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

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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

Public redacted version of “Prosecution’s Consolidated Request for Leave to Reply to the YEKATOM and NGAÏSSONA Defence’s Responses to the Prosecution’s Request for leave to add Six Items to the List of Evidence, (ICC-01/14-01/18-1238-Conf-Corr) (ICC-01/14-01/18-1239-Conf)”, 13 January 2022, ICC-01/14-01/18-1248-Conf

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

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I. INTRODUCTION

1. The Prosecution requests leave to reply to the YEKATOM and NGAISSONA Defence's Responses to the Prosecution's Request for leave to add Six Items to the List of Evidence ("Responses").¹

2. A limited and focused reply addressing the legal positions advanced in the Responses would assist Trial Chamber V ("Chamber") in the proper determination of the relevant issues, and is otherwise in the interests of justice. These comprise (1) the scope and assessment of relevant factors which a Chamber may reasonably consider in determining whether undue prejudice arises from the timing of requests to add items to a Parties' List of Evidence ("LoE"); (2) whether the Prosecution may rely on the evidence of non-testifying witnesses in the material to be added to the LoE, *inter alia*, in examining other witnesses; and (3) whether continuing investigations into group crimes *in particular*, and the participation of other members suspected thereof, may be properly curtailed due to the start of trial regarding other alleged members of the same group. The Prosecution would also seek briefly to address certain misleading statements by the Defence.

3. A reply in relation to the proposed issues would assist the Chamber in its resolution of the Request by clarifying the facts and applicable law, as well as the determinative factors regarding the disposition of such applications going forward.

¹ See ICC-01/14-01/18-1238-Conf-Corr ("YEKATOM Defence Response"), ICC-01/14-01/18-1239-Conf ("NGAISSONA Defence Response"). See also, ICC-01/14-01/18-1212-Conf (Request).

II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(1) of the Regulations of the Court (“RoC”), this submission is classified as “*Confidential*” as it concerns filings of the same designation. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

5. The Prosecution requests leave to reply on the issues arising from the Responses, as follows:

(1) The scope and assessment of relevant factors which a Chamber may reasonably consider in determining whether undue prejudice arises from the timing of requests to add items to the LoE²

- Whether undue prejudice arises where the Accused has knowledge (actual or constructive) of the subject matter of his prior communications with [REDACTED]³ sought to be introduced.
- Whether or to what extent the Chamber may take into account the challenges of international cooperation, and the logistical and resource constraints arising from the COVID-Pandemic, in the exercise of its broad discretion to determine the question of reasonable diligence⁴ in the collection of evidence.⁵

² See YEKATOM Defence Response, paras. 16-35, and NGAISSONA Defence Response, paras. 6-9.

³ See Prosecution Request, para. 8, and NGAISSONA Defence Response, para. 11.

⁴ See *Prosecutor v. Popovic, et al.*, IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, para. 31 (noting that, “Reasonable diligence must be understood with regard to the realities facing the parties, not measured by what a party with infinite time and limitless investigative resources might have discovered or understood.”)

⁵ See YEKATOM Defence Response, paras. 9-15, and NGAISSONA Defence Response, paras. 6-8. See also, ICC-01/14-01/18-480-Conf-Corr, para. 4.

(2) *The propriety of the Prosecution's intended reliance on the evidence of non-testifying witnesses in material to be added to the LoE, inter alia, in examining other witnesses*⁶

- Whether the manner in which the Prosecution intends to use the prospective evidence is a prerequisite or even a factor in determining an application to add the material to the LoE,⁷ or dispositive thereof

(3) *Constraints on the continuation of the Prosecution's authorised investigation of related group crimes involving other suspected members of the group of which the Accused were a part*⁸

- Whether or to what extent continuing investigations into group crimes *in particular*, and the participation of other members suspected thereof, may be properly curtailed due to the start of trial regarding other alleged members of the same group.⁹
 - i. Does the Statute require the Prosecution to limit its further investigations in respect of the conduct of a related trial, in view of its statutory obligations under article 54(1).¹⁰
 - ii. Can the submission of evidence derived from continuing related investigations be precluded under the Court's regulatory framework on the basis of its timing alone.¹¹

⁶ See YEKATOM Defence Response, paras. 36-43, and NGAISSONA Defence Response, para. 10.

⁷ See ICC-01/14-01/18-989-Conf, para. 5 (noting 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 evidence causes undue prejudice to the procedural rights of the Defence").

⁸ NGAISSONA Defence Response, paras. 4-5, 9.

⁹ See ICC-01/14-01/18-T-012-ENG, p. 14-15, l. 6-20, and p. 17, l. 2-6. See also, ICC-01/14-01/18-474-Red, para. 25; ICC-01/14-01/18-488-Conf, paras. 6-9.

¹⁰ See NGAISSONA Defence Response, para. 9 (asserting that "[REDACTED]").

¹¹ See NGAISSONA Defence Response, para. 7 (arguing that [REDACTED], "[REDACTED]").

6. As noted, the Prosecution would additionally seek briefly to address Defence assertions, which it considers mischaracterise its positions as concerns [REDACTED]'s interview.¹²

IV. RELIEF SOUGHT

7. For the above reasons, the Chamber should permit a consolidated reply to the YEKATOM and NGAISSONA Defence's Responses to the Prosecution Request for leave to add Six Items to the List of Evidence.



Karim A. A. Khan QC, Prosecutor

Dated this 25th day of January 2022
At The Hague, The Netherlands

¹² See NGAISSONA Defence Response, para. 9.