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**No. ICC-01/14-01/18
Date: 3 February 2022**

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 redacted version of

Decision on the Prosecution Request to Add Six 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’), and Regulation 24(5) of the Regulations of the Court, issues this ‘Decision on the Prosecution Request to Add Six Items to its List of Evidence’.

I. Procedural history

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 14 December 2021, the Prosecution, in accordance with the Chamber’s direction,³ filed its updated List of Evidence.⁴
3. On the same day, the Prosecution filed a request to add six items (the ‘Items’) related to [REDACTED] (the ‘Person of Interest’) to its List of Evidence (the ‘Request’).⁵
4. On 10 January 2022, the Yekatom Defence⁶ and the Ngaïssona Defence⁷ (jointly, the ‘Defence’) opposed the Request.

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, ICC-01/14-01/18-724-Conf-AnxC-Corr).

³ Decision on the Prosecution Request to Add Seven Items to its List of Evidence, 6 December 2021, ICC-01/14-01/18-1206, para. 16, p. 7.

⁴ Prosecution’s Updated List of Evidence, ICC-01/14-01/18-1211 (with confidential Annex A, containing the updated List of Evidence, ICC-01/14-01/18-1211-Conf-AnxA; and confidential Annex B).

⁵ Prosecution’s Request for leave to add Six Items to the List of Evidence, ICC-01/14-01/18-1212-Conf (with confidential Annexes A-F) (public redacted version notified on 21 December 2021, ICC-01/14-01/18-1212-Red).

⁶ Corrected version of ‘Yekatom Defence Response to “Prosecution’s Request for leave to add Six Items to the List of Evidence” (ICC-01/14-01/18-1212-Conf)’, 10 January 2022, ICC-01/14-01/18-1238-Conf, ICC-01/14-01/18-1238-Conf-Corr (public redacted version notified the next day, ICC-01/14-01/18-1238-Corr-Red) (the ‘Yekatom Defence Response’) (with confidential Annex A), paras 2, 45.

⁷ Defence response to “Prosecution’s Request for leave to add Six Items to the List of Evidence”(ICC-01/14-01/18-1212), ICC-01/14-01/18-1239-Conf (public redacted version notified on 25 January 2022, ICC-01/14-01/18-1239-Red) (the ‘Ngaïssona Defence Response’), paras 2, 14.

5. On 13 January 2022, the Prosecution filed a request for leave to reply to the Defence's responses to its Request (the 'Request for Leave to Reply').⁸
6. On 14 January 2022, the Yekatom Defence informed the Chamber that it does not intend to respond to the Request for Leave to Reply.⁹
7. On 17 January 2022, the Ngaïssona Defence responded to the Request for Leave to Reply.¹⁰

II. Analysis

1. *The Request for Leave to Reply*

8. The Prosecution seeks to address, *inter alia*, (i) '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 [...]'; (ii) 'whether the Prosecution may rely on the evidence of non-testifying witnesses in the material to be added to the [List of Evidence], *inter alia*, in examining other witnesses'; and (iii) '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'.¹¹
9. The Single Judge notes that the issues identified by the Prosecution in its Request for Leave to Reply could reasonably have been anticipated in the Request, and further considers that a reply on these issues is not necessary for the adjudication of the Request. Accordingly, the Request for Leave to Reply is rejected.

⁸ Prosecution's Consolidated Request for 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, (ICC-01/14-01/18-1238-Conf-Corr) (ICC-01/14-01/18-1239-Conf), ICC-01/14-01/18-1248-Conf (public redacted version notified on 25 January 2022, ICC-01/14-01/18-1248-Red).

⁹ Email from the Yekatom Defence, 14 January 2021, at 09:26.

¹⁰ Defence Response to the "Prosecution's Consolidated Request for 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, (ICC-01/14-01/18-1238-Conf-Corr) (ICC-01/14-01/18-1239-Conf)", ICC-01/14-01/18-1249-Conf (the 'Response to Request for Leave to Reply').

¹¹ Request for Leave to Reply, ICC-01/14-01/18-1248-Red, paras 1-2, 5, 7.

2. *The Request*

10. The Single Judge recalls the applicable law for requests to add items to the list of evidence, as set out in his previous decision.¹²
11. Turning to the Request, the Single Judge notes that the Items comprise:
 - (i) The transcript of the Prosecution's interview with the Person of Interest on 18 October 2021 (hereinafter: 'Item A');¹³
 - (ii) The transcript of the Prosecution's interview with the Person of Interest on 24 November 2021 (hereinafter: 'Item B');¹⁴
 - (iii) Material annexed to the transcript of the 24 November 2021 interview (hereinafter: 'Item C');¹⁵
 - (iv) A Word document titled [REDACTED] extracted from the computer hard-drive of the Person of Interest by the [REDACTED] authorities (the 'Authorities') (hereinafter: 'Item D');¹⁶
 - (v) A Word document titled [REDACTED] from the computer hard-drive of the Person of Interest extracted by the Authorities (hereinafter: 'Item E');¹⁷ and
 - (vi) A data extraction and analysis report dated 12 January 2021 and issued by the Authorities (hereinafter: 'Item F').¹⁸
12. Turning to the specific circumstances at hand, the Single Judge notes that the Defence opposes the Request.

¹² 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.

¹³ CAR-OTP-2134-1599.

¹⁴ CAR-OTP-2134-1852.

¹⁵ CAR-OTP-2134-1868.

¹⁶ CAR-OTP-2134-0449.

¹⁷ CAR-OTP-2134-0441.

¹⁸ CAR-OTP-2134-0407.

13. The Single Judge considers that the timing of the Request is, as also pointed out by the Defence,¹⁹ concerning. In this regard, he notes that the Prosecution requests addition of the Items over a year after the time limit to file its List of Evidence.
14. However, the Single Judge notes that the Prosecution submits that this is due to ‘circumstances outside its control’.²⁰ In particular, the Single Judge notes the Prosecution’s submissions that efforts to locate the Person of Interest [REDACTED] by the Authorities [REDACTED] were ‘not successful’ and that several circumstances prevented it from conducting its interview with the Person of Interest until 18 October 2021.²¹ He further notes the Prosecution’s submission that, upon commencing the interview on 18 October 2021, [REDACTED]; and that, as result, the interview could only be continued on 24 November 2021.²²
15. Moreover, the Single Judge observes that the Prosecution (i) collected the transcript of the 18 October 2021 interview (Item A) that same day and disclosed it on 29 October 2021;²³ (ii) collected the transcript of the 24 November 2021 interview (Item B) and the material annexed to it (Item C) the next day and disclosed both items on 14 December 2021.²⁴ He thus notes that the Prosecution collected these items as early as possible and proceeded to a reasonably swift review and disclosure.
16. As regards Items D, E and F, the Single Judge observes that while these items were seemingly in the Authorities’ possession since 12 January 2021,²⁵ the

¹⁹ See *e.g.* Yekatom Defence Response, ICC-01/14-01/18-1238-Corr-Red, para. 8, Ngaïssona Defence Response, ICC-01/14-01/18-1239-Red, para. 6.

²⁰ Request, ICC-01/14-01/18-1212-Red, para. 5.

²¹ See Request, ICC-01/14-01/18-1212-Conf, para. 6, where the Prosecution refers to [REDACTED].

²² Request, ICC-01/14-01/18-1212-Conf, para. 6.

²³ Prosecution’s Communication of the Disclosure of Evidence on 29 October 2021, 1 November 2021, ICC-01/14-01/18-1158 (with one confidential annex, ICC-01/14-01/18-1158-Conf-Anx). See, *in particular*, the annex, listing the items disclosed on 29 October 2021 as part of ‘Trial RULE 77 Package 63’, including item CAR-OTP-2134-1599. See also Request, ICC-01/14-01/18-1212-Red, para. 7, n. 5.

²⁴ Prosecution’s Communication of the Disclosure of Evidence on 14 December 2021, 15 December 2021, ICC-01/14-01/18-1215 (with one confidential annex, ICC-01/14-01/18-1215-Conf-Anx). See, *in particular*, the annex, listing the items disclosed on 14 December 2021 as part of ‘Trial INCRIM Package 116’, including items CAR-OTP-2134-1852 and CAR-OTP-2134-1868. See also Request, ICC-01/14-01/18-1212-Red, para. 7, nn. 6-7.

²⁵ The Single Judge notes that Item F, consisting of the report detailing the extraction and analysis of the data – including Items D and E – is dated 12 January 2021 (see CAR-OTP-2134-0407, at 0407).

Prosecution did not collect these documents until 14 June 2021, and only disclosed Items D and E on 4 August 2021²⁶ and Item F on 27 August 2021.²⁷ The Single Judge considers that while the delay in the collection of these three items could be due to reasons beyond the Prosecution's control (including that the Authorities did not make the documents immediately available to it), the subsequent disclosure of the items fell entirely within the Prosecution's responsibility. In this regard, the Chamber recalls that it recently expressed being troubled by the number of times the Prosecution has so far breached its disclosure obligations, and that it expects it to tackle its statutory obligations more diligently in the future.²⁸

17. With regard to the delay between the disclosure of Items D, E and F and the filing of the Request,²⁹ the Single Judge observes that it indeed took four months for the Prosecution to request the addition of those three items to its List of Evidence after their disclosure.³⁰ The Single Judge, however, also notes that the Prosecution was only able to complete its second part of the interview with the Person of Interest on 24 November 2021 and disclosed the transcript of this interview (Item B) together with the material annexed to it (Item C) on 14 December 2021, *i.e.* the same day that it filed the Request. The Single Judge therefore considers that, while unfortunate, it was reasonable for the Prosecution to complete the interview and all other investigative steps concerning the Person

²⁶ Prosecution's Communication of the Disclosure of Evidence on 4 August 2021, 4 August 2021, ICC-01/14-01/18-1084 (with one confidential annex, ICC-01/14-01/18-1084-Conf-Anx). *See, in particular*, the annex, listing the items disclosed on 4 August 2021 as part of 'Trial INCRIM package 105', including items CAR-OTP-2134-0449 and CAR-OTP-2134-0441. *See also* Request, ICC-01/14-01/18-1212-Red, para. 7, nn. 9-10.

²⁷ Prosecution's Communication of the Disclosure of Evidence on 27 August 2021, 30 August 2021, ICC-01/14-01/18-1098 (with one confidential annex, ICC-01/14-01/18-1098-Conf-Anx). *See, in particular*, the annex, listing the items disclosed on 27 August 2021 as part of 'Trial INCRIM Package 107', including item CAR-OTP-2134-0407. *See also* Request, ICC-01/14-01/18-1212-Red, para. 7, n. 11. *See further* Yekatom Defence Response ICC-01/14-01/18-1238-Corr-Red, paras 11, 14.

²⁸ Decision on the Yekatom Defence Motion for Finding of Disclosure Violation and Additional Remedies, 7 December 2021, ICC-01/14-01/18-1202-Conf (public redacted version notified the same day, ICC-01/14-01/18-1202-Red), para. 23.

²⁹ The Chamber notes that the Prosecution disclosed Items D and E on 4 August 2021, and Item F on 27 August 2021; and that it filed the Request on 14 December 2021.

³⁰ *See also* Ngaïssona Defence Response, ICC-01/14-01/18-1239-Red, para. 8.

of Interest before requesting the addition of all the items related to him to its List of Evidence to ensure that they be assessed in their full context.³¹

18. Furthermore, the Single Judge observes that the Items amount to only 84 pages, and that some of the information contained therein is in part duplicative.³² He therefore notes that the Items are limited in volume, as also highlighted by both the Prosecution and the Ngaissona Defence.³³
19. Specifically with regard to Item C, the Single Judge observes that two of its pages include an email [REDACTED].³⁴ The Single Judge notes that this email chain was disclosed on 26 October 2020 under the ERN CAR-OTP-2124-0903, added to the List of Evidence,³⁵ discussed during the trial,³⁶ and introduced as part of P-2841's prior recorded testimony pursuant to Rule 68(3) of the Rules of Procedure and Evidence.³⁷ The Single Judge therefore notes that the Defence was already privy to the information contained therein. Moreover, and noting that the Items partly relate to the circumstances surrounding this email chain and thus may shed further light on this matter,³⁸ the Single Judge is unconvinced by the Defence's submission that adding the Items, and particularly Item C, to the List of Evidence, would be 'entirely superfluous' and 'would not bear prospective significance to the proceedings'.³⁹
20. On the contrary, and bearing in mind the Prosecution's submissions that the Items are 'highly probative as to the actions of BOZIZE and his supporters in

³¹ See, in this regard, Request, ICC-01/14-01/18-1212-Red, para. 7.

³² See Items C, D, E and F.

³³ Request, ICC-01/14-01/18-1212-Red, para. 15; Ngaissona Defence Response, ICC-01/14-01/18-1239-Red, para. 9.

³⁴ CAR-OTP-2134-1868, at 1870-1871 (Item C).

³⁵ List of Evidence, ICC-01/14-01/18-724-Conf-AnxC-Corr, p. 40, entry 1729.

³⁶ See e.g. transcript of hearing, 5 November 2021, ICC-01/14-01/18-T-073-CONF-ENG, p. 73, lines 5 to p. 79, line 3.

³⁷ Second Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-2012, P-0801, P-2027 and P-2841, 22 April 2021, ICC-01/14-01/18-964-Conf, para. 35, p. 14. See also email from the Chamber, 2 July 2021, at 14:07, where the Chamber confirmed that the requirements of Rule 68(3) of the Rules of Procedure and Evidence had been met for CAR-OTP-2124-0903.

³⁸ See e.g. CAR-OTP-2134-1599, at 1600 (Item A); CAR-OTP-2134-1852, at 1853-1854, 1864-1866 (Item B); CAR-OTP-2134-1868, at 1870-1871 (Item C).

³⁹ Yekatom Defence Response, ICC-01/14-01/18-1238-Corr-Red, paras 23, 28; Ngaissona Defence Response, ICC-01/14-01/18-1239-Red, paras 11-12.

CAMEROON in 2013 – including NGAISSONA – in planning and coordinating military operations to regain power in CAR’,⁴⁰ the Single Judge is of the view that the Items seem to bear potential significance to the proceedings.

21. In these circumstances, the Single Judge considers that any potential prejudice caused to the Defence by the addition of the Items to the Prosecution’s List of Evidence is limited in nature and is outweighed by the potential significance to the proceedings that the Items seem to bear.
22. With regard to the Defence’s submissions related to the Prosecution’s ‘failure’ to add the Person of Interest to its Final Witness List,⁴¹ the Single Judge notes that the non-inclusion of a particular individual in this list does not preclude the Prosecution from requesting the addition of items related to such individual to its List of Evidence.
23. The Single Judge further takes note of the Yekatom Defence’s submissions on the discrepancy between, on the one hand, the Prosecution’s interpretation of the content of the Items and, on the other hand, the account of the Person of Interest as set out in the interview transcripts⁴² as well as the evidence heard so far in this case.⁴³ The Single Judge considers these submissions to be premature, recalls that the Request does not concern the submission into evidence of the Items and therefore sees no need to further address any arguments regarding the Prosecution’s interpretation of the evidence contained in the Items. In any event, the Single Judge reiterates that the Chamber will, as part of its deliberation of the judgment pursuant to Article 74(2) of the Statute, assess the evidence holistically.⁴⁴
24. With regard to the Ngaïssona Defence’s submission that the Prosecution is continuing ‘to pursue open-ended incriminatory investigations’, ‘more than one

⁴⁰ Request, ICC-01/14-01/18-1212-Red, para. 14.

⁴¹ Yekatom Defence Response, ICC-01/14-01/18-1238-Corr-Red, paras 17-21; Ngaïssona Defence Response, ICC-01/14-01/18-1239-Conf, para. 10.

⁴² CAR-OTP-2134-1599 (Item A); CAR-OTP-2134-1852 (Item B).

⁴³ See Yekatom Defence Response, ICC-01/14-01/18-1238-Conf-Corr, paras 24-25, 30-41.

⁴⁴ See Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, para. 53; email from the Chamber, 4 May 2021, at 11:44; First Decision on Addition of Items, ICC-01/14-01/18-989-Conf, para. 11.

year after the expiration of the deadline set by the Chamber',⁴⁵ the Single Judge recalls that, according to the Prosecution, it intended to locate and presumably interview the Person of Interest before [REDACTED] (*i.e.* before the 9 November 2020 final disclosure deadline).

25. Nonetheless, the Single Judge recalls, once more, that investigations should largely be completed at the stage of the confirmation of charges hearing.⁴⁶ The Single Judge trusts that the Prosecution has fully completed its investigations in this case and that the interview conducted with a person of interest to the case at such an advanced stage of the proceedings constitutes nothing more than an unfortunate exception.

26. For all the reasons stated above, the Single Judge grants the Request.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request for Leave to Reply; and

GRANTS the Request to add items CAR-OTP-2134-1599; CAR-OTP-2134-1852; CAR-OTP-2134-1868; CAR-OTP-2134-0449; CAR-OTP-2134-0441; CAR-OTP-2134-0407 to the Prosecution's List of Evidence.

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



Judge Bertram Schmitt

Single Judge

Dated 3 February 2022

At The Hague, The Netherlands

⁴⁵ Ngaïssona Defence Response, ICC-01/14-01/18-1239-Red, paras 5, 9.

⁴⁶ See *e.g.* Decision on the Prosecution Request to Vary the Time Limit for Disclosure of Evidence related to Witnesses on the Preliminary Witness List, 11 September 2020, 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), para. 16.