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**International
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Date: **10 February 2023**

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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Public
With Public Annex A**

**Public Redacted Version of the “Yekatom Defence Response to the
Prosecution’s “Request for leave to add one item to the List of Evidence”,
ICC-01/14-01/18-1702-Conf, 15 December 2022”, 10 February 2023**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom (“Defence”) hereby responds to the Prosecution’s “Request for leave to add one item to the List of Evidence” (“Request”).¹
2. The Defence submits that the Request should be rejected in light of grave concerns regarding the preservation and authenticity of the content of [REDACTED] phone.

PROCEDURAL HISTORY

3. On 16 July 2020, the Chamber ordered the Prosecution to file its List of Evidence by 9 November 2020.²
4. On 10 November 2020, the Prosecution’s List of Witnesses and Evidence was notified to the parties.³
5. On 29 September 2021, the Single Judge instructed the Prosecution to thoroughly review its List of Evidence for completeness and indicated that any additions to this list should be “sought on an exceptional basis”.⁴
6. On 14 December 2021, the Prosecution filed its “Updated List of Evidence”⁵ pursuant to a Chamber order.⁶
7. On 6 May 2022, the Prosecution filed its “Request for leave to add 9 items to the List of Evidence collected from [REDACTED]”.⁷

¹ [ICC-01/14-01/18-1702-Conf](#), Public Redacted Version available : [ICC-01/14-01/18-1702-Red](#).

² [ICC-01/14-01/18-589](#), para. 14.

³ [ICC-01/14-01/18-724](#), and more specifically Annex C for the List of Evidence [ICC-01/14-01/18-724-Conf-AnxC-Corr](#).

⁴ See Chamber’s email dated 29 September 2021; also quoted in Chamber’s decisions such as [ICC-01/14-01/18-1206](#) para. 8 or [ICC-01/14-01/18-1301-Conf](#) para 13.

⁵ [ICC-01/14-01/18-1211](#) and its annex A [ICC-01/14-01/18-1211-Conf-AnxA](#).

⁶ [ICC-01/14-01/18-1206](#), para. 16.

⁷ [ICC-01/14-01/18-1394-Conf](#), para. 8. Public Redacted Version available : [ICC-01/14-01/18-1394-Red2](#).

8. On 6 October 2022, in his “Decision on the Prosecution Request to Add 103 Items to its List of Evidence” the Single Judge indicated that “bearing in mind 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 no further requests will be filed”.⁸
9. On 4 November 2022, the Prosecution filed its “Request for leave to add 22 items to the List of Evidence”, which included other documents seized from [REDACTED].⁹
10. On 15 December 2022, the Prosecution filed its “Request for leave to add one item to the List of Evidence” relating to CAR-OTP-00000637, a contact list extracted from a phone belonging to [REDACTED] (“Contact List”).¹⁰
11. On 20 December 2022, the Chamber granted an extension of the deadline to respond to the Request until 30 January 2023.¹¹
12. Between 5 and 26 January 2023, both the Yekatom and Ngaïssona Defence teams held *inter partes* discussions with the Prosecution regarding the extraction of the Contact List from [REDACTED] phone.
13. On 26 January 2023, the Prosecution disclosed the fact that they physically manipulated the phone and that “photographs of certain SMS/WhatsApp messages were taken preliminarily to assess the relevance of the phone’s potential content to the investigation”.¹² The Prosecution informed the Defence it would formally disclosed these photographs.

⁸ [ICC-01/14-01/18-1597-Conf](#), para. 23.

⁹ [ICC-01/14-01/18-1653-Conf](#).

¹⁰ [ICC-01/14-01/18-1702-Conf](#). Public Redacted Version available : [ICC-01/14-01/18-1702-Red](#).

¹¹ Email from the Chamber dated 20 December 2022 at 13:03

¹² Email from the Prosecution to the Yekatom and Ngaïssona Defence dated 26 January 2023 at 16:53.

14. On 27 January 2023, given the extent to which the above-mentioned physical manipulation was contrary to standard investigative best practices (see below), the Defence requested an extension of the deadline to respond to the Request, so to be in a position to properly assess the impact of this misstep.¹³
15. On 27 January 2023, the Chamber extended the deadline to respond to the Request to 10 February 2023.¹⁴
16. On 2 February 2023, the Prosecution formally disclosed the photographs taken during their inspection of the phone, along with their associated metadata on Nuix ("Photographs").¹⁵

APPLICABLE LAW

17. According to the jurisprudence of the Court, a request to add documents to the List of Evidence is not a request for extension of time under regulation 35 of the Regulations.¹⁶ The Chamber must "determine in the concrete circumstances whether reliance by the Prosecution on items additional to those included in the initial list of evidence causes undue prejudice to the procedural rights of the Defence".¹⁷ In making this decision the Chamber considers factors including "the extent to which the requested addition is opposed by the Defence, the time when the addition is sought, the nature and amount of the material concerned, the intended purpose for the Prosecution's requested reliance on such material as well as its prospective significance in light of the charges brought against the accused and the rest of the available evidence".¹⁸

SUBMISSIONS

¹³ Email from the Yekatom Defence dated 27 January 2023 at 14:14.

¹⁴ Email from the Chamber dated 27 January 2023 at 17:35

¹⁵ Trial Other 21 02 February 2023.

¹⁶ [ICC-01/14-01/18-989-Conf](#), para. 5 and references cited therein.

¹⁷ [ICC-01/14-01/18-989-Conf](#), para. 5.

¹⁸ [ICC-01/14-01/18-989-Conf](#), para. 5.

18. The Defence will first address best practices commonly adopted throughout the international community regarding the analysis of a telephone (A). Issues with the Prosecution handling of [REDACTED] phone, from which the Contact List was extracted, will then be detailed (B). Finally, the Defence will argue that the issues detected militate in favour of the rejection of the addition of the Contact List to the Prosecution's List of Evidence (C).

A. On the best practices regarding analysis of a mobile device

19. After an initial review of the Photographs disclosed on 2 February 2023, the Defence noticed that the handset, from which the Contact List of the Prosecution's request was extracted, had been manipulated by Prosecution investigators at the very least in October 2022.¹⁹ The said manipulation included searches with key words throughout the applications contained in the phone.
20. Whatever steps are taken by investigators, they must be forensically sound. To be forensically sound, the "acquisition and subsequent analysis of ...[digital] data" with these tools must be able to preserve "the data in the state in which it was first discovered" and "not in any way diminish the evidentiary value of the electronic data through technical, procedural or interpretive errors"²⁰. If digital forensic best practices are not followed, the Chamber will not be in a position to authenticate data.
21. It is best practice to not examine evidence on the original device. Doing so creates at least two failure points. First, there is the possibility of the destruction or changing of data, locally and remotely, on the device. This can happen through automated processes, such as mobile phone operating systems that automatically change data on power-up or alter time and date stamps. A second risk in examining evidence on the original device is due to the dynamic nature

¹⁹ See as an example NuiX Metadata of CAR-OTP-00000650 indicating an access on 19 October 2022.

²⁰ Rodney McKemmish, [When is Digital Evidence Forensically Sound?](#), 2008, p. 6.

of data on these devices. On a powered device, data is constantly updated and refreshed, and cannot be write-blocked.²¹ Quite simply, the device's data forensically changes with every interaction – every button pressed, every message searched, and every time it is powered on.

22. An added complication is that attempts to isolate the phone may create a false sense of security. Simply putting a phone in airplane mode may not

disable Bluetooth, Wi-Fi, and other wireless protocols or may only disconnect them temporarily. Examiners should manually confirm that network connectivity has been disabled or consider alternate means of isolation, including placing the device in an RF shielded enclosure, removing the SIM card from the device or utilizing a Cellular Network Isolation Card (CNIC) for GSM phones.²²

23. Again, proceeding without these steps increases the risk that phone data may be changed and altered, either locally or through cloud backup systems, and after the phone has come into possession of the examiner.

24. Due to these risks, Interpol best practice is clear: "If the equipment is turned off, do not turn it on."²³

25. There are exceptional circumstances where this may not be possible (see below), but best practice is to create a forensic image that copies or clones the entire device. Alternatively, if it is not possible to create such an image, logical copies of files are a suitable alternative. A logical copy replicates selected data from the device without copying the entirety of the device.²⁴

²¹ See "Interpol Guidelines for Digital Forensics First Responders", Version 7, March 2021 (Annex A), p. 24.

²² Annex A, p. 30.

²³ Annex A, p. 17.

²⁴ Annex A, p. 21; *see also* Digital Forensics for Legal Professionals: Understanding Digital Evidence from the Warrant to the Courtroom. Larry E. Daniel and Lars E. Daniel. Syngress, 2012. P. 266 : "Logical acquisitions of cell phones are performed using cell phone forensic software. A logical acquisition typically only recovers data on a cell phone that is not deleted. Depending on the phone and the forensic tools used, some or all of the data might be able to be acquired. For instance, where only some of the data can be acquired, this means that the text messages, contact list, and call history might be acquirable using the cell phone forensics tools, but the images and ringtones are not".

26. Digital forensic investigative practice recognizes carveouts to the above guidelines. Triage models allow for onsite inspection of devices and data when there is a need to quickly identify, analyse, and interpret digital evidence.²⁵ The decision to engage in this inspection primarily hinges on if the data is volatile – if there is a chance the data may be lost due to a loss of power or connection – or if it is a matter of exigency. Even when faced with this situation, investigators should always choose the most forensically sound method available. Manual inspection is always the least forensically sound, and is fraught with risks to the phone data and information. It is clearly to be avoided except in cases of emergency.

B. On the Prosecution’s investigative failures during the collection of item CAR-OTP-00000637

- i) The Prosecution Cannot Authenticate Phone Data – or Contact List – Prior to July 2022*
27. [REDACTED]. Among the items seized was a mobile phone handset, which was given to the ICC Registry on 31 March 2022. On 20 July 2022, the Prosecution created a forensic copy of the handset.
28. The Prosecution has provided no information as to how the phone was treated and / or accessed over this five-month period, either by the [REDACTED] authorities or the Registry. Best practice would have been to create a forensic copy of the phone as soon as possible, to forestall any loss of data or changes to the data. Because the Prosecution chose to wait so long, the Chamber is now deprived of the chance to assure itself that the phone seized from [REDACTED] has not been accessed, changed, or damaged. The Prosecution can only demonstrate that from July 2022.

²⁵ UNODC, “Digital forensics”, available at: <https://www.unodc.org/e4j/en/cybercrime/module-4/key-issues/digital-forensics.html> (consulted on 10 February 2023)

29. This creates a critical gap in the authenticity of the contact list, which cannot be cured. The Prosecution cannot go back in time and authenticate the phone data prior to July 2022. Because of that, the Chamber should not grant the Request.
- ii) The Prosecution Violated Phone Data Integrity Twice Prior to Extraction of Contact List*
30. The Prosecution extracted the Contact List from the handset – not the forensic copy – on 16 November 2022 using a Cellbrite device.²⁶ At least twice beforehand, Prosecution investigators accessed the handset: on 19 October 2022 to search SMS messages²⁷ and again on 11 November 2022 to search Whatsapp messages.²⁸
31. Each time the Prosecution decided to search the handset, investigators would have changed the volatile data on the phone handset *simply by turning the phone on*. In other words, despite the fact that the Prosecution created a forensic copy of the phone in July 2022, it still chose a forensically unsound method to search the phone content. Button by button, the Prosecution took the phone further away from the July 2022 forensic copy.
32. Because of this decision, the Prosecution cannot now rely on data extracted from the phone after July 2022, as is the subject of this request. The Prosecution's investigators have now impaired the very authenticity of any data subsequently extracted. Based on the Contact List alone, the Chamber does not have the possibility of knowing what was changed, added, or deleted by the investigator during this manual inspection. The Prosecution's Cellbrite report does not include any indication of when entries were made or modified. The Prosecution's poor practices can be cured in this instance by reverting to the

²⁶ See *Summary* tab of Contact List

²⁷ CAR-OTP-00000650

²⁸ CAR-OTP-00000663. Searching Whatsapp data – which is encrypted – does pose unique difficulties. Data may only be extracted via an APK downgrade (which is potentially damaging to a handset). In this instance, there was no time sensitive need, and any search could have proceeded *after* a Cellbrite extraction. Again, the Prosecution's choices here are indicative of their poor practices which have put the integrity of the phone data into question.

July 2022 forensic copy, which would protect against inadvertent data loss due to poor investigative practices.

iii) The Prosecution Cannot Guarantee the Forensic Integrity

33. However, it is worth distinguishing what can and cannot be cured. Once the forensic copy is made in July 2022, it acts as a backstop for later issues. The Chamber can revert to the copy and cure the Prosecution's mistakes. This is not possible for any issues prior to July 2022. The Prosecution cannot guarantee the forensic integrity of the Contact List or cure mistakes that would have been done by others, which would have compromised the phone data because there is no forensic copy available to do so.

iv) The Prosecution's Search for Relevance Does Not Excuse Violating Triage Practices

34. Finally, it is worth focusing on the Prosecution's stated reason to access the handset in October 2022: to 'assess the relevance of the phone's potential content to the investigation'. This does not fit the triage model for accessing handsets in forensically unsound manners, which focuses on loss of data or loss of life. The Prosecution had a forensic copy of the phone available to it and did not need to risk the handset. It is highly unclear as to why the Prosecution would have had any question about the relevance of a phone seized from a suspect at the time of the arrest and which had already been forensically copied in July 2022.

C. On the impact of the Prosecution's deficiencies on addition of the item to the List of Evidence

35. The Defence argues that the deficiencies identified above warrant a rejection of the Prosecution request to add the Contact List to its List of Evidence.
36. Indeed, the Prosecution's apparent intention with the Contact List is to link various members of the Anti-Balaka to [REDACTED]. As the analysis of those contacts appear to still be ongoing, and despite the absence of mentions of Mr.

Yekatom's name in the Request, the Defence wishes to refer to its previous submissions on the prejudicial nature of the alleged (and contested) links between [REDACTED].²⁹

37. The Single Judge recently rejected the addition to the List of Evidence of two videos which the Prosecution described as probative "of the connection between YEKATOM's Group and other Anti-Balaka figures and groups, [REDACTED]", *inter alia* on the ground that "the Single Judge is unpersuaded that their late addition to the List of Evidence would 'not cause unfair prejudice to the accused' because they have been known to the Defence".³⁰ With respect to the Contact List, of which the Prosecution has not completed its analysis, the Defence consequently remains totally unaware of the extent to which it may be used by the Prosecution and the prejudice that may arise from addition of this item to the List of Evidence.
38. In light of the potential importance of the Contact List, the deficiencies in the Prosecution handling of [REDACTED] phone are significant and could compromise the integrity of the proceedings. The authenticity of the Contact List is irremediably put into doubt to the point that, should the item be added to the List of Evidence, the Chamber could not give it any weight during its final deliberation of the judgement.
39. In addition, part of the prejudice to the Defence is also unknown. As early as the confirmation stage the Prosecution was relying on a list of attributed numbers and corresponding Call Data Records to support various allegations such as that Mr Yekatom was [REDACTED].³¹ These allegations were also maintained during the Trial as the Prosecution used call data records and introduced bar table motions to attribute certain phone numbers to various

²⁹ [REDACTED].

³⁰ [ICC-01/14-01/18-1710-Conf](#), paras 31-32.

³¹ [REDACTED].

individuals of interest in this case. The Defence contracted a telecommunications specialist prior to the commencement of this trial to analyse all the various call data records and attributed phones and used several call sequence tables throughout its examination to challenge the Prosecution's allegations and / or attributions. The inclusion at this late stage of the proceedings of a contact list from [REDACTED] handset, created at an unknown time period, will cause undue prejudice to the Defence as its telecommunications analysis was based on the entirety of the telecommunications material disclosed and included on the List of Evidence.

40. Consequently, the Defence respectfully requests the Chamber to reject the Prosecution Request.

CONFIDENTIALITY

41. The present response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed simultaneously.

RELIEF SOUGHT

42. In light of the above, the Defence respectfully requests Trial Chamber V to:
- REJECT** the addition to the Prosecution's List of Evidence of item CAR-OTP-00000637.

RESPECTFULLY SUBMITTED ON THIS 10th DAY OF FEBRUARY 2023



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