



Original: **English**

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

Date: **13 May 2022**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

Public redacted version of "Prosecution's Response to "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", ICC-01/14-01/18-1388-Conf, 2 May 2022

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) hereby provides its response to 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” (“Request”).¹ The Request is wholly unsubstantiated and Trial Chamber V (“Chamber”) should therefore reject it in its totality.

2. *First*, the Defence’s demand to dismiss *in limine* the Prosecution’s request to submit items relating to attributions and contacts evidence in respect of Call Data Records (“CDR”), relies on an unsubstantiated and misconceived understanding of the Court’s procedural framework. While the Defence is entitled to notice of the evidence on which the Prosecution intends to rely, contrary to the Request, it is not entitled to *advance notice* of the reasons which underpin the Prosecution’s intention. The erroneous conflation of these two distinct questions — *what* is the evidence on the one hand, and *why* such evidence on the other — lies at the heart of the Request, and warrants its dismissal.

3. The Request’s assertion that the Prosecution has not followed the Initial Directions on the Conduct of Proceedings² (“Initial Directions”) is equally unsubstantiated. It arises from the Defence’s misapprehension both of the Initial Directions and the material provided to it pursuant thereto. All documents intended to be presented from the bar table relating to attributions evidence are listed in Annex C, Part 2, which was provided to the Defence on 17 January 2022. There has been no failure by the Prosecution to comply with the Initial Directions.

¹ ICC-01/14-01/18-1377-Conf.

² ICC-01/14-01/18-631, para. 62.

4. *Second*, there are no grounds advanced in the Request warranting the suspension of the Chamber's consideration on the basis of the conditions, as set out in the Request.

5. As concerns the formal recognition of the items presented in the "Prosecution request for submission via a bar table motion of call data records and related evidence" ("Bar Table Motion"),³ the basis for the formal recognition of all 686 items of evidence ("Submitted Items") tendered is clear and sufficient. The Submitted Items are reliable and authentic.⁴ Each is *prima facie* relevant to and probative of material issues within the confirmed facts and circumstances of the case.⁵ Moreover, all of the documents under consideration were duly disclosed as INCRIM, the vast majority of which were provided years ago.

6. In addition, the Submitted Items' relation to a pending request under rule 68(2) of the Rules of Procedure and Evidence ("Rules") does not make their submission from the bar table procedurally inappropriate. Similarly, nothing prevents the formal recognition of the Submitted Items prior to the completion of the testimony of witnesses relevant to the attributions ascribed in the Bar Table Motion, since the standard evidentiary criteria and weight of such evidence will be determined by the Chamber holistically when deliberating its judgement pursuant to article 74(2).⁶

7. Finally, recognising the formal submission of sizeable evidence via bar table motion is in line with the Chamber's approach to similarly voluminous documents,

³ Prosecution's submission of call data records and related evidence via the "bar table", 4 March 2022, 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.

⁴ Bar Table Motion, ICC-01/14-01/18-1296, paras. 15-23.

⁵ ICC-01/14-01/18-1296-Conf-AnxA, ICC-01/14-01/18-1296-Conf-AnxB, ICC-01/14-01/18-1296-Conf-AnxC, ICC-01/14-01/18-1296-Conf-AnxD.

⁶ See ICC-01/14-01/18-1359, para. 10-12.

and will serve to expedite the proceedings and ensure a fair trial under article 64(2) of the Statute.

II. CONFIDENTIALITY

8. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is filed as “Confidential” as it refers to documents of the same classification. The Prosecution will file a public redacted version as soon as practicable.

III. SUBMISSIONS

A. The Defence is not entitled to advance notice of the relevance of evidence

9. The underlying premise in the Request is incorrect, namely:

“The Bar-Table Motion contains new attributions and communications for ten individuals for whom neither the DCC, CoC, nor PTB provides *notice of their relevance* to the case.”⁷

The Defence is not entitled to *advance notice* of the relevance of evidence supporting or substantiating the confirmed facts and circumstances of the case. The Request provides absolutely no legal substantiation for such a proposition.

10. The Defence erroneously conflates the notice requirements of article 61(3) as relates to the material facts underpinning the charges and the *evidence* relied on to prove them.⁸ Not only has this Chamber previously underscored the difference between the ‘scope of the case’ and the ‘scope of evidence’ in respect of prior challenges by the Ngaissona Defence,⁹ but the Appeals Chamber has similarly clarified the degree and nature of the notice to which an Accused is entitled within the

⁷ ICC-01/14-01/18-1377-Conf, para. 8 (emphasis added).

⁸ See ICC-01/14-01/18-1377-Conf, para. 11 (arguing “notice of the charges”).

⁹ See ICC-01/14-01/18-703-Red, para. 49-51.

Court's statutory framework.¹⁰ Neither, stands for the proposition that the Statute provides for advance notice of the relevance of *evidence* used to prove duly noticed facts and circumstances concerning the charges.

11. The contention that the Defence has some procedural entitlement to understand the reasons *why* the Prosecution relies on any particular piece of evidence is misinformed. The Prosecution is not obligated to sort out the Defence's "confus[ion] as to the potential role" of any given piece of evidence, nor is it incumbent on the Prosecution to impart to the Defence an "appreciat[ion] what role they play in the Prosecution's case."¹¹ Rather, the Defence is responsible to evaluate the evidence that it is duly provided:

"Whilst the Prosecutor is under a strict obligation to provide the Defence with the entirety of the materials it considers relevant, thereby making the Defence fully aware of the nature, cause and content of the charges, *the Defence cannot abdicate its duty and responsibility to examine such materials, which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor*, as well as to identify portions which it deems relevant for the purposes of the Chamber's determinations under article 61(7) of the Statute."¹²

12. Here, the Defence has had the benefit of substantial and detailed procedural instruments in this case. These include a 249-page Document Containing the Charges ("DCC"), appending a 506-page annex concerning call sequence data¹³; a 112-page Confirmation Decision, incorporating by reference the relevant provisions of the DCC;¹⁴ and a 193-page Trial Brief.¹⁵ Further, with near uniformity, the Submitted Items

¹⁰ ICC-01/14-01/18-874, paras. 15, 40, 46-47 (noting the Trial Chamber's recitation of the applicable notice requirements under article 67(1) - i.e., "[the] right entitles the accused to have notice of 'the facts and circumstances underpinning the charges' in addition to the 'legal characterisation of the facts to accord with the crimes under the jurisdiction of the Court and the precise mode(s) of liability under Articles 25 and 28 of the Statute'").

¹¹ ICC-01/14-01/18-1377-Conf, paras. 8, 10.

¹² ICC-01/05-01/13-177, para. 10.

¹³ ICC-01/14-01/18-282-Conf-AnxB1, and ICC-01/14-01/18-282-Conf-AnxJ1.

¹⁴ ICC-01/14-01/18-403-Red-Corr, *passim* (see e.g. pp. 105, 106 explicitly referencing the DCC in the operative part of the Confirmation Decision).

¹⁵ ICC-01/14-01/18-723-Conf.

were disclosed as INCRIM years ago. The Defence has thus had ample time to assess and determine their relevance and probative value within the context and contours of a well-defined and extensively noticed case.¹⁶

13. The Request's attempt to shift the Defence's responsibility to review and assess the evidence in its possession,¹⁷ and to craft a notice requirement out of the Court's prior practice (for instance, whereby certain Chambers have required the Parties' provision of so-called in-depth analysis charts ("IDAC")), is unavailing.

14. In the *Ongwen* case for example, the Single Judge of Pre-Trial Chamber II advanced a rationale similar to that in the Request in ordering the Parties' to produce an IDAC. There, the Single Judge averred (in part) that an IDAC would provide the Defence with "[a]ll necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence."¹⁸ In reversing the impugned decision the Appeals Chamber noted that, although the Single Judge's failure to seek the prior submissions from the Parties was erroneous,¹⁹ she had acted within her discretion under article 61(3) and rule 121(2) of the rules.²⁰

15. Importantly, the Appeals Chamber's determination that the underlying IDAC order was indeed discretionary underscores that the underlying rationale (*i.e.*, to "understand the reasons why the Prosecutor relies on any particular piece of evidence")²¹ is not embodied in a procedural entitlement, contrary to the suggestion of the Request. Moreover, the 2022 Chamber's Practice Manual's express provision

¹⁶ ICC-01/14-01/18-703-Red, para. 38 (noting the "significant number of submissions from both the Ngaissona Defence and the Prosecution regarding the scope of the evidence to be introduced by the Prosecution at trial and its relationship to the scope of the charges").

¹⁷ ICC-01/14-01/18-1377-Conf-AnxB, p. 4 [REDACTED]. The preceding highlights the Ngaissona Defence's fundamental misapprehension of the distinction between notice of charges and as regards the *evidence* proving them.

¹⁸ ICC-02/04-01/15-203, para. 37, (referring to ICC-01/05-01/08-55, paras. 66-70; ICC-01/09-01/11-44, para. 21; ICC-01/09-02/11-48, para. 22.) and paras. 38-42.

¹⁹ ICC-02/04-01/15-251, para. 43.

²⁰ ICC-02/04-01/15-251, para. 33.

²¹ ICC-02/04-01/15-251, para. 37.

that “no submission of any ‘in-depth analysis chart’, or *similia*, of the evidence relied upon for the purposes of the confirmation hearing can be imposed on either of the parties”²² further underscores the absence of any statutory basis for the Defence’s contentions. The Defence’s argument that “[t]he Prosecution has not previously demonstrated with the required clarity and specificity *how* it intends to use this information”²³ fails.

B. The Bar Table Motion was filed in compliance with the Initial Directions on the Conduct of Proceedings

16. The Defence’s claim that the Prosecution “partly did not follow the procedure set out in the Decision on the Conduct of Proceedings” is without merit.²⁴ It also rehashes the same erroneous arguments made on 2 March 2022 in respect of the Defence’s attempt to justify a request for an extension of time to respond to the Bar Table Motion, having received the annexes of documents intended for submission from the bar table on 17 January 2022.²⁵

17. The Initial Directions on the Conduct of Proceedings provides, in relevant part:

“Bar table applications shall contain (i) a short description of the item (and/or relevant portions therein); and (ii) a short description of the asserted relevance and probative value pursuant to Rule 64(1) of the Rules. Before submitting the application, the tendering participant shall inquire whether the opposing participant consents or objects and include this information in the table.”²⁶

²² Chamber’s Practice Manual, Fifth edition (25 March 2022), paras. 24, 43 <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20220323-chambers-practice-manual-fifth-edition-eng.pdf>.

²³ ICC-01/14-01/18-1377-Conf, para. 10.

²⁴ ICC-01/14-01/18-1377-Conf, para. 9.

²⁵ See Email from Ngaissona Defence to Trial Chamber V, dated 2 March 2022 at 17:00.

²⁶ ICC-01/14-01/18-631, para. 62 (“Initial Directions”).

18. The Prosecution made the following clear when providing the Defence with the annexes of the proposed material for submission on 17 January 2022:

“The Prosecution intends to submit 688 INCRIM items related to CDR through a bar table motion. Please see attached the relevant parts of three annexes - Annexes B, C and D - that we intend to file with the Chamber, listing the documents and explaining their relevance. Annex B lists the CDR and cell site information underlying the assertions made in the Prosecution’s Trial Brief. Annex C lists documents relevant to telephone number attribution. Annex D lists the remaining CDR sought to be submitted.”²⁷

19. The “relevant parts” of the three annexes correspond to the two express requirements of the Initial Directions. The Defence’s contention that “[t]he Bar-Table Motion contains items in Annex C which were not included in the Annex provided to the Defence during *inter partes* consultations” is at best misleading.

20. As noted above, the Request misunderstands the information provided pursuant to the Initial Directions. None of the items identified in the Request as falling short of the Initial Directions²⁸ actually concern items being tendered from the bar table. For example, at Annex C of the Bar Table Motion in the attribution table set out at Part 1, the submission status of the items identified as not being provided to the Defence in *inter partes* consultations note for instance, “testimonial, to be introduced” or “document already submitted”.²⁹ By contrast, all documents listed in Annex C, Part 1, indicating a submission status of “document submitted herein”, are listed in Annex C, Part 2, entitled “Submitted Items Containing Attribution Information.”³⁰ Annex C, Part 2 was indeed timely provided to the Defence in *inter partes* consultations.

²⁷ See Email from Prosecution to the Defence, dated 17 January 2022 at 15:40 (at ICC-01/14-01/18-1377-Conf-AnxB, p.3).

²⁸ See ICC-01/14-01/18-1377-Conf, para. 9, fn. 14.

²⁹ See ICC-01/14-01/18-1296-Conf-AnxC, p. 26 *et seq.*

³⁰ See *Id.*

21. The Request is thus simply wrong. All *tendered* documents via the Bar Table Motion were specifically notified and identified in the annexes provided to the Defence before its filing in conformity with the Initial Directions. The annexes provided to the Defence now approaching four months ago comply fully.

22. Beyond this, the Prosecution does not consider that the *inter partes* consultations required by the Initial Directions entitles the Defence to a fully-fledged preview of the prospective bar table submissions. They simply provide for this. As expressly required, the relevant provisions of the Initial Directions require only a “short description of the asserted relevance and probative value”,³¹ and not an explanation as to *why* the Prosecution relies on the item or its particular role in the case.

C. There is no basis for a suspension of the applicable time limits

23. As noted above, the Defence’s attempt to extend the time limit pending the fulfilment of several conditions is without justification. Notably, the Defence has already benefitted from a two-month extension of the time to respond to the Bar Table Motion, originally due on 14 March 2022.³²

24. The Request now argues that the Defence should not be obliged to respond to the Bar Table Motion until such time as the Chamber has ruled on the Prosecution’s requests to introduce via rule 68(2) the statements of [REDACTED],³³ [REDACTED], respectively. As the Chamber noted in the 12 April 2022 “Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence)”,³⁴ the mere fact of “documentary evidence being related to a request under Rule 68(2) of the Rules which is still under consideration by the Chamber does not, as

³¹ ICC-01/14-01/18-631, para. 62 (“Initial Directions”).

³² See Email of Trial Chamber V to the Parties and Participants, dated 4 March 2022, at 15:39; see also ICC-01/14-01/18-1377-Conf, para. 2.

³³ ICC-01/14-01/18-1043-Conf and ICC-01/14-01/18-808-Conf.

³⁴ ICC-01/14-01/18-1359.

such, render submission of that item through a different avenue procedurally improper.”³⁵

25. While the testimony of certain upcoming witnesses may expand upon and clarify aspects of the Submitted Items, there is nothing to prevent the Chamber from recognising the formal submission of the CDR from the Bar Table Motion first, followed by decisions on the relevant rule 68(2)(b) statements and/or hearing the evidence of further witnesses. The CDR remain relevant and reliable even without the [REDACTED], and before development through further witness testimony. And, in any case, the standard evidentiary criteria may be sufficiently established in any appropriate manner prior to the rendition of the article 74 judgement, and further, is not *a priori* confined to any specific means of proof. Thus, the Chamber should reject Defence arguments that effectively assert that only a *witness* may give “contextualisation” to the Submitted Items,³⁶ and the implicit suggestion that this may reasonably substantiate the requested extension. It does not.

26. The CDR are relevant in their totality to establish and corroborate the network of communications between, *inter alia*, Anti-Balaka leaders and members. In turn, these establish the interaction between members and further support the inference — at the most basic level — that the individuals involved comprise a “group” within the meaning of the confirmed facts, circumstances, and charges. There is no legitimate argument that the Chamber, comprised of professional judges, need especially screen itself from the tendered evidence in view of its article 74 deliberations.³⁷

³⁵ ICC-01/14-01/18-1359, para. 21.

³⁶ See *The Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, STL-11-01/T/TC/F1876, Decision on three Prosecution motions for the admission into evidence of mobile telephone documents, 6 March 2015, para. 38.

³⁷ ICC-01/05-01/13-1285, para. 12 (“[u]nlike situations where submitting marginally relevant or prejudicial material may unduly compromise the proceedings, such as when these materials are introduced in trials where fact-finding is done by a jury, these issues do not apply when professional judges are evaluating the evidence presented”).

27. Unfair prejudice should not be confused with merely a negative impact on the Defence case;³⁸ and the Defence has not shown that formal recognition of the Submitted Items would adversely impact the fairness or expeditiousness of the proceedings, or the just evaluation of witness testimony. There is no “trial by ambush” here, as the Defence claims. Not only have all of the tendered documents been disclosed – that vast majority for years, but in addition, the Defence has had a duty and responsibility with respect to their assessment and evaluation³⁹ which it has presumably discharged.

28. Finally, the formal recognition of the Submitted Items would streamline and expedite the proceedings, negating the need to submit individual documents ahead of various witness’ appearance, and piecemeal motions as further evidence on communications arises.⁴⁰ This is in line with the Chamber’s approach to Facebook materials, whereby voluminous documents used limitedly in a witness’ examination may be more appropriately submitted through a bar table application.⁴¹ There is no exclusionary rule which indicates that the volume of evidence is a bar to its formal recognition. In this respect too, the Request fails to establish any plausible basis for the suspension of the time limit for a response to the Bar Table Motion sought.

³⁸ *The Prosecutor v. Hysni Gucati and Nasim Haradinaj* - KSC-BC-2020-07/F00334, Decision on the Prosecution Request for Admission of Items Through the Bar Table, 29 September 2021, para. 15.

³⁹ ICC-01/05-01/13-177, para. 10.

⁴⁰ See ICC-01/14-01/18-1296, para. 14.

⁴¹ See email decision of 2 July 2021 at 14:07 in relation to submitted materials for P-2841; email decision of 19 July 2021 at 11:37 in relation to submitted materials for P-2027; email decision of 27 August 2021 at 08:10 in relation to submitted materials for P-2673; email decision of 29 September 2021 at 15:05 in relation to submitted materials for P-0801; email decision of 1 October 2021 at 12:28 in relation to submitted materials for P-2328.

IV. CONCLUSION

29. For the above reasons, the Request should be rejected in its entirety.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan QC, Prosecutor

Dated this 13th day of May 2022

At The Hague, The Netherlands