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No. ICC-01/14-01/18

Date: 23 May 2024

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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Ngaïssona Defence Request for Leave to Add D30-4848 to its List
of Witnesses and for In-Court Protective Measures**

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

The Office of the Prosecutor

Karim A. A. Khan
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis
Anta Guissé
Sarah Bafadhel

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops
Marie-Hélène Proulx
Lauriane Vandeler

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

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 (6)(f), 67, and 69 of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Ngaïssona Defence Request for Leave to Add D30-4848 to its List of Witnesses and for In-Court Protective Measures’.

I. Procedural history and submissions

1. On 17 November 2023, in accordance with the time limit set by the Chamber,¹ the Ngaïssona Defence (the ‘Defence’) filed its final list of witnesses (the ‘List of Witnesses’).²
2. On 2 May 2024, the Defence requested leave to add D30-4848 to its List of Witnesses (the ‘Addition Request’) and, should this request be granted, to grant in-court protective measures for this witness (the ‘ICPM Request’, and jointly the ‘Request’).³ It submits, *inter alia*, that ‘D30-4848’s evidence is relevant to the Defence case’ and that ‘the anticipated evidence, in part, concerns general matters already known by the Prosecution and the other parties and participants’.⁴
3. On 6 May 2024, the Yekatom Defence informed the Chamber that it does not intend to respond to the Request and defers to the Chamber’s discretion.⁵
4. On 13 May 2024, the Office of the Prosecutor (the ‘Prosecution’) objected to the Request (the ‘Response’). It submits that the Request ‘fails to show due diligence’ as there is ‘no justification for [its] lateness’ and because ‘the Defence’s contentions regarding the relevance of his evidence fail in light of the numerous

¹ Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence), 29 May 2023, ICC-01/14-01/18-1892, para. 21(i).

² See Annex 1 to the Defence Submission of its Final List of Witnesses and its List of Evidence, ICC-01/14-01/18-2215-Conf-Anx1-Corr.

³ Ngaïssona Defence consolidated request for leave to add D30-P-4848 to its List of Witnesses and for in-court protective measures for D30-P-4848, ICC-01/14-01/18-2473-Conf (with confidential Annex A, ICC-01/14-01/18-2473-Conf-AnxA, containing a summary of D30-4848’s anticipated evidence).

⁴ Request, ICC-01/14-01/18-2473-Conf, para. 20.

⁵ Email from the Yekatom Defence, 6 May 2024, at 11:48.

similar witnesses (including an expert witness), who were dropped by the Defence without any explanation, either then or now'.⁶

II. Analysis

5. The Chamber recalls the applicable law for requests to add witnesses to the final list of witnesses, as set out in a previous decision concerning a Prosecution witness,⁷ which applies *mutatis mutandis* to requests by the Defence.
6. The Chamber notes that the Addition Request was submitted more than five months after the time limit set for the Defence's List of Witnesses and in the midst of its evidence presentation. It is not persuaded by the Defence's attempted justifications of this tardiness⁸ and considers that it would have been prudent to inform the participants and Chamber earlier of D30-4848's potential testimony, particularly considering that the witness's first screening already took place on 14 July 2021.⁹
7. However, it is recalled that it would be unreasonable for the Chamber, to which a truth-seeking function is assigned by the Statute, to determine that potentially relevant evidence could not, under any circumstance, be used at trial if not itemised in the list of evidence before the trial commences.¹⁰ Having reviewed the anticipated testimony of D30-4848,¹¹ the Chamber acknowledges that it bears prospective significance to the case, in particular with regard to the activities of Central Africans exiled in Cameroon; the witness's contacts with Mr Ngaïssona

⁶ Prosecution's Response to the "Ngaïssona Defence consolidated request for leave to add D30-P-4848 to its List of Witnesses and for in-Court protective measures for D30-P-4848" (ICC-01/14-01/18-2473-Conf), ICC-01/14-01/18-2490-Conf-Exp, confidential *ex parte*, only available to the Prosecution (confidential redacted version notified the same day, ICC-01/14-01/18-2490-Conf-Red), para. 1.

⁷ Decision on the Prosecution Request to Add P-2687 to its Final Witness List, 27 September 2021, ICC-01/14-01/18-1118-Conf, paras 8-9 *referring to* 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 (public redacted version notified on 30 September 2022) (the 'LoE Decision'), paras 5-6.

⁸ Request, ICC-01/14-01/18-2473-Conf, paras 21-27.

⁹ See Request, ICC-01/14-01/18-2473-Conf, para. 23. See also Response, ICC-01/14-01/18-2490-Conf-Red, paras 3-9.

¹⁰ LoE Decision, ICC-01/14-01/18-989-Red, para. 6.

¹¹ See Annex A to the Request, ICC-01/14-01/18-2473-Conf-AnxA. See also Request, ICC-01/14-01/18-2473-Conf, paras 29-34.

and other individuals during his stay in Cameroon and his knowledge of Mr Ngaïssona's involvement with the Anti-Balaka.

8. The Chamber further observes that while the Prosecution objects to the Addition Request, it does not allege any potential prejudice if D30-4848 were to be added to the Defence's List of Witnesses. In this context, the Chamber also notes that D30-4848's anticipated evidence has been available to the Prosecution since 2 May 2024¹² and does not raise any novel issues which could not have been foreseen by the Prosecution. On the contrary, and as acknowledged by the Prosecution,¹³ the issues to be addressed with D30-4848 would have otherwise been part of the Defence's examination of other witnesses, which have, however, meanwhile been withdrawn by the Defence.¹⁴ Moreover, the Chamber notes that the Yekatom Defence has not objected to the Addition Request.
9. In light of the above, the Chamber grants the Addition Request. Nonetheless, the Chamber stresses that it will not tolerate any delays by virtue of this addition to the List of Witnesses. Therefore, it orders the Defence to schedule D30-4848's testimony before the summer recess.
10. Finally, the Chamber considers it more appropriate to rule on the ICPM Request after the Victims and Witnesses Unit (the 'VWU') has provided its assessment on in-court protective measures. Accordingly, the Chamber defers its decision with regard to the ICPM Request and instructs the VWU to provide its assessment on in-court protective measures for witness D30-4848 at the latest two working days in advance of the witness's scheduled testimony.

¹² See Annex A to the Request, ICC-01/14-01/18-2473-Conf-AnxA. See also Request, ICC-01/14-01/18-2473-Conf, paras 29-34.

¹³ Response, ICC-01/14-01/18-2490-Conf-Red, paras 13-15.

¹⁴ In this respect, the Chamber notes in particular that the Defence intends to call D30-4848 in order to replace D30-4747 (*see* Request, ICC-01/14-01/18-2473-Conf, para. 27), who was withdrawn for unknown reasons (*see* email from the Defence, 25 January 2024, at 16:50) and in order to cover issues which would have otherwise been addressed with expert witness D30-4885 (*see* Request, ICC-01/14-01/18-2473-Conf, para. 39), who was withdrawn as the Defence 'no longer intend[ed] to rely on his report' (*see* email from the Defence, 1 May 2024, at 14:25).

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Addition Request;

DEFERS its decision on the ICPM Request;

ORDERS the VWU to provide its assessment on in-court protective measures for witness D30-4848 at the latest two working days in advance of the witness's scheduled testimony; and

ORDERS the Defence and the Prosecution to file public redacted versions of the Request, ICC-01/14-01/18-2473-Conf, and the Response, ICC-01/14-01/18-2490-Conf-Exp, respectively, within two weeks of notification of the Chamber's decision on the ICPM Request.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 23 May 2024

At The Hague, The Netherlands