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

Date: **2 October 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

**Public Redacted Version of “Defence Response to Prosecution’s Request for the
Submission of Document CAR-D30-0024-0032 in Rebuttal”, ICC-01/14-01/18-2683-
Conf, 9 September 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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I. INTRODUCTION

1. The Defence for Patrice-Édouard Ngaïssona ('Defence') hereby responds to the "[...] *requête aux fins d'autorisation de soumission formelle du document CAR-D30-0024-0032 comme "rebuttal evidence"*" dated 3 September 2024 ('Request').¹
2. The Request, intended to supplement the "Prosecution's Request to Submit Evidence in Rebuttal" dated 27 August 2024 ('First Request')² and filed after the authorised time limit,³ should be dismissed for the same reasons as the First Request, namely its failure to meet the criteria for rebuttal evidence. The Request is yet another attempt by the Prosecution to refine its case by (i) undermining a key Defence witness who withstood the Prosecution's abrasive cross-examination unscathed and (ii) pursuing its unwarranted campaign against the Defence and the evidence it presented. The Prosecution fails to provide any concrete evidence of the alleged ramifications between document CAR-D30-0024-0032 ('Proposed Item') and any alleged fabrication of evidence on behalf of Mr Ngaïssona, involving witness D30-4914. The Chamber should terminate this futile pursuit, allowing the Defence to allocate its limited resources to substantive matters crucial for the determination of this case.

II. CONFIDENTIALITY

3. In accordance with Regulation 23bis(1) of the Regulations of the Court, the Request is filed as "confidential" as it contains information related to filings that have the same classification.

III. PROCEDURAL HISTORY

4. On 5 November 2023, the Defence met with witness D30-4914 in Bangui. During that meeting, the witness expressed his fears about his security.

¹ ICC-01/14-01/18-2666-Conf.

² ICC-01/14-01/18-2657-Conf.

³ Request, para. 3: "*De fait, le document [...] doit être mis en rapport avec la preuve d'interférences de partisans de NGAÏSSONA avec des témoins de l'Accusation dont la soumission formelle a récemment été requise à titre de "rebuttal evidence"*". See also Request, para. 21: "*A cet égard, il doit être mis en perspective avec la preuve d'interférences par des partisans de l'accusé avec des témoins de l'Accusation dont la soumission formelle a été requise [...]*".

5. On 17 November 2023, the Defence submitted its Final List of Witnesses and its List of Evidence, informing, *inter alia*, the Chamber, parties and participants about its intention to call witness D30-4914.⁴
6. On 4 December 2023, the Defence sought guidance from the Chamber regarding any legal or procedural obstacles in obtaining prior recorded testimonies of four (4) Defence witnesses in a fully remote manner. Among those witnesses was D30-4914, who was “[REDACTED]”.⁵
7. On 8 January 2024, the WIF and PTSCF were sent to the Victims and Witnesses Unit (‘VWU’), effectively informing them about the witness’s security concerns.⁶
8. On the same day, Defence team members on mission in Bangui met with the VWU representative from the field office (‘FO VWU Representative’). The FO VWU Representative explained to them the risk of D30-4914 being arrested while trying to renew his passport or exit the country in order to come and testify *viva voce*, given that [REDACTED]. The FO VWU Representative explained that the Court’s Protection Programme (‘ICCPP’) would not protect the witness against an arrest and that [REDACTED]. For these reasons, the FO VWU Representative suggested that D30-4914 testifies vial AVL.
9. On 9 January 2024, the Defence had a meeting with VWU to discuss how to proceed with the organisation of D30-4914’s travel and testimony at the seat of the Court in light of his security situation.
10. On 8 February 2024, VWU reached out to the Defence requesting more details as to why the witness is in hiding and whether the Defence sent [REDACTED].⁷
11. On 13 February 2024, after speaking to D30-4914 on the phone, the Defence reported to VWU that the witness met with their colleagues from the field office and submitted his passport application.⁸

⁴ ICC-01/14-01/18-2215 and ICC-01/14-01/18-2215-Conf-Anx1.

⁵ Email from the Defence to the Chamber on 04/12/2023, at 16:27.

⁶ Email from the Defence to VWU on 08/01/2024, at 19:24.

⁷ Email from VWU to the Defence on 08/02/2024, at 14:02.

⁸ Email from the Defence to VWU on 13/02/2024, at 11:47.

12. On 6 March 2024, the Defence filed the “Ngaïssona Defence Consolidated Request for In-Court Protective Measures for Witnesses D30-4914, D30-4197, D30-P-4504 and D30-P-4608”, detailing D30-4914’s security concerns.⁹
13. On the same day, VWU informed the Defence that they had obtained D30-4914’s passport.¹⁰
14. On 2 April 2024, the FO VWU Representative contacted the Defence about D30-4914’s visa application and inquired as to whether the witness was still in hiding.¹¹
15. On 3 April 2024, the Defence, after speaking to D30-4914 on the phone, informed VWU that he was still in hiding but agreed to meet them in order to apply for a visa. The Defence further reiterated that his security situation remains the same.¹²
16. On the same day, the FO VWU Representative responded requesting again to be informed of the reasons why the witness was in hiding,¹³ to which the Defence responded the following:

“[REDACTED]”.¹⁴
17. On 9 April 2024, the FO VWU Representative requested again the WIF and PTSCF for the witness,¹⁵ which the Defence sent the same day.¹⁶
18. On 15 August 2024, VWU filed the “Redacted version of the “Victims and Witnesses Unit’s Observations on the Ngaïssona Defence Consolidated Request for In-Court Protective Measures for Witness D30-4914 (ICC-01/14-01/18-2395-Conf)” (ICC-01/14-01/18-2629-Conf)”, stating that “in the absence of any specific threats, the VWU does not find any objectively justifiable reasons warranting the adoption of ICPMs”.¹⁷
19. On the same day, the Defence submitted its observations on the abovementioned filing, reiterating the seriousness of D30-4914’s security situation especially given “the sensitivity

⁹ ICC-01/14-01/18-2395-Conf, paras 18-23.

¹⁰ Email from VWU to the Defence on 06/03/2024, at 10:11.

¹¹ Email from the FO VWU representative to the Defence on 02/04/2024, at 15:05.

¹² Email from the Defence to the FO VWU Representative on 03/04/2024, at 09:38.

¹³ Email from the FO VWU representative to the Defence on 03/04/2024, at 10:14.

¹⁴ Email from the Defence to the FO VWU Representative on 04/04/2024, at 09:51.

¹⁵ Email from the FO VWU Representative to the Defence on 09/04/2024, at 13:42.

¹⁶ Email from the Defence to the FO VWU Representative on 09/04/2024, at 13:46.

¹⁷ ICC-01/14-01/18-2629-Conf, para. 9.

of the content of the witness testimony, which concerns military operations, FACA members and people close to the current Government”.¹⁸

20. On 19 August 2024, the Single Judge issued the “Decision on the Ngaïssona Defence Request for In-Court Protective Measures for D30-4914”, granting the Defence’s request for in-court protective measures.¹⁹
21. On 20 August 2024, the Duty Counsel assigned for D30-4914 informed the Defence during a break from the hearings about a security incident involving the witness and related to his testimony before the Chamber.
22. On 21 August 2024, D30-4914, when questioned by the Prosecution and later by the Defence in redirect examination, gave details about the security incident.²⁰ During the “goodbye” meeting between the witness and the Defence that took place after the hearing in the presence of VWU, the witness repeated the same information he mentioned during his testimony. Besides the aforementioned, the Defence received no further information on the matter by the witness since he was under VWU’s responsibility and the Defence is not allowed to contact him.
23. On the same day, the Defence had a call with VWU to find out more about the security incident. VWU mentioned that the security incident took place [REDACTED], that the Chamber has been informed accordingly and that there was a press article [REDACTED]. VWU assured the Defence that they would assess the situation during the so-called “30-day cooling-off period” and that the witness would not return to CAR unless it is considered safe.
24. On 22 August 2024, VWU contacted the Defence requesting more information on past security incidents reported by the witness,²¹ to which the Defence responded the same day.²² In its response, the Defence (i) reiterated the different occurrences where the witness had reported being threatened and (ii) referred VWU to the PTSCF, the witness’ prior

¹⁸ Email from the Defence to the Chamber on 15 August 2024, at 17:54.

¹⁹ ICC-01/14-01/18-2640-Conf.

²⁰ ICC-01/14-01/18-T-303-CONF-ENG, p. 61, lns 21-25 to p. 62, lns 1-20 and p. 91, lns 15-25 to p. 92, lns 1-6.

²¹ Email from VWU to the Defence on 22/08/2024, at 12:51.

²² Email from the Defence to VWU on 22/08/2024, at 17:18.

written statement,²³ the submissions of the Defence in its Request for ICPMs²⁴ and in its Observations on the VWS observations on the request for Protective measures for D30-4914.²⁵

25. On 26 August 2024, VWU sent the article mentioning D30-4914 to the Defence.²⁶

26. On 27 August 2024, the Prosecution filed its “Request for the Submission of Rebuttal Evidence”, which included a total of 98 items of evidence.²⁷

27. On 28 August 2024, the Defence disclosed the Proposed Item.²⁸

28. On 29 August 2024, the Defence submitted the “Sixth Request for Leave to Add Items to the List of Evidence and Fourth Application for the Submission of Evidence from the Bar Table”.²⁹

29. On 30 August 2024, the Defence informed the Chamber, parties and participants about the withdrawal of its request to add the Proposed Item to its List of Evidence. Additionally, the Defence withdrew the Proposed Item from its “Fourth Application for the Submission of Evidence from the Bar Table”.³⁰

30. On 3 September 2024, the Prosecution filed the Request.³¹

IV. SUBMISSIONS

A. The Prosecution fails to meet the threshold for rebuttal evidence

31. For the same reasons detailed in the ‘Defence Response to “Prosecution’s Request for the Submission of Rebuttal Evidence”’, incorporated here by reference,³² the Prosecution failed to demonstrate that the Proposed Item is “of significance vis-à-vis the legal issues to

²³ CAR-D30-0024-0001-R01, p. 0029, lns 1177-1182.

²⁴ ICC-01/14-01/18-2395-Conf, paras 20-23.

²⁵ Email from the Defence to the Chamber on 15/08/2024, at 17:54.

²⁶ Email from VWU to the Defence on 26/08/2024, at 14:42.

²⁷ ICC-01/14-01/18-2657-Conf and ICC-01/14-01/18-2657-Conf-Anx.

²⁸ See Trial D30 Evidence Package 77 – 28 August 2024.

²⁹ ICC-01/14-01/18-2662-Conf.

³⁰ Email from the Defence to the Chamber on 30 August 2024, at 17:38.

³¹ ICC-01/14-01/18-2666-Conf.

³² ICC-01/14-01/18-2672-Conf.

be determined in this case, particularly in light of the evidence already on the record”, which the Chamber indicated as the sole factor for considering rebuttal requests.³³

32. *First*, the Prosecution fails to identify any appropriate legal issue the Proposed Item pertains to. On 20-21 August 2024, the Defence called witness D30-4914, who expanded on his prior statement, [REDACTED].³⁴ The witness further clarified that after Mr Ngaïssona’s arrest, [REDACTED].³⁵ The witness finally specified that [REDACTED].³⁶ During cross-examination, the Prosecution challenged the witness on the source and specific evidence of his claims.³⁷ The witness offered [REDACTED]. However, the Prosecution did not pursue this lead further.³⁸

33. Now, the Prosecution seeks leave to introduce a press article [REDACTED] as rebuttal evidence after the authorised time limit to do so. The article in question [REDACTED]. [REDACTED].³⁹ The Prosecution asserts that there is corroborating evidence (“*indices concordants*”) indicating that the Proposed Item may have been falsified to support D30-4914’s testimony on the aforementioned aspects.⁴⁰ Furthermore, the Prosecution seems to argue that this article would significantly assist the Chamber in determining the following issues : (i) the credibility, or lack thereof, of Defence witness D30-4914; and (ii) the existence of an enterprise of evidence fabrication in support of Mr Ngaïssona’s cause.⁴¹

34. Neither of these two issues are appropriate for presenting rebuttal evidence. Regarding the issue of credibility, in the *Bemba* case, the Trial Chamber denied the Prosecution’s request to submit new evidence concerning the credibility of certain Defence witnesses, considering that the Prosecution had already had the opportunity to question them.⁴² In the present case, the Prosecution had ample opportunity to cross-examine D30-4914 and in fact did.

³³ Email decisions from the Chamber dated 7 February 2024 at 15:10 clarified on 9 August 2024, at 21:21.

³⁴ D30-P-4914: ICC-01/14-01/18-T-303-CONF-ENG, p. 39, ln 23 to p. 44, ln. 2.

³⁵ D30-P-4914: ICC-01/14-01/18-T-303-CONF-ENG, p. 44, lns 22-25.

³⁶ D30-P-4914: ICC-01/14-01/18-T-303-CONF-ENG, p. 45, lns 3-5.

³⁷ D30-P-4914: ICC-01/14-01/18-T-303-CONF-ENG ET, p. 63.

³⁸ D30-P-4914: ICC-01/14-01/18-T-303-CONF-ENG ET, p. 64.

³⁹ CAR-D30-0024-0032.

⁴⁰ Request, para. 20.

⁴¹ Request, para. 21.

⁴² ICC-01/05-01/08-3029, para. 30. *See also Prosecutor v. Ntagerura et al*, No. ICTR-99-46-T, Decision on the Prosecutor’s Motion for Leave to call Evidence in Rebuttal Pursuant to Rules 54, 73 and 85(A)(iii) of the Rules of Procedure and Evidence, 21 May 2003, para. 33.

35. Moreover, the Proposed Item alone cannot assist the Chamber in determining the credibility of D30-4914's testimony on these matters. To have the slightest impact, the Prosecution would have needed to first investigate and provide concrete elements showing fabrication, [REDACTED], on behalf of Mr Ngaïssona's Defence team or supporters. The Chamber is being urged to infer that the Proposed Item was crafted [REDACTED], an assertion which, as further elaborated below, is entirely unsupported and neither the sole plausible conclusion nor a reasonable one. The Prosecution's failure to undertake the essential step of clarifying the underlying circumstances surrounding the creation of the Proposed Item, its origin and its authorship leaves the Chamber devoid of direct evidence and calls into question the Prosecution's genuine interest in substantiating its claim.
36. Consequently, it is not appropriate at this late stage of the proceedings to submit the Proposed Item to assess the credibility of D30-4914 and it could not significantly assist the Chamber, as the alleged involvement of the witness in the publication of this article, let alone any fraudulent intent, is founded entirely on assumptions and speculations.
37. Regarding the issue of the alleged "enterprise" of interference in support of Mr Ngaïssona's cause,⁴³ as previously explained, this matter is not appropriate for determination before this Chamber either. This issue is already under separate proceedings before this Court. The Chamber decided that it would not "address the alleged conduct or activities of any individuals previously or currently associated with either of the Defence teams".⁴⁴ In the Request, while the Prosecution employs the broad term of "supporters of the accused"⁴⁵ to describe those allegedly responsible for the claimed interference, thereby avoiding a direct accusation against the Defence, a thorough review of the Prosecution's allegation clearly indicates that an alleged involvement by the Defence is what is fundamentally at stake here.⁴⁶ According to the Prosecution, the goal of the publication of the Proposed Item in the CAR press would have been to reinforce D30-4914's testimony. This, in turn, would have been orchestrated to [REDACTED].⁴⁷ Also, the Prosecution unambiguously asks the Chamber to correlate the Proposed Item with the 98 items sought to be submitted in the First Request, in which the Prosecution explicitly accused the Defence of a pattern of

⁴³ Request, paras 3, 21.

⁴⁴ ICC-01/14-01/18-2126-Conf, para. 83. *See ibid.*, para. 20.

⁴⁵ Request, paras 21-23.

⁴⁶ *See e.g.* Request, paras 30-31.

⁴⁷ Request, para. 23.

improper conduct and insinuated this pattern may also extend to Defence witnesses.⁴⁸ The Prosecution is perfectly free to use the Proposed Item within the context of its investigations into the alleged Article 70 offences. The relevance, reliability and probative value of this Item can then be determined in this separate case, if such case is ever pursued.

38. There is no concrete evidence proving the Proposed Item was falsified. The Prosecution's claim that this article was fabricated by individuals associated with Mr Ngaïssona to support D30-4914's testimony is plainly speculative. The rapid publication following the incident is typical for newspapers and in no event allows to "infer falsification".⁴⁹ Moreover, while D30-4914 might be [REDACTED], the person accused of leaking the information [REDACTED]. Therefore, it is far from "inconceivable" (*"invraisemblable"*) that journalists might have been interested by information [REDACTED], especially as it concerns the Court.⁵⁰ The use of the term "inconceivable" alone shows how baseless the Prosecution's submissions are. Finally, both D30-4914 and D30-4197 [REDACTED],⁵¹ which means [REDACTED] and interference by persons linked to Mr Ngaïssona is not the sole reasonable inference.⁵²

39. As to [REDACTED], which does not mean that such individual was necessarily "associated" with the witness.⁵³ Likewise, the late Cyriaque Gonda's alleged Facebook account is connected with over 700 Facebook users. [REDACTED].⁵⁴ Neither does the mere speculation that supporters of Mr Ngaïssona might have written the Proposed Item. If every press article supportive of Mr Ngaïssona were to be suspected of being falsified to reinforce his Defence case, a large proportion of the CAR press community would fall under suspicion.⁵⁵

40. These connections drawn by the Prosecution raise serious concerns about its credibility and professionalism, highlighting the extent of its efforts to force incongruous elements into coherence. Relying on these tenuous connections to persuade the Chamber that

⁴⁸ First Request, para. 8.

⁴⁹ Request, para. 24.

⁵⁰ Request, para. 24.

⁵¹ D30-P-4197: ICC-01/14-01/18-T-278-CONF-ENG CT, pp. 38-41; D30-P-4914: ICC-01/14-01/18-T-303-CONF-ENG ET, p. 46, lns 12-17. *See also* [REDACTED].

⁵² Request, para. 25.

⁵³ Request, para. 26.

⁵⁴ Request, para. 29.

⁵⁵ Request, para. 28.

[REDACTED] Mr Ngaïssona's supporters and/or the Defence would have conspired to lend credence to a fabricated narrative and that the witness' credibility is therefore impacted is an egregious overreach and a blemish on its integrity.

41. The Prosecution does not cease there but further insinuates that the Defence is complicit in the witness's knowledge of other testimonies, such as [REDACTED], despite such information being confidential.⁵⁶ The Prosecution also suggests its theory is reinforced by another Defence witness, D30-4197, allegedly possessing similar knowledge.⁵⁷ This claim is not only unacceptable and unfounded as already elaborated upon in the Defence Response to the First Request, but it is also illogical, considering the alleged leaks affect both Prosecution and Defence witnesses equally. To date, leakage involves the identities of two Defence witnesses, including the witness at the centre of the present discussion, D30-4914, whom the Prosecution implausibly accuses of having disclosed his own identity, as well as D30-4848.⁵⁸ It is counterintuitive that the Defence would compromise its own witnesses by revealing their identities, particularly after striving for protective measures to be implemented for them.⁵⁹
42. The Defence's ethical standards are unwavering and apply equally to both Prosecution and Defence witnesses. It is highly regrettable that the identities of certain Prosecution witnesses have been exposed to the public. However, in light of certain testimonies, it is evident that maintaining confidentiality in such a small country as CAR is exceedingly challenging. Rumours spread rapidly and the leakage could originate from multiple sources, independent of any involvement by the Defence.
43. For instance, when asked how he knew that [REDACTED] had come to testify, D30-4848 replied: "A. [9:45:24] Mr President, I told you that our country is small and rumours go everywhere, and the fact that I've come to give testimony here, already back home people know that I'm here, so I couldn't tell you how those people heard about that."⁶⁰ D30-4848 later added about [REDACTED]'s testimony: [REDACTED].⁶¹

⁵⁶ [REDACTED].

⁵⁷ Request, para. 31.

⁵⁸ See below.

⁵⁹ See ICC-01/14-01/18-2395-Conf and email from the Defence to the Chamber on 15/08/2024, at 17:54 titled "Defence observations on the VWS observations on the request for Protective measures for P-4914".

⁶⁰ D30-4848: ICC-01/14-01/18-T-298-CONF-ENG ET, p. 7, lns 8-13. Also, p. 9, lns 15-19.

⁶¹ D30-P-4848, ICC-01/14-01/18-T-298-CONF-ENG ET, p. 9, lns 22-25.

44. Finally, it is not “peculiar” (“*curieux*”) that D30-4914 also stated that P-1847 and P-2673 [REDACTED].⁶² In fact, this was partly corroborated by D30-4848, who also expressed his surprise [REDACTED].⁶³
45. The Defence is appalled by the baseless accusations directed at the Defence. Such allegations are not only unfounded but also undermine the integrity and professionalism that the Defence team upholds, by strictly adhering to the highest ethical standards.
46. In any event, as previously submitted in the Defence response to the First Request, this issue of alleged interference is regrettably far from new.⁶⁴ In light thereof, the submission of the Proposed Item to determine the legal issue of alleged interference by the Defence and persons linked to Mr Ngaïssona is neither appropriate nor necessary.
47. The only issue to be determined in this case *vis-à-vis* which the Proposed Item might hold significance is the issue of evidence fabrication [REDACTED]. Yet, it is worth noting that the Prosecution ignores this relevance aspect of the Proposed Item entirely.
48. Had the Prosecution been genuinely interested in uncovering the truth, it could have extended its investigation to cover all facts and evidence relating to [REDACTED], and P-1847’s involvement therein, right after receiving D30-4197 and D30-4914’s rule 68(3) statements containing allegations thereof, namely as soon as December 2023.⁶⁵ Yet no proper investigation on the part of the Prosecution occurred. This would have allowed the Prosecution to present rebuttal evidence in this respect, if any, well before the rebuttal deadline, including during the cross-examination of both witnesses. Additionally, this line of defence was foreseeable from the Defence’s questioning of several Prosecution witnesses,⁶⁶ which could have prompted further investigation during the Prosecution’s case.
49. Instead, the Prosecution not only failed to present any rebuttal evidence in this respect but its tentative reliance on a press article containing anonymous hearsay, to support its

⁶² Request, para. 31.

⁶³ D30-P-4848: ICC-01/14-01/18-T-297-CONF-ENG ET, p. 52, lns 4-7.

⁶⁴ ICC-01/14-01/18-2672-Conf.

⁶⁵ D30-4197’s statement was disclosed in January 2024, *see* Trial D30 Evidence Package 57 11 January 2024 and D30-4914’s statement was disclosed in December 2023, *see* Trial D30 Evidence Package 55 15 December 2023.

⁶⁶ P-0884: ICC-01/14-01/18-T-058-CONF-ENG ET, p. 83; P-0306: ICC-01/14-01/18-T-067-CONF-ENG CT, pp. 16-17; P-0801: ICC-01/14-01/18-T-038-CONF-ENG ET, pp. 89-90; P-0888: ICC-01/14-01/18-T-123-ENG ET WT, pp. 83-84; P-0889: ICC-01/14-01/18-T-110-CONF-ENG ET, p. 83.

allegations of an interference pattern, without bringing forward any additional concrete contextual elements, is nothing more than a desperate attempt to have another swing at perfecting its case by discrediting not only a key Defence witness, who endured the Prosecution's aggressive cross-examination without a scratch, but also the Defence case in general.

50. Therefore, considering the above, the Prosecution failed to meet the threshold required to present rebuttal evidence and the Request should be denied.

B. The Proposed Item lacks *prima facie* probative value and will not contribute to the manifestation of the truth

51. While the Proposed Item initially seemed relevant to the Defence for corroborating existing evidence on [REDACTED], it appeared upon closer examination that it lacked sufficient indicia of probative value and authenticity to be submitted.

52. It is a press article [REDACTED] that does not disclose the source of its information. The article mentions [REDACTED]. In fact, [REDACTED]. Therefore, the Proposed Item will not assist the Chamber in determining whether [REDACTED].

53. Additionally, after the Defence's initial review, a deeper analysis of the Proposed Item's formatting revealed it lacked sufficient indicia of authenticity. Given the Chamber's stance on the low probative value of newspaper articles,⁶⁷ the Defence reassessed the press article which it had initially deemed relevant. Concluding that its potential relevance failed to outweigh its lack of *prima facie* reliability and probative value, the Defence promptly decided to withdraw its initial request to add it to its List of Evidence and submit it to the record of the case.

⁶⁷ See ICC-01/14-01/18-T-069-CONF-ENG ET, p. 76, lns 19-25 to p. 77, ln 1 : "PRESIDING JUDGE SCHMITT: [15:08:34] And may I shortly. Please move on because this is -- the witness is perfectly right when he says this is a newspaper article, this is an opinion. You can ask a witness what he wants to say to an opinion, but to comment on some opinion of a journalist, okay, what kind of, yeah, of proof might that be, yeah, and how well might that proof be. So the newspaper article, as such, is perhaps -- has not such a high probative value, to put it this way. And the witness has clearly stated that he thinks this is biased. So we have really to move on from there. It doesn't make sense to -- to indulge in these kinds of documents further"; ICC-01/14-01/18-T-127-CONF-ENG ET, p. 28, lns 21-25; ICC-01/14-01/18-T-182-ENG ET, p. 25, lns 3-11; ICC-01/14-01/18-T-031-CONF-ENG CT, p. 22, lns 23-25 to p. 23, lns 1-3; ICC-01/14-01/18-T-281-CONF-ENG ET, p. 36, lns 18-22.

54. Although the authenticity of the Proposed Item became uncertain upon closer examination, it is understandable that the Defence initially accepted it as genuine. The Defence received the Proposed Item on 26 August 2024, just days before the time limit to submit its last Bar Table Motion. The Proposed Item was sent to the Defence by VWU, a neutral section of the Court. VWU informed the Defence that it was taking the reported security incident very seriously and had implemented a 30-day cooling-off period for the witness before any possible return to CAR. This gave the Defence an initial impression that the Proposed Item could be trusted.
55. Moreover, the details contained in the Proposed Item about the security situation of D30-D30-4914 matched the Defence's knowledge on the matter. Discussions with VWU regarding (i) the risk of the witness [REDACTED] and (ii) mitigating measures, had started in January 2024. Since November 2023, the witness had consistently conveyed his security fears caused by [REDACTED] to both the Defence and VWU. Due to these fears, the Defence had been unable to meet him in person in December 2023 for signing his statement and had been authorised by the Chamber to read it back to him over the phone.⁶⁸ Finally, the witness had testified in court a few days earlier about an [REDACTED], in the presence of VWU.⁶⁹ To the Defence's knowledge, witness D30-4914 is currently [REDACTED]. Therefore, the Defence had initially no reasons to question the information contained in the Proposed Item.
56. Additionally, and for the reasons explained above, the Proposed Item would not contribute to the manifestation of the truth under Articles 64(6)(d) and 69(3) of the Statute as it is not more convincing than the evidence already presented at trial and relates to a factual allegation, namely [REDACTED], that has been known for months.⁷⁰ Nonetheless, the Chamber is fully capable of evaluating the issue of evidence fabrication [REDACTED] without the Proposed Item. *First*, two Defence witnesses, D30-4197 and D30-4914 mutually corroborated each other on these aspects, and have been cross-examined by the

⁶⁸ Email from the chamber to the Defence on 12/12/2023, at 11:13: "The Defence is instructed to liaise closely with the Registry to ensure that the most secure means of communication are chosen in order to protect the witnesses".

⁶⁹ ICC-01/14-01/18-T-303-CONF-ENG, p. 40, lns 16-20, p. 61, lns 21-25 to p. 62, lns 1-20 and p. 91, lns 15-25 to p. 92, lns 1-6.

⁷⁰ For the range of appropriate factors the Chamber may have regard to in determining whether certain additional evidence may be necessary for the determination of the truth pursuant to Article 69(3), see ICC-01/04-01/07-T-222-Red2, p. 77; ICC-01/05-01/08-3029, para. 29.

Prosecution on this issue. *Second*, the Chamber has received ample other evidence relating to P-1847's credibility.

57. Therefore, the Defence has acted diligently in withdrawing its request seeking leave to submit the Proposed Item, which is not necessary to demonstrate the truth and lacks *prima facie* admissibility.

C. The Request will further prolong and threaten the fairness of the proceedings

58. Pursuant to the second sentence of Regulation 35(2) of the Regulations of the Court, after the lapse of a time limit, the party requesting variation is required to demonstrate that it was unable to file the application within the time limit for reasons outside its control. In the case at hand, while the Proposed Item was indeed disclosed after the time limit for the submission of rebuttal evidence, the Prosecution had ample notice, as substantiated above, that the Defence intended to raise the issue of evidence fabrication against Mr Ngaïssona during the presentation of its case, and more specifically during the testimony of D30-4197 and D30-4914. Yet, the Prosecution failed to present a shred of rebuttal evidence on this issue within the required deadline. Therefore, the Prosecution fails to demonstrate that it was unable to file a rebuttal application on the issue of Prosecution witness coaching within the time limit for reasons outside of its control, except if one considers that the lack of evidence constitutes a valid reason.

59. Moreover, the late submission of the Proposed Item in rebuttal would cause great prejudice to the Defence and violates Mr Ngaïssona's rights. The Defence would be confronted with new grave accusations of interference that it would have no choice but to thoroughly investigate. This takes time and resources at a stage of the proceedings when investigations are typically completed. Also, if a rebuttal were permitted, the Defence would use its right to present rejoinder evidence, such as new testimonial evidence, causing further delay in the ongoing case.⁷¹ Given the advanced stage of the proceedings, submitting the Proposed Item along with the other 98 items in rebuttal now would compromise the fairness and efficiency of the trial.⁷²

⁷¹ ICC-02/04-01/15-1623, para. 17.

⁷² ICC-02/04-01/15-1600, para. 11.

60. In conclusion, the submission of the Proposed Item is not in the interest of justice and neither appropriate nor necessary for the determination of the truth. If the Proposed Item were ultimately deemed reliable, it would be of little to no probative value as the information contained in this unestablished news publication is vague and based on anonymous hearsay. If the Proposed Item were ultimately deemed unreliable or even falsified, which the Prosecution woefully fails to establish, this information alone would not invalidate or even undermine D30-4914 and D30-4197's testimonies and prior recorded statements. There is nothing in the case record to support such a claim. As to the allegations of interference against the Defence and people associated with Mr Ngaïssona, these questions should not even be addressed before the Chamber, as it is not the appropriate forum.

V. RELIEF SOUGHT

61. For the reasons presented above, the Defence respectfully requests the Chamber to **REJECT** the Prosecution Request.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 2 October 2024

At The Hague, the Netherlands.