

**Cour
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**International
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Court**

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TRIAL CHAMBER V

Before: Judge Beti Hohler , Presiding Judge
Judge Joanna Korner
Judge Keebong Paek

SITUATION IN CENTRAL AFRICAN REPUBLIC II

***IN THE CASE OF THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

**Public Document
with Confidential Annexes A, B and C**

**Public Redacted Version of “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)”, ICC-01/14-01/18-1748-Conf, 10 February 2023**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Defence for Mr Ngaïssona (the 'Defence') requests Trial Chamber V (the 'Chamber') to reject the Prosecution "Request for leave to add one item to the List of Evidence" (the 'Request') notified on 15 December 2022.¹ Despite the Chamber ordering the Prosecution to request such additions on an exceptional basis,² this constitutes the eleventh request made by the Prosecution to add items to its List of Evidence (the 'LoE').³

2. The Defence opposes the Request. First, the Defence submits that the Chamber should dismiss the Request *in limine* since (a) the Prosecution has not adequately explained why the Item was only disclosed now and what are the circumstances of the Item's creation; (b) the nature and amount of the material is in practical terms unknown. In the alternative the Request should be rejected since (c) the Item does not have the prospective significance to justify the prejudice that its addition to the LoE would occasion; and (d) the addition of the Item to the LoE would be prejudicial.

3. The Prosecution Request consistently minimises and misrepresents the prejudicial nature of such late requests. It is also baffling that the Prosecution refuses to provide the full forensic picture of this item⁴ especially when the Defence could not rely at face value upon almost any of the metadata it initially provided.⁵

II. Confidentiality

4. This response is filed as confidential pursuant to regulation 23 (1) *bis* of the Regulations of the Court, as it responds to a filing of the same classification. A public redacted version will be filed in due time.

¹ ICC-01/14-01/18-1702-Conf.

² ICC-01/14-01/18-1206, para. 8; ICC-01/14-01/18-1301 30-09-2022, para. 13.

³ 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 and ICC-01/14-01/18-1653-Conf.

⁴ Annex A, Prosecution emails of 26 January 2023 16:53 and 13 January 2023 17:38, pp. 4-6.

⁵ See paras 9, 17, 19, and 28 *below*.

III. Relevant Procedural History

5. On 16 July 2020, the Chamber ordered the Prosecution to disclose all incriminatory materials by 9 November 2020 and to file a corresponding LoE containing all the materials it intended to submit as evidence during trial by the same deadline.⁶ The Chamber indicated that, in order to add materials to the LoE after the deadline of 9 November 2020, the Prosecution should seek leave from the Chamber.⁷

6. Between 9 November 2020 and 4 November 2022, the Prosecution filed ten requests to amend its LoE,⁸ despite the Single Judge's instructions to the Prosecution "to thoroughly review its List of Evidence for completeness" and the expectation that "any additions thereto are sought on an exceptional basis and in a timely manner in advance of the hearing to avoid wasting valuable court time".⁹

7. On 15 December 2022, the Prosecution filed the Request seeking the late addition to its LoE of a contact list¹⁰ (the 'Item') extracted from a phone collected by national authorities during [REDACTED] search and seizure operation at the alleged [REDACTED].¹¹

8. On 20 December 2022, the Chamber granted the Defence's request for an extension of time to respond to the Prosecution's Request pursuant to Regulation 35 of the Regulations of the Court. The deadline to respond was set to 30 January 2023.¹²

9. Subsequently, on 19 January 2023,¹³ the Defence sought disclosure of further information about the circumstances of the Item. The Prosecution responded on 26

⁶ ICC-01/14-01/18-589.

⁷ *Ibid*, para. 16.

⁸ 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-01/14-01/18-1212-Conf; ICC-01/14-01/18-1285-Conf; ICC-01/14-01/18-1330-Conf; ICC-01/14-01/18-1394-Conf and ICC-01/14-01/18-1653-Conf.

⁹ ICC-01/14-01/18-1597-Conf, para. 22.

¹⁰ CAR-OTP-00000637.

¹¹ Request, para. 2.

¹² See email from the Chamber on 20 December 2022, at 13:03.

¹³ Annex A, Defence email of 19 January 2023 10:03, pp. 4-5.

January 2023.¹⁴ The Prosecution attached 13 photographs¹⁵ that it explained depict “certain SMS/WhatsApp messages were taken preliminarily to assess the relevance of the phone’s potential content to the investigation.”¹⁶ On 27 January 2023, the Trial Chamber granted¹⁷ a request to extend the deadline for a response to 10 February 2023 following requests from the Defence¹⁸ because of *inter alia* the disclosure of the 13 photos. On 3 February 2023, the Prosecution provided the full chain of custody and metadata for the 13 photographs. Following further queries, the Prosecution again clarified the chain of custody on 7 February 2023.¹⁹

IV. Applicable Law

10. In the first decision on whether to grant the Prosecution leave to add items to its LoE,²⁰ 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.”²¹ The factors to consider in ruling on a request 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 material; and (5) its prospective significance in light of the charges brought against the accused and the rest of the available evidence.²²

11. In that decision, the Chamber reasserted the importance of the Prosecution’s LoE as a procedural guarantee for Defence trial preparation. It further clarified that

¹⁴ Annex A, Prosecution email of 26 January 2013 16:53, p. 4.

¹⁵ CAR-OTP-00000650, CAR-OTP-00000651, CAR-OTP-00000653, CAR-OTP-00000655, CAR-OTP-00000657, CAR-OTP-00000658, CAR-OTP-00000660, CAR-OTP-00000662, CAR-OTP-00000663, CAR-OTP-00000664, CAR-OTP-00000665, CAR-OTP-00000666, and CAR-OTP-00000667.

¹⁶ Annex A, Prosecution email of 26 January 2013 16:53, p. 4.

¹⁷ Email, 27 January 2023 17:34, subject ‘Decision on the Urgent Yekatom Defence Request for extension of time to respond to Prosecution’s Request ICC-01/14-01/18-1702-Conf’.

¹⁸ Yekatom Defence email, 27 January 2023 14:14, ‘Urgent Yekatom Defence Request for extension of time to respond to Prosecution’s Request 1702-Conf’ and Ngaïssona Defence email, 27 January 2023 14:43, ‘RE: Urgent Yekatom Defence Request for extension of time to respond to Prosecution’s Request 1702-Conf’.

¹⁹ Annex A, Prosecution email of 7 February 2023 15:34, p. 2.

²⁰ ICC-01/14-01/18-989-Conf.

²¹ ICC-01/14-01/18-989-Conf, para. 5.

²² *Ibid*, para. 5.

addition was possible where items were received “only after the time limit for the provision of the Prosecution’s List of Evidence expires”, or the relevance of certain others became “apparent with the development of the trial proceedings”.²³

V. Submissions

12. The Prosecution’s submissions with respect to the Item fall short of fulfilling the criteria required by the Court’s jurisprudence and this Chamber’s approach concerning late additions to the LoE.

A. The Prosecution has not adequately substantiated why the Item was disclosed now and the circumstances of the Item’s creation

a) The delayed disclosure has not been explained and the chain of custody of material associated with the Item has been riddled with errors

13. To justify its Request to add the Item in the LoE after the set deadline, the Prosecution claims that “[t]he Registry provided the Prosecution with access to the relevant phone on 11 November 2022, following which the contact list was extracted on 15 November 2022, and the Item registered in Ringtail disclosed to the Defence on 2 December 2022.”²⁴ While the date of the disclosure to the Defence is accurate, other available information leads to more questions than answers. There are gaps and inconsistencies in the information that the Prosecution has communicated *inter partes* or included in the disclosed chain of custody and metadata. To properly adjudicate the Request, the Chamber must be provided with answers to significant questions regarding the identity of persons handling the item, the owner of the item, the integrity of the item, and the chain of custody and its metadata. Therefore, the Defence requests that the Request be dismissed *in limine*.

14. According to the Request and *inter partes* follow-up, the chronology of the Prosecution obtaining, extracting and disclosing the Item is:

a. March 2022 – [REDACTED];

²³ *Ibid*, para. 6.

²⁴ Request, para. 2.

- b. 28 June 2022 – [REDACTED]²⁵ a Prosecution request to examine the phone within the Registry;
- c. 20 July 2022 – the Prosecution examined the phone and created a forensic copy, but left the forensic copy in the possession of the Registry;
- d. 11 November 2022 – the Registry permitted the Prosecution to examine the forensic copy of the phone; and
- e. 15 November 2022 – the Prosecution created the Item from the forensic copy.

15. From the disclosed material and *inter partes* explanations, the above timeline leaves the following important questions unanswered, which impact the integrity of the Item and the fairness of the Request:

- a. Why was the phone not available to the Prosecution between March and 28 June 2022?
- b. Why, following the decision of 28 June 2022, did it take a full month before the Prosecution examined the phone?
- c. Why did it take “several contacts with the Registry”²⁶ to obtain access in late 2022?
- d. And why were the 13 photographs only taken in October and November 2022 and who specifically took them?

16. Cross cutting the above questions is the larger question of what entity (State or organ of the Court) was in possession or **control** of the phone from which the Item was ostensibly extracted during various periods. This is important to confirm that the Item’s integrity was not compromised or that the Chamber is not receiving a selection of information that lacks important context. Questions of authenticity, reliability,

²⁵ [REDACTED].

²⁶ Annex A, Prosecution email of 13 January 2023 17:38, p. 6.

admissibility²⁷ and weight are part of the Chamber's ultimate assessment of evidence if the Chamber permits addition to the LoE. However, the Chamber should still consider that compromised integrity would greatly undermine any significance the item might have and is therefore appropriate to consider in the context of the Request. Additionally, answers to these questions will determine whether the time at which the Prosecution sought this addition to the LoE was truly out of its control.

17. The Request mentions that the Registry received the phone "shortly thereafter" the search and seizure operation [REDACTED]. However, the Item's initial chain of custody showed that the phone was handed over by [REDACTED] to a Prosecution analyst²⁸ on 15 November 2022 and from the analyst to the OTP-IEU on 16 November 2022.²⁹ Therefore, it appeared that [REDACTED] was in possession of the phone from 27 February 2022 until 15 November 2022. *Inter partes*, the Prosecution clarified³⁰ that the chain of custody information was incorrect and that the phone [REDACTED]. However, the need for an [REDACTED], coupled with the significant delay of the Registry to provide the Prosecution with an item that would ordinarily be in the Office of the Prosecutor's ('OTP') possession and control, implies that the Registry was not able to share the item with the Prosecution for reasons unknown not only to the Defence but to the Chamber.

18. Who had control of the phone and why it was not provided to the Prosecution is important to evaluate the prejudice caused by the Request. While the delay may not be attributable to the Prosecution – though the Prosecution has not substantiated the cause of the delay – it appears that the phone has been in the possession of some section of the Registry or Court for about eight months without disclosure, and for obscure motives. The Prosecution claims that it is important evidence that merits the exceptional remedy of late addition to its LoE. Irrespective of whether this statement

²⁷ A piece of evidence may be so lacking in terms of the indicia of reliability that is not 'probative' and is therefore inadmissible. See *Prosecutor v. Dario Kordic and Mario Cerkez*, [Decision on Appeal Regarding Statement of a Deceased Witness](#), 21 July 2000, IT-95-14/2-AR73.5, para. 24.

²⁸ [REDACTED], see Prosecution email of 13 January 2023 17:38, p. 6.

²⁹ Annex B.

³⁰ Annex A, Prosecution email of 13 January 2023 17:38, p. 6.

of the significance is accurate, if the Prosecution's view is accepted,³¹ then any delay in the provision of this item is highly prejudicial. Thus, the Chamber and Defence should have access to all available and relevant information.

19. Further, the chain of custody information provided in relation to the 13 related photographs was initially incorrect and continues to raise questions. The Defence inquired on 7 February 2023 as to whether these photos also included 'traceability' information³² since [REDACTED] was also in their chain of custody³³ and, if so, why it appeared to indicate that the phone was transferred from [REDACTED] to the ICC on 31 March 2022 and not 19 March 2022 as previously explained *inter partes*. The Prosecution explained the same day that "these photographs were taken by the OTP at the Court premises from the screen of the phone."³⁴ The Prosecution has not provided an explanation for the 31 March date, but it re-disclosed the chain of custody to reflect 19 March.³⁵ The Prosecution alleges that they created these photographs on 19 October and 11 November 2022.³⁶ If the Prosecution indeed created some of these photographs on 19 October, this means that some of their claims are incorrect, namely (1) that "[t]he Registry provided the Prosecution with access to the relevant phone on 11 November 2022"³⁷ and (2) that the "Prosecution could not have been aware of the existence of this material"³⁸ in its communication to the Chamber of 25 October 2022. The claim that a preliminary assessment³⁹ occurred on 11 November, the same day the Prosecution received the item, also appears inaccurate. It is not clear why a preliminary assessment occurred the same day that handover occurred when in fact an almost identical investigation appears to have occurred on 19 October.

³¹ I.e. that the item has "significant probative value" (Request, para. 5) and "highly relevant attribution information" (Request, para. 2).

³² [REDACTED]. See Annex A, Prosecution email of 6 February 2023 17:39, p. 3.

³³ See Annex C.

³⁴ [REDACTED]. See Annex A, Prosecution email of 26 January 2023 16:53, p. 4.

³⁵ See Disclosure Trial Metadata Reissue package 39. The formal communication has not yet been filed.

³⁶ It was not until 8 February 2022, that the Defence received the corrected chain of custody for these items following a query. See Disclosure Trial Metadata Reissue package 39. The formal communication has not yet been filed.

³⁷ See also Request, para. 2.

³⁸ See also Request, para. 9.

³⁹ See footnote 34 above.

20. Given the evolving information about the phone and the Item, it is surprising that the Prosecution refuses to disclose [REDACTED] or seek the permission of [REDACTED], as requested *inter partes* by the Defence. The Prosecution argues that the Defence does not need the [REDACTED] since it has “access to the relevant information pertaining to the chain of custody through the disclosed metadata.”⁴⁰ The disclosed metadata has been in a constant state of flux as substantiated above. The Defence still does not have full information. While it was correct for the Prosecution to disclose the 13 photographs, they produce questions rather than answers.

b) There are anomalies surrounding the creation of the Item

21. First, the lack of information concerning the integrity of the collection of the phone and Item should lead the Chamber to reject the Request. The Prosecution has not produced documentation concerning the seizure of the phone and has rejected a request to provide a forensic report.

22. However, whether the integrity or reliability of information in the Item was impacted by the person interacting with the phone also arises from an examination of the 13 photographs disclosed by the Prosecution. Digital evidence collection is a specialised skill and can compromise the integrity of the material if incorrectly executed.⁴¹ The “best chance of recovery” includes the practice to “[d]isconnect mobile devices from their networks to ensure data is not remotely modified or destroyed.”⁴² There are indications in disclosed material that this may not have been the case.

23. As concerns the Item, the 13 photographs suggest that someone accessed the phone before the Item was created and may not have disconnected the phone from the network. While it appears that ‘airplane mode’ is on, one of the photographs depicts a message received “aujourd’hui”.⁴³ This suggests that someone connected the phone to a network that could have altered its contents.

⁴⁰ Annex A, Prosecution emails of 26 January 2023 16:53 and 13 January 2023 17:38.

⁴¹ [SWGDE Best Practices for Mobile Device Evidence Collection & Preservation, Handling, and Acquisition, v1.2](#) (‘SWGDE Best Practices’ - last accessed: 10 February 2023), s. 5, p. 10.

⁴² SWGDE Best Practices, s. 5.4, p. 13.

⁴³ CAR-OTP-00000664.

24. While it is unclear whether the integrity of the information was affected by connecting the phone to a network or software automatically running, the photographs also suggest that some software ran within the phone. The photographs' metadata depict examinations on two dates. Two icons appear⁴⁴ in the upper left corner of the phone on 11 November that are not present on 19 October.⁴⁵

25. The photos also raise the question of whether power losses in the phone have led to data loss or corruption. On 11 November, the phone appears to lose 21% of its charge over two hours.⁴⁶ The phone's clock does not appear to be keeping time, which may also be indicative of battery failures.⁴⁷

26. Before deciding the Request, the Chamber should have a clear record of who handled the phone, what training they had, for how long, etc. Without this, the risk of admitting in the case record an Item which has been meddled – accidentally or intentionally – is simply too high.

c) There are discrepancies intrinsic to the Item

27. Various discrepancies intrinsic to the Item, when set against the other extrinsic discrepancies described above, raise further questions about the timeline of the Item.

28. The Item's date of creation indicated within the Item is wrong according to the Prosecution. The Item indicates on sheet 1 that a file system extraction occurred on 27 May 2022, contrary to what is asserted in the Request, i.e. the extraction of the contact list occurred on 16 November 2022.⁴⁸ The Prosecution indicated *inter partes* that it was

⁴⁴ CAR-OTP-00000663.

⁴⁵ For example, CAR-OTP-00000650.

⁴⁶ Compare CAR-OTP-00000663 and CAR-OTP-00000666. In combination with the chain of custody, it is possible to infer the time at which each photograph was taken from the meta-data title. CAR-OTP-00000650 has, for example, the title [REDACTED].

⁴⁷ CAR-OTP-00000650, from 19 October 2022 appears to have been taken at 11h32 [REDACTED] and the phone time is **22h16**. CAR-OTP-00000663, from 11 November 2022 appears to have been taken at 11h50 [REDACTED]. The phone time is **1h25**.

⁴⁸ Request, para. 2. The Request indicates 15 November 2022; however, this appears to be a clerical error as the updated chain of custody and Prosecution communications indicate that this was 16 November 2022. See Annex A, Prosecution email of 13 January 2023 17:38, p. 6.

[REDACTED].” Despite [REDACTED],⁴⁹ it is indicative of a problem in the forensic process and is a non-trivial mistake.⁵⁰

29. The Prosecution’s refusal to disclose the [REDACTED] documenting the extraction process is perplexing.⁵¹ The sole explanation for rejecting the Defence request is that “Trial Chamber V rejected a similar request through its decision ICC-01/14-01/18-1438-Conf.”⁵² Presumably, the similarity, in the Prosecution’s view, is that the issue concerned extraction reports from a phone. Without prejudice to the prior Defence position, there is a difference between the two requests for disclosure.

30. First, that prior decision concerned a request for an extraction report regarding digital materials seized from Prosecution witness P-0889.⁵³ The Chamber found that the Prosecution had provided certain relevant extraction information, albeit not in the form of an extraction report, several months before witness P-0889 testified, and more importantly that certain unanswered aspects of the reliability of the digital evidence could have been addressed by the Defence through its examination of P-0889.⁵⁴ Here, in contrast, the request concerns another late addition of an item to the Prosecution’s LoE that comes over two years after the expiration of the deadline for the Prosecution to submit its LoE. It concerns certain attributions and contacts for witnesses who have already testified such as [REDACTED]. Moreover, unlike Witness P-0889, the Prosecution has not identified the owner of the phone and the two possibilities, [REDACTED], are not scheduled to testify.

31. Second, the Chamber *did* consider the discrepancies in the previously disclosed items material to Defence preparation as it ordered the Prosecution to provide

⁴⁹ See Annex A, Prosecution email of 13 January 2023 17:38, p. 6.

⁵⁰ “Documentation should meet the requirements of the organisation’s policies and should at least contain information on evidence handling, examination information and a report of findings”, see Scientific Working Group on Digital Evidence, [SWGDE Best Practices for Mobile Phone Forensics, Version 2.0 \(February 11, 2013\)](#) (last accessed: 10 February 2023), p. 9.

⁵¹ See Annex A, Prosecution email of 13 January 2023 17:38, p. 6.; see also See Annex A, Defence email of 19 January 2023 10:03, p. 5 : [REDACTED].

⁵² See Annex A, Prosecution email of 13 January 2023 17:38, p. 6.

⁵³ ICC-01/14-01/18-1438, para. 16.

⁵⁴ *Ibid.*

explanations,⁵⁵ which the Prosecution ultimately produced. Here, there are also discrepancies the Prosecution has not fully explained. Notwithstanding the Prosecution's invitation for the Defence to examine the Item with the Registry, the burden is on the Prosecution to justify the addition of this item to its LoE despite the undue prejudice it causes. The Defence should not need to invest resources when the Prosecution has failed to provide important information in relation to a request that must be exceptionally justified.

32. Evidence integrity is crucial in a criminal trial and the chain of custody ensures that evidence is free from tampering, manipulation or mishandling. The evaluation of the prospective significance criterion⁵⁶ of the Item must take into account major issues with the Item itself. The Request, specifically and unequivocally announced that the Item will be part of a bar table motion.⁵⁷ Allowing its late addition to the LoE without answers from the Prosecution on the issues at hand would be prejudicial to Defence rights. For this reason, the Chamber should reject the Request *in limine*.

B. The Request should be dismissed *in limine* as the nature and amount of the material is unknown

33. The Prosecution admits that only “a time-sensitive preliminary analysis”⁵⁸ was performed and the full analysis “is still to be completed”. As such, the nature and amount of information that will result from the analysis is unknown. Significantly, it remains unknown who is the owner of the phone from which the item was extracted. While it was assumed to have been [REDACTED], through the Prosecution's disclosure of the 13 photographs, it is now clear that this assumption is either false or incomplete. If the Prosecution cannot provide the basic answer as to who owned or used the phone, it is impossible for the Chamber to evaluate the significance of any list of contacts extracted from it. Further, the Prosecution does not know what kind of information it will identify and, most importantly, whether that information is

⁵⁵ *Ibid*, para. 17.

⁵⁶ *See* para. 10 *above*.

⁵⁷ Request, para. 8.

⁵⁸ *Ibid*.

relevant to the case. Consequently, the Defence cannot respond to the anticipated unknown prospective significance. This concern is yet another facet of the issue previously raised by the Defence in respect to attributions the Prosecution had not yet specified and the consequent risk of trial by ambush.⁵⁹

34. As stated by this Chamber, the issue of the evidence's prospective significance is a separate issue from the Article 69(4) criteria upon which the Chamber would assess the evidence if it were to be submitted.⁶⁰ Therefore, the Prosecution must fully substantiate the prospective significance of the items in its Request for the Chamber to determine whether it should be added to the Prosecution's LoE. The Prosecution's failure to do so should result in the dismissal of the request *in limine*.

C. The Item does not have the prospective significance to justify the prejudice that the addition to the LoE would occasion

35. In disclosing evidence late and requesting its addition to the LoE, the Prosecution must either show that the new evidence is more compelling than previously disclosed evidence, or that it brings to light previously unknown facts that have a significant bearing upon the case. In *Katanga*, the Chamber held that

[i]f the Prosecution seeks to disclose newly discovered incriminating evidence after the applicable time limit, it must convince the Chamber of the significance and relevance of the newly discovered evidence and the need for the Chamber to consider it in the interest of having a better understanding of the case and the establishment of the truth. It does not suffice, in this regard, for the Prosecution simply to argue that the evidence is new.⁶¹

36. Under the *Katanga* jurisprudence, the Chamber should reject the Request. The Request mostly argues that the Item should be added since it is new. The Prosecution submits that the Item contains, *inter alia*, telephone attribution information previously unknown. This new information allowed the Prosecution "to identify new contacts

⁵⁹ ICC-01/14-01/18-1377-Conf, paras 33-46 also cited and discussed in ICC-01/14-01/18-1409-Red, para. 20.

⁶⁰ See e.g. ICC-01/14-01/18-989, para. 11 ; ICC-01/14-01/18-1573, para. 28.

⁶¹ *Prosecutor v. Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP- 1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 30.

between key individuals and participants in the Anti-Balaka leadership during the period at issue in this case.”⁶² The Request both fails to clearly lay out the importance of this new information, and overstates its prospective significance.

a) Alleged telephone attributions

37. At least two attributions the Prosecution claims are new⁶³ already exist within disclosed material.⁶⁴ Hence such information is neither “compelling” nor “new”. The Prosecution’s failure to notice that some of the information is duplicative should lead the Chamber to scrutinise the Prosecution’s submissions with respect to the previously unknown attributions. The Prosecution has not explained the significance of these attributions to its case, provided that they are accurate.

b) New alleged contacts between key individuals and participants in the Anti-Balaka leadership during the charged period

38. Generally, the Chamber has made clear that call data records showing mere contacts are of limited probative value or use for the case.⁶⁵

39. The Prosecution has listed alleged phone contacts within the Request without explaining their alleged significance. The names of the people the Prosecution attributes to various phone numbers may appear elsewhere in the case-file. However, the burden of trying to predict the relevance of the contacts solely from the Prosecution arguing they show “new contacts between key individuals and participants in the Anti-Balaka leadership during the period at issue in this case” should not be on the Defence. The Request appeals to the unfounded notion of guilt by association without specifics. For example, simply stating that [REDACTED] has no probative value in relation to Mr Ngaïssona’s alleged criminal responsibility for the charged crimes. The alleged contacts provide no information as to the content and purpose of the alleged

⁶² Request, para. 6.

⁶³ Request, para. 5.

⁶⁴ [REDACTED].

⁶⁵ ICC-01/14-01/18-T-127-CONF-ENG RT, p. 79, l. 8-17. ICC-01/14-01/18-T-143-CONF-ENG, p. 40, ll. 8-25; p. 60, l. 22 to p. 61, l. 5; and p. 65, ll. 12-25. ICC-01/14-01/18-T-168-CONF-ENG, p. 52, ll. 3-4. ICC-01/14-01/18-T-089-CONF-ENG, p. 12, ll. 3-7.

conversations, thereby limiting their significance to the case. In short, the Prosecution has not explained how the new evidence relates to its overall case.⁶⁶

c) Pairing the name [REDACTED] to the email address [REDACTED]

40. The Prosecution overemphasizes the Item's prospective significance with respect to the email address [REDACTED]. The argument only rests upon transitive reasoning and is too quick to conclude that the attribution is correct. The Prosecution explains:

the Item contains an entry pairing the name [REDACTED] to the email address [REDACTED]. In another entry, the email address [REDACTED] is listed for the name [REDACTED].⁶⁷

Yet, the Item does not show that the recipient of Mr Ngaïssona's alleged email was [REDACTED].

41. These submissions are mere speculation since the Prosecution has not identified to whom the phone belonged. From the 13 photographs, it appears that certain messages are addressed to [REDACTED]. It is therefore possible that [REDACTED] was the owner of the phone. In this scenario, if [REDACTED] then he would remember his email address and not need to write it next to his name.

42. It is possible that the phone belonged to some as-yet other unnamed individual. Without a clear indication of the phone's owner, the significance of the information in the phone is not possible to assess. Even if the Prosecution produced the owner, it is not clear that they would be able to give clarity as to the information's prospective significance due to the voluminous amounts of information contained within the Item and the limitations of human memory.

43. Finally, the alleged information in the Item is too limited to establish an alleged email link between Mr Ngaïssona and [REDACTED] and to justify the exceptionally

⁶⁶ See *Prosecutor v Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP- 1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, 27 July 2009, para. 30.

⁶⁷ Request para. 7.

late addition of this Item into proceedings. Moreover, if the Prosecution considered this alleged email link significant, it could have sought the contents of the [REDACTED] email account.

D. The request should be dismissed as the addition of the Item to the LoE would be prejudicial

44. The Chamber should consider whether the Prosecution could have acted more expeditiously when evaluating the prejudice. While the Request states that the “Prosecution could not have been aware of the existence of this material, did not possess or control it, nor had the means to locate and secure it”,⁶⁸ the Court’s jurisprudence deems the Prosecution a unitary entity.⁶⁹ This means that if one part of the OTP was aware of the existence of this phone, then ICC law deems the rest of the office, including the trial team prosecuting Mr Ngaïssona, to know about the phone.

45. While the Request nominally concerns only “one” Item, it is a request that concerns thousands of contacts. The sheer volume and complexity of the material is a factor the Chamber should consider in weighing the prejudice to the Defence when deciding the Request. Indeed, the Prosecution admitted it was not able to conduct a full analysis of the material’s significance because of time constraints. It has not yet offered an update, which gives an indication of the scale of prejudice that could be at issue.

46. The Chamber should reject the Request to prevent [REDACTED] transforming the *Yekatom and Ngaïssona* trial into unending proceedings. The 13 photographs hint at other possible items that the Prosecution may have also obtained. This includes the

⁶⁸ Request, para. 9.

⁶⁹ *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the Admissibility of the Appeal, ICC-01/14-01/21-514, 25 October 2022, para. 14; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence Request for Reconsideration and, in the Alternative, Leave to Appeal the “Decision on Witness Preparation and Familiarisation”, ICC-01/12-01/18-734, 9 April 2020, para. 13.

possible existence of (1) emails,⁷⁰ (2) WhatsApp messages,⁷¹ and (3) documents obtained from WhatsApp conversations⁷² or emails.

47. More concerning, phone numbers contained in the Item and associated with Mr Ngaïssona's name in the Request⁷³ are in contact with phone numbers attributed to key insider witnesses who already testified before the Court, namely [REDACTED],⁷⁴ [REDACTED],⁷⁵ [REDACTED],⁷⁶ [REDACTED],⁷⁷ [REDACTED],⁷⁸ and [REDACTED].⁷⁹ Again, the Defence is deprived of the opportunity to confront them with the Item and the telephone numbers therein. As foreseen by the Defence in its Response to the Prosecution's first request to introduce items [REDACTED] into evidence,⁸⁰ the Defence would now be forced to effectively "engage in a growing body of evidence with a receding list of testifying witnesses to confront the evidence with."⁸¹ Given that almost all insider witnesses already testified in Mr Ngaïssona's case, the late addition of the Item would be unduly prejudicial to Mr Ngaïssona's defence right to a fair proceeding. This would create a Catch-22 situation whereby only the recalling of all relevant witnesses would allow the Defence to fully challenge the content of the Item in accordance with Article 67 of the Statute, but where such recalling would infringe on Mr Ngaïssona's right to be tried without undue delay. In both scenarios, the Defence's right to a fair trial would be infringed.

48. Lastly, the Prosecution argues that the addition of the Item would contribute to the expeditiousness of the proceedings and that the Request is not untimely since the Defence has the remainder of the proceedings to address the material.⁸² The Prosecution does not substantiate how the addition of the material would contribute

⁷⁰ See, for example, the mail icon in the upper left of CAR-OTP-00000650.

⁷¹ CAR-OTP-00000662.

⁷² CAR-OTP-00000662.

⁷³ [REDACTED].

⁷⁴ CAR-OTP-2054-1480; CAR-OTP-2019-1364.

⁷⁵ CAR-OTP-2054-1480; CAR-OTP-2054-1482.

⁷⁶ CAR-OTP-2054-1480; CAR-OTP-2019-1364.

⁷⁷ CAR-OTP-2054-1481; CAR-OTP-2019-1364.

⁷⁸ CAR-OTP-2019-2839; CAR-OTP-2019-1361; CAR-OTP-2019-1362.

⁷⁹ CAR-OTP-2019-1364.

⁸⁰ ICC-01/14-01/18-1417-Conf.

⁸¹ ICC-01/14-01/18-1417-Conf, paras 22 and 24.

⁸² Request, paras 3, 9.

to the expeditiousness of the proceedings. In fact, the addition of the Item would cause significant delays. In the Request, the Prosecution notes certain attributions for telephone numbers and contacts between alleged key individuals in the Anti-Balaka leadership who have already testified, namely [REDACTED]. Moreover, for certain phone attributions for individuals such as [REDACTED], the Defence is robbed of the opportunity to examine Prosecution witnesses such as P-2843 who allegedly knew this individual and characterized him as [REDACTED].⁸³ The Defence has lost an opportunity to examine these issues and the only remedy would be to potentially recall these witnesses, which would inevitably delay the proceedings.

VI. Relief sought

49. The Defence respectfully requests the Chamber to:

REJECT the Request *in limine*.

or in the ALTERNATIVE, **REJECT** the Request.

Respectfully submitted,



G. J. Alexander Knoops
on behalf of
Patrice-Edouard Ngaïssona

Dated this 25 February 2026

At The Hague, The Netherlands

⁸³ ICC-01/14-01/18-T-073-CONF-ENG, p. 88.