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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

**Public Redacted Version of “Prosecution’s Response to Defence Application
pursuant to article 57(3)(b) of the Statute to seek the cooperation of the Central
African Republic”, ICC-01/14-01/18-1141-Conf,
20 October 2021**

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. The Office of the Prosecutor (“Prosecution”) defers to Trial Chamber V’s (“Chamber”) discretion in relation to the Ngaïssona Defence’s Application pursuant to article 57(3)(b) to seek the cooperation of the Central African Republic (“CAR”).¹ It nevertheless makes the following three observations for the Chamber’s consideration, set out below.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), this document is filed as “Confidential” as it refers to a filing of the same classification.

III. SUBMISSIONS

3. The following three observations bear on the Chamber’s appropriate exercise of discretion regarding the Defence Application: *First*, the Application does not identify with specificity how Mr Ngaïssona’s [REDACTED], “may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence”, as required by rule 116(1)(a) of the Rules of Procedure and Evidence (“Rules”). Rather than identifying an issue or explaining how the Accused’s [REDACTED] is material to the Defence’s preparation, the Application only refers generally to “assess[ing] the credibility and the reliability of the evidence proposed against Mr Ngaïssona”, and to “show[ing] that the accounts of events presented by certain Prosecution witnesses in relation to Mr Ngaïssona’s [REDACTED] [...] are totally unfounded.”²

¹ ICC-01/04-01/18-1133-Conf (“Application”).

² Application, para. 16.

4. *Second*, and relatedly, the Prosecution observes that the Defence has at no time filed an alibi notification under rule 79 of the Rules as required, nor so much as indicated its intention to do so, despite requests from the Chamber and the Prosecution.³ If – as the Application suggests – the Defence intends to assert that Mr Ngaissona was present at a place other than where the Prosecution’s evidence indicates, such that he was not in a position to commit the crimes charged,⁴ it is incumbent upon the Defence to notify the Prosecution of that position, as provided for in rule 79(1)(a).

5. *Third*, it is not clear that the Defence has exhausted all reasonable avenues for collecting the material sought, or has sufficiently demonstrated that it cannot be obtained without the Chamber’s intervention.⁵ Although the Defence has sent a request to the [REDACTED],⁶ it does not appear to have sought the assistance of the Registry in doing so. This avenue would have been preferable to the Defence requesting the information in its own capacity, as it would have drawn on the existing diplomatic channel as foreseen in article 87(1)(a), meaning that that it would have been directed to the appointed CAR focal point designated to facilitate the Registry. Further, there is no indication that this avenue is not presently open to the Defence, or otherwise not viable.

³ See ICC-01/14-01/18-459, para. 3F (in which the Chamber sought submissions on whether the Defence intended to advance a defence in accordance with rule 79); ICC-01/14-01/18-473-Red, para. 33 (in which the Defence stated it was not in a position to inform the Chamber as to whether it wished to raise a defence in accordance with rule 79); ICC-01/14-01/18-851-Conf-Anx (in which the Prosecution requested from the Defence timely notice and disclosure of information and evidence concerning any prospective defence under rule 79).

⁴ See *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgment, 28 November 2007, para. 417; *Prosecutor v. Popović et al.*, ICTR-05-88-A, Judgment, 30 January 2015, para. 343.

⁵ See e.g., ICC-01/05-01/13-1768, para. 10 (granting an article 57 application on finding that “[the Defence] cannot obtain the material without the intervention of the Chamber”); see also para 8 noting the requirements *inter alia* of “necessity” (internal citations omitted).

⁶ See Annex C to Application.

IV. CONCLUSION

6. Bearing in mind the observations above, the Prosecution defers to the Chamber's discretion in relation to the Ngaissona Defence's Application for cooperation pursuant to article 57(3)(b).

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

Karim A. A. Khan QC, Prosecutor

Dated this 3rd day of November 2021
At The Hague, The Netherlands