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**International
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Date: **01 March 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 "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", ICC-01/14-01/18-1285-Conf', 24 February 2022, ICC-01/14-01/18-1292-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”) partially opposes the *Request for Leave to add the 21 Items to the List of Evidence and their Submission from the Bar Table, and to extend the estimated examination time for P-0889* (“the Request”).¹ The Defence opposes the sought addition of the 21 items to the List of Evidence (“LoE”), and defers to the Chamber’s discretion as to the request to extend the estimated examination time for P-0889.
2. In light of the Decision issued by the Single Judge suspending *sine die* the deadline to respond to the Prosecution’s request for admission of the 21 items from the bar table, the Defence does not address this aspect of the Request in this response.²

PROCEDURAL BACKGROUND

3. On 25 June 2020, the Prosecution sent a request for assistance to [REDACTED] to obtain *inter alia* the Facebook account of P-0889 (“Request for Assistance”).³
4. On 16 July 2020, the Chamber ordered the Prosecution to provide its LoE to the parties by 9 November 2020.⁴
5. On 9 November 2020, the Prosecution filed its *List of Witnesses and Evidence*.⁵
6. On 5 March 2021, the Prosecution received the 21 items that are the subject of the Request.⁶
7. On 16 April 2021, the Prosecution requested leave to add six Yahoo email threads to its LoE (“First Request”) arguing notably that the relevant items

¹ [ICC-01/14-01/18-1285-Conf.](#)

² Email from Trial Chamber V to the Parties on 18 February 2022 at 13:41.

³ [CAR-OTP-2127-9187.](#)

⁴ [ICC-01/14-01/18-589](#), para. 14.

⁵ [ICC-01/14-01/18-724-Conf-AnxC.](#)

⁶ [ICC-01/14-01/18-1285-Conf.](#) para. 3.

were only obtained after the disclosure deadline set by the Chamber.⁷ The Chamber granted the requests finding *inter alia* that the late addition of the material to the LoE was due to the fact that the Prosecution received the material after the time limit to file the LoE, that it had conducted a swift review of the material and that there was no prejudice to the Defence teams.⁸

8. On 29 June 2021, the Prosecution sought leave from the Chamber to include two medical records to its LoE (“Second Request”).⁹ Leave was granted on the same grounds as the First Request.¹⁰
9. On 28 September 2021, the Prosecution sought authorisation to add four items, namely four annexes to P-0306’s statement, to its LoE (“Third Request”) arguing that the items were not timely added to its LoE because of “an administrative oversight linked to the unique nature of this witness’s security situation”.¹¹ The Defence opposed the Prosecution request on the basis of the lateness of the request and the failure of the Prosecution to demonstrate that an administrative oversight could be characterised as a good cause for this addition.¹²
10. On 29 September 2021, the Single Judge granted the Prosecution’s Third Request emphasizing that this oversight was unfortunate and should be avoided and instructed the Prosecution to thoroughly review its LoE for completeness.¹³
11. On 22 October 2021, the Prosecution filed its Request for Leave to Add Seven Items to the LoE (“Fourth Request”).¹⁴

⁷ [ICC-01/14-01/18-958-Conf](#); Public redacted version: [ICC-01/14-01/18-958-Red](#).

⁸ [ICC-01/14-01/18-989-Conf](#).

⁹ [ICC-01/14-01/18-1042-Conf](#); Public redacted version: [ICC-01/14-01/18-1042-Red](#).

¹⁰ [ICC-01/14-01/18-1080-Conf](#).

¹¹ Email from the Prosecution to the Parties on 28 September 2021 at 17:37.

¹² Email from the Yekatom Defence to the Parties on 28 September 2021 at 17:57.

¹³ Email from Trial Chamber V to the Parties on 29 September 2012 at 10:00.

¹⁴ [ICC-01/14-01/18-1144-Conf](#); Public redacted version: [ICC-01/14-01/18-1144-Red](#).

12. On 2 November 2021, the Prosecution sought leave to add four documents to its List of Material for witness P-2843.¹⁵ The Defence opposed the addition to the List of Material raising *inter alia* the fact that the four items were not included in the LoE.
13. On 3 November 2021, the Chamber ordered the Prosecution to file a request to add the four documents to its LoE, “should this be its intended course of action”.¹⁶
14. On 4 November 2021, the Prosecution filed a request accordingly (“Fifth Request”).¹⁷ Among the four items, one had not been disclosed to the Defence prior to 2 November 2021,¹⁸ and the three others had been disclosed under Rule 77.¹⁹
15. On 5 November 2021, the Chamber partially granted the Fifth Request, allowing the addition to the LoE for the three items already disclosed to the Defence but rejected the addition of the previously undisclosed document.²⁰ The Chamber reiterated its concerns over the Prosecution’s repeated requests for additions to its Lists of Materials of items not included in its LoE, and reiterated its previous instruction to “thoroughly review its list of evidence for completeness and to request such additions only on an exceptional basis”, further noting that it “would not tolerate that the Prosecution ignores this procedural step”.²¹
16. On 7 December 2021, the Single Judge granted the Prosecution’s Fourth Request stressing however that “it expects no more oversights from the Prosecution, and reiterates its previous instruction to thoroughly review its

¹⁵ Email from the Prosecution to the Parties on 2 November 2021 at 14:16.

¹⁶ Email from Trial Chamber V to the Parties on 3 November 2021 at 14:52.

¹⁷ [ICC-01/14-01/18-1164-Conf](#)

¹⁸ [CAR-OTP-2130-1031](#).

¹⁹ [ICC-01/14-01/18-1164-Conf, para. 5](#); See also [ICC-01/14-01/18-1166-Conf-Anx](#), page 5.

²⁰ [ICC-01/14-01/18-T-073-Red-ENG](#), page 3, ln 20 to page 4, ln. 7.

²¹ [ICC-01/14-01/18-T-073-Red-ENG](#), page 3 ln. 5-15.

list and request any additions thereto on an exceptional basis and in a timely manner".²²

17. On 14 December 2021, the Prosecution filed its updated LoE, containing 120 items in addition to those included in the initial LoE.²³
18. On the same day, the Prosecution submitted a request to add six items in relation to [REDACTED] on its LoE ("Sixth Request"). This request was subsequently granted by the Single Judge.²⁴
19. On 11 January 2022, in anticipation of the start of witness P-0889's testimony expected on 17 January 2022, the Prosecution transmitted its List of Materials for witness P-0889, in which were listed twenty-four items²⁵ that are not included in the Prosecution's LoE,²⁶ that had been disclosed on 4, 11 and 17 June 2021 under Rule 77.²⁷
20. On 17 January 2022, the hearings were cancelled,²⁸ and P-0889's appearance was later postponed to the ongoing Tenth Witness Block; he is scheduled to testify from 8 March 2022.²⁹
21. On 11 February 2022, almost one month after P-0889's testimony was initially expected, the Prosecution reclassified, *inter alia*, the 24 items from Rule 77 to INCRIM without providing any explanation for such reclassification.³⁰
22. On 17 February 2022, through *inter partes* correspondence with the Defence, the Prosecution communicated its intention to submit 21 of the 24 reclassified

²² [ICC-01/14-01/18-1206](#), para 15.

²³ [ICC-01/14-01/18-1211](#).

²⁴ [ICC-01/14-01/18-1212-Conf](#), Public redacted version : [ICC-01/14-01/18-1212-Red](#); [ICC-01/14-01/18-1270-Conf](#), Public redacted version : [ICC-01/14-01/18-1270-Red](#).

²⁵ Items 39 to 62 of its List of Materials.

²⁶ Email from the Prosecution to the Parties on 11 January 2022 at 21:09.

²⁷ Trial Rule 77 Packages 49, 50, and 51 respectively [ICC-01/14-01/18-1013-Conf-Anx](#) (4 June 2021); [ICC-01/14-01/18-1018-Conf-Anx](#) (11 June 2022); [ICC-01/14-01/18-1032-Conf-Anx](#) (17 June 2022). For ease of reference the Defence will only refer to the date of 4 June 2021 thereafter.

²⁸ Email from Trial Chamber V to the Parties on 17 January 2022 at 12:25.

²⁹ Email from the Prosecution to the Parties on 26 January 2022 at 12:20.

³⁰ Trial Reclassification to INCRIM Package 10: [ICC-01/14-01/18-1277-Conf-Anx](#).

items mentioned above, through a bar table motion.³¹ The Defence responded *inter partes* noting its opposition to the proposed motion, advancing that, due to its timing of the Prosecution's *inter partes* approach – i.e. less than three hours before filing – it was in contravention with the Chamber's Initial Directions³² to the effect that the moving party ought to inquire about the objection or consent of the other parties prior to filing any bar table motion; the Defence maintained its willingness to engage in *inter partes* consultations within a reasonable timeframe.³³

23. On the same day, the Prosecution filed its Request.³⁴
24. Following the notification of the Prosecution's request, the Single Judge directed the participants to file their responses by 24 February 2022.³⁵
25. The Defence partially responded to the Request by way of email, seeking the dismissal *in limine* of the bar table motion or, in the alternative, the extension of time to respond on its merits to 25 March 2022.³⁶
26. On 18 February 2022, the Prosecution responded, deferring to the Chamber's discretion.³⁷
27. The same day, the Single Judge concluded that the necessity for a ruling on the bar table application will depend on the outcome of the Chamber's decision on the Request, therefore suspending the response deadline to the bar table motion until further notice.³⁸

APPLICABLE LAW

³¹ Email from the Prosecution to the Defence on 17 February 2022 at 10:44.

³² [ICC-01/14-01/18-631](#), para. 62.

³³ Email from the Yekatom Defence to the Prosecution on 17 February 2022 at 13:00.

³⁴ [ICC-01/14-01/18-1285-Conf](#).

³⁵ Email from Trial Chamber V to the Parties on 17 February 2022 at 17:57.

³⁶ Email from the Yekatom Defence to the Parties on 17 February 2022 at 19:40.

³⁷ Email from the Prosecution to the Parties on 18 February 2022 at 11:04.

³⁸ Email from Trial Chamber V to the parties on 18 February 2022 at 13:41.

28. According to the jurisprudence of the Court, a request to add documents into the LoE is not a request for extension of time under regulation 35 of the Regulations.³⁹ 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”. 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”.⁴⁰
29. The Chamber may extend a time limit if good cause is shown, that is to say “when there are sound reasons which would objectively provide justification for the inability of a party to comply with his/her obligation”. As such, a party should show exceptional circumstances to add evidence after the deadline established by the Chamber.⁴¹

SUBMISSIONS

30. The Defence submits that the Prosecution has failed to provide a convincing explanation justifying its untimely request to add the 21 Items to the LoE. No good cause has been demonstrated to explain the Prosecution’s apparent inability to comply with its obligations.
31. In the Request, the Prosecution seeks to broadly justify its request by stating that the 21 Items were only received on 5 March 2021, which it qualifies as being “well after” the 9 November 2020 deadline. In addition, it states that the items were disclosed to the Defence on 4 June 2021, and added to P-0889’s List

³⁹ [ICC-01/14-01/18-989-Conf](#), para. 5 and references cited therein.

⁴⁰ [ICC-01/14-01/18-989-Conf](#), para. 5.

⁴¹ [ICC-01/14-01/18-403-Conf-Corr](#), para 23; Public redacted version : [ICC-01/14-01/18-403-Red-Corr](#).

of Materials on 11 January 2022. The Prosecution further points out the complexity of the analyses involved, insisting particularly on the volume and difficulty to decipher Facebook messages, thus requiring a thorough analysis.⁴²

32. Noting the Chamber's orders to the Prosecution issued on 29 September 2021 and 5 November 2021 to "thoroughly review its list of evidence for completeness and to request such additions only on an exceptional basis",⁴³ the Defence submits that these arguments are unconvincing; and that the Prosecution has had substantial time to review the 21 Items, and numerous occasions to request leave to add them to its LoE before 17 February 2022.
33. The Defence notes that the 21 Items that are now sought to be added to the LoE were obtained by the Prosecution after the 9 November 2020 deadline. It is understandable that, in relation to those items, the LoE deadline could not be met. However, the Defence submits that this does not discharge the Prosecution of conducting a reasonably swift review of its material and taking the necessary steps to diligently assess and communicate the potential relevance and use of its material in the proceedings.
34. The Prosecution has been in possession of the 21 Items since 5 March 2021, and disclosed them on 4 June 2021, six months before filing its updated LoE on 14 December 2021. Upon disclosure, all 21 Items had been registered, reviewed, and redacted.⁴⁴
35. For example, in its Fifth Request, the Prosecution sought leave for late addition of document CAR-OTP-2133-7314 consisting of Facebook messages

⁴² [ICC-01/14-01/18-1285-Conf](#).

⁴³ [ICC-01/14-01/18-T-073-Red-ENG](#), page 3 ln. 5 to page 4 ln. 3.

⁴⁴ [ICC-01/14-01/18-1285-Conf](#), para 10.

that were disclosed simultaneously to the 21 Items on 4 June 2021 under Rule 77 of the Rules.⁴⁵

36. Hence, upon receiving the items and prior to disclosing them to the Defence, the Prosecution appears to have engaged in a thorough review of the items, regardless of the complexity of the material. The Prosecution fails to explain why it took several months to conclude that upon further analysis, the nickname [REDACTED] refers to [REDACTED]; or why the relevance of various interlocutors like [REDACTED] would have required a separate time-intensive analysis.⁴⁶
37. In that regard, the Defence submits that evidence analysis is a standard aspect of the Prosecution's work and that "the mere fact that common day-to-day working methods did not allow earlier compliance with the time limit does not constitute exceptional circumstances".⁴⁷
38. Moreover, the Prosecution does not advance any convincing argument to justify its failure to request addition of the 21 items to its LoE in anticipation of P-0889's initial testimony. Indeed, prior to adding those items to its List of Material for this witness, the Prosecution should have sought leave to add them in its LoE, and thus comply with the Chamber's express instructions.⁴⁸ What is more, the Prosecution cannot reasonably argue that the "complexity of the analyses involved" and the fact that "messages contained in the Facebook accounts are voluminous and difficult to decipher" were impediments to requesting the addition of the 21 items when it had already

⁴⁵ Trial Rule 77 Packages 49.

⁴⁶ The Prosecution advances the necessity to analyse interactions between [REDACTED] and NGAISSONA to conclude [REDACTED] relevance. It provides [CAR-OTP-2130-3641](#) as an example, a short email disclosed prior to the 21 Items on 10 February 2021.

⁴⁷ See *Prosecutor v. Katanga & Ngudjolo*, [Decision on the Prosecution Motion for Leave to Disclose and add the Investigator's Report concerning Witness P-268 to the List of Incriminating Evidence](#), 27 September 2010, ICC-01/04-01/07-2325-Red, para. 14.

⁴⁸ [ICC-01/14-01/18-T-073-Red-ENG](#), page 3, lns 9-12.

taken the decision to add those very same items to its List of Material for P-0889's examination.

39. The Defence also notes that the Prosecution sent its Request for Assistance on 25 June 2020 but, through its investigation, obtained further information as to the potential relevance of P-0889's Facebook account on [REDACTED] when it interviewed the witness.⁴⁹ Considering this, the Prosecution could have reasonably anticipated that the content of any Facebook documents relating to P-0889 would be material to its case.⁵⁰ As such, they should have been immediately flagged as relevant by the investigators, no matter how "complex" their analysis. Likewise, the Prosecution ought to have prioritized the analysis of these items upon reception according to the order of appearance of its witnesses.
40. The Defence further considers it important to address two arguments made by the Prosecution. First, upon review of the relevance and probative value included in Annex A of the Request, one can conclude that most of the conversations were not particularly complex or difficult to decipher. By way of example, the item with ERN CAR-OTP-2132-2941, purportedly a Facebook conversation between P-0889 and [REDACTED], comprises two messages and is relied on to 'show[] that P-0889 communicates with [REDACTED] who he wishes a happy birthday on his behalf, and on behalf of [REDACTED].⁵¹ To suggest that the pleaded significance of these messages was [...] 'not immediately clear', or that these messages were 'voluminous and difficult to

⁴⁹ [CAR-OTP-2122-8036-R02](#) page 8066 ln. 1054 to page 8067 ln. 1091.

⁵⁰ Under Regulation 35, it is rather the inability of the prosecution to reasonably anticipate that the evidence would become material to the case that constitutes *exceptional circumstances*. See *Prosecutor v. Katanga & Ngudjolo*, [Decision on the Prosecution Motion for Leave to Disclose and add the Investigator's Report concerning Witness P-268 to the List of Incriminating Evidence](#), 27 September 2010, ICC-01/04-01/07-2325-Red, para. 17.

⁵¹ [ICC-01/14-01/18-1285-Conf-Anx](#), p. 5.

decipher' is clearly without merit; and this example duly exposes the broad-brush and ultimately unfounded nature of the Prosecution's argument.⁵²

41. Secondly, the Prosecution suggestion that the Defence is in a better position than the Prosecution to recognise the materiality of the conversations because of its "relationship to the persons and subject matter of the conversations" is similarly broad-brush and clearly unfounded. It is a transparent attempt by the Prosecution to avoid taking due responsibility for having failed to meet its obligation to provide due notice of the material it intend to use at trial, and it should be dismissed as such.
42. The same applies to the Prosecution's argument that the Defence was aware of the significance of the Items following their addition in the Prosecution's Lists of Materials for P-0889. As regards, P-0889's List of Materials, the relevance of the identified passages in the List of Materials was unspecified, leaving the Defence to undergo guesswork as to the Prosecution's intended manner of their use. As such, the mere fact that the 21 Items were included in the Prosecution's List of Materials on 11 January 2022 cannot be reasonably advanced to support the Prosecution claim that no undue prejudice is caused by the untimely addition of the 21 Items to its LoE.⁵³
43. In sum, there were at least five separate occasions that compound the Prosecution's continued failure to have sought leave to add the 21 Items on its LoE: on 4 June 2021, after their review and disclosure to the Defence; on 29 September 2021 and 5 November 2021 when the Chamber instructed the Prosecution to thoroughly review its LoE for completeness; on 14 December 2021 when it filed its updated LoE; and finally, as late as 11 January 2022, when it provided its List of Material for P-0889.

⁵² [ICC-01/14-01/18-1285-Conf](#), para 17.

⁵³ [ICC-01/14-01/18-1285-Conf](#), para 22.

44. As such, it can reasonably be concluded that the Prosecution has continued to ignore the Chamber's express direction to "thoroughly review its list of evidence for completeness and to request such additions only on an exceptional basis and in a timely manner"⁵⁴, a direction which is essential to safeguard the procedural rights of the Defence.
45. The Defence thus raises its grave concerns with what appears to be a clear and repetitive pattern of disclosure and notice-related violations emerging as this trial proceeds. Not only does the Prosecution's failure to seek leave to add the 21 Items to its LoE in a timely manner call into question the Prosecution's reasonable diligence in this regard, such conduct leads to constant undue caution on the Defence's part, as the Prosecution's LoE has repeatedly proven incomplete and thus unreliable.
46. As such, given the previous tolerance granted on various occasions to the Prosecution, the critical nature of the deadline for the LoE, and the necessity to set a limit to maintain the fairness of the trial and its underlying principles,⁵⁵ the Defence submits that the Request should be denied, as its granting would otherwise result in a prejudice to the Defence and set an unwarranted level of uncertainty as to the procedure of the case.

CONFIDENTIALITY

47. The present response is filed on a confidential basis corresponding to the classification of the Request. The Defence does not oppose the reclassification as public.

RELIEF SOUGHT

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

⁵⁴ Email from Trial Chamber V to the Parties on 29 September 2012 at 10:00.

⁵⁵ [ICC-01/14-01/18-403-Conf-Corr](#), para. 24 ; Public redacted version : [ICC-01/14-01/18-403-Red-Corr](#).

REJECT the Prosecution's Request.

RESPECTFULLY SUBMITTED ON THIS 1ST DAY OF MARCH 2022⁵⁶



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⁵⁶ The assistance of Legal Intern, Ms Yasmeen Hajjali, to the draft of this response is gratefully acknowledged.