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Date: **21 April 2020**

**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 Redacted**

**Public Redacted Version of “Prosecution’s Response to the NGAÏSSONA “Defence  
Submissions pursuant to Trial Chamber V’s Order Scheduling First Status  
Conference (ICC-01/14-01/18-473-Conf)”  
20 April 2020, (ICC-01/14-01/18-488-Conf)”**

**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”) responds to the issues raised in the NGAISSONA Defence’s Submissions pursuant to Trial Chamber V’s Order Scheduling First Status Conference (“Defence Submissions”).<sup>1</sup> As elaborated below, the Prosecution opposes the requests for specific relief advanced in the Defence Submissions, which Trial Chamber V (“Chamber”) should reject. The response otherwise addresses several discrete issues raised, which may facilitate the Chamber’s understanding of the prevailing circumstances regarding the status of the case and relative positions of the Parties.

## II. CONFIDENTIALITY

2. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this filing is classified as “Confidential”, as it refers to material that is not available to the public. The Prosecution will file a public redacted version as soon as possible.

## III. SUBMISSIONS

3. The following issues advanced in the Defence Submission are addressed in turn below: the impact of the COVID-19 pandemic on the start of trial; the substantiation of the charges; the scope of relevant trial evidence; video-link testimony; disclosure and related issues; the applicability of the current *inter partes* and e-Court disclosure practice; and the provision of transcriptions and translations of Sango audio/video material.

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<sup>1</sup> ICC-01/14-01/18-473-Conf.

4. The Prosecution incorporates its Observations on the Agenda of the First Status Conference (“Observations”)<sup>2</sup> in response to the remaining issues advanced by the Defence.

**A. Impact of the COVID-19 pandemic on the commencement date of the trial**

5. As recognised by the Parties and Participants, the COVID-19 pandemic and the related public safety restrictions implemented by national governments have adversely affected, if all but rendered their work exceedingly difficult in this case. The NGAISSONA Defence itself notes its inability to conduct legal visits or properly transmit materials to the Accused, even though he has a computer at his disposal.<sup>3</sup>

6. As previously submitted,<sup>4</sup> the Prosecution is likewise affected in its work by events far beyond its control and indeed, beyond the control of the ICC in the prevailing situation. Like the broader institution as a whole, it faces serious challenges, [REDACTED].

7. The Prosecution acknowledges that the current situation has, and will inevitably, affect the celerity of the proceedings. Whether these exceptional circumstances transgress what is ‘reasonable’ in respect of article 67 as balanced against the Chamber’s article 64 obligations and duty to establish the truth, is a separate question altogether. In any case, the issue is well premature at this very early stage of the trial phase. That said, the Prosecution is doing all that it can in the circumstances to find ways to progress its work in advancing the proceedings.

8. Contrary to the Defence Submissions, the Prosecution is not strictly circumscribed in its investigation beyond the confirmation hearing.<sup>5</sup> It is important

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<sup>2</sup> ICC-01/14-01/18-474-Conf.

<sup>3</sup> ICC-01/14-01/18-473-Conf, para.42.

<sup>4</sup> ICC-01/14-01/18-474-Conf, paras.7-13.

<sup>5</sup> ICC-01/14-01/18-473-Conf, paras. 20-21.

to note that most of the Prosecution's investigative work was carried out, to the extent possible, before the confirmation of charges hearing, in compliance with articles 54(1)(a) and 68(1). However, some necessary follow-up investigations that were initiated well before the pandemic require further execution.

9. The Statute does not prohibit post-confirmation investigation.<sup>6</sup> To the contrary, given the truth seeking obligation of the Prosecution and, importantly, of the Chambers of the Court, the regulatory framework explicitly allows the Prosecutor not only to investigate, but to seek (i) the subsequent confirmation of declined charges under article 61(8) and/or (ii) the amendment of charges under article 61(9) to that end. Indeed, the Prosecutor has done so as concerns the charges against NGAISSONA.<sup>7</sup>

#### **B. The charges against NGAISSONA are substantiated**

10. NGAISSONA's claim that he lacks proper notice of the Prosecution's case, given that the Pre-Trial Chamber did not confirm part of the charges against him is puzzling.

11. His further expectation that the Prosecution's case will not succeed because the Pre-Trial Chamber found that certain evidence lacked detail and was based on inferences is unavailing, as is the suggestion that the Prosecution's decision not to appeal the charges confirmed against NGAISSONA is somehow an admission of the weakness of the evidence against him.<sup>8</sup> In any event, this is a matter to be determined by the Chamber on the evidence adduced before it — not the Pre-Trial Chamber.

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<sup>6</sup> ICC-01/04-01/06-568, paras. 49-55.

<sup>7</sup> ICC-01/14-01/18-468-Conf.

<sup>8</sup> ICC-01/14-01/18-473-Conf, para.9.

**C. Nearly all evidence submitted by the Prosecution at confirmation remains highly relevant to the confirmed charges**

12. The Defence Submission asserts that most of the evidence disclosed before the confirmation hearing pertaining to the non-confirmed incidents charged in the Document Containing the Charges (“DCC”) and concern NGAISSONA’s role as the National Coordinator of the Anti-Balaka, are beyond the scope of the charges and thus irrelevant.<sup>9</sup> Undoubtedly, the assertion is based on a profound misunderstanding of the impact of the Confirmation Decision on the scope of *relevant evidence*.

13. Although the Confirmation Decision restricts the crimes for which the accused can be held responsible, it does not and cannot restrict the evidence proving them. Any of the Accused’s subsequent acts may be probative of his *prior intent*. The Prosecution is not restricted from presenting evidence of acts geographically and temporally outside of the scope of the charged crimes as part of its case to prove the Accused’s *mens rea* or the contextual elements of the *confirmed crimes*.<sup>10</sup>

14. *First*, as noted in the *Ntaganda* case regarding article 7, “[a]s the charged crimes must take place within an “attack”, the Prosecutor is free to present further additional acts to the ones charged, with a view to demonstrating that an “attack” within the meaning of articles 7(1) and 7(2)(a) took place.”<sup>11</sup> As the NGAISSONA Defence is well-aware, Pre-Trial Chamber II determined that the scope of the Anti-

<sup>9</sup> ICC-01/14-01/18-473-Conf, paras. 13, 16.

<sup>10</sup> ICC-01/04-02/06-2359, para. 696; ICC-01/09-01/11-2027-AnxI, Dis. Op. Carbuccia, para. 64; *Prosecutor v. Mrksic et al.*, IT-95-13/1-A, Judgement, 5 May 2009, para. 41; *Prosecutor v. Kunarac et al.*, IT-96-23 & 23/1, Judgement, 12 June 2002, para.100; *Prosecutor v. Milosevic*, IT-98-29/1-T, Judgment, 12 December 2007, paras. 918-919.

<sup>11</sup> ICC-01/04-02/06-309, para. 23.

Balaka ‘attack’ for article 7(1) and 7(2)(a) purposes took place from September 2013 through December 2014.<sup>12</sup>

15. The crimes committed by the Anti-Balaka in this period are obviously relevant and probative of (i) the pattern of crimes committed against the Muslim civilian population in the western part of the Central African Republic (“CAR”), (ii) the identity of the perpetrator group, (iii) the nature of the organisation, (iv) its structure, (v) its running, (vi) its operations, and (vii) its criminal organisational policy. This necessarily encompasses the role of the National Coordination and its members. Moreover, the Pre-Trial Chamber’s finding that “Yekatom and his group had been operating under the Coordination, *including* Ngaïssona”<sup>13</sup> in committing the confirmed crimes along the PK9 – Mbaiki Axis through around 28 February 2014, underscores the relevance of such evidence.

16. *Second*, NGAISSONA’s acts and conduct following the 5 December 2013 Bangui Attack in this context, including his continued involvement with the group throughout the course of its article 7(1) attack, is highly relevant to his intent *beforehand*.<sup>14</sup> Circumstantial proof of an accused’s prior intent through subsequent acts or post-offence conduct is well-recognised and even commonplace in criminal proceedings.

17. Here, after the 5 December 2013 Bangui Attack NGAISSONA (i) continued his involvement with the Anti-Balaka as their leader, within the group’s *de facto* structure and formalised National Coordination,<sup>15</sup> and (ii) continued to promote the

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<sup>12</sup> See ICC-01/14-01/18-403-Conf, para. 70.

<sup>13</sup> ICC-01/14-01/18-403-Conf, para. 142.

<sup>14</sup> See e.g., ICC-01/14-01/18-403-Conf, para. 176 (noting, “[t] Chamber has before it numerous witness statements and transcripts of witness interviews according to which Ngaïssona continued to finance the Anti-Balaka after his appointment as National General Coordinator. According to some of these witnesses, [REDACTED], this included the purchase of weapons and ammunition.)

<sup>15</sup> See ICC-01/14-01/18-403-Conf, paras. 69 (finding that “beginning in January 2014, the pre-existing *de facto* structure was formalised under the authority of the National Coordination), and para. 167 (finding that “the National Coordination fell under Ngaïssona’s authority).

practical acts and ideological objectives of the group as a leader, which continued a widespread campaign of violence against Muslim civilians, pursuant to its criminal policy.<sup>16</sup> For instance, the Pre-Trial Chamber’s recognition that “i[t] has before it numerous witness statements and transcripts of witness interviews according to which Ngaïssona *continued* to finance the Anti-Balaka after his appointment as National General Coordinator. According to some of these witnesses, [REDACTED], this included the purchase of weapons and ammunition”;<sup>17</sup> is clearly highly probative of what NGAISSONA meant the group to achieve from its inception.

18. Evidence showing NGAISSONA’s uninterrupted involvement with the Anti-Balaka’s activities and objectives during its commission of notorious crimes through December 2014, is plainly relevant evidence which may be properly admitted or formally submitted. Contrary to the Defence Submission, the Confirmation Decision does not materially alter the scope of the relevant evidence in this case.

19. The Prosecution reserves its right to further respond on this issue, in the event the Defence seeks to raise a formal evidentiary challenge *in limine*.

#### **D. Video-link testimony does not infringe the Accused’s right**

20. Contrary to the Defence Submissions, testimony given by video-link does not infringe NGAISSONA’s right to examine the witness against him.<sup>18</sup> Such testimony is allowed under articles 68 and 69(2), provided that it is not prejudicial to the rights

<sup>16</sup> See ICC-01/14-01/18-403-Conf, para. 64 (noting, that from September 2013 Anti-Balaka attacks against Muslims in western CAR comprised “retributive violence throughout Bangui, including Boeing and Bimbo, and across western CAR Prefectures, including Ouham (Bossangoa), Mambere-Kadei (Berbérati, Carnot, Guen), Lobaye (Boda), Ouham-Pende (Bossemptélé) and Ombella-M’Poko (Yaloké, Gaga, Zawa, Boali). These attacks involved the commission of murder, deportation and forcible transfer of population, imprisonment and other forms of severe deprivation of physical liberty, torture, rape, persecution and other inhumane acts” — all comprising the same material elements as the charged crimes); para. 70 (finding that “from September 2013 until December 2014, the Anti-Balaka carried out attacks pursuant to an organisational policy of a criminal nature, targeting the Muslim civilian population in western CAR” and that it was “widespread”); para. 164 (finding that “the concerned Anti-Balaka groups [i.e., the committing the widespread attack] were formally and politically under the umbrella of the National Coordination”) (emphasis added).

<sup>17</sup> ICC-01/14-01/18-403-Conf, para. 176.

<sup>18</sup> ICC-01/14-01/18-473-Conf, para. 15.



of the accused. Rule 67(1) of the Rules of Procedure and Evidence (“Rules”) safeguards the Defence’s right to examine the witness, and allows the use of such technology where it permits the Prosecution, the Defence and the Chamber to examine the witness. Insofar as the Defence may examine the witness in this way, there is nothing *a priori* about video-link testimony that is inconsistent with the legal framework of the Court, so as to require any “exceptional justification”.<sup>19</sup>

#### **E. Disclosure of outstanding material and related issues**

21. NGAISSONA’s request for the Chamber to impose strict rolling disclosure deadlines should be rejected. His complaints regarding the manner in which the Prosecution conducted disclosure leading up to the confirmation hearing are either unfounded or do not warrant the requested relief. The Defence has only on rare occasion seized the Prosecution with *inter partes* demands or complaints. Thus, there is no basis for the Chamber’s intervention at this stage, nor any substantiation of the Defence’s request to set a 5-day response time concerning any disclosure-related matters.<sup>20</sup>

22. *First*, the Prosecution notes that, during the pre-confirmation process, it disclosed some 20 packages of evidence on a rolling basis, through the 19 August 2019 deadline<sup>21</sup> as follows: On 25 January 2019, on 22 February 2019, on 26 March 2019, on 25 April 2019, on 07 May 2019, 4 packages on 17 May 2019, on 13 June 2019, on 08 July 2019, on 23 July 2019, 3 packages on 30 July 2019, on 07 August 2019, on 09 August 2019, on 14 August 2019 and on 16 August 2019 (i.e. three days before the actual deadline).

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<sup>19</sup> ICC-01/04-02/06-2175, para. 3; ICC-01/05-01/13-1697, paras. 9-16 ; ICC-02/04-01/15-497, para. 17.

<sup>20</sup> ICC-01/14-01/18-473-Conf, para. 23.

<sup>21</sup> ICC-01/14-01/18-199, p. 18.

23. *Second*, the Defence's allegation that the Prosecution disclosed "crucial evidence at the eve of and during the confirmation of charges hearing" is misleading. While the Prosecution continued (and continues) to disclose evidence pursuant to its ongoing disclosure obligations, none of this evidence was relied upon for purposes of the confirmation hearing except to address unanticipated misleading factual claims advanced by the Defence.<sup>22</sup>

24. NGAISSONA also takes an issue with the disclosure of the transcripts regarding Prosecution Witnesses P-0952, P-2173, P-0876, P-0487 in two subsequent disclosure packages, as exemplary of "piecemeal disclosure." The Prosecution disagrees: some of the transcripts that were not relied upon and thus not cited in the DCC were originally omitted from the disclosure packages. Upon being made aware of the discrepancy, the Prosecution promptly rectified the error, resulting in no prejudice to the Defence.

25. *Third*, raising these issues now without having approached the Prosecution to resolve disclosure issues previously is unhelpful. Further, that they were not raised before the confirmation hearing, pursuant to rule 122(3)<sup>23</sup> belies NGAISSONA's claims concerning their impact.

26. *Finally*, the Prosecution continues to proceed in good faith with regard to its disclosure obligations. It has done so throughout the proceedings. It is already conducting disclosure on a rolling basis in accordance with its obligations. Setting intermediary disclosure deadlines would be inefficient, as the Prosecution's disclosure process involves several steps, such as [REDACTED]. The Prosecution is actively reviewing its collection and will continue to disclose everything within its obligations.

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<sup>22</sup> ICC-01/14-01/18-375-Conf, *in particular* paras. 5-6, 8; pursuant to the Pre-Trial Chamber's order: ICC-01/14-01/18-T-010-ENG, p.3, line 24 to p.5, line 12.

<sup>23</sup> ICC-01/14-01/18-403-Conf, paras. 49-52.

27. The *inter partes* process should remain in the hands of the Parties, subject to the Chamber's intervention only where it becomes untenable, rather than pre-emptively. Doing otherwise would be both burdensome and create unnecessary litigation.

#### **F. The e-Court Protocol and *inter partes* disclosure should continue**

28. Notwithstanding the Defence's request that the Prosecution provide disclosure via a Ringtail link instead of going through the e-Court procedure presently in place,<sup>24</sup> the Chamber should maintain the current practice.

29. *First*, the Chamber has adopted the e-Court Protocol governing disclosure during the trial phase.<sup>25</sup> *Second*, the process is involved and multilateral. It is set up to allow the Chamber to ensure that disclosure takes place under satisfactory conditions in line with the requirements of article 61(3) and rule 121(2)(b).<sup>26</sup> For this reason, the practice has been applied consistently in all cases to ensure an accurate record of all the proceedings.

#### **G. Transcription and translation**

30. The Defence Submission seeks to impose conditions of disclosure that exceed the Prosecution's obligations under the Rules and the requirements otherwise adopted in the Court's practice. The Chamber should reject this. Specifically, NGAISSONA requests that (i) all disclosed evidence be provided to the Defence in one of the two working languages of the Court, that (ii) all rule 76 material be accompanied by French translations, and that (iii) all Sango audio/video material be accompanied by transcripts and translations. NGAISSONA further criticises the transcripts of audio/video items in Sango which only indicate <SAG> for parts where

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<sup>24</sup> ICC-01/14-01/18-473-Conf, para. 25.

<sup>25</sup> ICC-01/14-01/18-459, para. 8.

<sup>26</sup> ICC-01/14-01/18-64-Conf, para. 12.

Sango is spoken, as well as the translation of such audio/videos under the form of an “OTP summary”.<sup>27</sup>

31. As required, rule 76 material is, and has been provided in a language that the Accused understands — in this case, Sango or French.<sup>28</sup>

32. By contrast, in respect of other items of evidence, the plain texts of article 67(2) and rule 77 impose no such requirement. As established by Regulation 39 of the Regulations of the Court, and confirmed by the Courts’ case law, only items that the Prosecution effectively relies on at trial need to be translated into a working language of the Court.<sup>29</sup> For example, in the *Bemba et al.* case, the Single Judge noted that “requiring the translation of every single intercept communication in their entirety, including of those passages which are irrelevant or neutral to the charges and therefore of no use to either party or to the Chamber, would be tantamount to making it impossible to ever conduct proceedings within a reasonable time-frame.”<sup>30</sup>

## H. Remaining issues

33. As noted, the Prosecution refers to its prior Observations<sup>31</sup> in response to the remaining arguments advanced in the Defence Submissions.<sup>32</sup>

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<sup>27</sup> ICC-01/14-01/18-473-Conf, paras. 26-27.

<sup>28</sup> ICC-01/14-01/18-473-Conf, para. 19.

<sup>29</sup> ICC-01/05-01/13-177, para. 9. (“whilst the statutory instruments do not make it mandatory for the Prosecutor to provide translation of disclosed evidence into one of the working languages of the Court, the need for translation into a working language of the Court does indeed arise in respect of any portion of evidentiary item which is relevant to the nature, cause and content of the charges and upon which the Prosecutor intends to rely for the purposes of the confirmation hearing and will therefore include in her list of evidence.”)

<sup>30</sup> *Ibid.*, para. 11.

<sup>31</sup> ICC-01/14-01/18-474-Conf, [REDACTED].

<sup>32</sup> ICC-01/14-01/18-473-Conf, paras. 10, 12-14, 16-17, 29-31, 34-35.

#### IV. RELIEF SOUGHT

34. The Prosecution respectfully requests the Chamber to reject the requests for specific relief as put forward in the Defence Submissions.



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**Fatou Bensouda, Prosecutor**

Dated this 21<sup>st</sup> day of April 2020  
At The Hague, The Netherlands