

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: *ICC-01/14-01/18*

Date: **4 October 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public with Confidential Annex A

Public Redacted Version of ‘Defence Response to “Prosecution’s Fifteenth submission of miscellaneous items of evidence via the “bar table” (ICC-01/14-01/18-2058), 7 September 2023’

Source: Defence of Patrice-Edouard Ngaißsona

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 for Mr Patrice-Édouard Ngaïssona (the “Defence”) hereby responds to the “Prosecution’s Fifteenth submission of miscellaneous items of evidence via the “bar table”” (the Request).¹
2. Additionally, the Defence provides in confidential Annex A to the present response (the “Response”) its objections to and observations on each of the 36 miscellaneous items of evidence (the “Items”), which the Office of the Prosecutor (the “Prosecution”) seeks to submit into the record of the case.
3. The Defence makes these objections and observations pursuant to Rule 64(1) of the Rules of Procedure and Evidence (the “Rules”), and to assist the Chamber in its holistic assessment of the evidence during the deliberation of the judgment.
4. The Prosecution fails to adequately establish either the relevance, authenticity, and/or probative value for items identified below. For the remainder, the Defence defers to the Chamber’s assessment and the observations that will be made by the Defence team of Mr Yekatom.

II. CONFIDENTIALITY

5. Pursuant to Regulation 23*bis* of the Regulations of the Court, this Response along with its Annex A are filed as “Confidential”, as they concern material not available to the public. A public redacted version of this request will be filed as soon as practicable.

III. APPLICABLE LAW

¹ ICC-01/14-01/18-2058.

6. The Defence incorporates by reference its previous submissions with respect to the applicable law regarding the adjudication of Bar Table motions.²

IV. SUBMISSIONS

i. Human Rights Watch Reports at Item 1

7. The Prosecution seeks the submission of two articles from a collection of articles gathered in a Human Rights Watch reports (together the “Reports”).
8. The Reports consist of a press release and a media article that have not been created for the purpose of criminal proceedings. International jurisprudence has well established that NGO reports are, most of the time, not intended for criminal proceedings and therefore do not adopt an adequate methodology to be considered reliable in those type of proceedings. In the *Bemba* case, the Trial Chamber ruled, in relation to diverse NGO reports, including some reports issued by the FIDH and Human Right Watch, that given “their provenance and reliability is entirely uninvestigated and untested, these materials carry little, if any, evidential weight.”³
9. Furthermore, as held by the Trial Chamber in the *Ntaganda* case, “the probative value of information from reports [...] from various UN and NGO sources is often too low to serve as the only basis for a factual finding” and as such these documents should serve mainly as “corroboration for other credible and reliable evidence”.⁴ Yet, the Prosecution simply describes the content of the Reports it seeks to submit instead of identifying the evidence it intends to corroborate with the Reports. This effectively shifts the burden onto the Defence to identify how the Reports are relevant to the case and what submitted evidence they would

² ICC-01/14-01/18-1278, paras 6-9.

³ *The Prosecutor v Jean-Pierre Bemba*, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 255. *See also*, ICTY, *Prosecutor v. Milutinovic et al.*, ‘Decision on Evidence Tendered through Sandra Mitchell and Frederick Abrahams’, para. 21.

⁴ *The Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, 8 July 2019, ft. 132.

corroborate. More concerning, allowing the submission of the Reports would give a false sense of corroboration. Indeed, the Reports not only have the same sources of information (Peter BOUCKAERT) but convey similar and/or identical information on :

- the number of Muslims in BAORO in March 2014;⁵
- the number of Muslims sheltered in the church in BOALI in March 2014;⁶
- the number of Muslims in BODA in March 2014;⁷
- the number of Muslims in MBAÏKI before the conflict;⁸
- and the number of Muslims in YALOKÉ before they fled to CHAD;⁹
- the fact that Muslims with disabilities were left behind by their fellowmen;¹⁰
- the death of Djido SALEH;¹¹
- the experience of a girl named Halima;¹² and
- The experience of a Muslim called Al-HaJ Abdou Kadil.

Although there is consistency in the information provided, it does not amount to corroboration when the source of the information is the same.

10. As such, not only these two reports together give a false sense of corroboration, but granting the submission of both would not further assist the Chamber in its truth finding mission, as they are similar in content and have identical sources of information. Therefore, the Defence opposes the submission of the Reports as they bear little indicia of reliability, and lack probative value as the Prosecution fails to substantiate their corroborative value. Should the Chamber grant the submission

⁵ CAR-OTP-2001-2308, at 2316; CAR-OTP-2001-2308, at 2330.

⁶ CAR-OTP-2001-2308, at 2316; CAR-OTP-2001-2308, at 2330.

⁷ CAR-OTP-2001-2308, at 2316; CAR-OTP-2001-2308, at 2331.

⁸ CAR-OTP-2001-2308, at 2316; CAR-OTP-2001-2308, at 2331.

⁹ CAR-OTP-2001-2308, at 2316; CAR-OTP-2001-2308, at 2330.

¹⁰ CAR-OTP-2001-2308, at 2315 and 2316; CAR-OTP-2001-2308, at 2330.

¹¹ CAR-OTP-2001-2308, at 2316; CAR-OTP-2001-2308, at 2331.

¹² CAR-OTP-2001-2308, at 2315 ; CAR-OTP-2001-2308, at 2330.

of either one of the reports, the Defence submits that the other automatically loses its significance and no evidentiary weight should be afforded to it.

ii. Intelligence Bulletins at Item 2

11. *First*, the Intelligence Bulletins are not reliable. Several witnesses[REDACTED], testified that these intelligence reports lack reliability as they could have been written by anyone with ulterior motive, whether financial or political. Indeed, P-0291 testified that “the vast majority” of intelligence reports were not accurate and that “not only in 2013, [but] even today people falsify reports so as to benefit from funds” and submit them just “to prove that they have done the work”.¹³ P-2625 told the Chamber that [REDACTED] P-0876 testified that [REDACTED]. Yet, none of these Bulletins disclose any source. Without proper source, the information contained in those Bulletins cannot be verified and might simply be lies and rumors written by any individual to settle personal grudges. As such, and contrary to the Prosecution’s assertion, these Intelligence Bulletins do not assist the Chamber in its truth finding mission. Therefore, the Defence requests the Chamber to disregard these Intelligence Bulletins in the course of its holistic assessment of the evidence as they lack reliability, credibility, and overall probative value.

12. *Second*, Intelligence Bulletins reporting on P-0306’s alleged criminal activities could have been put to P-0306’s himself when he came to testify before the Chamber. The bundle of so-called Intelligence Bulletins was disclosed in March 2019 and [REDACTED]. The Prosecution had ample time to identify the specific Bulletins on P-0306’s alleged criminal activities and put those to him in an adversarial setting. The Bulletins in themselves constitute at best one version of the events. The Prosecution’s practice to submit these Bulletins *via* the Request, without having given P-0306 the opportunity to comment on them during his testimony, does not assist the Chamber in its truth finding mission, contrary to the Prosecution’s

¹³ ICC-01/14-01/18-T-053-ENG CT WT., p. 15, l. 2 – 10.

assertions. As a Bar Table application is not a remedy to a missed opportunity, the Defence requests the Chamber to disregard these Intelligence Bulletins during its holistic assessment of the evidence.

13. *Third*, contrary to the Prosecution's arguments on the Intelligence Bulletins' relevance, the Defence contends that P-0306's alleged criminal conducts do not attest to the Anti-Balaka's alleged criminality as several witnesses testified that P-0306 [REDACTED]. For instance, P-0808 testified that [REDACTED]. P-0889 added that [REDACTED]. Therefore, these Intelligence Bulletins are not relevant to the Anti-Balaka's alleged criminality and, as such, should not be relied upon by the Chamber in its holistic assessment of the evidence.

14. *Finally*, the intelligence bulletin reporting on the creation of the PCUD lacks detail and significance. The Defence respectfully invites the Chamber to rely on videos of Mr Ngaïssona announcing the creation of the PCUD (and their corresponding transcripts) that are already recognized as formally submitted by the Chamber.¹⁴ Although the rule of best-evidence does not apply before the International Criminal Court ('Court'), the Defence respectfully submits that the truth-finding mission necessarily implies that live-recordings of Mr Ngaïssona's words hold a higher probative value overall compared to a summary of Mr Ngaïssona's words inserted in a bundle of intelligence reports that lacks overall reliability and credibility. The latter therefore lacks significance. In any event, the creation of the PCUD falls outside of the temporal scope of the charges. The Defence requests that this Bulletin be not submitted so as to avoid the unnecessary overflowing of the case record.

iii. Media Articles

¹⁴ CAR-OTP-2023-2920 and CAR-OTP-2023-2935, recognised as formally submitted via email Decision on Submitted Materials for P-0992 (09 June 2022) and email Decision on Submitted Materials for P-1193 (01 November 2022) respectively.

15. The Prosecution seeks the submission of 7 media articles and 2 videos (accompanied with transcripts) from the bar table.¹⁵ Media related material has generally been rejected from the introduction through the bar table in international criminal proceedings on the basis of their lack of reliability and probative value without the testimony of a witness that can testify to the accuracy of the content of the material.¹⁶

16. The Trial Chamber in the *Ntaganda* case held that :

“media and press articles, absent any witnesses testifying to the accuracy of the information contained therein, have ‘limited probative value’ where they lack information on: the news outlets the articles are supposed to have appeared in; the background and qualifications of their authors; and the sources relied upon”.¹⁷

17. The Trial Chamber in the *Katanga* case has ruled in a similar manner and denied the admission of media articles on this basis.¹⁸

18. In relation to items 26 to 31, the Prosecution fails to provide information concerning the background and qualifications of their authors and more importantly the sources relied upon. This also applies for items 32-33 and 35-36.

19. Items 26 to 31 are authored by witness P-2432. The Prosecution sought the admission of [REDACTED] prior recorded statement and its associated material

¹⁵ CAR-OTP-2079-1163, CAR-OTP-2117-0667, CAR-OTP-2117-0670, CAR-OTP-2117-0678, CAR-OTP-2117-0681, CAR-OTP-2117-0687, CAR-OTP-2117-0698, CAR-OTP-2120-0308, and CAR-OTP-2120-0312.

¹⁶ ICTY, *Karadžić*, ‘Decision on Second motion for Admission of Evidence from Bar Table: General Michael Rose’, para. 10, and ‘Decision on Accused’s Bar Table Motion (Karadžić Statements)’, para. 10; *Stanišić and Župljanin*, ‘Decision Granting in Part the Prosecution’s Bar Table Motion and Granting the Prosecution’s Supplemental Bar Table motion’, para. 20, and ‘Decision Denying Prosecution’s Motion to Admit into Evidence MFI P171 and P911’, para. 17.

¹⁷ *The Prosecutor v Bosco Ntaganda*, Public redacted version of ‘Decision on Defence request for admission of evidence from the bar table’, 31 January 2018, ICC-01/04-02/06-2201-Red, para. 45.

¹⁸ *The Prosecutor v Germain Katanga*, Decision on the Prosecution’s Bar Table Motions, 19 December 2010, ICC-01/04-01/07-2635, para. 31.

via Rule 68(2)(b) of the Rules; a request that was rejected by the Chamber.¹⁹ The Chamber mostly based its decision on the fact [REDACTED]. The Defence had previously argued that P-2432's prior recorded testimony could not be admitted in full pursuant to Rule 68(2) as the witness was testifying on the acts and conducts of Mr Ngaïssona.²⁰ The Prosecution closed the presentation of its case on 29 August 2023 without having heard that witness or presenting any other application to admit her prior recorded statement on the record.

20. In light of this rejection, the Prosecution fails to present any background information on the author of the items and additional information on the sources that have been cited in the articles. Having the name of the sources does not necessarily confirm the methodology that was used or the degree of hearsay through which the information was obtained. This lack of detail directly impugns the probative value of the material the Prosecution seek to submit on the record without calling the witness that produced the said material. The witness also commented on some of the articles submitted by the Prosecution, providing background information on the interviews that led to [REDACTED] articles.²¹ However, the prior recorded statement of the witness is not in evidence, and the information on the reliability of the sources is not available to the Court to verify the probative value of the material and the eventual weight to give to those items.

21. If the absence of a witness authenticating the document is not a ground to reject the material in and of itself, the material sought to be submitted must be authenticated, or self-authenticated if no witnesses came to authenticate the content.

22. Also, in relation to Items 26-31, the URL link is not entirely visible, preventing any online verification about the authenticity of the article and more importantly its

¹⁹ ICC-01/14-01/18-1907-Conf, para 162.

²⁰ ICC-01/14-01/18-887-Red, para. 16.

²¹ CAR-OTP-2117-0645-R01.

content. It is impossible to verify if the content is currently online. The articles are not signed but only bear the mention AFP. Although the material contains initials with a date and a mention “lu le”, it does not have sufficient reliability and does not make the document self-authenticated, as anyone could have written on these documents.

23. In addition, Items 28 and 29 are citing [REDACTED]. The Prosecution is therefore trying to introduce evidence through the back door. Without any means for the Defence to examine the witness to establish the circumstances in which the interviews were conducted, if any notes of those interviews exists and can be inspected, or if the articles rely on hearsay for which the source of the hearsay information is too remote to warrant any evidential weight, the Defence is unable to challenge the information contained in the articles and the Court is unable to verify the reliability of the information. In these circumstances, the prejudicial effect blanky eclipses the probative value, if any probative value were to be given to these Items.

24. In relation to Items 35 and 36, and the corresponding transcripts which are found in Items 32 and 33, the Prosecution also fails to provide any background information on the author and any context of the video footage. The videos were formally submitted via Rule 68, and introduced in evidence pursuant to Rule 68(3) of the Rules.²² However, [REDACTED], as announced in an email from the Prosecution and she never testified in these proceedings.²³

25. Witness P-2587 commented in [REDACTED] prior recorded statement on the video contained in Item 35,²⁴ but this prior recorded statement is not part of the evidence on the record. Therefore, there is no information provided about the context for the video on the record at the moment. Therefore, the probative value

²² ICC-01/14-01/18-1661-Conf, p. 34.

²³ Email from OTP to Trial Chamber V and the parties on 1 June 2023, at 17:27.

²⁴ CAR-OTP-2120-0211-R02.

of this short footage is *de minimus*. No sources are named or identified. This video is very general and does not provide any context.

26. As to the authenticity of the items, the videos are not self-authenticated, and the Defence has no mean to verify the process of editing for example. Without the witness testifying to authenticate the videos, the requirement for authenticity is not met.
27. Once more, the prejudicial effect, deriving from the impossibility of the Defence to challenge or examine the author of those Items, outweighs the probative value of the Items if any were to be given to them.
28. In relation to item 22, the Prosecution also fails to establish any probative value, on the basis of the argument made above. Not only does the Prosecution fail to provide any background information concerning the author of the article, taking into consideration that the article is not even signed, but also does not provide information on the sources relied upon.
29. In addition, allegations reported by different media outlets whose source is the same does not make the evidence more truthful and does not increase the probative value. The same source reported by the same journalist in different media outlet also does not amount to corroboration. To the contrary, as noted by Judge Henderson in his reasons in the *Gbagbo* case, to be corroborated, evidence must “tend[s] to confirm the truth or accuracy of certain other evidence by supporting it in some material particular” and “must itself be relevant and credible, and it must come from a source independent of any evidence which is to

be supported by it”.²⁵ As mentioned above, being corroborative of other evidence on the record is not in itself sufficient to be considered probative.²⁶

30. The Defence respectfully requests the Chamber to disregard the aforementioned items during its holistic assessment, as these items do not bear sufficient indicia of reliability. Their submission results solely in flooding the case record with simulacra of corroborated information.

iv. Diplomatic passport no. D00000023 at item 24

31. This item alone does not provide a full picture of Mr Ngaïssona’s travels [REDACTED]. Indeed, [REDACTED], despite the Defence’s best effort to obtain it [REDACTED].²⁷ As such, and contrary to the Prosecution’s assertions, Mr Ngaïssona’s whereabouts cannot be ascertained on the sole basis [REDACTED].

32. As such, the item alone does not assist the Chamber in its truth finding mission as it constitutes partial evidence of Mr Ngaïssona’s travels and whereabouts during the relevant period. Reliance on this item as a standalone element by the Chamber in its holistic assessment of the evidence should therefore be limited.

V. CONCLUSION

33. Reliance on certain items in respect to core aspects of the charges or highly contentious issues, such as Mr Ngaïssona’s alleged knowledge of the alleged Anti-Balaka criminality, may result in prejudice to Mr Ngaïssona, outweighing any *prima facie* probative value to be found in those items.

²⁵ *The Prosecutor v Laurent Gbagbo and Blé Goudé*, Public Redacted Version of Reasons of Judge Geoffrey Henderson, ICC-02/11-01/15-1263-AnxB-Red, para. 46.

²⁶ *The Prosecutor v Germain Katanga*, Decision on the Prosecution’s Bar Table Motions, 19 December 2010, ICC-01/04-01/07-2635, para. 13.

²⁷ ICC-01/14-01/18-1159-Conf.

34. 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 allegations rather than an account of events having actually occurred, or the items consist of anonymous hearsay. The Defence respectfully requests the Chamber to consider this important safeguard when assessing the admissibility of the items sought to be submitted.

VI. RELIEF SOUGHT

The Defence respectfully requests the Chamber to:

TAKE INTO ACCOUNT the Defence's objections and observations in the present Response and its Annex A when the Chamber conducts its holistic assessment of the evidence during the deliberation of the judgement.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 4 October 2023

At The Hague, the Netherlands.