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**International
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Court**

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Date: **29 April 2022**

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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC with Confidential Annex A

**Public Redacted Version of the “Ngaïssona Defence Motion to obtain a lesser-
redacted version of document CAR-OTP-2110-0915”, 26 April 2022**

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 of Mr Ngaïssona ('the Defence') hereby presents its Motion to obtain a lesser-redacted version of document CAR-OTP-2110-0915 titled "RCA mission daily report: 20 December 2013" ('Motion').
2. The Defence submits that: *first*, paragraph 31 of CAR-OTP-2110-0915 is material to the Defence as it relates to a video already provided and discussed by a witness and whose date of creation is disputed; *second*, paragraph 42 of CAR-OTP-2110-0915 is material to the Defence as it appears to refer to one of the upcoming Bossangoa witnesses [REDACTED] and relates to a contested number of Muslim victims; *third*, the *Al Hassan* precedent, if applicable in the present case, allows for the lifting of the redactions. Lastly, the Defence respectfully requests the Chamber to exercise its discretionary right under Article 69(3) of the Statute and directly request the lesser-redacted version of document CAR-OTP-2110-0915 from the UN Office of Legal Affairs ('UN-OLA').

II. CONFIDENTIALITY

3. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the present Motion is filed as "confidential", as it refers to confidential information found in document CAR-OTP-2110-0915 which is classified as 'confidential'. The Defence will file a public redacted version in due course.

III. PROCEDURAL HISTORY

4. On 1 and 2 March 2022 during P-2049's examination by the non-calling party, document CAR-OTP-2110-0915 titled "RCA mission daily report: 20 December

2013” (‘UN Report’) was presented to the witness by the Defence, followed by questions on the incidents and information mentioned in it.¹

5. In an email dated 11 March 2022, the Defence requested the Prosecution to lift the redactions found in paragraphs 31 and 42 of document CAR-OTP-2110-0915 (‘Defence Request’ or ‘Request’). The Defence argued that the said paragraphs are relevant to the Defence’s preparations for the upcoming Bossangoa crime base witnesses, while no objectively justifiable risk to the safety of the person(s) concerned is found. The Defence further requested, in the event that the document was already redacted prior to its receipt by the Prosecution, that the Prosecution should revert back to the UN-OLA and request the lifting of these redactions.²
6. On 17 March 2022, the Prosecution rejected the Request, claiming that there is no indication that the redacted content is material to Defence preparation. Any reconsideration of the said Request would be made if the Defence could “identify its materiality in terms of having a direct connection to the charges or going to a live issue in the case (*see* decision in *Al Hassan* ICC-01/12-01/18-859-Red, paras. 9-10)”.³
7. On 23 March 2022, the Defence requested the reconsideration of its Request by the Prosecution in order for the matter to be resolved *inter partes*. The Defence argued that the *Al Hassan* jurisprudence mentioned in the Prosecution response is not binding upon the Chamber, while simultaneously arguing if it were applicable, it was at best misapplied and misinterpreted by the Prosecution.⁴ The Defence

¹ ICC-01/14-01/18-T-102-CONF-ENG ET 01-03-2022, page 38, lns 10-25 ; ICC-01/14-01/18-T-103-CONF-ENG ET 02-03-2022, page 72, lns 10-25 to page 74, lns 1-21.

² Annex A, pages 4-5.

³ Annex A, page 4.

⁴ Annex A, page 3. *See also The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of Decision on Defence request for disclosure of material related to Mr Al Hassan’s arrest and detention in Mali, 05 January 2021, ICC-01/12-01/18-859-Red, paras 9-10.

further requested confirmation whether the redacted information is covered by Article 54(1)(e) of the Statute.

8. On 20 April 2022, and after several reminders from the Defence, namely on 4, 13 and 20 April 2022,⁵ the Prosecution finally responded to the reconsideration request, rejecting it once again. According to the Prosecution, document CAR-OTP-2110-0915 is not covered by Article 54(3)(e). Further, the Prosecution considers that the information sought by the Defence does not appear to be *prima facie* material to its preparations for the upcoming Bossangoa witnesses.⁶

IV. LEGAL FRAMEWORK

9. Pursuant to para. 30 of the *Decision on Disclosure and Related Matters*

“Should the receiving party consider that a particular redaction is unwarranted or should be lifted as a result of changed circumstances, it shall approach the disclosing party directly. The disputing parties shall consult in good faith with a view to resolving the matter. (...) Calling on the professionalism of both parties, the Single Judge expects that the parties cooperate on this matter in good faith. If they are unable to agree, the receiving party may apply to the Chamber for a ruling. In such case, the onus shall be on the disclosing party to justify the particular redaction, and it shall file submissions in the record of the case within three days from notification of the application made by the receiving party, unless otherwise decided by the Chamber. Thereafter, the Chamber will rule as to whether the disputed redaction is to be lifted or maintained”.⁷

10. As evident from the extensive communication between the Defence and the Prosecution prior to the filing of the Motion,⁸ there is an inability to reach an *inter*

⁵ Annex A, pages 1-2.

⁶ Annex A, page 1.

⁷ ICC-01/14-01/18-64-Conf, para. 30.

⁸ See *above* title “III. Procedural history” and Annex A.

partes solution, therefore seizing the Chamber for a ruling is the only procedural step left to safeguard the rights of the Defence.

11. Continuing the *inter partes* discussions will not lead to any different outcome given the Prosecution's unjustifiable stance on the matter. On the contrary, it will lead to more time being lost. The Prosecution took 28 days and 3 follow-up emails to check their own records and clarify whether an un-redacted, or lesser-redacted version of the document was in their possession.⁹ In addition, the UN-OLA will most likely take an extensive period of time to process the request for a lesser-redacted version of the document, hence such a request must be made as soon as possible given the imminence of the remaining Bossangoa witnesses' testimony.
12. The Defence wishes to seize this opportunity and express its dismay with respect to the Prosecution's position on the matter. The Request was submitted on 11 March 2022 and still to the day of this filing, the issue has not been resolved. The Prosecution has put forth numerous ever-changing arguments which do not pass muster, resulting in loss of valuable time.

V. SUBMISSIONS

13. Mr Ngaïssona has been charged with war crimes and crimes against humanity that were allegedly committed, *inter alia*, in Bossangoa during the relevant time period.¹⁰ To support these allegations, 6 Prosecution witnesses (P-2049, P-2657, P-2462, P-2200, P-2658 and P-2453) are set to appear before the Court, 3 of which (P-2049, P-2657 and P-2462) have already testified on the alleged incidents that took place in Bossangoa. Evidently, all evidence that relates to the alleged Bossangoa crimes is, in and of itself, material to the Defence for the preparation of the Bossangoa witnesses.

⁹ Annex A, pages 1-3.

¹⁰ ICC-01/14-01/18-403-Conf-Corr, pages 107 to 111.

14. With respect to document CAR-OTP-2110-0915 in particular, this is a report from the UN-OLA on events in Bangui and Bossangoa, dated 20 December 2013. The Defence's request is limited to two paragraphs of the report, namely paragraphs 31 and 42, each of which will be addressed separately in our submissions.

a. Materiality of CAR-OTP-2110-0915, paragraph 31 for the Defence

15. Paragraph 31 of CAR-OTP-2110-0915, includes the description of a video that has a striking similarity with a video provided by witness P-2049, i.e. CAR-OTP-2088-2205. Notably, the main date of video CAR-OTP-2088-2205 is disputed; witness P-2049 claimed that this video was taken in Zéré on 6 September 2013.¹¹ A second copy of the same video can be found under the ERN CAR-OTP-2112-1379 with a main date listed as 4 November 2013. Pursuant to a metadata analysis performed by the Defence, the creation date of both videos is 18 March 2011, two years before the alleged Zéré attack.¹² Witness P-2049 was confronted with that evidence during his examination by the Defence and thus, the matter has already been brought to the Chamber's attention.¹³

16. Besides the similarities in the description, the video mentioned in paragraph 31 of the UN Report was also allegedly taken on 6 September 2013; however, key information, such as the names of the victims, is redacted. The Prosecution argues that "[r]edactions to the names of victims of that attack are not *prima facie* material" which could not be further from the truth. Witness P-2049 claimed that the man shown in the video being burnt alive was a man named Djouli, who was alive in 2011, year of the creation of the video, and only died in 2013.¹⁴ The Prosecution admits that "it is not known whether the video discussed at paragraph 31 (shown

¹¹ CAR-OTP-2088-2173-R03, para. 121.

¹² See CAR-D30-0008-0087.

¹³ ICC-01/14-01/18-T-102-CONF-ENG ET 01-03-2022, page 40, lns 2-20.

¹⁴ ICC-01/14-01/18-T-102-CONF-ENG ET 01-03-2022, page 39, ln. 25 to page 40, ln. 1 and page 41, lns 13-18 and 22.

by [REDACTED]) is the same as the video CAR-OTP-2088-2205 provided by P-2049”,¹⁵ which is precisely the reason for the Defence’s request; without the redacted information, no one is in a position to verify whether this is indeed the same video. By lifting the redactions, the Defence will be in a position to verify P-2049’s claims regarding the identity of the victim and shed a light on a video that allegedly depicts an attack taking place in 2013 when it was already created in and circulated since 2011. This also goes to evaluating the credibility of P-2049’s testimony on the Zéré events, the reliability of his sources of information, and the identity of the alleged victims, whose names P-2049 was asked to put on the record of the case.¹⁶

17. The Prosecution’s other arguments in rejecting the lifting of the aforementioned redactions are moot. *First*, the Prosecution states that “paragraph 31 concerns information provided by [REDACTED] about the Anti-Balaka’s 6 September 2013 ZERE attack, which is not charged”.¹⁷ Nevertheless, the Prosecution has actively elicited information regarding the Zéré attack from several witnesses,¹⁸ with the clear implication that these attacks were aided and abetted by Mr Ngaïssona due to their proximity to the Bossangoa attacks, and that they formed part of the evidence of the contextual elements of the crimes charged. Such allegations, despite not being part of the charges, are highly prejudicial against Mr Ngaïssona and the Defence should be disclosed all the relevant material to confront witnesses with and rebut these accusations.

¹⁵ Annex A, page 1.

¹⁶ ICC-01/14-01/18-T-100-CONF-ENG CT 25-02-2022, page 37, lns 20-25 to page 40, lns 1-12.

¹⁷ Annex A, page 1.

¹⁸ **P-2657**: ICC-01/14-01/18-T-104-CONF-ENG ET 03-03-2022, page 10, lns 10-22 to page 11, lns 1-11 ; **P-2049** : ICC-01/14-01/18-T-100-CONF-ENG CT 25-02-2022, page 28, lns 18-25 to page 29, lns 1-10 ; page 39, lns 8-25 to page 40, lns 1-12 ; page 52, lns 10-21 ; **P-2462** : ICC-01/14-01/18-T-059-CONF-ENG ET 30-08-2021, page 31, lns 20-25 to page 32, lns 1-17. References to the Zéré attack can be found in several witness statements such as **P-0314**: CAR-OTP-2008-1188-R03, paras 54-55 and 67; **P-2200**: CAR-OTP-2088-2146-R04, para. 27; **P-2453**: CAR-OTP-2111-0415-R04, para. 27; **P-2462**: CAR-OTP-2111-0452-R02, paras 23-24; **P-2049**: CAR-OTP-2088-2173-R04, paras 37-39; **P-2657**: CAR-OTP-2126-0058-R01, paras. 21 and 23.

18. *Second*, this argument is contrary to the Chamber's jurisprudence on the matter. In its "Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial", Trial Chamber V made a clear point about the use of non-charged incidents in the present case. Although the Chamber encouraged the Prosecution to focus its evidence presentation on the charged incidents, it held that the non-charged incidents fell within the "facts and circumstances" of the case and could be used for the purpose of proving the contextual elements of the charged crimes.¹⁹ The Zéré attack is inextricably linked to the Bossangoa charges and has been brought up time and time again by the Prosecution in order to prove the contextual elements of the alleged Bossangoa crimes. The Defence should thus be afforded the opportunity to contest them by having all the necessary information on the victims of this attack, information which is currently unavailable due to the redactions in paragraph 31 of document CAR-OTP-2110-0915.

19. *Third*, the fact that these names "are redacted as against the Prosecution as well"²⁰ cannot possibly be viewed as a valid argument for them to remain redacted. The materiality of the information sought for the Defence and not for the Prosecution is the criterion of whether these redactions should remain.

b. Materiality of CAR-OTP-2110-0915, paragraph 42 for the Defence

20. In its Request, the Defence specified that only the heading and the information in paragraph 42 found in page 0922 should be un-redacted. The underlying reason is that the redacted portion of the heading is clearly a function or a title, as indicated by the words following it ("of Bossangoa"). The redacted reference to what appears to be [REDACTED] is highly relevant, since [REDACTED]. The Prosecution admits that they are "not in a position to determine if the individual whose identity is redacted at paragraph 42 is [REDACTED]" and concludes that the *prima facie*

¹⁹ ICC-01/14-01/18-703-Conf, paras 48-53.

²⁰ Annex A, page 1.

materiality of this information is not established.²¹ However, given that key information is redacted, it is rather astonishing that the Prosecution is in a position to determine the *prima facie* immateriality of the Request with nothing more than what appears to be an educated guess about it not being the [REDACTED].

21. Furthermore, even if the aforementioned redactions do not relate to [REDACTED] personally, this section of the report questions the apparent inflation of the number of Muslim victims in the Bossangoa region, [REDACTED]. Such information goes to the core of the charges as regards the 5 December attack and impeaches the credibility of witnesses who have already testified, as well those still to come. Consequently, the redacted information should be made available to the Defence in light of the next Bossangoa-related testimonies.

c. The Al Hassan jurisprudence is misapplied by the Prosecution

22. In their 17 March 2022 email, the Prosecution suggested that a reconsideration of the Request would be feasible if the Defence could identify its materiality in terms of having a direct connection to the charges or going to a live issue in the case, applying as such the criteria found in the *Al Hassan* jurisprudence.²² The Defence incorporates by reference its arguments set forth in its email dated 23 March 2022, namely that (i) the *Al Hassan* jurisprudence is not binding upon the Chamber and (ii) if the criteria mentioned in paragraphs 9-10 of the *Al Hassan* decision were to apply, the Defence's Request falls squarely under them.²³ Moreover, the Defence has requested that the Trial Chamber confirm that the *Al Hassan* jurisprudence is not an accurate statement of the Prosecution's disclosure obligations.²⁴

²¹ Annex A, page 1.

²² *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of Decision on Defence request for disclosure of material related to Mr Al Hassan's arrest and detention in Mali, 05 January 2021, ICC-01/12-01/18-859-Red, paras 9-10.

²³ Annex A, page 3.

²⁴ ICC-01/14-01/18-1354-Conf, paras 21-27.

- d. The Chamber should request a lesser-redacted version of document CAR-OTP-2110-0915 directly from the UN-OLA*

23. Pursuant to Article 69(3) of the Statute:

The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

24. According to Trial Chamber III in Bemba “[t]he power of the Chamber under Article 69(3) of the Statute is a discretionary power to be exercised where the Chamber considers that certain additional evidence may be necessary for the determination of the truth. In considering whether or not to exercise this power in any particular case, it is appropriate for the Chamber to have regard to a broad range of factors, including the evidence already before it, the potential impact on the fairness and expeditiousness of the trial and rights of the accused, and the centrality and relevance of the additional evidence to the core matters for determination by the Chamber”.²⁵

25. In order to determine the truth about the alleged Zéré attack, as well as the credibility of the person providing a number of Muslim victims in Bossangoa, the Chamber should exercise the discretionary power it is afforded by the Statute and request the un-redacted version of document CAR-OTP-2110-0915 directly from the UN-OLA. The relevance of the aforementioned information is evident from its direct link to the charges against Mr Ngaïssona regarding the alleged crimes in Bossangoa during the relevant period. In addition, information found in paragraphs 31 and 42 of the UN Report is linked to other evidence before the Chamber, including videos, witness statements and testimonies.

²⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution's Application to Submit Additional Evidence", 2 April 2014, ICC-01/05-01/08-3029, para. 29.

26. To safeguard the expeditiousness of the proceedings, especially in light of the upcoming testimonies of the remaining Bossangoa witnesses, the Defence respectfully requests the Chamber to directly request the lesser-redacted version of document CAR-OTP-2110-0915 from the UN-OLA, pursuant to Article 87(6) of the Statute²⁶ and Article 15(1) and (2) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.²⁷ As previously analysed, a considerable amount of time has already been lost due to the unfruitful consultations between the Defence and the Prosecution. The Defence believes that a direct request from the Chamber to the UN-OLA will expedite the process and safeguard the rights of the Defence.

VI. RELIEF SOUGHT

27. In light of the above, the Defence respectfully requests the Chamber to

- i. **CONFIRM** that the information included in paragraphs 31 and 42 of document CAR-OTP-2110-0915 are relevant to the Defence's preparations;
- ii. **GRANT** the Defence's Motion for a lesser-redacted version of document CAR-OTP-2110-0915;
- iii. **REQUEST** the lesser-redacted version of document CAR-OTP-2110-0915 from the UN-OLA, or alternatively;
- iv. **ORDER** the Prosecution to promptly request a lesser-redacted version of the document from the UN-OLA and inform the Chamber of any progress on the matter;

²⁶ Article 87(6) of the Statute: "The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate".

²⁷ Article 15 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations: "1. With due regard to its responsibilities and competence under the Charter and subject to its rules as defined under the applicable international law, the United Nations undertakes to cooperate with the Court and to provide to the Court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute. 2. The United Nations or its programmes, funds and offices concerned may agree to provide to the Court other forms of cooperation and assistance compatible with the provisions of the Charter and the Statute".

- v. **REDUCE** the deadline for any responses to be filed to the present motion.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 29 April 2022

At The Hague, the Netherlands.