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**International
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Court**

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

Date: **25 January 2022**

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 Items to the List of Evidence’(ICC-01/14-01/18-1212)”, 10 January 2022**

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 14 December 2021, the Prosecution filed its “Prosecution’s Request for leave to add Six Items to the List of Evidence,” (“Prosecution Request”).¹ Despite the Prosecution being ordered to request such additions on an exceptional basis, this constitutes the sixth request made by the Prosecution to add items to its list of evidence.² In this latest request, the Prosecution has shown a total disregard of the procedural safeguards contained both in Trial Chamber V’s (‘the Chamber’) order to disclose all incriminatory material by 9 November 2020³ and in the Chamber’s latest September 2021 order to the Prosecution to review its list of evidence for completeness.⁴ This is illustrated by the Prosecution informing the Chamber and the parties that it is continuing its open-ended investigations against Mr Ngaïssona through [REDACTED] one year after the disclosure deadline set by the Chamber, and nearly eight months after the start of trial.
2. The Defence for Mr Patrice-Edouard Ngaïssona (‘Defence’) opposes the Prosecution Request since none of the factors the Chamber should consider when determining whether leave should be granted to the Prosecution militate in favour of granting the Prosecution Request.

II. Confidentiality

3. This response is filed as confidential pursuant to Regulation 23 (1) *bis* of the Regulations of the Court (the “Regulations”), as it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

¹ ICC-01/14-01/14-1212-Conf.

² ICC-01/14-01/18-958-Conf; ICC-01/14-01/18-1042-Conf; Email sent by the Prosecution, 28 September 2021 at 17:37; ICC-01/14-01/18-1144-Conf; ICC-01/14-01/18-1164-Conf; ICC-01/14-01/14-1212-Conf.

³ ICC-01/14-01/18-589, paras 10, 14.

⁴ Email sent by Trial Chamber V on 29 September 2012 at 10:00.

III. Applicable Law

4. In the first decision the Chamber rendered on whether to grant the Prosecution leave to add items to its list of evidence,⁵ the Chamber found 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 evidences causes undue prejudice to the procedural rights to the Defence.”⁶ In making this determination, the factors to be considered include *inter alia* : (1) the extent to which the requested addition is opposed by the Defence; (2) the time when the addition was sought; (3) the nature and the amount of the material concerned; (4) the intended purpose of the Prosecution’s requested reliance on such material; and (5) its prospective significance in light of the charges brought against the accused and the rest of the available evidence.⁷

IV. Submissions

5. The Defence submits that in these concrete circumstances where the Prosecution is continuing to pursue open-ended incriminatory investigations reliance by the Prosecution on these six items will cause undue prejudice to the Defence. In its “Decision Setting the Commencement Date of the Trial,” the Chamber set the deadline for the disclosure of incriminatory material to 9 November 2020, and did so in full knowledge of the impediments posed by the COVID-19 pandemic.⁸ Further, the Chamber has also determined that ensuring that all items on which the Prosecution intends to rely are on the list of evidence is “essential to safeguard the procedural rights of the Defence.”⁹ The Defence submits that exceptional circumstances, which would allow the Prosecution to

⁵ ICC-01/14-01/18-989-Conf.

⁶ Ibid., para. 5.

⁷ Ibid., para 5.

⁸ ICC-01/14-01/18-589, para. 10; ICC-01/14-01/18-T-012-ENG, page 9

⁹ ICC-01/14-01/18-T-073-Conf-ENG, page 2, line 14.

add items to its list of evidence, which were disclosed as late as August and December 2021 are not present in this case for the following four reasons.

6. *First*, the Prosecution Request is wholly untimely. Unlike other Prosecution requests where the Prosecution attempted to obtain the material well before the expiration of the time limit to file its list of evidence,¹⁰ here, the Prosecution sought to obtain the evidence well beyond the expiration of the deadline.
7. [REDACTED].¹¹ [REDACTED].¹² Given the Prosecution was aware of [REDACTED], and the delays caused by the COVID-19 pandemic, it should have known that in September 2020, [REDACTED].
8. With respect to the items CAR-OTP-2134-0449, CAR-OTP-2134-0441, CAR-OTP-2134-0407, the Prosecution obtained these items in June of 2021, and yet it provides no explanation as to why it only sought their inclusion on the list of evidence six months after having obtained them.¹³ These items were disclosed to the Defence in August of 2021. Had the Prosecution heeded the Chamber's instruction to "thoroughly review its List of Evidence for completeness",¹⁴ it would have disclosed the material as soon as possible to the Defence, and subsequently would have requested their inclusion on the list of evidence. Instead, the Prosecution sat on the material for nearly six months before requesting the Chamber leave to add the items to its list of evidence. The relevance of these items can be determined without [REDACTED], since [REDACTED] do not provide any vital context to their understanding. Therefore, the Prosecution should have sought to seek leave for at least these three items at an earlier stage.

¹⁰ ICC-01/14-01/18-989, para 8; ICC-01/14-01/18-1080, para. 9.

¹¹ Prosecution Request, para. 6.

¹² Ibid.

¹³ Prosecution Request, para. 10.

¹⁴ Email sent by Trial Chamber V on 29 September 2012 at 10:00.

9. *Second*, while the Defence agrees with the Prosecution that the additions are limited in volume, the nature of the evidence prejudices the Defence in that the Prosecution is continuing its evidence gathering in the case against Mr Ngaïssona, more than one year after the expiration of the deadline set by the Chamber. The Prosecution did not even attempt to [REDACTED]. [REDACTED].¹⁵ This conduct suggests that it did not even try to mitigate the prejudice caused by conducting [REDACTED] nearly 8 months after the start of trial.
10. *Third*, the Prosecution never states its intended purpose of relying on [REDACTED] and related documents thereto. The Prosecution is well-aware that the submission of [REDACTED]. However, the Prosecution conspicuously omits mentioning in its request whether it intends to add [REDACTED], and whether it seeks to introduce all six items through [REDACTED]. Such information is crucial for Defence preparations, especially in this context where nearly one year into the start of trial the Defence should be fully apprised of [REDACTED] Mr Ngaïssona.
11. Lastly, the Defence submits that the items do not bear prospective significance in light of the charges brought against Mr Ngaïssona and the rest of the available evidence. Assuming *arguendo* the truth of the content of [REDACTED], they do not bear any significance in light of the charges brought against the accused. [REDACTED].¹⁶ [REDACTED].¹⁷ [REDACTED].¹⁸ Similarly, the two documents [REDACTED], CAR-OTP-2134-0499 and CAR-OTP-2134-0441 and the investigation report related to their extraction, CAR-OTP-2134-0407 do not have any bearing on the charges since there is no nexus between these documents and Mr Ngaïssona. While CAR-OTP-2134-0499 and

¹⁵ [REDACTED]; [REDACTED].

¹⁶ CAR-OTP-2134-1599, at 1603, 1618.

¹⁷ CAR-OTP-2134-1852, at 1865.

¹⁸ CAR-OTP-2134-1599, at 1603, 1617.

CAR-OTP-2134-0441 may have been extracted from [REDACTED].¹⁹ Therefore, these two documents in addition to their extraction report do not have sufficient prospective significance to the charges so as to outweigh the prejudice caused to the Defence if the documents were to be added to the list of evidence.

12. The annexes to [REDACTED] contained in item CAR-OTP-2134-1868 consist of four documents, two of which are items subject to the Prosecution Request, and therefore for these duplicates²⁰ the Defence submits the same arguments regarding their prospective significance to the proceedings.²¹ The remaining two documents consist of two emails. One, is a copy of [REDACTED], which is already in evidence, and therefore its addition would not bear prospective significance to the proceedings. The other email, while not in evidence, does not have any direct bearing on the charges. It is merely an email exchange between [REDACTED] in which no content relevant to the charges is discussed and thus leave should not be granted to add this document to the list.

13. In sum, the Defence submits that none of the factors the Chamber considers in determining whether to grant leave to add the items to the list of evidence weigh in favour of granting the Prosecution Request.

V. Relief sought

14. The Defence respectfully requests the Chamber to REJECT the Prosecution Request.

Respectfully submitted,

¹⁹ CAR-OTP-2134-1852, at 1866, 1867

²⁰ CAR-OTP-2134-1868, at 1868-1869 is the same document as CAR-OTP-2134-0449; CAR-OTP-2134-1868, at 1874-1879 is the same document as CAR-OTP-2134-0441.

²¹ See paragraph 11 of the present response.



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The Hague, 25 January 2022