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Internationale**



**International  
Criminal  
Court**

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

Date: **11 May 2022**

**TRIAL CHAMBER V**

**Before:**

**Judge Bertrand 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 ROMBHOT YEKATOM  
AND PATRICE-EDOUARD NGAÏSSONA***

**Public with Confidential Annexes A to C**

**Public Redacted Version of the “Ngaïssona Defence Request for  
Dismissal of Certain Attributions and Allegations of Contacts and  
for Suspension of the Time-limit to Respond to the “bar table” on Call Data Records”,  
ICC-01/14-01/18-1377-Conf, 25 April 2022**

**Source: Defence of Patrice-Edouard Ngaïssona**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court*****to:****The Office of the Prosecutor**

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## I. Introduction

1. The Defence hereby makes several requests in relation to a 1<sup>st</sup> of March 2022 Prosecution request for submission via a bar table motion of call data records and related evidence ('the Bar-Table Motion').<sup>1</sup>
2. On 4 March 2022, the Trial Chamber granted a request to extend the deadline for a response from 14 March 2022 to 13 May 2022 in light of arguments<sup>2</sup> raised by the Defence.<sup>3</sup>
3. Prior to filing its response to the Bar-Table Motion, the Defence requests Trial Chamber V ('Trial Chamber' or 'Chamber') to:
  - a. Dismiss *in limine*, attributions and allegations of contacts not made in the Document Containing the Charges ('DCC'),<sup>4</sup> the Decision on the Confirmation of Charges ('CoC'),<sup>5</sup> or the Prosecution Trial Brief ('PTB') and the material associated thereof.<sup>6</sup> Confidential Annex A to the present filing lists these allegations and contacts associated with specific items.
  - b. Suspend the time limit for a response to the Bar-Table Motion until certain conditions are satisfied. These conditions are:
    - i. The Trial Chamber rendering a decision on filings ICC-01/14-01/18-808-Conf and ICC-01/14-01/18-1043-Conf, which concern the Prosecution's requests to

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<sup>1</sup> Prosecution's submission of call data records and related evidence via the "bar table", [ICC-01/14-01/18-1296](#). The Prosecution circulated a draft by email as required by the Trial Chamber Decision on the Conduct of Proceedings ([ICC-01/14-01/18-631](#), para. 62) on 17 January 2022.

<sup>2</sup> These arguments concerned *inter alia* extensive new material contained within the annexes to the Bar-Table Motion, the addition of new attributions and statements of witnesses yet to testify, and pending disclosure requests.

<sup>3</sup> Email, subject 'Decision on Request for an extension of time to respond to ICC-01/14-01/18-1296', sent 4 March 2022 15h39.

<sup>4</sup> ICC-01/14-01/18-282-Conf-AnxB1.

<sup>5</sup> ICC-01/14-01/18-403-Conf.

<sup>6</sup> ICC-01/14-01/18-723-Conf.

introduce *via* Rule 68(2)(b) the statements of [REDACTED]<sup>7</sup> and [REDACTED]<sup>8</sup>;

- ii. The completion of the testimony of witnesses upon which the Prosecution relies to make attributions in its Bar-Table Motion; and
  - iii. The Prosecution provides an exhaustive list of telephone attributions and contacts that it intends to rely upon within the CDRs that it is submitting through the Bar-Table Motion. This list must indicate where the charging documents precisely refer to the attributions or communications. This last request is necessary to avoid issues of notice and trial by ambush.
4. As discussed below, the Defence makes the present request (a) to ensure trial fairness pursuant to Articles 64(2) and 67(1)(b) of the Rome Statute ('Statute'). The Defence makes request (b) pursuant to Article 64(6)(f), (8)(b), and (9)(b) of the Statute and Regulation 35 of the Regulations of the Court ('RoC').
  5. The two underlying reasons for the Defence request are issues of notice raised by the Bar-Table Motion, which impact upon the fairness of proceedings, and the premature and piecemeal nature of the Bar-Table Motion. If the Defence is obliged to respond to the Bar-Table Motion, the need to hedge responses, provide amendments, and later retractions will be prejudicial to the Defence.

## II. Confidentiality

6. In accordance with regulation 23*bis*(1) of the Regulations of the Court, this request is filed confidentially as it responds to documents of the same classification. The Defence will file a public redacted version as soon as practicable.

## III. Submissions

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<sup>7</sup> [REDACTED]. The Prosecution submitted this statement on 26 June 2021 in filing ICC-01/14-01/18-1043-Conf.

<sup>8</sup> [REDACTED]. [REDACTED]. [REDACTED]. The Prosecution submitted this statement on 11 January 2021 in filing ICC-01/14-01/18-808-Conf.

7. The present request is without prejudice to subsequent objections and/or submissions on the application of the standard admissibility criteria to this material in a response. The Defence also reserves its rights to make submissions on and/or objections to the Prosecution's specific use of the items at any other stage in the trial.

**A. The Trial Chamber should dismiss, *in limine*, attributions and communications not contained within the DCC, CoC, or PTB**

8. The Bar-Table Motion contains new attributions and communications<sup>9</sup> for ten individuals<sup>10</sup> for whom neither the DCC, CoC, nor PTB provides notice<sup>11</sup> of their relevance to the case. Also, in Annex C to the Bar-Table Motion, a new telephone number has been attributed to an alleged user while no allegations of communication is made for that particular individual in Annex A of the Bar-Table Motion. The Defence is confused as to the potential role of a stand-alone attribution not associated with any communications.<sup>12</sup>
9. Moreover, the Prosecution also partly did not follow the procedure set out in the Decision on the Conduct of Proceedings.<sup>13</sup> The Bar-Table Motion contains items in Annex C which were not included in the Annex provided to the Defence during *inter partes* consultations.<sup>14</sup> In addition, Annex A – the heart of the Prosecution's Bar-Table

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<sup>9</sup> I.e. alleged contacts between individuals in CDRs through the Bar-Table Motion annexes but unaddressed in the charging documents.

<sup>10</sup> Annex A to the Bar Table Motion lists alleged contacts between these individuals and other individuals. Annex B lists CDRs which are the raw material upon which the Prosecution constructed Annex A. Annex C alleges that certain information demonstrate that certain phone numbers are attributable to certain individuals.

<sup>11</sup> ANNEX I1 (ICC-01/14-01/18-282-Conf-AnxI1) to the DCC and ANNEX D to the PTB (ICC-01/14-01/18-723-Conf-AnxD) provide telephone number attributions for the individuals mentioned in relation to the CDR in the DCC and in the PTB as well as the evidence supporting these attributions. The DCC and the PTB do not mention the eleven individuals in relation to CDRs.

<sup>12</sup> In Annex C of the Bar-Table Motion, 'PART 2: SUBMITTED ITEMS CONTAINING ATTRIBUTION INFORMATION', tab 34, [REDACTED].

<sup>13</sup> [ICC-01/14-01/18-631](#), para 62.

<sup>14</sup> CAR-OTP-2076-0374-R04; CAR-OTP-2045-0048-R03; CAR-OTP-2048-0171-R02; CAR-OTP-2063-0050-R04; CAR-OTP-2118-5269-R01; CAR-OTP-2050-0654-R02; CAR-OTP-2062-0039-R02; CAR-OTP-2065-0003-R01; CAR-OTP-2072-1134-R04; CAR-OTP-2069-0035-R02; CAR-OTP-2082-1058-R03; CAR-OTP-2076-0911-R02; CAR-OTP-2099-7344; CAR-OTP-2101-7181; CAR-OTP-2102-7844; CAR-OTP-2101-6488; CAR-OTP-2099-8194; CAR-OTP-2099-8412; CAR-OTP-2099-8440; CAR-OTP-2099-8475; CAR-OTP-

Motion – had not been provided to the Defence at that time despite the Defence having expressly requested to be provided with such Annex.<sup>15</sup> In other words, taken together the Defence effectively sees these allegations of contacts for the first time in the Bar-Table Motion of 1<sup>st</sup> March 2022. This is almost a year and half after the Prosecution filed its PTB.

10. Since these attributions and communications are not mentioned in the DCC, CoC, or PTB the Defence cannot appreciate what role they play in the Prosecution's case. The Prosecution has not previously demonstrated with the required clarity and specificity how it intends to use this information. The Defence characterises these new attributions and alleged communications by the Prosecution as 'allegations' since the Defence cannot exclude that the Prosecution may intend to later argue that these attributions and alleged communications incriminate Mr Ngaïssona.
11. The Trial Chamber should not permit the Prosecution to augment its PTB let alone its DCC. It is too late. It is the duty of the Prosecution to provide all the facts underpinning the charges in the DCC and be specific enough to clearly and precisely inform the Accused of the details underpinning charges against him – the Chamber cannot compensate for any deficiencies.<sup>16</sup> The Appeals Chamber has found that, at the very latest, the assessment of whether an Accused had notice of the charges may only take into account information made available before the start of the trial hearings.<sup>17</sup> Importantly, a Trial Chamber should not permit the Prosecution to mould its case

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2099-8512; CAR-OTP-2099-8600; CAR-OTP-2099-9653; CAR-OTP-2099-9903; CAR-OTP-2099-9921; CAR-OTP-2066-1601; CAR-OTP-2066-2142; CAR-OTP-2066-3003; CAR-OTP-2099-5455; CAR-OTP-2130-3379; CAR-OTP-2124-0895; CAR-OTP-2124-0896; CAR-OTP-2066-2466; CAR-OTP-2124-0766; CAR-OTP-2124-0758; CAR-OTP-2124-0547; CAR-OTP-2124-0936; CAR-OTP-2124-0908; CAR-OTP-2124-0905; CAR-OTP-2124-1029; CAR-OTP-2124-0882; CAR-OTP-2124-0546; CAR-OTP-2124-0708; CAR-OTP-2124-0759; CAR-OTP-2124-0525 and CAR-OTP-2124-0848.

<sup>15</sup> [REDACTED].

<sup>16</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, [ICC-01/05-01/08-424](#), 15 June 2009, para. 208.

<sup>17</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, [ICC-01/04-01/06-3121-Red](#), 1 December 2014, para. 129.

against the Accused during the course of the trial depending on how the evidence unfolds.<sup>18</sup>

12. Most items in Annex C of the Bar-Table Motion are associated with multiple attributions, meaning that some of the items the Prosecution submits that relate to new allegations also are being submitted for pre-existing attributions. Therefore, the Defence does not request the Trial Chamber to dismiss *in limine* the submission of items used for multiple attributions. Instead, the Defence is requesting the Trial Chamber to reject *in limine* these new attributions and alleged communications. This is to confirm that the allegations are not contained within the charging documents and do not form part of the allegations that the Trial Chamber will consider in its Article 74 deliberations. This is so that the Defence is relieved from responding to the items with the certainty that a failure to respond will not be prejudicial to the Accused.
13. The Defence only requests the dismissal of the items exclusively used for these new attributions. The Defence has indicated these in Confidential Annex A in yellow.
14. The Defence should not have to attempt to predict what the Prosecution has not articulated and then respond to allegations where the Prosecution has not given prior notice of the role that the attribution or communication play in its case.
15. For these reasons, the Defence requests that the Trial Chamber reject *in limine* these new attributions and the alleged communications involving these individuals. In addition, the Defence requests the rejection *in limine* of the submission of items only used to support these attributions as listed in Confidential Annex A in yellow.

**B. The Trial Chamber must suspend the time limit for a response to the Bar-Table Motion until certain conditions are satisfied to avoid prejudice to the Defence**

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<sup>18</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, [ICC-01/05-01/08-424](#), 15 June 2009, para. 208, footnote 284 citing ICTY, *Prosecutor v. Kupreskic*, Appeal Judgement of 23 October 2001, para. 92.

16. The Trial Chamber has an inherent obligation pursuant to Article 64(2) to ensure fairness. As detailed below, the absence of three conditions being met<sup>19</sup> – the subject of this request – will result in prejudice to the Defence response to the Bar-Table Motion.
17. Regulation 35(2) of the RoC permits a Trial Chamber to “extend or reduce a time limit if good cause is shown”. Trial Chamber VII has implicitly accepted that it could grant a suspension of a deadline under Regulation 35(2) of the RoC provided the applicant could show “good cause”.<sup>20</sup> Nothing in this rule sets limits on the scope of extension the Trial Chamber can grant. This therefore includes a suspension of deadlines where the Defence can demonstrate “good cause”.
18. This power also arises from the Trial Chamber’s powers to “[r]ule on any other relevant matters” pursuant to Article 64(6)(f), “give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner” pursuant to Article 64(8)(b), and “[t]ake all necessary steps to maintain order in the course of a hearing” pursuant to Article 64(9)(b). The Trial Chamber should exercise these powers to ensure fairness as it is obliged to do pursuant to Article 64(2).

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<sup>19</sup> See the Defence request at para. 3(b)(i)-(iii) *above*.

<sup>20</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Pre-Trial Chamber II, Decision on the "Prosecution application for leave to submit an 'Amended and corrected version of Prosecution response to the "Requête urgente de la Défense sollicitant la mise en liberté provisoire de Monsieur Fidèle Babala Wandu" of 3 January 2014", [ICC-01/05-01/13-94](#), 14 January 2014.

1. *Without a decision on filings ICC-01/14-01/18-1043-Conf and ICC-01/14-01/18-808-Conf, which concern the Prosecution's requests to introduce via Rule 68(2)(b) the statements of [REDACTED]<sup>21</sup> and [REDACTED]<sup>22</sup>, the Defence will be prejudiced in making a response*

19. The Trial Chamber has not yet permitted submission of information from [REDACTED].<sup>23</sup> In addition, there is no statement from [REDACTED]. Until the Trial Chamber has received information from people [REDACTED] concerning the creation and interpretation of the CDRs, it would be highly prejudicial to receive the CDRs in Annexes B and D of the Bar-Table Motion or oblige the Defence to respond to the submission thereof.
20. The Prosecution describes the value of statements from [REDACTED] as going to the "integrity and reliability of [the] CDR collected [...]".<sup>24</sup> If the Trial Chamber does not permit the introduction of these persons' statements, then this affects the nature of the Defence response to the CDRs. The Defence could, for example, advance an argument that the CDRs are simply too unreliable given that no information exists on the record as to assess their completeness or the accuracy of the information they contained, or, in fact, how to interpret the information they contain.
21. The absence of a decision on the submission of the statements also means that the information is not formally available for the Trial Chamber to consider. Neither the Defence, nor the Prosecution, nor the Trial Chamber are CDR technicians or experts. Making basic assumptions about the specific content of CDRs could turn out to be incorrect or at best be a guess.

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<sup>21</sup> [REDACTED]. [REDACTED]. The Prosecution submitted this statement on 26 June 2021 in filing ICC-01/14-01/18-1043-Conf.

<sup>22</sup> [REDACTED]. [REDACTED]. [REDACTED]. The Prosecution submitted this statement on 11 January 2021 in filing ICC-01/14-01/18-808-Conf.

<sup>23</sup> See, as examples, ICC-01/14-01/18-1043-Conf and ICC-01/14-01/18-808-Conf, paras 29-34.

<sup>24</sup> ICC-01/14-01/18-808-Conf, paras 31 and 37.

22. In light of this, any Defence observations aimed at relevance, probative value, and the prejudice of submission/admission depend upon the Trial Chamber's disposition of the requests related to the [REDACTED].

*2. Responding to the Bar-Table Motion before certain witnesses have testified will be prejudicial to the Defence*

23. The Bar-Table Motion relies upon statements of witnesses that have yet to testify before the Court.<sup>25</sup> Any Defence response aimed at the relevance, probative value, or the prejudice in relation to these witnesses and the CDRs may change after having heard the witness testimony.

24. In addition, for most of these statements either a decision on the request to have the statement submitted pursuant to Rule 68(3) is still pending,<sup>26</sup> a request has not yet been filed,<sup>27</sup> or the Prosecution has not even planned to file such a request.<sup>28</sup> Therefore, the Defence cannot assume – presently – that any of the information contained in these statements will be part of the Trial Chamber's deliberations on the judgment.

25. The Bar-Table Motion is therefore premature. If the Trial Chamber does not suspend the deadline for a response, it will lead to a waste of time because the Defence will need to supplement or replace its position on the Bar-Table Motion response after each of the 10 witnesses testifies.<sup>29</sup>

26. Moreover, the process is operating in reverse. The Prosecution is asking the Defence to make submissions on the conclusions (contained in Annex C of the Bar-Table Motion) about who used a specific phone number listed in CDRs in Annexes A and B

<sup>25</sup> CAR-OTP-2076-0374-R04, CAR-OTP-2045-0048-R03, CAR-OTP-2048-0171-R02, CAR-OTP-2063-0050-R04, CAR-OTP-2118-5269-R01, CAR-OTP-2050-0654-R02, CAR-OTP-2062-0039-R02, CAR-OTP-2065-0003-R01, CAR-OTP-2072-1134-R04, and CAR-OTP-2069-0035-R02.

<sup>26</sup> See ICC-01/14-01/18-1281-Conf for CAR-OTP-2063-0050-R04 and ICC-01/14-01/18-1179-Conf 17-11-2021 for CAR-OTP-2050-0654-R02.

<sup>27</sup> See ICC-01/14-01/18-642-Conf-AnxA, p. 4, para. 8 for CAR-OTP-2076-0374-R04; p. 37, para. 107 for CAR-OTP-2065-0003-R01 and p.22 para 87 for CAR-OTP-2069-0035-R02.

<sup>28</sup> CAR-OTP-2118-5269-R01; CAR-OTP-2062-0039-R02 and CAR-OTP-2072-1134-R04.

<sup>29</sup> The Defence notes that P-1193 is scheduled to testify on 28 April 2022 (Email, subject 'UPDATE - Block 12 Witness Order and Schedule', sent 19 April 2022 18h31). In the event that the Trial Chamber decides upon this request before this point, then the number of statements will be nine.

to the Bar-Table Motion. The Defence cannot offer comprehensive arguments on annexes A, B or C before the submission of the underlying material or testimony of witnesses who could clarify or change the submissions on the final conclusions.

27. Not only does this go against the principle of judicial economy, but also the procedure creates prejudice to the Defence because the Defence will have to hedge its arguments that will both increase the page length of the response and makes the arguments less final and conclusive. The Defence can avoid equivocating if the Trial Chamber suspends the deadline for the response until the Chamber decides upon the respective statements and testimony.

3. *The Prosecution is supposed to know its case and should confirm an exhaustive list of attributions and connections that it intends to rely upon within the CDRs before the Defence responds.*

28. Rule 64 of the Rules of Procedure and Evidence ('RPE') and Decision on the Conduct of Proceedings<sup>30</sup> require the Prosecution to state the relevance when it submits an item. If the Prosecution is aware of attributions or alleged calls/connections in its Annexes A, B, C and D that it will use to argue for the conviction of Mr Ngaïssona then it must state them now since this is part of the relevance of the items. Similarly, if it intends to use any given item to support an attribution, then it must either disclose it or identify it to the Defence as part of this litigation.

29. The Defence's concern that the Prosecution has not made all attributions available is not speculative. In *inter partes* discussions on this Request, the Prosecution refused to offer a comprehensive list of attributions when asked by the Defence.<sup>31</sup> The condition requested here stems from a Defence's concern related to the ongoing introduction of new attributions that are either not part of the facts and circumstances of the case or, at the very least, require articulation by the Prosecution prior to the courtroom so that the Defence can adequately prepare.

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<sup>30</sup> [ICC-01/14-01/18-631](#), para 62.

<sup>31</sup> See Confidential Annex B.

30. The CDR material is voluminous. The Prosecution is submitting close to all CDR-related material disclosed in the case. An individual from the [REDACTED] whom the Prosecution asked for an analysis of certain call data records ('CDR') received 1018 items related to call data.<sup>32</sup> That individual identified 14,593,141 records within these items.<sup>33</sup> Even after they worked on a subset related to *only* 17 telephone numbers specified by the Prosecution, removed what they identified as duplicates, and removed connections not falling in the period between 1 March 2013 and 31 December 2014, they were still working with 220,415 records.<sup>34</sup>
31. The Defence needs a clear and explicit articulation of the allegations the Defence is facing as a necessary pre-condition to respond to the Bar-Table Motion and for a fair trial. The Defence should be able to assume that the information in the DCC or at least PTB is exhaustive and final. If the Trial Chamber does not order the Prosecution to confirm or produce a final list, it is not possible for the Defence to either seek the dismissal of certain allegations as argued above,<sup>35</sup> or prepare for trial or make full submissions on the evidentiary standard in response to the Bar-Table Motion without being prejudiced.
32. The present way of proceeding, where it seems new alleged communications could later arise out of the materials in annexes B and D, prevents the Defence from comprehensively responding to the Bar-Table Motion. This denies the Defence the opportunity to offer a final and consistent position. That is both unfair and prejudicial. This may complicate and prolong the disposition of the litigation, as the Defence may need to revise and augment its submissions. This prejudicial effect results specifically from the failure or unwillingness of the Prosecution to present all its allegations against Mr Ngaïssona.

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<sup>32</sup> CAR-OTP-2126-2529 at 2531.

<sup>33</sup> CAR-OTP-2126-2529 at 2532.

<sup>34</sup> CAR-OTP-2126-2529 at 2535.

<sup>35</sup> See section A *above*.

4. *The Prosecution must provide an exhaustive list of telephone attributions and contacts that it intends to rely upon within the CDRs which is necessary to avoid trial by ambush*

33. The absence of an exhaustive list of alleged attributions and communications extends beyond creating prejudice in responding to Bar-Table Motion. Previously unnotified alleged attributions and communications are not issues that the Defence can object to in a way that respects equality of arms when the Prosecuting introduces them during questioning of witnesses.<sup>36</sup>
34. The Prosecution continues to introduce new telephone numbers and attributions during the questioning of witnesses for which the Prosecution has not given the Defence notice.
35. During the testimony of P-0889, the Prosecution presented P-0889 with a list of contacts and asked the witness to identify the individuals.<sup>37</sup> The Defence asked the Prosecution *inter partes* to explain the relevance of the contacts discussed in court. The Prosecution response to this concern was “[w]e don’t consider it necessary at this point to explain our position in respect of the relevance of the numbers.”<sup>38</sup>
36. Given the above example, when the Prosecution states in its Bar-Table Motion that the CDRs in Annex D “may also respond to factual issues arising during the course of the trial”,<sup>39</sup> it does not appear that the Prosecution is referring to issues that arise in response to Defence questions. This is because the occasions upon when the Prosecution has raised these novel attributions and CDRs have **not** been during redirect examination or in reaction to novel information raised by the Defence during cross-examination.
37. An isolated example of such trial by ambush might be explicable as an anomaly, but the Prosecution has persistently surprised the Defence with attribution and CDR

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<sup>36</sup> See paras 35 and 37, 43-46 below.

<sup>37</sup> ICC-01/14-01/18-T-108-CONF-ENG, p. 9, l.17-25 and pp. 10-17.

<sup>38</sup> See Confidential Annex C.

<sup>39</sup> Bar-Table Motion, para. 9.

related material. The Prosecution introduced a telephone number during the questioning of P-0966 on 4 April 2022.<sup>40</sup> Despite an *inter partes* query from the Yekatom Defence, the Prosecution has not clarified to whom it thought this number belonged.

38. No matter how prepared the Defence is, and recalling that the potential number of records is 14,593,141,<sup>41</sup> the volume of material is such that without a clear delimitation of the factual allegations as regards the CDRs, the Prosecution will unfairly ambush the Defence during questioning and in final submissions. This will not lead to the truth, and it is reasonable to ask a Prosecuting authority to provide this information. In addressing 1,600 pages of evidence, the European Court of Human Rights ('ECtHR') has stated that the failure of a Prosecutor to indicate in detail the particular evidence on which he based their account of the facts in relation to the defendants impacts upon notice, preparation, and therefore the presumption of innocence.<sup>42</sup>

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<sup>40</sup> ICC-01/14-01/18-T-116-CONF-ENG ET 04-04-2022, p. 71, l. 16.

<sup>41</sup> See para. 30 *above*.

<sup>42</sup> ECtHR, [Barberà, Messegué and Jabardo v. Spain](#), Judgment, 10590/83, paras 77-78:

77. Paragraph 2 (art. 6-2) embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to **inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly**, and to adduce evidence sufficient to convict him. According to the Government, this is the purpose of the intermediate stage of the proceedings when parties make their interim submissions and indicate the evidence which they propose to tender (see paragraph 40 above). In its interim submissions in the instant case, the public prosecutor gave his version of the facts and defined them in legal terms. He also listed the evidence he sought to have admitted, including the 1,600 page investigation file, **the bulk of which did not concern the defendants; however, he did not specify in detail the particular evidence on which he based his account of the facts in relation to the defendants** [...], and **this made the defence's task more difficult**.

78. Paragraph 1 of Article 6 taken together with paragraph 3 (art. 6-1, art. 6-3), also **requires the Contracting States to take positive steps**, in particular to inform the accused promptly of the nature and cause of the accusation against him, to **allow him adequate time and facilities for the preparation of his defence**, to secure him the right to defend himself in person or with legal assistance, and to enable him to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

39. During hearings the Presiding Judge also commented upon the relevance or lack thereof of certain attributions, stating that:

[REDACTED].<sup>43</sup>

40. The response to this query was telling of the present approach and ambiguity in the trial:

[REDACTED].<sup>44</sup>

41. The Prosecution has not yet done so, despite the Defence having made a disclosure request *inter partes*.<sup>45</sup> With respect: a trial is not a puzzle and proceedings should not be even slightly mysterious. To both the Presiding Judge's question and Defence queries, it should have been easy to point to a reference in one of the charging documents. If this is not the case, then there is an issue with notice.

42. If new attributions are introduced during hearings this has at least two prejudicial effects. The Prosecution ambushes the Defence. The Prosecution denies the Defence the opportunity to prepare and investigate the allegations before the Prosecution asks the questions in court.

43. The effect of this is that the Defence may be unable to formulate a timely objection to stop inappropriate questions. Identifying the role a telephone number plays in the case involves searching through numerous separate spreadsheets that often contain thousands of rows. It also means that the Defence must do simple things such as consulting the client or reviewing disclosed material in a reactive and rushed way.

44. The Defence does not take a position as to whether this is a conscious strategy of the Prosecution, but ambush is certainly the effect and the Trial Chamber should put a stop to it. If, alternatively, the Prosecution is using the hearings as an investigative process to remedy deficient investigations, then the Trial Chamber must disapprove

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<sup>43</sup> ICC-01/14-01/18-T-108-CONF-ENG, p. 40 lines 21-24.

<sup>44</sup> ICC-01/14-01/18-T-108-CONF-ENG, p. 41 lines 1-4.

<sup>45</sup> See para. 35 *above*.

of such an approach. It is an established principle at the ICC, the Prosecution's investigation "should largely be completed at the stage of the confirmation hearing"<sup>46</sup> and Trial Chamber should not permit the Prosecution to mould its case during the course of the trial<sup>47</sup> or make investigations related to other CAR related trials.

45. If the Defence cannot make an informed objection, then the transcripts may be filled with information that should not be recorded. Particularly if a disclosure requests is not resolved until following witness testimony, the Defence may not be able to question the witness with all the necessary or available information.
46. If improper material is entering the record, and the Defence is being prejudiced in its capacity to fully scrutinize this, then this impacts upon the fairness of proceedings. It also may prolong the hearings leading to a lack of expeditiousness. If the Prosecution fills the record with improper material, this hinders the search for the truth and is a misuse of valuable court time.

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<sup>46</sup> ICC-01/04-01/10-514, para. 44.

<sup>47</sup> See para. 11 *above*.

#### IV. Relief Sought

47. The Defence respectfully requests the Chamber to:

- a. CONFIRM that the alleged attributions and communications listed in Confidential Annex A are not contained within the charging documents and do not form part of the allegations against Mr Ngaïssona that the Trial Chamber will consider in its Article 74 deliberations;<sup>48</sup>
- b. REJECT *in limine* the new attributions and alleged communications involving the individuals described in paragraph 8 above;
- c. REJECT *in limine* the submission of items listed in Confidential Annex A in yellow; and
- d. SUSPEND the time limit for a response to the Bar-Table Motion until all conditions specified in paragraph 3(b)(i)-(iii) above are satisfied.

Respectfully submitted,




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Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 11 May 2022

At The Hague, the Netherlands.

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<sup>48</sup> See para. 12 *above*.