

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **26 September 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 the “Yekatom Defence Response to the Prosecution’s “Request for leave to add 9 items to the List of Evidence collected from [REDACTED]”, ICC-01/14-01/18-1394-Conf, 6 May 2022”, ICC-01/14-01/18-1415-Conf, 19 May 2022

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 responds to the Prosecution’s “Request for leave to add 9 items to the List of Evidence collected from [REDACTED]”¹ (“Request”).
2. The Defence submits that the Request should be rejected in regard to seven items as their addition to the Prosecution’s List of Evidence would infringe on the fairness of the proceedings and be prejudicial to the rights of Mr Yekatom.² The Defence defers to the Chamber’s discretion in relation to the last two remaining items.³

PROCEDURAL HISTORY

3. On 16 July 2020, the Chamber ordered the Prosecution to file its List of Evidence by 9 November 2020.⁴
4. On 10 November 2020, the Prosecution’s List of Witnesses and Evidence was notified to the parties.⁵
5. Between 16 April 2021 and 24 March 2022, the Prosecution filed seven requests to add items to its List of Evidence,⁶ an eighth request was formulated by email.⁷

¹ [ICC-01/14-01/18-1394-Conf](#).

² Items CAR-OTP-2136-0341, CAR-OTP-2136-0219, CAR-OTP-2136-0221, CAR-OTP-2136-0227, CAR-OTP-2136-0239, CAR-OTP-2136-0249 and CAR-OTP-2136-0257.

³ Items CAR-OTP-2136-0310 and CAR-OTP-2136-0318.

⁴ [ICC-01/14-01/18-589](#), para. 14.

⁵ [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](#).

⁶ [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-01/14-01/18-1330-Red](#).

⁷ 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. On 29 September 2021, the Single Judge instructed the Prosecution to thoroughly review its List of Evidence for completeness and indicated that any additions to this list should be “sought on an exceptional basis”.⁸
7. On 14 December 2021, the Prosecution filed its “Updated List of Evidence”⁹ pursuant to a Chamber order.¹⁰
8. On 6 May 2022, the Prosecution filed its “Request for leave to add 9 items to the List of Evidence collected [REDACTED]”, the ninth one.¹¹
9. On 10 May 2022, the Defence requested the Prosecution to disclose the “Procès-Verbal de Perquisition” drafted by [REDACTED] authorities during the search and seizure of [REDACTED].¹² The same day the Prosecution sent a courtesy copy of the “Procès-Verbal de Perquisition”,¹³ which was subsequently formally disclosed through disclosure “Trial Rule 77 package 76” on 13 May 2022.
10. On 12 May 2022, and in light of the information contained in the “Procès-Verbal de Perquisition”, the Defence requested disclosure of the “Procès-Verbal de Transmission” of the seized items from [REDACTED] authorities to the Prosecution.¹⁴ The same day the Prosecution indicated that the “transmission letter does not include any detail as to the results of the search and seizure operation performed”.¹⁵

⁸ See Chamber’s email dated 29 September 2021; also quoted in Chamber’s decisions such as [ICC-01/14-01/18-1206](#) para. 8 or [ICC-01/14-01/18-1301-Conf](#) para 13.

⁹ [ICC-01/14-01/18-1211](#) and its annex A [ICC-01/14-01/18-1211-Conf-AnxA](#).

¹⁰ [ICC-01/14-01/18-1206](#), para. 16.

¹¹ [ICC-01/14-01/18-1394-Conf](#).

¹² Email from the Defence to the Prosecution sent on 10 May 2022 at 11:51 (available upon request).

¹³ CAR-OTP-2136-0181 sent by the Prosecution to the Defence on 10 May 2022 at 14:47.

¹⁴ Email from the Defence to the Prosecution sent on 12 May 2022 at 11:19 (available upon request).

¹⁵ Email from the Prosecution to the Defence sent on 12 May 2022 at 16:16 (available upon request).

APPLICABLE LAW

11. 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.¹⁶ 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”.¹⁷ 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”.¹⁸

SUBMISSIONS

12. The Defence first wishes to emphasize that it is cognizant of the Chamber’s position that for the purpose of a request to add items to a List of Evidence, it does not see the “need to further address any arguments regarding the reliability or authenticity of the items”, those considerations only being relevant for their submission into evidence.¹⁹
13. However, the Defence notes that in its submission, the Prosecution covered the question of the authenticity of the items for which addition is sought, indicating that “the fact that these Items were all collected from [REDACTED] tends to show their authenticity [...]”.²⁰ In this context, the Defence wishes to underline that it will address in the present response the authenticity and reliability of some of the items, to the extent that these issues also bear significance to the

¹⁶ [ICC-01/14-01/18-989-Conf](#), para. 5 and references cited therein.

¹⁷ [ICC-01/14-01/18-989-Conf](#), para. 5.

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

¹⁹ [ICC-01/14-01/18-989-Conf](#), para. 11.

²⁰ [ICC-01/14-01/18-1394-Conf](#), para. 10.

prejudice that their addition to the List of Evidence would cause, the latter being the relevant criterion when assessing the appropriateness of the Request.

14. It is in this framework that the Defence will first argue that no good cause for the late addition is shown for item CAR-OTP-2136-0341 (I); second, the Defence will address the procedural issues affecting the search and seizure [REDACTED] which militate in favour of the rejection of the Request (II); finally, it will be submitted that addition of the items to the List of Evidence would cause undue prejudice to Mr. Yekatom's rights (III).

I. On the absence of good cause for the late addition of CAR-OTP-2136-0341

15. The Defence notes that among the nine items for which addition to the List of Evidence is sought, the Prosecution included the 8 December 2014 issue of the Likongo newspaper.²¹ A summary analysis of this document shows that nothing makes this copy of the newspaper unique – for example, there are no personal comments or annotations next to a particular article; this particular copy is thus identical to all those sold in CAR on 8 December 2014.
16. The Defence contends that, in the absence of any Prosecution explanations as to why this issue of the Likongo newspaper was never collected in its investigation before, despite the presence of other articles of Likongo in the case file,²² it should be found that no good cause for the late addition of this document to the List of Evidence is shown. Indeed, since this newspaper was published and available in the public domain since December 2014, nothing prevented the Prosecution from obtaining a copy of this particular issue of the newspaper long before the search and seizure [REDACTED].

²¹ [ICC-01/14-01/18-1394-Conf](#), para. 14; item CAR-OTP-2136-0341.

²² See CAR-OTP-2074-0421 at 0431 or CAR-OTP-2074-0519 at 0522.

17. 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”,²³ which explains why the Chamber set a deadline before the beginning of the trial for its notification. It is submitted 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 facilitate the preparation of the defence in the context of complex and document-heavy international criminal cases, would be defeated.
18. Consequently, and despite the limited prejudice in relation to this item, the Defence respectfully requests the Chamber to reject the addition of CAR-OTP-2136-0341 to the List of Evidence.

II. On the procedural issues affecting the search and seizure [REDACTED]

19. As search and seizure operations constitute, by their very nature, serious interference to an individual’s right to private life, effective safeguards and frameworks regulating them are necessary in national legislations.²⁴
20. The current [REDACTED], originating from the law [REDACTED] and promulgated [REDACTED] on [REDACTED], provides the framework applicable to search and seizures that are conducted on the territory of [REDACTED].²⁵ Article [REDACTED] of the [REDACTED] provides *inter alia*, in the context of search and seizure operations, that “[l]es objets saisis sont inventoriés et placés sous scellés” and that « [i]l est dressé du tout procès-verbal”.
21. Those dispositions are of particular importance as their purpose is to authenticate the effective presence of the items seized in the location that was

²³ *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.

²⁴ See ECHR, *Chappel v. United Kingdom*, 30 March 1989, 10461/83, paras. 50-51 ; ECHR, *Vinks & Ribicka v. Latvia*, 30 January 2020, 28926/10, paras. 92-104.

²⁵ [REDACTED].

searched by the authorities. The French *Cour de Cassation* recently found that any party can contest the non-respect of these legal requirements in light of the right to contest the authenticity of evidence,²⁶ which right is enshrined in article 6 of the European Convention on Human Rights²⁷ and article 67(e) of the Statute. This decision underlines the importance of those formalities and their inherent link with the rights of the accused in a criminal trial.

22. In its Request, the Prosecution seeks the addition to its List of Evidence of six Anti-Balaka badges under the name of [REDACTED], Mr Yekatom, Mr Habib Beina, Mr Aristide Beina, [REDACTED] and [REDACTED],²⁸ allegedly collected during the search and seizure operation [REDACTED].²⁹
23. While a document apparently related to the search and seizure does mention a [REDACTED] where 21 badges were found,³⁰ the Defence notes that the formal official *Procès-Verbal de Perquisition*, which lists all items seized along with a detailed description, does not mention at any point the presence of these 21 Anti-Balaka badges.³¹ It is also understood from the Prosecution's email mentioned at paragraph 10 that the *Procès-Verbal de Transmission* of the seized items from [REDACTED] authorities to the Prosecution does not contain further information which could shed light on the absence of the Anti-Balaka badges from the *Procès-Verbal de Perquisition*. It should also be noted that in the same email, the Prosecution clarified that the mention of the "[REDACTED]" found [REDACTED] in the *Procès-Verbal de Perquisition* refers to documents shown at page 0214 of CAR-OTP-2136-0185-R01, and not to the Anti-Balaka badges subject of the Request.

²⁶ Chambre Criminelle de la Cour de Cassation française, 7 septembre 2021, [arrêt n°21-80.642](#), paras. 19-23.

²⁷ See ECHR, *Bykov v. Russia*, 10 March 2009, 4378/02, para. 90.

²⁸ [ICC-01/14-01/18-1394-Conf](#), para. 8 ; documents with ERN CAR-OTP-2136-0219, CAR-OTP-2136-0221, CAR-OTP-2136-0227, CAR-OTP-2136-0239, CAR-OTP-2136-0249 and CAR-OTP-2136-0257.

²⁹ [ICC-01/14-01/18-1394-Conf](#), para. 6.

³⁰ CAR-OTP-2136-0185-R01 at 0189.

³¹ CAR-OTP-2136-0181.

24. The Defence also highlights the uniqueness of the Anti-Balaka badges in document CAR-OTP-2136-0185-R01 as they are the only items specifically identified in the description of a photograph.³² This striking difference with all of the other documents allegedly collected during the search and seizure also favour a cautious approach regarding those Anti-Balaka badges. This mention is in any case certainly not sufficient to disregard their absence from the *Procès-Verbal de Perquisition*, which is the only authentic document per the [REDACTED].
25. As it stands, there can be no certainty as to the origin of those documents as, if they were in fact found [REDACTED], the *Procès-Verbal de Perquisition* is defective and missing mandatory information, contrary to Article [REDACTED] of the [REDACTED]. Moreover, it should be noted that [REDACTED],³³ and that both individuals who witnessed the search and seizure were not particularly familiar with [REDACTED].³⁴ In this regard, the fact that the search and seizure operation appears to have taken place [REDACTED] further diminishes the purported “authenticity” of the seized items [REDACTED]. This situation not only seriously affects the Prosecution’s argument that “the fact that these Items were all collected [REDACTED] tends to show their authenticity”³⁵ but also should be taken into account by the Chamber in its assessment of the appropriateness of the Request.
26. Indeed, the Defence contends that allowing the addition of the Anti-Balaka badges to the List of Evidence of the Prosecution, despite the serious procedural defects which affect their collection, would not be consistent with the principle that the Chamber should rule as non-admissible “evidence obtained by means

³² See CAR-OTP-2136-0185-R01 at 0189.

³³ [REDACTED]

³⁴ See CAR-OTP-2136-0181 at 0181 which indicates that one person was [REDACTED] and the other one was [REDACTED].

³⁵ [ICC-01/14-01/18-1394-Conf](#), para. 10.

of a violation of [the] Statute or internationally recognized human rights”,³⁶ and more generally the duty to ensure that a trial is fair and conducted with full respect for the rights of the accused.³⁷

27. Moreover, the particular circumstances of this case, which is tried before the Court with some evidence collected by national authorities, should not deprive Mr Yekatom of his right to contest the manner in which said evidence was collected, when it does not follow the procedural laws of the country of collection, the purpose of which are to safeguard the rights of an accused. In the present situation, the Defence contends that it is the Chamber’s prerogative to assess the violation of these procedural rules during the collection of the evidence [REDACTED].
28. The Defence respectfully submits that the Chamber should find that addition to the List of Evidence of the Anti-Balaka badges, which were allegedly collected during the search and seizure [REDACTED] but are omitted from the *Procès-Verbal de Perquisition*, is not appropriate and would affect the fairness and integrity of the proceedings. Consequently, the Chamber should reject the Prosecution’s Request in relation to the following items : CAR-OTP-2136-0219, CAR-OTP-2136-0221, CAR-OTP-2136-0227, CAR-OTP-2136-0239, CAR-OTP-2136-0249 and CAR-OTP-2136-0257.

III. On the undue prejudice arising from the addition of the documents to the List of Evidence

A. Prejudice arising from the impact of the documents on a core issue of the case : the alleged links between Mr Yekatom and [REDACTED]

29. The Prosecution argues in its Request that “the presence of the badges [REDACTED] tends to show his direct link with YEKATOM’s Group and that

³⁶ Article 69 (7) of the Statute

³⁷ Article 64 (2) of the Statute.

it fell formally and politically under the umbrella of the National Coordination and formed part of the broader Anti-Balaka group”.³⁸

30. The Defence recalls that the existence (or non-existence) of links [REDACTED], and more generally between the so-called “General Coordination” and Mr Yekatom, are salient and contested issues of the case.
31. In its Trial Brief the Prosecution argued such a link, indicating that [REDACTED]³⁹, that [REDACTED]⁴⁰ or that [REDACTED],⁴¹ relying *inter alia* on [REDACTED].⁴²
32. This alleged connection would be prejudicial to Mr Yekatom, *inter alia*, in light of the Prosecution’s position that “[REDACTED]” and that “[REDACTED]”.⁴³ These allegations also go to the Prosecution’s arguments about the existence of an “[o]rganisational criminal policy of targeting the Muslim population in western CAR”.⁴⁴
33. However, the testimony of witnesses [REDACTED], [REDACTED],⁴⁵ did not in fact corroborate the Prosecution’s theory. [REDACTED] explained that he never saw [REDACTED] and Mr Yekatom discussing together [REDACTED],⁴⁶ while [REDACTED] elaborated that he never saw Mr Yekatom [REDACTED],⁴⁷ and that [REDACTED] didn’t talk with Mr Yekatom [REDACTED]⁴⁸ nor did they communicate afterwards.⁴⁹ [REDACTED] also provided information regarding the existence of a misunderstanding or conflict between the two; he notably

³⁸ [ICC-01/14-01/18-1394-Conf](#), para. 11.

³⁹ [REDACTED]

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

indicated that Mr Yekatom was not present [REDACTED];⁵⁰ it was also indicated that [REDACTED] was partly responsible for [REDACTED], including Mr Yekatom, [REDACTED].⁵¹

34. In light of the importance of the [REDACTED] link to the case and its contested nature as demonstrated above, the addition of the Anti-Balaka badges to the List of Evidence should be carefully assessed by the Chamber due to the Prosecution's clear intention to use these items to demonstrate the existence of such a link. The Defence submits that in this assessment, the Chamber should take into account the authenticity issues demonstrated in section I and find that those issues are so critical that the use of those items to further the Prosecution's theory, on a crucial issue of the case, would be prejudicial to the Defence and affects the overall fairness of the proceedings.
35. Consequently, in light of the prejudice to the Defence and impact on the fairness of the proceedings, the addition of items CAR-OTP-2136-0219, CAR-OTP-2136-0221, CAR-OTP-2136-0227, CAR-OTP-2136-0239, CAR-OTP-2136-0249 and CAR-OTP-2136-0257 to the List of Evidence should be rejected.

B. Prejudice arising from the lost opportunity of the Defence to question witnesses on crucial aspects of some items

36. The Defence also contends that it would be prejudiced by the late addition of the Anti-Balaka badges to the List of Evidence, due to the combination of serious reliability issues affecting the badges and the fact that witnesses which could have clarified these issues have already testified.
37. Indeed, within the caveat of paragraphs 12-13, the Defence wishes to raise severe issues affecting the reliability of the six Anti-Balaka badges. The

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

disclosure process on 22 April 2022⁵² of these badges indicates that they are part of a bigger group of badges disclosed on the same date.⁵³ In this second group of badges, the Defence has identified serious defects which cast serious doubt about the reliability of all the badges, including the six which are part of the Prosecution's Request.

38. Those defects materialise in the discrepancy between the name of the person on the badge and the photo associated. As an example, one badge attributed to [REDACTED]⁵⁴ has the photograph of [REDACTED].⁵⁵ Another badge with the name of [REDACTED]⁵⁶ has the photograph of [REDACTED] instead.⁵⁷ Those errors are so manifest that it cannot be argued that the owner of those badges would not have raised them during the fabrication process, which itself cast doubt as to whether or not they were ever circulated. More specifically, it should be underlined that a discrepancy between the photograph and the name of the individual would have defeated the purpose of those badges on the ground : *i.e* correctly identifying their owner.
39. Additionally, the Defence notes unexplained differences in the methodology used to number those badges. For example, the alleged badge of Mr Yekatom is numbered "N° ID : [REDACTED]/ [REDACTED]/ [REDACTED]"⁵⁸ while [REDACTED] is numbered "N° ID : [REDACTED]".⁵⁹ To the contrary, a badge worn by Mr Namsio Emotion contemporaneously shows an absence of any numbering.⁶⁰

⁵² Trial INCRIM package 125.

⁵³ Trial Rule 77 package 75, items CAR-OTP-2136-0217 to CAR-OTP-2136-0255.

⁵⁴ CAR-OTP-2136-0237.

⁵⁵ See a photograph of [REDACTED].

⁵⁶ CAR-OTP-2136-0241.

⁵⁷ [REDACTED].

⁵⁸ CAR-OTP-2136-0257.

⁵⁹ CAR-OTP-2136-0239.

⁶⁰ CAR-OTP-2076-1283.

40. The Defence submits that these serious reliability issues greatly prejudices Mr Yekatom, which is compounded by the fact that numerous witnesses who could have addressed the above mentioned errors in the badges, and more broadly, their a purported authenticity, have already testified. As an example, P-0888 could have been asked to comment on the badges allegedly attributed to his brothers Habib and Aristide; more specifically he could have commented on the photographs to indicate whether they are contemporaneous of the events or were taken after the 2013-2014 crisis. P-2251 also extensively testified about Anti-Balaka badges and was shown several examples which allowed him to discuss the different types of badges, who received them, and to identify fake ones.⁶¹ P-0889 was also questioned on the matter of Anti-Balaka badges and discussed the various types of badges.⁶²
41. Those witnesses, among others, would have been best placed to comment on the group of Anti-Balaka badges disclosed on 22 April 2022, and to explain how such mistakes in the identification process of the owner could have occurred. The Defence's inability to questions these witnesses causes prejudice in light of the intended use of those documents by the Prosecution as it would infringe on Mr Yekatom's statutory right to examine witnesses.
42. The only remedy to this prejudice would be to reserve the right of the Defence to recall these witnesses, in order to ask them specific questions regarding the six Anti-Balaka badges. However, it is the Defence's view that this remedy would in turn infringe on Mr Yekatom's right to be tried without undue delay, in addition to the negative impact it would have on judicial economy. A holistic assessment between the advantages of the addition of those documents to the List of Evidence and the prejudices it would cause to Mr Yekatom militate in favour of the rejection of the Request.

⁶¹ P-2251 : [ICC-01/14-01/18-T-043-CONF-ENG CT](#), pages 47-49.

⁶² P-0889 : [ICC-01/14-01/18-T-110-CONF-ENG ET](#), pages 29-31.

43. In light of the above, the Defence respectfully requests the Chamber to reject the addition of items CAR-OTP-2136-0219, CAR-OTP-2136-0221, CAR-OTP-2136-0227, CAR-OTP-2136-0239, CAR-OTP-2136-0249 and CAR-OTP-2136-0257, to the List of Evidence.

CONFIDENTIALITY

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

RELIEF SOUGHT

45. In light of the above, the Defence respectfully requests Trial Chamber V to:

REJECT the addition to the List of Evidence of CAR-OTP-2136-0341, CAR-OTP-2136-0219, CAR-OTP-2136-0221, CAR-OTP-2136-0227, CAR-OTP-2136-0239, CAR-OTP-2136-0249 and CAR-OTP-2136-0257.

RESPECTFULLY SUBMITTED ON THIS 26th DAY OF SEPTEMBER 2022



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