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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 1

Public Redacted Version of 'Ngaïssona Defence's Second Application for the Submission of Evidence from the Bar Table (Yahoo Email Evidence)', ICC-01/14-01/18-2559-Conf, 28 June 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	
States' Representatives	Amicus Curiae	

REGISTRY	
Registrar Mr Osvaldo Zavala Giler	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	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 26 items from the bar table ('Submitted Items'). The items relate to Yahoo email communications extracted from Mr Ngaïssona's email account, which were disclosed to the Defence by the Prosecution.
2. The Submitted Items are *prima facie* relevant to material issues at trial and are sufficiently probative 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) associated documents, where applicable.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

¹ Neither the Prosecution nor the Defence objected to the submission of the Submitted Items during *inter partes* discussions with the Defence. However, both reserved their right to present further submissions on the relevance and probative value of the items in response to the Defence's bar table motion on Submitted Items. The Prosecution further specified that it disagreed with the Defence's assessment of the Submitted Items' relevance and probative value. The Defence included a column with associated documents since so many of the email exchanges are reproduced over several ERNs.

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 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 (Sexual and Gender Based Violence)".³ They are not subject to an exclusionary rule and are either relevant and probative to: (1) the evidentiary weight that should be attributed to the Yahoo emails disclosed by the Prosecution or (2) the material facts of the case.
6. The Defence maintains its objections regarding the reliability of the Yahoo emails that it first raised in the "Defence Response to the 'Prosecution's Application for Submission of Yahoo Email Evidence from the Bar Table Pursuant to Article 64(9), ICC-01/14-01/18-1450-Conf'".⁴ In particular: its argument that when the Prosecution processed the raw data from Yahoo into disclosable pdfs, it was unable to reproduce the exact content of the emails.⁵ The Defence raised several processing errors or anomalies, and requested the Chamber to find that the Yahoo email collection does not demonstrate sufficient indicia of reliability.⁶
7. Consistent with these Defence objections, the Defence is submitting emails that further demonstrate the lack of authenticity of the Yahoo email evidence submitted by the Prosecution. The Defence's primary argument is that the authenticity issues of the emails are so pervasive that the Chamber should not attribute to them any

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 ICC-01/14-01/18-1546.

⁵ ICC-01/14-01/18-1546, paras 6-22

⁶ Ibid.

evidentiary weight. However, given the Chamber has adopted “the so-called ‘Submission Approach’”⁷ to receiving evidence, the Defence has no visibility as to whether the Chamber will find that the Yahoo emails are reliable. Therefore, the Defence also submits, through the present application, several items that go to proof of several key facts of the case.

8. 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. Since neither the Prosecution nor the Yekatom Defence objected to the items, the Defence has not included in the annex their respective positions on each item.⁸
9. 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:⁹ (1) emails relevant to the lack of *prima facie* authenticity of the Yahoo emails disclosed by the Prosecution; (2) emails relevant to Mr Ngaïssona’s whereabouts from May to July 2013; (3) emails relevant to showing Mr Ngaïssona’s financial hardship during his exile following the Seleka coup; (4) emails relevant to Mr Ngaïssona’s role as President of the Central African Football Federation on the eve of the Seleka coup; and (5) emails relevant to information sharing among CAR citizens during the Seleka regime’s rule. After canvassing the relevance of the items, the Defence concludes the present application with submissions regarding the probative value of the Submitted Items.

⁷ ICC-01/14-01/18-631, para. 53.

⁸ 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.

⁹ 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.

A. Emails relevant to the lack of *prima facie* authenticity of the Yahoo emails submitted by the Prosecution

10. The Defence seeks to submit 10 emails that are indicative of the lack of *prima facie* authenticity of the Yahoo emails submitted by the Prosecution in this case.¹⁰ The lack of authenticity is demonstrated by either: (1) missing email exchanges in an email thread that has been reproduced across several ERNs or (2) different timestamps of the same email that has been reproduced across several ERNs.¹¹
11. These items are probative of the lack of authenticity of the Yahoo emails because they were processed and disclosed by the Prosecution using the same methods as the Yahoo emails the Prosecution tendered into evidence. Therefore, email exchanges that are part of the same email thread should be reproduced identically across all ERNs containing several versions of the same email thread. However, the content of these 10 items shows this is not the case since certain exchanges are missing or have different timestamps.

B. Emails relevant to Mr Ngaïssona's whereabouts from May to July 2013

12. The Defence seeks to submit five emails relevant to Mr Ngaïssona's whereabouts from April to July 2013.¹² The items consist of either emails sent from Mr Ngaïssona's email account stating that he is in a given location such as DOUALA in April 2013 and July 2013,¹³ or information regarding Mr Ngaïssona's anticipated travels from Brussels Airlines.¹⁴ Identifying Mr Ngaïssona's whereabouts during this time is a key issue in the case since the Prosecution alleges Mr Ngaïssona

¹⁰ CAR-OTP-2130-3522; CAR-OTP-2130-3568; CAR-OTP-2130-3642; CAR-OTP-2130-3644; CAR-OTP-2130-3646; CAR-OTP-2130-3648; CAR-OTP-2124-1027; CAR-OTP-2124-0929; CAR-OTP-2130-3517; CAR-OTP-2130-3389.

¹¹ The Defence refers the Chamber to the arguments it made in this regard in ICC-01/14-01/18-1546, paras 14-15.

¹² CAR-OTP-2130-3450; CAR-OTP-2130-3520; CAR-OTP-2130-3409; CAR-OTP-2130-3525; CAR-OTP-2130-3537.

¹³ CAR-OTP-2130-3450; CAR-OTP-2130-3537.

¹⁴ CAR-OTP-2130-3520; CAR-OTP-2130-3409; CAR-OTP-2130-3525.

participated in certain meetings in YAOUNDÉ and PARIS,¹⁵ during which the Anti-Balaka leadership allegedly emerged.

13. Throughout these proceedings, the Prosecution has argued that the Defence has impermissibly presented an alibi defence without having given the Prosecution due notice as required by Rule 79(1)(a) of the Rules.¹⁶ The Defence reiterates its position that Rule 79(1)(a) does not apply in circumstances where the accused has never been in close proximity to the crime scene.¹⁷ Therefore, when the Defence submits evidence regarding the impossibility that Mr Ngaïssona would have attended meetings in YAOUNDÉ or PARIS during a given time period, it can do so without any need to provide notice under Rule 79(1)(a).
14. The Prosecution is not able to cite one case to show otherwise. Instead, the Prosecution argues by analogy that if an accused allegedly fired a long-range missile from a given location, they would have to give notice of an alibi if they were to put forward evidence showing that they were not present at the location from which the missile was fired. The Prosecution underscores that such notice is necessary despite the accused not being alleged to have been present at the location of the explosion.¹⁸ This analogy is inapposite. Contrary to the assumption underlying the Prosecution's submissions, the location where the long-range missile would be fired would be part of the crime scene given that it would be the location where evidence related to a crime would be found.¹⁹ Here, the location of any said meeting in YAOUNDÉ or PARIS is not part of the crime scene since no evidence of the alleged crime base occurring in either BOSSANGO or BANGUI can be found there.

¹⁵ Albeit without the Prosecution ever providing the dates of such alleged meetings.

¹⁶ ICC-01/14-01/18-2298, para. 4 *and the references therein*.

¹⁷ ICC-01/14-01/18-2291, paras 4-5.

¹⁸ ICC-01/14-01/18-2528, para 31.

¹⁹ *Flippo v. West Virginia*, 528 U.S.11, 145 L.Ed.2d 16 (1999).

C. Emails relevant to showing Mr Ngaïssona's financial hardship during his exile following the Seleka coup

15. The Defence seeks to submit ten documents relevant to Mr Ngaïssona's financial hardships during his exile in CAMEROON and FRANCE in 2013.²⁰ Of those ten documents, four of them relate to Mr Ngaïssona's siblings dying, and the added financial difficulty he faced in the aftermath of their death in July and September 2013.²¹ Mr Ngaïssona's financial hardships during his exile is relevant to a core issue in the case, namely whether Mr Ngaïssona had the financial capacity to finance the Anti-Balaka in these key months, namely from June to September, during which the Prosecution alleges the Anti-Balaka became an organized fighting force.²² In the very months that the Prosecution alleges that Mr Ngaïssona would have been financing certain elements of the Anti-Balaka, these emails show that Mr Ngaïssona was facing financial distress. He had to request money from multiple sources to repatriate the body of his brother after his untimely death.
16. It defies common sense that Mr Ngaïssona would be financing individuals to whom he had no personal connection to the financial detriment of his closest family. The inference to be made from the emails is that he simply did not have the financial capacity to assist the Anti-Balaka movement at the time the Prosecution alleges. Further, emails such as CAR-OTP-2130-3555, demonstrate in the first half of 2013 that Mr Ngaïssona was completely consumed with the tremendous financial hardships of his family, leaving him with no mental bandwidth to address other matters. CAR-OTP-2130-3555 shows that upon receiving news from [REDACTED] about the local population resisting the Seleka in GOBONGO, Mr Ngaïssona did not react at all to it. Instead, Mr Ngaïssona immediately requested

²⁰ CAR-OTP-2130-3486; CAR-OTP-2130-3633; CAR-OTP-2130-3517; CAR-OTP-2130-3522; CAR-OTP-2130-3674; CAR-OTP-2130-3637; CAR-OTP-2130-3568; CAR-OTP-2130-3537; CAR-OTP-2130-3530; CAR-OTP-2130-3555.

²¹ CAR-OTP-2130-3568; CAR-OTP-2130-3537; CAR-OTP-2130-3530; CAR-OTP-2130-3555.

²² See Pre-Trial Brief, ICC-01/14-01/18-723, paras 91, 93.

financial assistance to address his own family's challenges, thereby showing [REDACTED] that the local population's resistance to the Seleka was not his priority at the time.

D. Emails relevant to Mr Ngaïssona's role as President of the Central African Football Federation on the eve of the Seleka coup

17. The Defence seeks to submit four emails relevant to Mr Ngaïssona's role as the President of the Central African Football Federation on the eve of Seleka coup.²³ This information is relevant to showing Mr Ngaïssona's active and continued involvement in the Central African Football Federation during his very short tenure as the Minister of Youth, Sports, Arts and Culture. Despite March 2013 being the month the Government of National Unity would fall, the emails demonstrate Mr Ngaïssona was at that time still pushing for the development of football in CAR.²⁴ They are consistent with evidence of Mr Ngaïssona's dedication to football in CAR, and his well-known generosity.²⁵ Mr Ngaïssona would often personally cover many of the expenses associated with the sport.²⁶ It was these types of initiatives by Mr Ngaïssona that led him to be named the National Coordinator of the Anti-Balaka in January 2014.²⁷

E. Emails relevant to information sharing among CAR citizens during the Seleka regime's rule

18. The Defence seeks to submit two emails relevant to the practice of widespread information sharing among CAR citizens during the Seleka regime.²⁸ The emails

²³ CAR-OTP-2130-3437; CAR-OTP-2130-3438; CAR-OTP-2130-3396; CAR-OTP-2130-3443.

²⁴ P-2027: T-040[ENG], p. 19, lines 10-13.

²⁵ P-2843: T-074 [ENG], pp-18-20, p. 36, lines 13-20; P-0808: T-070 [ENG], p. 24 lines 10-17; P-0808: T-071[ENG], p. 44, lines 13-24; P-1521: T-080[ENG] p. 38 lines 19-25 to p. 39 lines 1-7; P-2232: T-075[ENG] p. 20 lines 14-25 to p. 21 lines 1-6; P-0446: T-097 [ENG], p. 43, lines 19-24.

²⁶ Ibid.

²⁷ P-0889: T-109[ENG], p. 32, lines 17-25 to p. 33, lines 1-10; P-1521: T-082[ENG], p. 80, lines 2-25;

²⁸ CAR-OTP-2130-3555; CAR-OTP-2130-3659.

are relevant to showing that Mr Ngaïssona was not part of any “inner circle” that was planning to take down the Seleka regime. Instead, the emails show Mr Ngaïssona and certain of his interlocutors engaged in information sharing that had no connection to any concrete plans of taking down the Seleka regime. For example, in one email from [REDACTED], who the Prosecution accuses of assisting Mr Ngaïssona in financing the Anti-Balaka,²⁹ shares a news article with Mr Ngaïssona about the local population resisting the Seleka, with no indication that [REDACTED] wished to assist the local population or that he was asking Mr Ngaïssona to become involved in any resistance movement.³⁰ The emails are consistent with other evidence on record regarding information sharing among concerned CAR citizens, especially among those who fled CAR once the Seleka regime took power.³¹

E. Probative value of the emails the Defence seeks to submit for the truth of their content

19. As submitted above, the Defence maintains its arguments that the probative value of the Yahoo emails the Prosecution submitted is limited due to various processing errors. Therefore, the Chamber should attach little evidentiary weight to any email thread where it is reasonable to conclude that either: (1) there could be entire email messages missing from a given thread, or (2) the time at which the emails were sent is uncertain.
20. However, if the Chamber determines that these processing errors do not cast doubt on the reliability of the Yahoo emails, the Defence requests the Chamber to also consider items listed under subsections A through E of the present application. The emails are probative for two reasons. *First*, they are mutually corroborative of

²⁹ [REDACTED].

³⁰ CAR-OTP-2130-3555.

³¹ See P-0889: T-108[ENG], p. 27, lines 24-25 to p. 28, lines 1-8. P-2027: T-039[ENG], p. 48, lines 1-9; P-2841: T-030[ENG], p. 10, lines 1-22; P-1719: T-141[ENG], p. 34, lines 18-25.

one another and other evidence on record as substantiated above. *Second*, they were produced contemporaneously to the events, long before these proceedings were ever contemplated.

V. RELIEF SOUGHT

21. 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 dark ink, appearing to be a stylized 'N' or 'G' followed by a horizontal stroke.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 23 August 2024

At The Hague, the Netherlands.