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**International
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**No. ICC-01/14-01/18
Date: 17 September 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate 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 for the Submission of Rebuttal Evidence

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

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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), 67 and 69(3) of the Rome Statute (the 'Statute'), issues this 'Decision on the Prosecution Request for the Submission of Rebuttal Evidence'.

I. Procedural history

1. On 27 August 2024,¹ the Office of the Prosecutor (the 'Prosecution') sought leave to 'formally submit evidence in rebuttal' in relation to 98 items (the 'Rebuttal Evidence' and the 'Request').²
2. On 28 August 2024,³ the Common Legal Representatives for the Victims of the Other Crimes indicated that they do not intend to respond.⁴
3. On 4 September 2024, the Ngaïssona Defence opposed the Request (the 'Ngaïssona Defence Response').⁵
4. On the same day, the Yekatom Defence responded to the Request (the 'Yekatom Defence Response'). It deferred to the Chamber's discretion, subject to certain observations.⁶

¹ The Chamber instructed the participants to file any requests for leave to present rebuttal evidence as soon as practicable, and at the latest, five days after the last Defence witness has testified (*see* email from the Chamber, 7 February 2024, at 15:11).

² Prosecution's Request for the Submission of Rebuttal Evidence, ICC-01/14-01/18-2657-Conf (with one confidential annex, which contains a list of the proposed Rebuttal Evidence).

³ The Single Judge shortened the deadline to respond to 4 September 2024 (*see* email from the Chamber, 28 August 2024, at 11:48). The Ngaïssona Defence sought reconsideration of this order (*see* email from the Ngaïssona Defence, 28 August 2024, at 12:11), which was denied by the Chamber (*see* email from the Chamber, 29 August 2024, at 17:41).

⁴ Email from the Common Legal Representatives for the Victims of the Other Crimes, 28 August 2024, at 13:03.

⁵ Defence Response to "Prosecution's Request for the Submission of Rebuttal Evidence", ICC-01/14-01/18-2670-Conf.

⁶ Yekatom Defence Response to 'Prosecution's Request for the Submission of Rebuttal Evidence' (ICC-01/04-01/18-2657), ICC-01/14-01/18-2672-Conf.

II. Analysis

A. Applicable law

5. The Chamber recalls that leave must be sought in order to present rebuttal evidence⁷ and will only be granted if the proposed evidence is of significance *vis-à-vis* the legal issues to be determined in this case, particularly in light of the other evidence already on the record.⁸ As stated by the Appeals Chamber, 'each application for rebuttal evidence must be assessed on a case-by-case basis', and a 'decision in this respect requires the exercise of a trial chamber's discretion within the context of its overarching obligation to ensure that the rights of an accused are upheld'.⁹
6. The Chamber is further guided by the following criteria, which have been established by other trial chambers and endorsed by the Appeals Chamber: (i) whether 'an issue of significance has arisen *ex improviso*'; (ii) whether the 'evidence on rebuttal satisfies the admissibility criteria'; and (iii) whether 'this step will not undermine the accused's rights, in particular under Article 67 of the Statute'.¹⁰

B. The Chamber's determination

7. The Chamber observes that the Rebuttal Evidence consists of 98 items, containing (i) call data records, (ii) audio/video material, (iii) Facebook messages, (iv) other communications and correspondences, (v) Facebook metadata/reports, (vi) press articles, (vii) investigation reports, (viii) other reports, (ix) witness statements, (x) lists, (xi) photographs, and (xii) transcripts and other documents.

⁷ Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631 (the 'Initial Directions'), para. 16.

⁸ Email from the Chamber, 7 February 2024, at 15:11 *referring to* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution request to present evidence in rebuttal, 19 September 2019, ICC-02/04-01/15-1600, para. 6.

⁹ Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", 15 December 2022, ICC-02/04-01/15-2022-Conf (public redacted version notified the same day, ICC-02/04-01/15-2022-Red) (the '*Ongwen Appeals Judgment*'), para. 364.

¹⁰ *Ongwen Appeals Judgment*, ICC-02/04-01/15-2022-Red, paras 362-364, *referring, inter alia, to* Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005, 28 April 2011, ICC-01/04-01/06-2727-Conf (public redacted version notified the same day), paras 36-44.

8. It further notes that the Prosecution seeks to submit the Rebuttal Evidence to demonstrate ‘improper contact and/or influence by the Defence and persons linked to the Accused as regards Prosecution witnesses’.¹¹ According to the Prosecution, this evidence ‘establishes a pattern of conduct violative of the Protocol on the handling of confidential information issued by Trial Chamber V [...] and potentially article 70(1)(c)’ (the ‘Article 70 Allegations’). In the Prosecution’s submission, the Rebuttal Evidence is ‘responsive to prospective Defence assertions concerning the credibility of Prosecution witnesses affected by the improper pattern of conduct’.¹²
9. Irrespective of the questions whether the Rebuttal Evidence concerns an ‘issue of significance’, or whether it is appropriate to request its submission before *this* Chamber in light of the ongoing investigations of the Article 70 Allegations,¹³ the Chamber is, in any event, not persuaded that the issue at stake has arisen *ex improviso*, as argued by the Prosecution.¹⁴ In this respect, the Chamber recalls that the Prosecution initiated investigations into the Article 70 Allegations as early as April 2021.¹⁵ Furthermore, it notes that the majority of the Rebuttal Evidence has been obtained during the Prosecution’s evidence presentation,¹⁶ and was thus available and known to the Prosecution before closing its evidence.¹⁷
10. The Prosecution itself implicitly acknowledges that the issue was already known during its evidence presentation, when it argues that calling the Rebuttal Evidence then ‘was manifestly infeasible without undermining [its] investigation’ of the Article 70 Allegations.¹⁸ The Chamber is not persuaded by this submission. In

¹¹ According to the Prosecution, this concerns witnesses P-0888, P-0992, P-1193, P-1847, P-2673, P-2841, and P-2843.

¹² Request, ICC-01/14-01/18-2657-Conf, paras 1-2.

¹³ See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on “Prosecution’s Application to Submit Additional Evidence”, 2 April 2014, ICC-01/05-01/08-3029 (the ‘*Bemba* Decision’), para. 26, holding that the ‘[...] Relevant Material forms a portion of material obtained in the context of the prosecution’s investigation on alleged Article 70 offences which has resulted in the charges brought in case ICC-01/05-01/13. [...] this material is to be considered – or relates to matters to be considered – by the Pre-Trial Chamber [...]’.

¹⁴ See Request, ICC-01/14-01/18-2657-Conf, para. 16.

¹⁵ See Prosecution’s request for non-disclosure under rule 81(2) of materials collected during the investigation of potential offences under article 70, 8 June 2021, ICC-01/14-01/18-1016-Conf (with one confidential, *ex parte*, annex, only available to the Prosecution and Registry).

¹⁶ In this regard, the Chamber makes reference to the respective JEM metadata regarding the chain of custody for all items listed in the Annex to the Request, ICC-01/14-01/18-2657-Conf-Anx.

¹⁷ Prosecution’s Notice of the Close of its Case-in-Chief, 11 September 2023, ICC-01/14-01/18-2089.

¹⁸ Request, ICC-01/14-01/18-2657-Conf, para. 16.

this regard, the Chamber observes that the majority of the Rebuttal Evidence has been disclosed to both defence teams during the Prosecution's presentation of evidence.¹⁹ Moreover, it notes that all of the Rebuttal Evidence is documentary²⁰ in nature and would thus not have been accessible to the public.

11. Further taking into account that the Prosecution had an opportunity to examine the allegedly affected Prosecution witnesses²¹ and all defence witnesses in relation to the Article 70 Allegations,²² as well as the fact that the Request seems partly premised on speculations regarding the defence's closing arguments,²³ the Chamber considers that it would be prejudicial to the accused to submit the evidence in question at this stage of the proceedings. In light of the above, it rejects the Request.
12. Having said this, the Chamber observes that item CAR-OTP-00036817 is a transcript of audio CAR-OTP-00036359, which has already been recognised as formally submitted. Accordingly, and in line with the Chamber's directions to automatically recognise formal submission of transcripts associated with audio-visual material,²⁴ the Chamber instructs the Registry to reflect CAR-OTP-00036817 as formally submitted in JEM.
13. Lastly, the Chamber takes note of the defence's submissions regarding the breadth of allegations and unclarity of the references to the 'Accused', the 'Defence' and 'persons linked to the Accused' in the Request, as well as the Ngaïssona Defence's request to order the Prosecution to 'refrain from making unfounded and contemptible accusations against the Defence in the future'.²⁵ Considering that the Request is rejected and that the defence's responses to the

¹⁹ In this regard, the Chamber makes reference to the respective JEM metadata regarding the disclosure dates for all items listed in the Annex to the Request, ICC-01/14-01/18-2657-Conf-Anx. *See also* Ngaïssona Defence Response, ICC-01/14-01/18-2670-Conf, para. 11; Request, ICC-01/14-01/18-2657-Conf, para. 9.

²⁰ *See also* Request, ICC-01/14-01/18-2657-Conf, para. 20.

²¹ *See* fn. 11 above.

²² *See also* Bemba Decision, ICC-01/05-01/08-3029, para. 30.

²³ The Chamber recalls that the Prosecution justifies its Request, *inter alia*, as being 'responsive to **prospective** Defence assertions concerning the credibility of Prosecution witnesses affected by the improper pattern of conduct' (*emphasis added*), *see* Request, ICC-01/14-01/18-2657-Conf, para. 2.

²⁴ Initial Directions on the Conduct of the Proceedings, ICC-01/14-01/18-631, para. 64.

²⁵ *See* Ngaïssona Defence Response, ICC-01/14-01/18-2670-Conf, paras 39-50.

Request will be publicly available, the Chamber does not consider any further relief necessary at this stage.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

INSTRUCTS the Registry to reflect CAR-OTP-00036817 as formally submitted in JEM;

ORDERS the Prosecution to file a public redacted version of the Request, ICC-01/14-01/18-2657-Conf, within one week of the present decision; and

ORDERS the Ngaïssona Defence and the Yekatom Defence to file public redacted versions or request reclassification of the Ngaïssona Defence Response, ICC-01/14-01/18-2670-Conf, and the Yekatom Defence Response, ICC-01/14-01/18-2672-Conf, within two weeks of the present decision, taking into account the redactions applied by the Prosecution to the Request.

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



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 17 September 2024

At The Hague, The Netherlands