



Original: English

**No. ICC-01/14-01/18
Date: 7 December 2021**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public

Decision on the Prosecution Request to Add Seven Items to its List of Evidence

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of 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) and 67 of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Prosecution Request to Add Seven Items to its List of Evidence’.

I. Procedural history and submissions

1. On 9 November 2020, the Office of the Prosecutor (the ‘Prosecution’), in accordance with the time limit set by the Chamber,¹ filed its List of Evidence.²
2. On 22 October 2021, the Prosecution filed a request to add seven items (the ‘Items’) to its List of Evidence (the ‘Request’).³ The Prosecution argues that adding the Items to this list is justified because they are of significant probative value and their addition, while causing no undue prejudice to either accused, is in the interests of justice and the Chamber’s determination of the truth.⁴ It explains that the Items were subject to a delayed disclosure order and, ‘[w]hen they were ultimately disclosed on 14 December 2020, following the full implementation of protection measures, an administrative oversight meant that the Prosecution did not at that time seek to add them to its [List of Evidence]’. It further explains that it seeks the addition of the Items now, after being alerted to this ‘by a similar oversight in relation to P-0306’.⁵
3. The Prosecution submits that the Items, which concern P-2620 and P-2582, will assist the Chamber to ascertain that both witnesses were under the age of 15 years while in Mr Yekatom’s group, for the purposes of Count 29.⁶

¹ Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, para. 14, p. 10.

² Prosecution’s List of Witnesses and Evidence, ICC-01/14-01/18-724 (with confidential Annexes A-C) (a corrected version of the List of Evidence contained in Annex C was notified on 8 January 2021).

³ Prosecution’s Request for Leave to Add Seven Items to the List of Evidence, ICC-01/14-01/18-1144-Conf (public redacted version notified on 25 October 2021, ICC-01/14-01/18-1144-Red).

⁴ Request, ICC-01/14-01/18-1144-Red, paras 1, 3.

⁵ Request, ICC-01/14-01/18-1144-Red, para. 4.

⁶ Request, ICC-01/14-01/18-1144-Red, paras 6, 8, 11.

4. The Yekatom Defence (the ‘Defence’) opposes the Request.⁷ It submits that the Prosecution fails to demonstrate good cause for its late request, which causes, ‘even if limited’, prejudice to the Defence.⁸ It further argues that while the Chamber allowed the Prosecution to delay disclosure of *the identity and complete statements* of P-2620 and P-2582, initially by 9 November 2020 and, subsequently, until the full implementation of protective measures for both witnesses, this did not prevent the Prosecution from (i) adding the Items to its List of Evidence, pending disclosure, or (ii) disclosing redacted versions thereof within the deadline and adding them to its List of Evidence.⁹ It further argues that ‘the excuse [of administrative oversight] should not be repeatedly relied on in, nor accepted for, successive such requests’, and raises its concerns as regards ‘what appears to be a pattern of disclosure and notice-related violations emerging as this trial proceeds’.¹⁰

II. Analysis

5. The Single Judge recalls the applicable law for requests to add items to the list of evidence, as set out in a previous decision.¹¹
6. Turning to the specific circumstances at hand, the Single Judge notes that the Defence opposes the Request.
7. The Single Judge further notes that on 14 December 2020, when the Victims and Witnesses Unit (the ‘VWU’) informed the Chamber that protective measures for P-2620 and P-2582 had been fully implemented,¹² the Prosecution disclosed two of the Items concerning P-2620 without redactions (CAR-OTP-2121-2577; CAR-OTP-2121-2595) and redacted versions of the remaining five items (one of them concerning P-2620, CAR-OTP-2121-2578; the rest concerning P-2582, CAR-

⁷ Yekatom Defence Response to “Prosecution’s Request for Leave to Add Seven Items to the List of Evidence”, ICC-01/14-01/18-1144-Conf, 4 November 2021, ICC-01/14-01/18-1165 (the ‘Yekatom Defence Response’), paras 1, 21.

⁸ Yekatom Defence Response, ICC-01/14-01/18-1165, paras 2, 13-14.

⁹ Yekatom Defence Response, ICC-01/14-01/18-1165, paras 15-17.

¹⁰ Yekatom Defence Response, ICC-01/14-01/18-1165, paras 18-20.

¹¹ See Decision on the Prosecution Request to Add Six Email Threads to its List of Evidence, 6 May 2021, ICC-01/14-01/18-989-Conf (the ‘First Decision on Addition of Items’), paras 5-6. See also the jurisprudence referenced therein, nn. 15-20.

¹² Email from the VWU, 14 December 2020, at 12:50.

OTP-2126-0413; CAR-OTP-2126-0414; CAR-OTP-2126-0415; CAR-OTP-2126-0416).¹³ As regards the latter five items, the Prosecution disclosed a lesser redacted version of CAR-OTP-2121-2578 on 13 January 2021 and an unredacted version on 15 April 2021, and unredacted versions of the items concerning P-2582 on 20 October 2021. According to the Prosecution, it only realised that it had not sought leave to add the Items to its List of Evidence once it was alerted to it ‘by a similar oversight in relation to P-0306’ (*i.e.* on 28 September 2021, when it filed its request to add items related to P-0306 to its List of Evidence).¹⁴

8. In the Single Judge’s view, the Prosecution had plenty of occasions to notice that the Items were not included in its List of Evidence and to request leave to add them to it. Further, the Single Judge observes that while the Prosecution detected oversights in relation to P-0306, P-2620 and P-2582 presumably at the same time,¹⁵ it filed a request to add items related to P-0306 to the List of Evidence on 28 September 2021, but failed to do so for P-2620 and P-2582 until 22 October 2021. The Prosecution does not provide any explanation as to why it took almost one additional month to seek the addition of the Items to its List of Evidence, all the more so when the Chamber had instructed it on 29 September 2021 ‘to thoroughly review its List of Evidence for completeness’ and request any additions thereto ‘on an exceptional basis and in a timely manner’.¹⁶ Likewise, the Prosecution does not explain why it disclosed the four items concerning P-2582 in unredacted form only on 20 October 2021.
9. The Single Judge finds the timing of the Request, as well as the timing of the disclosure of the items related to P-2582 in unredacted form, concerning. Nonetheless, noting that P-0396, P-2620 and P-2582 were subject to the same

¹³ Prosecution’s Communication of the Disclosure of Evidence on 14 December 2020, 14 December 2020, ICC-01/14-01/18-772 (with one confidential annex, ICC-01/14-01/18-772-Conf-Anx) (both notified on 15 December 2020). *See, in particular*, the annex, listing the items disclosed on 14 December 2020 as part of the ‘Pre-Trial INCRIM Package 73’.

¹⁴ Email from the Prosecution, 28 September 2021, at 17:37.

¹⁵ In this regard, the Single Judge notes the Prosecution’s submission that ‘[a]lerted to this [referring to the ‘administrative oversight’ concerning the Items] by a similar oversight in relation to P-0306, the Prosecution now seeks to so add the seven documents’ (*see* Request, ICC-01/14-01/18-1144-Red, para. 4).

¹⁶ Email from the Chamber, 29 September 2021, at 10:00.

delayed disclosure order,¹⁷ he finds it plausible that the same oversight occurred in relation to all three witnesses and notes the Chamber's findings in relation to P-0306.¹⁸ In this regard, the Single Judge recalls that while such errors are unfortunate and should be avoided, at times they may occur and, insofar as made in good faith and in the absence of any indication of abuse, do not constitute an impediment to adding items to the List of Evidence. It further recalls that it would be unreasonable for the Chamber, to which a truth-seeking function is assigned by the Statute, to determine that potentially relevant evidence could not, under any circumstances, be used by the Prosecution at trial if not included in the List of Evidence three months before the trial commences.¹⁹

10. Having said that, the Single Judge notes that the Prosecution disclosed the Items almost a year ago and that, while it applied redactions to some of the Items, these were rather limited and did not prevent the Defence from accessing the relevant information contained therein (in particular, concerning P-2620's and P-2582's dates of birth).
11. Further noting the limited volume of the Items (eight pages in total), the Prosecution's anticipated timing of P-2620 and P-2582's testimonies²⁰ and that the Defence qualifies the potential prejudice caused to it as 'limited' or 'likely limited', the Chamber considers that no undue prejudice arises from the timing of the filing of the Request.
12. Moreover, bearing in mind that the Items may assist in ascertaining the ages of P-2620 and P-2582 at the relevant time for the purposes of Count 29, the Chamber also considers that the Items seem to bear prospective significance to the proceedings.

¹⁷ Decision on the Prosecution Request to Vary the Time Limit for Disclosure of Evidence related to Witnesses on the Preliminary Witness List, 11 September 2021, ICC-01/14-01/18-648-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Registry (confidential redacted version notified the same day, ICC-01/14-01/18-648-Conf-Red).

¹⁸ Email from the Chamber, 29 September 2021, at 10:00.

¹⁹ First Decision on Addition of Items, ICC-01/14-01/18-989-Conf, para. 6; email from the Chamber, 29 September 2021, at 10:00.

²⁰ See email from the Prosecution, 1 December 2021, at 17:42, listing them as the 71st and 75th witnesses, respectively. In this regard, the Single Judge also notes that the Chamber is currently only hearing the 23rd witness.

13. For all the reasons stated above, the Single Judge grants the Request.
14. In relation to the Defence's submission that 'the excuse [of administrative oversight] should not be repeatedly relied on in, nor accepted for, successive such requests' and its concerns as regards 'what appears to be a pattern of disclosure and notice-related violations emerging as this trial proceeds', the Single Judge recalls that the Chamber found that the Prosecution had violated its disclosure obligations pursuant to Rule 77 of the Rules of Procedure and Evidence in relation to, *inter alia*, Count 29, and, as a consequence, directed it 'to review the evidence in its possession, and confirm on the record that all documents falling within its disclosure obligations have indeed been disclosed, within one week of notification of the [...] decision'.²¹ Accordingly, and noting that the deadline for this exercise has not yet expired, the Single Judge does not consider that any further action is warranted at this stage.
15. With regard to the List of Evidence, the Single Judge stresses that it expects no more oversights from the Prosecution, and reiterates its previous instruction to thoroughly review its list and request any additions thereto on an exceptional basis and in a timely manner.²²
16. Moreover, and in light of the number of additions to the List of Evidence authorised by the Chamber since the start of this trial, the Single Judge considers that the participants, as well as the Chamber, would be assisted by an updated List of Evidence.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request to add items CAR-OTP-2121-2577; CAR- OTP-2121-2578; CAR-OTP-2121-2595; CAR-OTP-2126-0413; CAR-OTP-2126-0414; CAR-OTP-2126-0415; CAR-OTP-2126-0416 to the Prosecution's List of Evidence; and

²¹ Decision on the Yekatom Defence Motion for Finding of Disclosure Violation and Additional Remedies, 7 December 2021, ICC-01/14-01/18-1202-Conf, para. 22 (public redacted version notified the same day, ICC-01/14-01/18-1202-Red).

²² Email from the Chamber, 29 September 2021, at 10:00. *See also* transcript of hearing, 5 November 2021, ICC-01/14-01/18-T-073-CONF-ENG, p. 3, lines 9-15.

ORDERS the Prosecution to provide an updated List of Evidence within one week of notification of the present decision.

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

A handwritten signature in black ink, appearing to read 'BS', is written over a horizontal line.

Judge Bertram Schmitt

Single Judge

Dated 7 December 2021

At The Hague, The Netherlands