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No. ICC-01/14-01/18

Date: 24 May 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 Fourth Prosecution Submission Request from the Bar Table
(Recruitment and Use of Children)**

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 Fourth Prosecution Submission Request from the Bar Table (Recruitment and Use of Children)’.

I. Procedural history and submissions

1. On 1 April 2022, the Office of the Prosecutor (the ‘Prosecution’) sought formal submission of 49 items (the ‘Items’) comprising evidence relevant to the Anti-Balaka’s recruitment and use of children, including those under the age of 15, in hostilities during the period relevant to the charges (the ‘Request’).¹
2. On 7 April 2022, the Ngaïssona Defence informed the Chamber that it defers to the Yekatom Defence’s position in respect of the Items.²
3. On 14 April 2022, the Common Legal Representative of the Former Child Soldiers filed his response supporting the Request, submitting that the Items sought did not raise any procedural bars.³ He added, *inter alia*, that their submission would further assist the Chamber in assessing the nature, complexity and extent of the victimisation of the children concerned.⁴
4. On 25 April 2022,⁵ the Yekatom Defence filed its response (the ‘Response’).⁶ The Yekatom Defence does not oppose the submission of 17 items and provides

¹ Request for the Submission of Evidence from the Bar Table regarding the recruitment and use of child soldiers, ICC-01/14-01/18-1346 (with one confidential annex, ICC-01/14-01/18-1346-Conf-Anx).

² See email from the Ngaïssona Defence, 7 April 2022, at 10:57.

³ Response by the Common Legal Representative of the Former Child Soldiers to the Prosecution’s “Request for the Submission of Evidence from the Bar Table regarding the recruitment and use of child soldiers”, ICC-01/14-01/18-1363 (the ‘CLRVI Response’), paras 10, 19.

⁴ CLRVI Response, ICC-01/14-01/18-1363, paras 2, 18.

⁵ Upon the Yekatom Defence’s request, the Chamber extended the deadline to respond to the Request until 25 April 2022 for the Yekatom Defence. See email from the Chamber, 4 April 2022, at 15:26.

⁶ Yekatom Defence Response to the Prosecution’s “Request for the Submission of Evidence from the Bar Table regarding the recruitment and use of child soldiers”, 1 April 2022, ICC-01/14-01/18-1346, ICC-01/14-01/18-1379-Conf (with confidential Annex A) (public redacted version of the response notified the next day, ICC-01/14-01/18-1379-Red) (the ‘Yekatom Defence Response’).

its position in respect of the remaining 32.⁷ Specifically, it requests the Chamber's intervention in respect of nine items that are related to Prosecution trial witnesses, on grounds that they are a 'part of a prior recorded testimony' and five items related to audio-visual material as they are related to witnesses due to testify before the Chamber.⁸ It additionally requests that the Chamber rule that seeking submission of documents through a bar table request is 'unsuitable for documents that are either annexes or intrinsically linked to the prior recorded testimony of a witness who has not yet appeared before the Chamber' (the 'Additional Request').⁹

II. Analysis

5. The Chamber recalls its approach outlined in its previous decision on a submission request through a bar table.¹⁰ Accordingly, the Chamber notes the participants' arguments on the relevance and probative value of the Items including potential prejudice to the accused,¹¹ and defers their consideration under its deliberation pursuant to Article 74(2) of the Statute. At this stage, the Chamber will only consider whether the Items are subject to any statutory exclusionary rules, including procedural bars, obstacles, and preconditions.
6. Out of the 49 items subject to the Request, the Chamber notes that eight items have already been recognised as submitted¹² and therefore it need not recognise their submission again.

⁷ Yekatom Defence Response, ICC-01/14-01/18-1379-Red, para. 2. *See also* Annex to the Yekatom Defence Response, ICC-01/14-01/18-1379-Conf-AnxA. It is noted that out of these 17 unopposed items, two have already been recognised as submitted by the Chamber. *See* para. 6 below *referring to* CAR-OTP-2008-1165 and CAR-OTP-2001-3405.

⁸ Yekatom Defence Response, ICC-01/14-01/18-1379-Red, paras 13-23, 25-27.

⁹ Yekatom Defence Response, ICC-01/14-01/18-1379-Red, paras 27, 29.

¹⁰ Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), 12 April 2022, ICC-01/14-01/18-1359 (the 'Decision on the First Bar Table Request'), paras 10-12.

¹¹ Annex to the Yekatom Defence Response, ICC-01/14-01/18-1379-Conf-AnxA.

¹² Decision on the First Bar Table Request, ICC-01/14-01/18-1359, pp. 10-11 *referring to* CAR-OTP-2001-3405; CAR-OTP-2001-0987; CAR-OTP-2001-7017; CAR-OTP-2008-1165; CAR-OTP-2055-1987; CAR-OTP-2073-0871; CAR-OTP-2110-0935; and CAR-OTP-2127-4064.

7. As regards the remainder of the Items, the Chamber notes that the participants do not oppose the recognition of submission of 15¹³ of these items.¹⁴ Having reviewed these items, the Chamber finds that there are no procedural bars to their submission through the Request, and thus recognises their submission.
8. Turning to the objections concerning specific items, the Yekatom Defence requests that the Chamber reject item CAR-OTP-2003-1654, a 255-page compilation of information bulletins from 2014-2015, provided by the government of the Central African Republic.¹⁵ The Yekatom Defence submits that the item is long and lacks probative value, and that its submission is unnecessary because it contains a summary of another document, CAR-OTP-2073-0871, 'which is also part of the case file'.¹⁶
9. The Chamber notes that the Prosecution requests the submission of pages 1687-1690 only and not of the entire item.¹⁷ The Chamber reviewed item CAR-OTP-2003-1654 in its entirety as well as the pages submitted by the Prosecution. It finds that there are no procedural bars to recognise pages 1687-1690 of item CAR-OTP-2003-1654 as submitted and thus recognises submission of these pages only, as requested.¹⁸
10. Further, the Yekatom Defence submits that a procedural bar exists for nine items¹⁹ that consist of items provided by witnesses in the context of their prior recorded testimonies in order to support the claims concerning their age at

¹³ CAR-OTP-2004-0017; CAR-OTP-2087-9276; CAR-OTP-2072-1210; CAR-OTP-2072-1213; CAR-OTP-2019-1359; CAR-OTP-2066-5307; CAR-OTP-2118-0703; CAR-OTP-2122-9658; CAR-OTP-2122-9734; CAR-OTP-2127-6223; CAR-OTP-2127-6334; CAR-OTP-2130-1204; CAR-OTP-2130-1332; CAR-OTP-2072-1202; and CAR-OTP-2075-0664.

¹⁴ See Annex to the Request, ICC-01/14-01/18-1346-Conf-Anx; see also Annex to the Yekatom Defence Response, ICC-01/14-01/18-1379-Conf-AnxA.

¹⁵ Annex to the Yekatom Defence Response, ICC-01/14-01/18-1379-Conf-AnxA, pp. 2-3. The Chamber notes that although the Prosecution indicated that the Ngaïssona Defence objected to this item, no objections were filed by it on the record. See Annex to the Request, ICC-01/14-01/18-1346-Conf-Anx, pp. 3-4, entry 2.

¹⁶ Annex to the Yekatom Defence Response, ICC-01/14-01/18-1379-Conf-AnxA, pp. 2-3.

¹⁷ See Annex to the Request, ICC-01/14-01/18-1346-Conf-Anx, pp. 3-4, entry 2.

¹⁸ See further Decision on Submitted Material for P-2841, email from the Chamber, 2 July 2021, at 14:07 noting that it cannot be excluded that there may be circumstances warranting that only parts of a single item be submitted into evidence. These requests will be assessed on a case-by-case basis.

¹⁹ CAR-OTP-2121-2595; CAR-OTP-2126-0413; CAR-OTP-2126-0414; CAR-OTP-2126-0415; CAR-OTP-2126-0416; CAR-OTP-2128-1197; CAR-OTP-2128-1201; CAR-OTP-2128-1202; CAR-OTP-2128-1203.

the time period relevant to the charges (the ‘Witness Related Items’).²⁰ It argues that if these documents, being ‘part of the prior recorded testimony’ of these witnesses respectively,²¹ are recognised as submitted through the Request and not through an application pursuant to Rule 68(3) of the Rules, it would affect the fairness of the proceedings and be contrary to judicial economy.²²

11. Relatedly, the Yekatom Defence requests the Chamber’s intervention in respect of two videos, including their transcripts and translations, in total amounting to five items (the ‘Witness Related Video Items’).²³ It argues that both videos were provided by witnesses that are ‘scheduled to appear as Rule 68(3) witnesses’ and that a bar table application is therefore unsuitable for documents since they are either annexed or intrinsically linked to the prior recorded testimony of witnesses who have not yet appeared before the Chamber.²⁴ It also contends that submissions on their relevance, reliability, and probative value would be premature and could give rise to the need for additional submissions in the future that would be contrary to the principle of judicial economy.²⁵
12. The Chamber recalls the definition of ‘prior recorded testimony’ as set out in its previous decisions.²⁶ The Chamber clarifies further that the fact that an item of documentary evidence was produced and/or provided by a witness in the context of their providing a statement to the Prosecution does not, as such, and subject to there not existing any other procedural bars, preclude submission of such item through a written filing. The Chamber notes that there are no rules as to which manner of submission must be used for certain items of evidence. In any case, the manner through which an item is submitted, is immaterial for the purpose of its

²⁰ See Yekatom Defence Response, ICC-01/14-01/18-1379-Red, paras 13-23.

²¹ Yekatom Defence Response, ICC-01/14-01/18-1379-Red, paras 15-16, 20, 22.

²² Yekatom Defence Response, ICC-01/14-01/18-1379-Red, paras 17-22.

²³ Yekatom Defence Response, ICC-01/14-01/18-1379-Red, paras 25-27 *referring to* video CAR-OTP-2065-3843 (with CAR-OTP-2107-3077; CAR-OTP-2118-5668) and video CAR-OTP-2120-0305 (with CAR-OTP-2118-4772).

²⁴ Yekatom Defence Response, ICC-01/14-01/18-1379-Red, para. 27.

²⁵ Yekatom Defence Response, ICC-01/14-01/18-1379-Red, para. 27.

²⁶ See *for example*, Decision on the First Bar Table Request, ICC-01/14-01/18-1359, paras 15-16.

deliberations as the same criteria and standards apply to the Chamber's assessment.²⁷

13. Additionally, the Chamber emphasises that recognition of submission of an item prior to a witness's testimony does not preclude the participants from using the item in the context of the concerned witness's testimony. Further, a ruling on the submission of the item does not foreclose the possibility to raise issues pursuant to Rule 64(1) of the Rules if and when they become known later. Therefore, the Chamber is not persuaded that submission of these items through the Request would affect the fairness of the proceedings and/or be contrary to judicial economy.
14. For these reasons, and having identified no procedural bars to their submission through the Request, the Chamber recognises as submitted the nine Witness Related Items and five Witness Related Video Items. Accordingly, the Chamber rejects the Additional Request.
15. The Chamber further notes that the Prosecution did not seek submission of documents CAR-OTP-2121-2593²⁸ and CAR-OTP-2126-0385 (collectively, the 'Investigative Reports').²⁹ These provide details on the steps taken in order to obtain some of the Witness Related Items, namely items CAR-OTP-2121-2595 and items CAR-OTP-2126-0413, CAR-OTP-2126-0414, CAR-OTP-2126-0415, CAR-OTP-2126-0416, respectively. It is further noted that the Investigative Reports are not on the Prosecution's List of Evidence.³⁰ Given that they closely relate to Witness Related Items recognised as submitted herein and may bear prospective significance to the proceedings, the Chamber directs the participants

²⁷ See also TC IX, *The Prosecutor vs. Dominic Ongwen*, Decision on Prosecution's Request to Submit 1006 Items of Evidence, 28 March 2017, ICC-02/04-01/15-795, paras 14-15.

²⁸ As mentioned in relation to item CAR-OTP-2121-2595 in Annex to the Request, ICC-01/14-01/18-1346-Conf-Anx, p. 29, entry 1.

²⁹ As mentioned in relation to items CAR-OTP-2126-0413, CAR-OTP-2126-0414, CAR-OTP-2126-0415, and CAR-OTP-2126-0416 in Annex to the Request, ICC-01/14-01/18-1346-Conf-Anx, pp. 29-31, entries 2-5.

³⁰ It is noted that when the Prosecution requested the addition of the age-related items to its List of Evidence (namely, CAR-OTP-2121-2595, CAR-OTP-2126-0413, CAR-OTP-2126-0414, CAR-OTP-2126-0415, CAR-OTP-2126-0416) it did not request the concerned Investigative Reports. See Decision on the Prosecution Request to Add Seven Items to its List of Evidence, 7 December 2021, ICC-01/14-01/18-1206. See also Annex A to the Prosecution's Updated List of Evidence, ICC-01/14-01/18-1211-Conf-AnxA.

to provide their views, if any, on their (i) addition to the Prosecution's List of Evidence; and (ii) submission before the Chamber within one week of the issuance of the present decision.

16. As regards the remaining 11 items, which consist of reports by international organisations and NGOs,³¹ media articles,³² and a video with related items,³³ the Chamber notes that the Yekatom Defence provides its arguments concerning their reliability, probative value and alleged prejudice, but does not seek an immediate ruling on any procedural bars affecting their submission.³⁴
17. However, the Yekatom Defence opposes the submission of this video CAR-OTP-2122-9074 (with its transcript and translation, respectively, CAR-OTP-2127-7077 and CAR-OTP-2127-7096) (collectively, the 'Video Items').³⁵ The Chamber notes that while this video is included in the Prosecution's List of Evidence,³⁶ the related transcript and translation are not.³⁷
18. The Chamber has identified no procedural bars to the submission of these 11 items through the Request, including the Video Items. In particular, despite containing a narrative of a former child soldier, the Chamber does not consider these items to be testimonial in nature. Therefore, the Chamber recognises their

³¹ CAR-OTP-2001-0329; CAR-OTP-2001-0782; CAR-OTP-2001-1057; CAR-OTP-2001-7145; CAR-OTP-2075-0584; CAR-OTP-2075-0602. In respect of CAR-OTP-2075-0584, an Amnesty International report, the Yekatom Defence submits that the probative value of this item is outweighed by the prejudice to the accused. These arguments are rooted in the Yekatom Defence's position on the methodology adopted by the author and do not raise any procedural bars. *See* Annex to the Yekatom Defence Response, ICC-01/14-01/18-1379-Conf-AnxA, pp. 17-18, entry 12.

³² CAR-OTP-2032-0034; CAR-OTP-2074-3252. In respect of CAR-OTP-2074-3252, a press release, the Yekatom Defence also submits that its probative value is outweighed by the prejudice caused but does not raise any procedural bars. *See* Annex to the Yekatom Defence Response, ICC-01/14-01/18-1379-Conf-AnxA, pp. 33-34, entry 3.

³³ CAR-OTP-2122-9074; CAR-OTP-2127-7077; CAR-OTP-2127-7096.

³⁴ *See* Annex to the Yekatom Defence Response, ICC-01/14-01/18-1379-Conf-AnxA in respect of CAR-OTP-2001-0329; CAR-OTP-2001-0782; CAR-OTP-2001-1057; CAR-OTP-2032-0034; CAR-OTP-2074-3252; CAR-OTP-2001-7145; CAR-OTP-2075-0584; CAR-OTP-2075-0602; CAR-OTP-2122-9074; CAR-OTP-2127-7077; and CAR-OTP-2127-7096.

³⁵ *See* Annex to the Yekatom Defence Response, ICC-01/14-01/18-1379-Conf-AnxA, pp. 27-28.

³⁶ Annex A to the Prosecution's Updated List of Evidence, ICC-01/14-01/18-1211-Conf-AnxA, p. 328, entry 16266.

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 (*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).

submission. Further, bearing in mind its previous guidance in relation to the submission of transcripts or translations associated with audio-visual material submitted to the Chamber,³⁸ the Chamber recognises the submission of CAR-OTP-2127-7077 and CAR-OTP-2127-7096. Finally, noting that the item is on the Prosecution's List of Evidence,³⁹ the Chamber additionally recognises the submission of CAR-OTP-2122-9075, the metadata associated with video CAR-OTP-2122-9074, *proprio motu* in the interest of completeness of the record concerning this video.

³⁸ See Decision on the First Bar Table Request, ICC-01/14-01/18-1359, para. 24 *referring to* Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, para. 64.

³⁹ Annex A to the Prosecution's Updated List of Evidence, ICC-01/14-01/18-1211-Conf-AnxA, p. 328, entry 16267.



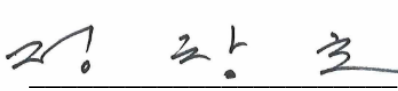
FOR THESE REASONS, THE CHAMBER HEREBY**REJECTS** the Additional Request;**DIRECTS** the participants to provide their views, if any, on the Investigative Reports, namely CAR-OTP-2121-2593 and CAR-OTP-2126-0385, as per paragraph 15, within one week of issuance of the present decision;**RECOGNISES** as submitted the following items:

CAR-OTP-2003-1654	CAR-OTP-2127-7077;
at pages 1687-1690;	CAR-OTP-2127-7096;
	CAR-OTP-2130-1204;
CAR-OTP-2004-0017;	CAR-OTP-2130-1332;
CAR-OTP-2087-9276;	CAR-OTP-2032-0034;
CAR-OTP-2001-0329;	CAR-OTP-2072-1202;
CAR-OTP-2001-0782;	CAR-OTP-2074-3252;
CAR-OTP-2001-1057;	CAR-OTP-2075-0664;
CAR-OTP-2001-7145;	CAR-OTP-2121-2595;
CAR-OTP-2072-1210;	CAR-OTP-2126-0413;
CAR-OTP-2072-1213;	CAR-OTP-2126-0414;
CAR-OTP-2075-0584;	CAR-OTP-2126-0415;
CAR-OTP-2075-0602;	CAR-OTP-2126-0416;
CAR-OTP-2019-1359;	CAR-OTP-2128-1197;
CAR-OTP-2065-3843;	CAR-OTP-2128-1201;
CAR-OTP-2066-5307;	CAR-OTP-2128-1202;
CAR-OTP-2107-3077;	CAR-OTP-2128-1203;
CAR-OTP-2118-0703;	CAR-OTP-2122-9075;
CAR-OTP-2118-4772;	
CAR-OTP-2118-5668;	
CAR-OTP-2120-0305;	
CAR-OTP-2122-9074;	
CAR-OTP-2122-9658;	
CAR-OTP-2122-9734;	
CAR-OTP-2127-6223;	
CAR-OTP-2127-6334;	

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.

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Judge Péter Kovács	Judge Bertram Schmitt	
	Presiding Judge	
		 _____
		Judge Chang-ho Chung

Dated 24 May 2022

At The Hague, The Netherlands