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**International
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Court**

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Date: **10 May 2022**

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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public Redacted Version of "Yekatom Defence Response to 'Prosecution's Request for Partial Reconsideration of the "Decision on the Prosecution Request to Add 21 Items to its List of Evidence and Extend Examination Time for P-0889 (ICC-01/14-01/18-1301-Conf)" (ICC-01/14-01/18-1372-Conf)'" of 6 May 2022 (ICC-01/14-01/18-1386-Conf)

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby respectfully responds to the 'Prosecution's Request for Partial Reconsideration of the "Decision on the Prosecution Request to Add 21 Items to its List of Evidence and Extend Examination Time for P-0889' ('Request')¹
2. The Request should be denied. There are no 'new facts' justifying partial reconsideration of the Chamber's Decision of 4 March 2022 ('Decision')² with respect to the two items of Facebook material ('Two Items'); nor is the sought reconsideration necessary to prevent an injustice. On the contrary, the Request merely constitutes a transparent attempt to circumvent the Chamber's ruling and should be dismissed as such, so as to avoid undue prejudice to the fairness of the proceedings.

PROCEDURAL HISTORY

3. For the sake of judicial economy, the Defence respectfully refers the Chamber to the procedural history of this matter as set out in the Defence's previous Response³ to the Prosecution's Initial Request for late addition to the Prosecution's List of Evidence of P-0889's Facebook material⁴ (respectively, 'Initial Response' and 'Initial Request').

APPLICABLE LAW

4. A Chamber has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute. Reconsideration is exceptional and should only take place if a clear error of

¹ [ICC-01/14-01/18-1372-Conf.](#)

² [ICC-01/14-01/18-1301-Conf.](#)

³ [ICC-01/14-01/18-1292-Conf.](#), paras 3-27. Public redacted version available at: [ICC-01/14-01/18-1292-Red.](#)

⁴ [ICC-01/14-01/18-1285-Conf.](#) Public redacted version available at: [ICC-01/14-01/18-1285-Red.](#)

reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.⁵

SUBMISSIONS

- I. **The Prosecution fails to demonstrate the existence of ‘new facts and information’ that could justify the sought reconsideration.**
5. The Prosecution claim that ‘new facts’ arising from the testimonies of P-0889 and P-0966 – specifically, (a) the family relationship between the interlocutors of the Facebook conversations [REDACTED] justify the sought reconsideration is without merit.⁶
 6. First, the family relationship between [REDACTED] is not a ‘new fact’ arising out of the testimony of P-0889 and P-0996, let alone one that could justify reconsideration. In the Initial Request, filed prior to the testimony of both P-0889 and P-0996, the Prosecution expressly submitted in relation to [REDACTED] that he was ‘presumably [REDACTED]; and further, [REDACTED].⁷
 7. The manner in which this evidence was elicited from P-0889 by the Prosecution further indicates that it had been in possession of information as to these familial links prior to his testimony:

[Prosecution Counsel] [REDACTED]

[P-0889]: Yes, that is [REDACTED].

[Prosecution Counsel]: [REDACTED]?

[P-0889]: Yes, that is also [REDACTED].⁸

⁵ See e.g., *Prosecutor v. Al Hassan*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, [ICC-01/12-01/18-734](#), 9 April 2022, para. 11, and references cited therein.

⁶ [ICC-01/14-01/18-1372-Conf](#), paras. 8-10.

⁷ See, [ICC-01/14-01/18-1285-Conf-Anx](#), pp. 1, 5.

⁸ ICC-01/14-01/18-T-108-CONF-ENG, 39:7-12.

8. Second, and in the same vein, [REDACTED] having joined the GOBERE group,' and his alleged presence 'in or around BENZAMBE at the end of August 2013', is not a 'new fact' for the purposes of the sought reconsideration.
9. On the contrary, the Prosecution has been in possession of this information since 5 March 2021, when it received the Facebook material of P-0889. Specifically, in one of the Two Items (i.e. CAR-OTP-2131-3120 at page 3122), P-0889 is asked by [REDACTED]; to which P-0889 replied, [REDACTED]⁹ In the Request, the Prosecution argues that the term '*benz ville*' is 'very likely' a reference to BENZAMBE.¹⁰
10. Notably, in the Initial Request, no mention is made of this exchange, despite the fact that the Prosecution expressly cites messages at the pages immediately preceding and following it (i.e. pages 3121 and 3123).¹¹ The Prosecution thus appears to have either failed to properly review the Facebook material prior to filing the Initial Request, for information in relation to the factual allegation that [REDACTED]; or alternatively, the Prosecution only made the determination to rely on this factual allegation as part of its case – and by extension, the Facebook exchange in question – after the Initial Request was filed. Either way, the information in question cannot reasonably constitute a 'new fact' justifying reconsideration of the Decision.
11. Furthermore, and even assuming *arguendo* that P-0966's evidence constitutes a 'new fact', the fact that it was elicited by the Prosecution, subsequent to the exclusion of the Two Items pursuant to the Decision, should disallow the Prosecution from relying on this purported 'new fact' in the Request. In this regard, the fact that the Prosecution deliberately and purposefully elicited this

⁹ [CAR-OTP-2131-3120](#), 3122.

¹⁰ [ICC-01/14-01/18-1372-Conf](#), fn. 12.

¹¹ [ICC-01/14-01/18-1285-Conf-Anx](#), pp. 1-2.

information from P-0966 is clear from the manner in which the question was posed:

*Juste parce qu'on est en train de parcourir des noms, quand vous étiez à Gobéré ou en route sur Bangui ou lors des attaques, par exemple, sur Benzambé, aviez-vous eu connaissance qu'une... [REDACTED]*¹²

12. The Prosecution approach in this regard is highly improper. The Initial Request was denied with respect to the Two Items, *inter alia* on the basis that 'the Prosecution provide[d] no explanation for its repeated failure to request the addition of the Items to its List of Evidence, despite several opportunities to do so since collecting them'.¹³ Instead of duly accepting this ruling, the Prosecution appears to have simply adopted a strategy of questioning its witnesses on the basis of the excluded material, and then claiming that evidence elicited in this regard comprises 'new facts' justifying reconsideration of the Decision. Simply put, the Request clearly comprises an attempt to circumvent the Chamber's ruling excluding the Two Items. On this basis alone, the Request should be dismissed.

II. The sought reconsideration is not necessary to prevent an injustice.

13. At the outset, given that the continued exclusion of the Two Items is the result of the Prosecution's own repeated failures of due diligence and non-compliance with directions of the Chamber, the Prosecution's reliance thereon to claim 'injustice' is misplaced, and should be disallowed.
14. Further, the very fact that the information constituting the 'new facts' is itself testimony elicited from Prosecution witnesses directly undermines the Prosecution claim that continued exclusion of the Two Items would constitute an 'injustice'. As the Prosecution states in the Request, 'P-0889 confirmed that

¹² ICC-01/14-01/18-T-116-CONF-FRA, 13:26-28.

¹³ [ICC-01/14-01/18-1301-Conf](#), para. 12; see also, [ICC-01/14-01/18-1292-Conf](#), paras 30-44.

[REDACTED].¹⁴ In the same vein, P-0966 gave evidence as to [REDACTED] in the movement, in the area of Koro-M'Poko and Bossangoa.¹⁵

15. The exclusion of the Two Items notwithstanding, the testimony of P-0889 and P-0966 remain part of the trial record; nor is the Prosecution barred from eliciting evidence on these matters from upcoming witnesses.
16. The suggestion that continued exclusion of the Two Items will 'deprive the Chamber', in any meaningful sense, is thus exaggerated.¹⁶ Indeed, the mere fact that, due to the Prosecution's own repeated failures of diligence, it will have been barred from relying on material with limited corroborative value, clearly does not meet the threshold of an 'injustice' warranting reconsideration of a Chamber decision, especially given the exceptional nature of reconsideration as a remedy.
17. The evidence on the trial record as to the questionable reliability and probative value of Facebook material, and especially the Facebook material of P-0889, further demonstrates the unfounded nature of the Prosecution claims as to the 'injustice' that will result should the Two Items remain excluded.¹⁷
18. The Prosecution also fails to establish how the Two Items demonstrate that [REDACTED], further undermining its claims in this regard.¹⁸

III. The sought reconsideration would prejudice the Defence.

19. First, the Prosecution's approach as adopted in the Request is procedurally unsound, and the Request merits denial on that basis alone.

¹⁴ [ICC-01/14-01/18-1372-Conf](#), para. 9.

¹⁵ Ibid.

¹⁶ Contra, [ICC-01/14-01/18-1372-Conf](#), para. 11.

¹⁷ See, [ICC-01/14-01/18-1341-Conf](#), para. 42-43, and references cited therein.

¹⁸ [ICC-01/14-01/18-1372-Conf](#), para. 11.

20. The Chamber partially denied the Prosecution's Initial Request in expressly considering the prejudice that the unjustifiably late addition of P-0889's Facebook material would occasion to the fairness of these proceedings.¹⁹ The Prosecution's transparent attempt to circumvent this ruling, i.e. its self-serving reliance on 'new facts' that the Prosecution itself purposefully elicited, should not be endorsed. This is especially the case given that, as noted above, reconsideration is an exceptional remedy.
21. Further, the Prosecution approach is prejudicial to judicial certainty. In the Request, the Prosecution has foreshadowed its intention to continue pursuing this approach, and to seek late addition of Facebook material, presumably including material excluded in the Decision, 'as the trial unfolds, and particularly as new information is provided by witnesses.'²⁰ Should this approach be endorsed therefore, the Defence will be faced with further requests for late addition of Facebook material, as well as renewed requests for partial reconsideration of the Decision, on the dubious basis of 'new facts' that the Prosecution will itself have elicited through witness testimony. However, the Defence will have been proceeding through trial with the reasonable expectation that, in accordance with the Decision, this material either was excluded, or was likely to be excluded from the proceedings; and which, as a consequence, would not have been prepared and/or preparing to address. In this respect, this Prosecution approach paradoxically is likely to occasion more prejudice to Mr Yekatom's right to notice and effective defence preparation than granting the Initial Request would have done, given the ongoing lack of certainty that allowing such an approach would foster. Nor can the Defence fairly be expected to second-guess which excluded Facebook Items the Prosecution will intend to introduce and/or re-introduce via this approach.

¹⁹ [ICC-01/14-01/18-1301-Conf](#), para. 14.

²⁰ [ICC-01/14-01/18-1372-Conf](#), para. 13.

22. The Prosecution's apparently ongoing failure to heed the Chamber's repeated warnings as regards seeking leave for amendment to its List of Evidence in a timely manner further militates against granting the Request.²¹
23. As set out above, the Prosecution appears to have made the determination to rely on the factual allegation that [REDACTED] participated in the movement at some point between the filing of the Initial Request and prior to the commencement of P-0966's testimony, on 4 April 2022. Indeed, the deliberate and specific manner in which the issue was raised by the Prosecution with P-0966 leaves no doubt as to the Prosecution's intentions in this regard.²² It was incumbent on the Prosecution to seek reconsideration of the Decision in relation to the Two Items (or at the very least, CAR-OTP-2131-3120) as soon as their intention to (re-)rely on the factual allegations set out in the Two Items crystallised. Instead, the Prosecution waited over two weeks after the conclusion of its examination of P-0966 before filing the Request.²³
24. Any suggestion that the Prosecution was justified in waiting until P-0966 testified, would be undermined by the fact that, as set out above, the Request appears to be part of a broader, strategic attempt to circumvent not only the Decision, but also the safeguards around late amendments to the List of Evidence.²⁴
25. As a result, the Defence has been unable to address this particular factual allegation through P-0966 (or P-0889) having not been provided sufficient notice of this apparently new aspect of the Prosecution case in advance of their testimony.

²¹ [ICC-01/14-01/18-1301-Conf](#), para. 12.

²² See *supra*, para. 12.

²³ The Prosecution concluded its examination of P-0966 on 4 April 2022.

²⁴ See also, [ICC-01/14-01/18-1372-Conf](#), para. 13 (regarding the Prosecution's expressly indicated intention to continue to seek late addition to the List of Evidence of Facebook material).

26. More broadly, this new aspect of the Prosecution case further demonstrates the prejudice that granting the Request would occasion to Defence preparation. Specifically, owing to the tardiness of the addition of these items, the Defence will have been unable to address the issue of [REDACTED] alleged participation in the movement in August 2013 through witnesses – in addition to P-0966 – who themselves claimed to have participated in the movement around that time, and/or other witnesses who may have been in a position to provide evidence on this matter. For instance, through P-0306, who allegedly was a prominent figure in the movement since its inception; or P-2251, who claims [REDACTED];²⁵ likewise, through P-1521, who allegedly [REDACTED]²⁶
27. Lastly, it appears clear that the Prosecution is impermissibly moulding its case as the evidence unfolds.²⁷ In this regard, the Defence recalls the comments of the Presiding Judge regarding the lack of clarity as to the relevance of evidence regarding the various [REDACTED] and links elicited by Prosecution Counsel during the testimony of P-0889.²⁸
28. This lack of clarity causes prejudice to Mr Yekatom's interlinked right to notice and his right to defence preparation;²⁹ and the Prosecution's stated intention to continue to rely on Facebook material as its relevance 'continue[s] to become clear and/or emerge as the trial unfolds' should raise serious concerns in this regard. This newfound, improper Prosecution strategy should be rejected, in order to ensure that the Prosecution case does not undergo a creeping transformation, late amendment by late amendment.

CONFIDENTIALITY

²⁵ ICC-01/14-01/18-T-043-CONF-ENG, 12:18-13:11.

²⁶ ICC-01/14-01/18-T-081-CONF-ENG, 8:1-22.

²⁷ ICTY, *Prosecutor v. Kupreškić et al.*, [Appeals Judgment](#), IT-95-16-A, 23 October 2001, paras 93, 115-125.

²⁸ See, ICC-01/14-01/18-T-108-CONF-ENG, 39:7-41:7.

²⁹ See, *Prosecutor v. Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 17 July 2019, [ICC-02/04-01/15-1562](#), para. 69; see also, [ICC-01/14-01/18-585](#), para. 18, and references cited therein.

29. The Response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed forthwith.

RELIEF SOUGHT

30. In light of the above, the Defence respectfully requests that Trial Chamber V:
DENY the Request.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF MAY 2022



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