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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 *PROSECUTOR v. ALFRED YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Prosecution’s Response to the “Yekatom Defence Request for Leave to Add 22 Items to its List of Evidence” (ICC-01/14-01/18-2425)”,
ICC-01/14-01/18-2433-Conf , 3 April 2024**

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) opposes, in part, the YEKATOM Defence’s request to add 22 items to its List of Evidence (“Request”).¹ Trial Chamber V (“Chamber”) should reject the addition of three proposed items, namely: (i) two media articles related to D29-3014’s testimony,² and (ii) one Facebook item obtained by the Defence through open-source investigation,³ for the Defence’s failure to show due diligence and to demonstrate their significance. The Prosecution Defers to the Chamber’s discretion regarding the remaining 19 proposed items, subject to the observations below.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential”, as it responds to a filing of the same classification. A public redacted version will be submitted as soon as practicable.

III. SUBMISSIONS

a. **The addition of three open-source documents related to D29- 3014 and D29-6016 is unjustified**

Two media articles related to D29-3014’s testimony

3. The addition of media articles CAR-D29-0002-0683 and CAR-D29-0002-0685 to the Defence’s List of Evidence (“LoE”) at this stage, works contrary to the conduct of proceedings. The request, which comes after the completion of D29-3014’s direct and cross-examination, and after the Defence was given a further opportunity to conduct re-examination seeks a second bite at the apple, and undermines the conduct of

¹ ICC-01/14-01/18-2425-Conf.

² CAR-D29-0002-0683 and CAR-D29-0002-0685.

³ CAR-D29-0016-0174.

proceedings decision in respect of the examination of witnesses.⁴ Moreover, the Defence failed to act with reasonable diligence in identifying the proposed documents, and the information which they provide has no significant impact on material issues in the case.

4. *First*, the Defence could (and should) have reasonably anticipated that the chronology of the BODA meetings would form part of the Prosecution's examination. D29-3014 is a YEKATOM Defence witness. In his statement, signed in September 2022,⁵ D29-3014 describes organising and taking part in the meeting with '*ressortissants*' from BODA ("BODA meeting").⁶ Thus, almost a year and a half before D29-3014's testimony, the Defence was aware that the circumstances concerning the BODA meeting, including its date and subject matter, formed part of the witness's prospective evidence.

5. *Second*, the Defence had ample opportunity to conduct any necessary investigations related to the BODA meeting ahead of D29-3014's testimony, and failed to exercise reasonable diligence. The proposed articles are not new. They have been available since their January 2015 publication — well-ahead of the Defence's September 2022 interview, the filing of its final LoE, and obviously, the witness's testimony. Moreover, while D29-3014's examination-in-chief took place on 30-31 January 2024, his cross-examination did not commence until 11 March 2024. This provided the Defence with ample *additional time* to address the matter even after his examination-in-chief, in anticipation of his cross-examination. It bears reminding that the YEKATOM Defence had also been in possession of the Prosecution's complete list of examination material during the month-long adjournment.

⁴ See ICC-01/14-01/18-631, paras. 16-17.

⁵ CAR-D29-0009-0355, at 0355.

⁶ See CAR-D29-0009-0355, at 0358, para. 18 (noting [REDACTED] (emphasis added)).

6. *Third*, the Defence had further opportunities to clarify the chronology of the relevant events through witnesses other than D29-3014. For example, since the media articles broach former President SAMBA-PANZA's January 2015 visit to BODA, the Defence was in a position to address this topic — of which it was aware — with P-0952 during her extensive examination in October 2023. It failed to do so. Moreover, it also failed to do so effectively in respect of D29-3015's testimony in December 2023.⁷

Open-source Facebook material from the [REDACTED] profile

7. The Defence request to add a screenshot of the Facebook *profile* in the name of [REDACTED]⁸ (which it asserts is [REDACTED]⁹) should be rejected. The Request fails to demonstrate the materiality of this document in regard to the testimony of D29-6016, or to the case more generally. D29-6016 does not mention [REDACTED] in her statement, nor does she claim to know or otherwise have been in contact with [REDACTED].

8. Further, the document has no *prima facie* significance to the Chamber's disposition of any contested issue in this case. [REDACTED] is not a witness before this Chamber, thus the material sought to be added does not concern a live matter and is not of sufficient importance to justify its late addition to the LoE.

9. The Defence has not acted with reasonable diligence. The Request fails to explain the manifest delay in seeking the addition of CAR-D29-0016-0174 to the LoE more

⁷ ICC-01/14-01/18-T-244-ENG-WT, p. 66, ln. 1 – p. 67, ln. 16 (describing “all the attempts at reconciliation that took place [regarding BODA] and that were not successful”; “meetings that we were able to hold in Mbaiki, that we were able to submit to Madam President of the republic, a memorandum on the main proposals that we are making to the government to find solutions to come out of this crisis” and President SAMBA-PANZA's engagement in respect of a meeting in BODA. Defence Counsel specifically drew the witness's attention to D29-3014 – as well (*see* ICC-01/14-01/18-T-244-ENG-WT, p. 67, ln. 10-12).

⁸ CAR-D29-0016-0174.

⁹ ICC-01/14-01/18-2425-Conf, para. 31.

than four months after the 17 November 2023 deadline set by the Chamber.¹⁰ Notably, the publication date of the photo set out at ERN page 0175 indicates 26 August 2023.

b. The Prosecution's observations on items deferred to the Chamber's discretion

10. As noted, the Prosecution defers to the Chamber's discretion with respect to the disposition of 19 proposed items, subject to several observations.

Two CSTs related to D29-3014's testimony

i) CAR-D29-0004-3925

11. As regards the proposed Call Sequence Table ("CST") reflecting connections regarding a phone number attributed to [REDACTED] to cell-towers in BANGUI from 15 January to 28 February 2014,¹¹ the Prosecution notes the following.

12. *First*, the CDR¹² on which the proposed CST relies contains data gaps, and does not provide a complete picture of the phone activity and its whereabouts during the relevant period. These comprise (i) missing cell site data, and/or (ii) phone inactivity for extended periods. Significantly, the underlying CDR does not contain data for, *inter alia*, 5-6 February 2014 — that is, within the period of the Anti-Balaka's attack on BODA.¹³

13. The underlying CDR also does not contain data for other periods due to the inactivity of the phone, such as from the early morning of 23 February until the evening of 24 February 2014. In the same vein for instance, while the CDR underlying

¹⁰ ICC-01/14-01/18-1892, para. 21(i).

¹¹ CAR-D29-0004-3925.

¹² CAR-OTP-2112-1654.

¹³ See ICC-01/14-01/18-723-Red, para. 163 (noting that the Anti-Balaka's attack on BODA's Muslim civilians began *on or about* 5 February 2014 (internal citations omitted); see ICC-01/14-01/18-282-AnxB1-Red, para. 477; see also CAR-OTP-2001-0835, at 0954.

the CST reflects a “Null” value for geolocation data concerning [REDACTED] attributed number on 4 January 2014 – *secondary data* reflecting his phone number long disclosed to the Defence¹⁴ shows the phone connecting to a cell tower in MBAIKI on that same date.¹⁵ Thus, contrary to the Request, it cannot be asserted that the phone number attributed to [REDACTED] was “continuously and consistently activat[ing] cell towers in BANGUI in the relevant period.”¹⁶ As noted below, the Defence advances the same misleading argument regarding Anti-Balaka ComZone Habib SOUSSOU, whose attributed phone number connects to the MBAIKI cell cite on 6-7 February 2014.¹⁷

14. *Second*, the Prosecution notes the Defence’s previous filings opposing the introduction of geolocation data on the basis, *inter alia*, of its ostensible uncertainty:

“cell site activations are subject to a myriad of factors including the load capacity and switch rates of individual sites, if and how often a company tune cell radio frequencies, the topography and interference of other objects, if a company measures the site location, and what steps a company takes to ensure that damage does not impact propagation. Without information of this sort [...] there is insufficient reliability for admission.”¹⁸

15. Assuming that the YEKATOM Defence intends to introduce the proposed documents, its previous posture is irreconcilable with the categorical assertions advanced in the Request regarding the locations of [REDACTED] and SOUSSOU in the ‘relevant period’.¹⁹ More importantly, the Defence’s previous posture belies the

¹⁴ CAR-OTP-2018-0611 and CAR-OTP-2069-0468.

¹⁵ CAR-OTP-2018-0611.

¹⁶ ICC-01/14-01/18-2425-Conf, para. 20.

¹⁷ CAR-OTP-2112-1485.

¹⁸ ICC-01/14-01/18-1408, paras. 21, and 22-23; *see also* ICC-01/14-01/18-1408, para. 27 (asserting “ambiguity as to the localisation of the antennas” and asserting that “caution to the reliability of the cell site location material”).

¹⁹ *See e.g.* ICC-01/14-01/18-2425-Conf, paras. 20, 21.

self-serving claim advanced only now, that geolocation data is significant. Here, the matter further concerns only a peripheral issue.

ii) CAR-D29-0004-3926

16. In respect of the proposed CST reflecting connections regarding a phone number attributed to Habib SOUSSOU to cell towers in BANGUI from 8 February through 21 April 2014,²⁰ the Prosecution provides the following observations.

17. *First*, as is the case above, the underlying CDR²¹ on which the proposed CST is based contains gaps and does not provide a complete picture of the phone's activity and whereabouts. These gaps comprise (i) missing cell site data; and/or (ii) phone inactivity for extended periods. For instance, the underlying CDR does not contain cell site data for the periods, *inter alia*, 11-12 March and 21-29 April 2014.

18. As noted, one of Habib SOUSSOU's attributed phones is inactive during the relevant period including, significantly 4-7 February 2014 — falling within the period of the Anti-Balaka's attack on BODA. In this respect, it is notable that the number attributed to another member of the BODA Anti-Balaka command [REDACTED] connects to the MBAIKI cell cite between 4 and 8 February 2014, passing through BIMBO and PISSA on 4 February before reaching MBAIKI.²²

19. The CDR underlying the proposed CST does not support the Defence's claim that it "contradicts the contested evidence of P-1962 with regard to Habib SOUSSOU's alleged presence in BOFA and his involvement in the establishment of the BODA Anti-Balaka coordination [...] in early February."²³ Rather, it buttresses P-1962's evidence significantly, including in respect of the circumstances of the BODA attack.

²⁰ CAR-D29-0004-3926.

²¹ CAR-OTP-2112-1619.

²² CAR-OTP-2054-1481.

²³ ICC-01/14-01/18-2425-Conf, para. 21.

In any case, the proposed CST is not significant, since it can do nothing to rehabilitate D29-3014's intentional and calculated false testimony regarding his direct contacts with Habib SOUSSOU in 2014 and with BODA's local authorities.²⁴

20. Three CDRs²⁵ in which Habib SOUSSOU's attributed number appears as a 'secondary number' provide geolocation data further undermining the Defence's assertions. They demonstrate that his phone was connecting to cell towers in BODA on 23, 24, and 27 April 2014 – as confirmed by CDR for an additional attributed phone number that shows his connection to the MBAIKI cell tower between 21-27 April 2014, passing through PISSA.²⁶ Again, the arguments advanced in support of the Request mislead.²⁷ It is also noteworthy that the CDR relied on by the Defence²⁸ reflects a missing value of "Null" in place of the *actual* geolocation data during this period.

21. *Third*, taking into consideration the additional phone number attributed to Habib SOUSSOU,²⁹ it is significant that it too reflects connections to the MBAIKI cell tower in early February, specifically on at least 6-7 February 2014³⁰ – within the time frame of the BODA Anti-Balaka attack.

Open-source material to be used during the testimony of D29-6016

22. The Prosecution observes the following regarding the proposed addition of (i) two open-source items relating to the *Mission interafricaine de surveillance des accords de*

²⁴ ICC-01/14-01/18-T-274-CONF-ET, p. 8 ln. 18 – p. 9, ln. 3 (claiming that he did not contact MBONDJO or see him at any point while the witness was in BANGUI, before or after the BODA events); ICC-01/14-01/18-T-274-CONF-ET, p. 9 ln. 13-15 (claiming that he did not contact his son Habib SOUSSOU when the witness was in BANGUI during 2014); *see also* ICC-01/14-01/18-T-274-CONF-ET, p. 17 ln. 9-19 (claiming that he did not have telephone contact with his son Habib SOUSSOU in 2014).

²⁵ CAR-OTP-2008-0481, CAR-OTP-2008-0480, and CAR-OTP-2030-0320.

²⁶ CAR-OTP-2112-1485.

²⁷ *See* ICC-01/14-01/18-2425-Conf, para. 21 (asserting that between 8 February 2014 *through* 21 April 2014 "Habib SOUSSOU was present in BANGUI"). Note that the Habib SOUSSOU's movement from BANGUI between 21-27 April 2014, including to BODA, falls within the period of the *Ordre de Mission* signed by NGAISSONA on 11 April 2014 (*i.e.*, ordering SOUSSOU "a se rendre à BODA" between 13 April and 15 May 2014), *see* CAR-OTP-2003-1076, at 1140-1141.

²⁸ CAR-OTP-2112-1619.

²⁹ CAR-OTP-2045-0048, CAR-OTP-2053-0546, and CAR-OTP-2041-0741.

³⁰ CAR-OTP-2112-1485.

Bangui,³¹ and (ii) four open-source Facebook screenshots from the “[REDACTED]” profile.³²

23. *First*, the Defence’s prospective use of the *Mission interafricaine de surveillance* documents to establish [REDACTED]³³ is not a valid justification for their inclusion in the LoE at this stage, particularly given that the matter is not contested.³⁴ This is also consistent with the Chamber’s findings in relation to the prospective testimony of D29-6018 [REDACTED] on the same matter.³⁵ Similarly, the prospective introduction of the documents would not appreciably assist the Chamber in its any assessment of any contested matter, or in its determination of the truth.

24. *Second*, regarding the four screenshots from a Facebook profile ostensibly attributed to [REDACTED], the Prosecution notes that the Defence intend to show these items to D29-6016 for her to identify [REDACTED] and other individuals, in an effort to establish that the account belongs to [REDACTED].³⁶ However, even if D29-6016 were to identify [REDACTED] (or anyone else) in photographs posted on that profile several months after [REDACTED], this would shed no light on [REDACTED] *before* or *during* the period relevant to the charges in this case. Thus, it is of clearly limited significance.

³¹ CAR-D29-0001-0565 and CAR-D29-0002-0690.

³² CAR-D29-0016-0176, CAR-D29-0016-0178, CAR-D29-0016-0179, and CAR-D29-0016-0180.

³³ Request, para. 29.

³⁴ ICC-01/14-01/18-2249-Conf, paras. 10-14.

³⁵ ICC-01/14-01/18-2424-Conf, par. 64.

³⁶ ICC-01/14-01/18-2425-Conf, para. 32.

Six Facebook items obtained from the Government of Ireland

25. While deferring to the Chamber's discretion on the proposed addition of six Facebook items to the LoE,³⁷ the Prosecution observes that the material constitutes extrinsic evidence of a collateral matter.

26. The six Facebook items primarily relate to P-2582 and P-2620, neither of whom are witnesses in this case. These items also fall outside the time frame related to the charges. Given that the proposed Facebook items go to proof of a collateral matter, should they be introduced, they are inherently of limited value to the proceedings, if at all.

Central African Code of Criminal Procedure

27. Concerning the proposed addition of the Central African Republic's ("CAR") Code of Criminal Procedure,³⁸ the Prosecution observes that: (i) CAR's domestic law of is a matter of public record presumably subject to article 69(6); and (ii) in any event, national legal provisions regarding search and seizure operations are not material to the admissibility or standard evidentiary assessment of items seized by officials and formally transmitted to the Court.³⁹ In particular, article 69(8) provides that the Court "*shall not rule on the application of a State's national law*" when deciding on the relevance or admissibility of evidence collected by a State.⁴⁰ As stated by the Appeals Chamber, "*issues regarding compliance with national law in the execution of a request for cooperation by the Court fall within the competence of the requested State.*"⁴¹

³⁷ CAR-D29-0008-0100, CAR-D29-0008-0101, CAR-D29-0008-0102, CAR-D29-0008-0103, CAR-D29-0008-0104, and CAR-D29-0019-3698.

³⁸ CAR-D29-0016-0180.

³⁹ ICC-01/05-01/13-2275-Red, paras. 296, 326, and 345.

⁴⁰ Article 69(8) (emphasis added).

⁴¹ ICC-01/05-01/13-2275-Red, para. 344 (emphasis added).

28. While the question of admissibility or the formal submission of the proposed document is not directly before the Chamber, its lack of materiality and the Chamber's preclusion from ruling on the application of State law regarding the search and seizure operation carried out by the CAR authorities, directly implicates the prospective *significance* of the proposed items to the trial — an issue squarely before the Chamber. Here, it bears underscoring two things: (i) the Anti-Balaka IDs seized at [REDACTED] which comprise YEKATOM's own and those of elements under his command are already submitted before the Chamber;⁴² and (ii) the YEKATOM Defence has signalled its intent to challenge the admissibility of the seized items on the basis of article 69(7), albeit contrary to article 69(8) and the Court's appellate jurisprudence.⁴³ It transparently seeks the addition of the proposed item for such purpose, and no other.

Media article reporting on Djido SALEH's murder

29. *Finally*, the Prosecution notes that the proposed media article reporting on Djido SALEH's murder⁴⁴ is cumulative. It does not contain information beyond that already in the case record. As the Defence concedes, the article is "consistent with Prosecution evidence *inter alia* regarding the circumstances of the killing and the fact that [some] perpetrators were arrested and later released."⁴⁵ The article equally supports other evidence relating to this incident, including that *a woman* was involved in the mutilation of SALEH's body.⁴⁶ Moreover, contrary to the Defence's assertion, the article's reference to SALEH having been attacked by "an angry mob of nearly 100 people (with no mention of involvement of the Anti-Balaka)"⁴⁷ does not attenuate the evidence of the participation of members of YEKATOM's Anti-Balaka group in the crimes. Indeed, it is consistent with the sworn testimony of insiders P-1647 and P-1339, both of whom identify members of YEKATOM's Anti-Balaka group as having been

⁴² See e.g. ICC-01/14-01/18-2199-Conf.

⁴³ ICC-01/14-01/18-2128-Conf, paras. 7-8, 18.

⁴⁴ CAR-D29-0002-0686.

⁴⁵ ICC-01/14-01/18-2425-Conf, para. 42.

⁴⁶ CAR-D29-0002-0686, at 0688.

⁴⁷ ICC-01/14-01/18-2425-Conf, para. 39.

involved in SALEH's murder and mutilation. Particularly, they implicate Honorine MBAFOLO (aka "*Mama tia godobe*") as a perpetrator of the crimes, among others.⁴⁸

IV. CONCLUSION

30. For the above reasons, the Chamber should reject the Request in respect of the three proposed items described.⁴⁹ The Prosecution otherwise defers to the Chamber's discretion regarding the disposition of the remaining 19 proposed items, subject to the observations noted.



Karim A. A. Khan KC, Prosecutor

Dated this 12th day of April 2024
At The Hague, The Netherlands

⁴⁸ [REDACTED]; ICC-01/14-01/18-T-156- ENG-CT, p. 28, ln. 25 - p. 29, ln.18; *see also* ICC-01/14-01/18-T-194-ENG-WT, p. 63, ln. 16 – p. 64, ln. 11 (identifying Honorine MBAFOLO as '*Mama tia godobe*'); *see also* ICC-01/14-01/18-T-194-ENG-WT, p. 65, ln. 16 – p. 66, ln. 14.

⁴⁹ *See* CAR-D29-0002-0683, CAR-D29-0002-0685, and CAR-D29-0016-0174.