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Date: **11 February 2022**

TRIAL CHAMBER V

Before: Judge 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***

Confidential with Confidential Annexes 1 and 2

**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"**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. The Defence of Mr Patrice-Edouard Ngaïssona ("Defence") hereby responds to the Prosecution's "Request for the Submission of Evidence from the Bar Table regarding the Prevalence of Sexual and Gender Based Violence" ("Prosecution Request").¹ The Prosecution requests Trial Chamber V ("Chamber") to recognize as formally submitted 140 items. In the Prosecution's submission, these items, which relate to the alleged prevalence of sexual and gender-based violence ("SGBV") in CAR both during and sometimes ten years prior to the Relevant Period² are relevant to article 30(2) and (3) of the Rome Statute, which relate to *mens rea* and to counts 40 and 41.³
2. The Defence opposes the submission of the 140 documents on the basis that the Prosecution has failed to file its 'bar table' in accordance with the express instructions contained in the "Initial Directions on the Conduct of Proceedings" ("Initial Directions").⁴ The Initial Directions require that bar table applications contain specific submissions on the relevance and probative value of each individual item. The bar table contained in the annex to the Prosecution Request provides a cursory description of the relevance of each item with absolutely no mention of the items' probative value. The Prosecution's failure to provide this information not only violates the Initial Directions, but goes against the statutory framework of the Court, which places the evidentiary burden squarely on the shoulders of the Prosecution to prove the guilt of the accused beyond a reasonable doubt.⁵ Therefore, the Defence requests the

¹ ICC-01/14-01/18-1233.

² The Prosecution uses this term in the Prosecution Request. *See* footnote 2. It stems from September 2013-December 2014. ICC-01/14-01/18-723-Red, para. 5.

³ Prosecution Request, paras 1-2.

⁴ ICC-01/14-01/18-631.

⁵ Article 66 of the Rome Statute.

Chamber to reject the Prosecution's Request *in limine*, and order the Prosecution to refile its bar table in accordance with the directions.

3. In the alternative, the Defence requests the Chamber to order the Prosecution for future 'bar table' applications to provide the relevance and probative value of each individual item. Further, the Defence provides in Confidential Annex 1 to the present response its item-by-item objections to the 140 documents the Prosecution wishes to submit before the Chamber. The Defence makes these objections pursuant to Rule 64(1) and they are intended to assist the Chamber in its holistic assessment of the evidence during the deliberation of the judgement.⁶ At this stage, the Defence requests that the Chamber exclude from its deliberations the item CAR-OTP-2001-7017, given its testimonial nature.
4. The Defence wishes to stress that it reserves its right to contest at a later stage of the proceedings any future Prosecution submissions regarding the relevance and probative value of the aforementioned documents in the event the Chamber were to grant the Defence's primary requested relief.

II. CONFIDENTIALITY

5. In accordance with regulation 23*bis*(1) of the Regulations of the Court, this response in addition to the annexes are filed confidentially since it makes references to information that the Prosecution has classified as confidential. A public redacted version shall be filed in due course.

III. APPLICABLE LAW

6. Pursuant to Article 66(2) of the Rome Statute, the burden of proof rests on the Prosecution to prove its case. Thus, in introducing a document, the Prosecution must demonstrate its relevance and probative value. If at the time of submitting

⁶ Initial directions, para. 62.

evidence, the Prosecution is unable to make such a demonstration, then the evidence should not be considered as formally submitted.⁷

7. While this Chamber decided to adopt the 'submission approach' in its evaluation of the evidence in this case, the Defence submits that trial chambers which have adopted the 'admission approach' can act as persuasive authority with respect to the interpretation that should be given to the criteria of relevance, authenticity, probative value, and prejudice. Trial Chamber II in *Katanga and Ngudjolo*, found that evidence is relevant if it "makes the existence of a fact at issue more or less probable."⁸ Whether or not this is the case will depend on "the purpose for which the evidence is adduced."⁹
8. In determining the probative value of an item tendered into evidence, the Court considers: (1) the reliability of the item, and (2) "the measure by which an item of evidence is likely to influence the determination of a particular issue in the case."¹⁰ An inherent part of an item's reliability is its authenticity, which means that the item is what it purports to be.¹¹ According to the jurisprudence of the Court, documents that do not "bear extrinsic indications as to their origin and author must always be authenticated by way of attestation or affidavit from an identified representative of the originating organization."¹² Once a *prima facie* finding of authenticity has been made, the Court must determine whether the "evidence demonstrates such qualities that, when considered alone, could be reasonably believed."¹³ Some of the key factors allowing testing such reliability is "whether the source of the information has an allegiance towards one of the

⁷ See ICC-01/04-01/07-2635, para. 13.

⁸ ICC-01/04-01/07-2635, para. 16.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 20.

¹¹ *Ibid.*, para. 22.

¹² *Ibid.*, para. 24.

¹³ *Ibid.*, para. 26.

parties in the case or has a personal interest in the outcome of the case [...]”; the “[n]ature and characteristics of the item of evidence” or “whether the information and the way in which it was gathered can be independently verified or tested”.¹⁴

9. Even if evidence is found to be relevant and probative, a chamber may still determine to accord it no evidentiary weight if its potential prejudicial effect on the rights of the accused or the fair evaluation of testimony or other evidence outweighs its probative value.¹⁵

IV. SUBMISSIONS

10. The Defence respectfully requests the Chamber to : (1) reject the Prosecution’s Request *in limine* for failure to comply with the Chamber’s Initial Directions or (2) in the alternative, for any subsequent bar table application, order the Prosecution to specify the probative value for each item it wishes to submit, and to take into account in its holistic assessment of the evidence the Defence’s objections to the 140 item contained in the Prosecution’s Request. Lastly, the Defence requests the Chamber to reject the Prosecution’s request to submit item CAR-OTP-2001-7017 given its testimonial nature.

A. The Prosecution’s Request should be rejected *in limine* for failure to comply with the Chamber’s Initial Directions

11. The Appeals Chamber has held that “evidence is properly before a trial chamber...when it has been submitted in accordance with the procedure adopted by the trial chamber....”¹⁶ Here, the Chamber determined to adopt the

¹⁴ *Ibid.*, para. 27.

¹⁵ See, for instance, Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Prosecution’s Request for Admission of Documentary Evidence”, dated 10 June 2014, ICC-01/09-01/11-1353, para.16. See also Articles 69(4) and 64(2) of the Rome Statute.

¹⁶ *Bemba et al.* Appeals Decision, ICC-01/05-01/13-2275-Red, para. 599.

following procedure for participants wishing to submit evidence in writing through a bar table application. The bar table application must contain: "(1) a short description of the item (and/or) relevant portions therein); and (2) a short description of the asserted relevance and probative value pursuant to Rule 64(1) of the Rules." The Prosecution has completely omitted to make any mention of the probative value for each item it wishes to submit in the annex containing the 140 items it wishes to submit through the Prosecution Request.

12. Indeed, the only submissions pertaining to the probative value of the 140 items are a few short paragraphs of the Prosecution Request. Without providing a single reference, the Prosecution submits that all the items falling into the six categories generated by the Prosecution are either *prima facie* reliable¹⁷ or the Prosecution merely provides the Chamber with the source of the documents without even making mention of the factors linked to probative value such as reliability and significance.¹⁸ First, the Prosecution must substantiate why each item has *prima facie* reliability. A short reference to the source being reputable or well-known or publically available is insufficient.¹⁹ Second, merely being able to identify with precision the source which provided the tendering party with an item of evidence is insufficient to demonstrate the item's probative value.

13. For example, the Prosecution states that documents obtained from the CAR government are *prima facie* reliable and government seals and headers further

¹⁷ Prosecution Request, para. 10(i)(submitting the documents emanating from the CAR authorities are *prima facie* reliable); para. 10(ii) (submitting the documents *prima facie* reliable because they emanate from well-known organisations).

¹⁸ Prosecution Request, para. 10(iii) (submitting the documents are reliable because they originate from reputable sources); para. (iv) (submitting that the documents were produced by local CAR victim collectives and stating the purpose of the surveys and when available the working methods); para. 10(v) (submitting that the documents were obtained from the hard drive of Levy Yakete through the French authorities); para. 10(vi) (submitting that the documents were provided by witnesses who attested to the truth of their statements).

¹⁹ See ICC-01/04-01/07-2635, paras. 24-33.

demonstrate their authenticity. However, the type of documents obtained from the CAR government that the Prosecution artificially groups together in one category are diverse in nature. They include such items as: audio recordings of speeches,²⁰ ceasefire agreements,²¹ internal government correspondence,²² and letters from civil society organisations to the government.²³ It should be noted that not all the documents contain letterheads, official seals, or signatures.²⁴ Further, the diverse document types make it impossible to group them together in terms of probative value. The criteria used to evaluate the probative value of an audio recording is not the same as a letter from civil society to the President of CAR. Lastly, the Prosecution's submissions that it will at a later stage address the reliability and authenticity of certain documents in a forthcoming bar table motion should bar their submission at this stage. These matters must be addressed at the time of the tendering party's submission of the documents as required by the Initial Directions.

14. The Initial Directions indicate that in accordance with Rule 64(1), the tendering party must explain each item's relevance and probative value. Rule 64(1) requires that an issue relating to relevance or admissibility be raised at the time when the evidence is submitted unless the issue was not known at the time of submission. Based on the Initial Directions, the Chamber found that this rule applies also to the tendering party since its bar table must include a description of relevance and probative value of each item in accordance with Rule 64(1).²⁵ Such an interpretation is in accordance with the Statute that places the onus of proof on the Prosecution to prove the charges beyond a reasonable doubt.²⁶

²⁰ CAR-OTP-2000-0627; CAR-OTP-2042-2125.

²¹ CAR-OTP-2001-3405; CAR-OTP-2008-0615; CAR-OTP-2101-3081.

²² CAR-OTP-2075-0915; CAR-OTP-2092-1257; CAR-OTP-2092-1485; CAR-OTP-2101-4029.

²³ CAR-OTP-2092-1502; CAR-OTP-2101-3983.

²⁴ CAR-OTP-2092-1485; CAR-OTP-2101-2663; CAR-OTP-2101-3490; CAR-OTP-2101-4029.

²⁵ Initial Directions, para. 62.

²⁶ Article 66 of the Rome Statute.

15. While the Prosecution is correct that there is no legal impediment to *submitting* items such as NGO reports or media articles whose source of information is anonymous, the 'submission approach' of the Chamber does not allow the Prosecution to abdicate its obligations under the Statute. The submission approach merely delays when the Chamber will make its evaluation of the evidence. It does not change the Prosecution's responsibilities, and thus the Prosecution must provide a short description in its bar table of the probative value of each item it wishes to submit before the Chamber.
16. Such a procedure was followed by the Prosecution in both *The Prosecutor v. Ongwen* and *The Prosecutor v. Al Hassan*, whose trial chambers also decided to adopt a 'submission approach' to the evaluation of evidence. In *Ongwen*, the Chamber indicated that the Prosecution submitted various categories of evidence but then also "indicat[ed] the relevance and probative value of *each individual item* in the six annexes of the Request" (*emphasis added*).²⁷ Similarly, in *Al Hassan*, the Chamber "observe[d] that, as directed, the Prosecution provided specific submissions on the relevance and probative value of *each document* submitted via its Request" (*emphasis added*).²⁸
17. Given the Prosecution Request has not been submitted in compliance with Initial Directions, the Defence respectfully requests the Chamber for the aforementioned reasons to reject the Prosecution's Request *in limine*. If the Prosecution wishes to submit these 140 items into evidence, it should be required to resubmit a bar table application specifying the probative value and relevance of each item. The Defence reserves its right to respond to this new bar table application.

²⁷ ICC-02/04-01/15-615, para. 14.

²⁸ ICC-01/12-01/18-2097, para. 16.

B. In the alternative, the Defence submits that the overwhelming majority of the items are irrelevant, and that the remaining relevant items are so lacking in probative value that they are unlikely to influence the Chamber's determinations of the material facts in this case

18. In the alternative, were the Chamber to reject the Defence's request to dismiss the Prosecution's request *in limine*, the Defence requests: (1) the Chamber to order the Prosecution to file any prospective bar table by addressing the relevance and probative value of each individual item it wishes to tender into evidence, and (2) take into account the Defence's objections to the items contained in Annex 1 to the present response as part of its holistic evaluation of the evidence.

19. The Prosecution submits that the 140 items are relevant to "Mr Ngaïssona's knowledge under article 30 and article 25(3)(d)(ii) that the Anti-Balaka would commit sexual violence "in the ordinary course of events", which underpin his alleged criminal responsibility for the two charges of rape and the charge of persecution.²⁹ Lastly, the Prosecution argues that the items related to the Anti-Balaka's alleged commission of SGBV against Muslim civilians during the Relevant Period are relevant to the Anti-Balaka's alleged widespread and systematic attack against that population.³⁰

20. The Prosecution makes the argument that because of the alleged prevalence of SGBV during and prior to the Relevant period, and specifically Anti-Balaka alleged commission of such violence, Mr Ngaïssona would have known that the Anti-Balaka would commit such violence. In order for this proposition to be true, the Prosecution must at the very least provide evidence that establishes

²⁹ Prosecution Request, para. 4.

³⁰ Ibid.

the prevalence of the Anti-Balaka committing SGBV during the Relevant Period.

21. An overview of the Prosecution's categorisation of the alleged relevance of the items reveals the following: (1) only 8 of the 140 items relate to alleged SGBV committed by the Anti-Balaka,³¹ (2) 14 items relate to both to alleged Anti-Balaka and Seleka perpetrators of SGBV,³² (3) 77 of the items relate to Seleka perpetrator SGBV,³³ and (4) 38 items allegedly relate to the prevalence of conflict-related SGBV in CAR.³⁴

22. Even when *assuming* *arguendo*, the Prosecution's categorisation of the relevance of the items is true, this overview of the Prosecution's evidence completely undermines the Prosecution's argument relating to SGBV violence in the CAR. The evidence presented by the Prosecution does not establish that the Anti-Balaka were mirroring the SGBV violence of the Seleka as a retributive form of punishment. Rather, the evidence presented in the bar table shows a clear systemic use of SGBV by the Seleka, whereas no such pattern emerges from the alleged Anti-Balaka crimes. Therefore, the Prosecution's claim that since the Anti-Balaka were aware of the Seleka commission of SGBV, it was clear that the Anti-Balaka would commit such crimes is based on pure speculation, and bears no relevance to the charges brought against Mr Ngaïssona.

³¹ CAR-OTP-2001-5386; CAR-OTP-2002-0039; CAR-OTP-2022-0375; CAR-OTP-2031-0157; CAR-OTP-2001-4909; CAR-OTP-2001-4967; CAR-OTP-2073-0893; CAR-OTP-2057-0911.

³² CAR-OTP-2092-1261; CAR-OTP-2092-2739; CAR-OTP-2092-2846; CAR-OTP-2001-0835; CAR-OTP-2001-1308; CAR-OTP-2001-3138; CAR-OTP-2001-3444; CAR-OTP-2001-6437; CAR-OTP-2001-7017; CAR-OTP-2008-1165; CAR-OTP-2055-1987; CAR-OTP-2061-1592; CAR-OTP-2071-2013; CAR-OTP-2110-0915; CAR-OTP-2110-0967; CAR-OTP-2025-0115; CAR-OTP-2033-7906.

³³ Confidential Annex 2

³⁴ Confidential Annex 2

23. While the Prosecution Request does refer to evidence showing that certain segments of the population were seeking to take action in response to the Seleka crimes, none of the items cited demonstrate the Anti-Balaka planning or intending to rape Muslim civilian women in retribution for the Seleka attacks.³⁵ Given its utter lack of relevance to the alleged crimes of the Anti-Balaka, the Defence submits that its submission violates the right of Mr Ngaïssona to be tried without undue delay under Article 67 of the Statute by flooding the case record with irrelevant evidence that the Chamber must parse through in order to reach its judgment. Further, the Defence submits that none of the items cited in the bar table demonstrate that the Anti-Balaka members committed SGBV against Muslim women as a form of retribution.
24. The Prosecution's Request's amounts to stereotyping the people of CAR. The Prosecution evidence relating to the alleged conflict-related prevalence of SGBV in the CAR both during and prior to the Relevant Period, taken at its highest, demonstrates a mere correlation between armed conflict and alleged SGBV in the CAR since 2003. The Prosecution requests the Chamber to make a speculative leap from that evidence and conclude that it was clear the Anti-Balaka would commit the same crimes. By doing so, the Prosecution is essentially taking away all agency from the actors that took part in the crisis during the Relevant Period. Following the Prosecution's logic, any actor participating in an armed conflict in CAR would foresee that SGBV would occur by virtue of participating in a conflict on CAR territory, which is simply untenable. The Prosecution's evidence contradicts this stereotype. From the 140 items, it clearly emerges that the Seleka were engaging in widespread and systematic use of SGBV violence whereas very few documents relate to Anti-Balaka alleged SGBV. Given that the Prosecution's arguments related to the

³⁵ See Prosecution Request, para. 9(iii), footnote 17.

relevance of conflict-related prevalence of SGBV are based on speculation, the Defence request the Chamber to find these items to be irrelevant.

25. The remaining SGBV items, namely those categorized as “Anti-Balaka perpetrator” and “Seleka and Anti-Balaka perpetrator” are so limited in probative value that they are unlikely to influence the Chamber in determining whether (1) the Anti-Balaka’s alleged commission of SGBV was part of its alleged widespread or systematic attack against the Muslim population or (2) whether Mr Ngaïssona was allegedly aware that the Anti-Balaka would commit such crimes.
26. Out of the 17 items categorized under both Anti-Balaka and Seleka perpetrator, the Defence submits 9 of them either: (1) do not distinguish between Anti-Balaka and Seleka perpetrators with respect to the information they provide on SGBV crimes,³⁶ or (2) do not indicate that the Anti-Balaka participated in SGBV but merely makes general assertions of crimes that were allegedly committed by the Anti-Balaka following Seleka crimes.³⁷ The probative value of such items is *de minimus* since the information provided makes it impossible for the Chamber to know the attribution of crimes to a particular group and whether the Anti-Balaka committed such crimes on a widespread and systematic scale. The Prosecution’s argument that in view of the Seleka crimes it was obvious that the Anti-Balaka would commit the same crimes is undermined by the very evidence the Prosecution wishes to submit. CAR-OTP-2001-6437 and CAR-OTP-2001-7017 consisting of two reports, which the Prosecution categorizes under “Seleka and Anti-Balaka perpetrators” clearly state the limits of their findings regarding Anti-Balaka SGBV crimes. Both reports found that they

³⁶ CAR-OTP-2092-2846; CAR-OTP-2001-1308; CAR-OTP-2001-3138; CAR-OTP-2001-3444; CAR-OTP-2008-1165; CAR-OTP-2110-0967.

³⁷ CAR-OTP-2092-1261; CAR-OTP-2092-2739; CAR-OTP-2071-2013.

could not confirm whether the alleged SGBV committed by the Anti-Balaka was widespread or systematic.³⁸

27. The remaining 6 documents which do specifically distinguish between alleged Anti-Balaka SGBV and Seleka SGBV crimes,³⁹ are reports emanating from international governmental organizations or NGOs, which are based on anonymous hearsay, and whose methodology is not always stated. Even in instances where the methodology is explained, given the anonymous nature of the sources of information, it is impossible for the Chamber to evaluate the information provided by the reports and to test its veracity. The Defence respectfully requests the Chamber to accord minimal probative value to the alleged crimes reported therein since the reports do not demonstrate sufficient indicia of reliability, bearing in mind that this request predominantly relies on anonymous hearsay, which cannot be accepted as evidence for the reasons of absence of any type of verification by the Court.

28. Of the 140 items the Prosecution wishes to submit, the Prosecution labelled only 8 as items relating to alleged Anti-Balaka SGBV. They consist of 4 reports stemming from international governmental organizations and NGOs,⁴⁰ 3 media reports,⁴¹ and one set of notes provided by a Rule 68(2)(b) witness.⁴² The Defence submits that NGO and international governmental organization reports in addition to media articles do not demonstrate sufficient indicia of reliability and should be accorded minimal, if any, evidentiary weight by the Chamber. This is due to the lack of information regarding their sources which are anonymous and therefore impossible to verify.

³⁸ CAR-OTP-2001-6437, at 6479; CAR-OTP-2001-7017 at 7118.

³⁹ CAR-OTP-2001-0835; CAR-OTP-2055-1987; CAR-OTP-2061-1592; CAR-OTP-2110-0915; CAR-OTP-2025-0115; CAR-OTP-2033-7906.

⁴⁰ CAR-OTP-2001-5386; CAR-OTP-2002-0039; CAR-OTP-2022-0375; CAR-OTP-2031-0157.

⁴¹ CAR-OTP-2001-4909; CAR-OTP-2001-4976; CAR-OTP-2073-0893.

⁴² CAR-OTP-2057-0911.

29. Moreover, the reports and articles often give little information regarding the methods used to identify perpetrators leaving the Chamber unable to ascertain whether the perpetrators have been accurately identified as such. Further, in the one case study cited by the Prosecution that was published in the Final Report of the Panel of Experts on the Central African Republic, it appears that rather than the alleged SGBV stemming from a policy to target the Muslim population, the alleged perpetrator targeted the victims as a result of a personal vendetta against the victims' father, which appears unrelated to his Muslim identity.⁴³
30. Lastly, the document allegedly relating to Anti-Balaka SGBV originating from witness P-1598 should be accorded no evidentiary weight. While the witness may have attested to the truth of his statement, the notes he took which the Prosecution seeks to submit through the bar table do not present sufficient indicia of reliability. First, many of the entries are illegible making it impossible to make out the date on which the alleged SGBV incident occurred. Further, the document is undated, and it is not apparent when the witness wrote down these notes, and how the information was gathered. It is therefore evidence which is impossible to evaluate and should be accorded no probative value.
31. Lastly, the Prosecution never substantiates in its request that Mr Ngaïssona was aware of the alleged Anti-Balaka committing SGBV. It is therefore puzzling that the Prosecution submits that the 140 items show that Mr Ngaïssona was aware that the Anti-Balaka would commit alleged SGBV crimes. A bar table motion is moreover not the procedural mechanism for the prosecution to try to substantiate these type of allegations which go into alleged *mens rea* of the accused; rather such allegations, and any such alleged evidence to it, should be

⁴³ CAR-OTP-2001-5386, at 5587.

presented through live testimony, which can be subjected to the examination by the parties and the judges.

32. In *Prosecutor v Bemba*, the Trial Chamber found that Mr Bemba had knowledge of his elements committing crimes because he had been made aware of certain FIDH reports and media articles.⁴⁴ Here, the Prosecution does not submit any evidence that the items related to alleged Anti-Balaka crimes reached Mr Ngaïssona. Indeed, the Prosecution is silent as to how Mr Ngaïssona was made aware of the alleged crimes detailed in the various items of the bar table. At the Confirmation stage of the proceedings, where the Pre-Trial Chamber applied a significantly lower standard of proof, Pre-Trial Chamber found that media reports were insufficient to demonstrate that Mr Ngaïssona knew of the crimes committed by Anti-Balaka since no evidence was lead to establish that the reports reached Mr Ngaïssona.⁴⁵ Given that at the trial stage of the proceeding, the Prosecution has failed to provide evidence that Mr Ngaïssona was made aware of these documents, the Prosecution has not discharged its burden of proof with respect to Mr Ngaïssona's *mens rea*.

33. The aforementioned paragraphs provide the Chamber with a summary of the Defence's objections, and are not fully exhaustive. The Defence respectfully refers the Chamber to the confidential Annex 1 of the present Request for a comprehensive overview of the Defence's objections to the 140 items.

**C. The Defence submits that item CAR-OTP-2001-7017 should
be excluded from the Chamber's deliberations given its
testimonial nature**

⁴⁴*Bemba* Trial Chamber Judgement, ICC-01/05-01/08-3343, *overturned* on appeal on different grounds, para. 714 (finding that Mr Bemba in a correspondence noted the existence of an FIDH, and therefore he was apprised of its content).

⁴⁵ Confirmation of Charges Decision, ICC-01/14-01/18-403-Red-Corr, para. 181.

34. Item CAR-OTP-2001-7017, which the Prosecution seeks to tender through the Prosecution Request is the "Final Report of the United Nations Commission of Inquiry on the Central African Republic" ("Final Report"). The Final Report states that the Commission of Inquiry was established to investigate humanitarian laws violations and human rights abuses with a view to identify perpetrators and hold them to account.⁴⁶

35. The report is compiled in part on the basis of the testimony of witnesses to which the Prosecution refers in the annex to the Prosecution Request.⁴⁷ Given the mandate of the Commission of Inquiry was to identify perpetrators with a view of holding them criminally responsible, these witnesses gave their statements with the view that they would one day be used in criminal proceedings. Therefore, their submission would be precluded since it constitutes prior recorded testimony under Rule 68, and thus cannot be submitted via bar table.⁴⁸ The factual findings of the Commission of Inquiry contained in the Final Report should also be excluded since they are based on prior recorded testimony which has not been properly submitted before the Chamber *via* a Rule 68 application. Therefore, the Defence respectfully requests the Chamber to reject the Prosecution's request to submit item CAR-OTP-2001-7017 into evidence.

V. RELIEF SOUGHT

36. The Defence respectfully requests the Chamber to:

⁴⁶ CAR-OTP-2001-7017, at 7022.

⁴⁷ See annex to the Prosecution's Request, CAR-OTP-2001-7017 *referencing* individual victim accounts, CAR-OTP-2088-1198; CAR-OTP-2088-1230; CAR-OTP-2088-1437; CAR-OTP-2088-1643; CAR-OTP-2088-1673; CAR-OTP-2088-1707; CAR-OTP-2088-1749.

⁴⁸ See *Prosecutor v. Ongwen*, Decision on Defence Request to Submit 470 Items of Evidence, ICC-02/04-01/15-1670, 14 November 2019, paras 9-11.

-REJECT the Prosecution's Request in *limine*

-In the alternative, **ORDER** the Prosecution to comply with the Chamber's Initial Directions as specified in paragraph 14 of the present response, and to take into account the Defence's objections contained in the present response and Confidential Annex 1 when the Chamber conducts its holistic assessment of the evidence during the deliberation of the judgement

-REJECT the Prosecution's request to submit item CAR-OTP-2001-7017 into evidence

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 11 February 2022

At The Hague, the Netherlands.