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TRIAL CHAMBER V

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public with Confidential Annex 1

Public Redacted Version of the “Defence Response to the Prosecution’s Eight Application for Submission of Audio/Videos Evidence from the Bar Table”, ICC-01/14-01/18-1945-Conf”, ICC-01/14-01/18-2035-Conf, 18 August 2023

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 Eight [*sic*] Application for Submission of Audio/Videos Evidence from the Bar Table' ('Application').¹
2. Further, the Defence provides in confidential Annex 1 to the present Response its item-by-item objections to the 328 items, including 117 videos, 186 transcripts and 25 documents, which the Prosecution wishes to submit before the Chamber.
3. The Defence makes these objections pursuant to rule 64(1) of the Rules of Procedure and Evidence ('Rules'), which are intended to assist the Chamber in its holistic assessment of the evidence during the deliberation of the judgment.²

II. CONFIDENTIALITY

4. In accordance with regulation 23bis(1) of the Regulations of the Court, this response and its annex are filed confidentially as they respond to documents of the same classification and contain confidential information. A public redacted version will be filed in due course.

III. APPLICABLE LAW

5. The Defence incorporates by reference its previous submissions with respect to the applicable law regarding the adjudication of Bar Table motions.³

IV. SUBMISSIONS

6. The present core submissions merely provide, through a few salient examples, an outline of the Defence's most common objections across all items found in the different categories identified by the Prosecution. For a comprehensive overview of the Defence's objections to the Prosecution's Application, the Defence respectfully refers the Chamber to confidential Annex 1 of the present Response.

¹ ICC-01/14-01/18-1945-Conf together with confidential Annex.

² ICC-01/14-01/18-631, para. 62 (« Initial Directions »). As per the Initial Directions, the Defence already provided the Prosecution with its view as to the submission of the items sought to be submitted.

³ ICC-01/14-01/18-1278, paras 6-9.

7. The Defence contends that the Prosecution failed to sufficiently substantiate both the relevance and significance of the evidence sought to be submitted (A) and its authenticity and reliability (B), which may result in prejudice to Mr NGAÏSSONA outweighing any *prima facie* probative value to be found in those items (C).

A. Lack of relevance and significance of the items sought to be submitted

8. While sometimes arguably fulfilling the minimal logical standard of relevance for the case, the evidence sought to be submitted bears no significance to the determination of whether Mr NGAÏSSONA was involved in the charged crimes.

a. Creation of the COCORA by individuals who allegedly later founded the Anti-Balaka movement

9. In its Application, the Prosecution submits that among the items relating to the general background of the conflict, some describe the creation of the COCORA by individuals who allegedly later founded the Anti-Balaka.⁴
10. For lack of reference provided by the Prosecution, the Defence assumes that it referred to CAR-OTP-2042-2201.⁵ This item however only suggests that Levy YAKETE was the COCORA's initiator. Yet, Levy YAKETE being the leader of the COCORA has, on its own, limited probative value to showing the origins of the Anti-Balaka movement or its creation.

b. Early mobilisation of the youth and Anti-Balaka attacks prior to 5 December 2013

11. In its Application, the Prosecution submits that items in Categories I and II relate to the early mobilisation of the youth and the Anti-Balaka attacks prior to 5 December 2013.⁶
12. *First*, the Defence notes that, in several instances, the substantiation of the relevance does not match the very content of the excerpt, but portrays a mere interpretation by the Prosecution – misleading mostly, and at times plainly incorrect. When purged of such

⁴ ICC-01/14-01/18-1945-Conf, para. 12.

⁵ Item #1, Category I.

⁶ ICC-01/14-01/18-1945-Conf, paras 12 and 14.

elements of interpretation, a great number of excerpts are irrelevant as proof of a particular proposition.

13. For instance, the Prosecution interprets CAR-OTP-2000-0522⁷ as being relevant to establishing the early efforts and capacity of the youth to organise, as over 1 million people attended a march allegedly organised by Mr NGAÏSSONA. Yet, this item lacks probative value in showing that Mr NGAÏSSONA was the organiser of this peaceful march, as it contains no single express mention of his name or person. For lack of any contextual or corroborative element, it is impossible to infer from this item that Mr NGAÏSSONA was indeed the organiser of this peaceful march. It therefore appears that the Prosecution conducted a subjective interpretation to conveniently fit its own narrative.
14. In addition, and as conceded by the Prosecution itself in its Annex, this item recounts the organisation of a peaceful march. It would therefore be irrational to submit that this item is probative in showing the early mobilisation of the youth in view of conducting attacks targeting the Muslim population.
15. Likewise, in relation to CAR-OTP-2108-0949,⁸ the Prosecution submits that it is relevant in showing that the Anti-Balaka conducted attacks prior to 5 December 2013 as the item contains footage of an alleged Muslim victim of the Anti-Balaka. The Defence notes that the alleged victim was injured in a gunfire exchange that lasted two hours purportedly against the FACA or the Anti-Balaka. Contrary to the Prosecution's contention, the alleged victim is not a Muslim civilian. As can be inferred from the explanations of the interpreter, he actively participated in the hostilities and therefore cannot qualify as a civilian. It follows that this item is of such limited significance that it is unlikely to have any bearing on the Chamber determining the existence of any attacks against civilians.
16. *Second*, the Prosecution seeks to tender items into evidence to establish a material fact whereas the relevance actually lies elsewhere. This is the case with item CAR-OTP-2092-0989.⁹ Analysed in conjunction with CAR-OTP-2092-0986,¹⁰ which provides context, the Prosecution submits that the item is relevant to establishing the early mobilisation of the Anti-Balaka. However, an objective analysis of the audio material shows that Mgr

⁷ Item #4, Category I.

⁸ Item #9, Category II.

⁹ Item #3, Category VII.

¹⁰ Item #3, Category VII.

NZAPALAINGA is only commenting on exactions carried-out by the Seleka. Consequently, the item has no purported relevance to crimes allegedly committed by the Anti-Balaka prior to 5 December 2013, nor does it make Mr NGAÏSSONA's involvement more or less probable.

17. *Third*, the Prosecution often draws very specific conclusions from particularly general statements. For instance, with respect to CAR-OTP-2092-1017,¹¹ the Defence notes that, on 26 September 2013, Mr TIANGAYE addresses the security and humanitarian situation in the Central African Republic ('CAR') in very broad terms. Given the lack of any specific reference to a particular crime or precise identification of the alleged perpetrators, the Defence fails to see how this item could be relevant in showing the early mobilisation of the Anti-Balaka. At the very best, the relevance of this item lies in the underlying facts reported in Mr TIANGAYE's speech, which describes the general security situation in the CAR, but certainly not in establishing the early mobilisation of the youth, nor Mr NGAÏSSONA's involvement in any of the charged crimes.
18. Similarly, the Prosecution grounds the relevance of CAR-OTP-2092-0990¹² on a reporter's unsubstantiated opinion, which is itself based on general observations of the attacks allegedly carried out against the civilians in the surroundings of BOSSANGO in 2013. In particular, the reporter describes in very broad terms attacks conducted by armed men, without however identifying them. He also states that the attacks took place in various villages around BOSSANGO, but without precisely indicating the location of each attack. The reporter finally specifies that the attacks were conducted against the civilian population, while acknowledging himself that the victims were both Christians and Muslims. As such, the mere media coverage of unidentified crimes, victims, or perpetrators does not suffice to demonstrate the early mobilisation of the youth, nor does it establish in any way Mr NGAÏSSONA's involvement in the charged crimes.

¹¹ Item #4, Category II.

¹² Item #5, Category II.

c. Organisation and functioning of the Anti-Balaka and its formalisation after 5 December 2013

19. In its Application, the Prosecution submits that items in several Categories are relevant to establishing the organisation and structure of the Anti-Balaka movement and its formalisation after 5 December 2013.¹³
20. *First*, the Prosecution does not make it clear, either in its Application or in its Annex, which items are actually relevant in this respect. If a handful of items contains footage of alleged Anti-Balaka elements training,¹⁴ or recount alleged meetings involving the Anti-Balaka,¹⁵ the link between these items and Mr NGAÏSSONA's potential involvement in the charged crimes is so tenuous that they will have no bearing on significantly assisting the Chamber to determine any material fact in the case against Mr NGAÏSSONA.
21. For instance, while the Prosecution contends that CAR-OTP-2084-1343¹⁶ is relevant to establishing the structure of the Anti-Balaka movement, the Defence notes that Mr NGAÏSSONA's person cannot be seen, and his name cannot be heard in the video. Without further precision or contextualisation by the Prosecution, there is no link with Mr NGAÏSSONA's alleged involvement therein. Rather, the Defence submits that this item could, at the very best, be relevant to establishing that the Anti-Balaka was not one coherent structure, but disorganised as a movement with different coordinators.
22. *Second*, the Defence notes that, according to the Prosecution's classification in its Annex to the Application, CAR-OTP-2042-1909¹⁷ seems to be the only video to potentially relate to the alleged formalisation of the movement. This item only shows that Mr NGAÏSSONA signed a public statement as general coordinator of the Anti-Balaka, according to which the movement undertakes to put an end to all hostilities and expresses its willingness to engage with President Catherine SAMBA-PANZA for the return of peace. As such, this item only shows that Mr NGAÏSSONA's intent was to foster the return of peace and security in the CAR.

¹³ ICC-01/14-01/18-1945-Conf, paras 14 and 20.

¹⁴ See CAR-OTP-2096-2477 and CAR-OTP-2096-2478 (regarding Mr YEKATOM's group and the YAMWARA School charges); see also CAR-OTP-2035-0273 and CAR-OTP-2012-0411.

¹⁵ See CAR-OTP-2084-1343 and CAR-OTP-2023-2402.

¹⁶ Item #3, Category V.

¹⁷ Item #1, Category VI.

d. Anti-Muslim rhetoric and policy of targeting the Muslim population

23. *First*, besides being misleading,¹⁸ the Prosecution's submissions are sometimes even contradictory, which is apparent with respect to certain items such as CAR-OTP-2000-0522.¹⁹ The Prosecution argues that this item is relevant to establishing the Anti-Balaka's anti-Muslim rhetoric. However, when analysing CAR-OTP-2042-2144, which the Prosecution cites as a complementary document, the Defence notes that Mr NGAÏSSONA is rather calling upon every single Central African, irrespective of their origin or geographical location, to mobilise towards peace and avoid a civil war: "*Cela appelle tous les centrafricains, parce que quelle que soit ton origine, quel que soit là où tu es, tu dois dire que le pays, la RÉPUBLIQUE CENTRAFRICAINE, c'est ton pays, le peuple centrafricain est un et indivisible.*"²⁰
24. *Second*, irrespective of issues of reliability which will be discussed further below, a number of items in the Application lack precision, rendering their relevance and significance doubtful.
25. For instance, regarding item CAR-OTP-2108-1299,²¹ the Peulh's ethnicity of the victim cannot be ascertained, and the perpetrators and circumstances of the event are unknown. As such, without any additional material or further contextualisation, this item cannot be regarded as relevant in showing the Anti-Balaka's policy of targeting Peulh Muslims.
26. Another example can be found in CAR-OTP-2108-1307,²² where it can neither be inferred from the item alone that the victim was a Peulh, nor that she was attacked by Anti-Balaka elements.
27. *Third*, the Defence highlights that a number of items are described by the Prosecution in its Annex to its Application as relevant to establishing the "policy of targeting Muslims" or the "targeting of Muslim civilians".²³ Yet, the images depicted in those items show

¹⁸ See for instance the Defence Position regarding Items #2 in Category II and #14 in Category VII, as exposed in Annex 1.

¹⁹ Item #4, Category I.

²⁰ CAR-OTP-2107-1483, at 1484, lns. 10-12.

²¹ Item #9, Category VII.

²² Item #10, Category VII.

²³ See the Prosecution's 'Relevance' section in its Annex, with respect to Items ##2, 3 and 7, Category III and Items ##16 to 22, Category III.

unidentifiable dead bodies whose religious allegiance cannot be determined, and whose civilian status cannot be ascertained. Such observations can be made with respect to the materials provided by P-0505,²⁴ as well as the series of contextual documents in support of P-2050's proposed evidence.²⁵

28. Regarding the materials listed in the Prosecution's Annex that were provided by P-2050,²⁶ they have been already recognised as formally submitted pursuant to the Chamber's Decision granting the Prosecution Requests for the Formal Submission of P-2050's Prior Recorded Testimony, pursuant to Rule 68(3) of the Rules,²⁷ and following the testimony of P-2050. Therefore, the Prosecution's Application for these materials should be considered moot. However, to the extent that the Prosecution provides arguments as to their relevance and probative value in its Annex, the Defence considers necessary to present its objections to the items in question in Annex 1 to the present Response, in particular on the lack of sufficient context provided for these materials. The Prosecution had the opportunity to contextualise them when P-2050 testified before the Chamber on 14 August 2023. However, instead of reinforcing the Prosecution's allegations that the items would be relevant to establishing the policy of targeting Muslims, it became clear from the examination that P-2050 had not seen any of the actual bodies – which had already been wrapped in body bags –, and therefore cannot confirm the identity of the victims.²⁸ Likewise, it also flows from P-2050's examination that the imam himself did not provide any substantiated information on the perpetrators' identity, and simply referred to a video being broadly circulated on the internet.²⁹

29. *Finally*, the Prosecution submits that items in Category V contain footage of Anti-Balaka elements voicing their anti-Muslim sentiments.³⁰ For lack of any reference provided by the Prosecution, the Defence reviewed all items of the said category and did not encounter any such anti-Muslim sentiment.

²⁴ Items ##2, 3 and 7, Category III.

²⁵ Items ##16 to 22, Category III.

²⁶ *Idem*.

²⁷ 'Second Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules', dated 5 June 2023, ICC-01/14-01/18-1907-Conf, paras 138-147.

²⁸ ICC-01/14-01/18-T-ENG RT, p. 22.

²⁹ ICC-01/14-01/18-T-ENG RT, p. 23, Ins. 4-22. For the video referred to by the imam, see CAR-OTP-2032-0169.

³⁰ ICC-01/14-01/18-1945-Conf, para. 20.

30. While CAR-OTP-2035-0273³¹ contains a statement of an alleged Anti-Balaka element who explained that the youth wished to take revenge for the exactions their families had suffered, it does not however allow to determine who the interviewee was speaking of, and certainly not that he was referring to Muslims. It is only the comments of the reporter which suggest an anti-Muslim sentiment by providing his opinion about how many non-Muslims were conflating Muslims and the Seleka in the CAR. This subjective interpretation by the reporter and uncontextualised statement of the interviewee should be ascribed minimal probative value in establishing any alleged anti-Muslim sentiment.

e. Mr NGAÏSSONA's alleged knowledge and public denial of the crimes

31. In its Application and Annex, the Prosecution argues that the items across various Categories are relevant to establishing Mr NGAÏSSONA's knowledge and public denial of the alleged crimes committed by the Anti-Balaka.

32. *First*, on several occasions, the Prosecution tends to distort the content of an item for it to better fit its narrative, hence impugning the relevance and probative value of the item concerned.

33. For example, the Prosecution argues that CAR-OTP-2042-4071³² shows Mr NGAÏSSONA's knowledge of the crimes committed by Anti-Balaka elements. The Defence notes however that, in this audio, Mr NGAÏSSONA exclusively refers to crimes committed by the Chadian forces. As such, the Defence fails to see how this item could make Mr NGAÏSSONA's knowledge of the charged crimes more or less probable.

34. Similarly, CAR-OTP-2012-0411³³ should not be regarded as significant in establishing any material fact in the case against Mr NGAÏSSONA. The audio only contains statements of Mr KOKATE, and the Prosecution itself highlights in the 'relevance' section of its Annex that this item is relevant in showing Mr KOKATE's knowledge of the crimes, not that of Mr NGAÏSSONA's. As such, and without any substantiation or corroboration, the Defence fails to see the link with any potential involvement of Mr NGAÏSSONA in the crimes charged. What is more, the Prosecution's assertion that Mr

³¹ Item #1, Category V.

³² Item #4, Category VI.

³³ Item #2, Category V.

KOKATE stated that extrajudicial killings should be carried out is inaccurate, or at the very least misleading. On the contrary, Mr KOKATE states that the mission of the movement is now to identify those who commit extra judicial killings and lootings and turn them over to the authorities for them to be tried for their wrongdoings.

35. *Second*, beyond mere distortion of the content of an item, the Prosecution employs the same cherry-picking method that the Defence has deplored from the start of the Prosecution's case, where it sometimes simply ignores any information that does not fit its narrative, especially when it is exculpatory. In particular, regarding CAR-OTP-2023-2447,³⁴ which is allegedly relevant to establishing Mr NGAÏSSONA's intent to commit the crimes, the Defence notes that, on the contrary, the item is relevant in showing that Mr NGAÏSSONA's intent was to implement peace talks, and to effectively do so, identify and punish rogue and violent elements within or claiming to be within the Anti-Balaka movement.
36. *Finally*, the Prosecution submits that items in Category VI are relevant to establishing Mr NGAÏSSONA's knowledge, public denial, and advocacy for the impunity of Anti-Balaka crimes.³⁵ To the contrary, the relevance of these items mainly lies in Mr NGAÏSSONA's advocacy for forgiveness and reconciliation. For instance, an objective analysis of Mr NGAÏSSONA's statement at CAR-OTP-2071-1989³⁶ reveals that in his view, bringing all of those who participated in hostilities to justice might end up in more tragedies and be perceived as injustice and generating revenge. Mr NGAÏSSONA clearly states that the people shall forgive and reconcile in order to move on: "*On peut se dire : « Bon, on pardonne et puis on se réconcilie, on avance »*".³⁷

f. Mr NGAÏSSONA's alleged role within and authority over the Anti-Balaka

³⁴ Item #8, Category VI.

³⁵ ICC-01/14-01/18-1945-Conf, para. 21.

³⁶ Item #13, Category VI.

³⁷ CAR-OTP-2122-9443, at 9444, lns. 30-31.

37. *First*, in its Application, the Prosecution submits that items in Category V contain footage of Anti-Balaka elements expressing their submission to Mr NGAÏSSONA's authority, which would thus be relevant to establishing his authority over the group.³⁸
38. While the Prosecution fails to provide any reference for this submission, the Defence assumes that it relates to CAR-OTP-2042-2926, which is the only item in Category V of the Prosecution's Annex containing arguable indications of Mr NGAÏSSONA's alleged authority over the Anti-Balaka.³⁹ According to the Prosecution's description of the item, Mr NGAÏSSONA would have instructed Mr NAMSIO to investigate the Anti-Balakas' blockade of a road in GOBONGO on the day of the recording – 5 June 2014, which falls well outside of the temporal scope of the charges.
39. The Defence first notes that, according to a proper analysis of the excerpt, and contrary to the Prosecution's description, Mr NAMSIO clearly specifies that the Anti-Balaka were not at the origin of the recounted blockade.
40. The Defence further highlights that the Prosecution makes an excessively broad interpretation of the language recorded in the item. While the Prosecution submits that Mr NGAÏSSONA *instructed* Mr NAMSIO to investigate the blockade incident, an objective analysis of the audio and reading of its transcript however shows that Mr NAMSIO was *asked* by Mr NGAÏSSONA to get down to the site of the incident to enquire about the situation: *“Édouard Patrice Ngaïssona m’a demandé de descendre sur le terrain m’enquérir de la situation”*.⁴⁰ While the verb “instruct” bears an authoritative meaning as someone *requests* something be done, “ask” is much less commanding and is more of an *invitation* to do something. Consequently, the Defence fails to see how this item could be relevant to establishing Mr NGAÏSSONA's authority over the Anti-Balaka. Rather, it is mostly relevant to establishing that Mr NGAÏSSONA's only concern was to enquire whether rogue Anti-Balaka elements were involved in the blockage.
41. *Second*, while the Prosecution submits that the audios and videos contained in Category VI are also relevant for the purpose of showing Mr NGAÏSSONA's authority over the

³⁸ ICC-01/14-01/18-1945-Conf, para. 20.

³⁹ Item #4, Category V.

⁴⁰ CAR-OTP-2118-5626, at 5628, lns 6-7.

Anti-Balaka, their content reveals that the Prosecution's claims are merely a subjective interpretation of such items.

42. Regarding its description of CAR-OTP-2042-0916,⁴¹ the Prosecution is misleading in alleging that the item shows that it was Mr NGAÏSSONA who pushed the youth into rising as one voice to defend the country. An objective analysis of Mr NGAÏSSONA's words reveals that, in fact, it is the circumstances related to the Seleka coup and subsequent violent exactions which led the youth to defend themselves: *"Je pense que le mouvement Anti-Balaka n'est pas né du jour au lendemain. Ce sont différentes circonstances et exactions commises à BANGUI avec l'entrée des Seleka et leur prise de pouvoir qui l'ont fait naître"*.⁴²
43. Additionally, according to the Prosecution's description of the recording, Mr NGAÏSSONA would have talked "about the creation of the Anti-Balaka movement (true Central Africans), since the Seleka were accompanied by foreigners". The Defence however highlights that rather than referring to the Anti-Balaka when mentioning 'true Central Africans', Mr NGAÏSSONA was referring to the Seleka: *"Le mouvement Anti-Balaka a vu le jour parce que des étrangers ont accompagné les Seleka qui étaient de vrais Centrafricains lors de leur entrée dans BANGUI"*.⁴³
44. As such, the Prosecution's description of the item is plainly incorrect, and should therefore be disregarded. The item is relevant to establishing Mr NGAÏSSONA's will to restore peace through dialogue, negotiations and peace talks with the relevant bodies and parties.
45. Likewise, the Prosecution's description of CAR-OTP-2023-2917⁴⁴ is far-reaching. This video was shot during the 29 November 2014 Anti-Balaka Extraordinary General Assembly, about the future of the organisation and its transformation into the *Parti Centrafricain pour l'Unité et le Développement*. The Prosecution submits that this item is relevant to establishing Mr NGAÏSSONA's authority to summon Anti-Balaka leaders to meetings. Yet, the Defence notes that the item merely reveals that Mr NGAÏSSONA

⁴¹ Item #6, Category VI.

⁴² CAR-OTP-2088-0649, at 0651, lns. 36-38.

⁴³ CAR-OTP-2088-0649, at 0651, lns. 40-42.

⁴⁴ Item #9, Category VI.

addressed the audience as general coordinator. As such, it is impossible to infer, neither from this item nor from the other related items,⁴⁵ that it was Mr NGAÏSSONA who summoned the meeting. In addition, this event again falls well outside of the temporal scope of the charges.

B. Lack of sufficient reliability of the items sought to be submitted

46. The Prosecution submits that the audio and video items are reliable and authentic.⁴⁶ Based on the current information, the Defence does not dispute the regularity of the procedure used to obtain these audios and videos but reserves its right to present further objections at any later stage of the proceedings should the Prosecution make further submissions regarding their chain of custody.

47. The Defence however submits that there are several indicators which raise doubts as to the reliability of the items sought to be submitted by the Prosecution.

a. Unsubstantiated dates and/or locations

48. When assessing video and audio materials, trial chambers attach importance to the date and/or location of the recording, as the relevance of the audio or video is dependent on them.⁴⁷

49. *First*, although the Prosecution argues that the reliability and authenticity of the items are clear from self-authenticating indicators, such as the mentioning of dates and locations,⁴⁸ the Defence notes that, in a great deal of instances, the Prosecution fails to adduce sufficient evidence as to the precise date or location of the items.

⁴⁵ Items ##10 to 12, Category VI.

⁴⁶ ICC-01/14-01/18-1945-Conf, para. 26.

⁴⁷ Trial Chamber II, *The Prosecutor v. Germain KATANGA and Mathieu NGUDJOLO CHUI*, “Decision on the Prosecutor’s Bar Table Motions”, ICC-01/04-01/07, para. 24.

⁴⁸ ICC-01/14-01/18-1945-Conf, para. 26.

50. On several occasions, the Prosecution seeks to submit recordings which date is unknown and cannot be inferred from the item itself, without providing verifiable information as to the timeframe or dates of the events being recorded.⁴⁹
51. With regards to CAR-OTP-2100-1914,⁵⁰ the Defence notes that, not only the document date cannot be inferred from the video itself, but the Prosecution specifies in its Annex that the “[m]ain date is taken online” without providing verifiable information about where this open-source video was obtained from, therefore depriving the Defence of any available means to determine the date of the video.
52. As for CAR-OTP-2014-0758,⁵¹ the Defence highlights that not only the date of the recording is unknown and cannot be inferred from the item itself, but the Prosecution also itself concedes that the location suggested by the title of the video – i.e. BODA – is not in line with P-0434’s statement that the rush was shot in BANGUI. Considering the additional circumstance that P-0434 is a withdrawn witness, the Defence is thus deprived of any available means to examine the witness with respect to the authenticity of this video.
53. Similar observations can be made regarding other items,⁵² but for the sake of conciseness, the Defence respectfully refers the Chamber to its observations in Annex 1.
54. *Second*, the Prosecution submits that some contextual documents are provided in order to inform the dates of the items sought to be submitted.⁵³ This is however untrue with respect to CAR-OTP-2092-0986.⁵⁴ This is a press article mentioned by the Prosecution to provide context, especially the date, to several audios and videos sought to be submitted. The Prosecution itself concedes that although the article was published 8 September 2013, the extracted recordings have a separate date: 14 October 2013. It is impossible for the date of the recordings to be posterior to that of the article where they are embedded. As such,

⁴⁹ See for instance, CAR-OTP-2050-0648 (Item #6, Category IV) or CAR-OTP-2035-0273 (Item #1, Category V).

⁵⁰ Item #8, Category III.

⁵¹ Item #1, Category VII.

⁵² See for instance, CAR-OTP-2084-1343 (Item #3, Category V) or CAR-OTP-2106-0684 (Item #2, Category VII).

⁵³ ICC-01/14-01/18-1945-Conf, paras 13, 15, 17, 19, 22 and 24.

⁵⁴ Item #7, Category I; Item #6, Category II; and Item #4, Category VII. Cited as a contextual document with respect to CAR-OTP-2092-0991 (Item #6, Category I), CAR-OTP-2092-0990 (Item #5, Category II) and CAR-OTP-2092-0989 (Item #3, Category VII).

the Defence is not in a position to ascertain whether the date of 14 October 2013 is the actual date of the items sought to be submitted by the Prosecution.

b. Lack of contemporaneousness

55. The Prosecution submits that the items sought to be submitted were broadcast or generated contemporaneously to the charges, before the present proceedings were even contemplated.⁵⁵
56. The Defence notes however that, with respect to several items, the Prosecution fails to demonstrate the information they contain was obtained right or shortly after the events.
57. For instance, regarding CAR-OTP-2126-2478,⁵⁶ the Prosecution submits that it appears from the description of the French version of this documentary that it was produced in May 2016. Similarly, CAR-OTP-2093-0830⁵⁷ and CAR-OTP-2093-0437⁵⁸ are dated 29 October 2018. As such these items are not contemporaneous to the charges and fall well outside the Relevant Period.

c. Unverifiable source

58. In its Application, the Prosecution submits that some of the items sought to be submitted were downloaded from the websites of renowned International NGOs and news outlets.⁵⁹
59. However, this proposition is not entirely true regarding CAR-OTP-2084-1343.⁶⁰ Although the Defence takes no position as to the characterisation of Human Rights Watch as a renowned NGO, it however incorporates by reference its previous submissions with respect to the risk of lack of factual substantiation of reports issued by non-governmental organisations.⁶¹ The Defence further highlights that, regarding CAR-OTP-2084-1343, there is no indication as to which video or film from Human Rights Watch the excerpt was taken out from. As such, the source of the video is unverifiable, and the reliability of the item is therefore impugned.

⁵⁵ ICC-01/14-01/18-1945-Conf, para. 26.

⁵⁶ Item #4, Category IV.

⁵⁷ Item #7, Category IV.

⁵⁸ Item #8, Category IV.

⁵⁹ ICC-01/14-01/18-1945-Conf, para. 26.

⁶⁰ Item #3, Category V.

⁶¹ ICC-01/14-01/18-1942-Conf, para. 42.

d. Opinion-evidence evidence

60. The Defence notes that a considerable proportion of the evidence sought to be submitted by the Prosecution is hearsay and opinion-based evidence or, when the source is identified, allegations for which information regarding the reliability and credibility of the original source is lacking.
61. For instance, according to the Prosecution's description of CAR-OTP-2107-1196,⁶² the item includes an interview of Anti-Balaka elements telling the journalist that they have been chasing Muslims away. The Defence notes however that the words of the Anti-Balaka elements that the journalist says he has interviewed are not directly recorded, but are only recounted by the journalist himself. As such, the item consists of second-hand hearsay. The Defence additionally underscores the impact of editing in news media, especially in that, as it is clear from P-2050's in-court testimony, the words of a journalist or reporter may be changed, shortened or compressed in such a way that they may, ultimately, no longer reflect the facts.⁶³
62. Similar observations can be made regarding CAR-OTP-2042-4615.⁶⁴ The Prosecution submits that this item contains reports on violence and killings perpetrated by both the Seleka and the Anti-Balaka in BAMBARI. The Defence notes however that the item solely contains second-hand information evidence about the recounted attacks as the journalist bases his news report on a declaration published by the President of the *Union pour le renouveau centrafricain*.
63. Likewise, in CAR-OTP-2055-2611,⁶⁵ the reporters express a strong opinion against the Anti-Balaka and use terms marked with incriminating connotations thereby demonstrating the bias of the reporters. The descriptions include opinions such as : “*la région est dévastée et gangrennée (sic) par la vengeance des Anti-Balaka*”; “*il y a comme une sorte de massacre programmé qui est en cours*” or “*une vraie volonté d’exterminer*”. Thus, unless the Prosecution provides the Chamber with supporting evidence attesting to the objectivity of the reporters, the reliability of the item is impugned.

⁶² Item #14, Category III.

⁶³ ICC-01/14-01/18-T-ENG RT, p. 55, lns. 1-10.

⁶⁴ Item #7, Category VI.

⁶⁵ Item #15, Category VII.

e. Impossibility for the Defence to authenticate documents through examination

64. The Prosecution submits in its Application that several audios and videos collected from individual sources – referred to as P-0434, P-0519, P-0568, P-1597, and P-2416 –, provided a statement to the Prosecution in which they explained the provenance of each audio/video, and/or identified individuals featuring therein.⁶⁶
65. On several occasions however, the Defence notes that the items sought to be submitted by the Prosecution were adduced by withdrawn witnesses.⁶⁷ Consequently, the Defence will never be put in a position to examine the witnesses on the authenticity of the items, and the Chamber is thus deprived of any available means to assess their reliability.
66. Regarding more specifically the evidence adduced by withdrawn witness P-0519, these materials were not even recorded by him: in his statement, P-0519 explains that the image and video files were provided to him by [REDACTED], who copied them on his laptop from a SD card. As such, there is no way for the Chamber to determine who recorded the videos, nor ascertain the chain of custody of the items, aside from solely relying on the Prosecution's word.
67. Similar observations can be made regarding the items adduced by P-1597 and P-2416, who are respectively a Rule 77 witness and a witness whose statement has been introduced under Rule 68(2)(b) of the Rules.⁶⁸

C. Prejudice to the Defence of Mr NGAÏSSONA

68. Reliance on certain documents in respect to core aspects of the charges or highly contentious issues, such as Mr NGAÏSSONA's alleged knowledge and public denial of the alleged crimes of the Anti-Balaka, may result in prejudice to Mr NGAÏSSONA outweighing any *prima facie* probative value to be found in those items.
69. This is especially the case when such probative value is limited by reason of the item in question being vague, unclear or containing merely opinion evidence, unsubstantiated

⁶⁶ ICC-01/14-01/18-1945-Conf, para. 31.

⁶⁷ Item #1, Category VII (P-0434); Items ##29 to 63, and 69 and 71, Category VII (P-0519); and Item #1, Category V (P-0568).

⁶⁸ ICC-01/14-01/18-1833-Conf.

allegations rather than an account of events having actually occurred, or the items consist of anonymous hearsay.

70. The Defence respectfully requests the Chamber to consider this important safeguard when assessing the admissibility of the items sought to be submitted.

V. RELIEF SOUGHT

71. In light of the above, the Defence respectfully requests the Chamber 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 judgment.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 4 October 2023

At The Hague, the Netherlands.