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**International
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Date: **30 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 the
Prosecution's "Request for leave to add 103 Items to the List of Evidence",
24 March 2022, ICC-01/14-01/18-1330-Conf', 27 May 2022,
ICC-01/14-01/18-1436-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 Yekatom (“Defence”) hereby responds to the Prosecution “Request for leave to add 103 Items to the List of Evidence” (“Request”).¹
2. The Defence submits that the Request should be rejected due to the Prosecution’s lack of diligences in collecting the documents, the untimeliness of the Request, and the number and voluminous nature of the documents for which addition to the List of Evidence is sought.

PROCEDURAL HISTORY

3. On 16 July 2020, the Chamber ordered the Prosecution to file its List of Evidence by 9 November 2020.²
4. On 10 November 2020, the Prosecution’s List of Witnesses and Evidence was notified to the parties.³
5. Between 16 April 2021 and 6 May 2022, the Prosecution filed seven requests to add items to its List of Evidence;⁴ an eighth request was formulated by email.⁵
6. On 14 December 2021, the Prosecution filed its “Updated List of Evidence”⁶ pursuant to a Chamber order.⁷

¹ [ICC-01/14-01/18-1330-Conf](#). Public Redacted Version also available: [ICC-01/14-01/18-1330-Red](#).

² [ICC-01/14-01/18-589](#), para. 14.

³ [ICC-01/14-01/18-724](#), and more specifically Annex C for the List of Evidence [ICC-01/14-01/18-724-Conf-AnxC-Corr](#).

⁴ [ICC-01/14-01/18-958-Conf](#), [ICC-01/14-01/18-1042-Conf](#), [ICC-01/14-01/18-1144-Conf](#), [ICC-01/14-01/18-1164-Conf](#), [ICC-01/14-01/18-1212-Conf](#), [ICC-01/14-01/18-1285-Conf](#), [ICC-01/14-01/18-1330-Conf](#). Public Redacted Version available for six of those requests: [ICC-01/14-01/18-958-Red](#), [ICC-01/14-01/18-1042-Red](#), [ICC-01/14-01/18-1144-Red](#), [ICC-01/14-01/18-1212-Red](#), [ICC-01/14-01/18-1285-Red](#), [ICC-01/14-01/18-1394-Conf](#).

⁵ See email from the Prosecution titled “OTP request to add P-0306’s Annexes to List of Evidence” sent on 28 September 2021 at 17:37.

⁶ [ICC-01/14-01/18-1211](#) and its annex A [ICC-01/14-01/18-1211-Conf-AnxA](#).

⁷ [ICC-01/14-01/18-1206](#), para. 16.

7. On 24 March 2022, the Prosecution filed its “Request for leave to add 103 items to the List of Evidence”.⁸ A public redacted version of the Request was subsequently filed on 13 April 2022.⁹
8. On 28 March 2022, following a request from the Ngaissona Defence,¹⁰ the Chamber extended the deadline to respond to the Request to 27 May 2022.¹¹

APPLICABLE LAW

9. According to the jurisprudence of the Court, a request to add documents to the List of Evidence is not a request for extension of time under regulation 35 of the Regulations.¹² The Chamber must “determine 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”.¹³ In making this decision the Chamber considers factors including “the extent to which the requested addition is opposed by the Defence, the time when the addition is sought, the nature and amount of the material concerned, the intended purpose for the Prosecution’s requested reliance on such material as well as its prospective significance in light of the charges brought against the accused and the rest of the available evidence”.¹⁴

SUBMISSIONS

10. The Defence submits that the Prosecution’s Request should be rejected due to its untimeliness and lack of diligence on the part of the Prosecution in its requesting the sought documents from the [REDACTED] authorities.

⁸ [ICC-01/14-01/18-1330-Conf.](#)

⁹ [ICC-01/14-01/18-1330-Red.](#)

¹⁰ Email from the Ngaissona Defence to the Chamber sent on 25 March 2022 at 11:48.

¹¹ Email from the Chamber to the Parties sent on 28 March 2022 at 18:35.

¹² [ICC-01/14-01/18-989-Conf.](#), para. 5 and references cited therein.

¹³ [ICC-01/14-01/18-989-Conf.](#), para. 5.

¹⁴ [ICC-01/14-01/18-989-Conf.](#), para. 5.

11. Indeed, the Defence notes that the Prosecution requested on 25 June 2020¹⁵ the Facebook account of several individuals, including [REDACTED] and [REDACTED].¹⁶ [REDACTED] (P-1806) was screened by the Prosecution on 15 February 2018,¹⁷ before being interviewed on 13 and 14 April 2018.¹⁸ The content of the screening note demonstrates that the Prosecution would have been aware of the potential importance of this individual to the case over two years prior to its seeking [REDACTED]'s Facebook account material. Likewise, the potential importance of [REDACTED]'s Facebook material to the Prosecution case should have been self-evident far earlier than 25 June 2020, given to his familial links with the former president of CAR.
12. As stated multiple times during the course of these proceedings, "investigations should largely be completed at the stage of the confirmation of charges hearing".¹⁹ The Defence contends that in sending the request for assistance ("RFA") to the [REDACTED] Authorities in June 2020 regarding individuals it has known to be of particular interest to the case for a number of years, given the absence of any explanation in the Request for such a late request, the Prosecution's conduct exhibits a lack of due diligence.
13. It is recalled that the List of Evidence is an instrument that is "an important guarantee for the trial preparation of defence teams before the Court",²⁰ which explains why the Chamber set a deadline before the beginning of the trial for its notification. It is submitted that the Prosecution should be barred from amending its List of Evidence with items that it could have reasonably obtained before the set deadline; otherwise, the main purpose of this list, which is to

¹⁵ Request, para. 3.

¹⁶ *Ibid*, para 2.

¹⁷ P-1806: [CAR-OTP-2070-0314-R01](#).

¹⁸ P-1806: Transcripts from [CAR-OTP-2102-0963-R01](#) to [CAR-OTP-2102-1090-R01](#).

¹⁹ [ICC-01/14-01/18-1270-Red](#).

²⁰ *Prosecutor v. Ongwen*, Decision on the "Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence", 2 December 2016, [ICC-02/04-01/15-619](#), para. 7.

facilitate the preparation of the defence in the context of complex and document-heavy international criminal cases, would be defeated.

14. This primary purpose of the List of Evidence is especially compromised in the present instance, where the documents for which addition is sought amounts to more than 5500 pages, and tens of thousands of Facebook messages. The Defence contends that, absent any justification by the Prosecution as to why the RFA was sent so late, it is submitted that the Chamber should reject the Request as it would cause undue prejudice to the Defence.
15. Finally, the Defence notes that the Prosecution took an entire year after the Facebook material was received to request their addition to the List of Evidence.²¹ The Prosecution's broad-brush attempts at justification for this lengthy delay has been addressed in Defence responses to previous Prosecution requests for late addition of Facebook material, which are adopted *mutatis mutandis* here.²²
16. The Facebook material subject of this latest Prosecution Request for late amendment of the List of Evidence further illustrates that the Prosecution's excuses in this regard simply do not hold water. The substantial delay in seeking the addition of the Facebook items is clearly not "justified and reasonable".²³ It cannot be reasonably suggested that the potential relevance to the Prosecution case of Facebook messages exchanged between individuals known to be in [REDACTED], in relation to the alleged whereabouts and activities of such individuals, including Mr Ngaissona and Bernard MOKOM,²⁴ in the lead-up to and during the indictment period on these proceedings (indeed, nothing less than the very "Strategic Common Plan" argued by the

²¹ Request, para. 3.

²² See, [ICC-01/14-01/18-1292-Conf](#), paras 36-41.

²³ Contra, [ICC-01/14-01/18-1330-Conf](#), para. 11.

²⁴ See e.g., [ICC-01/14-01/18-1330-Conf-AnxB](#), pp 16, 18.

Prosecution in this case²⁵); in relation to fighting in BOSSANGO, YALOE, BOUAR, and other localities;²⁶ in relation to the alleged armament and supply of the Anti-Balaka;²⁷ or indeed, in relation to alleged anti-Muslim sentiment and attacks on “Muslims”, itself arguably the very centrepiece of the Prosecution case;²⁸ – would not have been clear, long before the Request was filed.

17. Perhaps most egregious is the Prosecution’s implied suggestion that the potential relevance of messages between [REDACTED] in relation to the 5 December attack on BANGUI, itself a central incident the subject of seven counts within these proceedings, would not have been immediately apparent upon a preliminary review of the material.²⁹
18. By way of illustrative example: in CAR-OTP-2133-3757, [REDACTED] refutes a claim that the Anti-Balaka were retreating during the 5 December attack, stating *‘Pas encore / Pck je viens d’avoir leur chefs au phone / Ils ont un problème de munition’*.³⁰ In another conversation, P-2843 informed his interlocutor in relation to the Anti-Balaka attack that *‘ils ont pratiquement la maitris de la situation jusqu’au niveau du palais / mais à défaut de matos ils ont été repoussé par l fomac tchadien et la séléka / ils étaient plus de 800 à rentrer ce matin’*.³¹ In another conversation, [REDACTED] states, *‘Les anti sont toujours entrain de contrôle leur position / Et il gère leur munition’*.³² Notably, all of these exchanges occurred on 5 December 2013.
19. With respect, the Prosecution claim that the significance of these messages was not ‘clear instantaneously’, or that these messages were ‘difficult to decipher’,

²⁵ [ICC-01/14-01/18-282-Conf-AnxB1](#), paras 15, 34-37.

²⁶ See e.g., [ICC-01/14-01/18-1330-Conf-AnxB](#), pp 10, 14, 17.

²⁷ See e.g., [ICC-01/14-01/18-1330-Conf-AnxB](#), pp 12, 14, 27, 31, 33, 34, 38, 39, 41.

²⁸ See e.g., [ICC-01/14-01/18-1330-Conf-AnxB](#), pp 2, 4, 6, 31, 33, 38-39.

²⁹ See e.g., [ICC-01/14-01/18-1330-Conf-AnxB](#), pp 10, 14, 17.

³⁰ See, [CAR-OTP-2133-3757](#), at 3767-3771, [ICC-01/14-01/18-1330-Conf-AnxB](#), p. 27; see also, a similar claim as regards BOZIZE’s contact with the Anti-Balaka, at [CAR-OTP-2131-7325](#) at 7334-7337, [ICC-01/14-01/18-1330-Conf-AnxB](#), p. 29.

³¹ [CAR-OTP-2131-6546](#), at 6556-6557; [ICC-01/14-01/18-1330-Conf-AnxB](#), p. 28.

³² [CAR-OTP-2133-3390](#), at 3465-3469; [ICC-01/14-01/18-1330-Conf-AnxB](#), p. 29.

lacks all credibility. Indeed, it is self-evident that messages exchanged in the immediate lead-up and during the 5 December attack would have been potentially highly relevant to the Prosecution case. Nor can it be claimed that the Prosecution was unable to link [REDACTED] to the Facebook account in question, given that information regarding the email address linked to that account – i.e. [REDACTED] – was received simultaneously with the Facebook material in question.³³

20. Naturally, these issues are extensively addressed in the Prosecution's charging documents; this includes the Document Containing the Charges filed on 19 August 2019 – i.e. nearly an entire year before the Prosecution sent the RFA.³⁴ Indeed, given that the Facebook messages and individuals subject of the Request would appear to relate to central issues in the Prosecution case, they would therefore constitute the very target at which the RFA was aimed, and the very reason that the RFA was sent in the first place.
21. On the contrary, the nature of the Facebook messages themselves, as well as the circumstances in which their addition is now sought, would appear to indicate that the Prosecution is simply reviewing its evidentiary holdings and seeking to belatedly add material to bolster its case as the trial progresses. Indeed, the Prosecution admits as much in the Request, submitting that its analysis of the material included 'comparing the content of the messages to [...] trial testimony'.³⁵
22. This on-going moulding of the Prosecution case as the trial progresses is impermissible. Over fifteen months into the trial proceedings, the Defence should not be forced to reckon with tens of thousands of additional Facebook

³³ See, [ICC-01/14-01/18-1330-Conf](#), fn. 27.

³⁴ See e.g., [ICC-01/14-01/18-282-Conf-AnxB1](#), paras 15-17, 34-37, 53-59, 91-101; pp 50, 135-157; 82-85, 150-153.

³⁵ [ICC-01/14-01/18-1330-Conf](#), para. 10; see also, where the Prosecution extensively relies on trial testimony in arguing the relevance and probative value of the messages, e.g. fns 18, 20, 21-22, 37-39, 42-43, 45, 48.

messages being added to the trial record, relating to multiple material aspects of the Prosecution case, all while continuing Defence preparations during the Prosecution's presentation of evidence. Alarmingly, the Prosecution appears to intend to continue to mould its case in this manner, having seemingly flagged its intention to seek addition of further Facebook messages in the Request, which would further demonstrates the Prosecution's clear and continuing disregard for the List of Evidence deadline.³⁶

23. Further, the Request seeks late addition of Facebook conversations of witnesses that have already testified – i.e. P-2843 ([REDACTED], who testified on November 2021, four months prior to the filing of the Request) and P-2841³⁷ ([REDACTED], who testified in May 2021, ten months prior to the filing of the Request); the Defence, as well as the Chamber, have thus been deprived of the opportunity to seek clarification and verification of their messages. In the same vein, the Chamber has heard Prosecution witnesses who claim to have been in exile in Cameroon and in contact with BOZIZE's inner circle – namely, P-1847, P-2673,³⁸ and P-0801 – with whom the Prosecution case as regards the meaning and significance of these messages potentially could have been tested.
24. Indeed, the prejudice occasioned by the Defence's inability to test the Prosecution case with these individuals is compounded by the fact that, as is apparent from the trial record so far – notably including the evidence of P-2841 himself – the reliability and probative value of Facebook material is deeply questionable.³⁹
25. In the circumstances therefore, the Prosecution claim that the late addition of these tens of thousands of Facebook messages, over one year after the

³⁶ See, [ICC-01/14-01/18-1330-Conf](#), para. 10.

³⁷ See, [ICC-01/14-01/18-1330-Conf-AnxB](#), p. 34.

³⁸ Notably, the Request also seeks the addition of [CAR-OTP-2133-6457](#) i.e. a Facebook conversation between [REDACTED] and P-2673 (who himself testified in June 2021; see [ICC-01/14-01/18-1330-Conf-AnxB](#), p. 11.

³⁹ For reasons of judicial economy, the Defence respectfully refers the Chamber to its previous submissions in [ICC-01/14-01/18-1341-Conf](#), para. 42-43, and references cited therein.

commencement of trial, causes no unfair prejudice to the Defence is therefore manifestly without merit.⁴⁰

26. In light of the above, the Defence submits that the Request should be rejected due to its unjustified untimeliness, itself resulting from a clear lack of due diligence on the part of the Prosecution; and due to the substantial prejudicial effect that the addition of this material would have on the fairness of these proceedings.

CONFIDENTIALITY

27. The present response is filed on a confidential basis corresponding to the classification of the Request and due to the presence of information on Prosecution's witnesses. A public redacted version is being filed simultaneously.

RELIEF SOUGHT

28. In light of the above, the Defence respectfully requests Trial Chamber V to:
- REJECT** the Prosecution's Request.

RESPECTFULLY SUBMITTED ON THIS 30th DAY OF MAY 2022



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⁴⁰ Contra, [ICC-01/14-01/18-1330-Conf](#), paras 23-27.