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

Date: **5 August 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 Notice of withdrawal of submission ICC-01/14-01/18-1003-Conf and Request for leave to add two documents to the List of Evidence””, ICC-01/14-01/18-1058-Conf, 12 July 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 (“Defence”) opposes the request of the Office of the Prosecutor (“Prosecution”) seeking leave from Trial Chamber V (“Chamber”) to add two documents to its List of Evidence (“LoE”).¹
2. As will be elaborated below, the Prosecution failed to act diligently and professionally in seeking accessibility to the copies of the [REDACTED] provided by P-2462 (the “Documents”). Had it done so, it would have been able to obtain a copy of them as early as two (2) years ago. This late request for insertion was avoidable and should be rejected.

II. Confidentiality

3. In accordance with regulation 23*bis*(1) of the Regulations of the Court (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 as soon as practicable.

III. Applicable Law

4. 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 the concrete circumstances whether reliance by the Prosecution on items additional to those included in the initial list of evidence causes undue prejudice to the procedural rights of the Defence”.² 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

¹ ICC-01/14-01/18-1042-Conf (‘the Request’).

² ICC-01/14-01/18-989-Conf, para. 5, referring to ICC-02/04-01/15-619, para. 10 and ICC-02/04-01/15-957, para. 6.

material concerned, the intended purpose for the Prosecution's requested reliance on such material as well as its prospective significance in light of the charges brought against the accused and the rest of the available evidence."³

IV. Submissions

5. The Defence strongly opposes the addition of the Documents to the LoE as this would be unduly prejudicial to the procedural rights of the Defence.
6. The Chamber ordered the Prosecution to provide its LoE by 9 November 2020, a final disclosure deadline which was issued with a view of safeguarding the efficiency and fair conduct of the proceedings and which elapsed more than *eight* (8) months ago.
7. The Chamber has repeatedly stated that the Prosecution's investigations should have largely been completed at the confirmation stage.⁴ In its decision of 5 February 2021 rejecting the Prosecution's request to introduce new documents at the eve of trial, the Chamber, after having expressed its concerns and dismay regarding the Prosecution's repeated lack of diligence as regards its disclosure obligations, cautioned that it would "not tolerate avoidable oversights, particularly if they are detrimental to the rights of the accused, and it will certainly not accept any behaviour suggesting that the Prosecution may be acting in bad faith".⁵
8. In the *Kenyatta* case, Trial Chamber V ruled that "[p]ost-confirmation investigation may be appropriate when it pertains to evidence which the Prosecution could not with reasonable diligence have discovered or obtained

³ *Ibid.* See also ICC-02/04-01/15-1314, para. 7.

⁴ See e.g. Transcript of 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 12, lines 17-23; ICC-01/14-01/18-734, para. 11.

⁵ 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.

prior to confirmation.”⁶ As developed below, in the present case, the Prosecution was well aware, as early as June 2019, of the existence of the relevant [REDACTED] in the witness’ possession and could have obtained a copy of them [REDACTED] as early as then.

9. In the *Ongwen* case, where the Prosecution had requested the addition of documents to its LoE less than two months after the final disclosure deadline, the Single Judge was cognizant that “certain relevant materials may be received by the Prosecution only after the expiration of the time limit for the provision of its list of evidence, or that the relevance of certain others may only become apparent to it with the development of the trial proceedings which are necessarily dynamic in nature.”⁷
10. In the present case, the Prosecution is requesting to add the Documents more than eight (8) months after the time limit to file its LoE. While it alleges that it is due to the fact that it received the material only after the time limit’s expiration, *i.e.* on 15 June 2021,⁸ the Prosecution fails to substantiate why it was not able to obtain the Documents long before then.
11. The Prosecution submits that the witness had not brought the material with her when she was first interviewed in June 2019.⁹ The Prosecution then alleges that on [REDACTED] February 2020, its investigators had a follow-up meeting with her and attempted to collect the material from her but she again had not brought it with her.¹⁰ On the same day, she would also have authorized the Prosecution to collect [REDACTED].¹¹

⁶ ICC-01/09-02/11-728, para. 120.

⁷ ICC-02/04-01/15-619, para. 8.

⁸ Request, para. 2.

⁹ Request, para. 7.

¹⁰ Request, para. 8.

¹¹ *Ibid.*

12. The Prosecution, by arguing once again that “[d]ue to COVID-19, as well as security and budgetary restrictions” it would have then been unable to collect the Documents as from [REDACTED] February 2020 is far from convincing in that it suggests that the only way to obtain them would have been by meeting the witness again, when it would have sufficed, as a temporary alternative step, to ask the witness to send a copy of them [REDACTED].¹²
13. This is ultimately what the Prosecution did [REDACTED], but as late as 13 June 2021. And the witness did send the Documents two days later, on 15 June 2021.¹³
14. The Prosecution suggests having been unsure whether the witness was [REDACTED] so on 13 June 2021 she was first asked to confirm this point before being instructed to send the Documents [REDACTED].¹⁴ While it was wise to confirm this point then - as the Prosecution had observed that she [REDACTED]¹⁵ - it also means that it was technically possible for her to send this material [REDACTED] any time before [REDACTED] October 2020. Yet, the Prosecution never asked her that until last month.
15. It means that the Prosecution has waited almost two years before finally asking the witness to send photographs of the material [REDACTED]. It could have asked her in June 2019 during her interview, or even on [REDACTED] February 2020 during the follow-up meeting the Prosecution has reported in the Request or any time before October 2020 [REDACTED]. By choosing any of these options, the Prosecution would have been able to meet the 9 November 2020 deadline.

¹² Request, para. 9.

¹³ Request, para. 11.

¹⁴ *Ibid.*

¹⁵ ICC-01/14-01/18-1003-Conf, para. 14.

16. Therefore, the Prosecution has lacked manifest diligence in seeking access to the Documents, which would have been readily available by the 9 November deadline had the Prosecution exercised the most basic care.
17. In a previous request, the Prosecution's main argument for requesting leave for adding new material to its LoE after the deadline set by the Chamber was that the items in question "were not immediately available when they were requested at the time of the Prosecution's conduct of its investigation or they were not in the immediate possession of the person from whom the document or material was requested".¹⁶ To the contrary in the present case, these [REDACTED], which were from the outset in the witness' possession, would have been immediately available to the Prosecution had it made a request similar to that of 13 June 2021 before 9 November 2020.
18. Furthermore, the intended purpose for the Prosecution's requested reliance on the so-called medical records favours the rejection of the Request. The Prosecution argues that "P-2462's statement expressly mentions the medical records, which independently corroborate her account and bring to light information which may otherwise be unavailable to the Chamber."¹⁷
19. First, the Defence takes issue with the Prosecution's use of the term "medical records" for [REDACTED]. This qualification is not accurate. [REDACTED]¹⁸. [REDACTED]¹⁹ Furthermore, P-2462 refers in her statement to a [REDACTED].²⁰ Therefore, these [REDACTED] cannot be said to be more compelling than evidence already disclosed or that their addition onto the LoE will bring to light previously unknown facts which have a significant bearing

¹⁶ ICC-02/04-01/15-604 and its two confidential annexes, para. 15.

¹⁷ Request, para. 12.

¹⁸ P-2462, CAR-OTP-2111-0452-R02, at 0462, para. 52.

¹⁹ P-2462, CAR-OTP-2111-0452-R02, at 0454, para. 13, [REDACTED].

²⁰ P-2462, CAR-OTP-2111-0452-R02, at 0462, para. 52.

upon the case.²¹ Corroboration originating from [REDACTED], has little value if any. In addition, the Prosecution will have the opportunity during the witness' testimony to ask her all the questions it considers relevant in relation to [REDACTED].

20. Therefore, given the untimely nature of the Request and the manifest lack of diligence of the Prosecution in seeking access to the Documents, the procedural prejudice of adding these two documents to the LoE outweighs any added potential benefits.

21. The Defence takes note of the Chamber's clarification that requests for the addition of items onto the LoE do not concern the submission into evidence of the material in question.²² Therefore, the Defence will not address the question of the reliability and authenticity of the Documents in the present response. However, should the Request be granted and if necessary, the Defence reserves its right to object in due course to the submission into evidence of the Documents, for lack of *prima facie* authenticity.

22. Finally, so far as the Defence is aware, the Prosecution has not disclosed any material in relation to the [REDACTED] February 2020 meeting or its exchanges with [REDACTED] it is referring to in its Request. This material being necessary for the preparation of the Defence, the Defence requests disclosure of the related material, if any.

V. Relief sought

23. The Defence respectfully requests the Chamber to:

²¹ See ICC-01/04-01/07-3059, para. 21.

²² Request, para. 11.

- **DENY** the Prosecution's request to add the Documents on to the LoE, and
- **ORDER** the Prosecution to disclose, pursuant to rule 77 of the Rules of Procedure and Evidence, any document or material related to the follow-up meeting of [REDACTED] February 2020 with P-2462.

Respectfully submitted,



Mr Knoop
Lead Counsel for Mr. Patrice-Edouard
Ngaïssona

Dated this 5 August 2021

At The Hague, the Netherlands.