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Date: 23 August 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

**Public
with Confidential Annex I**

**Public Redacted Version of “Ngaïssona Defence’s First Application for the
Submission of Evidence from the Bar Table”, ICC-01/14-01/18-2514-Conf, 31 May
2024**

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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Unrepresented Victims		Unrepresented (Participation/Reparation)	Applicants
The Office of Public Counsel for Victims		The Office of Public Counsel for the Defence	
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REGISTRY			
Registrar Mr Osvaldo Zavala Giler		Counsel Support Section	
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Victims Section	Participation	and Reparations	Other

I. INTRODUCTION

1. Pursuant to paragraphs 61 and 62 of Trial Chamber V's ('Chamber') Initial Directions on the Conduct of Proceedings ('Initial Directions'), the Defence of Mr Patrice-Edouard Ngaïssona ("Defence") hereby submits 17 items from the bar table. The 17 items relate to several discrete topics that fall into four different categories, namely: (1) national government documents, (2) one international government document, (3) Anti-Balaka documents, and (4) FIFA documents ('Submitted Items').
2. The Submitted Items are *prima facie* relevant to material issues at trial, are corroborative of other evidence on record, and bear sufficient indicia of reliability to be recognized as formally submitted by the Chamber. Annex 1 of the present application provides the following for each item the Defence seeks to submit: (1) the evidence registration number ('ERN'); (2) the title of the item; (3) the date; (4) a short description of the item in addition to its relevance and probative value, and (5) the objections of the Prosecution.¹

II. CONFIDENTIALITY

3. The present filing is classified as confidential since it refers to items of evidence that either the Prosecution or the Defence have classified as such. A public redacted version will be filed as soon as practicable.

III. APPLICABLE LAW

4. The Defence incorporates by reference its submissions on the law applicable to the submission of evidence from the bar table set out in paragraphs 6

¹ The Yekatom Defence did not present any objections to the submission of the items during *inter partes* consultations. The Prosecution did not oppose the submission of the 18 items, except for the objections and or observations noted in the Prosecution position column of Annex 1.

through 9 of its response to the Prosecution's first bar table motion filed in this case.²

IV. SUBMISSIONS

5. The Submitted Items fulfill the requirements for formal submission, as outlined in the Chamber's Decision on the First Prosecution Submission Request from the Bar Table.³ They are not subject to an exclusionary rule and are relevant and probative of establishing the facts of this case. The present application will not fully address the relevance and probative value of every item the Defence seeks to submit. The Defence respectfully refers the Chamber and the parties to Annex 1 for its complete submissions on the relevance and probative value of the Submitted Items. Additionally, Annex 1 contains the objection and views of the Prosecution to the Submitted items.⁴ Unlike the Defence's past practice of identifying in *inter partes* discussion its basis for objecting to the submission of Prosecution documents, the Prosecution merely indicated that it objected to the submission of seven items. Without further information, the Defence is unable to respond to the Prosecution's objections at this time.
6. In the present application, the Defence will provide an overview of the Submitted Items, which it has organized into the following categories related to relevance:⁵ (1) documents relevant to Mr Ngaïssona's whereabouts spanning from December 2012 to December 2014; (2) documents relevant to

² ICC-01/14-01/18-1278.

³ ICC-01/14-01/18-1359, paras. 10-12, referring to the Initial Directions ICC-01/14-01/18-631, paras. 53-54, 62.

⁴ The Yekatom Defence did not object to the submission of the Submitted Items, and noted that it would provide its position on the authenticity, reliability and relevance upon receipt of the Defence's formal bar table application.

⁵ Three of the items presented in Annex 1 did not fit neatly into the categories canvassed in this application. They are: CAR-OTP-2100-1680, CAR-OTP-2100-0638, and CAR-D30-0003-0029. The Defence refers the Chamber to Annex 1 for the Defence's submissions regarding the relevance and probative value of these documents.

Mr Ngaïssona's lack of control over elements associated with the Anti-Balaka; and (3) documents relevant to impugning the testimony of several witnesses.

A. Documents relevant to Mr Ngaïssona's whereabouts spanning from December 2012 to December 2014

7. The Defence seeks to submit four documents that are indicative of Mr Ngaïssona's whereabouts spanning from December 2012 to December 2014.⁶ Three of the documents were issued by the Fédération Internationale de Football Association ('FIFA'), and consist of: (1) an invoice showing the costs FIFA incurred through changing Mr Ngaïssona's flight in June of 2013,⁷ (2) an expense report signed by Mr Ngaïssona indicating his expenses during the FIFA Club World Cup in Morocco in early December 2013,⁸ and lastly the FIFA invitation, including a programme of events for the FIFA World Cup in Japan that took place in December of 2012.⁹
8. The FIFA documents are probative of Mr Ngaïssona's whereabouts for three reasons. First, they were issued in the regular course of FIFA's activities concerning Mr Ngaïssona's role as the president of the Central African Football Federation. Therefore, the issuance of these documents had no connection to these proceedings. Second, the items are corroborative of other documentary evidence and testimonial evidence on record.¹⁰ Third, the *prima facie* reliability is clear from their content, which includes dates of travel,

⁶ CAR-D30-0001-0039; CAR-OTP-2131-0186; CAR-OTP-2131-0271; CAR-OTP-2113-0034.

⁷ CAR-OTP-2131-0186.

⁸ CAR-OTP-2131-0271.

⁹ CAR-D30-0001-0039.

¹⁰ See CAR-OTP-2124-0559; CAR-OTP-2124-0949 (listing a travel itinerary sent from the email account [REDACTED], which is the same account used to send the invoice under CAR-OTP-2131-0186, page 0187); CAR-OTP-2124-0949 (listing the travel itinerary to Marrakesh, Morocco during the same period as indicated in the expense report under CAR-OTP-2131-0271); P-2843: T-074 [ENG], p. 30, lines 21-24 (confirming Mr Ngaïssona's travel to Marrakesh, Morocco). CAR-D30-0001-0036 (attaching an electronic ticket to Japan issued by [REDACTED] for Mr Ngaïssona for the World Cup hosted by Japan).

detailed information regarding pricing and a specific programme of scheduled events. Moreover, all three documents contain a header, FIFA's logo, are dated, and have a known author. Fourth, two of the documents the Defence obtained directly from the Prosecution who in turn, received them in the regular course of their investigations [REDACTED].¹¹ The Defence obtained document CAR-D30-0001-0039 from [REDACTED], during the regular course of its investigations. Mr Ngaïssona's travel to Japan as a FIFA delegate is corroborated by other evidence on record,¹² and the document presents no indications that it is not authentic.

9. The fourth document relevant to Mr Ngaïssona's whereabouts consists of a response to the Prosecution's request for assistance ('RFA') [REDACTED].¹³ By way of this RFA response, [REDACTED]. [REDACTED]. This item is relevant to the Prosecution's lack of sufficient probative evidence of Mr Ngaïssona's whereabouts. [REDACTED],¹⁴ the Prosecution has submitted little to no documentary evidence on Mr Ngaïssona's whereabouts during the crucial period from May to August 2013. CAR-OTP-2113-0034 shows the weakness of the Prosecution's evidence to prove allegations that require the showing of Mr Ngaïssona's international travel, [REDACTED].
10. The item is probative for the following reasons. [REDACTED], who drafted this response, have proven to cooperate well with the Court. Indeed, Mr Ngaïssona's [REDACTED]. Therefore, while this document was produced for the purpose of these proceedings, there is no reason to doubt that [REDACTED]. Second, the document bears sufficient indicia of authenticity

¹¹ CAR-OTP-2131-0271; CAR-OTP-2131-0186.

¹² CAR-D30-0001-0036; P-2843: T-074 [ENG], p. 29, lines 1-10.

¹³ [REDACTED].

¹⁴ [REDACTED].

– it contains the header of the [REDACTED], and is dated and signed by a judicial officer.

11. This is the first time the Defence seeks to submit a response to an RFA into evidence. While with respect to the Yahoo emails the Chamber did not introduce RFA responses, the Chamber did determine to introduce *proprio motu* four forensic reports drafted by the Prosecution's Scientific Response Unit, which explained the extraction process used to process the Yahoo emails.¹⁵ While the reports were clearly made for the purposes of these proceedings and drafted by individuals working for the Prosecution, the Chamber introduced the items in the interest of completeness of the record.¹⁶

12. Here, similar interests weigh in favour of introducing CAR-OTP-2113-0034. The item is relevant to the Chamber's assessment of the Prosecution's evidence on record regarding Mr Ngaïssona's travel during a highly critical time, namely May through August 2013, and beyond. During the first half of 2013, Mr Ngaïssona is alleged to have attended meetings in Cameroon as part of an alleged emerging Anti-Balaka leadership.¹⁷ Allegations about Mr Ngaïssona's whereabouts and his participation in alleged meetings during his exile remain extremely vague and unsubstantiated by the Prosecution. In the interest of completeness of the evidentiary record, the Chamber should be able to rely on the fact that the Prosecution was unable to retrieve evidence [REDACTED].

13. Moreover, there is no procedural bar to submitting this item into evidence. RFA responses have been admitted into evidence before the ICTY, which has

¹⁵ ICC-01/14-01/18-1632, para. 12.

¹⁶ Ibid.

¹⁷ Pre-Trial Brief, ICC-01/14-01/18-723-Conf, paras 67-70.

similar procedural bars to introducing prior recorded testimony.¹⁸ While the response to the RFA uses subjective language such as the personal pronoun, “*nous*”, this stylistic choice [REDACTED] does not change the objective nature of the document. Like the above-mentioned forensic reports, which were drafted by individuals working in the Prosecution’s Scientific Response Unit, the content of the document has no connection to the perceptions or opinions of the individuals working for the [REDACTED].

B. Documents relevant to Mr Ngaïssona’s lack of control over the Anti-Balaka movement

14. The Defence seeks to submit four documents relevant to Mr Ngaïssona’s lack of control of the Anti-Balaka movement.¹⁹ Two of the documents are more specifically relevant to other evidence on record regarding the phenomenon of “fake” Anti-Balaka. Contrary to the Prosecution’s position that the term “fake” Anti-Balaka was merely an excuse by Mr Ngaïssona to further an alleged criminal policy targeting the Muslim population, these documents are consistent with other evidence showing that the Anti-Balaka movement lacked any cohesive structure. This lack of cohesion made it easy for opportunists to associate themselves with the movement for their own gain, which, in some instances, included committing crimes.²⁰

15. The other two documents relate specifically to Mr Ngaïssona’s lack of control of the movement. This is demonstrated by the government providing him with security due to attacks by individuals associated with the movement,

¹⁸ *The Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, *Decision on Milan Lukić’s Fourth Bar Table Motion*, 5 May 2009, page 2; *The Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, *Decision on Milan Lukić’s Renewed Bar Table Motion*, 12 May 2009, page 2; *The Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, *Decision on Milan Lukić’s Second and Third Bar Table Motion*, 5 May 2009, page 8. Compare Rules 92bis through Rule 92quinquies of the ICTY Rules of Procedure and Evidence with Rule 68 of the Rules of Procedure and Evidence of the ICC.

¹⁹ CAR-D30-0006-0332; CAR-D30-0003-0031; CAR-OTP-2100-0582; CAR-OTP-2008 0791.

²⁰ CAR-D30-0006-0332; CAR-OTP-2100-0582.

including those close to ANDJILO.²¹ While these two documents fall outside of the charged period,²² they are consistent with testimonial evidence that Mr Ngaïssona's life was in danger due to uncontrollable elements associated with the Anti-Balaka.²³

16. All four documents the Defence seeks to submit are probative of the Anti-Balaka being a diffuse movement such that it was impossible to control. First, three of the documents were issued by different sections of the CAR government either during the charged period or shortly thereafter, long before the current proceedings were contemplated. Second, the source of the documents, the CAR government, has never had any allegiance to Mr Ngaïssona. Third, the documents were gathered in the regular course of either the Prosecution or Defence investigations and bear sufficient indicia of authenticity, i.e. the documents present relevant headers, stamps, are signed and dated.

17. Similarly, the document issued by the Anti-Balaka so-called "*Etat Major*"²⁴ was issued contemporaneously to the charges long before those associated with the Anti-Balaka movement could have ever contemplated the current proceedings. Specifically, no one associated with the Anti-Balaka could have reasonably anticipated that the Prosecution needed to prove that the Anti-Balaka movement was effectively controlled by the National Coordination. Second, the document bears sufficient indicia of authenticity and reliability. It appears in the June 2014 edition of the "*Les Batisseurs*" newspaper, which is consistent with its nature as a public statement. The document also appears

²¹ CAR-D30-2008-0791; CAR-D30-0003-0031.

²² CAR-OTP-2008 0791.

²³ P-2027: CAR-OTP-2078-0059, at 0085, para. 155; P-0808: CAR-OTP-2025-0324 at 0346, para. 139; P-0884: T-058 [ENG], p. 69, lines 5-16; P-0888: T-123 [ENG], pp 42, lines 17-25 to p. 43, lines 1-3; P-0889: T-110 [ENG] p. 16, lines 18-25; P-1193: T-125 [ENG], p. 19, lines 24-25 to p. 20, lines 1-6; P-0808: T-071 [ENG], p. 62, lines 3-9

²⁴ CAR-D30-0006-0332.

authentic, as it contains a header, is signed and dated by a known member of the Anti-Balaka movement. Moreover, were it to be shown that such statement was never issued by a division of the Anti-Balaka movement known as the *Etat Major*, it remains probative of the fact that the Anti-Balaka movement could be appropriated by anyone, and therefore that it was not controlled by the Anti-Balaka National Coordination.

C. Documents relevant to impugning the testimony of several witnesses

18. The Defence seeks to submit seven documents relevant to the impugning of the testimony of several witnesses.²⁵ Specifically, the documents relate to Witnesses P-2673, P-0487, P-2625, P-2328, P-0306 and impugn their testimony through showing one of the following: (1) bias against Mr Ngaïssona, (2) potential inducements to testify, and (3) contradictions between the witnesses' evidence on a material fact and information contained in the items the Defence seeks to submit.²⁶

19. The documents are probative and impugn the testimony of the above-mentioned witnesses for the following two reasons. First, all the documents, except for CAR-D30-0003-0213, were either generated contemporaneously to the charges²⁷ or were generated in the ordinary course of business.²⁸ Thus, the information they relay was contemplated with either no knowledge of the

²⁵ CAR-OTP-2136-1366; CAR-D30-0004-0383; CAR-D30-0006-0332 (the Defence also seeks to submit this document to show the lack of control of Mr Ngaïssona over the Anti-Balaka movement); CAR-D30-0003-0213; CAR-D30-0003-0042; CAR-D30-0003-0022; CAR-OTP-2101-3410.

²⁶ CAR-D30-0004-0383; CAR-D30-0006-0332; CAR-D30-0003-0213; CAR-D30-0003-0042; CAR-OTP-2101-3410.

²⁷ CAR-D30-0004-0383 was published on 16 September 2013, and therefore predates the charged period. However, the same argument stands – the United Nations issued this document well before the charges were even contemplated by the Prosecution.

²⁸ CAR-D30-0003-0022 was issued on 24 August 2021, therefore it falls well outside of the charged period. However, its relevance is linked to the date of [REDACTED]. The document consists of a presidential decree - such documents are issued in the ordinary course of business of any president holding office.

current proceedings, or for purposes completely unrelated to these proceedings.²⁹

20. While CAR-D30-0003-0213 came into existence upon a Defence request, it does not diminish the document's probative value. The [REDACTED] that issued the item has no interest in the present proceedings and was never apprised of the reason for the Defence requesting this information. Indeed, the portion of P-0306's testimony the Defence sought to impugn was given in closed session.³⁰ The [REDACTED] merely responded to a query that does not rely on the perceptions of any one person, but rather requires checking the [REDACTED] records for an objective query, specifically: whether Mr KONATÉ and P-0306 [REDACTED]. This document shows that P-0306 was untruthful when he testified that he was [REDACTED].³¹

21. Second, all the documents bear sufficient indica of authenticity as they present clear indicators of being generated by the CAR government, [REDACTED], FIFA, United Nations or an organization associated with the Anti-Balaka. Specifically, the documents have relevant headers, logos, signatures, dated, and are stamped.

V. RELIEF SOUGHT

²⁹ While the Defence submits that CAR-D30-0003-0022 was issued as a reward for P-2673's testimony, the document itself was not issued at the behest of any one party. CAR-D30-0003-0042 is dated from 25 November 2022, and its relevance is related to P-2625's [REDACTED].

³⁰ P-0306 : T-068 [FRA], p. 73, line 27.

³¹ The Defence notes that in the "Prosecution's Response to the 'Third Ngaïssona Defence Request for Leave to add items to its List of Evidence (ICC-01/14-01/18-2439)'" , the Prosecution contested the significance of this item and cited the English transcript when quoting the witness. ICC-01/14-01/18-2446, paras. 16-17. The Prosecution submitted that the witness testified that he was [REDACTED] when questioned on whether he was [REDACTED]. Ibid. However, while this inference could reasonably be made from P-0306's testimony in the English transcript, the French transcript, from which the English transcript is derived, does not reflect the same response. Rather, the French transcript states that P-0306 testified that [REDACTED]. P-0306: T-068 [FRA], p. 73, line 27. This testimony does not allow the inference that the witness and KONATÉ [REDACTED]. Rather, it implies he is [REDACTED].

22. For the aforementioned reasons, the Defence respectfully requests the Chamber to recognize the Submitted Items listed in Annex 1 as formally submitted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized 'N' or similar character, located below the text 'Respectfully submitted,'.

Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 23 August 2024

At The Hague, the Netherlands.