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Date: 24 March 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

Prosecution's Consolidated Response to "Defence Observations on Registry's Observations on the Prosecution's "Request for leave to add one item to the List of Evidence (ICC-01/14-01/18-1702-Conf)" (ICC-01/14-01/18-1794-Conf)", ICC-01/14-01/18-1807-Conf, 21 March 2023 and "Yekatom Defence Observations, ICC-01/14-01/18-1809-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”) hereby submits its consolidated Response to “Defence Observations on Registry’s Observations on the Prosecution’s “Request for leave to add one item to the List of Evidence (ICC-01/14-01/18-1702-Conf)” (ICC-01/14-01/18-1794-Conf)”, (“Ngaissona Defence Observations”)¹ and “Yekatom Defence Observations further to the “Registry’s Observations on the Prosecution’s “Request for leave to add one item to the List of Evidence (ICC-01/14-01/18-1702-Conf)”, ICC-01/14-01/18-1794-Conf, 13 March 2023” (Yekatom Defence Observations).²

2. First, the Defence position that the “Request for leave to add one item to the List of Evidence”³ (the “Request”) relating to CAR-OTP-00000637 (the “Item”) is untimely and prejudicial to a fair trial is unavailing. The Prosecution’s initial review of the relevant smartphone was not conducted with a view to gathering further evidence for the current proceedings, but rather for a case at the Pre-Trial stage. Following discovery of the Item, the Prosecution swiftly conducted a preliminary review for the purposes of this trial and duly disclosed the Item. It is submitted that neither Defence team would suffer unfair prejudice through its addition to the LoE, nor have they shown otherwise.

3. Second, the arguments advanced in relation to the authenticity and reliability of the Item are relevant only for the Chamber’s assessment of its weight, and do not preclude the formal addition of the material to the LoE. Being of significant probative value, the Item’s inclusion on the LoE would further the Chamber’s search for the truth and serve to enhance the fair and expeditious nature of the proceedings.

¹ ICC-01/14-01/18-1807-Conf.

² ICC-01/14-01/18-1809-Conf.

³ ICC-01/14-01/18-1702-Conf.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the present Response is filed as “Confidential”, as it refers to a filing of the same classification. A public redacted version will be submitted as soon as practicable.

III. SUBMISSIONS

A. The addition of the Item to the LoE at this stage of the proceedings does not prejudice the Defence

5. The Prosecution notes that the relevant Item was extracted from a smartphone under the Registry’s custody and control on 15 November 2022, until which time the Prosecution was unaware of the existence of the Item. The Prosecution had, at that time, concluded the active investigation for the current trial and the exploitation of the smartphone was for the purposes of a separate – although linked – case. Upon realising the significance of the Item to the current proceedings, the Prosecution moved swiftly to preliminary review and the material duly disclosed to the Defence on 2 December 2022, prior to the filing of the Request shortly afterwards on 15 December 2022.⁴ Contrary to Defence submissions regarding the “untimeliness” of the Request,⁵ this timeline clearly demonstrates the Prosecution’s expeditious handling of the material upon acquiring knowledge of its existence.

6. As previously acknowledged in a Decision of the Single Judge in the present case, “certain relevant materials may be received only after the time limit for the provision of the Prosecution’s list of evidence expires”.⁶ The Single Judge has repeatedly held that it would be “unreasonable” for the Chamber to determine that

⁴ ICC-01/14-01/18-1702-Conf, para. 2.

⁵ ICC-01/14-01/18-1807-Conf, para. 12.

⁶ Decision on the Prosecution Request to Add Six Email Threads to its List of Evidence, ICC-01/14-01/18-989-Conf, para. 6.

material with prospective significance be automatically precluded from use by the Prosecution if not added to the LoE before the commencement of trial.⁷

7. As outlined in the Request, the Item is relevant to material matters at trial and bears sufficient indicia of reliability, and its addition to the LoE causes no prejudice to the fair conduct of the proceedings.⁸ It is noteworthy that the Prosecution is applying for leave to add just one single Item from data extracted from the smartphone.⁹ The Defence contention that such addition is prejudicial fails – and would in any case be outweighed by the significance of the material to the truth-seeking function of the Chamber. Crucially, neither the Ngaissona Defence observations nor the Yekatom Defence Observations make any concrete allegations that there has been any manipulation or corruption of the Item, but merely refers to a ‘risk’¹⁰ or speculates on various unlikely events that ‘may’ have occurred.¹¹ Finally, the relevant smartphone remains - in the custody and control of the Registry - available for the Defence to conduct their own independent forensic analysis.

B. The authenticity and reliability of evidence is assessed by the Chamber during its Article 74 Deliberations

8. In response to Defence arguments regarding the authenticity and reliability of previous items added to the LoE, the Chamber has repeatedly emphasised that, as part of its deliberation of the judgment pursuant to Article 74(2), it will assess the relevance and probative value of all evidence submitted at trial holistically. At this

⁷ ICC-01/14-01/18-989-Conf, para. 6; *The Prosecutor v. Dominic Ongwen*, Decision on the ‘Prosecution’s Request to Add Transcripts and Seven Additional Documents to its List of Evidence’, 2 December 2016, ICC-02/04-01/15-619.

⁸ Request, paras. 9-10.

⁹ See ICC-01/14-01/18-989-Conf para. 12, which indicates that the ‘amount’ of material sought to be added to the list of evidence is a factor to be considered when assessing if ‘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.

¹⁰ ICC-01/14-01/18-1809-Conf, para. 12.

¹¹ ICC-01/14-01/18-1807-Conf, para. 6.

point in the proceedings, the Chamber will take into account any related arguments raised by the participants over the course of the trial.¹²

9. The Prosecution further remarks that the Request does not concern the submission into evidence of the Item, but rather leave to include it on its LoE. There is no requirement that the Chamber at this stage address any arguments regarding the weight to be afforded the Item, and no prejudice to the Defence based on their unfounded concerns regarding the provenance of the material and its reliability.¹³

IV. CONCLUSION

10. For the foregoing reasons, the Prosecution reiterates its request for the Chamber's leave to add the Item to its LoE.



Karim A. A. Khan KC, Prosecutor

Dated this 24th day of March 2023

At The Hague, The Netherlands

¹² ICC-01/14-01/18-989-Conf, para. 11; ICC-01/14-01/18-1597-Conf, para. 18; *See also* Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, para. 53.

¹³ *See* ICC-01/14-01/18-989-Conf, para. 11.