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Date: **7 November 2023**

**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, B and C**

**Public Redacted Version of 'Response to "Prosecution's Ninth Application for the Submission of Evidence from the Bar Table and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576", 14 July 2023, ICC-01/14-01/18-1978-Conf'**

**Source:** **Defence for Mr. Alfred Rombhot Yekatom**

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

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## INTRODUCTION

1. The Defence for Mr. Yekatom ("Defence") hereby responds to the Prosecution's Ninth Application for the Submission of Evidence from the Bar Table and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576[1] in which it requests the submission of 66 items,[2] and for the Chamber to reconsider its Decision on the admission into evidence of item CAR-OTP-2053-0576 (respectively the "Submission Request" and the "Reconsideration Request", and together, "Ninth Application").[3]

2. The Defence requests the Chamber to reject the Submission Request with regards to 14 items[4] (the "OHCHR COI Documents") on the same basis as for CAR-OTP-2053-0576, *i.e.* that they consist of testimonial evidence, and to reject two items [5] received from UN-OLA (the "UN-OLA Documents") which comprise documents compiling testimonial evidence.

3. The Defence further opposes the Reconsideration Request on the grounds that the Prosecution has not met the required threshold for reconsideration.

4. Finally, the Defence provides its position on each specific item listed in Annex A of the present response. The Defence opposes the submission of a total of 34 items, for which specific and detailed reasoning is provided in Annex A.

[1] ICC-01/14-01/18-1947-Conf.
[2] ICC-01/14-01/18-1947-Conf, para. 1.
[3] ICC-01/14-01/18-1947-Conf, para. 4.
[4] CAR-OTP-2045-0287; CAR-OTP-2045-0452; CAR-OTP-2045-0525; CAR-OTP-2045-0536; CAR-OTP-2045-0559; CAR-OTP-2045-0561; CAR-OTP-2045-0563; CAR-OTP-2045-0569; CAR-OTP-2045-0581; CAR-OTP-2048-0109; CAR-OTP-2048-0129; CAR-OTP-2053-0567; CAR-OTP-2053-0645; and CAR-OTP-2101-0340.
[5] CAR-OTP-2088-1198 and CAR-OTP-2088-1230.

## PROCEDURAL HISTORY

5. On 2 December 2022, the Prosecution sought the submission of CAR-OTP-2053-0576 into evidence as part of its request for submission of evidence following the examination of P-1813.[6]

6. On 5 December 2022, the Defence opposed the submission of CAR-OTP-2053-0576 of the Prosecution on the ground that it consists of testimonial evidence. [7]

7. On 1 June 2023, the Chamber rendered its Decision via email on the items to be submitted with witness P-1813, rejecting the submission into evidence of CAR-OTP-2053-0576.[8]

8. On 27 June 2023, the Prosecution filed its Ninth Application.[9]

9. On 4 July 2023, the Chamber granted the Defence request for time extension to respond to the Ninth Application.[10]

10. On 5 July 2023, the Defence sent a disclosure request to the Prosecution in relation to the UN-OLA Documents.[11]

11. On 10 July 2023, the Defence sent a further disclosure request to the Prosecution in relation to the UN-OLA Documents.[12]

12. On 11 July 2023, the Prosecution responded to both disclosure requests.[13]

## APPLICABLE LAW

13. Article 64 (9) (a) – Rome Statute

[6] Email from the Prosecution to Trial Chamber V sent on 2 December 2022, at 16.33.
[7] Email from the Defence to Trial Chamber V sent on 5 December 2022, at 12.07.
[8] Email from the Trial Chamber V to the Parties and Participants sent on 1 June 2023, at 10.28.
[9] ICC-01/14-01/18-1947-Conf.
[10] ICC-01/14-01/18-1960.
[11] Email from the Defence to the Prosecution sent on 5 July 2023, at 15.48, ("Annex B").
[12] Email from the Defence to the Prosecution sent on 10 July 2023, at 17.27, ("Annex C").
[13] Email from the Prosecution to the Defence sent on 11 July 2023, at 14.18; Email from the Prosecution to the Defence sent on 11 July 2023, at 17.43 (contained respectively in Annex C and Annex B).

> The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to: (a) Rule on the admissibility or relevance of evidence[.]

14. Article 69 (2) – Rome Statute

> The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

15. Article 69 (4) – Rome Statute

> The Court may 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 of Procedure and Evidence.

16. Rule 64 – Rules of Procedure and Evidence

> 1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.
>
> 2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 137, sub-rule 1.
>
> 3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

**SUBMISSIONS**

17. In relation to the Submission Request, it is the Defence's position that there is no statutory bias towards receiving all evidence in the framework of the Court (A); and that both the OHCHR COI and UN-OLA Documents consist of testimonial evidence and therefore are inappropriate for submission via a bar table motion (B).

18. In relation to the Reconsideration Request, the Defence contends that the Prosecution did not substantiate its claim when requesting the Chamber to reconsider its decision on item CAR-OTP-2053-0576 (C).

19. Since the OHCHR COI Documents were prepared by the same entity and in the same manner as CAR-OTP-2053-0576, the same reasoning for the rejection of their submission applies. Regarding the UN-OLA Documents, which contain testimonies collected by the OHCHR COI, including duplicates of those contained in the OHCHR COI Documents, they should also be regarded as testimonial evidence.

### A. There is no statutory bias towards receiving all evidence in the framework of the Court

20. In the Ninth Application, the Prosecution claims that there exists a 'statutory bias towards receiving all evidence toward establishing the truth'; and relies on this purported statutory bias to claim that 'it is only when evidence *definitively* falls into a limiting category [such as 'testimonial evidence'] that its admission or submission under article 69 may otherwise be appropriately curtailed.[14]

21. Both of these claims are unfounded.

22. First, there is no basis to argue the existence of the claimed 'statutory bias'. Significantly, the sole element of jurisprudential support cited by the Prosecution – a decision issued by Trial Chamber V(A) in *Ruto & Sang* – is in fact a misquote.[15] Nowhere in that decision is it held that 'the established admissibility threshold favours admission of all prima facie relevant evidence subject to the Chamber's discretion'.[16] Nor can any such principle be gleaned from the decision, or the statutory framework.

[14] ICC-01/14-01/18-1947-Conf, para. 12.
[15] ICC-01/14-01/18-1947-Conf, para. 12, fn. 30, citing
[16] Contra, ICC-01/14-01/18-1947-Conf, para. 12.

23. The Prosecution omits to mention that this same decision specifically states that the admissibility of relevant evidence is subject to the Chamber's discretion to "exclude relevant evidence by operation of the provisions of the Statute or the Rules or by virtue of general principles of national or international law pursuant to Article 21 of the Statute".[17] Highly relevant to the Chamber's discretion in this regard is the fact that, as recognised in the jurisprudence of the Court, the statutory right of an accused to examine, or have examined, adverse witnesses, is of fundamental importance to the fairness of the proceedings.[18] This right is enshrined at Article 67 (1)(e) but also protected within Article 69 (2) which provides that "the testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence,"[19] where those exceptions "must be done with full respect of the accused's right to be afforded an opportunity to examine (or have examined) those witnesses." [20]

24. The Prosecution thus mistakenly gleans, from the interplay between a general rule and relevant procedural bars, a statutory bias in favour of admission. No such bias exists however – let alone a bias that could be relied on to narrow the scope of existing procedural bars to admission.

25. At the outset, the Prosecution's attempt to artificially constrict the definition of 'testimonial evidence' is at odds with the Court's jurisprudence. In *Ongwen*, Trial Chamber V held that material is testimonial in nature simply when it can be 'viewed as fitting within the definition of a prior recorded statement'[21] – and

[17] See *The Prosecutor V. William Samoei Ruto And Joshua Arap Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, ICC-01/09-01/11-1353, 10 June 2014, para. 15.
[18] *The Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, para. 43.
[19] Article 69 (2); See also *The Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, para. 43.
[20] Article 69 (2); See also *The Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, para. 43.
[21] ICC-01/14-01/18-1359, para. 16; *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.

by extension, not exclusively when said material is 'definitively' or 'unequivocally' testimonial. In the same vein, Trial Chamber VII in *Bemba et al.* found 'support in maintaining a broad interpretation of "prior recorded testimony"' within the drafting history of rule 68.[22] This interpretation was recently upheld by Trial Chamber III in *Gicheru*, where it was recalled 'that the definition of prior recorded testimony is broad'.[23]

26. Moreover, even assuming *arguendo* that such a statutory bias did exist, it does not follow that this bias could give rise to a heightened threshold in respect of procedural bars to admission. Indeed, following the Prosecution's logic, given the general nature of this purported statutory bias in favour of admission, this artificially heightened threshold would necessarily apply to all procedural bars to the admission of evidence.

27. In other words, to take the example of the prohibition on admission of evidence obtained by means of a violation of the Statute or internationally recognised human rights, under article 69(7): according to the Prosecution, Chambers would be in error if they excluded evidence on this basis unless they found that i) the evidence in question was 'definitively'/ 'unequivocally' obtained by such prescribed means; ii) the violation 'definitively'/ 'unequivocally' casts substantial doubt on the reliability of the evidence; and/or iii) the admission of the evidence would 'definitively'/'unequivocally' be antithetical to and seriously damage the integrity of the proceedings. In the same vein, applying this purported 'statutory bias' to rule 71, Chambers would be obliged to find that evidence of prior or subsequent sexual conduct of a victim or witness is

[22] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-Red-Corr, paras 28-32.
[23] *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution's Second Request to Introduce Evidence Other than Through a Witness , 15 March 2022, ICC-01/09-01/20-299, para. 11.

admissible unless it can be established that such evidence is 'definitively' or 'unequivocally' characterised as such.[24]

28. There is simply no basis to read any such requirement(s) into the statutory procedural bars to admission. If the drafters intended to limit the discretion of Chambers in this manner, they would have included wording to this effect. Indeed, in general, imposing any such limits on judicial discretion should be based on a firm foundation – in any event, a substantially firmer foundation than an opportunistically invented 'statutory bias' based on misquoted case law and a misreading of the legal framework.

29. The lack of merit of the Prosecution's preliminary argument is thus plain. It is little more than a transparent attempt to move the goalposts, as it were; and more than anything, it betrays the weakness of the Prosecution claim that the tendered evidence is not testimonial in nature.

### B. The OHCHR COI and UN-OLA Documents are testimonial

30. The well established jurisprudence of the Court provides for two factors relevant to the determination as to whether evidence is testimonial. It should be assessed firstly whether the "out-of-court statement was given to a person or body authorised to collect evidence for use in judicial proceedings,"[25] and secondly, whether "the person making the statement understands, when making the statement, that he or she is providing information which may be relied upon in the context of legal proceedings."[26]

[24] Rule 71 of the Rules states: 'In the light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

[25] *The Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, para. 47.

[26] *The Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, para. 49; referenced in *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr, para. 32: "it is rather only those where the persons are questioned in their capacity as witnesses in the context of or in anticipation of legal proceedings."

31. In relation to the first factor, it has been found that, in contrast with analytical reports based on personal stories,[27]

> "[a] statement given to representatives of an **intergovernmental organisation** with a **specific fact-finding mandate** may be considered as testimony if the manner in which the statement was obtained left no doubt that the information **might** be used in future legal proceedings."[28] [emphasis added]

32. The Prosecution claims that in addition to these well established criteria, there exists a number of "factual questions" that additionally need to be met for an item to be qualified as testimonial evidence.[29] However, not only does the Prosecution fail to cite any jurisprudence in support of this claim; the "factual questions" are in fact contrary to the jurisprudence.

33. For instance, the Prosecution claims that the entity collecting the evidence should be empowered to initiate or carry out legal proceedings; and have as a sole purpose or activity the collection of evidence for legal proceedings.[30] Yet this claim goes against the very clear jurisprudence which envisages that an entity with a "fact-finding mandate" could prepare evidence which qualifies as testimonial.[31] In the same vein, it has been found in prior cases that evidence collected by entities such as the Human Rights Commissions of Uganda[32] or the Commission of inquiry into post-election violence[33] could qualify as testimonial under the framework of the Court. These entities respectively had the mandate to:

> promote and protect human rights and freedoms in the country in recognition of Uganda's violent and turbulent history that had been characterized by arbitrary

[27] See also ICC-01/14-01/18-1359, para. 19: "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"
[28] *The Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, para. 48.
[29] See ICC-01/14-01/18-1947-Conf, paras. 22 and 25.
[30] ICC-01/14-01/18-1947-Conf, para. 22.
[31] See, *The Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, para. 48.
[32] *The Prosecutor V. Dominic Ongwen*, Decision on Defence Request to Submit 470 Items of Evidence, ICC-02/04-01/15-1670, paras. 9 and 10.
[33] *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution's Second Request to Introduce Evidence Other than Through a Witness , 15 March 2022, ICC-01/09-01/20-299, para. 16.

> arrests, detention without trial, torture and brutal repression with impunity on the part of security organs during the pre and post independence era[;][34]

and to:

> investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters.[35]

34. It thus appears that neither of these entities had, as a sole activity, the collection of evidence for legal proceedings; and that the latter did not have, within its mandate, the power to carry out judicial proceedings.

35. Finally, the Prosecution confuses the definition of testimonial evidence with the definition of a "prior statement" within the meaning of Rule 76 of the Rules specifically for the requirement that the witnesses need to "accept or adopt it as their own knowledge".[36] It is simply unfounded that testimonial evidence must meet this requirement of Rule 76. So much is clear in light of the nature of the evidence judicially qualified as 'testimonial' in the case law cited above.[37]

36. The Defence also notes that in *Ongwen,* a screening note prepared by the Prosecution on the basis of an interview with a witness also qualified as testimonial evidence[38] – which is significant given that in these proceedings, the Chamber has expressly distinguished screening notes from witness statements within the meaning of Rule 76, *inter alia* on the express basis that witnesses do not accept or adopt screening notes as their own knowledge.[39] Nor was that specific screening note "adopted" in Ongwen. Indeed, it appears from the

[34] Uganda Human Rights Commission, "UHRC Mandate", at https://uhrc.ug/about/uhrc-mandate/ (consulted on 11 July 2023).
[35] Government of Kenya, "Commission of Inquiry into the Post-Election Violence (CIPEV) final report", 16 Oct 2008, at https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report (consulted on 11 July 2023).
[36] ICC-01/14-01/18-1947-Conf, paras. 35 to 37.
[37] *Supra*, para. 33.
[38] See *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Submit 470 Items of Evidence, ICC-02/04-01/15-1670, para. 15.
[39] ICC-01/14-01/18-618, paras 9-12.

description given by the Prosecution that the individual did no testify and was not "formally" interviewed, which appears to suggest that he did not sign the said screening note.[40]

37. It is thus clear that these "factual questions" proposed by the Prosecution are an attempt to narrow the scope of 'testimonial evidence' and by extension, to water down the statutory safeguards that help to guarantee the fairness of the proceedings.

*i) The OHCHR COI documents*

38. First, the OHCHR COI Documents were collected by an entity which was authorized to collect evidence intended to be used in judicial proceedings.

39. Contrary to the Prosecution claims, the mandate of the OHCHR COI in CAR goes further than merely "fact-finding and the documenting of human rights violations".[41] In actual fact, its mandate was to:

> investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights in the Central African Republic (CAR) by all parties since 1 January 2013, compile information, help identify the perpetrators of such violations and abuses, point to their possible criminal responsibility and help ensure that those responsible are held accountable.[42]

40. In addition, the Prosecution also omitted to specify that it had the opportunity to verify OHCHR COI's mandate and role[43] through the Prosecution's meeting with P-0567 [REDACTED]. P-0567 [REDACTED].[44] He further specifies that:

> [REDACTED].[45]

[40] *The Prosecutor v. Dominic Ongwen*, Public Redacted Version of "Prosecution Response to the Defence Bar Table Motion" 25 October 2019, ICC-02/04-01/15-1646-Conf, 19 November 2019, ICC-02/04-01/15-1646-Red, para. 8 (d)
[41] ICC-01/14-01/18-1947-Conf, para. 34.
[42] CAR-OTP-2088-1515, p. 7025.
[43] ICC-01/14-01/18-1947-Conf, para 31: "silence as to the manner in which the information was obtained cannot be presumed to affirmatively meet the criteria for the 68"; see also ICC-01/14-01/18-1947-Conf, para. 39.
[44] CAR-OTP-2059-0084-R04, para. 71.
[45] CAR-OTP-2059-0084-R04, para. 74.

41. In its submission, the Prosecution suggests that the OHCHR COI was "not vested with any executive powers to conduct legal investigations in anticipation of concrete legal proceedings".[46] In this regard, it should be noted that it was under the authority of the United Nations Security Council that the OHCHR COI was established, and that its investigations took place;[47] i.e. the same entity empowered to refer a situation to the Prosecution[48] or to request the Prosecution to defer an investigation.[49]

42. Moreover, the Prosecution suggestion that the OHCHR COI's mandate was not 'linked to law enforcement authorities' work in CAR' is simply incorrect.[50]

43. In gathering information, the OHCHR COI 'spoke with senior members of the [CAR] judiciary and prosecution service, and reviewed case files and other dossiers they provided'.

44. Further, in its Final Report, the OHCHR COI repeatedly and directly refers to the Court, stating that "international criminal law is a central frame of reference" for said report, noting the Court's jurisdiction over crimes committed in CAR, and expressly referring to the fact that the Prosecutor was actively investigating the situation.[51] It also notably stated that "[t]he Office of the Prosecutor of the International Criminal Court facilitated access to its open-source material".[52] While this does not amount to the formal gathering of information at the behest of the Court, it evidences a level of cooperation between the two entities, and further provides an important context to the investigative mandate of OHCHR COI.

[46] ICC-01/14-01/18-1947-Conf, para. 33.
[47] CAR-OTP-2001-7017, at 7025, para. 2.
[48] Article 13 (b) of the Statute.
[49] Article 16 of the Statute.
[50] ICC-01/14-01/18-1947-Conf, para. 33; see also, *infra*, para. 44.
[51] CAR-OTP-2001-7017, at 7025, para. 4.
[52] CAR-OTP-2001-7017, at 7028, para. 19.

45. It is notable that the Prosecution failed to bring its own involvement in the investigative work of the OHCHR COI to the attention of the Chamber. Given this apparent aversion to transparency on the part of the Prosecution, it is also notable that the Prosecution refused a Defence disclosure request for the documents transmitted to or otherwise shared with the OHCHR COI in the context of its investigative work in CAR; and for the request for cooperation addressed to the Prosecution by the OHCHR COI – all of which would likely shed light on the full extent and nature of the cooperation between these entities.[53]

46. Second, there exists reliable information as to how the OHCHR COI Documents were collected and produced, confirming that the persons making the statements in question understood that they were providing information which may be relied upon in the context of legal proceedings.

47. The OHCHR 'Commissions of Inquiry and Fact-finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice' publication ("Publication") clearly states that investigators conducting interviews in the context of a commission of inquiry investigation must inform interviewees about the mandate of the commission, as well as the purpose of the interview.[54]

48. With regards to consent, the Publication provides the following:

> The informed consent of interviewees to use or share the information provided must be obtained during the interview (see subsect. 6, below). Interviewers need to explain the commission's/mission's confidentiality policy and ask the interviewees whether they consent to specific ways in which the information they have provided can be used or shared. For example, [...] if the information could be shared with other United Nations entities or with the International Criminal Court. Interviewees have

[53] See Annex B.
[54] UN OHCHR, "Commission of inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law, Guidance and Practice", (United Nations, 2015), p. 59.

> to be fully aware of the possible implications of their decisions and the potential risks [emphasis added].[55]

49. Indeed, in accordance with the Publication, P-0567 explains that:

> [REDACTED].[56]

50. In the same vein, the Publication also states:

> Once the interview is over, the interviewer is required to promptly record the notes of the interview in the commission's/mission's database. The task of the interviewer is to convert the information provided by the interviewee into a logical presentation about what happened, where, how, and who was involved.[57]

51. Moreover, the OHCHR COI Documents themselves indicate that interviewed witnesses were specifically asked whether they consented to the information they provided being shared with the Court (and other international and regional courts, including the ad hoc tribunals).[58] There is nothing 'equivocal' about this consent.[59] The criteria of 'informed consent' listed by the Prosecution can be dismissed out of hand as it is arbitrary, not supported by case law, and part of a broader strategy of goalpost-shifting.[60] Likewise, the suggestion that the informed consent provided by interviewees is not valid because 'the relevant field of the form is not consistently populated'.[61]

52. The interviewees were therefore well aware that they were being questioned in their capacity as a witness, in the context of an investigations on crimes committed in CAR and that the information may be relied upon in the context of judicial proceedings.

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[55] UN OHCHR, "Commission of inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law, Guidance and Practice", (United Nations, 2015), p. 60.
[56] CAR-OTP-2059-0084-R04, para. 74.
[57] UN OHCHR, "Commission of inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law, Guidance and Practice", (United Nations, 2015), p. 60.
[58] See for example, CAR-OTP-2045-0287 in the "Informed Consent" section.
[59] Cf. ICC-01/14-01/18-1947-Conf, para. 37.
[60] Cf. ICC-01/14-01/18-1947-Conf, para. 37.
[61] Cf. ICC-01/14-01/18-1947-Conf, para. 38.

53. The argument of the Prosecution that all the information above is non-existent and/or not available and needs to be presumed is unfounded. All information readily available goes to show that the criteria for testimonial evidence have been met.

54. Indeed, the fact-finding mandate of an entity authorized to conduct investigation, the knowledge of the witnesses of the mandate of the OHCHR COI,[62] the informed consent given by the witness to the investigator including for use of the information before international tribunals and for legal proceedings,[63] and the circumstances in which the statements were collected and recorded in the UNOHCR database,[64] are established and need not to be presumed.

55. Accordingly, the OHCHR COI Documents consist of testimonial evidence and should be barred from submission via bar table motion.

*ii) UN-OLA documents*

56. The UN-OLA, i.e. the entity that provided two tendered documents,[65] to the Prosecution, acts as the Focal Point between the United Nations and the ICC.[66]

57. In the Ninth Application, the Prosecution claimed that the "mandate for gathering this information [the UN-OLA Documents] cannot be determined".[67]

58. It is unclear how this Prosecution submission can be reconciled with the fact, as subsequently disclosed *inter partes*, that the UN-OLA Documents were provided to the Prosecution pursuant to a request for documentation 'in the

[62] ICC-01/14-01/18-1947-Conf, para. 37.
[63] ICC-01/14-01/18-1947-Conf, para. 31.
[64] see ICC-01/14-01/18-1947-Conf, para. 35.
[65] See metadata of the items and Annex B.
[66] See, https://legal.un.org/ola/UNICCCooperation.aspx.
[67] ICC-01/14-01/18-1947-Conf, para. 43.

archives of the' OHCHR COI; and further, comprise 'copies of documents that were already part of said archives.[68]

59. The Prosecution would also have been aware that a number of the compiled witness testimonies within the UN-OLA Documents consist of verbatim duplicates of the witness interviews that comprise the OHCHR COI Documents.[69] Indeed, page 1266 of CAR-OTP-2088-1230 and page 1267 of CAR-OTP-2088-1230 consist of two COI documents[70] while page 1218 of CAR-OTP-2088-1198 consists of CAR-OTP-2101-0340.[71]

60. It is also notable that the compiled testimonies within the UN-OLA Documents are each attributed to an enumerated 'Witness'; and that they have been re-formatted and compiled in a manner that would be consistent with copy-and-pasting OHCHR COI witness testimonies that had been available to the UN-OLA.

61. Far from being indeterminable, it can thus be inferred that the mandate for gathering the information within the UN-OLA Documents is in fact that of OHCHR COI – i.e. the entity that appears to have originally collected this information via investigations and witness interviews. Further, the Prosecution has made it abundantly clear in *inter partes* correspondence[72] that it was aware of the 'mandate and the methodology applied in [OHCHR COI's] collection of information' as set out in the OHCHR COI Report (notably relied on above).[73]

62. In the circumstances therefore, it borders on the misleading for the Prosecution to i) claim ignorance as to the mandate for gathering the information within the UN-OLA Documents; and ii) (incorrectly) argue that "the circumstance is

[68] Email from the Prosecution to the Defence sent on 11 July 2023, at 17.43 (Annex B)
[69] See ICC-01/14-01/18-1947-Conf, para. 43.
[70] Respectively CAR-OTP-2045-0525, item 20 of Annex A and CAR-OTP-2053-0567, item 33 of Annex A.
[71] Item 51 of Annex A.
[72] Annex C see Email from the Prosecution to the Defence sent on 11 July 2023, at 11.01.
[73] *Supra* para, 44 referring to item CAR-OTP-2001-7017.

directly analogous to the accounts compiled" within CAR-OTP-2002-0039, itself previously recognised as formally submitted by the Chamber, which considered that the document did not comprise testimonial evidence *inter alia* on the basis that:

> 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'.[74]

63. The Prosecution has also refused to provide the RFAs exchanged with UN-OLA that resulted in the production (and likely compilation) of the UN-OLA Documents, despite the high likelihood that they would shed further light on the original source material from which these testimonies were copied and compiled. This regrettable lack of transparency should be taken into consideration by the Chamber in assessing whether the Prosecution as the moving party has met its burden in tendering the UN-OLA Documents evidence, especially given the Chamber's discretion to "exclude relevant evidence by operation of the provisions of the Statute" – which would necessarily include an assessment of the prejudice to Mr Yekatom's right to examine witnesses brought against him, and its overriding duty to ensure a fair trial.[75]

64. In any event, it follows that the practices and procedures followed in the gathering of this information from witnesses, as explored in detail above, would be those applicable to the OHCHR COI; and as such, the information contained

[74] ICC-01/14-01/18-1359, paras 18-19.
[75] See *supra*, para. 23.

within these documents should likewise be considered testimonial in nature and thus inappropriate for submission via the bar table.

65. These documents should thus be recognized as testimonial and barred from submission by the Prosecution.

### C. The standard for reconsideration is not met in relation to item CAR-OTP-2053-0576

66. The jurisprudence of the Court is clear in that reconsideration is an exceptional measure which should only be allowed under strict and limited circumstances:

> Reconsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.[76]

67. It is for the requesting party to demonstrate the appropriateness of the reconsideration, yet the Prosecution falls short of substantiating its claim.[77]

68. The Prosecution claims that the reconsideration is necessary to prevent an injustice[78] and argues that the exclusion of item CAR-OTP-2053-0576 will "unjustly impact the proceedings"[79] as it "would adversely and unnecessarily affect the Chamber's truth-finding function".[80]

69. The Prosecution does not substantiate how the Chamber's truth-finding function is adversely affected. Indeed, the Prosecution has had ample time and

[76] Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4. Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al*., Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision on "Defence Request for Disclosure and Judicial Assistance"', 24 September 2015, ICC-01/05-01/13-1282, para. 8; Trial Chamber V-A, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19.
[77] *The Prosecutor v.Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the 'Order on numbering of evidence' of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para 16, referring to ICTY, *Prosecutor v Radovan Karadzic*, Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, IT-95-5/18-T.
[78] ICC-01/14-01/18-1947-Conf, para. 4.
[79] ICC-01/14-01/18-1947-Conf, para. 52.
[80] ICC-01/14-01/18-1947-Conf, para. 53.

resources to conduct its investigations and to gather evidence regarding the information contained in the document. In addition, the Prosecution had the opportunity to question P-1813 on the content of the document, going as far as reading extracts of this evidence to the witness.[81] Both the Prosecution and the Presiding Judge also asked multiple follow up questions.[82] The Prosecution even concedes in the Ninth Application that during his examination "P-1813 clarified and expanded on topics discussed during the meeting referenced in the document [CAR-OTP-2053-0576]".[83] Finally, the Prosecution has had the opportunity to examine several other witnesses about the information contained in the document, including the meeting with the MISCA.[84] It is clear from this that the truth finding function of the Chamber is not affected; and even less so in manner that would create an injustice, and constitute the requisite 'exceptional circumstances' warranting reconsideration.

70. Finally, the Prosecution has failed to show a clear error of reasoning. The document in question falls squarely within the accepted definition of testimonial evidence as elaborated above, and procedural bars to its admission thus apply. The purposes for which the Prosecution seeks the submission of a document, and whether the Prosecution has been able to elicit or introduce the same information from a different evidentiary source, has no bearing on the matter of whether that document comprises testimonial evidence. The Chamber proceeded as it ought to have, by determining the nature of the evidence on a case-by-case basis for the purpose of ensuring that adequate procedural safeguards remain in place.[85]

[81] ICC-01/14-01/18-T-180-CONF-FRA ET, p. 33, line 27 to p. 34, line 7.
[82] ICC-01/14-01/18-T-180-CONF-FRA ET, p. 33 line 27 to p. 40, line 8.
[83] ICC-01/14-01/18-1947-Conf, para. 53.
[84] See for example P-1838 : ICC-01/14-01/18-T-215-ENG CT, p. 20, line 14.
[85] See *The Prosecutor V. Germain Katanga And Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, paras. 43 and 46.

71. In light of the above, the Prosecution's Reconsideration Request should be rejected.

## CONCLUSION

72. Item CAR-OTP-2053-0576 consists of testimonial evidence, OHCHR COI Documents were prepared by the same entity and in the same manner as CAR-OTP-2053-0576, and the UN-OLA Documents are either duplicates of OHCHR COI Documents, or copies of documents which again were prepared by the same entity and in the same manner as CAR-OTP-2053-0576.

73. All of them should be regarded as testimonial and their submission should be rejected.

## CONFIDENTIALITY

74. The present request is filed on a confidential basis due to the classification of the submission it responds to. A public redacted version of the document will be filed in due time.

## RELIEF SOUGHT

75. In light of the above, the Defence respectfully requests Trial Chamber V to:

**REJECT** in part the Ninth Application;

**REJECT** the Reconsideration Request;

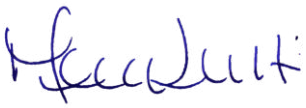
**REJECT** the submission of following items:

CAR-OTP-2001-0310; CAR-OTP-2001-0363; CAR-OTP-2001-0409; CAR-OTP-2001-0446; CAR-OTP-2001-0446; CAR-OTP-2001-1075; CAR-OTP-2020-0019; CAR-OTP-2045-0287; CAR-OTP-2045-0287; CAR-OTP-2045-0452; CAR-OTP-2045-0525; CAR-OTP-2045-0536; CAR-OTP-2045-0559; CAR-OTP-2045-0561; CAR-OTP-2045-0563; CAR-OTP-2045-0569; CAR-OTP-2045-0581; CAR-OTP-

2048-0109; CAR-OTP-2048-0129; CAR-OTP-2048-0129; CAR-OTP-2051-0479; CAR-OTP-2053-0538; CAR-OTP-2053-0567; CAR-OTP-2053-0645; CAR-OTP-2084-0305; CAR-OTP-2088-1179; CAR-OTP-2088-1198; CAR-OTP-2088-1230; CAR-OTP-2088-1375; CAR-OTP-2088-1423; CAR-OTP-2088-1437; CAR-OTP-2088-1473; CAR-OTP-2088-1485; CAR-OTP-2088-1493; CAR-OTP-2088-1572; CAR-OTP-2091-0488; CAR-OTP-2092-0340; CAR-OTP-3101-0340.

**CONSIDER** the Defence's observations included in Annex A on all other items.

**RESPECTFULLY SUBMITTED ON THIS 7th DAY OF NOVEMBER 2023**



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