

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 10 July 2024

TRIAL CHAMBER V

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

**Confidential
With Confidential Annex**

**Prosecution's Response to "Ngaïssona Defence's Third Application for the
Submission of Evidence from the
Bar Table" (ICC-01/14-01/18-2560)**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution opposes the Ngaissona Defence's submission of five out of the seven items ("Five Items")¹ proposed to be introduced from the bar table.² The Prosecution defers to the discretion of Trial Chamber V ("Chamber") for the two remaining items³ as further detailed in the Annex.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC"), this document is filed as "Confidential", as it responds to a filing of the same designation. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. The Five Items

1. CAR-D30-0012-0009 and CAR-D30-0012-0012

3. The Ngaissona Defence relies on CAR-D30-0012-0009 and CAR-D30-0012-0012 to ostensibly show "the unreliability of the Facebook evidence in this case, and to show that FROCCA had no active fighting force".⁴ The Facebook posts in question⁵ do not represent the images as FROCCA forces. Rather, the images are used illustratively to convey the general context of combat. Consequently, the information presented does not tend to establish any inaccuracy, much less unreliability in the Facebook posts, particularly as they make no explicit or implicit claim that the individuals shown in the pictures are associated with FROCCA. That inference is one drawn only by the Defence — not by the posts. Given the minimal potential impact of this item on the

¹ ICC-01/14-01/18-2560-Conf-AnxA, items relating to media articles, items, 2 (CAR-D30-0012-0009), 3 (CAR-D30-0012-0012), and miscellaneous items, item 1 (CAR-D30-0003-0211), 2 (CAR-D30-0003-0212), and 3 (CAR-D30-0001-0023) ("Annex 1 to Request").

² ICC-01/14-01/18-2516 ("Request").

³ Hereinafter, "Remaining Items".

⁴ Annex 1 to Request, p. 4-5, items 2 and 3, under the 'Relevance' column.

⁵ CAR-OTP-2091-0455 and CAR-OTP-2114-0550.

issues before it, the Chamber should be reluctant to admit it, as it will not significantly advance its inquiry.⁶

2. CAR-D30-0003-0211 and CAR-D30-0003-0212

4. The Chamber should reject the introduction of CAR-D30-0003-0211 and CAR-D30-0003-0212 via the bar table. *First*, the submission of these documents is precluded because, as 'attestations' clearly prepared by the respective declarants specifically for these proceedings, they are inherently 'testimonial' in nature.⁷ As such, they may only be introduced pursuant to Rule 68. The Defence may not obviate this requirement by tendering the documents through a bar table motion.⁸

5. *Second*, these documents, submitted for impeachment purposes, were not used during P-2625's cross-examination despite the Defence's anticipation of its possible necessity. Consequently, P-2625 was deprived of a fair opportunity to comment or explain the information now sought to be relied on⁹ by the Defence to impeach his evidence. As the Chamber will recall, P-2625 was a witness for whom the Defence had ample opportunity to prepare — indeed, years. Thus, the Defence should not be permitted to impugn the witness's evidence through the backdoor, having failed to challenge it appropriately during his lengthy and extensive cross-examination for purely strategic motives.

6. *Third*, and for the same reasons, the probative value for impeachment purposes is marginal, since the Chamber too has been deprived of an opportunity to receive an explanation, including of the context, from P-2625. Clearly, P-2625 would have been

⁶ ICC-01/04-01/07-2635, paras. 34-35.

⁷ ICC-01/14-01/18-2199-Conf, para. 21 (noting that, "[...] it is clear that the Statements were produced in the context of or in anticipation of legal proceedings").

⁸ ICC-01/14-01/18-631-Conf, para. 56 (noting that, "[...] evidence which is testimonial in nature is [...] inadmissible [...] when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court's applicable law are not met").

⁹ Annex 1 to Request, p. 7-8, items 1 and 2, under the 'Relevance' column.

best placed to provide it. Absent this, these documents are unreliable to draw the adverse inferences the Defence seeks to establish through their submission.¹⁰

3. CAR-D30-0001-0023

7. The Ngaïssona Defence relies on CAR-D30-0001-0023 to show that the “Muslim community trusted Mr Ngaïssona would assist them at a time when the Seleka forces were gaining great strength, thereby showing Mr Ngaïssona’s lack of anti-Muslim animus”. First, CAR-D30-0001-0023, a transmission from the *Cocommunauté Islamique Centrafricaine Bureau Exécutif National* to Ngaïssona, dated 12 February 2012, speaks for itself, and does not admit of the conclusions or inferences advanced by the Defence. Instead, it comprises a plea for peace, in the context of social cohesion activities. The Ngaïssona Defence’s precatory interpretation of the document, does not define its relevance, materiality, or weight. Nor, can it reasonably substitute for the requisite showing to sustain its formal submission. Further, the document effectively predates the relevant period, and the Request fails to demonstrate any *prima facie* relevance to the contested issues at trial. As such, its submission would only introduce pages of irrelevant material into an already substantial trial record.

B. Remaining Items

8. The Prosecution does not oppose the formal submission of the Remaining Items, but invites the Chamber to take into consideration its additional observations provided in the Annex.

¹⁰ ICC-01/14-01/18-2446-Conf, para. 13, (noting that the “[...] the attestation does not rule out that P-2625 in fact stayed at the hotel during the relevant period. The basis of the relevance put forth by the Defence hinges entirely on the accuracy of the hotel’s records, and beyond that, the status of the witness whether as a registered guest or an invitee of a registered guest”).

IV. RELIEF SOUGHT

9. For the above reasons, the Chamber should reject the Request in respect of the Five Items. The Prosecution otherwise defers to the Chamber's discretion regarding the formal submission of the Remaining Items.



Karim A. A. Khan KC, Prosecutor

Dated this 10th of July 2024

At The Hague, The Netherlands