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**International
Criminal
Court**

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Date: 1 May 2020

PRE-TRIAL CHAMBER II

Before:

**Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

**Public Redacted Version of “Consolidated Defence Response to Prosecution Regulation
35 requests ICC-01/14-01/18-375 and ICC-01/14-01/18-378”, ICC-01/14-01/18-388, 21 October
2019**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. On 25 September 2019, Pre-Trial Chamber II ('the Chamber') adjourned the confirmation of charges hearing in order to allow the Prosecution to respond by way of written submissions to the oral submissions made by the Defence of Mr Patrice-Edouard Ngaïssona ('the Defence') and the Defence of Mr Alfred Rombhot Yekatom.¹ The Chamber's instructions regarding the additional Prosecution submissions were clear. The Prosecution had until 3 October 2019 to make its submissions, and was requested to not make broad statements about the facts, but rather "make reference to specific items of evidence supporting a given allegation" (emphasis added).² Not once did the order mention that the Prosecutor would be permitted to present new evidence in its response to the Defence submissions. However, this is exactly what the Prosecution did, when in complete disregard of its obligations under Rule 121(3) of the Rules of Procedure and Evidence, it referred to 8 documents that were not in its list of evidence in its 3 October submissions.³
2. The Prosecution did not notify the Chamber or the Defence that it intended to present new evidence in its response to the Defence oral submissions. Rather, on 3 October, the day its response was due, and next on 8 October while the Defence was fully occupied with preparing its observations, the Prosecution filed two Regulation 35 requests respectively requesting that the 8 documents be added to its list of evidence.⁴

¹ ICC-01/14-01/18-T-010-CONF-ET, p. 4

² ICC-01/14-01/18-T-010-CONF-ET, p. 4(emphasis added).

³ ICC-01/14-01/18-376, paras 4,9,18,33,41-44,59,94.

⁴ ICC-01/14-01/18-378, ICC-01/14-01/18-375.

3. The Chamber *via* email confirmed the “disruptive impact” of the two requests on the rights of Mr Ngaïssona to prepare the confirmation of charges hearing, and provided an extension of time to respond to the Prosecution request until 21 October 2019. The Defence hereby files its consolidated response to the two requests, and submits that they should be rejected for the following reasons. First, the requests should be dismissed *in limine* for failure to comply with the requirements of Regulation 35 of the Regulations of the Court. Second, accepting the Prosecution’s arguments for adding the items would render null the safeguards provided by Rule 121(3). Third, the items are of such limited probative value that their addition will not assist the Chamber in the determination of the allegations advanced by the Prosecution.

II. Classification

4. The Defence classifies this response as confidential since it is a response to a request that has been filed confidentially. The Defence will file a public redacted version as soon as practicable

III. Submissions

- a. **The requests should be dismissed *in limine* for failure to comply with the requirements of Regulation 35 of the Regulations of the Court**
5. The Prosecution’s requests should be dismissed *in limine* for failure to make any submissions on the two criteria that must be met under Regulation 35 of the Regulations of the Court. When parties make requests for extensions of time under Regulation 35 after the time limit has expired, their applications must show both good cause and that their failure to comply with the deadline was for reasons outside their control.

6. The Prosecution was ordered to disclose all evidence and Rule 77 material by 19 August 2019.⁵ Therefore, the Prosecution's request to add additional items of evidence was made more than six weeks after 19 August deadline had expired. In these circumstances, the Prosecution was required both to show good cause and that it was not able to include these items in its list of evidence for reasons outside of its control.
7. In its 8 October request, the Prosecution does not make any submissions which mention good cause for extending the deadline or its inability to include the items on its original list of evidence for reasons outside of its control.⁶ While the Prosecution, in the 3 October request does make submissions with respect to good cause, it fails to make any mention about whether it was outside of the Prosecution's control to add the items by the deadline.⁷
8. With respect to the item CAR-OTP-2117-0389, the Defence avers that the Prosecution does state that it did not obtain the item until 17 September 2019, and thus, it was not possible to disclose it by 19 August 2019.⁸ However, the Prosecution has not made any submissions with respect to the date at which it filed its request for assistance (RFA) to obtain the document. This information is crucial since if the RFA was made at a late stage in the confirmation proceedings, then the Prosecution's failure to obtain the information by the confirmation hearing is not for reasons outside of its control.⁹
9. Since the Prosecution has failed to substantiate how the two requests meet the two cumulative criteria of Regulation 35 when the deadline has elapsed, the

⁵ ICC-01/14-01/18-199, p.18.

⁶ See ICC-01/14-01/18-378.

⁷ See ICC-01/14-01/18-375. The Prosecution only makes submissions with respect to good cause. Ibid, para. 6, 10.

⁸ ICC-01/14-01/18-375, para. 7.

⁹ Even though this Chamber has found such requests for assistance material to the Defence, Defence is not able to ascertain when such a request for assistance was made since it has not been able to locate it in the Prosecution's disclosures. ICC-01/14-01/18-315-Conf, para. 68

Defence submits that the requests should be dismissed *in limine* without considering the merits.

b. Accepting the Prosecution's arguments for adding the items to its list of evidence would completely render null the safeguards provided by Rule 121(3)

10. In the event the Chamber were to entertain the merits of the Prosecution's two requests, the Defence submits that the reason advanced by the Prosecution for its inability to include the items on its list of evidence is invalid, and accepting such a line of argument would render null the safeguards provided by Rule 121(3). For both requests, the reason the Prosecution advances for not including the items earlier on its list of evidence is that the relevance of the documents was not apparent upon its initial review, and their addition is sought in order to refute specific Defence allegations.¹⁰

11. The Defence submits that such a reason does not constitute good cause and does not demonstrate that the Prosecution's failure to comply with the 19 August deadline was outside of its control. In *The Prosecutor v. Lubanga*, the Appeals Chamber reasoned that good cause under Regulation 35 means that the inability of a party to conform to a procedural rule or regulation "must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligation." The Prosecution's inability to anticipate Defence arguments with respect to the DCC is not a sound reason, since anticipation of defence arguments would be done by any diligent Prosecution. Every single document included in the Prosecution's two requests is submitted for the purposes of proving the acts and conduct of Mr

¹⁰ ICC-01/14-01/18, para 4. ICC-01/14-01/18-378, paras 6-7. The Prosecution did not make this argument with respect to the document CAR-OTP-2117-0389. The Defence has made submissions with respect to the Prosecution's argument regarding this document in paragraph 8 of the present response.

Ngaïssona.¹¹ The Prosecution should have anticipated that the Defence would have contested its allegations with respect the acts and conduct of Mr Ngaïssona during the confirmation hearing.

12. The Defence respectfully submits that granting the Prosecution's request would effectively amount to flouting the procedural safeguards under Rule 121(3) of the Rules. Rule 121(3) guarantees that the Defence is put sufficiently on notice of the evidence the Prosecution intends to rely for the purposes of the confirmation hearing. This 30-day period is the minimum time afforded to the Defence under Rule 121(3) to prepare its submissions on the basis of the evidence disclosed by the Prosecution. If the Prosecution were permitted to amend its list of evidence on the basis of the Defence submissions made during the confirmation hearing, then the right of the Defence to be granted the necessary time to prepare for the confirmation hearing would not be effective since the Defence would never be fully apprised of the Prosecution's evidence until after it had made its submissions. This is exactly what occurred in the instant case.

13. The Prosecution's reliance on these items was a *fait accompli*; it only asked for the Chamber's authorization after it had already made its written submissions in which it referenced each of the 8 items. The Defence therefore was forced to respond to this evidence, despite having very little time and resources to prepare its reply to the Prosecution's response.

¹¹ CAR-OTP-2117-0389(referenced as evidence of the alleged Cameroonian number being attributed to Mr Ngaïssona and of Mr Ngaïssona's presence in France); CAR-OTP-2115-0462 (referenced as evidence of Mr Ngaïssona's alleged presence in France in the summer of 2013); CAR-OTP-2000-0658, and its translation CAR-OTP-2006-0739(referenced as evidence of Mr Ngaïssona allegedly mobilizing the youth in his ministerial position) ; CAR-OTP-2074-0411, CAR-OTP-2100-0042, CAR-OTP-2090-0002(referenced as evidence of Mr Ngaïssona's alleged involvement in COCORA); CAR-OTP-2107-0754(referenced as evidence of Mr Ngaïssona allegedly destabilizing the transitional government instead of working to achieve peace).

14. The Prosecution disclosed only one of these items before the 19 August deadline.¹² One item was disclosed at the end of August 2019.¹³ Significantly, six of the eight items were disclosed in October, nearly two weeks after the parties had made their submissions at the confirmation hearing.¹⁴
15. Moreover, the Defence received the disclosure of four of the items on 7 October 2019,¹⁵ after the Prosecution had filed its response to the Defence oral submissions. During this time, the Defence was in the middle of drafting its reply. The Defence was therefore prejudiced in receiving such late disclosures at such a critical juncture of the Confirmation of charges hearing. It had to devote its resources that were already stretched to the limit to take into account the new disclosure, and then the Prosecution's regulation 35 requests.
16. The Prosecution is incorrect when it argues that this did not prejudice the Defence because either 1.) the evidence did not refer directly to Mr Ngaïssona's direct alleged criminal responsibility¹⁶ or 2.) the evidence related to alleged facts of which Mr Ngaïssona should have been aware.¹⁷ With respect to the argument that the evidence did not refer directly to Mr Ngaïssona's alleged criminal responsibility, the Defence submits that the alleged facts for which the Prosecution seeks to introduce the evidence are related to Mr Ngaïssona's acts and conduct which are relevant for the purposes of the Prosecution establishing the alleged common plan. Since Mr Ngaïssona's alleged criminal responsibility hinges upon the existence of the common plan, the 8 items are directly relevant to it. Regarding the Prosecution's argument that Mr Ngaïssona should have

¹² CAR-OTP-2090-0002 was disclosed on 7 August 2019 in Pre-Confirmation PEXO package 4.

¹³ CAR-OTP-2107-0754 was disclosed on 29 August 2019.

¹⁴ Items CAR-OTP-2117-0389 and CAR-OTP-2115-0462 were disclosed on 1 October 2019. Items CAR-OTP-2000-0658, CAR-OTP-2006-0739, CAR-OTP-2074-0411, and CAR-OTP-2100-0042 were disclosed on 7 October 2019.

¹⁵ See *ibid.*

¹⁶ ICC-01/14-01/18-378, paras 14,16,18; See ICC-01/14-01/18-375, paras 6.

¹⁷ ICC-01/14-01/18-375, paras 6, 10 ; ICC-01/14-01/18-378, para. 12.

been aware of the evidence, the Defence submits that the Prosecution is impermissibly reversing the burden of proof which is prohibited under Article 66 of the Statute. It is for the Prosecution to establish that there are sufficient grounds to believe that the charges against Mr Ngaïssona should be confirmed. The Defence has no obligation to be aware of the hypothetical evidence the Prosecutor may disclose with respect to an allegation related to Mr Ngaïssona. Therefore, the Prosecution has failed to substantiate the lack of prejudice.

17. The Defence notes that regarding the transcript of Witness [REDACTED], the Prosecution submits that there is no prejudice since several other transcripts were disclosed to the Defence and as a result the Defence should have prepared accordingly. The Defence submits that the Prosecution misconstrues its disclosure obligations with respect to Witness interviews. The witness transcripts of a single witness form a whole that is indivisible with respect to the Prosecution's disclosure obligations. The Prosecution is not permitted under the Rules to cherry pick various days or tracks of a witness' statement, and only disclose certain days by the disclosure deadline. The witness transcripts form one statement since they consist of a single witness' account of the events related to the charges. Often, a witness may touch upon an event on Day 1 of a given transcript only to come back to the event on Day 3 and Day 5. Only disclosing certain transcripts by the 19 August 2019 disclosure deadline gives a distorted impression of the witness' statement both to the Defence and to the Chamber, who is also not apprised of the statement as a whole. Proceeding with disclosure of witness transcripts as the Prosecution has done is equivalent to not including certain pages or paragraphs of a non Article 55(2) witness statement, even though such paragraph or page is clearly part of one and the same document. The Defence provides the Chamber with the table below to illustrate how it was prejudiced in its preparations of Witness [REDACTED] statement due to the Prosecution's piecemeal disclosure process:

[REDACTED].

18. Despite all the witness interviews being conducted over a span [REDACTED] in [REDACTED], the Prosecution only disclosed 5 out of [REDACTED] interviews by the 19 August deadline, and thus the Defence was prejudiced in its preparations of this statement. The Prosecution's reasons for disclosing almost 2/3 of the statement after the disclosure deadline are not compatible with the Rules of Procedure and Evidence since the transcripts form one statement, and unless there is an explicit exception such as under Rule 81, it must be disclosed. Thus, the Prosecution should not be allowed to add to its list of evidence [REDACTED] witness transcript, namely CAR-OTP-2107-0754.

c. **Third, the items are of such limited probative value that their addition will not assist the Chamber in the determination of the allegations advanced by the Prosecution**

19. Lastly, the Defence submits that the items the Prosecution seeks to introduce are of such limited probative value that it would be disproportionate with respect to the rights of the Defence to permit the Prosecution to add the items onto its list of evidence. In *The Prosecutor v. Gbagbo*, the Prosecution requested to add a witness statement to its list of evidence under Regulation 35 at the confirmation stage of the proceedings.¹⁸ The Pre-Trial Chamber held that the Prosecution had already submitted evidence with respect to the charged incident in question and so it was “unnecessary and disproportionate to expect the Defence, which has so far been preparing its submissions on the basis of the evidence disclosed by the Prosecutor [...] to analyse and respond also to this

¹⁸ ICC-02/11-01/11-632-Red

item of evidence.”¹⁹

20. Here, like in *Gbagbo*, the Prosecutor is requesting to add items onto its list of evidence whose addition is unnecessary for the Chamber’s determination of the facts since the Chamber has before it Prosecution evidence of a similar nature.²⁰ For example, the Prosecution requests to add a witness statement, news media articles, and an NGO report in support of the allegation that Mr Ngaïssona was involved in the creation or the financing of COCORA. The Prosecution has already referred to such categories of items in its list of evidence,²¹ and thus the Chamber would not be materially assisted by the addition of items CAR-OTP-2074-0411, CAR-OTP-2100-0042, CAR-OTP-2090-0002.

21. Moreover, these items are so lacking in probative value, that for this reason alone they should not be added to the Prosecution’s list of evidence. Media articles whose source is unknown, a witness statement who does not state its source, and a page of an NGO report that consists of an unsourced chart that lists the anti-balaka coordination as being affiliated with COCORA, cannot meaningfully assist the Chamber in determining whether there are reasonable grounds to believe that Mr Ngaïssona founded or financed the group.

22. Similarly, the alleged *proces-verbal*, item CAR-OTP-2115-0462, does not, as admitted by the Prosecution,²² have any bearing on whether Mr Ngaïssona founded the FROCCA group. Moreover, the *proces-verbal* does not give any information relating to Mr Ngaïssona’s presence in France when FROCCA was

¹⁹ ICC-02/11-01/11-632-Red, para. 15

²⁰ The Defence avers that for the items CAR-OTP-2117-0389 and CAR-OTP-2107-0754, there is not similar evidence on record. However, the Defence submits that the probative value of allowing the Prosecutor to submit this evidence would be unfair given the prejudice to the Defence that would be incurred by such submission. See paragraphs 13-18 of the present response.

²¹ ICC-01/14-01/18-282-Conf-AnxB1(‘DCC’), para. 26 footnote 32.

²² ICC-01/14-01/18-375, para. 6.

allegedly founded. Lastly, with respect to Mr Ngaïssona's speech given on 15 March 2013, the Defence submits that this speech is already on record with a different ERN number.²³ Therefore, its addition would do nothing more than needlessly add more documents for the Chamber to review. The Defence submits that the document's translation should not be added since the original language of the item is in French, one of the official languages of the Court. Since the point of contention between the Defence and the Prosecution, is the interpretation of the speech, it should be interpreted in its original version, and not from a translation provided by a party.

23. Given that the additional items are of such limited probative value that they cannot materially assist the Chamber in coming to any determination, the Chamber should find like in *Gbagbo* that their addition is unnecessary, and disproportionate to the rights of the Defence.

RELIEF SOUGHT

24. The Defence respectfully requests the Chamber to:

- **REJECT** the Prosecution's Regulation 35 requests to add 8 additional items onto its list of evidence;

Respectfully submitted,

²³ DCC, para. 31, footnote 46 cites item CAR-OTP-2000-0655, which is the same speech as CAR-OTP-2000-0658, which the Prosecution now seeks to add to its list of evidence.



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Dated this 1 May 2020,

At The Hague, the Netherlands.