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International
Criminal
Court

Original: **English**

No.: **ICC-01/14-01/18**
Date: **13 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 YEKATOM AND PATRICE-EDOUARD NGAÏSSONA

Public

Public Redacted Version of the "Response of the Common Legal Representative of the Former Child Soldiers to the Yekatom Defence's 'Request for the Exclusion of Fabricated Evidence'" (No. ICC-01/14-01/18-2314-Conf, dated 19 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 (the "Defence") "Request for the Exclusion of Fabricated Evidence" (the "Request").[1] The Request should be dismissed as (i) it lacks a procedural basis; (ii) it does not meet the requirements under article 69(7) of the Rome Statute (the "Statute"), and (iii) the exclusion of the contested evidence would be prejudicial to the fairness and integrity of the proceedings.

II. PROCEDURAL BACKGROUND

2. On 13 November 2023, the Defence requested by email an extension of up to 80 pages of the page limit in accordance with regulation 37(2) of the Regulations of the Court (the "Regulations") concerning its forthcoming request for the exclusion of evidence related to witnesses CAR-OTP-P-2475, CAR-OTP-P-2018, CAR-OTP-P-1974, CAR-V45-P-0001 and CAR-V45-P-0002.[2]

3. On 15 November 2023, the Prosecution and the Common Legal Representatives of Victims (the "CLRV") opposed said request.[3] On the same day, Trial Chamber V (the "Chamber") granted an extension of up to 50 pages to the Defence to file its request and to the other participants, should they file any response.[4]

4. On 5 December 2023, the Defence filed the Request, seeking the exclusion of evidence related to witnesses CAR-OTP-P-2475, CAR-OTP-P-2018, CAR-OTP-P-1974, CAR-V45-P-0001 and CAR-V45-P-0002, pursuant to article 69(7) of the Statute.[5]

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[1] See the "Request for the Exclusion of Fabricated Evidence", No. ICC-01/14-01/18-2240-Conf, 5 December 2023 (the "Request"), with Confidential Annex A, No. ICC-01/14-01/18-2240-Conf-AnxA, Confidential Annex B, No. ICC-01/14-01/18-2240-Conf-AnxB, and Confidential Annex C, No. ICC-01/14-01/18-2240-Conf-AnxC, and Public Annex D, No. ICC-01/14-01/18-2240-AnxD. A public redacted version of the Request was filed on 9 February 2024 as No. ICC-01/14-01/18-2240-Red.
[2] See the Email correspondence from the Defence dated 13 November 2023 at 10:47.
[3] See the Email correspondence from the CLRV dated 15 November 2023 at 14:51.
[4] See the Email correspondence from the Chamber dated 15 November 2023 at 14:51.
[5] See the Request, *supra* note 1.

5. On 8 December 2023, the Prosecution requested an extension of time until 19 January 2024 to respond to the Request.[6]

6. On 11 December 2023, the CLRV supported the Prosecution request for variation of time limit and requested to be granted the same extension of time to file their respective responses.[7] On the same day, the Defence filed its response to the Prosecution request not opposing the sought extension of time.[8]

7. On 14 December 2023, the Chamber granted the Prosecution request for variation of time and extended the time limit for all participants to respond to the Request to 19 January 2024.[9]

III. CLASSIFICATION

8. Pursuant to regulation 23*bis* (2) of the Regulations, the present submissions are classified as confidential since the Request bears the same level of classification.

IV. SUBMISSIONS

1. Applicable law

9. 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]". Pursuant to rule 63(2) of the Rules of Procedure and Evidence (the "Rules"), the Chamber shall

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[6] See the "Prosecution's Request for Variation of Time Limit pursuant to Regulation 35", No. ICC-01/14-01/18-2251, 8 December 2023 (reclassified as Public pursuant to Trial Chamber V's instructions dated 22 December 2023).

[7] See the Email correspondence from the CLR1 dated 11 December 2023 at 08:36, and the Email correspondence from the CLR2 dated 11 December 2023 at 08:47.

[8] See the "Yekatom Defence Response to 'Prosecution's Request for Variation of Time Limit pursuant to Regulation 35' (ICC-01/14-01/18-2251-Conf)", No. ICC-01/14-01/18-2254, 11 December 2023 (reclassified as Public pursuant to Trial Chamber V's instructions dated 22 December 2023).

[9] See the "Decision on the Prosecution Request for Extension of Time to Respond to Yekatom Defence's Request to Exclude Evidence" (Trial Chamber V, Single Judge), No. ICC-01/14-01/18-2261, 14 December 2023.

have the authority to "*assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69*". According to the relevant jurisprudence, the Chamber's assessment of items for the purposes of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to admitted evidence in its final assessment once the entire case record is before it.[10]

10. 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.[11] 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*".[12] A causal link between the violation and the gathering of the evidence is therefore required.[13]

11. If this condition is met, the second 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*

[10] 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.
[11] 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 10, para. 30.
[12] 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 10, para. 31.
[13] See the "Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements", *supra* note 10, para. 31; and the "Public Redacted Version of Decision on 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.

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.[14]

12. 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.[15] Consistent jurisprudence of the Court has established that the party bringing the motion under article 69(7) of the Statute bears the burden to show that the criteria for the exclusion of evidence are met.[16] Rule 64(1) of the Rules requires the participants to raise "*issues relating to the relevance or admissibility* [of evidence] […] *at the time when the evidence is submitted to a Chamber*". The rule "*exceptionally*" allows for objections to be raised later "*when those issues were not known at the time when the evidence was submitted*". The provision does not provide for any other exception, as underlined already by the Chamber.[17]

2. The Request lacks a procedural basis, does not meet the applicable requirements, and the exclusion of the contested evidence will be prejudicial to the fairness and integrity of the proceedings

a) The Request lacks a procedural basis

13. The Legal Representative submits that the Request lacks a procedural basis insofar as it is untimely and is not the appropriate procedural route for the Defence's intended objective. First, on the timing of the Request, rule 64(1) of the Rules requires the participants to raise "*issues relating to the relevance or admissibility* [of evidence] […]

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[14] See the *Bemba et al.* Judgment of 8 March 2018, *supra* note 12, para. 280. See also the *Bemba et al.* Decision of 16 September 2015, *supra* note 12, 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 10, para. 31.
[15] See the "Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements", *supra* note 10, 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.
[16] See, *inter alia*, the "Decision on Request to declare telephone intercepts inadmissible" (Trial Chamber VII), No. ICC-01/05-01/13-1284, 24 September 2015, para. 32; and the "Public redacted version of 'Decision on requests related to the submission into evidence of Mr Al Hassan's statements", *supra* note 10, para. 37. See also the "Public Redacted Version of Decision on the Confirmation of Charges" (Pre-Trial Chamber I), No. ICC-01/04-01/10-465-Red, 16 December 2011, paras. 57-60.
[17] See the "Decision on the Yekatom Defence Motion to Exclude Call Location Evidence" (Trial Chamber V), No. ICC-01/14-01/18-602, 24 July 2020, para. 16.

at the time when the evidence is submitted to a Chamber". The rule "*exceptionally*" allows for objections to be raised later only "*when those issues were not known at the time when the evidence was submitted*" and such objections can only be raised "*immediately after the issue has become known*".

14. The Request aims at excluding evidence which was presented to the Chamber months ago. It is grounded on issues which were well known and discussed by the Defence at the time when the evidence was submitted. In particular, the Defence has claimed the existence of a collusive "*scheme*" of the kind described in the Request repeatedly and since a long time already.[18] Contrary to the Defence's contention,[19] this is not its "*first opportunity*" to raise issues concerning the admissibility of the contested evidence. As required by rule 64(1) of the Rules, the Defence should have raised any issues related to the relevance or admissibility of this evidence punctually, at the time of each testimony and of the submission of each item - or "*immediately*" after - but it failed to do so. Therefore, the Request fails short of complying with the applicable procedural requirements under rule 64(1) of the Rules and should be dismissed for this reason alone.

15. Second, on the appropriateness of the Request, the CLR1 posits that a request under article 69(7) of the Statute is not the right avenue to challenge the credibility of witnesses and the probative value to be accorded to the evidence. Instead, closing submissions, final briefs and, where applicable, "*no case to answer*" (the "NCTA") motions would have been the appropriate procedural avenues for this.

16. In effect, the Request aims at excluding a substantial body of direct evidence pertaining to Count 29. While the Defence masks its Request as one based on article 69(7) of the Statute seeking the exclusion of a multitude of evidence linked to a specific count, the underlying objective is intrinsically aligned with that of a NCTA motion. The Defence effectively attempts to achieve what a NCTA motion pursues – the

[18] [REDACTED]
[19] See the Email correspondence from the Defence dated 15 November 2023 at 12:33.

removal of an entire set of evidence related to a specific count. By seeking to exclude multiple pieces of evidence in one consolidated motion, the Defence is, in essence, mounting a challenge against the Prosecution's case on Count 29 as a whole.

17. Allowing such comprehensive exclusion requests without requiring a prior leave to file a NCTA motion may create a loophole in the legal process. Indeed, a decision on whether or not to conduct a NCTA procedure is discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64(2) and (3)(a) of the Statute.[20] The Defence's strategic use of article 69(7) to achieve the practical effect of a NCTA motion attempts to circumvent the established procedural safeguards. This approach potentially enables the Defence to sidestep the necessary scrutiny and authorization inherent in filing a motion challenging the sufficiency of evidence, undermining the due process guarantees established by the applicable law and the integrity of the proceedings.

18. Accordingly, the Request should be dismissed as it fails short of complying with the applicable procedural requirements.

b) The Request does not meet the requirements under article 69(7) of the Statute

19. The CLR1 recalls that in accordance with article 69(7) of the Statute, the Chamber, as a first step, has to determine whether the item of evidence was "*obtained by means of a violation of* [the] *Statute or internationally recognized human rights*".[21] In this

[20] See the "Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on Defence request for leave to file a 'no case to answer' motion'" (Appeals Chamber), No. ICC-01/04-02/06-2026 OA6, 5 September 2017, para. 44.
[21] See the *Bemba et al.* Judgment of 8 March 2018, *supra* note 12, para. 280. See also the *Bemba et al.* Decision of 16 September 2015, *supra* note 12, 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 10, para. 31.

regard, a causal link between the violation and the gathering of the evidence is required.[22] The CLR1 submits that the Request fails to meet the above requirements.

20. First, the Defence fails to demonstrate that the Prosecution was in breach of its duties with respect to investigations. The Defence alleges that "[h]*ad the OTP respected basic investigative principles and exhibited due diligence, the array of misconduct* [of 'Conspirators'] *would have been evident at the early stages of its investigations*", and that the Prosecution's alleged failure to properly investigate on "[t]*he systematic collusion amongst* ['Conspirators']" "*has resulted in the fabrication of substantive evidence concerning Count 29*".[23] The CLR1 recalls in this regard that "*the obligation to conduct an effective investigation is an obligation not of result but of means*",[24] and thus "*there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable*".[25] The Prosecution must investigate with integrity, but it is not obliged, nor can it be expected, to ensure a particular outcome in criminal proceedings. The fact that during its investigations the Prosecution did not discover the existence of the alleged "*scheme*" amongst the alleged 'Conspirators' and/or did not find sufficiently proved the alleged misconduct, does not render the investigations ineffective as such. If fact, it rather demonstrates that the alleged "*scheme*" does not exist and the alleged misconduct did not take place.

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[22] See the *Bemba et al.* Judgment of 8 March 2018, *supra* note 12, para. 280. See also the *Bemba et al.* Decision of 16 September 2015, *supra* note 12, 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 10, para. 31.
[23] See the Request, *supra* note 1, para. 4.
[24] See ECtHR, *X and Others v. Bulgaria*, Application No. 22457/16, 2 February 2021, para. 186; and *A, B and C v. Latvia*, Application No. 30808/11, 31 March 2016, para. 149. In this sense, see also the "Decision on Mr Blé Goudé's request for compensation" (Article 85 Chamber), No. ICC-02/11-01/15-1427, 10 February 2022, para. 29: "*any criminal case necessarily starts with charges brought by a prosecutor's office against a suspect. As the prosecutor's office sets out to prove these charges, an acquittal, regardless of its basis, means that the prosecution 'failed'* […]. *It follows that a 'failed' prosecution does not necessarily mean that the prosecution was 'wrongful'*".
[25] See ECtHR, *X and Others v. Bulgaria*, Application No. 22457/16, 2 February 2021, para. 186; and *A, B and C v. Latvia*, Application No. 30808/11, 31 March 2016, para. 149. See also M. BERGSMO *et al.*, *"Article 54"*, in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 1384 (mn. 10): "*Decisive weight must be given to whether the Prosecutor has fulfilled his or her investigative obligations in good faith* [and] *the broad scope of investigations before international criminal tribunals, where significant amounts of evidence are collected, all of which needs to be organised and evaluated*".

The Prosecution cannot be blamed for *not taking actions* if it did not have sufficient elements for doing so.

21. Second, the Defence fails to demonstrate the causal link between the Prosecution's alleged failure to carry out effective investigations and the gathering of the contested evidence. For instance, the Defence fails to demonstrate how the under oath testimony given before the Chamber by Prosecution Witnesses P-2475, P-2018, and P-1974 and CLR1 Witnesses V45-P-0001 and V45-P-0002, constitutes a violation of a provision of the Statute or internationally recognised human rights.

22. The Defence's challenges to the credibility of the relevant Witnesses and to the accuracy and reliability of their testimony hinge on the probative value of the evidence presented. This should be holistically evaluated as part of the Chamber's determination under article 74 of the Statute. Regarding the documents submitted in connection with said Witnesses, it has been observed by the Chamber and the participants that numerous documents issued in the CAR, presented thus far in the trial, lack adequate indicators of reliability. However, this observation does not necessarily imply that these documents were intentionally fabricated.

23. In this regard, the CLR1 recalls that "[i]*n the absence of a systematic and centralised database in the country to record and double-check identification documents, a prevailing declaratory-based system of the issuance of identification documents many years after one's birth is very likely to contribute to the proliferation of identification documents with different personal data thereon*".[26] The prevailing administrative practices in the CAR suggest that discrepancies in the identification documents of individuals − including those of former child soldier victims − may arise from factors unrelated to the accusations of fabrication leveled against the involved intermediaries and victims. One such factor is

[26] See the "Confidential Redacted Version of the 'Response of the Common Legal Representative of the Former Child Soldiers to the 'Yekatom Defence Request for the Amendment of the Victim Application Procedure'", No. ICC-01/14-01/18-1498-Conf-Exp, dated 4 July 2022", No. ICC-01/14-01/18-1498-Conf-Red, 5 July 2022, para. 41. A public redacted version was filed on 3 October 2022 as No. ICC-01/14-01/18-1498-Red.

the prevalent level of corruption in the country. Additionally, it is not uncommon for individuals in the CAR to resort to alternative means in obtaining identification documents to circumvent institutional bureaucracy and reduce costs.[27]

24. Finally, the Defence has never been prevented from, or limited in, its right to confront the evidence brought against the Accused. On the contrary, Mr Yekatom fully exercised his right to cross-examine all Witnesses called by the opposing participants during their in-court testimony and to test all associated evidence. Since the Defence failed to demonstrate that the contested evidence was "*obtained by means of a violation of* [the] *Statute or internationally recognized human rights*", it is not required to entertain the second inquiry of the applicable test. Accordingly, the Request should be dismissed as it fails to meet the applicable requirements under article 69(7) of the Statute.

c) The exclusion of the contested evidence is prejudicial to the fairness and integrity of the proceedings

25. The CLR1 submits that, should the Request be nevertheless entertained and ultimately granted, the exclusion of the contested evidence will be prejudicial to the fairness and integrity of the proceedings. Indeed, a substantial aspect of the Defence case – which has just recently started – is focused on challenging the credibility of the concerned Witnesses. This was confirmed by the Defence during its opening statements[28] and it is reflected in the Defence's intention to call [REDACTED],[29] and to seek [REDACTED].[30]

26. On the one hand, it seems illogical for the Defence to request the exclusion of the contested evidence, while at the same time a large number of its witnesses are expected to testify on that evidence. On the other hand - given the importance of the

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[27] *Idem*, para. 38.
[28] See e.g., the transcripts of the hearing held on 28 November 2023, No. ICC-01/14-01/18-T-253-ENG, pp. 5 lines 21-25, p. 6 lines 1-2, pp. 30 *et seq*. The words 'fabrication' and 'fabricated' appear 23 times in the transcript.
[29] [REDACTED]
[30] [REDACTED]

issues which are materially in dispute - it is in the interest of justice to hear these witnesses and test their evidence in court to shed light on the Defence's allegations on the very existence of a collusive "*scheme*".

27. In addition, should the Request be granted, the opposing participants would be prevented from an opportunity to seek leave to present evidence in rebuttal.[31] It is also in the interest of justice and of the integrity of the proceedings that the Chamber assesses the credibility of the concerned Witnesses and the probative value of the substantial body of evidence pertaining to Count 29 holistically with the entirety of evidence presented at trial. Following the "*Submission Approach*",[32] this holistic evaluation can only take place when the Chamber possesses a complete understanding of all the evidence in its determination under article 74 of the Statute.[33] The Request appears to aim at divesting the Chamber of this crucial role.

28. Accordingly, the Request should be dismissed also for the reason that the exclusion of the contested evidence would be prejudicial to the interests of the justice and integrity of the proceedings.

[31] See the "Initial Directions on the Conduct of the Proceeding" (Trial Chamber V), No. ICC-01/14-01/18-631, 26 August 2020.
[32] *Idem*, paras. 52-59.
[33] *Ibid*. See also the *Bemba et al.* Judgment of 8 March 2018, *supra* note 12, paras. 8 and 598; and the "Decision on Prosecution application submitting 30 exhibits into evidence" (Trial Chamber X), No. ICC-01/12-01/18-2097, 28 January 2022, para. 5.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests that the Chamber:

- **REJECT** in its entirety the Defence's Request.

RESPECTFULLY SUBMITTED,

Dmytro Suprun
Common Legal Representative of the Former Child Soldiers

Dated this 13th Day of February 2024
At The Hague, The Netherlands