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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

Public Redacted Version of “Defence response to the Prosecution’s ‘Request for leave to add 9 items to the List of Evidence collected from [REDACTED]’ (ICC-01/14-01/18-1394-Conf)”, 19 May 2022, ICC-01/14-01/18-1417-Conf

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. On 6 May 2022, the Prosecution filed its “Request for leave to add 9 items to the List of Evidence collected from [REDACTED]” (‘Prosecution Request’).¹ Despite the Trial Chamber ordering the Prosecution to request such additions on an exceptional basis, this constitutes the ninth request made by the Prosecution to add items to its List of Evidence.²
2. The Defence opposes the Prosecution Request as it is untimely and should have been filed earlier in the proceedings in light of the information the Prosecution had in its possession. Further, the 9 items collected from [REDACTED] (‘Items’) do not bear sufficient prospective significance to the proceedings to override the prejudice that their late addition would cause to the Defence.

II. Confidentiality

3. This response is filed as confidential pursuant to Regulation 23 (1) *bis* of the Regulations of the Court (the ‘Regulations’), as it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. Relevant Procedural history

4. On 16 July 2020, the Chamber ordered the Prosecution to disclose all incriminatory material by 9 November 2020 and to file a corresponding List of Evidence containing all the materials it intended to submit as evidence during

¹ ICC-01/14-01/18-1394-Conf

² ICC-01/14-01/18-958-Conf; ICC-01/14-01/18-1042-Conf; Email sent by the Prosecution, 28 September 2021 at 17:37; ICC-01/14-01/18-1144-Conf; ICC-01/14-01/18-1164-Conf; ICC-01/14-01/14-1212-Conf; ICC-01/14-01/18-1285-Conf; ICC-01/14-01/18-1330-Conf; ICC-01/14-01/18-1394-Conf.

trial by the same deadline.³ The Chamber indicated that, in order to add material to the List of Evidence after the deadline of 9 November 2020, leave should be sought by the Prosecution.⁴

5. On, [REDACTED], [REDACTED] [REDACTED]. The Prosecution issued a Request for Assistance ('RFA') on the following day to the competent [REDACTED] authorities.⁵ On [REDACTED], the [REDACTED] authorities executed the RFA and proceeded with a search and seizure operation at [REDACTED] in [REDACTED], resulting in the collection of the Items.⁶
6. The Items were formally disclosed to the Defence on 22 April 2022.⁷
7. On 6 May 2022, the Prosecution filed the Prosecution Request.⁸

IV. Applicable Law

8. In the first decision the Chamber rendered on whether to grant the Prosecution leave to add items to its list of evidence,⁹ the Chamber found that "it must be determined in the concrete circumstances whether reliance by the Prosecution on items additional to those included in the initial list of evidences causes undue prejudice to the procedural rights to the Defence."¹⁰ In making this determination, the factors to be considered include *inter alia*: (1) the extent to which the requested addition is opposed by the Defence; (2) the time when the addition was sought; (3) the nature and the amount of the material concerned; (4) the intended purpose of the Prosecution's requested reliance on such

³ ICC-01/14-01/18-589.

⁴ Ibid, para. 16.

⁵ ICC-01/14-01/18-1394-Conf, para. 6.

⁶ CAR-OTP-2136-0181

⁷ ICC-01/14-01/18-1375.

⁸ ICC-01/14-01/18-1394-Conf

⁹ ICC-01/14-01/18-989-Conf.

¹⁰ Ibid., para. 5.

material; and (5) its prospective significance in light of the charges brought against the accused and the rest of the available evidence.¹¹

V. Submissions

9. The Defence objects to the Prosecution Request and submits that (i) the Request is untimely; (ii) the Items therein do not bear sufficient prospective significance in light of the charges brought against the accused and the rest of the available evidence; and (iii) their late addition to the List of Evidence would cause undue prejudice to the Defence.

i. The Request is untimely

10. The Prosecution should have obtained and disclosed the Items earlier in the proceedings. While the Defence acknowledges the Prosecution's swiftness in reviewing and disclosing the items collected from [REDACTED], it takes issue with the timeliness of the RFA pursuant to which the Items were collected. The Prosecution failed to substantiate why it could not have issued the RFA earlier, when it had sufficient information to locate [REDACTED] well before [REDACTED]. Indeed, not only did the Prosecution file several previous RFAs targeting [REDACTED] before [REDACTED],¹² but it was also in possession of a map on which [REDACTED] was clearly indicated by Prosecution Witness P-0889 on 11 July 2020.¹³ Such map was then disclosed to the Defence on 3 August 2020,¹⁴ three months before the Chamber's deadline for full disclosure.

11. The Prosecution could have, and should have, filed for an RFA as soon as it was in possession of information on the whereabouts of [REDACTED], so that

¹¹ Ibid., para. 5.

¹² CAR-OTP-2117-0116-R02 ; CAR-OTP-2127-0915; CAR-OTP-2130-0259.

¹³ CAR-OTP-2124-1255 ; CAR-OTP-2122-8230, at 8233.

¹⁴ Pre-trial INCRIM package 44, 3 August 2020

items collected from a resulting search and seizure operation would have been transferred to the Hague, itemised, registered, reviewed and disclosed before the Chamber's deadline.

12. Therefore, the Prosecution Request is untimely, as the Prosecution failed to substantiate why it was unable to comply with the Chamber's deadline, when it had the means and opportunity to do so.

ii. The Items do not bear sufficient prospective significance

13. The Prosecution appears to inflate the prospective significance of the Items in light of the charges brought against Mr Ngaïssona and the rest of the available evidence.

14. *First*, the Defence submits that the lack of contemporaneousness between the search and seizure operation and the relevant period (i.e. 2013-2014) inherently diminishes the relevance of the items seized. The Prosecution heavily speculated about the relationships between [REDACTED] and other individuals solely from the presence of the Items in [REDACTED] without weighing in context- and time-specific factors.

15. The Prosecution intends to establish a connection between [REDACTED] and other individuals during the relevant period solely because of the retrieval of the Items from [REDACTED] in 2022. Yet, such an approach calls for a high degree of speculation. The Defence equally notes that, according to the Prosecution, the presence of Anti-Balaka badges at [REDACTED] in 2022 "tends to show his direct link with YEKATOM's Group"¹⁵. The Defence fails to see how the Prosecution can draw conclusions on the existence of a direct link between groups during the relevant period, merely based on the presence of

¹⁵ ICC-01/14-01/18-1394-Conf, para. 11.

certain badges at [REDACTED] in 2022. The fact that there is no way to establish when [REDACTED] acquired such badges only reinforces the Defence's submissions that no meaningful conclusions can be drawn from their presence at [REDACTED].

16. In regard to the presence of Mr Bozizé's driving licence at [REDACTED], the Prosecution asserts that "[REDACTED]'s possession of the document alone reflects a direct connection between him and BOZIZE, potentially well before the creation of the Anti-Balaka". The fact that [REDACTED] was allegedly in possession of an expired driving licence specimen of Mr Bozizé does not "alone" establish a "direct connection" with him. Indeed, a driving licence specimen is not personal nor unique. Thus, it cannot be inferred that the person identified on the document specimen, i.e. Mr Bozizé, is the one who actually gave the document to [REDACTED]. Moreover, the fact that the driving licence expired on March 2012 is not conclusive for the assertion that [REDACTED] came into possession of Mr Bozizé's driving licence before the relevant period nor does it establish a pre-existing relationship between [REDACTED] and Mr Bozizé.

17. *Second*, the Items are not as probative as asserted by the Prosecution in its Request. The six Anti-Balaka badges and [REDACTED] business card are undated, leaving their probative value in relation to the relevant period dubious. Indeed, the six Anti-Balaka badges could have been created and distributed after the relevant period. Similarly, there is no evidence supporting that the phone numbers [REDACTED] and [REDACTED] on [REDACTED]'s business card were actually in service and used by [REDACTED] during the relevant period. They do not appear in the Prosecution's Bar Table Motion, thus showing that the Prosecution never intended to attribute these numbers to [REDACTED].

18. The probative value and prospective significance of item 8, namely Mr Bozizé's driving licence, is also extremely limited. The document shows a driving licence which expired on 30 March 2012, a year before the relevant period of the charges. Additionally, the stamp "SPECIMEN" indicates that the document is not an original, thereby depriving the item of sufficient probative value. Finally, Prosecution Witness P-0889 said in 2016 to be in possession of Bozizé's old driving licence that was given to him by [REDACTED] in Zongo.¹⁶ Therefore, even if the Prosecution establishes that the driving licence retrieved from [REDACTED] is the one referred to by P-0889, its "chain of custody" is so uncertain that it not only weakens the probative value of the item itself, but also does not assist the Chamber in its truth seeking mission.

19. *Third*, the Items do not provide evidence on "*important and hitherto unknown facts*",¹⁷ which may justify their late addition to the List of Evidence. To the contrary, and as partially conceded by the Prosecution¹⁸, they are merely corroborative of evidence that already exists in the case record:

- [REDACTED]'s alleged function as [REDACTED] was already commented upon by several Prosecution witnesses, as well as made part of the record;¹⁹
- the Prosecution already attributed the phone number [REDACTED] to [REDACTED] in its submission of Call Date Records via a bar table, along with [REDACTED] supporting items of evidence;²⁰

¹⁶ CAR-OTP-2027-2290, at 2296 para. 37.

¹⁷ *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, 'Decision on two requests to vary the time limit for disclosing incriminating evidence' (ICC-02/05-01/20-379), para. 27.

¹⁸ ICC-01/14-01/18-1394-Conf, para. 12, 14 and 15.

¹⁹ **P-1521** : [REDACTED]; **P-0801** : [REDACTED]; **P-0884** : [REDACTED] ; **P-0446** : [REDACTED]; **P-0889** : [REDACTED].

²⁰ ICC-01/14-01/18-1296-Conf-AnxC 01-03-2022 1/33 EC T

- the conclusion drawn by the Prosecution from the presence of Anti-Balaka badges has already been commented upon by several Prosecution witnesses in their statements and during their testimonies;²¹ and
- Mr Ngaïssona's political role within the Anti-Balaka movement and his views on the transitional government have already been commented upon by several Prosecution witnesses in their statements and during their live testimonies before the Chamber.²²

20. Therefore, the inferences that can be drawn from the Items are insignificant in light of similar information being already available on the record of the case. Their potential contribution to the Chamber's truth finding function would be *de minimus*. In light of the minimal significance of the evidence, the Prosecution should not be allowed to bypass the important procedural safeguard which requires it to provide its incriminating evidence well in advance of Trial.

iii. The late addition of the Items to the List of Evidence would cause undue prejudice to the Defence

21. Should the Chamber find the Items to bear prospective significance to the proceedings, the Defence submits that such significance would in any event be

²¹ On Habib BEINA and Aristide BEINA and their alleged link with YEKATOM and [REDACTED] : **P-0888** : CAR-OTP-2031-0217, para. 33; [REDACTED]; [REDACTED]; **P-1093** : CAR-OTP-2045-0048, para. 38; **P-0954** : CAR-OTP-2048-0171, para. 66 – 82; **P-1786** : CAR-OTP-2058-0200, para. 21 – 34. On [REDACTED] and his relation to [REDACTED]: **P-0889** : CAR-OTP-2027-2290; [REDACTED]. On YEKATOM and the anti-Balaka movement : [REDACTED]. On [REDACTED] alleged relation with YEKATOM : **P-0889** : CAR-OTP-2122-8079, at 8102;

²² On Mr Ngaïssona's political role : **P-0992** : ICC-01/14-01/18-T-095-CONF-ENG ET, p. 30; **P-0889** : ICC-01/14-01/18-T-110-CONF-ENG E, p.5; **P-0966** : ICC-01/14-01/18-T-118-CONF-ENG ET, p. 37 ; **P-0888** : ICC-01/14-01/18-T-123-ENG E, p.8; On Mr Ngaïssona's attitude towards the transitional government : **P-0884** : ICC-01/14-01/18-T-058-CONF-ENG ET, pp. 40-43 ; **P-0992** : ICC-01/14-01/18-T-095-CONF-ENG ET, pp. 14-29.; **P-0889** : ICC-01/14-01/18-T-110-CONF-ENG ET, pp. 67-68.

insufficient to override the undue prejudice which their late addition would cause to Mr Ngaïssona's procedural rights.

22. The Prosecution seeks the addition of items that directly pertain to Mr Ngaïssona, [REDACTED], Alfred Yekatom, Habib Beina, Aristide Beina, and [REDACTED]. However, the above-mentioned individuals either benefit from the right against self-incrimination (Messrs Ngaïssona, Yekatom and [REDACTED]), are deceased (Mr Habib Beina), already testified ([REDACTED]) or are not expected to testify (Mr Aristide Beina) before the Court. The Defence will therefore be stripped of its opportunity to confront these individuals with the Items at an adversarial hearing as well as with the conclusion drawn by the Prosecution based upon their presence in [REDACTED]. Further, given that most 'insider' witnesses who were part of the Anti-Balaka Coordination have already testified, the Defence will be deprived of the opportunity of confronting them with the Items, as well as with the conclusions that the Prosecution draws from them with respect to the structure of the Anti-Balaka movement.

23. The Prosecution's submissions that no undue prejudice is caused in light of the fact that it has "carefully selected" the Items, "rather than inundating the Parties with a request to add dozens of items to the LoE"²³ is meritless. Given that the deadline to file its List of Evidence has expired over one year and a half ago, a careful selection of the evidence it wishes to add to its List of Evidence is the very least that can be expected from the Prosecution.

24. *Finally*, the Defence is concerned by the prejudicial effect that the Prosecution's investigations in the context of [REDACTED] may have on the current proceedings. On the one hand, the trial against Mr Yekatom and Mr Ngaïssona

²³ ICC-01/14-01/18-1394-Conf, para. 17.

started more than a year ago and the Prosecution's investigation should have been largely completed by now.²⁴ On the other hand, [REDACTED]. The Prosecution should not be permitted to use [REDACTED] to bypass the Chamber's deadline for full disclosure, and ultimately remedy or further its investigation in the present case during the trial phase. This would, in the course of time, require the Defence to engage in a growing body of evidence with a receding list of testifying witnesses to confront the evidence with. Such scenario would be considerably prejudicial to Mr Ngaïssona's statutory rights to be informed promptly and in detail of the cause and content of the charges as well as to have adequate time for the preparation of the Defence. The Prosecution should not be allowed to remedy deficiencies in its evidence through the submission of the Items more than one year and a half after the deadline for full disclosure and at the expense of Mr Ngaïssona's procedural rights.

VI. Relief sought

25. The Defence respectfully requests the Chamber to **REJECT** the Prosecution Request.

Respectfully submitted,



²⁴ ICC-01/14-01/18-1270-Conf, para. 25 ('Nonetheless, the Single Judge recalls, once more, that investigations should largely be completed at the stage of the confirmation of charges hearing. The Single Judge trusts that the Prosecution has fully completed its investigations in this case and that the interview conducted with a person of interest to the case at such an advanced stage of the proceedings constitutes nothing more than an unfortunate exception').

Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

The Hague, 26 September 2022