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**No. ICC-01/14-01/18  
Date: 6 October 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 103 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 Ngaiisona*, having regard to Articles 64(2) and 67 of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Prosecution Request to Add 103 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,<sup>1</sup> filed its List of Evidence.<sup>2</sup>
2. On 14 December 2021, the Prosecution, in accordance with the Chamber’s direction,<sup>3</sup> filed its updated List of Evidence.<sup>4</sup>
3. On 1 March 2022, the Single Judge, *inter alia*, rejected the Prosecution’s request to add 21 items to its List of Evidence with the exception of eight items (the ‘Prior Request’<sup>5</sup> and the ‘Prior Decision’,<sup>6</sup> respectively).
4. On 13 July 2022, the Single Judge rejected the Prosecution’s request to reconsider the Prior Decision with regard to two items the addition of which had been rejected.<sup>7</sup>

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<sup>1</sup> Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, para. 14, p. 10.

<sup>2</sup> 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).

<sup>3</sup> Decision on the Prosecution Request to Add Seven Items to its List of Evidence, 7 December 2021, ICC-01/14-01/18-1206 (the ‘7 December 2021 Decision’), para. 16, p. 7.

<sup>4</sup> 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).

<sup>5</sup> Request for leave to add 21 Items to the List of Evidence and their Submission from the Bar Table, and to extend the estimated examination time for P-0889, 17 February 2022, ICC-01/14-01/18-1285-Conf (with one confidential annex) (public redacted version notified on 11 March 2022, ICC-01/14-01/18-1285-Red).

<sup>6</sup> Decision on the Prosecution Request to Add 21 Items to its List of Evidence and Extend Examination Time for P-0889, 4 March 2022, ICC-01/14-01/18-1301 (reclassified to public on 29 September 2022).

<sup>7</sup> Decision on the Prosecution Request for Partial Reconsideration of ‘Decision on the Prosecution Request to Add 21 Items to its List of Evidence and Extend Examination Time for P-0889’, 13 July 2022, ICC-01/14-01/18-1511-Conf.

5. On 24 March 2022, the Prosecution sought the Chamber's leave to add 103 items (the 'Items') to its List of Evidence (the 'Request').<sup>8</sup>
6. On 27 May 2022,<sup>9</sup> the Yekatom Defence<sup>10</sup> and the Ngaïssona Defence<sup>11</sup> (jointly, the 'Defence') opposed the Request.

## II. Analysis

7. The Single Judge recalls the applicable law for requests to add items to the list of evidence, as set out in his previous decision.<sup>12</sup>
8. The Single Judge notes that the Items comprise five 'Facebook Business Record' reports and 98 Facebook conversations between [REDACTED] from their respective Facebook accounts and other individuals during the relevant period.<sup>13</sup>
9. The Single Judge notes that the Defence opposes the Request, on the basis, *inter alia*, of the untimeliness of (i) the request for assistance through which it obtained the Items; (ii) the processing of the Items for disclosure; and (iii) the identification of the Items and subsequent filing of the Request.<sup>14</sup>
10. In this regard, the Single Judge first notes that the Prosecution obtained the Items through the same request for assistance that it obtained the items subject to the Prior Request. As such, the circumstances concerning the timing of the obtaining

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<sup>8</sup> Request for leave to add 103 Items to the List of Evidence, ICC-01/14-01/18-1330-Conf (with confidential annexes A and B, ICC-01/14-01/18-1330-Conf-AnxA and ICC-01/14-01/18-1330-Conf-AnxB, respectively) (public redacted version notified on 12 April 2022, ICC-01/14-01/18-1330-Red), paras 1, 29.

<sup>9</sup> Upon the Ngaïssona Defence's request, the Single Judge extended the deadline for responses to the Request to 27 May 2022 for all participants (email from Ngaïssona Defence, 25 March 2022, at 11:48; email from the Chamber, 28 March 2022, at 18:35).

<sup>10</sup> 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, ICC-01/14-01/18-1436-Conf (public redacted version notified on 30 March 2022, ICC-01/14-01/18-1436-Red), paras 2, 26, 28.

<sup>11</sup> Defence response to the "Request for leave to add 103 items to the List of Evidence", ICC-01/14-01/18-1330, ICC-01/14-01/18-1437-Conf (public redacted version notified on 29 June 2022, ICC-01/14-01/18-1437-Red), paras 2, 26-27.

<sup>12</sup> 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 (public redacted version notified on 30 September 2022, ICC-01/14-01/18-989-Red) (the '6 May 2021 Decision'), paras 5-6. See also the jurisprudence referenced therein.

<sup>13</sup> See the ERNs of the 103 items subject to the Request listed in Annex A to the Request, ICC-01/14-01/18-1330-Conf-AnxA.

<sup>14</sup> See e.g. Yekatom Defence Response, ICC-01/14-01/18-1436-Red, paras 2, 10-20, 25-26; Ngaïssona Defence Response, ICC-01/14-01/18-1437-Red, paras 5-15.

of this material were already considered in the Prior Decision.<sup>15</sup> The Single Judge will therefore not address the Defence's submissions concerning the Prosecution's lateness in sending its request for assistance.

11. Second, the Single Judge notes that, upon receipt of the Items on 5 March 2021, the Prosecution proceeded to a reasonably swift review and disclosure of the Items between 31 May and 17 June 2021.<sup>16</sup>
12. Third, with regard to the time elapsed between the disclosure of the Items and the filing of the Request (almost one year), the Single Judge takes note of the Yekatom Defence's submissions that the potential relevance of some of the Items should have become apparent to the Prosecution 'long before the Request was filed' or even 'immediately [...] upon a preliminary review of the material' since some of the Items relate to central issues in the Prosecution case.<sup>17</sup> However, the Single Judge also notes the Prosecution's explanation that the delay between disclosure and identification of the most relevant items was due to several factors, including the complexity of the case, the volume of the material (amounting to more than 25,000 pages), the Prosecution's limited resources, the difficulty to 'decipher' the messages, and the need to undertake 'a careful and holistic analysis of the materials, including by comparing them to other evidence in the case'.<sup>18</sup>
13. The Single Judge observes that some of the Items comprise Facebook conversations of witnesses who have already testified in this case, namely P-2841, P-2673 and P-2843, and takes note of the Defence's submissions concerning their prejudicial nature.<sup>19</sup> The Single Judge notes, however, that P-

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<sup>15</sup> See Prior Decision, ICC-01/14-01/18-1301, para. 12, n. 19, where the Single Judge noted that, given that the Prosecution had submitted its request for assistance on 25 June 2020, and had only received the requested material on 5 March 2021, the receipt of the items past the final disclosure deadline was beyond the Prosecution's control.

<sup>16</sup> Prosecution's Communication of the Disclosure of Evidence on 31 May and 4 June 2021, 4 June 2021, ICC-01/14-01/18-1013 (with one confidential annex, ICC-01/14-01/18-1013-Conf-Anx); Prosecution's Communication of the Disclosure of Evidence on 11 June 2021, 11 June 2021, ICC-01/14-01/18-1018 (with one confidential annex, ICC-01/14-01/18-1018-Conf-Anx); Prosecution's Communication of the Disclosure of Evidence on 18 June 2021, 18 June 2021, ICC-01/14-01/18-1032 (with one confidential annex, ICC-01/14-01/18-1032-Conf-Anx).

<sup>17</sup> Yekatom Defence Response, ICC-01/14-01/18-1436-Red, paras 15-20.

<sup>18</sup> Request, ICC-01/14-01/18-1330-Red, paras 11-12.

<sup>19</sup> Yekatom Defence Response, ICC-01/14-01/18-1436-Red, paras 23-24; Ngaïssona Defence Response, ICC-01/14-01/18-1437-Red, paras 20-23.

2841 and P-2673 testified prior to the Prosecution being in a position to disclose the Items,<sup>20</sup> and that the Facebook conversations in which they participate are limited in scope and number (amounting to one conversation each with four and six pages, respectively).<sup>21</sup>

14. By contrast, the Single Judge notes that the Prosecution had already effected disclosure and had been in possession of the Items for eight months by the time P-2843 appeared before the Chamber.<sup>22</sup> He further notes that the Facebook conversations in which P-2843 participates are more substantial compared with those in which P-2841 and P-2673 participate.<sup>23</sup>
15. Having said that, the Single Judge notes that, contrary to the Ngaïssona Defence's suggestion,<sup>24</sup> other 'insider' witnesses are still expected to provide testimony before the Chamber.<sup>25</sup> He further notes that some of these witnesses are expected to testify at the end of the Prosecution case.<sup>26</sup> The Defence will therefore have the opportunity to examine these witnesses on the topics discussed in the Items, including (i) the organisation of the Anti-Balaka from April 2013 onwards, (ii) the communication and coordination amongst different individuals, and (iii) Mr Ngaïssona's role within the group.
16. Moreover, the Single Judge takes note of the Prosecution's explanation that the Items show, *inter alia*, (i) 'BOZIZE's and his inner circle's involvement with the Anti-Balaka'; (ii) 'the (military) organisation of the Anti-Balaka from April 2013 onwards in different areas in the CENTRAL AFRICAN REPUBLIC ("CAR"), in the DEMOCRATIC REPUBLIC of the CONGO ("DRC"), in CAMEROON, and in FRANCE, as well as the communication/coordination of Anti-Balaka

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<sup>20</sup> For P-2841, see transcripts of hearing, 7 May 2021, ICC-01/14-01/18-T-029-Red-ENG; 30 May 2021, ICC-01/14-01/18-T-030-Red-ENG; for P-2673, see transcripts of hearing, 3 June 2021, ICC-01/14-01/18-T-041-CONF-ENG; 4 June 2021, ICC-01/14-01/18-T-042-CONF-ENG.

<sup>21</sup> For P-2841, see CAR-OTP-2131-1303; for P-2673, see CAR-OTP-2133-6457.

<sup>22</sup> See transcripts of hearing, 5 November 2021, ICC-01/14-01/18-T-073-Red-ENG; 9 November 2021, ICC-01/14-01/18-T-074-Red-ENG.

<sup>23</sup> See CAR-OTP-2131-6546; CAR-OTP-2131-4793; CAR-OTP-2131-1420; CAR-OTP-2133-1610; CAR-OTP-2133-7875; CAR-OTP-2131-3007.

<sup>24</sup> Ngaïssona Defence Request, ICC-01/14-01/18-1437-Red, paras 20-23.

<sup>25</sup> See e.g. P-0954; P-2269; P-0975; P-0458; P-2602; P-1647; P-1786; P-0487; P-1858.

<sup>26</sup> See e.g. P-2269; P-0975; P-0458; P-2602; P-1647, according to the Prosecution's latest witness order (email from the Prosecution, 3 October 2022, at 17:14).

members across these areas’; (iii) ‘the structure, identity, and composition of the group as well as the identity and location/whereabouts of particular Anti-Balaka members; (iv) ‘Anti-Balaka attacks between September and December 2013’; (v) ‘the link between the Anti-Balaka and FROCCA [...]’; (vi) ‘the Anti-Balaka’s provision of weapons, ammunition and other means prior to/after the 5 December 2013 attacks on BANGUI and BOSSANGO’; (vii) ‘the planning and preparation of the 5 December 2013 attack on BANGUI and other locations in CAR, including the descent of men to BANGUI in view of the attack’; (viii) ‘the Anti-Balaka’s adoption of a generalised anti-Muslim rhetoric [...]’; and (ix) ‘the planning of Anti-Balaka attacks in January 2014’.<sup>27</sup>

17. Furthermore, and specifically with regard to Mr Ngaïssona, the Single Judge notes the Prosecution’s submissions that the Items show Mr Ngaïssona’s ‘whereabouts and his role before and after the 5 December 2013 attacks’, including, *inter alia*, that (i) ‘prior to the 5 December 2013 attacks, NGAISSONA was meeting and coordinating with other key-Anti-Balaka figures’; (ii) ‘he was involved in the decision-making process regarding the attack on BANGUI’; (iii) he and Bernard Mokom ‘liaised with BOZIZE’ and ‘received money from BOZIZE’; and (iv) ‘NGAISSONA visited troops in the field and provided them with supplies’. The Prosecution submits that the Items also show that ‘before his 14 January 2014 arrival in BANGUI, it was decided that NGAISSONA should return to BANGUI *in view of* organising and coordinating the Anti-Balaka’.<sup>28</sup>
18. In this context, and mindful of the truth-seeking function assigned to the Chamber, the Single Judge once again emphasises that it would be unreasonable for the Chamber to determine that evidence with prospective significance could not, under any circumstances, be used by the Prosecution at trial if not included in the List of Evidence by the final disclosure deadline.<sup>29</sup>
19. Thus, having balanced the prospective significance of the Items against the potential prejudice that could be caused to the Defence by their late addition to

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<sup>27</sup> Request, ICC-01/14-01/18-1330-Red, para. 21.

<sup>28</sup> Request, ICC-01/14-01/18-1330-Red, para. 22.

<sup>29</sup> *See e.g.* 6 May 2021 Decision, ICC-01/14-01/18-989-Red, para. 6, and the jurisprudence referred to therein.

the Prosecution's List of Evidence, the Single Judge is of the view that the Request should be granted only with respect to the following items: CAR-OTP-2131-0993; CAR-OTP-2131-1003; CAR-OTP-2131-1021; CAR-OTP-2131-1032; CAR-OTP-2131-1038; CAR-OTP-2132-7664; CAR-OTP-2131-3310; CAR-OTP-2133-3029; CAR-OTP-2131-5988; CAR-OTP-2132-9746; CAR-OTP-2132-5849; CAR-OTP-2133-2450; CAR-OTP-2133-4968; CAR-OTP-2133-1362; CAR-OTP-2132-3145; CAR-OTP-2131-7002; CAR-OTP-2131-5407; CAR-OTP-2132-6515; CAR-OTP-2133-2041; CAR-OTP-2132-7067; CAR-OTP-2132-2869; CAR-OTP-2131-2814; CAR-OTP-2131-7091; CAR-OTP-2132-6105; CAR-OTP-2131-9180; CAR-OTP-2132-1276; CAR-OTP-2133-7723; CAR-OTP-2133-7159; CAR-OTP-2132-0370; CAR-OTP-2132-0463; CAR-OTP-2131-8427; CAR-OTP-2133-6457; CAR-OTP-2131-5707; CAR-OTP-2133-2227; CAR-OTP-2133-1986; CAR-OTP-2131-2344; CAR-OTP-2132-0119; CAR-OTP-2132-6685; CAR-OTP-2133-3149; CAR-OTP-2131-6407; CAR-OTP-2132-1004; CAR-OTP-2133-2021; CAR-OTP-2133-5725; CAR-OTP-2132-5658; CAR-OTP-2133-3390; CAR-OTP-2132-5088; CAR-OTP-2132-1239; CAR-OTP-2133-3757; CAR-OTP-2131-6546; CAR-OTP-2132-4240; CAR-OTP-2131-7325; CAR-OTP-2133-3618; CAR-OTP-2133-6061; CAR-OTP-2131-1303; CAR-OTP-2131-2629; CAR-OTP-2132-0056; CAR-OTP-2132-9197; CAR-OTP-2132-1254; CAR-OTP-2131-6106; CAR-OTP-2131-6655; CAR-OTP-2133-0880; CAR-OTP-2132-6648.

20. In addition, the Single Judge considers that, in order to mitigate any potential prejudice caused to the Defence as a result of the addition of items related to P-2843, only addition of limited extracts of some of these items should be granted, as follows: CAR-OTP-2131-4793, limited to pages 4793, 4810-4837; CAR-OTP-2131-1420, limited to pages 1420, 1435-1438, 1444-1446; CAR-OTP-2133-1610, limited to pages 1610-1612, 1621-1623.
21. With regard to the remainder of the Items, the Single Judge considers that the prospective significance to the proceedings that these items might bear is outweighed by the potential prejudice that could be caused to the Defence by their addition to the Prosecution's List of Evidence.



22. Lastly, the Single Judge agrees with the Ngaiissona Defence<sup>30</sup> that the Prosecution should have informed the Chamber and the participants that it was in the process of reviewing material and that it intended to file the Request, at the very least after the Single Judge's instruction that it 'thoroughly review its List of Evidence for completeness' and request any additions thereto 'on an exceptional basis and in a timely manner'.<sup>31</sup> Therefore, noting that the Prosecution refers to [REDACTED]<sup>32</sup> the Single Judge instructs the Prosecution to inform the Chamber and the participants whether it intends to file further requests to add material to its List of Evidence, within five days of notification of the present decision.
23. Needless to say, and bearing in mind that investigations should largely be completed at the stage of the confirmation of charges hearing, the Single Judge trusts that the Prosecution has fully completed its investigations in this case and that no further requests will be filed.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**PARTLY GRANTS** the Request with regard to the following items: CAR-OTP-2131-0993; CAR-OTP-2131-1003; CAR-OTP-2131-1021; CAR-OTP-2131-1032; CAR-OTP-2131-1038; CAR-OTP-2132-7664; CAR-OTP-2131-3310; CAR-OTP-2133-3029; CAR-OTP-2131-5988; CAR-OTP-2132-9746; CAR-OTP-2132-5849; CAR-OTP-2133-2450; CAR-OTP-2133-4968; CAR-OTP-2133-1362; CAR-OTP-2132-3145; CAR-OTP-2131-7002; CAR-OTP-2131-5407; CAR-OTP-2132-6515; CAR-OTP-2133-2041; CAR-OTP-2132-7067; CAR-OTP-2132-2869; CAR-OTP-2131-2814; CAR-OTP-2131-7091; CAR-OTP-2132-6105; CAR-OTP-2131-9180; CAR-OTP-2132-1276; CAR-OTP-2133-7723; CAR-OTP-2133-7159; CAR-OTP-2132-0370; CAR-OTP-2132-0463; CAR-OTP-2131-8427; CAR-OTP-2133-6457; CAR-OTP-2131-5707; CAR-OTP-2133-2227; CAR-OTP-2133-1986; CAR-OTP-2131-2344; CAR-OTP-2132-0119; CAR-OTP-2132-6685; CAR-OTP-2133-3149; CAR-OTP-2131-6407; CAR-OTP-2132-1004; CAR-OTP-2133-2021; CAR-OTP-2133-

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<sup>30</sup> See Ngaiissona Defence Request, ICC-01/14-01/18-1437-Red, paras 17-19.

<sup>31</sup> See email from the Chamber, 29 September 2021, at 10:00.

<sup>32</sup> Request, ICC-01/14-01/18-1330-Conf, para. 10. See also Yekatom Defence Response, ICC-01/14-01/18-1436-Red, para. 22.

5725; CAR-OTP-2132-5658; CAR-OTP-2133-3390; CAR-OTP-2132-5088; CAR-OTP-2132-1239; CAR-OTP-2133-3757; CAR-OTP-2131-6546; CAR-OTP-2132-4240; CAR-OTP-2131-7325; CAR-OTP-2133-3618; CAR-OTP-2133-6061; CAR-OTP-2131-1303; CAR-OTP-2131-2629; CAR-OTP-2132-0056; CAR-OTP-2132-9197; CAR-OTP-2132-1254; CAR-OTP-2131-6106; CAR-OTP-2131-6655; CAR-OTP-2133-0880; CAR-OTP-2132-6648; CAR-OTP-2131-4793, limited to pages 4793, 4810-4837; CAR-OTP-2131-1420, limited to pages 1420, 1435-1438, 1444-1446; CAR-OTP-2133-1610, limited to pages 1610-1612, 1621-1623;

**REJECTS** the remainder of the Request; and

**INSTRUCTS** the Prosecution to inform the Chamber and the participants whether it intends to file further requests to add material to its List of Evidence, within five days of notification of the present decision.

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



**Judge Bertram Schmitt**

**Single Judge**

Dated 6 October 2022

At The Hague, The Netherlands