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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 Annex 1

Public redacted version of the ‘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, filed on 29 September 2023

Source: Defence of Patrice-Edouard Ngaiïssona

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-Edouard Ngaïssona ('Defence') hereby responds to the "Prosecution's Eleventh Application for the Submission of Open-source Evidence from the Bar Table" ('Application').¹
2. Further, the Defence provides in confidential Annex 1 to the present response ('Response') its item-by-item objections to the 42 items of open-source evidence that the Prosecution seeks to submit into the record of the case ('Open-Source Items').
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 Annex 1 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 Defence's most salient objections. For a comprehensive overview of the Defence's observations on the Prosecution's Application, the Defence respectfully refers the Chamber to confidential Annex 1 to the Response.
7. The Defence contends that the Prosecution failed to sufficiently substantiate both the relevance and significance of the evidence sought to be submitted (A) and its authenticity

¹ ICC-01/14-01/18-2010-Conf together with confidential Annex.

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

³ ICC-01/14-01/18-1278, paras 6-9.

and reliability (B), which may result in prejudice to Mr Ngaïssona outweighing any *prima facie* probative value to be found in the tendered items.

A. Lack of relevance and significance of the items sought to be submitted

a. Contextual elements of the charged war crimes and crimes against humanity

8. In its Application and related Annex, the Prosecution submits that a number of items are relevant to establishing the contextual elements of the charged war crimes and crimes against humanity allegedly committed by the Anti-Balaka.⁴
9. In a few instances, the Prosecution employs its recurrent cherry-picking method, which the Defence has frequently deplored. In particular, the Prosecution often proposes a selective and incomplete description of an item, and ignores any information that does not fit its narrative. For instance, while the Prosecution argues that CAR-OTP-2001-2139⁵ lists the crimes committed by the Anti-Balaka during and after the 5 December 2013 attack of BANGUI, the Defence notes that the item in fact refers to attacks allegedly led by *both* the Seleka and the Anti-Balaka. In particular, the item stresses that “after the ex-Seleka forces managed to push back the Anti-Balaka groups they began a much more extensive series of reprisal attacks against Christians”⁶ and that “[t]he large majority of those killed on 5 and 6 December were Christian men targeted by ex-Seleka forces.”⁷
10. Similarly, the Prosecution submits that CAR-OTP-2001-2203⁸ documents the alleged large-scale Anti-Balaka attacks against the Muslim population in various localities. But again, on several occasions, the item refers to alleged attacks led by *both* the Seleka and the Anti-Balaka and stresses that:

“Since the mostly Muslim Seleka coalition seized power in March 2013, the country has been shattered by violence, much of it against members of the Christian community. The

⁴ ICC-01/14-01/18-2010-Conf, para. 6.

⁵ Item #1.

⁶ See CAR-OTP-2001-2139, at 2140.

⁷ See CAR-OTP-2001-2139, at 2144.

⁸ Item #2.

Seleka, which left power in mid-January 2014, killed thousands of Christian civilians, and looted and burned thousands of Christian homes.”⁹

11. The item also highlights that:

“Both anti-balaka militias and retreating Seleka forces have engaged in these arson attacks, setting fire to thousands of homes belonging to both Muslim and Christian communities.”¹⁰

b. Alleged deliberate and targeted violence on the Muslim civilian population

12. In its Application and related Annex, the Prosecution submits that a series of items are relevant to alleged Anti-Balaka attacks against the Muslim civilian population.¹¹

13. *First*, on several occasions, the items alone do not permit the identification of the perpetrators as the Anti-Balaka, nor do they allow one to infer that the target was the Muslim population. For instance, the Prosecution argues that CAR-OTP-2001-2880¹² indicates that satellite imagery analysed by Human Rights Watch confirms that predominantly Muslim neighbourhoods of BANGUI were largely destroyed by the Anti-Balaka during the Relevant Period. Nevertheless, it cannot be inferred from the satellite imagery alone that the perpetrators of said destructions were Anti-Balaka elements or that the destroyed homes were specifically those of the Muslim inhabitants.

14. Similar observations can be made regarding CAR-OTP-2042-5124,¹³ which describes the bodies found in the Ali Babolo Mosque as wrapped in white body bags.¹⁴ As such, not only is it impossible to identify them or determine whether they indeed belonged to the Muslim community, but it is also impossible to determine whether the deceased individuals were civilians or persons participating in hostilities.

15. *Second*, several of the tendered items make an account of the events in such general terms that it is not possible to draw any specific conclusion as to the alleged perpetrators or

⁹ See CAR-OTP-2001-2203, at 2206.

¹⁰ See CAR-OTP-2001-2203, at 2211.

¹¹ ICC-01/14-01/18-2010-Conf, para. 6.

¹² Item #4. See also CAR-OTP-2001-2883 (item #5); CAR-OTP-2005-0197 (item #20); CAR-OTP-2075-0670 (item #30).

¹³ Item #24.

¹⁴ See CAR-OTP-2002-0504, at 5126.

victims of the recounted attacks. For instance, the Prosecution argues that item CAR-OTP-2001-6752¹⁵ reports on the crimes committed by Anti-Balaka against the Muslim civilian population. However, the item only mentions “*crimes atroces contre la minorité musulmane*” and “*trois mois [de] pillages et [de] massacres interreligieux*” in such general terms that it cannot establish with sufficient precision that it designates attacks allegedly carried out by the Anti-Balaka against the Muslim civilian population. In any event, should the item arguably fulfil the minimal standard of relevance for the case, it does not make Mr Ngaïssona’s involvement in the charged crimes more or less probable and therefore has no probative value.

16. Likewise, it cannot be inferred from CAR-OTP-2042-5290¹⁶ itself that the perpetrators were the Anti-Balaka. The item only mentions hostilities initiated by armed groups and the fight back of the Seleka: “*Des groupes armés ont lancé une offensive sur la ville. Les forces de l’ex-Séléka ont rétorqué.*”¹⁷ Besides, it is impossible to determine whether the injured people sent to the *Hôpital Communautaire*, as described in the item, are civilians or persons participating in hostilities, nor can it be ascertained whether they belonged to the Muslim community. In this respect, the Defence recalls witness P-1576’s in-court testimony, where the witness confirmed that the *Hôpital Communautaire* hosted injured individuals by the Seleka, mostly Christians.¹⁸

17. *Third*, as already highlighted above,¹⁹ the description of the tendered items often ignores any information that does not fit the Prosecution’s narrative. For instance, regarding CAR-OTP-2079-0678,²⁰ while the Prosecution submits that the item documents the massive exodus of the Muslim population from BOSSANGO to escape the violence of the Anti-Balaka, the Defence notes that, more accurately, the item mentions massive displacements in general, not just of the Muslim population, but also of the Christian community: “*Les violences en Centrafrique ont engendré des déplacements de populations massifs, dans les communautés musulmanes comme chrétiennes*”.²¹

¹⁵ Item #17.

¹⁶ Item #26.

¹⁷ See CAR-OTP-2042-5290, at 5290.

¹⁸ See ICC-01/14-01/18-T-239-CONF-ENG, p. 58, lns 1-19.

¹⁹ See *supra*, para. 10.

²⁰ Item #33.

²¹ See CAR-OTP-2079-0678, at 0678.

18. Even more ostensibly, the Prosecution argues that CAR-OTP-2002-0504²² reports on Anti-Balaka attacks against the Muslim population in various localities. However, the Prosecution conveniently omits to mention that the item expressly refers to attacks led by the Seleka and Peulh herders targeting the civilian population:

“Seleka also killed civilians as they fled, including around Carnot. Sometimes the Seleka joined armed Peulh herders attempting to move their cattle through the region. Together these groups attacked civilians suspected of sheltering anti-balaka fighters.”²³

c. Organisation of the Anti-Balaka

19. In its Application and related Annex, the Prosecution argues that several items are relevant to the organisation of the Anti-Balaka.²⁴ The Defence notes however that the Prosecution mischaracterises, or fails to substantiate, the relevance of the items in question.

20. Regarding CAR-OTP-2001-5026,²⁵ the Prosecution submits that the media article reports that according to Mr Richard Bejouane, the alleged chief of staff of the Anti-Balaka, there are 52,000 Anti-Balaka elements. However, this figure should not be accorded any probative value since, as discussed during [REDACTED] in-court testimony on [REDACTED], the Anti-Balaka used to inflate the number of their elements for political purposes, in order to gain more credibility towards national and international interested parties:

“ [REDACTED]”²⁶

21. Besides, the item lacks relevance in showing the organisation of the Anti-Balaka during the Relevant Period. Contrary to the Prosecution’s description, the item would rather be relevant to establishing how the Anti-Balaka was disorganised as a group, without an actual unified leadership: the sources of AFP “*mettent en doute l’existence même d’un réel commandement unifié*”.

²² Item #19.

²³ See CAR-OTP-2002-0504, at 0506.

²⁴ ICC-01/14-01/18-2010-Conf, para. 6.

²⁵ Item #15.

²⁶ [REDACTED].

22. Similar observations can be made with respect to CAR-OTP-2091-1791²⁷ and CAR-OTP-2074-0278.²⁸ The Prosecution contends that these items are relevant to show the degree of organisation of the Anti-Balaka. However, the former article refers to an armed group “*assimilated* to the Anti-Balaka” [emphasis added],²⁹ without providing any specifications as to what group that would be, nor to the nature of the alleged assimilation of said group to the Anti-Balaka movement. Likewise, the latter article refers to FROCCA, COAC, COCORA or more generally “Bozizé’s men”.³⁰ However, the Prosecution fails to substantiate any link between the Anti-Balaka and those organisations. As such, the item referring to the above-mentioned groups has, on its own, limited probative value to establishing the organisation of the Anti-Balaka.

d. Alleged hate speeches by the Bozizé regime vis-à-vis the Muslim population

23. In its Application and related Annex, the Prosecution submits that a number of items are relevant to establishing the Bozizé regime’s alleged hate speech towards the Muslim population as a tool to gain support and reclaim power.³¹

24. The Defence identified two items that would potentially support the Prosecution’s submissions,³² but none of which sufficiently fulfil the standards of relevance or significance for the present case. CAR-OTP-2069-3540³³ contains an interview with Mr Lin Banoukepa reacting to the attack allegedly carried out by the Seleka on the BOY-RABE district in BANGUI. The Prosecution submits that Mr Banoukepa describes the intention of the Seleka and its supporters to Islamise CAR. However, the item bears no relevance to determining whether the Anti-Balaka – or Mr Ngaïssona specifically – adhered to the alleged hate speeches of the Bozizé regime or that they expressed any sort of anti-Muslim animus. *First*, the Prosecution fails to establish the link – if any – between the Bozizé regime and the Anti-Balaka, or between Mr Banoukepa, coordinator of the FROCCA, and the Anti-Balaka. As such, Mr Banoukepa’s comments cannot be attributed to the Anti-Balaka – and even less to Mr Ngaïssona. *Second*, the Prosecution does not substantiate how

²⁷ Item #40.

²⁸ Item #29.

²⁹ See CAR-OTP-2091-1791, at 1792.

³⁰ See CAR-OTP-2074-0278, at 0285 and 0287.

³¹ ICC-01/14-01/18-2010-Conf, para. 6.

³² CAR-OTP-2069-3540 (item #28) and CAR-OTP-2089-0143 (item #38).

³³ Item #28.

describing the intention of the Seleka to Islamise CAR should be considered as hate speech, as Mr Banoukepa's comments do not, in themselves, bear any mark of aggressiveness, hostility or hatred.

25. While similar reservations apply to CAR-OTP-2089-0143,³⁴ the Defence additionally notes that the Prosecution fails to substantiate its relevance on a particular point. The Prosecution alleges that the item provides the definition of "Toro Boro", arguably a "derogatory" term demonstrating the Bozizé regime's anti-Muslim animus. However, neither the item nor the Prosecution provide any specification as to what "Toro Boro" actually means, nor do they substantiate why it is regarded as a "derogatory" term. Rather, the purported definition contained in the item reads as follows: "*les rebelles soudanais présents à l'Est du Tchad, et par extension toutes les milices alliées au gouvernement tchadien...*" Not only does this portion contain no single reference to Muslims – therefore ruling out the anti-Muslim animus allegation –, but it even suggests that the definition of "Toro Boro" is so extensive that it would encompass all militias supporting the Chadian government. As such, it gets even further away from the alleged relevance to a purported anti-Muslim speech conveyed by the Bozizé regime.

e. Mr Ngaïssona's alleged individual responsibility

26. In its Application and related Annex, the Prosecution argues that CAR-OTP-2130-5493,³⁵ [REDACTED] is relevant to establishing Mr Ngaïssona's individual criminal responsibility, as it would purportedly confirm the attribution of P-2843's phone number and email, which he would have both used to communicate with Mr Ngaïssona.³⁶
27. The Defence notes that the Prosecution has also sought the submission of this item via another bar table application, namely its "Sixteenth supplementary submission of call data records and related evidence via the 'bar table'".³⁷ In its 27 September 2023 Decision, the Chamber ruled that it deferred its determination on the submission of this item, and that:

³⁴ Item #38.

³⁵ Item #42.

³⁶ ICC-01/14-01/18-2010-Conf, para. 6 and Annex.

³⁷ See Annex C to the "Prosecution's Sixteenth supplementary submission of call data records and related evidence via the 'bar table'", ICC-01/14-01/18-2061-Conf-AnxC.

“[i]t will consider the Defence’s arguments on this item as a whole, as well as the specific portions concerning P-2843, together when deciding on this item’s submission in the context of the Prosecution’s Eleventh Bar Table Application.”³⁸

28. *First*, the Defence objects to the submission of this item because it is too voluminous for the purpose of attributing one phone number. The item comprises 174 pages listing many email addresses and telephone numbers.
29. *Second*, although publicly available, the item does not actually appear to be a public document. Official documents that are not publicly available from official sources – e.g. the website of an organisation or official publications – are not self-authenticating and must be certified by the relevant authority.³⁹
30. In any case, the Chamber should approach the reliability of this document with caution. The item is listed as open source – which is to say found in public. However, the website⁴⁰ from which it was retrieved does not provide any clarity as to its origin. It did not originate from the [REDACTED], but rather was found on “[REDACTED]”. This appears to be either a document sharing website,⁴¹ or a website that crawls the internet for files which are then re-distributed to attract advertising revenue through turning up in search results. In short, the website from which [REDACTED] was obtained may be public, but it does not provide authentication of the item nor a chain of custody.
31. Given the circumstances of [REDACTED], the Chamber should not attribute probative value to the item. The Prosecution has not pointed to any basis in the document to consider that the information it seeks to use is contemporary or was accurate in 2013-2014. Moreover, other prejudice also militates against admission. At the time the Prosecution requested the addition of this item to its list of evidence,⁴² it stated that the document would “[REDACTED]”⁴³ but the Chamber found that potential prejudice that could be caused to the Defence outweighed any potential significance.⁴⁴ There it is now prejudicial for the

³⁸ See ICC-01/14-01/18-2110, p. 10, para. 25.

³⁹ See ICC-01/04-01/07-2635, para. 24(b).

⁴⁰ See ICC-01/14-01/18-2010-Conf-Anx, p. 22. [REDACTED]

⁴¹ [REDACTED].

⁴² See [REDACTED].

⁴³ See [REDACTED]

⁴⁴ See ICC-01/14-01/18-T-073-CONF-ENG, p. 4, lns 13-18.

Prosecution to submit this item without discussing it with the witness who could have clarified some of the issues raised here.

32. *Third*, the Defence disputes the Prosecution’s contention that the attribution was “established” during P-2843’s in-court testimony. More specifically, when the Prosecution asked P-2843 whether the numbers [REDACTED] and [REDACTED] seemed familiar, P-2843 replied negatively and that he did not remember these numbers anymore.⁴⁵ Then, when the Prosecution showed P-2843 a Facebook conversation, and asked whether the numbers [REDACTED] and [REDACTED] indicated therein were the numbers attributed to and used by him, P-2843 replied: “[REDACTED].”⁴⁶ The Prosecution itself conceded in Annex C to its “Sixteenth supplementary submission of call data records and related evidence via the ‘bar table’” that P-2843 “[REDACTED].”⁴⁷ As such, the Prosecution mischaracterises P-2843’s in-court testimony and fails to substantiate how CAR-OTP-2130-5493 would be relevant to Mr Ngaissona’s individual criminal responsibility.

B. Lack of sufficient reliability of the items sought to be submitted

a. Humanitarian agencies material

33. In its Application and related Annex, the Prosecution submits that some of the tendered items were collected from “reliable humanitarian agencies”, such as [REDACTED].⁴⁸ However, whether reports, statistics or satellite imagery, these items lack sufficient reliability and should be accorded limited probative value.

34. *First*, international jurisprudence has well established that humanitarian agencies reports are, most of the time, not intended for criminal proceedings and therefore do not adopt an adequate methodology to be considered reliable in such proceedings. In the *Bemba* case, the Trial Chamber ruled, in relation to diverse NGO material, including some reports issued by Human Rights Watch, that given “their provenance and reliability is entirely uninvestigated and untested, these materials carry little, if any, evidential weight.”⁴⁹ For

⁴⁵ See [REDACTED].

⁴⁶ See [REDACTED].

⁴⁷ See Annex C to Prosecution’s Sixteenth supplementary submission of call data records and related evidence via the “bar table”, ICC-01/14-01/18-2061-Conf-AnxC, footnote 8.

⁴⁸ ICC-01/14-01/18-2010-Conf, para. 8.

⁴⁹ *The Prosecutor v Jean-Pierre Bemba*, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 255.

more extensive developments on the matter, and in the interest of efficiency, the Defence respectfully refers the Chamber to its Responses to the “Prosecution’s Sixth Application for the Submission of Evidence from the ‘Bar Table’”⁵⁰ and to the “Prosecution’s Fifteenth submission of miscellaneous items of evidence via the ‘Bar Table’”.⁵¹

35. The Defence additionally notes that reports of humanitarian agencies – however reliable these agencies may be – are often characterised by their extensive reliance on hearsay and indirect information provided by sources whose anonymity is preserved. For instance, CAR-OTP-2001-2880⁵² is a Human Rights Watch report whose author does not appear to have witnessed the events himself as suggested by his reference to what “Human Rights Watch has documented on the ground”.⁵³ The same observations can be made regarding CAR-OTP-2015-0493,⁵⁴ a *Médecins sans frontières* article based on quotes from alleged survivors without any specification as to their identity, or CAR-OTP-2002-0504⁵⁵ whose author recounts events that occurred in various localities “according to Human Rights Watch research and information from local Muslim leaders.”⁵⁶ For lack of precise sources and in the absence of the reports’ authors being called by the Prosecution to testify in the present case, the Defence is deprived of any opportunity to question the veracity and reliability of the content of the items. Therefore, they should be accorded limited probative value.

36. *Second*, on a number of occasions, the Prosecution tenders satellite imagery in support of its submission that the Anti-Balaka carried-out attacks targeting the Muslim population.⁵⁷ The Defence however deplores the Prosecution’s failure to put such satellite imagery to Prosecution witness P-2193, while it had the opportunity to do so when he testified before the Chamber on 19 March 2021.⁵⁸ Putting the images to a satellite imagery expert like P-2193 would have allowed the Chamber to have the witness potentially confirm the alleged

⁵⁰ See ICC-01/14-01/18-1942-Conf, paras 41-44.

⁵¹ See ICC-01/14-01/18-2084-Conf, paras 7-10.

⁵² Item #4.

⁵³ See CAR-OTP-2001-2880, at 2882.

⁵⁴ Item #22.

⁵⁵ Item #19.

⁵⁶ See CAR-OTP-2002-0504, at 0506.

⁵⁷ CAR-OTP-2001-2880 (item #4); CAR-OTP-2001-2883 (item #5); CAR-OTP-2005-0197 (item #20); CAR-OTP-2057-0966 (item #27); CAR-OTP-2075-0670 (item #30)

⁵⁸ See ICC-01/14-01/18-T-019-ENG ET WT.

destructions, assess the localisation of the alleged destroyed neighbourhoods and verify their identification as Muslim neighbourhoods.

37. But most importantly, the Defence notes that the satellite imagery items themselves demonstrate insufficient indicia of reliability. For instance, CAR-OTP-2075-0670⁵⁹ indicates that “This is a preliminary analysis & has not yet been validated in the field. Please send ground feedback to UNITAR / UNOSAT.”

38. At the right-hand side of the document there is another note which reads:

“The depiction and use of boundaries, geographic names and related data shown here are not warranted to be error-free nor do they imply official endorsement or acceptance by the United Nations.”

39. *Third*, the Prosecution also seeks to submit items containing statistics on the number of displaced persons and/or victims of the conflict in the CAR, such as CAR-OTP-2002-0504⁶⁰ and CAR-OTP-2015-0493.⁶¹ The absence of source or methodology in support of the figures mentioned throughout the items prevents the Defence from challenging their collection, determination and, therefore, veracity. But even more ostensibly, CAR-OTP-2110-0460⁶² does not demonstrate *prima facie* indicia of reliability. The methodology section of the item and other side notes show that the figures are based on estimates: “*La CMP continue d’utiliser les estimations des populations déplacées*”.

40. Besides, the item itself indicates that the figures it contains are subject to an ongoing update: “*La CMP travaille sur un mécanisme d’actualisation de ces chiffres*” and “*Ces chiffres seront mis à jour de façon hebdomadaire*”.

41. *Finally*, the Defence notes that a couple of humanitarian agencies’ items the Prosecution seeks to submit lack contemporaneousness. Human Rights Watch article CAR-OTP-2002-0504⁶³ is dated 22 December 2014, i.e. more than six months after the charges against Mr Ngaïssona. Likewise, Amnesty International report CAR-OTP-2017-0115⁶⁴ is dated July 2015 and as such falls well outside the relevant period for the charged crimes.

⁵⁹ Item #30.

⁶⁰ Item #19.

⁶¹ Item #22.

⁶² Item #41.

⁶³ Item #19.

⁶⁴ Item #23.

b. Media articles

42. In its Application and related Annex, the Prosecution contends that other tendered items were collected from “reputable national and international media outlets with particular knowledge of the conflict”.⁶⁵

43. *Preliminarily*, the Defence notes 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.⁶⁶

44. The Trial Chamber in the *Ntaganda* case held that:

“media and press articles, absent any witnesses testifying to the accuracy of the information contained therein, have ‘limited probative value’ where they lack information on: the news outlets the articles are supposed to have appeared in; the background and qualifications of their authors; and the sources relied upon”.⁶⁷

45. Similarly, the Trial Chamber in the *Katanga* case denied the admission of media articles on this basis, as they “often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources”.⁶⁸

46. *Additionally*, the Defence recalls the Presiding Judge’s own words with respect to newspaper articles in the instant case. When P-2625 testified on 18 January 2023, the Prosecution put CAR-OTP-2074-0278 – item #29 in the Prosecution’s Annex to the Application – to the witness, and the Presiding Judge stated as follows:

⁶⁵ ICC-01/14-01/18-2010-Conf, para. 8.

⁶⁶ 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.

⁶⁷ *The Prosecutor v Bosco Ntaganda*, Public redacted version of ‘Decision on Defence request for admission of evidence from the bar table’, 31 January 2018, ICC-01/04-02/06-2201-Red, para. 45.

⁶⁸ *The Prosecutor v Germain Katanga*, Decision on the Prosecution’s Bar Table Motions, 19 December 2010, ICC-01/04-01/07-2635, para. 31.

“I’m very critical about showing newspaper articles anyway, as everybody knows here in the courtroom from hearings in the past. [...] [Newspaper articles] reflect the opinion of someone.”⁶⁹

47. 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 media articles is anonymous hearsay and opinion evidence or, when the source is identified, allegations for which information regarding the reliability and credibility of the original source is entirely lacking.⁷⁰
48. *Furthermore*, not only has the Prosecution failed to adduce any information about the background and qualifications of the relevant news agencies or authors of the publications – thus leaving the Chamber in the dark as to their objectivity and professionalism –, but it sometimes even presents a news agency as reliable while basic open-source research would suggest otherwise. For instance, CAR-OTP-2001-4472⁷¹ is a press article downloaded by the Prosecution from the website of Turkish Press. The Prosecution’s failure to substantiate Turkish Press’s political or financial independence from any government agency casts doubts as to its reliability. But more strikingly, the Defence notes that some information contained in the article was allegedly provided by Mr Djappa Blaise to Anadolu Agency.⁷² Basic open-source research on this agency reveals that it appears as a Turkish government agency,⁷³ therefore rendering its independence from any political entity more than doubtful. For lack of active substantiation of Anadolu Agency and Turkish Press’s reliability, CAR-OTP-2001-4472 should be granted no probative value, when taken for the truth of its content.
49. As a consequence, the Defence respectfully requests that the Chamber proceed with extreme caution when assessing the probative value of a media article for which the Prosecution failed to provide any specifications as to its political or financial independence.

⁶⁹ See ICC-01/14-01/18-T-190-ENG CT WT, p. 15, lns 20-24.

⁷⁰ See for instance, CAR-OTP-2001-6998 (item #18), CAR-OTP-2079-0598 (item #31), CAR-OTP-2079-0622 (item #32), CAR-OTP-2079-1159 (item #34), CAR-OTP-2079-1166 (item #35), CAR-OTP-2082-0732 (item #36) or CAR-OTP-2083-0429 (item #37).

⁷¹ Item #13.

⁷² See CAR-OTP-2001-4472, at 4472.

⁷³ For instance, Reuters qualifies Anadolu Agency as a “state-run news agency” (<https://www.reutersagency.com/en/partners/connect-anadolu/>).

50. *Finally*, as similarly submitted above in relation to humanitarian agencies material, most of the media articles tendered by the Prosecution in its Annex are characterised by their extensive reliance on hearsay or indirect information based on data provided by other sources, without substantiating any methodology whatsoever to the collection of such data. For instance, CAR-OTP-2001-4429⁷⁴ is an article downloaded by the Prosecution on the website of Reuters. However reliable Reuters might arguably be, the item is merely an account of facts and figures provided by the United Nations Aid Chief and, as she was not called by the Prosecution, the Defence did not have an opportunity to challenge her methodology to collect and establish these facts and figures or to question them. As such, the item contains unverifiable second-hand information and, therefore, lacks probative value. Likewise, CAR-OTP-2001-4623⁷⁵ is an article from The Star providing numbers of Muslim refugees. However, those numbers are based on figures provided by the United Nations, and without any substantiation on how these numbers were collected and established, the Defence is not in a position to challenge the methodology to their collection or to question their accuracy. Moreover, using different media outlets which have the same source of information, gives a false appearance of corroboration.

51. Sometimes, the information contained in media articles tendered by the Prosecution consists even of third-hand hearsay. In CAR-OTP-2042-5196,⁷⁶ the information on the 5 December attack on BOSSANGO was given to *Libération* by Dr Sabine Roquefort – a doctor from *Médecins sans frontières* based in BANGUI on 5 December 2013 – who herself got the information from journalists on the ground.⁷⁷

c. Other materials

52. In respect of the other categories of materials that the Prosecution seeks to submit, such as a Facebook post⁷⁸ or data provided by the Central Intelligence Agency,⁷⁹ the Defence makes the following general submissions and respectfully refers the Chamber to confidential Annex 1 to the Response for further developments.

⁷⁴ Item #12.

⁷⁵ Item #14.

⁷⁶ Item #25.

⁷⁷ See CAR-OTP-2042-5196, at 5201.

⁷⁸ CAR-OTP-2091-0433 (item #39).

⁷⁹ CAR-OTP-2001-3319 (item #8).

53. Regarding Facebook material, the Defence reiterates its reservations on their reliability and probative value, especially when neither the author nor the recipient of an exchange or post, nor the individuals mentioned therein, have provided testimony as to the meaning and veracity of the relevant posts.⁸⁰
54. With respect to data provided by the Central Intelligence Agency,⁸¹ the Defence highlights that their probative value is inherently impugned by the working methods of an intelligence agency 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.

V. RELIEF SOUGHT

55. The Defence respectfully requests the Chamber to **TAKE INTO ACCOUNT** the Defence's objections contained in the Response and its confidential Annex 1 when the Chamber conducts its holistic assessment of the evidence during the deliberation of the judgment.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 28 November 2023
At The Hague, the Netherlands.

⁸⁰ See Defence Response to the "Prosecution's Seventh Application for the Submission of Evidence from the Bar Table", ICC-01/14-01/18-1999-Conf, paras 9-16; Defence Response to the "Prosecution's Tenth Application for the Submission of Facebook Evidence from the Bar Table", ICC-01/14-01/18-2065-Conf, paras 8-10.

⁸¹ CAR-OTP-2001-3319 (item #8).