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**International
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Date: **30 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
NGAÏSSONA***

Public with Confidential Annex 1

Public Redacted Version of ‘Defence Response to the “Prosecution’s Twelfth Application for Submission of Photographic Evidence from the Bar Table” ICC-01/14-01/18-2032-Conf’, (ICC-01/14-01/18-2129-Conf), filed 6 November 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 Twelfth Application for Submission of Photographic Evidence from the Bar Table" ('Application').¹
2. Further, the Defence provides in confidential Annex 1 to the present response ('Response') its item-by-item objections to the 65 photographs that the Prosecution seeks to submit into the record of the case.
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 23*bis*(1) of the Regulations of the Court, this response and its Annex 1 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 an outline of the Defence's most salient objections. For a comprehensive overview of the Defence's observations on

¹ ICC-01/14-01/18-2032-Conf together with confidential Annex.

² ICC-01/14-01/18-631, para. 62 ('Initial Directions').

³ ICC-01/14-01/18-1278, paras 6-9.

the Prosecution's Application, the Defence respectfully refers the Chamber to confidential Annex 1 to the Response.

7. The Defence objections pertain to: (1) the procedural bars, which prevent the submission of two documents *via* bar table, namely CAR-OTP-2119-0033 and CAR-OTP-2117-0727 and (2) objections with respect to relevance and probative value of the items, which the Defence requests the Chamber to take into account as part of its holistic assessment of the evidence during its Article 74 deliberations.

A. The Defence's objections to the submission of CAR-OTP-2119-0033 and CAR-OTP-2117-0727 are not moot

8. In its Application, the Prosecution submits that it is no longer seeking the submission of documents CAR-OTP-2119-0033 and CAR-OTP-2117-0727, which it characterizes as contextual documents providing information about Witness P-0557's photographs.⁴ Thus, the Prosecution argues that the Defence's objections to the two items are moot.⁵ The Defence appreciates that the Prosecution is no longer seeking to submit the contextual documents. However, the Defence's objections are not moot since in the Annex to the Application, the Prosecution makes submissions on these two allegedly contextual documents and asks the Chamber to refer to them.⁶ Given the Prosecution has decided not to submit these documents, the Prosecution should not have referred to them in its Annex to the Application. They are not, and will not be part of the record of the case. Thus, the Defence's objections still stand.
9. The Prosecution chose not to call witness P-0557 as a witness to the proceedings, whereas it had ample time, specifically from October 2019, to take a statement from

⁴ Application, para. 10.

⁵ Ibid.

⁶ Annex to Application, items submitted under "I. Crimes committed by the Anti-Balaka in BANGUI in the aftermath of the 5 December 2013 attack" and "II. Organisation of [REDACTED]"

P-0557 and request that it be introduced under Rule 68.⁷ Now, it requests the Chamber to take into account both : (1) a Prosecution investigation report of the Prosecution's meeting with P-0557 during which he provided technical information regarding the photographs he gave to the Prosecution and information related to the locations where those photographs were taken⁸, and (2) a certificate certifying that [REDACTED] contained in the hard drive he gave to the Prosecution.⁹

10. The Defence submits that these two items, taken together constitute prior recorded testimony, and therefore cannot be taken into consideration as part of the Chamber's assessment of the Application without such an action violating the requirements of Rule 68 of the Rules. In "the Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules"¹⁰, Trial Chamber IX followed the Court's settled case-law and determined that "a statement can be considered a prior recorded testimony if the person when providing the statement understands that 'he or she is providing information which may be relied upon in the context of legal proceedings', namely when he or she is 'questioned in the capacity as [a] witness [] in the context of or in anticipation of legal proceedings.'"¹¹

11. The Prosecution investigation report coupled with the statement signed by P-0557¹² indicate that P-0557 knew that he was providing the photographs and giving information about them in the context of the proceedings that are currently taking place before this Chamber. The investigation report specifically indicates that the Prosecution investigators discussed P-0557's cooperation in the Prosecution's

⁷ CAR-OTP-2119-0033 (indicating that the Prosecution met with P-0557 in [REDACTED]).

⁸ Ibid.

⁹ CAR-OTP-2117-0727.

¹⁰ ICC-02/04-01/15-596-Red.

¹¹ Ibid., para. 9.

¹² CAR-OTP-2119-0033; CAR-OTP-2117-0727.¹³ CAR-OTP-2119-0033.

investigation, which means that P-0557 was fully aware that [REDACTED] and his statements regarding it would be used in the present proceedings.¹³ Therefore, the Chamber should not even refer to the investigation report¹⁴ and the certification signed by P-0557¹⁵ stating that [REDACTED] when considering the relevance and probative value of the photographs taken by P-0557.

B. The lack of relevance or sufficient reliability of the 65 photographs the Prosecution seeks to submit

12. The Prosecution argues that the items it seeks to submit are relevant to the following material issues: (1) the Anti-Balaka allegedly targeting Muslim civilians during, and after the 5 December 2013 attack on Bangui; (2) the violence on the Muslim civilian population by the Anti-Balaka, which allegedly continued throughout western CAR after the 5 December attack; (3) the members of the Anti-Balaka's leadership who in July 2014 represented the group at the Brazzaville Forum; and (4) the organisation of the Anti-Balaka group which was allegedly led by Mr Yekatom [REDACTED].¹⁶ In the present response, the Defence will not address the photographs allegedly portraying the Anti-Balaka leadership at the Brazzaville forum, and further defers to the Yekatom Defence regarding the photographs allegedly relating to Mr Yekatom's group. The Defence limits these submissions to the above-mentioned material issues (1) and (2).

13. The Prosecution's submissions that certain photographs are relevant and probative of the Muslim victims of the Anti-Balaka's alleged attack on 5 December 2013 are not sufficiently substantiated. The two photographs on this material issue that the Prosecution seeks to submit depict dead bodies, which cannot be readily identified

¹³ CAR-OTP-2119-0033.

¹⁴ Ibid.

¹⁵ CAR-OTP-2117-0727.

¹⁶ Application, para. 12.

since they [REDACTED].¹⁷ Therefore, contrary to the Prosecution's submissions, the photographs are not probative of the identity of the perpetrators as Anti-Balaka or another group since the perpetrators are not pictured. Given the bodies are covered it is also impossible to know: (1) the religious affiliation of the victims whose bodies are shown; and (2) their status as either civilians or persons taking part in hostilities. More generally, even assuming [REDACTED] on 5 December 2013, the pictures would have been taken after the attack and so the identity of the perpetrators and victims is not ascertainable from the photographs.¹⁸ Therefore, the Chamber should assign minimum probative value to these photographs because of these limitations.

14. Similarly, the items are either not relevant or not probative of the violence on the Muslim civilian population by the Anti-Balaka, which allegedly continued throughout western CAR after the 5 December attack. For example, the photographs taken by [REDACTED],¹⁹ which is approximately 7 months outside the temporal scope of the Relevant Period,²⁰ and over a year after the last charged crime. With the exception of the [REDACTED],²¹ P-2324 [REDACTED] provides no evidence as to circumstances of the destruction of certain areas, and nothing in his statement suggests that he would have eye-witnessed the destruction during the Relevant Period.²² Given these shortcomings of P-2324's statement in showing that these photographs do in fact relate to alleged events taking place during the

¹⁷ CAR-OTP-2117-1190; CAR-OTP-2117-1198.

¹⁸ However, the Defence requests that the Chamber not consider P-0557's certification, namely CAR-OTP-2117-0727 when making its determinations [REDACTED].

¹⁹ See e.g. CAR-OTP-2100-2068; CAR-OTP-2100-2069; CAR-OTP-2100-2070; CAR-OTP-2100-2074; CAR-OTP-2100-2075. The Defence's comprehensive objections with respect to P-2324 [REDACTED].

²⁰ The Relevant Period in CAR spans from December 2013 to December 2014. ICC-01/14-01/18-89, para. 2.

²¹ See e.g. CAR-OTP-2100-2071; CAR-OTP-2100-2072.

²² See e.g. CAR-OTP-2100-2068; CAR-OTP-2100-2069; CAR-OTP-2100-2070. The Defence's comprehensive objections with respect to [REDACTED] photographs can be found in the annex to the present submissions.

Relevant Period, these photographs should not be taken into account by the Chamber because of their lack of relevance to the present proceedings.

15. The Prosecution also seeks to submit numerous photographs taken by witness [REDACTED], which were taken in [REDACTED].²³ While there was no requirement that the Prosecution introduce these photographs through Witness [REDACTED], in choosing to submit them through a bar table application, the Prosecution has left unanswered major gaps in its evidence, such that the photographs cannot be found to be probative of the Anti-Balaka targeting and killing Muslims in [REDACTED] in January of 2014.

16. First, it is impossible to infer from the items themselves that the victims pictured in the photographs were Muslim or any other religious affiliation. More specifically, [REDACTED] explained in his statement that he could only “identify *some* of the people in the photographs”, without however specifying which of them he can identify and which he cannot.²⁴ Additionally, he added that some of the victims had their bodies burned to the point where they would not be identifiable to anyone.²⁵ The witness’ identification of the victims as Muslims was based on the circumstance that “they were dressed in longue robes”.²⁶ This basis for asserting the Muslim affiliation of the victims is unreliable since wearing long robes is not exclusive to one religion.

17. Second, for items allegedly depicting Anti-Balaka fighters,²⁷ it is impossible to ascertain whether the persons depicted in the photograph took part in the events

²³ CAR-OTP-2083-1203; CAR-OTP-2083-1227; OTP-2083-1373; CAR-OTP-2083-1385; CAR-OTP-2083-1469; CAR-OTP-2083-1481; CAR-OTP-2083-1501; CAR-OTP-2083-1505; CAR-OTP-2083-1513; OTP-2083-1525; CAR-OTP-2083-154; CAR-OTP-2083-1581; OTP-2083-1609; CAR-OTP-2083-1613; CAR-OTP-2083-1625; CAR-OTP-2083-1629; CAR-OTP-2083-1653; CAR-OTP-2083-1721; CAR-OTP-2083-1753; CAR-OTP-2083-1969; CAR-OTP-2083-1977; CAR-OTP-2100-2068.

²⁴ See CAR-OTP-2108-0465, at 0503, para. 209

²⁵ See CAR-OTP-2108-0465, at 0483, paras 111-112.

²⁶ CAR-OTP-2108-0465, at 0483, para. 111

²⁷ CAR-OTP-2083-1469; CAR-OTP-2083-1581.

in [REDACTED]. [REDACTED] statement does not indicate whether [REDACTED] got this information directly from the men [REDACTED], or whether he got the information from the press or hearsay. Further, it is impossible to infer from the items themselves whether these individuals were Anti-Balaka members. [REDACTED] did not assert in his statement that the individuals were members of the Anti-Balaka. [REDACTED] stated that in [REDACTED].²⁸ In [REDACTED] statement, it appears the Prosecution did not question [REDACTED] on which individuals were Anti-Balaka and which ones were local opportunists, and because Witness P-2205's testimony has been submitted under Rule 68(2)(b), Mr Ngaïssona has been deprived of the opportunity to examine witness [REDACTED]'s on the distinction he made between local opportunists and Anti-Balaka members. Since the Prosecution did not ask Witness [REDACTED] to provide an item-by-item description in which he would indicate which individuals are opportunists and which are Anti-Balaka members, and the basis of his knowledge, the Chamber should accord no probative value to these items.

18. Third, the Prosecution submits that certain photographs of wounds show that the individual was likely cut by a machete or other sharp instrument.²⁹ However, the photographs have limited probative value in establishing this allegation. From the four corners of the photographs, it is impossible to ascertain whether a machete could be responsible for the wounds. In his statement, [REDACTED] did not provide an item-by-item explanation of the wounds and whether they came from machetes or another object and on what basis he could make such a statement. Therefore, the Chamber should find the photographs of wounds have minimal probative value.

19. The Defence submits that the aforementioned items the Prosecution seeks to submit either do not have *prima facie* relevance or their probative value is limited

²⁸ CAR-OTP-2108-0465, at 0503, para. 209.

²⁹ CAR-OTP-2083-1625; CAR-OTP-2083-1629.

and incapable of supporting the allegations the Prosecution submits are proven by them.

V. RELIEF SOUGHT

20. For the foregoing reasons, the Defence respectfully requests the Chamber to:

-DISREGARD the Prosecution's references in the Annex of the Application to documents CAR-OTP-2119-0033 and CAR-OTP-2117-0727 since these documents qualify as prior recorded testimony and cannot be submitted *via* bar table;

-TAKE INTO ACCOUNT the Defence's objections contained in the Response and its confidential Annex 1 when the Chamber conducts its holistic assessment of the evidence during the deliberation of the judgment.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 30 October 2023

At The Hague, the Netherlands.