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No.: ICC-01/14-01/18
Date: 12 February 2021

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

**Public redacted version of “Prosecution’s Response to the Ngaissona Defence Motion to strike [REDACTED] from the Final List of Witnesses and for the Exclusion of his Anticipated Evidence (ICC-01/14-01/18-807-Conf)”,
19 January 2021, (ICC-01/14-01/18-840-Conf)**

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the NGAISSONA Defence’s Motion to strike Witness [REDACTED] from the Prosecution’s Final List of Witnesses and for the Exclusion of his Anticipated Evidence (“Motion”).¹ The Motion lacks any colourable legal basis under the Statutory framework and should therefore be summarily dismissed.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“Regulations”), this Response is filed as “Confidential”, as it responds to a confidential filing and further concerns matters related to a prospective Prosecution Witness which should not be made public. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

There is no statutory basis to strike [REDACTED] from the Prosecution’s List of Witnesses or to exclude his prospective testimony *in limine*

3. *First*, as NGAISSONA concedes, the motion does not implicate article 69(7).² Nor, does that provision apply, despite the Motion’s strained attempt to frame the issue of [REDACTED] credibility as “cast[ing] substantial doubts on the reliability of the evidence”³ such that his prospective evidence — on a different matter altogether — “would be antithetical to, and would seriously damage, the integrity of the proceedings”.⁴ This premise is patently flawed, unavailing, and moreover, belied by NGAISSONA’s previous position.

¹ ICC-01/14-01/18-807-Conf.

² ICC-01/14-01/18-807-Conf, para. 1.

³ ICC-01/14-01/18-807-Conf, para. 3.

⁴ ICC-01/14-01/18-807-Conf, para. 3.

4. Notably, in relation to a near identical claim advanced by the Defence during the proceedings on the confirmation of charges, Pre-Trial Chamber II observed that:

“(i) in spite of this Witness being referenced a number of times in the DCC, his evidence is not per se determinative of the suspects’ responsibility; and (ii) the Defence for *Ngaïssona* has relied upon Witness [REDACTED], both on its oral and written submissions”.⁵

5. *Second*, as the Chamber has previously recognised, the “parties are entitled to a degree of deference in the selection and presentation of their evidence”.⁶ This is even more so where the Party carries an evidentiary burden. Although this discretion is not absolute, the Motion does not establish any exceptional criteria. Thus, the general rule under the statutory framework applies — *i.e.*, that rule 64(1) of the Rules of Procedure and Evidence “does not provide ... for objections to be raised *prior* to the submission of evidence. It is therefore clear that the parties and participants cannot raise any such objections before the time of submission”.⁷

6. *Third*, the Motion does not give rise to any issue under article 69(4), much less one warranting the extraordinary measure of precluding prospective evidence *in limine* because: (a) the Chamber has employed the ‘Submission’ regime,⁸ thus deferring any assessment of the “standard evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgment pursuant to Article 74(2) of the Statute”⁹; and (b) the issue of Witness [REDACTED] credibility is in any case routed in an entirely collateral matter. It does not concern the evidence which is the subject matter of his prospective

⁵ ICC-01/14-01/18-403-Conf-Corr, para. 33 (emphasis added), citing ICC-01/14-01/18-T-008-Red-ENG, p. 117 and ICC-01/14-01/18-T-009-Red-ENG, pp. 9-10, 32 and ICC-01/14-01/18-382-Conf-Corr, paras. 26 (footnote 49), 107 (footnote 220), 110 (footnotes 232-234), respectively.

⁶ ICC-01/05-01/13-1622, para. 9.

⁷ See ICC-01/14-01/18-602, para. 16.

⁸ See ICC-01/14-01/18-631, para. 53.

⁹ See ICC-01/14-01/18-631, para. 53; *see also* ICC-01/05-01/13-2275-Red, paras. 583, 598; and ICC-02/04-01/15-615, para. 4.

testimony in any way. To the extent that the Defence disputes his credibility, this may be fully tested at trial — the very purpose of an Accused’s right to examine under article 67(1)(e). Likewise, the Chamber may apply a cautious approach to the evaluation of such evidence, as it deems appropriate.¹⁰ Notably, it is clear from the jurisprudence of this Court that a Trial Chamber may rely on a Witness’s testimony, or aspects thereof, even when credibility issues arise.¹¹ The requested remedy is thus both legally unfounded and unnecessarily overbroad.¹²

7. Finally, the Prosecution observes that NGAISSONA’s extensive reference to the [REDACTED] belies its previous asserted claim of unfair prejudice in respect of the Prosecution’s referral of the Defence to seek timely access to the record of the proceedings in respect of Witness [REDACTED].¹³

IV. CONCLUSION

8. For the above reasons, the Request is without merit and should be summarily dismissed.



James Stewart, Deputy Prosecutor

Dated this 12th day of February 2021

At The Hague, The Netherlands

¹⁰ See e.g. ICC-01/14-01/18-403-Conf-Corr, para. 34 (noting that “the Chamber has refrained from entering findings based entirely on Witness [REDACTED] and has only referred to this Witness’ evidence for the purpose of corroborating findings otherwise established to the relevant standards”).

¹¹ See ICC-01/04-02/12-271-Corr, para. 168.

¹² See ICC-01/14-01/18-403-Conf-Corr, para. 34 (finding even at the less consequential level of confirmation of charges proceedings that “excluding all of the material relating to Witness [REDACTED] from the confirmation of charges would be an excessive and disproportionate measure”).

¹³ See ICC-01/14-01/18-301-Conf, paras. 21-22; ICC-01/14-01/18-303-Conf, paras. 11-12; ICC-01/14-01/18-311-Conf, paras. 8-9; ICC-01/14-01/18-349-Conf, para. 22, ICC-01/14-01/18-513-Red, paras. 9-11.