

**Cour
Pénale
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**International
Criminal
Court**

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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

Public redacted version of “Prosecution’s Request for the Submission of Rebuttal Evidence”, ICC-01/14-01/18-2657-Conf, 27 August 2024

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INTRODUCTION

1. Pursuant to the Initial Directions on the conduct of the proceedings,¹ the Prosecution seeks leave to formally submit evidence in rebuttal. The tendered evidence reflects improper contact and/or influence by the Defence and persons linked to the Accused as regards Prosecution witnesses (“Proposed Evidence”).² The Proposed Evidence comprises social media records, Call Data Records (“CDR”), Call Sequence Tables (“CST”), and other documents set out in the Annex. It establishes a pattern of conduct violative of the Protocol on the handling of confidential information issued by Trial Chamber V (“Chamber”)³ and potentially article 70(1)(c).

2. The Proposed Evidence constitutes appropriate rebuttal and is responsive to prospective Defence assertions concerning the credibility of Prosecution witnesses affected by the improper pattern of conduct (“Targeted Witnesses”). The improper conduct appears to have occurred surreptitiously during the presentation of the Prosecution’s case – although it is not clear that it is so confined. Nevertheless, the Defence has made affirmative use of the statements and/or testimony of the Targeted Witnesses during its direct case and/or challenged the conduct of persons linked to the Defence and/or the Defence arising from material disclosed pursuant to the Prosecution’s article 70 investigation.

3. In the alternative, the Proposed Evidence may be introduced pursuant to articles 64(6)(d) and 69(3). It is compelling and brings to light facts and circumstances having a direct and significant impact on the evidence in this case. Moreover, it bears on the Chamber’s assessment of the Targeted Witnesses’ testimony, particularly in respect of any evidence they provide favourable to the Accused, and importantly, to the Chamber’s statutory duty to determine the truth in these proceedings.

¹ ICC-01/14-01/18-631, para. 16; *see also* ICC-01/14-01/18-2491-Anx4-Red, p. 2.

² Hereinafter, “Request.”

³ ICC-01/14-01/18-677-Anx1; *see* ICC-01/14-01/18-156-AnxA.

I. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), this response is filed as “Confidential”, as it contains information that should not be made public at this time. A public redacted version will be filed as soon as practicable.

II. SUBMISSIONS

A. The Proposed Evidence Comprises Appropriate Rebuttal

5. The Chamber “enjoys wide discretion when it is seized of a request to consider rebuttal evidence.”⁴ And although, the Statute’s framework does not refer to a ‘rebuttal phase’ as such,⁵ the practice is nevertheless recognised.⁶

6. Here, the Proposed Evidence demonstrates improper contact with and/or influence exerted on Prosecution witnesses during the course of trial. The Targeted Witnesses include; [REDACTED] (P-0888); [REDACTED] (P-0992); [REDACTED] (P-1193); [REDACTED] (P-1847); [REDACTED] (P-2673); [REDACTED] (P-2841); and [REDACTED] (P-2843).

7. Significantly, the Proposed Evidence links the improper conduct to the Defence and individuals associated with the Accused, including [REDACTED], and members of former President Francois BOZIZE’s *Kwa na Kwa* party (“KNK”) [REDACTED]⁷ and [REDACTED],⁸ a former Defence witness.

8. It is not known whether the pattern of improper conduct is limited to the Targeted Witnesses, or if it may extend to other Prosecution (or even Defence) witnesses. However, it suffices that the Proposed Evidence presents factual

⁴ ICC-01/05-01/08-3029, para. 25.

⁵ ICC-01/05-01/08-3029, para. 22.

⁶ See e.g. ICC-01/04-02/06-2246; ICC-02/04-01/15-1600.

⁷ See e.g., ICC-01/14-01/18-T-034-ENG CT WT, p. 65, lns. 12-15.

⁸ See e.g., ICC-01/14-01/18-T-144-Red-FRA, p. 14, lns. 24-25.

circumstances significant to the issues to be determined by the Chamber.⁹ Indeed it goes to the heart of the Chamber's critical role in evaluating the trial evidence. Put more succinctly, "it is precisely the function of the judge to tell the true from the sham, the genuine from the bogus."¹⁰ The Proposed Evidence is necessary and appropriate to the discharge of that function.

a. The Evidence

9. The Proposed Evidence consists of 98 items listed in the attached Annex. As noted, they comprise Facebook records, CDR, CST, and other documents. All of the constituent items have been disclosed, with most having been provided pursuant to the Chamber's directions over the course of more than a year.¹¹

10. As noted, the Proposed Evidence goes to a discrete issue, namely [REDACTED] improper contact with Prosecution witnesses. Thus, the Prosecution considers that the Chamber should firstly take such conduct into account in evaluating the evidence of the Targeted Witnesses. Similarly, it should also take into account that, insofar as the impropriety may be imputable to the Accused directly, or indirectly through his Defence or persons linked to him or his cause, the Proposed Evidence may properly demonstrate 'consciousness of guilt', as an independent basis for its submission in rebuttal.

b. Improper conduct

11. The Proposed Evidence establishes a persistent pattern of conduct demonstrating improper contacts with Prosecution witnesses in this case over an extended period of

⁹ See *e.g.* ICC-02/04-01/15-1600, para. 6 (noting that the determination of whether rebuttal evidence is necessary involves consideration of "whether the factual allegations related to the proposed evidence are of significance vis-à-vis the legal issues to be determined").

¹⁰ ICC-02/04-01/15-1600-Anx, para. 6.

¹¹ See *e.g.* ICC-01/14-01/18-1063-Conf; ICC-01/14-01/18-1127-Conf; ICC-01/14-01/18-1641-Conf; ICC-01/14-01/18-2047-Conf; ICC-01/14-01/18-2243-Conf.

time. The Prosecution thus incorporates by reference its prior submissions set out in previous filings regarding its article 70 investigation.¹²

12. As recently acquired and analysed CDR confirm — shown in the CST submitted - the Defence has had unauthorised contact with Prosecution witnesses, specifically via [REDACTED]. The CDR establish that [REDACTED] has been in direct contact with Prosecution witnesses [REDACTED], [REDACTED], and [REDACTED]. For instance, it demonstrates his contact with [REDACTED] on the evening of the first day of his testimony before the Chamber,¹³ and that he was also in contact with [REDACTED] three days after he completed his testimony.¹⁴ These contacts were clearly not authorised.¹⁵ Indeed, the Chamber has confirmed that the Contact Protocol implicitly prohibits contact with a non-calling Party's witness, even post-testimony:

“the Chamber considers that contact between the non-calling party and witnesses who have completed their testimony is prohibited unless exceptional circumstances can be demonstrated”¹⁶

Although the Chamber opined that any other understanding would provide blanket authorisation for participants to continue questioning witnesses indefinitely,¹⁷ it also emphasised the spirit behind the Contact Protocol, noting “*its duty to ensure the integrity of the proceedings.*”¹⁸ Here, the Proposed Evidence goes directly to the latter obligation.

¹² See, ICC-01/14-01/18-1139-Conf-Corr-Red; ICC-01/14-01/18-1310-Conf; ICC-01/14-01/18-1444-Conf; ICC-01/14-01/18-1588-Conf-Red; ICC-01/14-01/18-1906-Conf; ICC-01/14-01/18-2077-Conf-Red; ICC-01/14-01/18-2348-Conf-Red; ICC-01/14-01/18-2495-Conf-Red; ICC-01/14-01/18-1588-Conf-Red; ICC-01/14-01/18-1016-Conf-Exp.

¹³ [REDACTED].

¹⁴ [REDACTED]. Note, this is consistent with the pattern of conduct demonstrated in CAR-OTP-00000080, at 000013, a Facebook conversation in which [REDACTED] (P-2843) mentions that about 10 days after his testimony he was contacted by NGAISSONA, through a “third-party” in BANGUI, to supposedly ‘thank him’ for everything that he did for him (during his testimony) - “[REDACTED].

¹⁵ See ICC-01/14-01/18-677-Anx1, para. 101, which lifts the prohibition on discussions once the testimony is completed only between the witness and the party introducing the evidence (“Once the witness’ evidence in court is completed, the prohibition on discussions between the party introducing the evidence and the witness is lifted, unless the Chamber directs otherwise.”).

¹⁶ ICC-01/14-01/18-2493-Conf, para. 8.

¹⁷ ICC-01/14-01/18-2493-Conf, para. 9.

¹⁸ ICC-01/14-01/18-2493-Conf, para. 8 (emphasis added).

13. The Proposed Evidence reflects a broad array of improper conduct. For instance, the CDR evidence reflects [REDACTED] contacts with KNK members [REDACTED] and [REDACTED], both of whom were involved in efforts to intimidate Prosecution witness [REDACTED] in relation to the testimony he provided. For example, in an [REDACTED] Facebook conversation — about a week after [REDACTED] testimony was completed — [REDACTED] threatened the witness, stating: «[REDACTED]».¹⁹ In a Facebook conversation of [REDACTED], [REDACTED] informed [REDACTED] that he had obtained reliable information corroborated (by an independent source) [REDACTED] regarding [REDACTED] confidential testimony.²⁰ This conversation occurred after [REDACTED] had also been contacted the previous day by one [REDACTED]²¹

14. Facebook records also reflect [REDACTED] passing on information regarding [REDACTED] to an interlocutor,²² stating: [REDACTED]²³ In the exchange, [REDACTED] also notes expressly: “*Ngaissona m’a appelé depuis la Haye pour m’informer.*»²⁴

15. The Proposed Evidence demonstrates a persistent pattern of impropriety by the Defence and/or persons linked to the Accused. In this respect, the Prosecution incorporates by reference its submissions regarding its request for the formal submission of P-1847’s prior statements.²⁵

¹⁹ See CAR-OTP-00000077, at 000001.

²⁰ CAR-OTP-00000079, at 000034-000036.

²¹ CAR-OTP-00000079, at 000034 ([REDACTED])

²² See Annex, p. 166-170: CAR-OTP-00000084-000033-000037.

²³ CAR-OTP-00000084-000033-000035.

²⁴ CAR-OTP-00000084-000036 (emphasis added); All references to [REDACTED] trial testimony and transcript were redacted from the public record.

²⁵ ICC-01/14-01/18-2154-Red.

c. The proposed rebuttal is limited

i. The purpose and scope

16. The Defence's contact with Prosecution witnesses flagrantly violates the Contact Protocol and potentially article 70(1)(c). It arose *ex improviso*,²⁶ and it was not, nor could it have reasonably been, anticipated in either framing or presenting the Prosecution's case-in-chief. And, although the evidence of such conduct emerged over a period of time, calling such evidence in the Prosecution's direct case during the course of an ongoing investigation or seeking to reopen the case for such purpose, was manifestly infeasible without undermining that investigation.

17. In any event, even though the conduct (known so far) occurred during the presentation of the Prosecution's case, it is significant that the Defence made use of the affected witness's statements and evidence in the presentation of its own case, as noted. Thus, the Proposed Evidence is appropriate and necessary for the Chamber to assess and weigh the credibility of Prosecution witnesses (many of whom are insider witnesses linked to the Accused), and especially the Targeted Witnesses in particular as concerns any evidence potentially favourable to the Accused or otherwise inconsistent with their prior statements adverse to the Accused's interests. It is practically axiomatic that where a Party has engaged in conduct which may taint or mislead evidence before the Chamber, such evidence may be properly addressed in rebuttal, even if the rebuttal evidence would not otherwise be admissible. Thus, rebuttal evidence is appropriate insofar as "[...] unforeseen questions is an inherent phenomena to criminal cases" and that in exceptional circumstances, which cannot be dealt with sufficiently during the evidence of the witness then before the Court by way of questioning or making an objection, rebuttal evidence may be permitted."²⁷

²⁶ See e.g., ICC-01/04-01/06-2727-Red, para. 37.

²⁷ ICC-01/04-01/06-2727-Red, para. 40 (internal citations omitted).

18. Unlike evidence going to the circumstances of the commission of the crime — more appropriately advanced in respect of sentencing²⁸ — the Proposed evidence is properly tendered in rebuttal, as it goes to the nature and quality of the trial testimony and claims and arguments propounded by the Defence regarding the witnesses affected by the improper contacts.

19. Although the volume of the Proposed Evidence is substantial, its scope is narrowly circumscribed and limited.

ii. Expeditiousness and Absence of prejudice

20. The Proposed Evidence is entirely documentary. The Prosecution does not seek to call or recall any witnesses in light of the information uncovered during the course of its article 70 investigation. As well, all of the constituent documents have been previously disclosed, with almost the entirety of the Proposed Evidence being provided over at least the last year. Thus the formal submission of the Proposed Evidence will also not unduly lengthen the proceedings or materially affect their expeditious conduct.

21. The Proposed Evidence has also been referenced in several Prosecution filings to which the Defence has been made privy. Indeed, as noted, the Defence has affirmatively addressed aspects of this evidence in its case-in-chief on this basis and the prior disclosures. Accordingly, the Chamber's formal recognition of its submission in rebuttal is not unduly prejudicial. It is more so entirely justifiable because it arises as a product of the Defence's course of conduct and that of persons acting at the behest of and/or in the Accused's interests.

22. The Proposed Evidence is not redundant and is plainly consequential to the Chamber's core function of fairly evaluating the trial evidence and the testimony of the witnesses concerned. Thus its submission is not only consistent with, but

²⁸ See Rule 145(1)(c) of the Rules.

substantially advances the Chamber's statutory duty to determine the truth in these proceedings.

B. Articles 64(6)(d) and/or 69(3) Alternative

23. Even assuming *arguendo* that the Proposed evidence does not fulfil the established criteria for rebuttal — which it does — the Chamber may alternatively introduce the Proposed evidence pursuant to articles 64(6) and 69(3).

24. Article 64(6)(d) and (f) authorise a Chamber to "[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties" and "[r]ule on any other relevant matters."²⁹ Similarly, article 69(3) "provides the Chamber with the authority to request the submission of all the evidence that it considers necessary for the determination of the truth."³⁰ Accordingly, there is plainly a statutory basis for the Chamber to exercise its discretion to formally submit the Proposed Evidence consistent with the range of related considerations. These include "the evidence already before it, the potential impact on the fairness and expeditiousness of the trial and rights of the accused, and the centrality and relevance of the additional evidence to the core matters for determination by the Chamber."³¹

25. Here, the Proposed evidence would manifestly assist the Chamber's ability to evaluate the evidence of the Targeted Witnesses, the context thereof, and to appraise the arguments and contentions advanced by the Defence in its case-in-chief regarding the strength of the Prosecution's evidence and case, more generally.³² Conversely, absent the submission of the Proposed Evidence, the Chamber would deprive itself of critical facts bearing significantly on the reliability of the testimony of witnesses who have been demonstrably improperly contacted/influenced by the Defence. Moreover, the formal submission of the Proposed Evidence would not occasion prejudice. Clearly

²⁹ See article 64(6)(d); see ICC-01/04-01/06-2727-Red, para. 37.

³⁰ See article 64(6)(f); see ICC-01/04-01/06-2727-Red, para. 37.

³¹ ICC-01/05-01/08-3029, para. 22, para. 29.

³² See e.g. ICC-01/04-02/06-2258, para. 26.

the Accused is not entitled to benefit from unlawful conduct on a claim that its exposure is prejudicial — interference with the integrity of the proceedings before the Court is not a right that is protected under the Statute.

III. REQUESTED RELIEF

26. For the above reasons, the Prosecution respectfully requests that the Chamber deem the referenced evidence formally submitted for the purposes of rebuttal, or in the alternative, pursuant to article 64(6) and 69(3).

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 24th day of September 2024
At The Hague, The Netherlands