

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No: *ICC-01/14-01/18*

Date: **22 April 2022**

**TRIAL CHAMBER V**

**Before:** Judge 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  
NGAÏSSONA***

**Public with Confidential Annex 1**

**Public Redacted Version of the “Defence Response to the Prosecution’s ‘Request for leave to add 21 Items to the List of Evidence and their Submission from the Bar Table, and to extend the estimated examination time for P-0889’, ICC-01/14-01/18-1285-Conf”, 31 March 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. On 17 February 2022, the Prosecution filed its “Request for leave to add 21 Items to the List of Evidence and their Submission from the Bar Table, and to extend the estimated examination time for P-0889”.<sup>1</sup> As part of its request, the Prosecution requested that a number of Facebook conversations be submitted into evidence from the Bar Table (“Submission Request”). On 4 March 2022, the Trial Chamber V (“the Chamber”) partially granted the Prosecution’s request to add certain Facebook items to its list of evidence and instructed the participants to file responses to the Submission Request by 31 March 2022.<sup>2</sup> The Defence for Patrice-Edouard Ngaïssona (“the Defence”) hereby responds to the Submission Request, specifically to the eight items for which leave was granted to be added to the Prosecution List of Evidence.

## **II. CONFIDENTIALITY**

2. In accordance with regulation 23*bis*(1) of the Regulations of the Court, this response in addition to the annexes are filed confidentially since it makes references to information that during the course of Witness P-0889’s testimony was discussed in private session. A public redacted version shall be filed in due course.

## **III. APPLICABLE LAW**

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

## **IV. SUBMISSIONS**

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<sup>1</sup> ICC-01/14-01/18-1285-Conf.

<sup>2</sup> ICC-01/14-01/18-1301-Conf.

<sup>3</sup> ICC-01/14-01/18-1278, paras 6-9.

4. As a preliminary matter, the Defence submits that the Prosecution failed to respect the Initial Directions on the Conduct of Proceedings (“Initial Directions”) when it omitted to first consult with the Defence on whether it objects or consents to the submission of the Facebook communications before filing the Submission Request.<sup>4</sup> The Prosecution stipulated that it filed its Submission Request on the same day that it provided the Defence with its annex containing its Bar Table.<sup>5</sup> The Initial Directions specify that the tendering party must liaise with the opposing party *before* it files its Bar Table request. Since the Prosecution liaised with the Defence the same day as filing the Submission Request, the Prosecution did not provide the Defence with sufficient time to review the items and give its position thereby violating paragraph 62 of the Initial Directions. On this basis, the Submission Request should be rejected *in limine*.
5. However, in this instance, the Prosecution also presented the eight items subject to the Submission Request to Witness P-0889 during the course of his testimony, and requested their submission into evidence pursuant to paragraph 63(i) of the Initial Directions. In response to the Prosecution’s request to submit the items through Witness P-0889, the Defence submitted that it would provide its objections to the items *via* the present response to the Submission Request.<sup>6</sup>
6. While there are no procedural bars that would preclude the eight items subject to the Submission Request from being submitted into evidence, the Defence respectfully requests the Chamber to accord no probative value to seven out of the eight items. The Defence does not object to the Prosecution’s submissions

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<sup>4</sup> ICC-01/14-01/18-631, para. 62.

<sup>5</sup> Submission Request, para. 12.

<sup>6</sup> Email from: Ngaïssona Defence to: Trial Chamber V, dated 22 March 2022 at 14:13.

regarding the relevance and probative value of item CAR-OTP-2131-1012 since during his testimony P-0889 [REDACTED].<sup>7</sup> For the remaining seven items, the Defence submits that they are of such limited probative value that they are unlikely to influence the Chamber's determinations of: (1) whether the Anti-Balaka were allegedly organizing militarily as of July 2013 in different areas of the Central African Republic ("CAR"), Democratic Republic of the Congo ("DRC") and Cameroon; (2) whether Mr Ngaïssona was referred to as the boss upon his return to Bangui, (3) whether the Anti-Balaka adopted anti-Muslim rhetoric, and (4) what were the whereabouts of Anti-Balaka members, and (5) whether there was a link between the Anti-Balaka and FROCCA.<sup>8</sup>

7. The Prosecution's submissions on the relevance and the probative value of the seven Facebook items when juxtaposed with P-0889's testimony, which contextualized each of these conversations, brings into sharp relief the dangers of relying on Facebook communications for the truth of their content. The Facebook conversations should not be relied upon for the following three reasons: (1) they amount to anonymous hearsay (2) the context in which the statements were made reveal their unreliability and (3) the terms employed by the interlocutors in the conversations cannot be interpreted at face value.
8. *First*, when confronted with these items Witness P-0889 expressly stated that the Chamber should not take into account what he said on Facebook because [REDACTED].<sup>9</sup> [REDACTED].<sup>10</sup> The information contained in these conversations therefore amounts to anonymous hearsay which is impossible to evaluate in terms of veracity, and thus is devoid of probative value.

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<sup>7</sup> ICC-01/14-01/18-T-108-CONF-FRA ET, page 22.

<sup>8</sup> ICC-01/14-01/18-1285, para 14.

<sup>9</sup> ICC-01/14-01/18-T-108-CONF-FRA ET, page 48.

<sup>10</sup> Ibid.

9. *Second*, Witness P-0889 provided the context in which these conversations took place, which further demonstrate their lack of reliability. P-0889 testified at length that he made certain statements on Facebook out of anger and used the social media platform as a release from the suffering caused by the Seleka regime.<sup>11</sup> He therefore made statements about undertaking actions such as the use of weapons and fighting that he admitted he was incapable of actually doing.<sup>12</sup>
10. *Third*, Witness P-0889 clarified that certain words he employed in the Facebook messages cannot be ascribed their ordinary meaning. For example, P-0889 testified that [REDACTED].<sup>13</sup> Moreover, P-0889 testified that [REDACTED].<sup>14</sup> [REDACTED].
11. Similarly, the use of the word “*muslim*” was contextualized by Witness P-0889. The most illustrative example was his Facebook conversation with [REDACTED] for which the Prosecution submits that it is probative with respect to anti-Muslim rhetoric. Notably, Witness P-0889 testified that [REDACTED]. [REDACTED]. [REDACTED],<sup>15</sup> [REDACTED]. Witness P-0889 further testified that he, like many Central Africans, did not employ the term “Seleka” for fear of being denounced by Seleka informants and so the term “*Muslim*” was employed when referring to Seleka members.<sup>16</sup>
12. Witness P-0889’s testimony on the Facebook items provided vital information with respect to evaluating its accuracy and meaning. Without it, it would be impossible for the Chamber to evaluate the probative value of the conversations. Therefore, the Defence objects to the Chamber considering, in its

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<sup>11</sup> ICC-01/14-01/18-T-111-CONF-FRA, pages 34-35.

<sup>12</sup> Ibid., page 35.

<sup>13</sup> ICC-01/14-01/18-T-108-CONF-FRA ET, page 26.

<sup>14</sup> Ibid., page 25.

<sup>15</sup> ICC-01/14-01/18-T-111-CONF-FRA, page 23.

<sup>16</sup> ICC-01/14-01/18-T-111-CONF-FRA, pages 26-27, 30.

holistic assessment of the evidence when deliberating its judgement, any Facebook exchanges with which P-0889 was not confronted.

13. For the aforementioned reasons, the Defence submits that the Facebook conversations should not be considered by the Chamber for the truth of their content. The Defence further refers the Chamber to Annex 1 of the present response in which it provides item by item objections to the Prosecution's submissions on the items' probative value.

## **V. RELIEF SOUGHT**

14. The Defence respectfully requests the Chamber to:

- take into account the Defence's objections to admissibility contained in the present response and Confidential Annex 1 when the Chamber conducts its holistic assessment of the evidence when deliberating its judgment.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 22 April 2022

At The Hague, the Netherlands.