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No.: **ICC-01/14-01/18**
Date: **4 March 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 YEKATOM AND PATRICE-ÉDOUARD NGAÏSSONA

Public

Public Redacted Version of the "Response of the Common Legal Representative of the Former Child Soldiers to the Defence's Request for a forensic examination of [REDACTED] (No. ICC-01/14-01/18-2321-Conf)" (No. ICC-01/14-01/18-2335-Conf, dated 30 January 2024)

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

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the "Legal Representative" or the "CLR1") herewith submits his response to the Yekatom Defence's Request for a forensic examination of [REDACTED] (the "Defence's Request" or "Request").[1]

2. The CLR1 submits first that the Defence's Request is based on evidence obtained by the VWU in violation of the Rome Statute (the "Statute") and internationally recognised human rights of Witnesses [REDACTED] and [REDACTED], and accordingly must be denied in order to preserve the fairness and integrity of the proceedings as well as to ensure the rights and liberties of the concerned individuals. Second, since in essence the Defence requests [REDACTED], the forensic examination of [REDACTED] is neither an appropriate nor permissible avenue for the purported objective, and the Defence's Request must be dismissed also for this reason.

II. PROCEDURAL BACKGROUND

3. On 3 August 2023, Trial Chamber V (the "Chamber") issued the "Decision on the Common Legal Representatives of Victims Requests for Leave to Present Evidence and Further Order on the Remainder of the Prosecution Presentation of Evidence", finding it appropriate and necessary to hear the evidence of victims a/20722/21 ([REDACTED]) and a/65991/19 ([REDACTED]).[2]

[1] See the "Yekatom Defence Response to CLRV1 Response of 17 January 2024 to VWU Submissions (ICC-01/14-01/18-2305-Conf-Red)", No. ICC-01/14-01/18-2321-Conf, 22 January 2024 (the "Defence's Request").

[2] See the "Decision on the Common Legal Representatives of Victims Requests for Leave to Present Evidence and Further Order on the Remainder of the Prosecution Presentation of Evidence" (Trial Chamber V), No. ICC-01/14-01/18-2016-Conf, 3 August 2023, para. 26. A public redacted version was filed on 6 September 2023 as No. ICC-01/14-01/18-2016-Red.

4. On 11 August 2023, the CLR1 submitted to the VWU [REDACTED] with respect to Witnesses [REDACTED] and [REDACTED].[3]

5. Witnesses [REDACTED] and [REDACTED] testified at the seat of the Court respectively on [REDACTED],[4] and on [REDACTED].[5]

6. On 15 December 2023, the VWU [REDACTED].[6]

7. On 21 December 2023, the Single Judge instructed the VWU to share said information with the parties and participants, on the record, by 8 January 2024.[7]

8. On 8 January 2024, the VWU filed the Registry's Submissions.[8]

9. On 16 January 2024, the CLR1 filed the "Response of the Common Legal Representative of the Former Child Soldiers to the Registry's Submissions (No. ICC-01/14-01/18-2290-Conf, dated 8 January 2024) and Urgent Request for an order to the VWU to complete the security risk assessment with respect to Witnesses [REDACTED] and [REDACTED] and implement protective measures as appropriate" (the "CLR1's Submissions of 16 January 2024").[9]

[3] [REDACTED]
[4] [REDACTED]
[5] [REDACTED]
[6] [REDACTED]
[7] See the Email correspondence from the Chamber dated 21 December 2023 at 17:09.
[8] See the "Registry's submission regarding material obtained by VWU in the course of the execution of its mandate", No. ICC-01/14-01/18-2290-Conf, 8 January 2024 (the "Registry's Submissions"). A public redacted version was filed on 29 February 2024 as No. ICC-01/14-01/18-2290-Red.
[9] See the "Response of the Common Legal Representative of the Former Child Soldiers to the Registry's Submissions (No. ICC-01/14-01/18-2290-Conf, dated 8 January 2024) and Urgent Request for an order to the VWU to complete the security risk assessment with respect to Witnesses [REDACTED] and [REDACTED] and implement protective measures as appropriate", No. ICC-01/14-01/18-2305-Conf-Exp, 16 January 2024. A confidential redacted version was filed on 17 January 2024 as No. ICC-01/14-01/18-2305-Conf-Red (the "CLR1's Submissions of 16 January 2024").

10. On 22 January 2024, the Yekatom Defence filed its Request.[10] On the same day, the VWU filed its Observations.[11]

11. Following a request from the CLR1,[12] the Chamber instructed the participants to file responses, if any, to the Defence's Request by 30 January 2024, COB.[13]

III. CLASSIFICATION

12. Pursuant to regulation 23*bis* and (2) of the Regulations of the Court, the present submissions are classified as confidential since the Defence's Request bears the same level of classification.

IV. SUBMISSIONS

1. Applicable Law

13. Evidence collection at the Court is governed by the Statute and the Rules of Procedure and Evidence (the "Rules"). Pursuant to article 64(9)(a) and 69(4) of the Statute, the Chamber has the power to rule on the "*relevance or admissibility of any evidence, taking into account,* inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the* [Rules]". Under rule 63(2) of the Rules, the Chamber shall have the authority to "*assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69*". The Chamber's assessment for the purposes

[10] See the Defence's Request, *supra* note 1.
[11] See the "Victims and Witnesses Unit's Observations on the "Response of the Common Legal Representative of the Former Child Soldiers to the Registry's Submissions (No. ICC-01/14-01/18-2290-Conf, dated 8 January 2024) and Urgent Request for an order to the VWU to complete the security risk assessment with respect to Witnesses [REDACTED] and [REDACTED] and implement protective measures as appropriate" (ICC-01/14-01/18-2305-Conf)", No. ICC-01/14-01/18-2320-Conf-Exp, 22 January 2024. A confidential redacted version was filed on 26 January 2024 as No. ICC-01/14-01/18-2320-Conf-Red. A public redacted version was filed on 29 February 2024 as No. ICC-01/14-01/18-2320-Red.
[12] See the Email correspondence from the CLR1 dated 23 January 2024 at 17:50.
[13] See the Email correspondence from the Chamber dated 24 January 2024 at 12:21.

of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment.[14]

14. In the *Lubanga* case, Trial Chamber I established a threefold test and ruled that it will focus "*first, on the relevance of the material (viz. does it relate to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims); second, on whether or not it has probative value (bearing in mind, for instance, "the indicia of reliability"); and, third, on the probative value of the evidence as against its prejudicial effect*".[15]

15. In turn, article 69(7) of the Statute regulates the admissibility of evidence obtained by means of violation of the Statute or internationally recognized human rights. This provision is thus *lex specialis* to the evidence admissibility framework set out in the Statute.[16] As the Appeals Chamber clarified, article 69(7) envisages two consecutive inquiries. First, in line with its *chapeau*, the Chamber has to determine whether the item of evidence was "*obtained by means of a violation of* [the] *Statute or internationally recognized human rights*".[17] A causal link between the violation and the gathering of the evidence is therefore required.[18] If this condition is met, the second

[14] See the "Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements" (Trial Chamber X), No. ICC-01/12-01/18-1475-Red, 20 May 2021, para. 29; the "Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011" (Trial Chamber III), No. ICC-01/05-01/08-2012-Red, 9 February 2012, para. 14; and the "Decision on Prosecution's first request for the admission of documentary evidence" (Trial Chamber VI), No. ICC-01/04-02/06-1181, 19 February 2016, para. 7.

[15] See the "Decision on the admissibility of four documents on 13 June 2008" (Trial Chamber I), No. ICC-01/04-01/06-1399, paras. 27-31 (Emphasis added).

[16] See the "Decision on the admission of material from the "bar table" (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009, para. 34; and the "Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements", *supra* note 14, para. 30.

[17] See the "Public redacted version of Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red, 8 March 2018 (the "*Bemba et al.* Judgment of 8 March 2018"), para. 280. See also the "Decision on Kilolo Defence Motion for Inadmissibility of Material" (Trial Chamber VII), No. ICC-01/05-01/13-1257, 16 September 2015 (the "*Bemba et al.* Decision of 16 September 2015"), paras. 39 and 41; and the "Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements", *supra* note 14 para. 31.

[18] See the "Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements", *supra* note 14, para. 31; and the "Public Redacted Version of Decision on

step is to consider whether: (i) the "*violation casts substantial doubt on the reliability of the evidence*" under article 69(7)(a); or (ii) the "*admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings*" under article 69(7)(b) of the Statute. If the answer to either of these two questions is affirmative, the evidence concerned is inadmissible.[19]

16. The rationales for this exclusionary rule are mainly two: (i) to avoid reliance on unreliable evidence; and (ii) to preserve the integrity of the proceedings.[20] Initially, the Preparatory Committee struggled to determine whether the central issue should prioritize the manner in which the evidence was collected or the potential impact of such a violation on the proceedings.[21] The final consensus integrates both criteria: initially, evidence exclusion hinges on the premise that it was obtained in violation of an individual's rights. However, exclusion as a remedy for such violations is contingent upon specific adverse effects on the proceedings, such as compromised reliability or the potential to significantly undermine the integrity of the proceedings.[22]

17. Although article 69(7) employs mandatory language, the Chambers maintain discretion in deciding on a case to case basis, carefully considering the facts, circumstances, and breaches to determine whether to admit or reject the relevant

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the Request to Exclude Audio Recordings Pursuant to Article 69(7) of the Statute" (Trial Chamber III, Single Judge), No. ICC-01/09-01/20-284-Red2, 18 February 2022, para. 45.

[19] See the *Bemba et al.* Judgment of 8 March 2018, *supra* note 17, para. 280. See also the "*Bemba et al.* Decision of 16 September 2015, *supra* note 17, paras. 39 and 41; and the "Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements", *supra* note 14, para. 31.

[20] See the "Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements", *supra* note 14, para. 32; and the "Decision on the Prosecutor's Bar Table Motions" (Trial Chamber II), No. ICC-01/04-01/07-2635, 17 December 2010, para. 39.

[21] The 1994 International Law Commission Draft Statute for an International Criminal Court contained a proposed rule that evidence shall not be admissible if obtained "*by means of a serious violation of this statute or other rules of international law*". This revised an earlier draft in 1993 that provided for an exclusionary rule triggered by obtaining evidence "*directly or indirectly by illegal means which constitutes a serious violation of internationally recognized human rights*". However, the text adopted by the Rome Conference contains no reference to this requirement within the first limb (Article 69(7)). See VIEBIG P., *Illicitly Obtained Evidence at the International Criminal Court* International Criminal Justice Series Volume 4, ISBN 978-94-6265-092-3, Staatsanwaltschaft Hamburg, Germany, January 2016, pp. 163-187.

[22] See PIRAGOFF D. and CLARKE P., Article 69, para. 88, in AMBOS K. (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, Beck, Hart, and Nomos, 4th ed., 2022.

evidence. The exclusion shall take place at the discretion of the judges and the reliability and accuracy shall be kept into consideration, unless serious and grave violations have not been used in its procurement. The initial advantage of excluding illicit evidence is to enforce discipline among investigative authorities, ensuring that no evidence obtained through illegal or unwanted methods is produced.

18. The Statute does not quantify the violation of the Statute, or the internationally recognized human right, by reference to the degree of "seriousness". Therefore, "*even a non-serious violation may lead to evidence being deemed inadmissible, provided that one of the two limbs of the test in Article 69(7) is satisfied*. […] *It is only in the second limb of the test that a requirement of a degree of "seriousness" is introduced, although this is unconnected to the seriousness of the violation*".[23] Trial Chamber I further found that the fact that "*a violation involved the right to privacy of a third party is not relevant when deciding whether the first step of the test for admissibility of evidence under Article 69(7) is satisfied*".[24] Accordingly, the identity of the person whose human rights were infringed is not a material consideration. In other words, evidence does not become admissible simply because the violation did not involve the human rights of the accused.[25]

19. When deciding whether there has been serious damage to the "*integrity of proceedings*" as provided in article 69(7)(b), it has been stressed that "*the respect for the integrity of proceedings is necessarily made up of respect for the core values which run through the Rome Statute*".[26] It has been suggested that applying this provision involves balancing a number of concerns and values found in the 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*".[27]

[23] See the "Decision on the admission of material from the 'bar table'", *supra* note 16, para. 36
[24] *Idem*, para. 37.
[25] *Ibid*.
[26] *Idem*, para. 42.
[27] *Idem*, para. 42 (Emphasis added).

2. Response to the Defence's Request

a) The Defence's Request is based on evidence obtained by the VWU in violation of the Statute and internationally recognised human rights

20. The Defence's Request for the forensic examination of [REDACTED] is based on evidence obtained by the VWU in violation of the Statute and internationally recognised human rights of the concerned individuals. The CLR1 reiterates in full by reference his Submissions of 16 January 2024.[28]

21. The subsequent *post factum* request by the Defence for a judicial order to proceed with a forensic examination of [REDACTED] does not cure the initial violation of the Statute and of the Witnesses' internationally recognized human rights. The concept of *post factum* authorization for the acquisition of evidence refers to seeking approval after the information has already been obtained. While such authorization may be sought in an attempt to rectify the initial breach, it does not negate the violation of the Statute and of human rights that occurred during the acquisition of the information. In other words, the fact that authorization is sought after the fact does not undo the violation of the Statute and of human rights that occurred at the time of acquisition. The rights of the individuals from whom the information was obtained remain infringed, and the integrity of the evidence remains compromised.

22. Furthermore, in accordance with the relevant jurisprudence of the Court, the identity of the person whose human rights were infringed is not a material consideration in determining the admissibility of evidence.[29] In other words, evidence does not become admissible simply because the violation did not involve the human rights of the accused.[30] Admitting evidence that authorities unlawfully obtain through the violation of privacy and correspondence, would not only contravene the right not to incriminate oneself but also erode the presumption of innocence by unfairly

[28] See the CLR1's Submissions of 16 January 2024, *supra* note 9, paras. 21-33.
[29] See the "Decision on the admission of material from the 'bar table'", *supra* note 16, para. 37.
[30] *Ibid*.

prejudicing the two Witnesses. Therefore, any evidence obtained through such violations should be excluded from proceedings to uphold these fundamental rights and principles of justice.

23. Lastly, article 69(7)(b) of the Statute underscores the importance of integrity in proceedings, necessitating respect for core values enshrined in the Statute, including the rights of individuals.[31] Therefore, any application of this provision must balance various concerns and values within the Statute, with a focus on upholding the rights of all parties involved. In summary, the right not to incriminate oneself, the presumption of innocence, and the prohibition against the violation of privacy and correspondence are closely interlinked. Upholding these rights and principles is essential for ensuring fairness, justice, and the protection of individual liberties in criminal proceedings.

24. Consequently, granting the Defence's Request will mean upholding the initial violation by the VWU of the Statute and internationally recognised human rights of Witnesses [REDACTED] and [REDACTED]. Thus, the Defence's Request must be denied in order to preserve the fairness and integrity of the proceedings as well as to ensure the rights and liberties of the concerned individuals.

b) The Defence requests [REDACTED]

25. The Defence does not merely seek a further inquiry into [REDACTED], but seeks to obtain further evidence [REDACTED],[32] and in particular [REDACTED],[33] [REDACTED],[34] [REDACTED],[35] and [REDACTED].[36] In essence, the Defence requests [REDACTED].

26. [REDACTED].

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[31] *Ibid*.
[32] See the Defence's Request, *supra* note 1, para. 24.
[33] *Idem*, para. 27.
[34] *Idem*, para. 24.
[35] *Ibid*.
[36] *Idem*, para. 26.

27. The right not to incriminate oneself, closely linked to the presumption of innocence, is protected under article 6(2) of the European Convention on Human Rights (the "ECHR"). The European Court of Human Rights (the "ECtHR") has established that protections under article 6(1) and (3) of the ECHR apply to individuals subject to a "*criminal charge*", which encompasses situations where a person's situation has been substantially affected by actions taken by the authorities based on suspicion of criminal conduct.[37] The ECtHR's judgment in *Aleksandr Zaichenko v. Russia*,[38] later affirmed in the *Ibrahim and Others v. the United Kingdom*,[39] also holds significant relevance. In the former case, the ECtHR considered a suspect who was questioned about their alleged involvement in criminal activities as being under a "charge" for the purposes of article 6 of the ECHR. It clarified that once suspicion of theft arose against the applicant, it was the responsibility of the police to apprise him of his right to remain silent and of the privilege against self-incrimination.

28. Consequently, given the scope and objective of the Defence's Request, the forensic examination of [REDACTED] is neither an appropriate nor permissible avenue in the particular circumstances of the case, and accordingly, the Defence's Request must be dismissed also for this reason.

V. RELIEF SOUGHT

29. For the foregoing reasons, the CLR1 respectfully requests that the Chamber:

- **REJECT** the Defence's Request.

[37] See ECtHR, *Saunders v. the United Kingdom*, Application No. 19187/91, 17 December 1996, Reports of Judgments and Decisions 1996-V, para. 68.
[38] See ECtHR, *Aleksandr Zaichenko v. Russia*, Application No. 39660/02, 18 February 2010.
[39] See ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], Applications Nos. 50541/08, 50571/08, 50573/08, 13 September 2016, para. 249.

RESPECTFULLY SUBMITTED,

Dmytro Suprun
Common Legal Representative of the Former Child Soldiers

Dated this 4th Day of March 2024
At The Hague, The Netherlands