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

Public with Confidential Annexes 1 and 2

Public redacted version of the ‘Defence Response to the “*Treizième requête de l’Accusation aux fins de soumission formelle d’éléments de preuve sur le fondement de l’article 69(3) du Statut de Rome, via la “Bar Table”*” (ICC-01/14-01/18-2131-Conf), filed on 6 October 2023

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 Patrice-Édouard Ngaïssona ('Defence') hereby responds to the "*Treizième requête de l'Accusation aux fins de soumission formelle d'éléments de preuve sur le fondement de l'article 69(3) du Statut de Rome, via la "Bar Table"*" ('Application').¹
2. Further, the Defence provides in confidential Annexes 1 and 2 to the present response ('Response') its item-by-item objections to the 45 Anti-Balaka documents and 100 items provided by the Central African National Authorities ('CAR National Authorities') that the Prosecution seeks to submit into the record of the case.
3. The Defence makes these objections pursuant to Rule 64(1) of the Rules of Procedure and Evidence ('Rules'), which are intended to assist the Chamber in its holistic assessment of the evidence during the deliberation of the judgment.²

II. CONFIDENTIALITY

4. In accordance with Regulation 23*bis*(1) of the Regulations of the Court, this response and its Annexes 1 and 2 are filed confidentially as they respond to documents of the same classification and contain confidential information. A public redacted version will be filed in due course.

III. APPLICABLE LAW

5. The Defence incorporates by reference its previous submissions with respect to the applicable law regarding the adjudication of Bar Table motions.³

IV. SUBMISSIONS

6. The present core submissions merely provide an outline of the most salient Defence objections. For a comprehensive overview of the Defence's observations on the Prosecution's Application, the Defence respectfully refers the Chamber to confidential Annexes 1 and 2 to the Response.

¹ ICC-01/14-01/18-2048-Conf together with confidential Annexes A and B.

² ICC-01/14-01/18-631, para. 62 ('Initial Directions').

³ ICC-01/14-01/18-1278, paras 6-9.

A. The Prosecution seeks the submission of two *procès-verbaux* which cannot be submitted from the ‘bar table’

7. In its Application, the Prosecution seeks the submission of CAR-OTP-2134-1599 and CAR-OTP-2134-1852.⁴ These items are two *procès-verbaux d’audition* [REDACTED]. These two items are of a testimonial nature and are sought to be submitted through an inappropriate channel.

a. The Prosecution is circumventing the procedure set out in Regulation 24(5) of the Regulations of the Court

8. At the outset, the Chamber should reject the Prosecution’s request to take into consideration paragraphs 12 to 27 of its Application when ruling upon a previously-submitted bar table application, namely the “Prosecution’s Ninth Application for the Submission of Evidence from the Bar table and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576” (‘Prosecution’s Ninth Bar Table Application’).⁵ The Prosecution is bluntly circumventing the procedure set out in Regulation 24(5) of the Regulations of the Court, which requires that “[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.”

9. Absent a leave to reply to the Defence Response to the Prosecution’s Ninth Bar Table Application,⁶ the Prosecution should not be allowed to make further submissions on a matter to which the Defence already responded.

10. However, should the Chamber extraordinarily decide to follow the Prosecution in its deviation from the letter of Regulation 24(5) and take paragraphs 12 to 27 of the Prosecution’s Application into account when ruling on the Prosecution’s Ninth Bar Table Application, the Defence requests that the Chamber take account of the arguments developed below in Section (b).

⁴ ICC-01/14-01/18-2048-Conf, para. 11.

⁵ ICC-01/14-01/18-2048-Conf, para. 13.

⁶ ICC-01/14-01/18-2036-Conf (Defence Response to the ‘Prosecution’s Ninth Application for Submission of Evidence from the Bar Table and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576’).

b. CAR-OTP-2134-1599 and CAR-OTP-2134-1852 are testimonial in nature and cannot be submitted from the ‘bar table’

11. The Prosecution’s 20-paragraph-long contention that [REDACTED] is not a Prosecution witness in the case within the meaning of Rule 68, and therefore that his *procès-verbaux d’audition* are of a documentary nature, is legally unfounded and amounts to a considerable departure from the well-established jurisprudence of this Court.
12. The Chamber made clear that “there exists a series of factors that may serve as guidelines to determine whether an out-of-court statement qualifies as testimony”.⁷ These well-established factors are: (i) whether the out-of-court statement was given to a person or body whose mandate includes the collection of evidence for use in judicial proceedings, and (ii) whether the person making the statement understood that the information they provided may be relied upon in the context of legal proceedings.⁸ Accordingly, the Chamber has previously ruled in this case that *procès-verbaux d’audition* or interviews conducted by the [REDACTED] police in the framework of an *enquête préliminaire* are testimonial in nature.⁹ Additionally, in the *Ongwen* case, Trial Chamber IX held that statements from alleged victims taken by the Ugandan police during their investigation into alleged LRA attacks “must be viewed as fitting within the definition of prior recorded statement [and] are indeed testimonial in nature” [emphasis added].¹⁰ It is evident that [REDACTED] *procès-verbaux d’audition* are testimonial in nature, especially considering that, as explained by the Prosecution itself when it sought their addition to its List of Evidence, it was the ICC Prosecution *itself* who interviewed [REDACTED] on [REDACTED], in the course of its investigation against Mr Ngaïssona.¹¹ The fact that the statements were transcribed by the [REDACTED] police, and that the interview took place in the presence of the [REDACTED] authorities who facilitated it, does not take away the

⁷ Email Decision on Submitted Materials for [REDACTED], dated 1 June 2023, at 10:28.

⁸ See the Defence Response to the “Prosecution’s Ninth Application for Submission of Evidence from the Bar Table and request for reconsideration of the Decision on the submission of CAR-OTP-2053-0576” (ICC-01/14-01/18-2036-Conf). For case-law, see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-2635, paras 47-49; *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-795, paras 18-20; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-1478-Red-Corr, para. 32.

⁹ Email Decision on Submitted Materials for [REDACTED], dated 12 October 2022 and email Decision on Submitted Materials for [REDACTED], dated 11 March 2022.

¹⁰ *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-795, para. 20.

¹¹ ICC-01/14-01/18-1212-Conf, paras 5-6.

fact that the interview was actually conducted by the Prosecution, and therefore amounts to an ICC statement.

13. Besides, the Defence deplores the rather reductionist – not to say absurd – Prosecution’s approach when it contends that:

“il n’existe pas de différence fondamentale de nature entre de tels documents, consignant des propos d’individus qui ne sont pas témoins au procès établis dans la perspective d’une procédure judiciaire, et des interviews ou articles de presse reproduisant des informations données par des témoins.”¹²

14. The Prosecution is seeking the submission of testimonial items through the back door, by putting forward this confusing and legally unfounded reasoning.

15. Contrary to the Prosecution’s contention, the submission of these two *procès-verbaux* from the ‘bar table’ is prejudicial to the Defence of Mr Ngaïssona, and in breach of the most fundamental rights of the accused, who would be deprived of any possibility to examine what is – in law and in fact – a witness. The only reason why [REDACTED] is not a witness within the meaning of Rule 68 – as the Prosecution submits – is because the Prosecution forewent the opportunity to call him in the case. Despite him being [REDACTED], nothing would have prevented the Prosecution from calling [REDACTED] to testify before the Chamber. Additionally, the Prosecution’s reasoning – should it be considered as valid – would leave the determination of the testimonial nature of an item in the full discretion of the parties to the proceedings. The Defence would therefore be equally entitled to submit from a ‘bar table’ virtually any statement, provided it does not call the witness in the case.

B. Lack of sufficient relevance, reliability and authenticity of the items sought to be submitted

a. Alleged Anti-Balaka press releases

16. In its Application, the Prosecution seeks the submission of a series of press releases attributed to the Anti-Balaka Coordination in order to establish the alleged organised

¹² ICC-01/14-01/18-2048-Conf, para. 25.

character of the movement, and Mr Ngaïssona's purported authority over it throughout the Relevant Period.

17. *First*, these press releases lack contemporaneousness as most of them are dated late 2014 or even 2015, i.e. several months after the last charged crimes. As such, the Prosecution is trying to retroactively reconstruct the contextual elements of the charged crimes and Mr Ngaïssona's alleged responsibility by inferring conclusions from documents or information falling outside the temporal scope of the charges.
18. *Second*, the Defence notes inconsistencies in the formatting and design of these items attributed to the Anti-Balaka Coordination. In particular, the Prosecution is seeking the submission of CAR-OTP-2032-0058 and CAR-OTP-2093-0155, both allegedly signed by [REDACTED]. Although only eleven days separate the two documents, their formatting is fundamentally different: the headers contain different information (while CAR-OTP-2032-0058 reads "*Coordination nationale*", CAR-OTP-2093-0155 indicates "*Coordination générale*"), the fonts used are different, the name under the signature are different (while CAR-OTP-2032-0058 contains [REDACTED] full name and title, CAR-OTP-2093-0155 simply indicates [REDACTED]), one has a banner across the document while the other does not, and CAR-OTP-2093-0155 contains many typos and an approximative French language while CAR-OTP-2032-0058 contains a more diplomatic and formal language. All those discrepancies cast doubt as to the authenticity of the documents and the Prosecution has not provided any explanation in this regard. The authorship cannot be undoubtably established and in the absence of [REDACTED], the alleged author, testifying in the case to dispel any doubt, the Chamber should not accord them any probative value.
19. *Finally*, rather than reinforcing the idea that the Anti-Balaka was an organised movement, the discrepancies between documents allegedly emanating from the same person tend to show that, as explained by P-0889 during his in-court testimony,¹³ there was no centralised structure within the movement.

¹³ P-0889: ICC-01/14-01/18-T-110-CONF-ENG ET, p. 65, lns 18-25.

b. Alleged Anti-Balaka badges

20. In its Application, the Prosecution seeks the submission of 19 alleged Anti-Balaka badges collected by the [REDACTED] at [REDACTED] on [REDACTED].¹⁴

21. *First*, the Prosecution argues that the Single Judge granted the Prosecution’s request to add these badges to its List of Evidence considering their “potential significance to the case”.¹⁵ However, the standard for addition to the List of Evidence – namely sufficient potential significance to the case – is fundamentally different than that required for the submission of an item *via* a bar table application. This difference is evidenced by the Single Judge’s ruling on the addition of the badges to the Prosecution’s List of Evidence:

“ [REDACTED].”

22. Accordingly, the Prosecution’s argument pertaining to the badges being admitted to its List of Evidence does not presume to their admissibility, and is therefore inapposite for the purpose of their admission *via* the present bar table motion.

23. *Second*, the Prosecution contends that the Anti-Balaka badges relate to its factual allegation concerning the organised character of the Anti-Balaka:

*“pour qu’ils puissent être émis par la Coordination Nationale Anti-Balaka, il a fallu que les éléments soient recensés à BANGUI et dans les provinces, ce qui implique des instructions, la transmission de ces instructions, et leur exécution par conséquent une chaîne de commandement.”*¹⁶

24. However, in the absence of any substantiation as to an actual – if any – census of the Anti-Balaka elements who received a badge, or instructions provided for that purpose, the Prosecution’s allegation is purely and simply unfounded and amounts to speculation.

25. *Third*, the Prosecution cannot reasonably argue that the badges are relevant to establishing the connexion between the group led by Mr Yekatom and the Anti-Balaka Coordination of Mr Ngaïssona.¹⁷ In fact, the Prosecution’s contention calls for a significant degree of speculation: the Prosecution cannot draw conclusions on the existence of a direct link between groups during the Relevant Period, merely based on the presence of certain

¹⁴ ICC-01/14-01/18-2048-Conf, paras 5-10.

¹⁵ ICC-01/14-01/18-1573-Conf.

¹⁶ ICC-01/14-01/18-2048-Conf, para. 7.

¹⁷ ICC-01/14-01/18-2048-Conf, para. 8.

badges at [REDACTED] in [REDACTED]. Indeed, the existence of links between Mr Mokom and Mr Yekatom's group and between Mr Yekatom's group and the National Coordination has not been demonstrated in the course of the Prosecution's case. Besides, the fact that it has not been established how the badges made their way into [REDACTED] only reinforces the Defence's submissions that no meaningful conclusion can be drawn from their presence at [REDACTED].

26. The weakness of the Prosecution's proposition is further evidenced by the Prosecution's own equivocal argumentation. While it first argues that the collection of the badges at [REDACTED] "tends to confirm" that they were made by the National Coordination, it then submits in the very next sentence that the badges were "necessarily" made by the National Coordination.¹⁸ Not only does the Prosecution fail to substantiate its allegations, but it also fails to develop an appropriate syllogistic argumentation. This is at best a disregard of the methodology for legal submissions, if not a clear manifestation of the weakness of its proposition.
27. *Fourth*, the Defence notes that none of the badges are dated, therefore, leaving their probative value in relation to the Relevant Period more than dubious, and further shows their lack of sufficient indicia of authenticity. Indeed, nothing guarantees that the badges seized at [REDACTED] were not created and distributed after the Relevant Period. The Prosecution's attempt to establish the date of badges by referring to [REDACTED] in-court testimony should be accorded no evidentiary weight as the Prosecution chose not to put CAR-OTP-2136-0227 – [REDACTED] alleged badge – to [REDACTED] while it had the opportunity to do so when [REDACTED] came to testify before the Chamber in [REDACTED].
28. *Fifth*, the Prosecution contends that the authenticity of the badges is "évidente" as they would be identical to other badges submitted into evidence.¹⁹ The Defence recalls however that the case record counts at least two different templates of Anti-Balaka badges. Several witnesses testified about the difference between badges with a dove emblem²⁰ and badges with a lion image,²¹ such as P-2251, who explained that those two types of badges were

¹⁸ ICC-01/14-01/18-2048-Conf, para. 10.

¹⁹ ICC-01/14-01/18-2048-Conf, para. 9.

²⁰ See for instance CAR-OTP-2112-1332.

²¹ See for instance CAR-OTP-2076-1275.

not distributed at the same time.²² Other witnesses even drew a distinction between yellow badges and white badges.²³

29. The Defence further recalls that, to this day, the authenticity of alleged Anti-Balaka badges remains a highly contested issue in the case. Notably, P-0889 extensively addressed the issue of fake badges during his in-court testimony,²⁴ highlighting in particular that “the badges also took on another dimension, because other persons got involved in producing fake badges in order to be able to get something out of the DDR process.”²⁵ P-0889’s statement is corroborated by [REDACTED] where [REDACTED] further explained that [REDACTED] to make some money.²⁶ P-1962 even stated that he heard rumours according to which there were false badges that one could buy in the market.²⁷ Similarly, P-2251 extensively testified about Anti-Balaka badges and was shown several examples which allowed him to discuss the different types of badges and to identify forged ones.²⁸
30. The Defence also identifies unexplained inconsistencies in the methodology for the numbering of the badges. For instance, while CAR-OTP-2136-0219 or CAR-OTP-2136-0221 contain an ID number with six digits in a green font, whereas other badges such as CAR-OTP-2136-0239 and CAR-OTP-2136-0249 contain an ID number with four digits in a red font. Again, the Prosecution forewent the opportunity to address the above-mentioned errors when it declined to ask P-2251 to comment on the numbering of the badges, or when it chose not to present [REDACTED] with [REDACTED] own alleged badge tendered as part of the Prosecution’s Application.
31. *Finally*, the Defence notes that the *Procès-Verbal de Perquisition*,²⁹ which lists all items seized at [REDACTED] on [REDACTED], along with a detailed description, does not mention at any point the presence of the Anti-Balaka badges among which was the present item. This casts further doubt on the circumstances of their collection and therefore on their overall probative value.

²² P-2251 : ICC-01/14-01/18-T-043-CONF-ENG CT 07-06-2021, from p. 47, line 24 to p. 49, line 13. *See also* P-0889: ICC-01/14-01/18-T-110 FRA RT, p. 35 et p. 36, l. 18-25.

²³ [REDACTED].

²⁴ P-0889: ICC-01/14-01/18-T-110-ENG ET, from p. 29 line 2 to p. 32, line 5.

²⁵ P-0889: ICC-01/14-01/18-T-110-ENG ET, p. 29, lns 2-4.

²⁶ [REDACTED].

²⁷ P-1962 : ICC-01/14-01/18-T-140-CONF-ENG ET, p. 17 lns 11-24.

²⁸ P-2251 : ICC-01/14-01/18-T-043-CONF-ENG CT, from p. 47, line 7 to p. 49, line 13.

²⁹ *See* CAR-OTP-2136-0181.

c. Other Anti-Balaka documents

32. In Annex A to its Application, the Prosecution submits that three *titres de reconnaissance*³⁰ are relevant to the purported organised character of the Anti-Balaka and to Mr Ngaïssona’s alleged authority and ability to issue orders throughout the Relevant Period. However, these items lack contemporaneousness as they are dated [REDACTED], about [REDACTED] after the last crimes with which Mr Ngaïssona is charged. The Prosecution is trying to retroactively reconstruct Mr Ngaïssona’s alleged responsibility by inferring conclusions from documents or information falling outside the temporal scope of the charges. In addition, these *titres de reconnaissance* alone are irrelevant to show that Mr Ngaïssona had in fact any leadership or authority over the Anti-Balaka. Should the Chamber decide however to accord any probative value to these items, the Defence notes that they authorise the persons allegedly mandated thereby to “*superviser et garantir la paix durable de la Populations (sic) dans la dite localité*”. As such, these *titres de reconnaissance* would rather be probative – if at all – to establish the Coordination’s efforts to engage in the pacification of the country.

33. The Prosecution also seeks the submission of three letters³¹ bearing the header of the Anti-Balaka, which would be relevant to the purported organised character of the Anti-Balaka and to Mr Ngaïssona’s alleged authority over the movement. *First*, two out of these three documents are undated, and CAR-OTP-2101-4138 is dated 6 May 2014. As such, the Prosecution cannot reasonably infer that the items have any relevance to the Relevant Period for the charges; at the very best CAR-OTP-2101-4138 is relevant as of 6 May 2014. *Second*, while the Prosecution contends that CAR-OTP-2101-4138 is relevant to establishing Mr Ngaïssona’s alleged capacity to summon the Anti-Balaka military leaders in BANGUI and to issue instructions to them including in BOSSANGO and the LOBAYE, the Defence notes that the item refers to a “*Conclave de sensibilisation*” is part of a national reconciliation and peaceful process:

“Dans le cadre du processus de réconciliation nationale et de restauration de la cohésion sociale, il apparaît nécessaire et urgent que des dispositions soient prises dans le sens

³⁰ CAR-OTP-2059-0033, CAR-OTP-2059-0034 and CAR-OTP-2059-0035.

³¹ CAR-OTP-2062-0107, CAR-OTP-2087-9024 and CAR-OTP-2101-4138.

d'enrayer tout acte à caractère scandaleux de nature à compromettre les efforts entrepris pour la normalisation et la pacification de la République Centrafricaine."³²

34. What is more, as explained by the report attached to the item, the purpose of the “*Conclave de sensibilisation*” is to communicate with Anti-Balaka officials to have them adhere to the normalisation and pacification process and instil the spirit of social cohesion and *laïcité* in their minds.³³ Therefore, these documents bearing the header of the Anti-Balaka would rather be probative to establish the movement’s efforts towards pacification of the country.

d. Intelligence documents

35. In its Application, the Prosecution seeks the submission of various intelligence documents such as intelligence reports, compilation of intelligence reports, or press reviews of *Cellule de Renseignement et de la Documentation*.

36. *First*, the probative value of intelligence reports is inherently impugned by the working methods in the field of intelligence being based on techniques that are not disclosed to the public, which considerably lack transparency and which make it impossible to examine or conduct inquiries as to the reliability and veracity of what they purport to show.

37. *Second*, several witnesses, including former Prime Minister Nicolas Tiangaye (P-0291), testified that these intelligence reports lack reliability as they could have been written by anyone with ulterior motive, whether financial or political. During his in-court testimony, P-0291 extensively explained how intelligence reports in general are corrupted and filled with false information,³⁴ and especially highlighted that:

*“[c]’est une situation qui a toujours été dénoncée dans notre pays, les fiches [de renseignement] mensongères, qui ont causé beaucoup de tort aux Centrafricains.”*³⁵

and that:

“C’est pas seulement en 2013. De tout temps, de tout temps, même aujourd’hui, il y a toujours des fiches mensongères où les gens cherchent à régler des comptes personnels ; ou pour

³² CAR-OTP-2101-4138, at 4138.

³³ CAR-OTP-2101-4138, at 4141.

³⁴ P-0291: ICC-01/14-01/18-T-053-FRA, from p. 14, line 19 to p. 16, line 11.

³⁵ P-0291: ICC-01/14-01/18-T-053-FRA, p. 15, lns 7-9.

justifier [...] les fonds politiques qui leur sont alloués, il faut bien qu'ils envoient des fiches pour démontrer qu'ils ont fait le travail."³⁶

38. [REDACTED]³⁷ [REDACTED].³⁸

39. With that in mind, it is even more important for the Prosecution to strictly establish the relevance and reliability of the tendered items. Yet, a considerable proportion of the evidence sought to be submitted by the Prosecution through intelligence reports is anonymous hearsay and unsourced information. For instance, CAR-OTP-2003-1592 contains a large amount of hearsay information evidenced by phrasings such as "[REDACTED]"³⁹ or "[REDACTED]".⁴⁰ As for CAR-OTP-2075-1097 or CAR-OTP-2075-1092, they simply contain information unsupported by any source. Without proper source, the information contained in those intelligence documents cannot be verified and might simply be lies and rumours written by any individual to settle personal grudges.

40. The Defence further notes that a number of intelligence documents sought to be submitted by the Prosecution are compilation of intelligence reports,⁴¹ which raises questions regarding their integrity, especially casting doubt on whether they are exhaustive compilations or selective ones, as well as on the authorship of the compilation.

41. *Finally*, with respect to several items, the Prosecution submits that information contained in intelligence documents is corroborated by witnesses' testimonies. However, in a number of instances, the Prosecution conveniently misinterprets the witnesses' testimonies to make them fit with its narrative.⁴² Most strikingly, the Prosecution contends that the figure of 1,323 Anti-Balaka elements contained in CAR-OTP-2075-1008 is corroborated by P-1521. Nevertheless, P-1521 explained during his in-court testimony on 30 November 2021 that:

"[10:32:44] Two thousand people? I don't know. I said that from Gobéré people decided the way to go, some went on the road Bouca-Bangui, and others went on the road to Gobéré-

³⁶ P-0291: ICC-01/14-01/18-T-053-FRA, p. 15, lns 13-17.

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ CAR-OTP-2003-1592, at 1623.

⁴⁰ CAR-OTP-2003-1592, at 1648.

⁴¹ See for instance CAR-OTP-2003-1592, CAR-OTP-2075-1046, CAR-OTP-2092-1173 or CAR-OTP-2092-1218.

⁴² See for instance the Defence's position regarding CAR-OTP-2075-1015 or CAR-OTP-2075-1022.

Bossembélé to go to Bangui. And there were others who chose a different route from Bossangoa to go to Bangui. That's what I said, but I didn't give a figure. If I weren't there, how could I give a figure of the number of people who were there? That's what I said. [...] [10:37:46] With regard to the document, I recall that I said 2,000. But if you look at the end of that document, it says I'm not sure of the numbers. So I talked about 2,000 people, but I did say I'm unsure of numbers because 2,000 people seems to be a high number.”⁴³

42. The Defence has repeatedly and consistently deplored the Prosecution's cherry-picking and mischaracterisation methods in previous responses to bar table applications. The Defence would like to exclude the possibility of the Prosecution's malicious intent in its evidentiary assessment. However, such a possibility arises from the circumstances. At the very best, this last example, regarding P-1521's testimony, is a clear indication that the Prosecution is either negligent or simply incompetent in its approach to evidence.

e. Judicial documents

43. Among the series of judicial documents tendered in its Application, the Prosecution is seeking to submit an [REDACTED].⁴⁴ This item specifies that [REDACTED]. According to the Prosecution, [REDACTED]. Yet, it is clearly indicated in the item itself that this proposition was not supported by evidence:

“ [REDACTED].”⁴⁵ [emphasis added]

44. Not to mention that the Prosecution chose not to call [REDACTED] to testify in the case, whereas he could have provided the Chamber with contextualising elements on [REDACTED]. This circumstance is highly prejudicial to the Defence who has been denied the possibility to challenge the witness' statements pertaining to Mr Ngaïssona's alleged criminal responsibility.

45. The Prosecution further seeks the submission of two warrants of arrest targeting Mr Ngaïssona, namely CAR-OTP-2001-5376 and CAR-OTP-2002-0481. Nevertheless, both these items considerably lack precision. CAR-OTP-2001-5376 is merely a list of individual's names targeted by the warrant of arrest. This item (i) refers to persons the competent authorities have not even taken the time to identify,⁴⁶ (ii) does not go into the

⁴³ ICC-01/14-01/18-T-081-CONF-ENG ET, p. 12, lns 12 et seq and p. 14, lns 17-20.

⁴⁴ CAR-OTP-2101-2542.

⁴⁵ CAR-OTP-2101-2542, at 2551.

⁴⁶ For instance, [REDACTED].

details of each individual’s alleged conduct, and (iii) fails to indicate on what ground or what legal qualification the warrant of arrest is based. As for CAR-OTP-2002-0481, the Defence notes that, although it indicates the legal qualifications grounding the warrant of arrest, the item does not go into the details of Mr Ngaïssona’s alleged conduct and fails to provide any time frame for said conduct.

46. The Prosecution inferring from these items that they are relevant to determining Mr Ngaïssona’s criminal responsibility as it would refer to his criminal behaviour does not match with the actual content of the document. But *most importantly*, a blanket use of such warrants of arrest to infer criminal responsibility is a serious breach of Mr Ngaïssona’s presumption of innocence.

f. Press articles

47. The Prosecution seeks the submission of press-related material in order to establish the contextual elements of the armed conflict, the Anti-Balaka’s alleged policy of targeting the Muslim civilian population and Mr Ngaïssona’s purported criminal responsibility.

48. The Defence respectfully refers the Chamber to its extensive submissions regarding the lack of probative value of media articles in previous responses to bar table applications.⁴⁷ For the purpose of the present Response, the Defence only recalls that, although media-related material as a category is not excluded from submission through a ‘bar table’, it has generally been rejected in international criminal proceedings on the basis of their lack of reliability without the testimony of a witness that can testify to the accuracy of the content of the material.⁴⁸ The Defence also recalls the Presiding Judge’s own reservations with respect to newspaper articles in the instant case, on the occasion of [REDACTED] in-court testimony.⁴⁹

⁴⁷ See notably Defence Response to the “Prosecution’s Eleventh Application for the Submission of Open-source Evidence from the Bar Table” (ICC-01/14-01/18-2114-Conf) and Defence Response to “Prosecution’s Fifteenth submission of miscellaneous items of evidence via the ‘bar table’” (ICC-01/14-01/18-2084-Conf).

⁴⁸ ICTY, *Karadžić*, ‘Decision on Second motion for Admission of Evidence from Bar Table: General Michael Rose’, para. 10, and ‘Decision on Accused’s Bar Table Motion (Karadžić Statements)’, para. 10; *Stanišić and Župljanin*, ‘Decision Granting in Part the Prosecution’s Bar Table Motion and Granting the Prosecution’s Supplemental Bar Table motion’, para. 20, and ‘Decision Denying Prosecution’s Motion to Admit into Evidence MFI P171 and P911’, para. 17.

⁴⁹ See ICC-01/14-01/18-T-190-ENG CT WT, p. 15, lns 20-24.

g. Other national authorities' documents

49. In respect of the other categories of national authorities' documents that the Prosecution seeks to submit, such as *comptes-rendus de réunion*,⁵⁰ agreements⁵¹ or maps,⁵² the Defence respectfully refers the Chamber to confidential Annexes 1 and 2 to the Response for further developments.

C. Prejudice to Mr Ngaïssona

50. Reliance on certain items in respect to core aspects of the charges or highly contentious issues, such as Mr Ngaïssona's alleged authority over the Anti-Balaka movement, is likely to result in prejudice to Mr Ngaïssona, outweighing any *prima facie* probative value to be found in those items.

51. This is especially the case when such probative value is limited by reason of the items in question being vague, unclear or containing merely opinion evidence, unsubstantiated allegations rather than an account of events having actually occurred, or the items consisting of anonymous hearsay. Their submission results solely in flooding the case record with simulacre of probative information.

52. The Defence respectfully requests the Chamber to consider this important safeguard when assessing the admissibility of the items sought to be submitted.

V. RELIEF SOUGHT

53. The Defence respectfully requests the Chamber to

REJECT the submission of the following items:

CAR-OTP-2134-1599

CAR-OTP-2134-1852

⁵⁰ See for instance CAR-OTP-2092-2450, CAR-OTP-2092-2455 or CAR-OTP-2092-2891.

⁵¹ See for instance CAR-OTP-2089-0624 or CAR-OTP-2089-0653.

⁵² See for instance CAR-OTP-0080-0834, CAR-OTP-2008-0853 or CAR-OTP-2075-1370.

TAKE INTO ACCOUNT the Defence's objections contained in the Response and its confidential Annexes 1 and 2 when the Chamber conducts its holistic assessment of the evidence during the deliberation of the judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized name or set of initials, located below the text 'Respectfully submitted,'.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaissona

Dated this 17 November 2023

At The Hague, the Netherlands.