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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public
with Confidential Annex A, and
***EX PARTE*, only available to the Prosecution, Annex B**

**Prosecution's Submission in Compliance of the Single Judge's
"Order to provide a Preliminary Witness List", ICC-01/14-01/18-528**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. In compliance with the Single Judge's "Order to provide a Preliminary Witness List", the Office of the Prosecutor ("Prosecution") hereby provides a list of (i) the witnesses that it is already certain it will call to testify ("Preliminary Witness List"); and (ii) the witnesses that it is certain not to call to testify.¹

II. CONFIDENTIALITY

2. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this filing is classified as "Public", with a "Confidential" Annex A and an "EX PARTE", only available to the Prosecution, Annex B. Both Annexes refer to witness names that are not public.

III. SUBMISSIONS

3. The Preliminary Witness List, as well as the list of witnesses that the Prosecution does not intend to call to testify is set out at in a Confidential Annex A. The Preliminary Witness List is sub-divided into:

- The list of witnesses whose statements have been disclosed, and who the Prosecution intends to call live;
- The list of witnesses whose statements have been disclosed, and whose statement the Prosecution intends to certify under Rule 68(2);
- The list of witnesses whose statements have not yet been disclosed, and who the Prosecution intends to call live; and

¹ ICC-01/14-01/18-528, para. 4.

- The list of witnesses whose statements have not yet been disclosed, and whose statement the Prosecution intends to certify under Rule 68(2).

4. *EX PARTE*, available to the Prosecution only, Annex B lists the 11 witnesses whose names cannot yet be disclosed to the Defence as the finalisation of their individual risk assessments and potential implementation of risk mitigation measures, where necessary in consultation with the VWS, is pending.

A. Witnesses to be called

5. The Prosecution intends to rely on the evidence of 152 witnesses. These include around 90 concerning the case against NGAISSONA and 62 concerning the case against YEKATOM. In addition, the Prosecution expects to call five experts in the following fields: Historical and overview regarding the conflict; satellite photography; trauma; call data records; and the phenomenon of child soldiers in CAR.²

6. As previously noted, the Prosecution intends to use of rule 68(2) and (3) of the Rules of Procedure and Evidence to streamline the presentation of its case.³ Rule 68(2) designations are provisionally indicated in the attached Annexes, whereas the Prosecution continues to consider the potential use of rule 68(3).⁴

B. Witnesses no longer to be called

7. In view of the Decision on the Confirmation of Charges⁵, the Prosecution will not present the evidence of 53 witnesses on whom it relied to support the

² These are referenced in the Prosecutions filing on the First Status Conference. Note that the Prosecution has not yet concluded its instruction in respect of a prospective demographic expert.

³ ICC-01/14-01/18-474-Conf.

⁴ The Prosecution will update the Chamber, Parties and Participants these designations in its final witness list.

⁵ ICC-01/14-01/18-403-Conf (“Confirmation Decision”).

confirmation of charges proceedings or on whom the Parties were otherwise on notice of its intention to rely as INCRIM.

C. Reduction in the scope of the charges

8. The Preliminary Witness List takes into account the “reduced scope of the charges following the confirmation of charges” referenced in the Order⁶, as reflected in the Prosecution’s elimination of 53 witnesses.

9. The Prosecution notes however, further to its previous observations concerning its approach to the scope of evidence in this case,⁷ that there is no ratio or presumed correlation between the scope of criminal charges and that of the *relevant evidence* required to prove them. By contrast, the Prosecution bears the burden of proof and, in the discharge of its duties under article 54(1), article 64(2) expressly guarantees it a fair trial process,⁸ particularly through the presentation of relevant and probative evidence.⁹ The notion of procedural fairness requires that no Party¹⁰ is put at a disadvantage in presenting its case.¹¹

10. The Prosecution has reasonably balanced its witness selection in view of its statutory duties and the burden of proof, bearing in mind the seriousness of the confirmed charges, their temporal scope and material elements, the relevant alternative modes of liability, the multiplicity of counts, the complexity of the Anti-

⁶ ICC-01/14-01/18-528, para. 4(ii).

⁷ See ICC-01/14-01/18-488-Conf, paras. 12-18, incorporated by reference.

⁸ Article 64(2) (noting “The Trial Chamber shall ensure that a trial is fair and expeditious”). See also ICC-01/04-135-Teng, 31 March 2006, para. 38 (noting, “fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings”); ICC-02/04-01/05-90-US-Exp (reclassified by ICC-02/04-01/05-135), para. 24.

⁹ See article 69(3).

¹⁰ ICC-01/04-02/12-271-AnxA, para. 6 (noting the Prosecution, in particular).

¹¹ See *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on the Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 25; *Prosecutor v. Jadranko Prlić, et al.*, Case, IT-04-74-AR73.4, Decision on the Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution, 6 February 2007, para. 24; *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, 14 September 2006, para.13; *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgment, 15 July 1999, para. 48.

Balaka's unconventional organisational framework, and the historical context and narrative of the conflict.

11. The Prosecution has moreover, taken account of the breadth of the contextual elements of the charged crimes as confirmed, including evidence of an non-international armed conflict in existence through at least August 2014¹²; and as regards the 'widespread attack' set out in the facts and circumstances and operational parts of the Confirmation Decision¹³ ("Widespread Attack"). As framed by the Pre-Trial Chamber, the Widespread Attack spans from September 2013 through December 2014; concerns several Prefectures in the western part of the Central African Republic ("CAR"); and involves the large scale victimisation of Muslim civilians throughout the region.¹⁴ The Prosecution has further considered the requirements of article 7(3) of the Elements of Crimes ("Elements") regarding the requisite organisational policy, and particularly proof that the organisation (Anti-Balaka) actively promoted or encouraged the Widespread Attack,¹⁵ including through the actions of its membership and/or leadership.

12. As such, the Prosecution considers that its Preliminary List of Witnesses reasonably attends to these important *evidentiary* considerations, and fully accords with the dictates of procedural fairness, which requires that it "be granted the *genuine* ability to present [its] case."¹⁶

¹² See ICC-01/14-01/18-403-Conf-Corr, paras. 144, 153, and p. 105 (confirming the war crime of conscripting and/enlisting children under age 15 and their use in hostilities).

¹³ See ICC-01/14-01/18-403-Conf-Corr, pp. 107, 111, and para. 70 (referencing a "widespread attack"); *but see*, para. 122 (noting "widespread or systematic attack") (emphasis added).

¹⁴ ICC-01/14-01/18-403- Conf-Corr, paras. 64, 69, 70, and 72-74.

¹⁵ Article 7(3) of the Elements ("[i]t is understood that "policy to commit such attack" requires that the ... organization actively promote or encourage such an attack against a civilian population").

¹⁶ ICC-02/04-01/05-90-US-Exp (reclassified by ICC-02/04-01/05-135), para. 24 (emphasis added). *See also*, Orić Appeal Decision on Admissibility of the Evidence, para. 7: "[T]he Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond reasonable doubt"; *see also* Prosecutor v. Tadić, "Judgement", IT-94-1-A, 15 July 1999, paras. 43, 44, 48 and 52 (noting, "the right to a fair trial [...] covers the principle of equality of arms" which "means that the Prosecution and the Defence must be equal before the Trial Chamber").

IV. CONCLUSION

13. While the Prosecution has made all efforts to ensure the prompt disclosure of the identity of all the witnesses included in the Preliminary Witness List, the individual risk assessments for a handful of witnesses are still in process. The COVID-19 pandemic still presents serious challenges in this respect,¹⁷ but the Prosecution continues to complete the assessments, and where relevant implement risk mitigation measures, on an ongoing basis, and endeavours, in consultation with the VWS as needed, for this process to be finalised before the judicial summer recess.

14. Finally, the Prosecution notes that, while it intends to abide by the Preliminary Witness List to the extent practicable, this may ultimately vary somewhat from its final list of witnesses, depending on witness availability, security, and other pertinent factors. As such, the Prosecution reserves its rights in this respect.



Fatou Bensouda, Prosecutor

Dated this 15th day of June 2020
At The Hague, The Netherlands

¹⁷ See also ICC-01/14-01/18-488-Conf.