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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 with Confidential Annex I & II
Public Redacted Version of 'Ngaïssona Defence's Sixth Request
for Leave to Add Items to the List of Evidence and Fourth Application for the
Submission of Evidence from the Bar Table', ICC-01/14-01/18-2662-Conf, 29
August 2024**

Source: Defence of Patrice-Edouard Ngaïssona

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

The Office of the Prosecutor Mr Karim A. A. Khan KC Mr Mame Mandiaye Niang Mr Kweku Vanderpuye		Counsel for the Defence of Mr Ngaïssona Mr Geert-Jan Alexander Knoops Ms Marie-Hélène Proulx Ms Lauriane Vandeler Mr Alexandre Desevedavy	
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Legal Representatives of the Victims Mr Abdou Dangabo Moussa Ms Elisabeth Rabesandratana Mr Yaré Fall Ms Marie-Edith Douzima-Lawson Ms Paolina Massidda Mr Dmytro Suprun		Legal Representatives of the Applicants	
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	
Victims and Witnesses Unit		Detention Section	
Victims	Participation	and Reparations	Other
Section			

I. INTRODUCTION

1. The Defence for Mr Patrice-Edouard Ngaïssona ('Defence') respectfully requests Trial Chamber V (the "Chamber") for leave to add one item, CAR-D30-0024-0032, to the List of Evidence (the "LoE") submitted on 17 November 2023 (the "Request").¹ As will be detailed below, the item, dated [REDACTED], is relevant, probative, reliable and authentic. The item is detailed in **Confidential Annex I**.
2. Moreover, pursuant to paragraphs 61 and 62 of the Chamber's Initial Directions on the Conduct of Proceedings (the "Initial Directions"),² the Defence hereby submits eight (8) items from the bar table : CAR-D30-0005-0178, CAR-D30-0018-0104, CAR-OTP-2130-6350-R01, CAR-D30-0009-0090, CAR-D30-0009-0091, CAR-D30-0009-0092, CAR-D30-0009-0093, and CAR-D30-0024-0032, at page 0035 (the "Items").
3. The 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 recognised as formally submitted by the Chamber. The **Confidential Annex II** 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; and (4) a short description of the item in addition to its relevance and probative value. The Defence sought the positions of the parties on the submission of the items, except for CAR-D30-0024-0032. Given the time at which the Defence received the document and the deadline set by the Chamber in its "Order Amending the Deadline for Bar Table Motions by the Defence and Instruction regarding Rule

¹ ICC-01/14-01/18-2215, with confidential Annex 2 ICC-01/14-01/18-2215-Conf-Anx2.

² ICC-01/14-01/18-631.

68(2)(b) Declarations”,³ the Defence was not in a position to seek the parties’ positions on the submission of the item prior to filing the present application.

4. The positions of the Yekatom Defence and the Prosecution are also reflected in the **Confidential Annex II**.

II. CONFIDENTIALITY

5. 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

6. 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.⁴

IV. SUBMISSIONS

A. Request to Add CAR-D30-0024-0032 to the Defence’s List of Evidence

7. The item for which the addition is sought is a [REDACTED] press article, from [REDACTED] published on [REDACTED], entitled [REDACTED] at CAR-D30-0024-0032, at 0035.
8. The article discloses [REDACTED] name, photograph, and the [REDACTED]. It is reported that the individual who leaked such information to the public was Prosecution witness [REDACTED] who, for his close relationship with the current regime in the Central African Republic (CAR) and depraved services, was

³ See Chamber’s email dated 15 May 2024, at 10:30 (“*latest withing one week after the testimony of the last witness called by the Defence is concluded, each Defence team may file any further miscellaneous bar table applications.*”)

⁴ ICC-01/14-01/18-1278.

appointed [REDACTED]. In the course of his newly appointed duties, [REDACTED] reportedly spotted the name of [REDACTED]. The article mentions a threat indicating imminent and certain retribution upon the Defence witness [REDACTED]. The item finally describes [REDACTED], who together initiated meetings in [REDACTED].

9. The article is relevant to the credibility of [REDACTED] as it highlights the witness' character and his bias towards Mr Ngaïssona, given his reported closeness to the current President and political regime.⁵ The item is corroborative and probative of [REDACTED],⁶ as well as his testimony regarding Prosecution witnesses who prepared their testimonies against Mr Ngaïssona.⁷ Indeed, [REDACTED] testified that individuals held weekly meetings in [REDACTED],⁸ [REDACTED].⁹ The item is also probative of the pattern described by [REDACTED] regarding the current regime's involvement and that of [REDACTED] in the case against Mr Ngaïssona.¹⁰
10. The addition of CAR-D30-0024-0032 to the List of Evidence will not cause prejudice to the parties and participants, given the length of the document and its prompt disclosure. The Defence was not in a position to add the item to its List of Evidence on 17 November 2023 given the publication date of the article. The item was provided, upon the Defence's request, by the Victims and Witnesses Unit on 26 August 2024. The Defence disclosed the item on 28 August 2024 after careful review of the evidence.¹¹
11. The Defence submits that the above constitutes exceptional circumstances that warrant the addition of CAR-D30-0024-0032 to its List of Evidence.

⁵ CAR-D30-0024-0032, at 0035, [REDACTED].

⁶ ICC-01/14-01/18-T-303-CONF-ENG ET., p. 61, line 21 to p. 67, line 24.

⁷ ICC-01/14-01/18-T-303-CONF-ENG ET., pp.43-47.

⁸ ICC-01/14-01/18-T-303-CONF-ENG ET., p. 44, lines 22-24.

⁹ ICC-01/14-01/18-T-303-CONF-ENG ET., p. 47, lines 7-10.

¹⁰ See e.g., ICC-01/14-01/18-T-278-CONF-ENG CT., p. 47.

¹¹ Trial D30 Evidence Package 77 28 August 2024.

B. Application for the Submission of the Items from the Bar Table

12. As detailed below, the Items fulfil the requirements for formal submission, as outlined in the Chamber's Decision on the First Prosecution Submission Request from the Bar Table.¹² They are not subject to any exclusionary rule, and are relevant and probative of the facts of the case.

1. The Items are not subject to an exclusionary rule

13. To the exception of CAR-D30-0018-0104 and CAR-D30-0024-0032,¹³ the pre-conditions for the submission of the Items are met : (1) they were disclosed to the parties and participants;¹⁴ (2) they are on the Defence's List of Evidence, as updated on 16 July 2024;¹⁵ (3) they are in a working language of the Court; and (4) the Defence enquired whether the opposing participants consent or object to their submission.¹⁶

14. Further, pending the Chamber's decision on both the above Request and the "Fifth Ngaïssona Defence request for leave to add items to the List of Evidence (ICC-01/14-01/18-2622)", there is no procedural bar or obstacle to the submission of the Items. Notably, none of them is testimonial in nature.

2. The Items are relevant and probative of the facts of the case

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

¹³ The Defence filed a request for leave to add CAR-D30-0018-0104 to its List of Evidence (ICC-01/14-01/18-2622), to which neither the Prosecution nor the Defence for Mr Yekatom intend to respond (*see* Yekatom Defence email dated 16 August 2024, at 11:20; *see* Prosecution email dated 21 August 2024, at 11:49). The Chamber decided that, in the interests of efficiency, it will rule on the request to add the item to the list of evidence and the present application at the same time (*see* email *Order in relation to Yekatom Defence Request ICC-01/14-01/18-2633-Conf and Ngaïssona Defence Request ICC-01/14-01/18-2622*, dated 16 August 2024, at 16:03).

¹⁴ Trial Rule 77 package 56 04 August 2021, Trial D30 Evidence Package 73 21 June 2024, Trial D30 Evidence Package 75 05 August 2024, Trial D30 Evidence Package 77 28 August 2024.

¹⁵ ICC-01/14-01/18-2596 and ICC-01/14-01/18-2596-Conf-AnxA.

¹⁶ ICC-01/14-01/18-631, para. 62.

a. CAR-D30-0005-0178 (the “First Item”)

15. CAR-D30-0005-0178 is a screenshot of the metadata of CAR-OTP-2088-2207, a picture provided by Prosecution Witness P-2049 during his interview with the Prosecution in 2018 (the “Picture”).¹⁷ The First Item shows different data of the Picture (e.g., the File size, the File Type, the Image size and its Resolution) and that the file supporting the Picture was created and last modified in January 2016. It further lists the JPEG metadata (aka “EXIF data” or “Exchangeable Image File Format” data) of JPEG image CAR-OTP-2088-2207. The First Item also shows the “User Comment” metadata field, which exists to record information, particularly text, for which other standard fields are not suitable. Here, the “User Comment” field mentions “*User Comment: CREATOR: gd-jpeg v1. (using IJG JPEG v62), default quality*”.

i. The First Item is relevant and probative of the facts of the case

16. The First Item is relevant to the case as it is the metadata of the Picture, which has been recognised as formally submitted into evidence.¹⁸ *First*, as the First Item is a set of data providing information about the Picture, it is relevant to assess an item of evidence related to the charged location of BOSSANGO that is submitted into evidence.

17. *Second*, CAR-OTP-2088-2207 was provided by P-2049 who alleged that it was taken by [REDACTED], on 6 December 2013, and sent by phone to him when he was still at the [REDACTED].¹⁹ P-2049 further said that he was in the Picture but could not be seen.²⁰ As such, the First Item is also relevant to the credibility of P-2049, in particular with respect to his testimony on CAR-OTP-2088-2207 and to his

¹⁷ CAR-OTP-2088-2173-R04, para. 125.

¹⁸ See email Decision on Submitted Materials for P-2049 dated 23 August 2022.

¹⁹ CAR-OTP-2088-2173-R04, para. 125; ICC-01/14-01/18-T-101-CONF-ENG CT., p. 12 line 9 to p. 14 line 15.

²⁰ CAR-OTP-2088-2173-R04, para. 125.

proposed evidence on the alleged victims of the 5 December attack in BOSSANGOA.

18. *Third*, the First Item is probative of the Picture possibly having been downloaded from a web application (i.e. the internet) rather than having been received through a phone from the photographer. As mentioned above, the First Item shows data that indicates “CREATOR: gd-jpeg v1”. GD (GD Graphics Library), which appears to be reflected by “gd”, is an open-source code library for the dynamic creation of *inter alia* PNG, JPEG and GIF images.²¹ This strongly indicates that GD was used to create a JPEG image, thus “gd-jpeg”. “v1” indicates the version of the code library used. Therefore, “CREATOR: gd-jpeg v1” suggests that the Picture is a JPEG image created or modified using the open-source library GD Graphics Library version 1. The GD library (i.e. software programming code available to be integrated into other software) is commonly applied as part of web-site development for creating interactive web sites such as blogs and web-forums. The usual role of GD is to modify uploaded images. This is typically done to shrink and crop images, allowing the website to load more quickly among other things.

19. *Finally*, the First Item shows that the creation and modification date of the image file is 2016. This is irreconcilable with P-2049's explanation which connects the photograph to events that allegedly took place the day after the 5 December attack in 2013.²² This erroneous date is further probative of the indicia that the image came from the internet. Similarly, the metadata indicating that the file was processed with GD is consistent with the photograph being processed in one way or another and P-2049 obtaining it from the internet long after the 2013 events.

²¹ <https://www.oxxus.net/tutorials/php/gd-library> - :~:text=GD is an open source,GD involve web site development.

²² See ICC-01/14-01/18-T-101-ENG CT., p. 12, lines 18 to p. 14, lines 15.

20. Therefore, this metadata suggests that the Picture was resized and/or processed by a web-application and downloaded from a website.

ii. The First Item bears sufficient indicia of reliability and authenticity

21. The First Item is reliable as it was found and created during the inspection of the Picture, granted by the Prosecution and conducted in presence of members of the Registry on 6 June 2024, on the Court's premises.

22. The reliability of the First Item is further reinforced as it was provided by members of the Registry to the Defence on 7 June 2024. The First Item also bears sufficient indicia of authenticity as there is a Registry Consultation Form that attests to all the steps that led to the creation of the First Item. The Consultation Form is signed by members of the Registry and of the Defence who were present during the inspection of the Picture.²³

b. CAR-D30-0018-0104 (the "Second Item")

23. CAR-D30-0018-0104 provides recommendations on the use of Historic Cell Site Location information contained in Call Data Records (CDRs) when conducting Cell Site Analysis for the purpose of legal proceedings. These recommendations are provided by the Scientific Working Group on Digital Evidence (SWGDE). The Second Item details the data that can be reflected in different CDRs and provides explanations on *inter alia* cell sites, cell sectors, azimuth, and geolocation. The SWGDE also recommends that certain processing and verifying steps be taken and outlines the best practices to follow for the purpose of presenting Cell Site Information before Courts and submitting it in trial proceedings.

i. The Second Item is relevant and probative of establishing the facts of the case

²³ The Consultation Form is available upon request if necessary.

24. The Second Item is relevant to the assessment of CDRs presented at trial. For example, the SWGDE recalls the importance of being able to properly interpret data and recognise the differences in key terms contained in CDRs in different formats. To this end, it is recommended that a “CDR reference document should be requested for each cellular provider”.²⁴ The Defence notes that, despite having submitted CDRs which present data under different terms, the Prosecution has failed to present any reference document in support of the CDR.

25. The Second Item is further relevant to assess the use of CDRs by the Prosecution and the conclusions drawn by the Prosecution from them, as well as their submission into the case record. For example, the SWGDE recommends that certain steps be taken to verify cell site analysis, which were not effectuated by the Prosecution.²⁵

26. The Item is probative of the Prosecution’s lack of rigour throughout trial in presenting call data. The Item sets a standard of best practices that the Prosecution failed to meet in order to safeguard the integrity and uphold the quality of its CDR evidence.

ii. The Second Item bears sufficient indicia of reliability and authenticity

27. The Second Item bears sufficient indicia of reliability since it provides the sources to its recommendations²⁶ as well as the history of the document, from the first draft to its publication.²⁷

28. Additionally, the item bears sufficient indicia of authenticity since it is dated, contains a header, and is stamped.

²⁴ CAR-D30-0018-0104, at 0115, para. 7.1.

²⁵ CAR-D30-0018-0104, at 0116 and 0121.

²⁶ CAR-D30-0018-0104, at 0122-0124.

²⁷ CAR-D30-0018-0104, at 0125.

c. CAR-OTP-2130-6350-R01 (the “Third Item”)

29. CAR-OTP-2130-6350-R01 is an Investigation Report from the Office of the Prosecutor that outlines the Prosecution’s attempts to access and/or obtain P-2462’s medical records from [REDACTED]. The report demonstrates that the Prosecution’s attempts, effectuated throughout the year 2020, were unfruitful. It indicates that [REDACTED] was unable to locate P-2462’s medical file.

i. The Third Item is relevant and probative of establishing the facts of the case

30. The Third Item is relevant to the assessment of P-2462’s testimony on the alleged medical treatment she may have received from [REDACTED]. The item is further relevant to the authenticity and overall probative value of the underlying documentary evidence produced in support of the allegations of P-2462’s medical treatment (CAR-OTP-2127-9467 and CAR-OTP-2127-9468).

31. The item is probative of the absence of official documentation in support of the treatment P-2462 said she received from [REDACTED]. The Item corroborates the Defence’s similar failed attempts to retrieve such medical file despite numerous exchanges with [REDACTED] in view of retrieving it.²⁸

ii. The Third Item bears sufficient indicia of reliability and authenticity

32. The Third Item bears sufficient indicia of reliability as it was produced by the investigation division of the Office of the Prosecutor and disclosed to the parties and participants through Trial Rule 77 package 56 dated 4 August 2021.

33. Similarly, the report bears sufficient indicia of authenticity – it is dated, contains a header, and all relevant information concerning the case and P-2462. The report also provides relevant related evidence in the case record with linked ERNs.

²⁸ ICC-01/14-01/18-1844-Conf-Exp; ICC-01/14-01/18-1844-Conf-Exp-AnxA; ICC-01/14-01/18-1844-Conf-Exp-AnxB; ICC-01/14-01/18-1844-Conf-Exp-AnxC.

**d. CAR-D30-0009-0090, CAR-D30-0009-0091, CAR-D30-0009-0092,
and CAR-D30-0009-0093 (the “Facebook Items”)**

34. The Facebook Items are composed of four (4) Facebook publications from the account “POUPOULENGUE BANGOS” which were posted between 30 November 2013 and 2 December 2013. D30-4679, as the creator and user of the account during the Relevant Period,²⁹ republished others’ publications, including that of then-UN Security Adviser Christian Legue, Henri GROTHE and “Donald Watler Kenam”. The publications relay 1) the provisional interruption of movements and operations from and towards DAMARA until 2 December 2013 due to violent clashes between the Seleka and the Anti-Balaka;³⁰ 2) the cancellation of the 1 December 2013 parade for security reasons;³¹ 3) the closing off of some districts in the south of BANGUI during the night of the 1 December to 2 December 2013;³² and 4) the fact that the town of DAMARA has been deserted following rumours of an upcoming attack in the city by the Anti-Balaka.³³

i. The Facebook Items are relevant and probative of establishing the facts of the case

35. The Facebook Items are relevant in light of the Prosecution’s allegations regarding the relevance and the probative value of the other purported Facebook messages authored by D30-4679, who is considered by the Prosecution as “privy to key-insider information”.³⁴ They are corroborative of D30-4679’s testimony on, *inter alia*, rumours circulating on Facebook and the internet about the situation in the

²⁹ ICC-01/14-01/18-T-300-ENG ET WT., p.4, lines 6-14.

³⁰ CAR-D30-0009-0090.

³¹ CAR-D30-0009-0091.

³² CAR-D30-0009-0092.

³³ CAR-D30-0009-0093.

³⁴ ICC-01/14-01/18-1330, para. 13.

country.³⁵ Additionally, the Facebook Items are corroborative of D30-4679's testimony regarding his sources of information during the Relevant Period, such as Henri Grothe.³⁶ Indeed, CAR-D30-0009-0091 and CAR-D30-0009-0092 show D30-4679's second Facebook account reposting Henri GROTHE, with whom D30-4679 was communicating on Facebook about the situation in the Central African Republic during the Relevant Period.³⁷

36. The Facebook Items, read chronologically, illustrate the spreading of rumours, prior to the 5 December 2013, about an upcoming Anti-Balaka attack on Bangui and that such attack was expected and of public knowledge.

ii. The Facebook Items bear sufficient indicia of reliability and authenticity

37. The Facebook Items are authentic and reliable as they were obtained directly from Facebook and D30-4679 confirmed that he was both the creator and user of the Facebook account "POUPOULENGUE BANGOS".³⁸

38. Additionally, they are publicly available posts.

e. CAR-D30-0024-0032 (the "Article")

39. The Defence hereby incorporates the description, relevance and probative value of CAR-D30-0024-0032, at 0035, as elaborated in paragraphs 6, 7 and 8 of the present submission.

³⁵ See e.g., ICC-01/14-01/18-2055-Conf-Anx1-Corr, page 17 ; ICC-01/14-01/18-T-299-CONF-ENG ET, pp. 86-87 ; ICC-01/14-01/18-T-300-ENG ET WT., pp. 6-8 ; ICC-01/14-01/18-T-300-ENG ET WT., pp. 32-33, 36, 39.

³⁶ See e.g., ICC-01/14-01/18-T-300-ENG ET WT., p. 6, lines 11-24 ; ICC-01/14-01/18-T-300-ENG ET WT., p. 66, lines 6-9. ICC-01/14-01/18-T-300-ENG ET WT., p. 67, lines 19-21.

³⁷ See ICC-01/14-01/18-2062, page 13, para. 23: "GROTHE is a BOZIZE loyalist who worked to disseminate information on the Anti-Balaka. His conversations are relevant, in particular with respect to BOZIZE's inner circle and Anti-Balaka activities on the ground". See CAR-OTP-2099-7606, showing a Facebook conversation between "Henri Grothe" and [REDACTED].

³⁸ ICC-01/14-01/18-T-300-ENG ET WT., page 4, lines 10-11.

40. The Article is authentic and reliable as it is dated, contains a header, and is a publication from a daily newspaper from BANGUI.

41. In light of the foregoing, the Items fulfil the requirements for formal submission through the bar table as they are not subject to any exclusionary rule and are relevant and probative of the facts of the case.

V. RELIEF SOUGHT

42. The Defence respectfully requests the Chamber to

GRANT Leave to Add CAR-D30-0024-0032 to the Defence's List of Evidence;
and

RECOGNISE AS FORMALLY SUBMITTED the following items: CAR-D30-0005-0178, CAR-D30-0018-0104, CAR-OTP-2130-6350-R01, CAR-D30-0009-0090, CAR-D30-0009-0091, CAR-D30-0009-0092, CAR-D30-0009-0093, and CAR-D30-0024-0032, at 0035.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 2 October 2024

At The Hague, the Netherlands.