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**International
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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Confidential

**Decision on the Prosecution Request to Add 21 Items to its List of Evidence
and Extend Examination Time for P-0889**

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2) and 67 of the Rome Statute (the 'Statute'), issues this 'Decision on the Prosecution Request to Add 21 Items to its List of Evidence and Extend Examination Time for P-0889'.

I. Procedural history

1. On 9 November 2020, the Office of the Prosecutor (the 'Prosecution'), in accordance with the time limit set by the Chamber,¹ filed its List of Evidence.²
2. On 14 December 2021, the Prosecution, in accordance with the Chamber's direction,³ filed its updated List of Evidence.⁴
3. On 11 January 2022, the Prosecution provided the Chamber and participants with its list of materials for the examination of P-0889,⁵ whose testimony was initially scheduled to commence on 17 January 2022 but was subsequently postponed to 8 March 2022.⁶
4. On 17 February 2022, the Ngaïssona Defence objected to the use of 15 items included in the Prosecution's list of materials for the examination of P-0889 on the basis that they were not included in the Prosecution's List of Evidence (the 'List of Materials Request').⁷
5. On the same day, the Prosecution filed a request seeking the Chamber's leave to (i) add 21 items (the 'Items') to its List of Evidence (the 'List of Evidence

¹ Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, para. 14, p. 10.

² Prosecution's List of Witnesses and Evidence, ICC-01/14-01/18-724 (with confidential Annexes A-C) (a corrected version of the List of Evidence contained in Annex C was notified on 8 January 2021, ICC-01/14-01/18-724-Conf-AnxC-Corr).

³ Decision on the Prosecution Request to Add Seven Items to its List of Evidence, 7 December 2021, ICC-01/14-01/18-1206 (the '7 December 2021 Decision'), para. 16, p. 7.

⁴ Prosecution's Updated List of Evidence, ICC-01/14-01/18-1211 (with confidential Annex A, containing the updated List of Evidence, ICC-01/14-01/18-1211-Conf-AnxA; and confidential Annex B).

⁵ Email from the Prosecution, 11 January 2022, at 21:09.

⁶ See email from the Prosecution, 16 December 2021, at 08:52; email from the Prosecution, 26 January 2022, at 12:20.

⁷ Email from the Ngaïssona Defence, 17 February 2022, at 14:43.

Request'); (ii) extend the estimated examination time for P-0889 from two to six hours 'to ensure that the Items can be properly addressed, as necessary' (the 'Examination Time Request'); and (iii) recognise the Items as formally submitted (the 'Submission Request' and, jointly, the 'Request').⁸

6. On 17 February 2022, noting that P-0889 was scheduled to start testifying on 8 March 2022, the Single Judge directed the participants to file responses to the Request, if any, by 24 February 2022.⁹
7. On 18 February 2022, following requests by the Yekatom Defence and the Ngaïssona Defence (jointly, the 'Defence') in relation to the Submission Request,¹⁰ the Single Judge suspended the response deadline to the Submission Request 'until further notice', noting that the necessity for a ruling on the Submission Request will depend on the outcome of the decision on the List of Evidence Request.¹¹
8. On 24 February 2022, the Yekatom Defence opposed the List of Evidence Request, and indicated that it defers to the Chamber's discretion as regards the Examination Time Request.¹² On the same day, the Ngaïssona Defence opposed both of these requests.¹³
9. On 1 March 2022, with a view to ensuring the efficiency and expeditiousness of the proceedings, and in order to facilitate the participants' preparation of P-0889's examination, the Single Judge (i) rejected the List of Evidence Request with the exception of eight items, namely CAR-OTP-2131-1012; CAR-OTP-2131-5154;

⁸ 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 (with one confidential annex, ICC-01/14-01/18-1285-Conf-Anx).

⁹ Email from the Chamber, 17 February 2022, at 17:57.

¹⁰ See email from the Ngaïssona Defence, 17 February 2022, at 18:13; email from the Yekatom Defence, 17 February 2022, at 19:40. See also email from the Prosecution, 18 February 2022, at 11:04.

¹¹ Email from the Chamber, 18 February 2022, at 13:41.

¹² Yekatom Defence Response to "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, ICC-01/14-01/18-1292-Conf (public redacted version notified on 1 March 2022, ICC-01/14-01/18-1292-Red) (the 'Yekatom Defence Response'), paras 1, 48.

¹³ Defence response to 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), ICC-01/14-01/18-1293-Conf (the 'Ngaïssona Defence Response'), paras 2-3, 28.

CAR-OTP-2131-6832; CAR-OTP-2132-7226; CAR-OTP-2132-7764; CAR-OTP-2133-2735; CAR-OTP-2133-2741; and CAR-OTP-2133-8109; (ii) authorised the inclusion of these eight items in the Prosecution's list of materials for the examination of P-0889; (iii) rejected the Examination Time Request; and (iv) instructed that responses to the Submission Request, if any, be filed by 31 March 2022. The Single Judge indicated that full reasons for the decision would follow.¹⁴

II. Analysis

1. *The List of Evidence Request*

10. The Single Judge recalls the applicable law for requests to add items to the list of evidence, as set out in his previous decision.¹⁵
11. Turning to the Request, the Single Judge notes that the Items comprise one 'Facebook Business Record' report and 20 Facebook conversations between P-0889 and several individuals during the relevant period.¹⁶
12. The Single Judge notes that the Defence opposes the List of Evidence Request, on the basis, *inter alia*, of its untimeliness.¹⁷ In this regard, the Single Judge notes, as also pointed out by the Defence,¹⁸ that while the receipt of the Items past the final disclosure deadline was beyond the Prosecution's control,¹⁹ the Prosecution provides no explanation for its repeated failure to request the addition of the Items

¹⁴ Email from the Chamber, 1 March 2022, at 18:21.

¹⁵ See Decision on the Prosecution Request to Add Six Email Threads to its List of Evidence, 6 May 2021, ICC-01/14-01/18-989-Conf (the '6 May 2021 Decision'), paras 5-6. See also the jurisprudence referenced therein, nn. 15-20.

¹⁶ CAR-OTP-2131-1012; CAR-OTP-2131-3049; CAR-OTP-2131-3120; CAR-OTP-2131-5154; CAR-OTP-2131-6832; CAR-OTP-2131-8590; CAR-OTP-2131-9585; CAR-OTP-2131-9941; CAR-OTP-2132-0021; CAR-OTP-2132-0973; CAR-OTP-2132-2941; CAR-OTP-2132-6963; CAR-OTP-2132-7226; CAR-OTP-2132-7764; CAR-OTP-2132-9727; CAR-OTP-2132-9942; CAR-OTP-2133-2735; CAR-OTP-2133-2741; CAR-OTP-2133-7624; CAR-OTP-2133-8109; CAR-OTP-2133-8132. See also the Annex to the Request, ICC-01/14-01/18-1285-Conf-Anx.

¹⁷ See e.g. Yekatom Defence Response, ICC-01/14-01/18-1292-Red, para. 30; Ngaïssona Defence Response, ICC-01/14-01/18-1293-Conf, para. 12. For further arguments, see Yekatom Defence Response, ICC-01/14-01/18-1292-Red, paras 33-46; Ngaïssona Defence Response, ICC-01/14-01/18-1293-Conf, paras 13-24.

¹⁸ Yekatom Defence Response, ICC-01/14-01/18-1292-Red, para. 33; Ngaïssona Defence Response, ICC-01/14-01/18-1293-Conf, para. 12.

¹⁹ In this regard, the Single Judge notes that, according to the Prosecution, it submitted its request for assistance on 25 June 2020, and only received the requested material on 5 March 2021 (see Request, ICC-01/14-01/18-1285-Conf, para. 3).

to its List of Evidence, despite several opportunities to do so since collecting them, including, most recently, when preparing for P-0889's testimony, which was initially scheduled to commence on 17 January 2022.

13. The Single Judge recalls his repeated directions that the Prosecution should 'thoroughly review its List of Evidence for completeness' and request any additions thereto 'on an exceptional basis and in a timely manner'.²⁰ At the same time, the Single Judge is mindful of the truth-seeking function assigned to the Chamber, and recalls that it would be unreasonable for the Chamber to determine that evidence with prospective significance could not, under any circumstances, be used by the Prosecution at trial if not included in the List of Evidence by the final disclosure deadline.²¹
14. Having balanced the prospective significance of the Items against the potential prejudice that could be caused to the Defence by their addition to the Prosecution's List of Evidence, the Single Judge is of the view that the List of Evidence Request should be rejected, with the exception of eight items, namely CAR-OTP-2131-1012; CAR-OTP-2131-5154; CAR-OTP-2131-6832; CAR-OTP-2132-7226; CAR-OTP-2132-7764; CAR-OTP-2133-2735; CAR-OTP-2133-2741; and CAR-OTP-2133-8109 (the 'Added Items').
15. The Single Judge notes that the Prosecution disclosed the Added Items between 4 and 11 June 2021,²² and included them in its list of materials for the examination of P-0889 sent to the Chamber and the participants on 11 January 2022. He is further of the view that the Defence has sufficient time to review these additional items in preparation for P-0889's examination. In this respect, he notes that the

²⁰ See e.g. email from the Chamber, 29 September 2021, at 10:00; 7 December 2021 Decision, ICC-01/14-01/18-1206, para. 8.

²¹ See e.g. 6 May 2021 Decision, ICC-01/14-01/18-989-Conf, para. 6, and the jurisprudence referred to therein.

²² Prosecution's Communication of the Disclosure of Evidence on 31 May and 4 June 2021, 4 June 2021, ICC-01/14-01/18-1013 (with one confidential annex, ICC-01/14-01/18-1013-Conf-Anx). See, in particular, the annex, listing the items disclosed on 4 June 2021 as part of 'RULE 77 Package 49 – 04 June 2021', including items CAR-OTP-2131-1012; CAR-OTP-2131-6832; CAR-OTP-2132-7226; CAR-OTP-2132-7764; CAR-OTP-2133-2735; CAR-OTP-2133-2741; CAR-OTP-2133-8109. See also Prosecution's Communication of the Disclosure of Evidence on 11 June 2021, 11 June 2021, ICC-01/14-01/18-1018 (with one confidential annex, ICC-01/14-01/18-1018-Conf-Anx). See, in particular, the annex, listing the items disclosed on 11 June 2021 as part of 'RULE 77 Package 50 - 11 June 2021', including item CAR-OTP-2131-5154.

Defence clearly already reviewed the Items in detail for the purpose of responding to the Request.

16. Moreover, the Single Judge takes note of the Prosecution's explanation that 'the Items show, amongst others, (i) the (military) organisation of the Anti-Balaka from July 2013 onwards in different areas [...], as well as the communication/coordination of Anti-Balaka members across these areas; (ii) the participation of the Anti-Balaka in attacks in September 2013; [...] (iv) the planning and preparation of the 5 December 2013 attack on BANGUI; (v) the role of NGAISSONA – referred to as the 'boss' upon his return to BANGUI on 14 Januarys 2014 [...]; (vi) the Anti-Balaka's adoption of anti-Muslim rhetoric, [...], conflating the Seleka and Muslims; [...]'.²³
17. Therefore, in these circumstances, the Single Judge considers that any potential prejudice caused to the Defence by the addition of the Added Items to the Prosecution's List of Evidence is limited in nature and is outweighed by the prospective significance to the proceedings that these items might bear.²⁴

2. *The List of Materials Request*

18. With regard to the Added Items, the Single Judge considers that any potential prejudice caused to the Defence by their inclusion on the list of materials for P-0889's examination is limited in nature and is outweighed by the prospective significance to the proceedings that these items might bear.
19. As regards the other items opposed by the Ngaïssona Defence in its List of Materials Request, the Single Judge recalls that, during the hearings, the Prosecution should only rely upon items included in its List of Evidence.²⁵ Accordingly, all items not included in the Prosecution's List of Evidence should be removed from the Prosecution's list of materials for the examination of P-0889.

²³ Request, ICC-01/14-01/18-1285-Conf, para. 14.

²⁴ See e.g. 6 May 2021 Decision, ICC-01/14-01/18-989-Conf, para. 5, and the jurisprudence referred to therein.

²⁵ See email from the Chamber, 29 September 2021, at 10:00.

20. The Prosecution is therefore instructed to provide an updated list of materials for the examination of P-0889 as early as possible.

3. *The Examination Time Request*

21. The Prosecution also requests that its examination time of P-0889 be extended from two to six hours, arguing, *inter alia*, that (i) this supplemental time will 'ensure that it has enough time' to clarify aspects of 'the Items or some of them'; (ii) its request 'does not substantially impact the Chamber's determination to receive P-0889's evidence pursuant to rule 68(3)'; and (iii) 'lead[ing] evidence on the Items through P-0889 will continue to advance the expeditious conduct of the proceedings'.²⁶
22. The Single Judge is unconvinced by these arguments. First, he notes that the Chamber granted the Prosecution's request to introduce P-0889's prior recorded testimony pursuant to Rule 68(3) of the Rules on the basis, *inter alia*, that it would cut the time for the Prosecution's examination of the witness from eight to two hours, 'thereby promoting the expeditiousness of the proceedings'.²⁷ Second, the Single Judge notes that the List of Evidence Request has been rejected for the majority of the Items. The time needed for the discussion of the Added Items can, in the Single Judge's view, be accommodated within the anticipated duration.
23. The Examination Time Request is therefore rejected.

4. *The Submission Request*

24. In light of the granted addition of the Added Items to the Prosecution's List of Evidence, the Single Judge instructs the participants to file responses, if any, to the relevant parts of the Submission Request by 31 March 2022.

²⁶ Request, ICC-01/14-01/18-1285-Conf, para. 23.

²⁷ Ninth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0992, P-0446, P-0888, P-0889 and P-1416, 21 December 2021, ICC-01/14-01/18-1226-Conf, paras 28, 30.

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FOR THESE REASONS, THE SINGLE JUDGE HEREBY

PARTLY GRANTS the List of Evidence Request with regard to the Added Items;

REJECTS the remainder of the List of Evidence Request;

AUTHORISES the Prosecution to include the Added Items to its list of materials for the examination of P-0889;

ORDERS the Prosecution to provide an updated list of materials for the examination of P-0889 as early as possible;

REJECTS the Examination Time Request;

INSTRUCTS the participants to file responses, if any, to the Submission Request with regard to the Added Items by 31 March 2022; and

ORDERS the Prosecution and the Ngaïssona Defence, respectively, to file public redacted versions of the Request and the response to the Request within one week of notification of the present decision.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt

Single Judge

Dated 4 March 2022

At The Hague, The Netherlands