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**International
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Court**



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No: **ICC-01/14-01/18**

Date: **12 May 2021**

TRIAL CHAMBER V

Before:

**Judge Bertrand 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 ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Public Redacted Version of “Defence response to ‘Prosecution’s Request for leave to add six Yahoo email threads to the List of Evidence’”, ICC-01/14-01/18-973-Conf, 29 April 2021

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. The Defence for Mr Ngaïssona (“the Defence”) opposes the request of the Office of the Prosecutor (“Prosecution”) seeking leave from the Trial Chamber (“Chamber”) to add six Yahoo email threads to its List of Evidence (“LoE”).¹ The Defence submits that the Request is prejudicial to the right of Mr Ngaïssona to have adequate time to prepare for trial. This prejudice is exacerbated by the fact that the Prosecution has not disclosed the entire body of the 5365 emails with 885 attachments which they received from the [REDACTED] Authorities but has rather “filtered out” the emails and only disclosed those which they consider relevant from their perspective.² The six email threads which the Prosecution now seeks to include in its LoE are a further selection from the disclosed emails. The Defence submits that it is necessary for the Prosecutor to disclose all the Emails they received in order for the six threads to be viewed in their proper context and to determine whether prejudice exists. This would enable the Chamber to properly determine the prejudice occasioned to the Defence by the addition of the six email threads to the LoE.

II. Confidentiality

2. In accordance with regulation 23*bis*(1) of the Regulations, this response is filed confidentially as it responds to a document of the same classification and contains confidential information. A public redacted version will be filed in due course.

¹ ICC-01/14-01/18-958-Conf (‘the Request’)

² The Request, para. 7.

III. Applicable Law

3. Article 67 (1) (b) of the Rome Statute provides that an accused has a right to have adequate time and facilities to prepare for trial.
4. To safeguard this right, Chambers of the Court generally set deadlines within which the Prosecution is required to file its LoE. In this regard, the Single Judge in the *Ongwen* case held that “[t]he provision of a list of evidence by the Prosecution, while not required as such by the legal instruments of the Court, has been ordered consistently by trial chambers of this Court – including in the present case – with a view to facilitating preparation of defence teams by having the Prosecution indicate, prior to the commencement of the trial, the items of evidence which it intends to rely on for trial.... [T]his instrument is an important guarantee for the trial preparation of defence teams before the Court.”³
5. According to the jurisprudence of the Court, a request to add documents into the LoE is not a request for extension of time under Regulation 35 of the Regulations. However, the Chamber must “determine *in concreto* whether reliance on the part of the Prosecution on items of evidence additional to those included in the original list of evidence causes an undue prejudice to the procedural rights of the Defence.” In making this decision the Chamber considers factors including “the extent to which the requested addition is opposed by the Defence, the time when the addition is sought, the nature and amount of the material concerned, the intended purpose for the Prosecution’s requested reliance on such material as well as its prospective significance in

³ *The Prosecutor v. Dominic Ongwen* “Decision on the ‘Prosecution’s Request to Add Transcripts and Seven Additional Documents to its List of Evidence’” ICC-02/04-01/15-619 (2 December 2016) para. 7.

light of the charges brought against the accused and the rest of the available evidence.”⁴

IV. Submissions

6. The Defence strongly opposes the addition of the Emails to the LoE as this would be prejudicial to the right of the Defence to have adequate time to prepare for trial. The Chamber set 9 November 2020 as the deadline for the disclosure of evidence because it considered “a deadline of 90 days before the trial appropriate in order to enable the Defence to adequately prepare for trial.”⁵ The Chamber ordered the Prosecution to provide *inter alia* the LoE, containing the materials which the Prosecution intends to submit as evidence during trial by 9 November 2020, a deadline which elapsed more than five months ago. Besides the Chamber has repeatedly stated that the Prosecution’s investigations should have largely been completed at the confirmation stage.⁶ For example, in its decision of 5 February 2021, rejecting the Prosecution’s request to rely on three of the emails at the Opening Statement the Chamber reminded “the Prosecution again that its investigations should have been largely completed at the stage of the confirmation of charges hearing.”⁷

7. The Defence takes issue with the timing of the Request. The Prosecution indicates that it obtained the emails in January 2021 due to the [REDACTED] authorities’ delay in responding to the Prosecution’s request for assistance for reasons relating to the Pandemic; which request was only sent in March 2020.⁸ The Prosecution argues that they disclosed the items in a timely fashion.

⁴ Ibid, para. 10.

⁵ ICC-01/14-01/18-589, para. 14.

⁶ See transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 12, lines 17-23; Decision on the Prosecution Request for Extension of Time Limit to Disclose certain Transcripts and Translations, 18 November 2020, ICC-01/14-01/18-734, para. 11.

⁷ The Chamber’s email decision “RE: List of Material to be used by Prosecution in the course of the Opening Statement” dated 5 February 2021.

⁸ The Request, para. 6.

However, the Prosecution does not provide convincing arguments to justify why it only requests the emails to be added to the LoE at this moment, in mid-April, three months after having received them. The Defence acknowledges that according to the jurisprudence of the Court, a request to add material to the LoE is not subject to the criteria under regulation 35 Request, nevertheless, the timing of the Request is one of the factors that a Chamber is to consider when dealing with such requests. The Defence submits that this request has been filed in an untimely manner and therefore should be rejected.

8. Furthermore, the Defence submits that the delay in the Prosecution's request to add the material in its LoE is unjustified. Since January 2021, the Prosecution has been aware of the existence of these emails; and since early February (opening statement phase) they have been aware of their intention to rely on those emails as INCRIM against Mr Ngaïssona.⁹ In these circumstances, it is unjustifiable that the Prosecution waited another two months to request that these items be added to its LoE. The Defence assumed these items would not be added to the LoE given the silence on the Prosecution's part and the prejudice caused is significant.
9. The Defence submits that prejudice also arises from the fact that the Prosecution did not disclose the entirety of the emails it received from the [REDACTED] authorities. According to the Request, "[t]he response contained 5265 emails with 885 attachments from [REDACTED] different Yahoo accounts. As soon as these items were downloaded, investigators or analysts reviewed them and filtered out irrelevant items, and then two sets of attorneys reviewed a smaller number to classify them legally, doing a primary and secondary review to prepare them for disclosure, and adding redactions

⁹ See Prosecution email dated 4 February 2021.

where necessary.”¹⁰ With only a fraction of the emails disclosed, neither the Defence nor the Chamber has a full picture of the evidence and has to rely on the Prosecution’s perception of what is relevant. As a result, the Defence is unable to ascertain whether the emails disclosed are only those relevant to the Prosecution’s case against Mr Ngaïssona. Similarly, the Defence cannot overrule the possibility that there may have been potentially exculpatory evidence, or evidence material to the preparation of the Defence, which was considered by the Prosecution as irrelevant and therefore not disclosed. The Defence submits that the Chamber should not allow a narrow selection of emails to be added to the LoE before the Defence is permitted access to the entire body of emails retrieved from the [REDACTED] authorities. Only then can the issue of prejudice be properly determined.

10. The issue of prejudice arises even more because of the existence of authenticity and reliability concerns with the emails. For instance, it appears that Mr Ngaïssona gave two different responses to the same email as illustrated below.¹¹

[REDACTED].

[REDACTED].

11. As can be seen from the two documents above, it appears that Mr Ngaïssona gave two different responses to the same email. The Defence acknowledges that this may be possible within one email chain, but these responses appear as two separate emails as shown above. Since the dates and the times of the two responses are different, it is possible that the two documents are two different responses to the same e-mail chain, whose subject heading is [REDACTED]. However, the manner in which the documents are registered

¹⁰ The Request, para. 7.

¹¹ CAR-OTP-2130-3297 and CAR-OTP-2130-3296

on Ringtail raises questions as to their authenticity. For this reason it is paramount for the Defence to conduct further scrutiny on how the Prosecution obtained, extracted and disclosed the evidence. Without access to the entire body of emails, the Defence is unable to determine whether the Prosecution only disclosed portions which they wish to rely on to prove the charges against Mr Ngaïssona. The Defence is unable to ascertain whether the six email threads which are the subject of the Request reflect an incomplete context, which context is important to assess the issue of prejudice. Therefore they should not be included in the LoE.

12. Furthermore, although the Prosecution submits that the emails are authentic because they come from the provider itself,¹² the documents disclosed have been prepared by the Prosecution who had to make a selection and transform the data received into a readable (.pdf) format.¹³ Furthermore, the format of the emails appear irregular, given they have been prepared and processed by the Prosecution. For instance, there is no usual heading from the email (yahoo) provider. The emails appear to have been strung together by cut and paste method and for this reason the Defence challenges the authenticity and reliability of the emails. The Defence submits that it is necessary for the Defence to have access to all the emails the Prosecution received from the [REDACTED] authorities in a format that is as close as possible to the original.

V. Relief sought

13. The Defence requests the Chamber to:

- a) DENY the Prosecution's request to add the six email threads on to the LoE.

¹² Request, para. 27.

¹³ [REDACTED].

- b) Or in the alternative, before deciding on the Prosecution request, to ORDER the Prosecution to disclose all the requests for assistance made by the Prosecution to the [REDACTED] authorities, all the emails received as a result, as well as reports on how the data was extracted and processed.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 12 May 2021

At The Hague, the Netherlands.