

**Cour
Pénale
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**International
Criminal
Court**

Original:

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

Date: **8 March 2024**

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 ‘Defence Response to the “Prosecution’s
Seventeenth Application for the Submission of Facebook Evidence from the
Bar Table” ICC-01/14-01/18-2062-Conf’, (ICC-01/14-01/18-2115-Conf)
filed on 29 September 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 Seventeenth Application for the Submission of Facebook 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 [REDACTED] items of evidence in relation to [REDACTED] Facebook accounts that the Prosecution seeks to submit into the record of the case ('Facebook Items').
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. As a preliminary matter, the Defence notes with concern that the Prosecution impermissibly replied to the Defence's responses to the seventh and tenth applications from the Bar Table in the core text of the Application as well as in its Annex B.⁴ Based on the Defence responses just mentioned,⁵ the Prosecution also took the opportunity in its Annex B to supplement its submissions made in its "Request for leave to add 21 Items to the List of

¹ ICC-01/14-01/18-2602-Conf together with confidential Annexes A and B.

² ICC-01/14-01/18-631, para. 62.

³ ICC-01/14-01/18-1278, paras 6-9.

⁴ See Application, paras 54-55 and its Annex B.

⁵ ICC-01/14-01/18-1874-Conf, paras 9-16; ICC-01/14-01/18-1956-Conf, paras 9-10.

Evidence and their Submission from the Bar Table, and to extend the estimated examination time for P-0889”.⁶ Indeed, along its Application and related Annex A, the Prosecution filed a second annex titled “Facebook Attributions Table”.⁷ This annex contains extensive supplemental submissions pertaining to the identification of the alleged users of [REDACTED] Facebook accounts which were the object of three of the Prosecution’s previous bar table motions. These submissions relate, *inter alia*, to the alleged accounts of [REDACTED], and P-0889. In total, Annex B contains alleged user identification information in relation to [REDACTED] Facebook accounts whereas the Application relates to [REDACTED] Facebook accounts only. The Prosecution decided to circumvent the Chamber’s ruling dismissing its request for leave to reply to the Defence response to the seventh Prosecution submission request from the Bar Table by replying to it in the Application (and, while the Prosecution was at it, also supplementing two previous bar table motions).⁸ This is simply unacceptable. Considering how prejudicial to Mr Ngaïssona’s fair trial rights this contentious approach is, the Defence respectfully requests the Chamber to strike from the records all submissions in Annex B that are related to the Facebook accounts addressed in previous Prosecution’s applications and limit its assessment to the Prosecution’s submissions made in relation to the Facebook Items forming part of the Application.

7. Similarly, the Prosecution impermissibly relied on P-1847’s prior statement, including as a unique source, in support of certain of its allegations albeit no decision having yet been issued by the Chamber on the introduction of P-1847’s prior recorded testimony pursuant to rule 68(2)(d) of the Rules.⁹ Given that this issue is currently being adjudicated and that P-1847’ statement is not currently submitted onto the record of the case, the Defence urges the Chamber to ignore the information contained in P-1847’s statement in the context of the Application.

⁶ ICC-01/14-01/18-1285-Conf.

⁷ Annex B to Application.

⁸ ICC-01/14-01/18-2066, para. 6.

⁹ See Application, footnotes 22 and 109.

A. General remarks on the unreliability of Facebook content

8. The Prosecution alleges that the attribution of a Facebook account to its effective user is an issue of reliability rather than authenticity.¹⁰ Irrespective of whether the attribution of the Facebook account to its effective user is an issue of the authenticity of the evidence or, more generally, its reliability, the Prosecution does not contest the fact that the authorship of the content of a Facebook item needs to be *prima facie* demonstrated for the purpose of determining the probative value of that item. The Prosecution also acknowledges that for an item to be considered reliable, it must demonstrate that the evidence displays such qualities that, “when considered alone, it could reasonably be believed”.¹¹
9. In the *Katanga and Ngudjolo* case, Trial Chamber I has held that “if [...] it is impossible for the Chamber to conduct any independent evaluation of the evidence - if there are no adequate and available means of testing its reliability - then the court will need to consider carefully whether the party seeking to introduce it has met the test of demonstrating, *prima facie*, its probative value.”¹² The Defence disagrees with the Prosecution’s unsubstantiated allegation that information such as “the user’s name, nickname, or military position; an evaluation of the user’s writing style, language, and grammar” would be sufficient, in addition to the user account information, to ascertain the user identification of a particular item. These criteria should not be considered as appropriate independent tools to test the reliability of the evidence as anybody could misuse a person’s name, nickname or even military position. As to the writing style used, this is even less adequate as two different individuals could use the same language, coded or not, or the same expressions. The Facebook Items provide countless illustrations of the same language and writing style being used by different individuals. The subjectivity of this assessment would be incompatible with any independent and serious evaluation of the evidence. The Defence therefore reiterates the legal arguments put forward in its “Response to the ‘Prosecution’s Seventh Application for the Submission of Evidence from the Bar Table’” and its “Response to the ‘Prosecution’s Tenth Application for the Submission of Evidence from the Bar Table’”, where it extensively addressed the unreliability of Facebook content and user identification, especially when neither the sender nor the recipient of an exchange, nor the individuals

¹⁰ Application, para. 53. The Defence however notes that the Prosecution relies on the user account information produced by Facebook as “further indicia of [the] authenticity” of the Facebook Items.

¹¹ Application, footnote 170.

¹² ICC-01/04-01/07-2290, para. 21.

mentioned therein, have confirmed the authorship, meaning and veracity of the relevant conversations or posts, and how reliance thereof without any contextualisation from their authors would be prejudicial to Mr Ngaïssona, even more so when they relate to central aspects of the charges or highly contentious issues.¹³

B. Lack of sufficient relevance and probative value of the Facebook Items

a. [REDACTED]'s alleged Facebook account

10. *First*, the Defence strongly contests the Prosecution's allegation that [REDACTED]'s account is relevant with respect to Mr Ngaïssona and his role in Bozizé's so-called inner circle.¹⁴ In these 72 lengthy conversations the Prosecution seeks to submit, Mr Ngaïssona is cited only once.¹⁵ It is puzzling that from this unique reference to Mr Ngaïssona on 3 September 2013 in the sentence "[REDACTED]", the Prosecution is able to deduce and argue that the conversations of [REDACTED], as a whole, "demonstrate, inter alia, that in September 2013, NGAISSONA was in BERTOUA meeting other Anti-Balaka leaders." Based on the same sentence, the Prosecution dares to submit that this conversation shows "NGAISSONA's leadership role and involvement in the Anti-Balaka prior to the 5 December 2013 attacks on BANGUI and BOSSANGO".¹⁶ This is a waste of the Defence's time and resources to have to respond to such misconceived allegations. At the outset, it is not clear whom the term "[REDACTED]" is referring to. While in one conversation, when prompted, [REDACTED] specifies that "[REDACTED]" refers to "Bozizé",¹⁷ it is clear in several other instances that [REDACTED]'s use of the term "[REDACTED]" cannot be referring to François Bozizé. For example, in a conversation dated [REDACTED], [REDACTED] mentions being with the "[REDACTED]"¹⁸ while in various conversations over the month of [REDACTED], including on [REDACTED], [REDACTED] emphasizes that the "[REDACTED]" or "[REDACTED]" is still in

¹³ ICC-01/14-01/18-1874-Conf, paras 9-16. *See also* ICC-01/14-01/18-1956-Conf, paras 9-10.

¹⁴ Application, paras 14, 17.

¹⁵ CAR-OTP-2103-4023, at 4027.

¹⁶ Annex A to Application, #9.

¹⁷ CAR-OTP-2103-3293, at 3392.

¹⁸ CAR-OTP-2103-3975, at 3977-3978.

[REDACTED].¹⁹ Therefore, any systematic assumption that the term “[REDACTED]” would be referring to François Bozizé is very dangerous, misleading and against the interest of justice.²⁰ Likewise, it is not clear from the language of the conversation alone if Mr Ngaïssona and [REDACTED]. Additionally, the allegation that the term “[REDACTED]” would necessarily refer to “[REDACTED]” is plainly wrong and very misleading. Since [REDACTED]’s interlocutor seemed to be in [REDACTED] at the time of these exchanges,²¹ the term “[REDACTED]” could generally refer to Cameroon (the country) and not to a specific city in Cameroon. Also, on [REDACTED], [REDACTED] says that he is in [REDACTED] with the [REDACTED], which raises doubt as to whether he was in [REDACTED].²² Finally, the sentence itself, which is not correct grammatically, does not allow the reader to understand whom visited whom and where. The Prosecution’s reliance on this unique, grammatically incorrect and opaque sentence, to argue that these 72 conversations are relevant to showing Mr Ngaïssona’s role in Bozizé’s so-called inner circle at the time is, if anything else, the admission of the weakness of the evidence against Mr Ngaïssona and the Prosecution’s desperate readiness to create artificial and erroneous connections that are not meeting in the slightest the standard imposed by its mandate.

11. *Second*, while certain of [REDACTED]’s conversations seem to indicate that he is supportive of François Bozizé’s return, the Prosecution fails to prove that [REDACTED] received any instructions from François Bozizé.²³ First, as mentioned above, the Prosecution automatically attributes the term “[REDACTED]” to Bozizé when this term is used to refer to various individuals. Second, [REDACTED] regularly suggests not having received any instructions from the “[REDACTED]” and waiting. For instance, on [REDACTED], he mentions [REDACTED].²⁴ On [REDACTED], he still seems to be waiting for the green light.²⁵ Therefore, the Prosecution fails to adduce any evidence of “BOZIZE’s involvement in the development of strategies to organise the Anti-Balaka and/or their organisation between April and December 2013”.²⁶

¹⁹ CAR-OTP-2103-3293, at 3309; CAR-OTP-2103-3637, at 3642-3643; CAR-OTP-2103-3219, at 3224.

²⁰ Annex A to Application, #56. See [REDACTED].

²¹ CAR-OTP-2103-4023, at 4023.

²² See CAR-OTP-2103-3922, at 3923.

²³ Application, para. 15.

²⁴ CAR-OTP-2103-3180, at 3186. See also on 5 September 2013, CAR-OTP-2103-3293, at 3332, on 29 October 2013, at 3189-3190, on 1 November 2013, CAR-OTP-2103-4149, at 4151-4152.

²⁵ CAR-OTP-2103-3496, at 3499.

²⁶ See Annex A to Application, #60.

12. Finally, on the question of reliability, the Defence observes that one phone number ([REDACTED]) is provided twice for this alleged user, but that the Facebook Business Record (“FBR”) indicates that it was both (i) verified on the date of registration of the account and (ii) unverified. The same phone number cannot at the same time be verified and unverified. This anomaly casts doubt as to the user-verification of this account given that the attribution of this phone number cannot be ascertained.

b. [REDACTED]’s alleged Facebook accounts

13. The Defence does not stipulate to the Prosecution’s submissions regarding the admissibility of the relevant Facebook Items and it reserves its right to contest its evidentiary weight at a later stage.

14. Additionally, none of the conversations or posts contained in these particular Facebook messages have been contextualised by any of the alleged senders and recipients. Therefore, for reasons elaborated in previous submissions,²⁷ this item should not be accorded any probative value as far as the truth of its content is concerned.

15. Regarding [REDACTED]’s alleged presence in [REDACTED], the Defence notes important discrepancies between [REDACTED]’s allegations in relation to his location in these Facebook conversations and what he told the Prosecution during an interview as reflected in the summary of his statement contained in the Prosecution’s Preliminary Witness List.²⁸ This shows once again the *prima facie* unreliability of the information contained in these Facebook conversations, when not contextualised by their author.

c. [REDACTED]’s alleged Facebook account

16. The Defence notes that the Prosecution does not seem to distinguish between comments and opinions given on certain news received from the media and the reality on the ground. This is problematic and misleading especially when these discussions touch upon information in relation to the alleged military strategy implemented at the time relevant to the charges. For instance, the allegation that [REDACTED]’s conversations “[REDACTED]” is based on [REDACTED]’s mere opinion given in a private conversation. The underlying Facebook Item should therefore be dismissed for lack of

²⁷ ICC-01/14-01/18-1874-Conf, paras 9-16; ICC-01/14-01/18-1956-Conf, paras 9-10.

²⁸ ICC-01/14-01/18-642-Conf-AnxA, page 4, mentioning [REDACTED].

relevance as it does not make this particular proposition of the Prosecution more or less probable.²⁹

d. [REDACTED]’s alleged Facebook account

17. *First*, a brief analysis of this account and its metadata raises uncertainties as to the identity of this Facebook user. As conceded by the Prosecution, while the profile was registered under the name of “[REDACTED]”, in the content of the account, the user presents himself as “[REDACTED]”. Moreover, the phone number [REDACTED] being unverified, no attribution of this number to [REDACTED] or [REDACTED] can reasonably be based on this FBR and alleged user’s messages alone.³⁰

18. *Second*, the Defence fails to see how this one item of proposed evidence allegedly relating to [REDACTED] will advance the Chamber’s inquiry as to any of the material facts in dispute in this case. Also, the name “[REDACTED]” is used throughout the bar table motion annex to refer to at least three different “[REDACTED]”, namely “[REDACTED]”, “[REDACTED]”, and “[REDACTED]”. The Prosecution fails to substantiate how [REDACTED]’s FBR would be more relevant to the charges than the conversations of “[REDACTED]” which so far as the Defence is aware have not been the target of any request for assistance. The Defence submits that this Facebook Item should be disregarded for lack of significance.

e. [REDACTED]’s alleged Facebook account

19. *First*, based on the Defence’s understanding of the FBR, it seems that the phone number [REDACTED] that is provided was only verified as of [REDACTED].³¹ This casts doubt on the user-verification of this account before this date. In any event, no attribution of these numbers to [REDACTED] alias [REDACTED] can reasonably be based on this FBR alone. The fact that this number may have been used in Western Union transactions and recorded under the title ‘[REDACTED]’ does not ascertain that this phone number belongs to [REDACTED].³²

²⁹ CAR-OTP-2099-7830 at 7839-7840.

³⁰ CAR-OTP-2099-5455, at 5456. *See* Application, Annex B, page 25, #19.

³¹ CAR-OTP-2131-1021.

³² Application, Annex B, page 26, #20.

20. *Second*, according to the Prosecution, these Facebook conversations would demonstrate that [REDACTED] was in contact with [REDACTED].³³ Once again this is very misleading. The only underlying evidence in support of this allegation is an excerpt of one of the user's conversations, dated [REDACTED], in which he offers to forward a message that is ultimately for the attention of [REDACTED].³⁴ This does not mean that [REDACTED]. First, he does not specify that he [REDACTED]. Second, the review of these Facebook conversations in their entirety shows to the contrary that this user was [REDACTED]. Indeed, in [REDACTED], this user complains about being excluded from the [REDACTED]. Later, in [REDACTED], [REDACTED] informs [REDACTED] that he ([REDACTED]) spoke that morning to the [REDACTED]. The fact that he was obtaining unverified information about [REDACTED] from a certain "[REDACTED]" and another individual named "[REDACTED]" says a lot about how [REDACTED] this user was.³⁵

21. *Third*, these conversations have very limited probative value in showing that in June 2013, François Bozizé was planning to return to power.³⁶ First, the brief mention of the 'boss' alleged negotiations with powerful countries does not ascertain what these negotiations were about.³⁷ Also, it could be equally relevant to showing diplomatic measures taken by Bozizé, assuming the 'boss' is referring to Bozizé, which the Prosecution failed to substantiate. Finally, based on the conversations he had only a few days later, it appears that [REDACTED].³⁸ In light thereof, this information lacks probative value in showing the Bozizé was planning on returning to power in June 2013 and should be dismissed.

22. *Fourth*, as alluded above, the use of the term "boss" cannot alone be attributed to François Bozizé. This is a generic term that is used very frequently in the Central African society to refer to individuals with some level of authority. Therefore, it cannot be ascertained that [REDACTED], who would have telephoned the [REDACTED], was indeed François Bozizé.³⁹ Without contextualization from the author, this cannot have any probative value.

³³ Application, para. 30.

³⁴ See footnote 81 of the Application referring to CAR-OTP-2131-2629 at 2636.

³⁵ CAR-OTP-2132-3145, at 3173-3177, 3188-3189. See also CAR-OTP-2131-9180, at 9225-9236 where [REDACTED].

³⁶ Application, para. 31.

³⁷ CAR-OTP-2133-4968 at 5009-5010.

³⁸ CAR-OTP-2132-3145, at 3173-3177, 3188-3189.

³⁹ CAR-OTP-2133-5725 at 5758-5760.

23. Finally, the Defence submits that [REDACTED]'s comments on [REDACTED] mentioning a certain "[REDACTED]" is not relevant to showing that "[REDACTED]".⁴⁰ The Prosecution has failed to substantiate that [REDACTED] refers to Mr Ngaïssona when mentioning "[REDACTED]". [REDACTED] is a very common name and could be referring to countless other individuals.⁴¹

f. [REDACTED]'s alleged Facebook Account

24. *First*, based on the Defence's understanding of the FBR, it seems that the only phone number that was verified during the relevant period for the charges was the phone number [REDACTED] which appears, based on the telephone extension, to correspond to [REDACTED]. The two [REDACTED] were only verified as of 8 September 2014.⁴² Therefore, this casts doubt as to the user-verification of this account before this date.

25. *Second*, contrary to the Prosecution's submissions, these conversations are not relevant to showing that [REDACTED] lived at the Golf Residence together with Mr Ngaïssona and Bernard Mokom.⁴³ [REDACTED] mentions that he heard that Mr Ngaïssona and Bernard Mokom were at the Golf with [REDACTED] for quite some time but [REDACTED] does not respond on this point to confirm or infirm it. More importantly, the Prosecution ignores the explanations about this conversation given by [REDACTED]. Indeed, the [REDACTED] report that when specifically asked about this exchange, [REDACTED] said the following: [REDACTED]".⁴⁴ Therefore, this conversation should not be considered relevant for this particular proposition.

26. *Third*, these Facebook conversations have no probative value in showing that "in September 2013, NGAISSONA's, YAKETE's, and KOKATE's arrival in [REDACTED] signified the certain likelihood of action afoot".⁴⁵ On [REDACTED], [REDACTED] finds out through his interlocutor that the above individuals would have arrived in [REDACTED]. [REDACTED] just reacts to the information received by speculating as to what it might mean. This suggests, if anything, that his source of information comes from

⁴⁰ Application, para. 32, referring to CAR-OTP-2132-9197 at 9202-9203 and CAR-OTP-2133-5725 at 5833-5834 ([REDACTED]).

⁴¹ See CAR-OTP-2129-0847, under "Contacts" at entry 79. See also CAR-OTP-2102-9934 at 9953-9954 and CAR-OTP-2103-1678 at 1686.

⁴² CAR-OTP-2131-1003.

⁴³ Application, para. 34, referring to CAR-OTP-2100-2994 at 3027.

⁴⁴ See, for instance, CAR-OTP-2130-0290, at page 12, para. 75.

⁴⁵ Application, para. 37, referring to CAR-OTP-2132-2869 at 2881.

rumours from various people on the internet, and that he does not have any information directly from relevant source(s). It could also suggest that he would not have been in contact with Mr Ngaïssona before [REDACTED] albeit having resided at the [REDACTED].

27. *Fourth*, an analysis of the entirety of [REDACTED]’s conversations – including those not cherry picked by the Prosecution – as well as [REDACTED], confirms the impression that he did not have any insider information and was just commenting the information that was being circulated on the internet. He had no role in [REDACTED], had [REDACTED], and kept busy [REDACTED] and commenting the news.⁴⁶ Therefore, reliance on these conversations to support allegations such that “in October 2013, NGAISSONA and Bernard MOKOM visited troops at the border and brought them ammunitions in view of an imminent operation” would result in a prejudice to Mr Ngaïssona outweighing any *prima facie* probative value to be found in those items.⁴⁷ Moreover, the Defence has not identified one single Prosecution witness who corroborates the allegation that [REDACTED].⁴⁸

28. Finally, these conversations have no probative value in showing that “[REDACTED]”.⁴⁹ This compilation of information in the same sentence gives the misleading understanding that these alleged events would somehow be linked and sequenced. The only conclusions that may be reasonably drawn are the following. On [REDACTED], [REDACTED] told his interlocutor that Mr Ngaïssona was in Douala, “[REDACTED]”.⁵⁰ [REDACTED] is clearly speculating as to whether both men are together. On [REDACTED], he then mentions that [REDACTED].⁵¹ He does not mention anything about [REDACTED]. In fact, to the contrary, he says a few lines later [REDACTED].⁵² Therefore, the allegation that [REDACTED] is erroneous. Likewise, [REDACTED] told his interlocutor that [REDACTED].⁵³ He then mentions that [REDACTED].⁵⁴ The Prosecution artificially constructs a connection between these two comments that it fails to substantiate. First, as developed above, [REDACTED] does not specify who he refers to by “the boss”. Second,

⁴⁶ See, for instance, CAR-OTP-2100-2994 (not sought to be submitted) combined with CAR-OTP-2130-0290, page 11, para. 70. See conversations in CAR-OTP-2131-5251 (not sought to be submitted) on 16 July, 15 September 2013. See also *ibid.*, paras 25, 31-44, 75.

⁴⁷ Application, para. 37.

⁴⁸ ICC-01/14-01/18-1437-Conf, para. 23.

⁴⁹ Application, para. 37.

⁵⁰ CAR-OTP-2132-1004 at 1010-1011.

⁵¹ CAR-OTP-2131-5407 at 5505-5506.

⁵² *Ibid.*

⁵³ CAR-OTP-2131-5407 at 5506-5507.

⁵⁴ *Ibid.*

[REDACTED] does not say that “the boss” gave instructions to or in the presence of [REDACTED].

g. [REDACTED]’s alleged Facebook account

29. According to the Defence’s understanding of the FBR, it seems that the phone number which was provided was only verified as of 1 February 2014.⁵⁵ This casts doubt on the user-verification of this account before this date. In any event, no attribution of these numbers to [REDACTED] can reasonably be based on this FBR alone.
30. The Defence notes that most of the Prosecution’s submissions in this section are not related to nor based on the content of this Facebook account but merely on P-2841’s testimony at trial.⁵⁶ As elaborated in the “Defence Response to the “Prosecution’s Sixth Application for the Submission of Evidence from the Bar Table” ICC-01/14-01/18-1868-Conf”,⁵⁷ these bar table motions should not be an opportunity for the Prosecution to develop legal conclusions on the acts and conduct of the alleged users of these Facebook accounts especially when they do not directly or indirectly arise from the relevant Facebook conversations the Prosecution seeks to submit.
31. Second, the only item sought to be submitted was added onto the Prosecution’s List of Evidence after the testimony of P-2841, who is the interlocutor of [REDACTED] in this exchange. The Prosecution therefore forwent the opportunity to question P-2841 on the meaning and context of this conversation and in turn, the Defence was not able to put the information relayed in this conversation to P-2841 at trial.
32. As to the allegation that [REDACTED] would have “[REDACTED]”,⁵⁸ this is an allegation that is materially in dispute and for which extensive submissions have already been made by the Defence, which incorporates herewith by reference paragraphs 72-74 of its “Defence Response to the “Prosecution’s Application for Submission of Yahoo Email Evidence from the Bar Table Pursuant to Article 64(9)””.⁵⁹

⁵⁵ CAR-OTP-2131-1038.

⁵⁶ Application, para. 39.

⁵⁷ ICC-01/14-01/18-1868-Conf, paras 8-9.

⁵⁸ Application, para. 39.

⁵⁹ ICC-01/14-01/18-1450-Conf, paras 72-74.

33. In light thereof, for lack of contextualisation, this Facebook account, when considered for the truth of its content, should not be accorded any probative value, and the Prosecution's additional allegations unrelated to this Facebook account should be ignored.

h. [REDACTED]'s alleged Facebook account

34. Based on the Defence's analysis, it seems that the only verified phone number ([REDACTED]) was verified as of 2018, *i.e.*, several years after the charged crimes. This casts doubt on the user-verification of this account before this date, especially since the two other phone numbers provided have not been verified.⁶⁰ In any event, no attribution of these numbers to [REDACTED] can reasonably be based on this FBR alone.

35. Regarding CAR-OTP-2133-6457, this Item was added onto the Prosecution's List of Evidence after the testimony of P-2673, who is the interlocutor of the alleged user in this exchange. The Prosecution therefore forwent the opportunity to question P-2673 on the meaning and context of this conversation and in turn, the Defence was not able to put the information relayed in this conversation to P-2673 at trial. Therefore, this Item should not be accorded any probative value as far as the truth of its content is concerned.

36. Finally, the Defence strongly contests the relevance of these items to showing that [REDACTED] was in contact with Mr Ngaïssona. The Prosecution fails to point to any Facebook Items it seeks to submit to support this allegation but merely refers to the testimony of P-0884, who explains that at some point [REDACTED].⁶¹ The only information that can be deduced from this testimony is that [REDACTED] might have known where the residence of Mr Ngaïssona's family was located [REDACTED]. Moreover, this account of event is contradicted by [REDACTED] who did not [REDACTED].⁶² Moreover, the very opaque language used does not allow any reasonable person to conclude that "[REDACTED]".⁶³ Clearly, none of them is with Mr Ngaïssona as [REDACTED] believes [REDACTED] and his interlocutor, [REDACTED], did not seem to know that [REDACTED]. Neither of them seems to know when this descent to Bangui would take place, if it would take place at all; they are merely asking each other. Without any clarification as to the meaning of this exchange, relying on it for allegations relevant

⁶⁰ CAR-OTP-2131-1032.

⁶¹ ICC-01/14-01/18-T-054-CONF-ENG ET, pages 61-62.

⁶² ICC-01/14-01/18-T-040-CONF-ENG CT2, pages 20-21.

⁶³ Application, para. 45 referring to CAR-OTP-2131-2814 at 2815-2816.

to the charges would be highly prejudicial to Mr Ngaïssona and would outweigh any probative value of that Facebook Item.

i. [REDACTED]’s alleged Facebook account

37. The Prosecution’s allegation that Mr Ngaïssona would be part of Mr Bozizé’s inner circle is an unsubstantiated legal conclusion which does not have its place in the Application.⁶⁴ The Defence does not contest that both men knew each other in the context of [REDACTED]. However, while these conversations may have limited probative value in showing that this alleged user was in contact with Mr Ngaïssona in 2014,⁶⁵ it is not relevant whatsoever to showing the Mr Ngaïssona was a member of François Bozizé’s so-called inner circle, and such allegation should strictly be avoided in this context.

C. Prejudice to Mr Ngaïssona

38. Reliance on certain documents in respect to core aspects of the charges or highly contentious issues, such as Mr Ngaïssona’s purported individual criminal responsibility, may result in prejudice to Mr Ngaïssona outweighing any *prima facie* probative value to be found in those items.

39. This is especially the case when such probative value is limited by reason of the Facebook account in question being subject to a one-sided interpretation formulated by the Prosecution, or when neither the sender nor the recipient of an exchange, nor the individuals mentioned therein, have provided testimony as to the meaning and veracity (including authorship) of the relevant conversations.

40. 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

41. The Defence respectfully requests the Chamber to **TAKE INTO ACCOUNT** the Defence’s objections contained in the Response and its confidential Annex 1 when the

⁶⁴ Application, para. 48.

⁶⁵ CAR-OTP-2131-1420, at 1445; CAR-OTP-2131-4793, at 4827; CAR-OTP-2133-1610, at 1611.

Chamber conducts its holistic assessment of the evidence during the deliberation of the judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized 'N' or similar character, followed by a horizontal line.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 8 March 2024

At The Hague, the Netherlands.