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No. ICC-01/14-01/18

Date: 12 April 2022

TRIAL CHAMBER V

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the First Prosecution Submission Request from the Bar Table
(Sexual and Gender Based Violence)**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2) and (9), 69 and 74(2) of the Rome Statute (the ‘Statute’) and Rules 63 and 64 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence)’.

I. Procedural history and submissions

1. On 4 January 2022, the Office of the Prosecutor (the ‘Prosecution’) filed a request for submission of evidence from the bar table (the ‘Request’).¹ It requests that the Chamber recognises as formally submitted 140 items² related to the prevalence of sexual and gender based violence in the Central African Republic (the ‘CAR’) during and prior to the period relevant to the charges.
2. On 11 February 2022, the Ngaïssona Defence filed its response, requesting the Chamber to reject the Request *in limine* on the basis of not complying with the Chamber’s ‘Initial Directions on the Conduct of the Proceedings’ (the ‘Initial Directions’)³ in relation to indicating the relevance and probative value, and to order the Prosecution to re-file it in line with these directions.⁴ Alternatively, it requests the Chamber to order the Prosecution to provide arguments on the relevance and probative value of each individual item it wishes to submit through written filing in its future applications.⁵ The Ngaïssona Defence also requests to not recognise as formally submitted item CAR-OTP-2001-7017 as it is

¹ Request for the Submission of Evidence from the Bar Table regarding the Prevalence of Sexual and Gender Based Violence, ICC-01/14-01/18-1233 (with one confidential annex, the corrected version of which was notified on 15 February 2022, ICC-01/14-01/18-1233-Conf-Anx-Corr).

² The Chamber notes that while the Prosecution requests the submission of 140 items, these include five items which have already been recognised as submitted, as also stated by the Prosecution itself (*see* Request, ICC-01/14-01/18-1233, p. 6, n. 6).

³ *See* Initial Directions, 26 August 2020, ICC-01/14-01/18-631.

⁴ Defence Response to the Prosecution’s “Request for the Submission of Evidence from the Bar Table regarding the Prevalence of Sexual and Gender Based Violence”, ICC-01/14-01/18-1278 (the ‘Ngaïssona Defence Response’), paras 2, 11-17 (with confidential Annexes 1 and 2, ICC-01/14-01/18-1278-Conf-Anx1 and ICC-01/14-01/18-1278-Conf-Anx2).

⁵ Ngaïssona Defence Response, ICC-01/14-01/18-1278, paras 3, 18.

testimonial in nature,⁶ and presents its objections per item for the remaining items for future consideration of the Chamber.⁷

3. On the same day, the Yekatom Defence filed its response, similarly requesting the Chamber to reject the Request *in limine*, without prejudice, for lack of procedural conformity.⁸ Alternatively, it requests the Chamber to reject the Request with regard to 31 items, defers to the Ngaïssona Defence in relation to 92 items, and does not object to the submission of 17 items.⁹ In particular, the Yekatom Defence objects to the submission of two items arguing that they are testimonial in nature.¹⁰
4. Also on the same day, the Common Legal Representatives of Victims of Other Crimes (the ‘CLR V’) requested the Chamber to grant the Request (the ‘CLR V Response’).¹¹

II. Analysis

A. Request to reject *in limine*

5. The Yekatom and Ngaïssona Defence (jointly, the ‘Defence’) request the Chamber to reject the Request *in limine*. The Defence argues that the Prosecution failed to include sufficient information on the alleged relevance and probative value for each item in the Request and that, thus, the Request was not filed in accordance with the Initial Directions.¹²

⁶ Ngaïssona Defence Response, ICC-01/14-01/18-1278, paras 3, 34-35 *referring to* CAR-OTP-2001-7017.

⁷ *See* Annex 1, ICC-01/14-01/18-1278-Conf-Anx1. *See also* Ngaïssona Defence Response, ICC-01/14-01/18-1278, paras 19-33.

⁸ Yekatom Defence Response to the Prosecution’s “Request for the Submission of Evidence from the Bar Table regarding the Prevalence of Sexual and Gender Based Violence”, 4 January 2022, ICC-01/14-01/18-1233, 11 February 2022, ICC-01/14-01/18-1279, paras 2, 12, 18-25 (with confidential Annex A, ICC-01/14-01/18-1279-Conf-AnxA).

⁹ Yekatom Defence Response, ICC-01/14-01/18-1279, paras 3, 73.

¹⁰ Yekatom Defence Response, ICC-01/14-01/18-1279, paras 39-47 *referring to* CAR-OTP-2001-3268, CAR-OTP-2002-0039.

¹¹ Response by the Common Legal Representatives of the Victims of the Other Crimes to the Prosecution’s “Request for the Submission of Evidence from the Bar Table regarding the Prevalence of Sexual and Gender Based Violence”, ICC-01/14-01/18-1276.

¹² Yekatom Defence Response, ICC-01/14-01/18-1279, paras 18-25; Ngaïssona Defence Response, ICC-01/14-01/18-1278, paras 11-17.

6. In the Initial Directions, the Presiding Judge set out that a bar table application shall contain, *inter alia*, ‘(i) a short description of the item (and/or relevant portions therein); and (ii) a short description of the asserted relevance and probative value pursuant to Rule 64(1) of the Rules’.¹³
7. Having reviewed the Request, the Chamber is satisfied that the Prosecution filed the Request in accordance with the Initial Directions. While the Prosecution itself indicates that four ‘standard short-hand statement[s] of relevance’ were repeated throughout the annex to the Request in respect to each item,¹⁴ these standard statements are further explained in the Request, detailing the reasons for which the Prosecution considers the items encompassed thereby to be relevant.¹⁵ The Prosecution further outlines, albeit grouped into separate broader categories, the reasons for which it considers the submitted items to be reliable and authentic.¹⁶ In the annex to the Request, additional information as regards the most salient excerpts of the items is also included.¹⁷
8. The requirement of a ‘short description of the asserted relevance and probative value’ of an item submitted through written filing as set in the Initial Directions does not preclude the submitting party from making the same or similar arguments wholesale for a number of items within a certain category of documents, as long as the said ‘short description’ is sufficiently clear and applicable to the item. The Chamber considers this approach to be in the interest of efficiency in order not to burden the Chamber and the participants with repetitive submissions. While this may not always assist the submitting participant in arguing their case, the Chamber sees no principled impediment to this approach.
9. Therefore, the Chamber dismisses the Defence’s requests to reject the Request *in limine* as well as the request by the Ngaïssona Defence to order the Prosecution ‘to file any prospective bar table by addressing the relevance and probative value

¹³ Initial Directions, ICC-01/14-01/18-631, para. 62.

¹⁴ Request, ICC-01/14-01/18-1233, para. 9.

¹⁵ Request, ICC-01/14-01/18-1233, para. 9(i) to (iv).

¹⁶ Request, ICC-01/14-01/18-1233, para. 10(i) to (vi).

¹⁷ See Annex, ICC-01/14-01/18-1233-Conf-Anx-Corr.

of each individual item it wishes to tender'.¹⁸ In light of the above, the Chamber also sees no need to direct the Prosecution to resubmit the Request.

B. Objections to individual items

10. The Chamber recalls that, in accordance with the 'Submission Approach', it 'will assess the standard evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgment pursuant to Article 74(2) of the Statute'.¹⁹
11. Accordingly, the Chamber notes the participants' arguments on the relevance and probative value of the items subject to the Request, and defers its consideration until its deliberation of the judgment pursuant to Article 74(2) of the Statute.²⁰
12. At this stage, the Chamber will only consider the admissibility of items in the context of the statutory exclusionary rules, including procedural bars, obstacles and preconditions.²¹
13. In this regard, the Ngaïssona Defence requests the Chamber to reject item CAR-OTP-2001-7017, arguing that since it is based on individual witness accounts, it is testimonial in nature.²²
14. The Yekatom Defence requests the Chamber to reject two items, namely CAR-OTP-2001-3268 and CAR-OTP-2002-0039, due to their testimonial nature.²³ As regards item CAR-OTP-2001-3268, the Yekatom Defence further submits that, due to its nature, the Prosecution's attempt 'to use it for the truth of its content is self-serving and impermissible'.²⁴
15. The Chamber recalls that '[e]vidence which is testimonial in nature is [...] inadmissible [...] when not elicited orally or when the conditions for the

¹⁸ Ngaïssona Defence Response, ICC-01/14-01/18-1278, para. 18.

¹⁹ Initial Directions, ICC-01/14-01/18-631, paras 53, 62.

²⁰ Initial Directions, ICC-01/14-01/18-631, para. 53.

²¹ Initial Directions, ICC-01/14-01/18-631, para. 54.

²² Ngaïssona Defence Response, ICC-01/14-01/18-1278, para. 35.

²³ Yekatom Defence Response, ICC-01/14-01/18-1279, paras 39, 43.

²⁴ Yekatom Defence Response, ICC-01/14-01/18-1279, paras 45-46.

introduction of the prior recorded testimony specifically provided for in the Court's applicable law are not met'.²⁵

16. In this context, the Chamber recalls that a statement can be considered a prior recorded testimony if the person when providing the statement understands that they are 'providing information which may be relied upon in the context of legal proceedings', namely when they are questioned in the capacity of a witness in the context of or in anticipation of legal proceedings.²⁶ Further, when materials can be 'viewed as fitting within the definition of a prior recorded statement', '[s]uch materials are indeed testimonial in nature and they cannot be recognised as submitted through the "bar table"'.²⁷
17. Item CAR-OTP-2001-7017 contains the 'Final Report of the United Nations Commission of Inquiry on the Central African Republic', which presents information gathered by the commission in accordance with its mandate. The Chamber notes that the report includes findings made by the commission and while witness statements have informed the report, these statements are not as such included in the report. Having reviewed CAR-OTP-2001-7017, the Chamber is therefore of the view that this item, in itself, is not testimonial in nature. On this basis, and further considering that there appear to be no other bars to the submission of item CAR-OTP-2001-7017, the Chamber recognises this item as submitted.

²⁵ Initial Directions, ICC-01/14-01/18-631, para. 56. *See also* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wanda and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, para. 581.

²⁶ Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1926, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaiissona Defence Motion to Limit the Scope of P-2926's Evidence, 10 March 2021, ICC-01/14-01-18-907-Red, para. 11; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, para. 9 (internal footnotes omitted), *referring to* Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motion, 17 December 2010, ICC-01/04-01/07-2635, para. 49; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 32.

²⁷ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution's Request to Submit 1006 Items of Evidence, 28 March 2017, ICC-02/04-01/15-795, para. 20.

18. Turning to item CAR-OTP-2002-0039, a 237-page report by the ‘*Coalition des ADH pour les victimes de la RCA*’, the Chamber notes that pages 0043 to 0072 appear to contain individual victim accounts with identifying information. The report indicates that these accounts were compiled by a number of civil society organisations with a view to documenting alleged crimes against humanity against people originating from Chad in the CAR.²⁸ It further appears from the JEM code²⁹ that an ‘individual source’ seems to have sent the report to the ‘OTP Information Desk’.³⁰
19. However, the circumstances in which the individuals concerned provided their accounts are not specified further. In particular, the report does not show the purpose or mandate of the civil society organisations compiling the report, in particular whether they had a specific fact-finding mandate. It also does not show the context in which the individuals concerned outlined their experiences, whether they were questioned in a witness capacity in the context or anticipation of any concrete legal proceedings or, importantly, whether the individuals giving their accounts did so with the understanding that they were ‘providing information which may be relied upon in the context of legal proceedings’.³¹ For these reasons, the Chamber considers that the individual accounts included in this document do not qualify as ‘prior recorded testimony’ in the sense of Rule 68 of the Rules. On this basis, and further considering that there appears to be no other bar to the submission of CAR-OTP-2002-0039 in its entirety, the Chamber recognises this item as formally submitted.
20. Item CAR-OTP-2001-3268 is a ‘*mémoire*’ sent by the CAR Minister of Justice to the Prosecutor of the Court, in support of the referral of the situation in the CAR.³² Having reviewed its contents, the Chamber does not consider this item to be testimonial in nature. Therefore, and further considering that there appear to be no other bars to the submission, the Chamber does not see any procedural bar

²⁸ See CAR-OTP-2002-0039, at 0041.

²⁹ JEM (Judicial Evidence Management) code is the current ICC Registry tool to manage and present electronic evidence during court proceedings (formerly, eCourt Ringtail).

³⁰ The Chamber further notes that the report also mentions ‘*la cour*’, although without further specification (see CAR-OTP-2002-0039, at 0274).

³¹ See also Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motion, 17 December 2010, ICC-01/04-01/07-2635, para. 48.

³² Yekatom Defence Response, ICC-01/14-01/18-1279, para. 45.

to recognising the submission of CAR-OTP-2001-3268, and thus recognises the submission of this item.

21. Additionally, the Yekatom Defence argues that submission of items CAR-OTP-2057-0911 and CAR-OTP-2100-2410 through a bar table submission request is affected by ‘procedural impropriety’, as the items are related to pending requests under Rule 68(2) of the Rules.³³ The Chamber is of the view that the mere fact of an item of documentary evidence being related to a request under Rule 68(2) of the Rules which is still under consideration by the Chamber does not, as such, render submission of that item through a different avenue procedurally improper. Having reviewed the items, the Chamber does not consider there to be any other bars to their submission through the Request, and thus recognises the submission of items CAR-OTP-2057-0911 and CAR-OTP-2100-2410.
22. Furthermore, the Chamber takes note of the Prosecution’s submission of CAR-OTP-2001-6437, a report by the ‘*Fédération Internationale des Ligues des Droits de l’Homme*’. This appears to be a duplicate of CAR-OTP-2001-2769, which has already been recognised as submitted.³⁴ The Chamber therefore does not recognise submission of CAR-OTP-2001-6437.
23. In addition, the Chamber notes that item CAR-OTP-2001-1767 is indicated by the Prosecution as already having been submitted.³⁵ However, the JEM code of this item does not indicate that it has been recognised as formally submitted, and the item is in fact not mentioned in the pending submission email requests by the Prosecution.³⁶ The Chamber therefore notes that CAR-OTP-2001-1767 has not been recognised as submitted at this stage, without prejudice to its potential submission in the future.
24. Finally, the Chamber notes that two items which are listed for submission by the Prosecution do not appear to be on the Prosecution’s List of Evidence, namely

³³ Yekatom Defence Response, ICC-01/14-01/18-1279, paras 48, 50-51.

³⁴ See email from the Chamber, 14 June 2021, at 12:20.

³⁵ See Annex to the Request, ICC-01/14-01/18-1233-Conf-Anx-Corr, pp. 24-25, entry 5.

³⁶ See email from the Chamber, 1 October 2021, at 12:31.

CAR-OTP-2130-1119 and CAR-OTP-2130-3104.³⁷ However, these items are the translation of a transcript as well as the transcript of two videos, which themselves are included in the Prosecution's List of Evidence. Bearing in mind the guidance given in the Initial Directions in relation to the submission of transcripts or translations associated with audio-visual material submitted to the Chamber,³⁸ the Chamber therefore considers there to be no bar to recognising the submission of items CAR-OTP-2130-1119 and CAR-OTP-2130-3104. These two items are therefore recognised as submitted.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the request of the Defence to reject the Request *in limine*;

REJECTS the request by the Ngaissona Defence to order the Prosecution to file any prospective bar table by addressing the relevance and probative value of each individual item;

REJECTS the submission of CAR-OTP-2001-6437;

RECOGNISES as submitted the following items:

CAR-OTP-0080-0705;	CAR-OTP-2008-1045;	CAR-OTP-2075-1170;
CAR-OTP-2000-0627;	CAR-OTP-2008-1122;	CAR-OTP-2092-1193;
CAR-OTP-2000-0658;	CAR-OTP-2008-1299;	CAR-OTP-2092-1200;
CAR-OTP-2001-3178;	CAR-OTP-2034-3203;	CAR-OTP-2092-1257;
CAR-OTP-2001-3268;	CAR-OTP-2034-4722;	CAR-OTP-2092-1261;
CAR-OTP-2001-3405;	CAR-OTP-2042-2125;	CAR-OTP-2092-1485;
CAR-OTP-2006-0661;	CAR-OTP-2060-0668;	CAR-OTP-2092-1488;
CAR-OTP-2008-0615;	CAR-OTP-2075-0915;	CAR-OTP-2092-1592;

³⁷ See Prosecution's Updated List of Evidence, 14 December 2021, ICC-01/14-01/18-1211 (with confidential Annex A, containing the Updated List of Evidence, ICC-01/14-01/18-1211-Conf-AnxA, and confidential Annex B, ICC-01/14-01/18-1211-Conf-AnxB). The items were disclosed on 18 December 2020 and 4 February 2021, respectively (see disclosure package 74, Annex to Prosecution's Communication of the Disclosure of Evidence on 18 December 2020, 18 December 2020, ICC-01/14-01/18-787-Conf-Anx; disclosure package 85, Annex to Prosecution's Communication of the Disclosure of Evidence on 4 February 2021, 5 February 2021, ICC-01/14-01/18-872-Conf-Anx).

³⁸ Initial Directions, ICC-01/14-01/18-631, para. 64.


CAR-OTP-2092-1782;	CAR-OTP-2066-0425;	CAR-OTP-2073-0893;
CAR-OTP-2092-1979;	CAR-OTP-2071-2013;	CAR-OTP-2073-1329;
CAR-OTP-2092-2739;	CAR-OTP-2073-0871;	CAR-OTP-2087-9413;
CAR-OTP-2092-2771;	CAR-OTP-2100-1131;	CAR-OTP-2087-9426;
CAR-OTP-2092-2846;	CAR-OTP-2110-0893;	CAR-OTP-2112-1394;
CAR-OTP-2101-1437;	CAR-OTP-2110-0905;	CAR-OTP-2122-9665;
CAR-OTP-2101-1455;	CAR-OTP-2110-0915;	CAR-OTP-2122-9915;
CAR-OTP-2101-2209;	CAR-OTP-2110-0925;	CAR-OTP-2122-9916;
CAR-OTP-2101-2663;	CAR-OTP-2110-0935;	CAR-OTP-2127-4551;
CAR-OTP-2101-3081;	CAR-OTP-2110-0961;	CAR-OTP-2127-6420;
CAR-OTP-2101-3449;	CAR-OTP-2110-0967;	CAR-OTP-2127-6597;
CAR-OTP-2101-3490;	CAR-OTP-2110-0973;	CAR-OTP-2127-6903;
CAR-OTP-2101-3983;	CAR-OTP-2110-0994;	CAR-OTP-2130-1119;
CAR-OTP-2101-4029;	CAR-OTP-2110-0998;	CAR-OTP-2130-3104;
CAR-OTP-2127-6888;	CAR-OTP-2110-1030;	CAR-OTP-2000-0300;
CAR-OTP-2001-0987;	CAR-OTP-2122-5902;	CAR-OTP-2050-0888;
CAR-OTP-2001-1259;	CAR-OTP-2122-9457;	CAR-OTP-2050-0895;
CAR-OTP-2001-1308;	CAR-OTP-2127-3941;	CAR-OTP-2002-0283;
CAR-OTP-2001-2890;	CAR-OTP-2127-4064;	CAR-OTP-2069-0322;
CAR-OTP-2001-3138;	CAR-OTP-2127-4096;	CAR-OTP-2084-0259;
CAR-OTP-2001-3332;	CAR-OTP-2127-6521;	CAR-OTP-2025-0115;
CAR-OTP-2001-3444;	CAR-OTP-0075-1807;	CAR-OTP-2025-0118;
CAR-OTP-2001-7017;	CAR-OTP-0075-2041;	CAR-OTP-2025-0121;
CAR-OTP-2002-0039;	CAR-OTP-2000-0066;	CAR-OTP-2033-7903;
CAR-OTP-2008-1165;	CAR-OTP-2001-2948;	CAR-OTP-2033-7905;
CAR-OTP-2022-0375;	CAR-OTP-2001-3988;	CAR-OTP-2033-7906;
CAR-OTP-2031-0157;	CAR-OTP-2001-4014;	CAR-OTP-2033-7907;
CAR-OTP-2034-0224;	CAR-OTP-2001-4048;	CAR-OTP-2033-7909;
CAR-OTP-2034-0226;	CAR-OTP-2001-4909;	CAR-OTP-2129-1340;
CAR-OTP-2034-0270;	CAR-OTP-2001-4976;	CAR-OTP-2129-1552;
CAR-OTP-2034-2141;	CAR-OTP-2001-7254;	CAR-OTP-2129-1589;
CAR-OTP-2055-1987;	CAR-OTP-2005-0084;	CAR-OTP-2129-1649;
CAR-OTP-2061-1592;	CAR-OTP-2023-3004;	CAR-OTP-2008-1281;
CAR-OTP-2066-0289;	CAR-OTP-2042-0552;	CAR-OTP-2057-0911;

CAR-OTP-2079-0010; CAR-OTP-2108-0748; CAR-OTP-2127-4542;
CAR-OTP-2100-2410; CAR-OTP-2122-9857; CAR-OTP-2127-4642;
CAR-OTP-2100-2609; CAR-OTP-2123-0473;


and

ORDERS the Registry to reflect that these items have been so recognised in the JEM code.

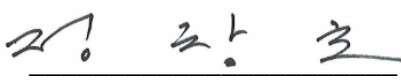
Done in both English and French, the English version being authoritative.



Judge Péter Kovács



Judge Bertram Schmitt
Presiding Judge



Judge Chang-ho Chung

Dated 12 April 2022

At The Hague, The Netherlands