interview.²⁴⁴
103. At trial, the OTP appears to have adopted the position that [REDACTED].²⁴⁵ This untenable position, little more than a transparent attempt to salvage [REDACTED] (P-2620's) credibility, does nothing to absolve the investigative failures: on the contrary it aptly illustrates the degree to which tunnel vision has affected the OTP, i.e. its inability, or unwillingness, to recognise a clear and present exculpatory circumstance necessitating further investigation pursuant to article 54(1)(a).²⁴⁶ This investigative failure is especially remarkable given that a follow-up interview with P-2620 was based on the Prosecution's consideration that it was 'critical to obtain additional details and clarifications in order to determine whether to seek [an] amendment of charges ... given the potential impact of the information P-2620 provided'.²⁴⁷
104. The OTP was also on notice of further misconduct concerning [REDACTED] (P-2620) through the acts [REDACTED], [REDACTED] (P-2638), [REDACTED], along with [REDACTED] (P-2580), [REDACTED].²⁴⁸ [REDACTED] after this interview, and pursuant

²⁴² [REDACTED]. Another video and/or photograph in which [REDACTED] can be seen is [REDACTED] cited in the DCC, itself filed prior to [REDACTED] interviews (see, ICC-01/14-01/18-282-Conf-AnxB1, [REDACTED]).

²⁴³ See, ICC-01/14-01/18-282-Conf-AnxB1, [REDACTED]; see also, ICC-01/14-01/18-723-Conf, [REDACTED]. At trial, this video was shown by the OTP to [REDACTED].

²⁴⁴ This is despite OTP investigators re-visiting P-2620's account of [REDACTED] in this follow-up interview; see, CAR-OTP-2121-2567, para. 21. See also, Annex A, [REDACTED].

²⁴⁵ See, ICC-01/14-01/18-T-122-CONF-ENG CT [73:21-25] and [75:15-20].

²⁴⁶ It is immaterial whether the OTP is truly of the position that [REDACTED] were distinct individuals. That being said, the Defence notes that at no stage in this trial did the OTP seek to elicit positive evidence from its witnesses, including insider witnesses, about an [REDACTED]. For instance, the OTP did not elicit this from P-1647 when he testified, despite the fact that he had previously stated to investigators that he had been appointed [REDACTED], see, CAR-OTP-2050-0654, para. 43. In any event, this would constitute another failure by the OTP to verify P-2620's account.

²⁴⁷ [REDACTED].

²⁴⁸ Annex A, [REDACTED]. Note that the OTP had been aware of an ESF employee named '[REDACTED]' involved in identifying 'former child soldiers' in [REDACTED] since May 2019 see CAR-OTP-2135-4183.

to investigators' express request for [REDACTED] provided the OTP with [REDACTED] a '*Bulletin de naissance*' [REDACTED].²⁴⁹

105. Yet again, it is immediately apparent that the '*Bulletin de naissance*' had been tampered with: i.e., that the '9' in '2019' had been written over in pen as a '6'.²⁵⁰ The words '[REDACTED]' also appear to have been doctored to suggest that the document was created in [REDACTED]; likewise, date of the document itself.²⁵¹ Further, the [REDACTED] indicate that P-2620 was 15 years old at the time of the examination – substantially contradicting her claimed DOB of [REDACTED] 2001.²⁵² Yet the OTP does not appear to have confronted [REDACTED] (P-2620) with [REDACTED], electing simply to have presented her with the '*bulletin de naissance*'.²⁵³ Moreover, the OTP appears to have simply accepted her denial that the document pertained to her all, without pursuing the matter any further – despite the clear implication of her denial being that [REDACTED] (P-2638) had presented the OTP with fabricated documents – a potential criminal offence under the Statute. In such circumstances, the OTP's initial assessment – maintained well into these trial proceedings – that the '*bulletin de naissance*' was not exculpatory in light of P-2620's denials only further serves to illustrate the [REDACTED].²⁵⁴

106. [REDACTED] records provided by [REDACTED] (P-2620) in her follow-up interview should only have served to compound investigators' suspicions.²⁵⁵ However, investigators again appear to have failed to raise a glaring inconsistency therein: namely, the fact that the birth date of '[REDACTED]' as indicated on the first page (i.e. [REDACTED]) does not correspond with the dates of [REDACTED].²⁵⁶

107. The above thus clearly constituted exculpatory circumstances that warranted further meaningful investigation.²⁵⁷ Yet none appears to have been conducted: for instance, no attempt to track down [REDACTED] or his family members; no attempt to authenticate [REDACTED].

²⁴⁹ Annex A, [REDACTED].

²⁵⁰ Annex A, [REDACTED].

²⁵¹ Annex A, [REDACTED].

²⁵² CAR-OTP-2119-0909, at 0910; *cf.* CAR-OTP-2121-2567, para. 11.

²⁵³ CAR-OTP-00000069.

²⁵⁴ Annex B, Email from OTP to Defence, 4 November 2022 at 16:47.

²⁵⁵ Annex A, [REDACTED].

²⁵⁶ See, CAR-OTP-2121-2578, Annex B to CAR-OTP-2121-2567.

²⁵⁷ See, Annex A, [REDACTED]. In the interests of judicial economy, the Defence respectfully refers the Chamber to its submissions in ICC-01/14-01/18-1393-Conf-Exp, paras 22-43, especially paras 23-26, 36-40, 42-43 which refer to wider backdrop of inconsistencies in P-2620's witness statement which further underscore lack of OTP investigative diligence.

iv. Former Prosecution witness [REDACTED] (P-2511)²⁵⁸

108. [REDACTED] (P-2511) was interviewed by OTP investigators on [REDACTED].²⁵⁹ He claimed to have joined Mr Yekatom's group when he was 13 years old and provided investigators with his birth certificate ('P-2511 Birth Certificate').²⁶⁰

109. Again, investigators failed to seek authentication of its evidence, or to pursue clear exculpatory circumstances. Basic investigative follow-up would have revealed that the *Officier d'État Civil* (civil registrar), named on the P-2511 Birth Certificate – '[REDACTED]', former Mayor of [REDACTED] – had passed away in [REDACTED], i.e. five years prior to the issuance of the P-2511 Birth Certificate.²⁶¹ Further, the document is not signed by [REDACTED], or indeed by any *Officier d'État Civil*, the relevant section having been left blank.²⁶²

110. Nor did the OTP avail itself of clear opportunities to test the substantive evidence of [REDACTED] (P-2511) as an alleged former child soldier in Mr Yekatom's group. In this regard, the Defence recalls an interview of P-2511's [REDACTED], [REDACTED], conducted by the OTP with the Defence present on [REDACTED].²⁶³ The joint interview of [REDACTED] arose from unsubstantiated claims that the Defence had contacted family members of P-2511 and 'revealed to his family that he is an OTP witness' including, to [REDACTED].²⁶⁴

111. During the course of this interview, it was [REDACTED]'s evidence that the Defence did not reveal the status of [REDACTED] (P-2511) as an OTP witness. More pertinently, [REDACTED] described the ESF Programme participants as 'orphans', as opposed to former child soldiers:

[REDACTED]: [REDACTED]

[REDACTED]: [REDACTED]

[REDACTED]: [REDACTED]

[REDACTED]: [REDACTED]

²⁵⁸ The OTP withdrew P-2511 on 10 March 2023 and in doing so, suggested that he be called as a Chamber witness; see ICC-01/14-01/18-1791-Conf, paras 6-7.

²⁵⁹ Annex A, [REDACTED].

²⁶⁰ CAR-OTP-2114-0178, para. 29; and CAR-OTP-2114-0192.

²⁶¹ These documents include a death certificate for [REDACTED] (CAR-D29-0013-0121) and a photograph of his grave and tombstone (CAR-D29-0010-0020), both of which indicate that he died on [REDACTED]. See also, CAR-D29-0014-0073, indicating that [REDACTED]'s tenure as mayor ended in [REDACTED]. See also, ICC-01/14-01/18-1814-Conf-Exp, paras 7-12.

²⁶² CAR-OTP-2114-0192.

²⁶³ See, Annex B, Email from OTP to Defence, 25 November 2022 at 14:45.

²⁶⁴ See, Annex B, Email from OTP to Defence, 21 October 2022 at 17:24. The Defence responded, explaining that the claim was unfounded, and providing a detailed response as regards its investigations involving family members of P-2511; see Annex B, Email from Defence to OTP, 23 October 2022 at 13:12.

[REDACTED]: [REDACTED].

112. Despite this information, the OTP was solely occupied with its rigorous investigation of (false) allegations of improper interference by the Defence.²⁶⁵ In contrast, the OTP made no attempt to inquire further or investigate [REDACTED]'s exonerating description of ESF Programme participants. Nor did it utilise the opportunity to test [REDACTED]'s (P-2511's) account with [REDACTED], who was uniquely placed to confirm (or deny) it, given that P-2511 had specifically claimed that [REDACTED].²⁶⁶

113. The OTP's single-minded pursuit of confirmation of [REDACTED]'s (P-2511's) unfounded accusations – at the expense of pursuing exonerating circumstances, or of seizing a clear opportunity to verify his account – is an apt illustration of the OTP's broader failure to meet its statutory duties.

iii) The OTP's investigative failures and the collusive conduct of the Conspirators has resulted in violations of article 67(1)(e) and 67(2)

114. As set out above, it is the OTP's investigative failures that enabled the Conspirators to operate with impunity and expand their fraudulent conduct. This not only amounts to a violation of article 54(1) but additionally, constitutes a violation of articles 67(1)(e) and 67(2) - namely, Mr Yekatom's fundamental right to confront the evidence brought against him and his right to the disclosure of exculpatory material. These violations amount to a related but separate, stand-alone violation for the purposes of assessing the first limb of article 69(7). The article 67 violations are two-fold.

115. First, the OTP's persistent failure to either effectively investigate exonerating circumstances,²⁶⁷ and/or mischaracterise exculpatory material as non-disclosable,²⁶⁸ are clear breaches of article 67(2). Indeed, the jurisprudence of this Court is clear in that the OTP's duty to investigate both incriminating and exonerating circumstances equally is intrinsically linked to its disclosure obligations pursuant to article 67(2).²⁶⁹ It is

²⁶⁵ See also Annex B, Email from OTP to Defence, 25 November 2022 at 14:45.

²⁶⁶ In his witness statement, P-2511 claimed that [REDACTED]; see CAR-OTP-2114-0178, paras. 57-58.

²⁶⁷ See *supra*, paras 73-113.

²⁶⁸ See e.g. *supra*, para. 100, fns 328, 255; see also, Annex B, Annex to Email from OTP to Defence, 14 July 2023 at 16:21, esp. #1-4, 10, 12, 21, 29, 31-36 (where the OTP systematically refused disclosure of material that clearly potentially affects the credibility of its evidence, including information regarding: its selection and supervision of intermediaries, payments thereto or their conflict(s) of interest; P-2683's role as a Registry intermediary; misconduct of ESF-affiliated intermediaries; OTP authentication of its evidence; and ongoing article 70 inquiries in the context of Count 29)

²⁶⁹ Bemba Disclosure Decision, para. 14.

insufficient for the OTP to merely wait for exculpatory material to come into its possession; rather, article 54(1)(a) requires the OTP to make reasonable efforts to obtain information where there are reasonable grounds to believe that it may be potentially exculpatory.²⁷⁰

116. However, the OTP's investigative and disclosure failures inevitably placed an additional burden on the Defence to essentially correct the work of the OTP and ensure that fraudulent evidence is not placed before this Chamber. Whilst the Defence must of course diligently investigate the case against it, the burden remains on the OTP to effectively investigate its own case, which includes exonerating themes. However, in this instance, and as a result of the poor quality of OTP investigations, the Defence has been forced to allocate considerable resources to verify evidence relied upon by the OTP to defend against allegations based on fabricated material.

117. Second, the collusive network and indeed goal of the Conspirators, was seemingly not limited to procuring false evidence and fraudulent documents in support of the OTP's case. Regrettably, there have been several egregious instances whereby the Conspirators have further sought to interfere with Defence investigations with the aim of preventing potential witnesses from meeting with and/or testifying on behalf of the Defence.

118. To the Defence's knowledge, such instances date back to [REDACTED] when, as recorded by the OTP as part of an investigation report, [REDACTED] (P-2580) conceded that he had met with 'child victims' in an attempt to prevent them from meeting with the Defence.²⁷¹ In particular, the OTP records P-2580 stating that he found that it was [REDACTED].²⁷²

119. At the time of this incident, [REDACTED] (P-2580) was both an OTP and Registry intermediary and therefore reasonably perceived to be acting with authority on behalf of the Court. Moreover, he occupied a prominent and influential role amongst child victims given his position as an [REDACTED]. He was evidently aware of this position and his intended outcome was to intentionally interfere with the Defence's case. The impact of his actions *vis-à-vis* the 'child victims' was seemingly not rectified by

²⁷⁰ Ruto Asylum Application Decision, para. 32.

²⁷¹ Annex A, [REDACTED].

²⁷² Annex A, [REDACTED].

the OTP, given P-2580's refusal to provide the OTP with the names of the individuals that he met with, contrary to the Intermediary Guidelines and Intermediary Code.²⁷³

120. [REDACTED] (P-2580's) actions were by no means an isolated incident. As recently set out by the Defence,²⁷⁴ instances of interference have multiplied following the close of the OTP's case and prior to the commencement of the presentation of the Defence case. In particular, in early [REDACTED], Registry Intermediary [REDACTED] (P-2638), in coordination with [REDACTED], reportedly threatened [REDACTED].²⁷⁵

121. More recently, the Defence was also made aware of an incident whereby [REDACTED] (P-1974) and [REDACTED] (P-2580) had contacted 'children of [REDACTED]' and invited them to a public gathering in [REDACTED].²⁷⁶ During this gathering, it is reported that P-1974 instructed those present to: (i) not worry because the '[REDACTED]', (ii) '[REDACTED]', and (iii) [REDACTED]²⁷⁷ P-1974 is also reported to have provided payment to individuals present at the gathering.

122. Undoubtedly, this incident is a clear attempt undertaken by OTP witnesses and former intermediaries to encourage individuals to not engage with the Defence, and to pervert the course of justice.²⁷⁸ Given the location of the incident and the size [REDACTED], as well as P-1974's role as a [REDACTED] in [REDACTED], this attempt will undoubtedly have had a chilling effect on potential Defence witnesses in the crucial weeks leading up to the presentation of the Defence case. This has stymied Mr Yekatom's right to call witnesses on his behalf, in a case which is beset with fraudulent evidence.

iv) The violations of article 54(1) and article 67 have directly resulted in the Prosecution's gathering of the Fabricated Evidence

123. Given the nature of the violations of articles 54 and 67, it is manifestly apparent that there is a clear link between these violations and the OTP's gathering of evidence.

This is evidenced by the fact that the OTP delegated its investigative obligations to

²⁷³ The Defence is aware that [REDACTED] is subject to investigations but it is not privy to the scope or extent of the investigation or the precise scope of the conclusions reached by the Prosecution; see, T-248-CONF-ENG CT [33:4-34:16] and Annex B, Email from OTP to Parties and Participants of 30 November, at 14:51.

²⁷⁴ ICC-01/14-01/18-2161-Conf-Exp, para. 22.

²⁷⁵ [REDACTED].

²⁷⁶ Annex B, Email from Defence to OTP of 25 October 2023 at 14:47.

²⁷⁷ Ibid.

²⁷⁸ For completeness, the Defence has flagged the incident with the OTP which has stated that it [REDACTED] whilst at the same underscoring its position that P-1974 was a [REDACTED] as exculpatory see, Annex B, Email from OTP to Defence of 26 October 2023 at 09:24. The Defence contests the OTP's factual understanding and characterisation of the incident as non-exculpatory, and notes the OTP's ongoing article 67(2) disclosure obligations irrespective of the status of proceedings.

intermediaries and ESF-affiliated individuals and in doing so failed to: (i) adequately screen the intermediaries despite the real threat of fraudulent ‘child soldier’ demobilisation programmes, (ii) supervise its intermediaries, especially in light of the cross-over (and concomitant conflict of interest) involving OTP and Registry intermediaries and/or OTP witnesses, and (iii) address or implement appropriate measures following clear and flagrant breaches of the Intermediary Guidelines and Intermediary Code.

124. Irrespective of whether the collusive network amongst the Conspirators existed prior to the Prosecution’s investigation, it is apparent that the investigative failures emboldened the Conspirators. Rather than address this, the OTP failed to take rudimentary investigative steps at the appropriate time in order to verify the source of information and test the evidence brought before the Chamber – despite clear *indicia* of fraud and/or grave inconsistencies in the evidence. This significant investigative gap enabled the Conspirators to continue to fabricate evidence on a wider basis and with impunity – as evidenced by the further contamination of ‘[REDACTED]’ (P-0001) and ‘[REDACTED]’ (P-0002).
125. Further, once the fraudulent nature of the ESF programme was clearly brought to the attention of the OTP, it has sought to shirk its obligations and mischaracterise the exculpatory nature of the fraudulent ESF Programme, compounding its investigative violations under article 54(1) and giving rise to further violations pursuant to articles 67(1)(e) and 67(2).
126. In this regard, the fact that the Prosecution has ‘withdrawn’ its reliance on [REDACTED] (P-2582), [REDACTED] (P-2620) and [REDACTED] (P-2511) as Prosecution witnesses and/or is no longer relying on [REDACTED] (P-2018) or [REDACTED] (P-2580) as Prosecution intermediaries does not negate the violation nor break the causal link. Not only has the OTP formally submitted documents pertaining to these witnesses – which remain on the record - but it is the cumulative conduct of the Conspirators which is of relevance, and which has resulted in a wider fraudulent scheme concerning the ESF Programme. The OTP funnelled its investigation through ESF-affiliates, relying on them for evidence and leads, in full knowledge of their multi-layered conflicts of interest; and created the conditions for, or was at the very least, indifferent to, mass witness contamination. Notably, of the eight ‘Crime base witnesses related to child soldiers’ in the Prosecution Witness List, seven were either ESF-

affiliates (or family members thereof) or ESF Programme participants.²⁷⁹ The evidence of [REDACTED] (P-2475), P-2018 and [REDACTED] (P-1974), as well as the evidence of ‘[REDACTED]’ (P-0001) and ‘[REDACTED]’ (P-0002), is a component of this fraudulent scheme and continues to be relied upon by the OTP and CLRV in these proceedings.

127. Nor is the OTP’s decision to not call [REDACTED] (P-2582), [REDACTED] (P-2620) and [REDACTED] (P-2511) as witnesses indicative of good or corrective investigative practices. Rather, having been confronted with evidence of the fraudulent scheme, the OTP undertook a selective and superficial review in a vain effort to preserve its reliance on [REDACTED] (P-2475), [REDACTED] (P-2018) and [REDACTED] (P-1974) rather than reassess its evidence in a holistic manner and in light of all that which had been uncovered by the Defence.

128. The same is also true of the Prosecution’s recent intention to request the [REDACTED] concerning [REDACTED] (P-2580) [REDACTED] (P-2475) [REDACTED].²⁸⁰ Again, whilst the Defence is not privy to the extent of the Prosecution’s investigation nor its conclusion(s), it appears that the investigation was limited to a very narrow aspect of a far broader conspiracy to falsify evidence, involving not only P-2580, but a range of Conspirators, including P-2475. Despite seemingly acknowledging that fabricated documents were submitted with regard to P-2475’s age, the Prosecution has not sought to formally withdraw the documents from the case record; nor does it seem to have initiated a broader investigation with respect to the illegal conduct of P-2475, who remains a Prosecution witness. The OTP cannot wash its hands of the wider conspiracy, or of its own conduct in enabling it, simply by [REDACTED].

C. Part III: The Fabricated evidence is inherently unreliable and should not be admitted in preservation of the integrity of these proceedings

i) The article 54(1) and article 67 violations cast substantial doubt on the reliability of the Fabricated Evidence

129. Given the ‘key value’ preserved by article 69(7), i.e. the protection of the accuracy and reliability of the Court’s fact-finding by requiring that evidence of

²⁷⁹ ICC-01/14-01/18-724-Conf-AnxA, #52-59. Noting further the remaining witness was withdrawn and was not alleged to have been a child soldier for the purposes of the Statute.

²⁸⁰ Annex B, Email from OTP to Parties and Participants of 30 November at 14:51.

questionable credibility be excluded,²⁸¹ it follows that systematic witness collusion²⁸² and evidence fabrication are precisely the sort of ‘mischief’ that the exclusionary powers within article 69(7) were intended to counteract.²⁸³ Further, the inherent unreliability of evidence elicited or obtained from witnesses who have engaged in collusion and/or falsified evidence, the OTP’s violation of article 54(1) has rendered the Fabricated Evidence untruthful or unreliable.²⁸⁴ As such, there are no portions or aspects of the Fabricated Evidence that are untainted by the collusion given the extent of the violation and the fraudulent intention of the Conspirators.

130. Any suggestion that it is the conspiracy itself, and not the violation of article 54(1), that casts substantial doubt on the reliability of the Fabricated Evidence and therefore, that article 69(7)(a) is unmet, cannot be sustained. It is both the conspiracy and the violation, that create the requisite substantial doubt, because both the conspiracy and the violation are in fact inextricably intertwined: the former would not have existed, in its current, widespread and far-reaching form, had it not been for the latter. Simply put, through its repeated and consistent violations of article 54(1), the Prosecution played an integral, if unwitting, part in the conspiracy.

131. From the outset, it was the OTP’s article 54(1) violations that enabled the conspirators to perpetuate their fraudulent conduct in the renewed context of these proceedings: specifically, its decision to funnel its investigation through the ESF Conspirators, in full knowledge of their multiple conflicts of interest arising from the original ESF Programme fraud, and their concomitant motive to conceal the latter.²⁸⁵

132. Likewise, it was an OTP violation that enabled [REDACTED] (P-2018) to orchestrate the systematic fabrication of evidence with his ESF co-Conspirators: i.e. its failure to distance P-2018 from the investigation, despite knowing of his illicit contact with potential witnesses, and his compounded conflict of interest arising from his role as VPRS intermediary tasked to gather ‘former child soldiers’, and thereby facilitate mass witness contamination.²⁸⁶

²⁸¹ See *supra*, para. 32.

²⁸² As defined by the ICTR Appeals Chamber, ‘collusion’ is ‘an agreement, usually secret, between two or more persons for a fraudulent, unlawful or deceitful purpose’; see Karera Appeals Judgment, para. 234.

²⁸³ The ICTR Appeals Chamber has repeatedly held that, ‘if an agreement between witnesses for the purpose of untruthfully incriminating an accused were indeed established their evidence would have to be excluded pursuant to Rule 95 of the Rules (i.e. article 69(7)’s counterpart provision, which states: No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings); see, Karera Appeals Judgment, para. 234.

²⁸⁴ Lubanga Confirmation Decision, para. 85.

²⁸⁵ See *supra*, paras 60-61.

²⁸⁶ See *supra*, paras 62-67.

133. It was through multiple OTP violations that [REDACTED] (P-2620) and [REDACTED] (P-2582) were able to secure relocation, whereupon they further colluded along with [REDACTED]: i.e. its refusal to act on the obvious unreliability of their fictitious accounts; its refusal to investigate [REDACTED] (P-2638's) obviously tampered documents; and its refusal to seek basic authentication of P-2582's fraudulent birth certificates.²⁸⁷
134. In the same vein, it was also through the Prosecution's multiple violations in respect of [REDACTED] (P-2580) in particular that he was subsequently able to conspire with [REDACTED] (P-2475) to produce and provide fraudulent documents: i.e. its failure to investigate him in a timely manner as the common denominator in the obviously unreliable accounts provided by [REDACTED] (P-2620), [REDACTED] (P-2582), and [REDACTED] (P-2583); and instead, to formally engage him as OTP intermediary, despite the multiple indicia of his fundamental unsuitability for the role;²⁸⁸ and despite the self-reflection and 'lessons learned' supposedly undertaken by the OTP following the OTP-enabled fraudulent child soldier and intermediary collusion scandal in the *Lubanga* proceedings, over ten years prior.²⁸⁹
135. Had it not been for the OTP violations – i.e. its decision to ignore manifest evidence-tampering on [REDACTED] (P-2475's) fraudulent baptism certificate and academic documents, and its refusal to conduct basic authentication thereof, and to instead call him as an OTP witness²⁹⁰ – he would not have been enabled to give false evidence.
136. Further, when after P-2475's testimony, the OTP discovered that [REDACTED] (P-2580) was requesting money from [REDACTED] ([REDACTED]) via Facebook, it neglected to obtain Facebook material in respect of [REDACTED], despite the manifestly corrupt nature of these requests.²⁹¹ Had the OTP not failed to investigate these clearly exculpatory circumstances, in violation of article 54(1),²⁹² it would have discovered that [REDACTED] (P-2018) was also soliciting money from [REDACTED], and that he, [REDACTED] and [REDACTED] had been in contact regarding her upcoming

²⁸⁷ See *supra*, paras 85-107.

²⁸⁸ See *supra*, paras 68-72.

²⁸⁹ See *supra*, paras 56, 71; and *infra*, paras 147-150.

²⁹⁰ See *supra*, paras 74-79.

²⁹¹ [REDACTED]. The OTP was aware that P-2580 had been involved in [REDACTED] contact with the OTP from the outset; see, *supra*, [REDACTED].

²⁹² The OTP was in possession of P-2582's Facebook account information since [REDACTED] in May/June 2022; see *supra*, para. 22.

testimony²⁹³ Instead, through this OTP violation, P-2018 and P-1974 were called as OTP witnesses, like [REDACTED] (P-2475), to give false evidence to conceal and perpetuate their widespread fraud.²⁹⁴

137. Had it not been for these violations, the ESF Conspirators would not have been enabled to continue their ‘former child soldier’ production factory unchecked, in their capacity as Registry intermediaries, onward through the CLRV case.

138. The joint scheme of [REDACTED] (P-2638), [REDACTED] (P-2018) and ‘[REDACTED]’ (P-0001) was likely inspired by the prior success of P-2638, [REDACTED] (P-2580) and [REDACTED] (P-2620) in securing relocation for the latter.²⁹⁵ Had the OTP not failed to seize any of the myriad opportunities to uncover their various misconduct, through basic respect of its article 54(1) investigative duties, P-0001 would never have been in a position to brazenly narrate a false account, under a false identity, with the specific aim of relocation.²⁹⁶ In fact, the OTP violations not only directly enabled the Conspirators: it also emboldened them: ‘[REDACTED]’s’ (P-0002’s) false testimony, also delivered under a false identity, was only made possible due to the culture of impunity brought about by the OTP’s years-long neglect of its statutory investigative duties, within which the Conspirators were able to operate.

139. Further, the content (and therefore the reliability) of the Fabricated Evidence would not have been the same had these violations not occurred.²⁹⁷ In fact, it could not have been more different: had it not been for the OTP’s violation of article 54(1), the Fabricated Evidence would never have become part of the trial record. Much like the conspiracy in its current form, it would not have existed in the first place.

140. Lastly, the substantiality threshold in article 69(7)(a) has been met. The evidence demonstrates systematic collusion, evidence fabrication, and witness interference, on a scale that is unprecedented before the Court; likewise, the sheer extent of the OTP’s repeated and consistent article 54(1) violations.

²⁹³ See *ibid*.

²⁹⁴ Annex A, [REDACTED].

²⁹⁵ See *supra*, paras 15-16.

²⁹⁶ See *supra*, para. 25.

²⁹⁷ Bemba et al Western Union Decision, para. 54 ; Lubanga Confirmation Decision, para. 85.

ii) *The admission of the Fabricated Evidence would be antithetical to and would seriously damage the integrity of the proceedings*

141. The plain wording of article 67(9)(b) is clear in that it is the admission of the evidence in question which triggers the second limb of the alternative embodied within the article and not the violation itself.²⁹⁸

142. In this assessment of the second limb it is necessary to examine the scope and meaning of the ‘integrity of proceedings’, which has been interpreted to mean the ‘appropriate balance between the rights of the accused and the need to respond to victims’ and the international community’s expectations’,²⁹⁹ as well as ‘respect for the core values which run through the Rome Statute’ including ‘respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes’.³⁰⁰ This is followed by an assessment of the ‘antithesis’ or ‘damage’ caused.³⁰¹ Relevant factors in this regard may (not should) include (i) the nature and gravity of the violation; (ii) whether the rights violated related to the accused; (iii) the Prosecution’s degree of control over the evidence gathering process or power to prevent the improper or illegal activity; and (iv) the level of care that was displayed to minimise the risk of any violations occurring and measures taken once the violation has occurred to reduce the impact thereof.³⁰²

143. It is self-evident from the above submissions that the admission of the Fabricated Evidence is antithetical to at least two core values of this Court, namely the fairness of these proceedings and the effective prosecution before this Chamber. The ICC is repeatedly touted as offering the highest standard of fairness, due its role as an international standard setter and due to the importance of fairness for the legitimacy and continued operation of the Court.³⁰³ In doing so, it must – at all times – adhere to and promote the rule of law.³⁰⁴ However, the production and admission of falsified evidence and/or unverified material, is not only a violation of legal procedure but is an assault on the rule of law itself. It directly undermines the fairness of these proceedings and the rights of Mr Yekatom, in that he is expected to defend against allegations based upon falsified evidence generated from a deceptive and collusive network. There are no

²⁹⁸ Lubanga Confirmation Decision, para. 86; Piragoff/Clarke 2022, mn. 90.

²⁹⁹ Lubanga Confirmation Decision, para. 86. See also Brdjanin Decision, para. 62.

³⁰⁰ Lubanga Bar Table Decision, para. 42.

³⁰¹ Piragoff/Clarke 2022, mn. 91.

³⁰² E.g. see most recently, Gicheru Art 69(7) Decision, para. 49 and cites therein.

³⁰³ See e.g., Judge Hans-Peter Kaul Address.

³⁰⁴ UNGA Rule of Law Draft Resolution, para. 23: ‘[w]e recognize the role of the International Criminal Court in a multilateral system that aims to end impunity and establish the rule of law’.

justifiable grounds whereby this would be permitted in any criminal judicial system, and falls far short of the international community's expectations for international proceedings.³⁰⁵

144. Moreover, the admission of the Fabricated Evidence would undoubtedly send a concerning message to the public – one that condones the illegal falsification of evidence,³⁰⁶ and poor investigative standards before the ICC. It would also ignore the deterrence and discipline purpose embedded and recognised within article 69(7).³⁰⁷ Indeed, it is in this context that the aforementioned factors at paragraph 142 were developed and may be considered in the assessment of the 'antithesis' or 'damage' caused.

145. As set out above, the OTP acted with careless disregard of its investigative duties and powers pursuant to article 54(1), played a direct role in the violation of article 54(1) and in breach of the fairness of these proceedings as guaranteed under article 67. It funnelled its investigations through intermediaries and subsequently failed to supervise and/or take appropriate measures whereby it was evident that the intermediaries' conduct was *inter alia*: in violation of the rights of Mr Yekatom and the statutory framework of this Court; amounted to corrupt practice which comprised the intermediaries' functions; and amounted to deception or knowingly misleading the Court. Even the review conducted in 2020, and subsequent investigation of [REDACTED], was selective and by no means sufficient to stamp out the continued reliance on Fabricated Evidence and more pertinently, to publicly hold the Conspirators to account.

146. The OTP compounded the problem in its failure to take rudimentary verification steps which are demanded of any investigation, not least one where the collusive network was so obvious. From a holistic overview of these failures, it is reasonable to conclude that the OTP's failure to test its case - in a manner required of these proceedings - was intentional, as part of a single-minded and overly narrow focus to support its case theory in relation to Count 29.

³⁰⁵ See e.g. Karera Appeals Judgment, para. 234.

³⁰⁶ See e.g. Kordić & Čerkez Transcript, lines 11-14, p. 13684, where Judge Robinson observed that "the concept of serious damage to the integrity of the proceedings connotes, in my view, shades of conduct, shades of illegality".

³⁰⁷ Lubanga Bar Table Decision, para. 45 citing to Brđanin Decision. See also Bemba et al Appeals Judgment Separate Opinion of Judge Geoffrey Henderson, para. 33: 'The Trial Chamber in Lubanga suggests that the purpose of the exclusionary rule is, *inter alia*, to discipline or deter unlawful conduct by the OTP. Therefore, an assessment of the Prosecution's control over the evidence gathering process or the power to prevent the improper conduct is particularly relevant.'

147. The OTP's conduct is particularly concerning given that it has seemingly learnt no lessons from the *Lubanga* case. As described by former international prosecutor, Dermot Groome:

Even if the use of intermediaries to identify and interview potential child soldiers was necessary in *Lubanga*, the Prosecution does not appear to have taken the steps necessary to verify the information gathered in this way [...] [g]iven that the age of a victim/witness at the time he or she was inducted into combat was a central issue in the trial, the Prosecution had an important responsibility to independently verify the age of these witnesses before advancing their evidence in court. Had the Prosecution done so, the true age of the victims would have been apparent and many of the problems during the proceedings would have been avoided.³⁰⁸

148. This description is alarmingly true of these proceedings over ten years later. This is despite the fact that the OTP's investigative failures led to witness interference and evidence fabrication which very nearly derailed the *Lubanga* proceedings. This resulted in much damage to the reputation of the Court, not to mention the public perception of its ability to perform the mandate with which it has been entrusted by the international community.³⁰⁹

149. Whilst the Intermediary Guideline and Intermediary Code were purposefully introduced after *Lubanga* to counter the infiltration of falsified evidence via intermediaries – this is only effective if the OTP actually implements the provisions and safeguards in place. This was not the case here. Intervention is thus required at this stage in order to set a red line for the OTP and third parties drawn into these proceedings and to send a clear message that the Court will no longer tolerate sub-standard investigative practices which jeopardise proceedings, infringe on the fundamental rights of an accused and undermine the efficient and proper administration of justice.³¹⁰

150. Indeed, as with *Lubanga*, the Defence and Chamber will have already 'spent a considerable period time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The prosecution's negligence in failing to verify and scrutinise this material sufficiently

³⁰⁸ Groome 2014, p. 25.

³⁰⁹ The manner in which the OTP utilised intermediaries in *Lubanga* meant that they were portrayed as 'betrayers of trust, both of local communities and of the cause of international justice itself'. Such representations may further compromise the Court's legitimacy and ability to protect those who fundamentally support its work, see Clancy 2015, pp. 219-248 at 221.

³¹⁰ See also *Lubanga Jurisdiction Appeal Judgment*, para. 39: 'the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice'.

before it was introduced led to significant expenditure on the part of the Court'.³¹¹ This detrimental impact will only continue if the Fabricated Evidence is admitted given that once unreliable evidence finds its way into a trial it will inevitably pollute the case record as 'rather like cancer cells, pieces of fabricated evidence disguise themselves and gain sustenance by attaching themselves to genuinely probative evidence. Over the course of a trial lasting several months or a year evidential debris has ample opportunity to contaminate genuine and probative evidence in the minds of the judges'.³¹²

CLASSIFICATION

151. The Request, as well as Annexes A to C, are filed on a confidential basis as they refer to confidential material concerning protected witnesses. A public redacted version of the Request will be filed forthwith.

CONCLUSION AND RELIEF SOUGHT

152. The Conspirators' attempt and intention to lead falsified evidence against Mr Yekatom for personal gain should have been stamped out by the OTP at the outset. Regrettably, this was not done as the OTP's investigation was subject to a litany of failures. The Chamber is asked to now intervene to ensure that there can be no reward for conspiring to falsify evidence, that there is an end to the OTP's indifference to its investigative obligations, and further, to safeguard the moral integrity and legitimacy of these proceedings.

153. For the foregoing reasons, and pursuant to article 69(7), the Defence respectfully requests Trial Chamber V to **EXCLUDE** the Fabricated Evidence.

RESPECTFULLY SUBMITTED ON THIS 9th DAY OF FEBRUARY 2024



Me Mylène Dimitri

Lead Counsel for Mr. Yekatom

The Hague, the Netherlands

³¹¹ Lubanga Trial Judgment, para. 482.

³¹² Murphy 2010, pp. 539–573.