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**International
Criminal
Court**

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

Date: **10 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

Public redacted version of “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

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. SUBMISSIONS

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber V (“Chamber”) to: (a) authorise the addition of 21 Facebook records (“Items”)¹ to its List of Evidence² in accordance with the Decision Setting the Commencement Date of the Trial³ and subsequent decisions;⁴ (b) recognise the Items as ‘formally submitted’, in accordance with articles 64(9)(a), 69(3) and 69(4), rule 63(2) of the Rules of Procedure and Evidence (“Rules”) and the Initial Directions on the Conduct of Proceedings (“Initial Directions”);⁵ and (c) permit the extension of P-0889’s supplementary examination from two to six hours,⁶ to ensure that the Items can be properly addressed, as necessary.

2. The Items comprise one Facebook Placeholder report and 20 Facebook conversations between [REDACTED] (P-0889) and several individuals during the Relevant Period.⁷ The Items are relevant to material issues at trial, mutually corroborative, and bear sufficient indicia of reliability on which the Chamber may properly base its article 74 decision.

3. The addition of the Items to the LoE is warranted and appropriate in the circumstances. Despite the Prosecution requesting the Facebook account of P-0889 on 25 June 2020, the materials were only received on 5 March 2021, well after the 9 November 2020 deadline to file its LoE.⁸ They were disclosed to the Defence in June 2021 and listed on P-0889’s examination list on 11 January 2022.

¹ CAR-OTP-2134-0407, CAR-OTP-2134-0441, CAR-OTP-2134-0449, CAR-OTP-2134-1599, CAR-OTP-2134-1852, CAR-OTP-2134-1868.

² ICC-01/14-01/18-724-Conf-AnxC-Corr (“LoE”).

³ ICC-01/14-01/18-589, para. 10, 14 and 16 (“Decision”).

⁴ ICC-01/14-01/18-989-Conf, para. 5-6; ICC-01/14-01/18-1080-Conf, para. 7; T-073-ENG ET, p. 3, l. 16-17; ICC-01/14-01/18-1206, para. 5.

⁵ ICC-01/14-01/18-631, para. 61.

⁶ In its rule 68(3) application, the Prosecutor maintained its initial two-hour estimate for the supplemental examination of P-0889 (*see* ICC-01/14-01/18-1170, para.19); *see* ICC-01/14-01/18-1226, paras. 28-30 (granting the application, noting the anticipated expedition of the proceedings).

⁷ As defined in the Prosecution’s Trial Brief, from September 2013 through December 2014: ICC-01/14-01/18-723-Red para. 5.

⁸ ICC-01/14-01/18-589, para. 14.

4. Recognition of the Items' formal submission is also warranted and appropriate. As detailed in the Annex, each item submitted *prima facie* satisfies the evidential criteria for submission.

5. Finally, the addition of the Items to the LoE and their formal submission causes no prejudice to a fair trial. To the contrary, it would assist in the Chamber's determination of the truth, and would contribute to an expeditious trial.

II. CONFIDENTIALITY

6. Pursuant to regulation 23*bis*(1) of the Regulations of the Court ("RoC"), the Prosecution files this request and its Annex as "*Confidential*" because they contain confidential information regarding Prosecution evidence. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. Background

7. P-0889's Facebook account was obtained from Facebook Ireland Limited (Meta INC - former Facebook INC's Irish subsidiary), pursuant to a Request for Assistance ("RFA") made to the competent Irish authorities on 25 June 2020 [REDACTED].⁹

8. Despite numerous attempts to secure the expedited treatment of this RFA, the competent Irish authorities only transmitted the Items on 5 March 2021, pursuant to the relevant domestic legal procedures. The authorities informed the Prosecution that, although marked as urgent, the disposition of the RFA was delayed primarily because of the partial closure of the national courts due to Covid-19. The fact that Items were obtained after the 9 November 2020 deadline to file the LoE is thus due to circumstances outside the Prosecution's control.

⁹ CAR-OTP-2127-9187

9. The material responsive to this particular RFA consisted of 19 Facebook accounts comprising 197,719 items including 155,407 messages, 1213 photographs, 31 videos, 585 status updates, 230 wall posts, 31.333 Friends records and 3.240 Friends requests.¹⁰

10. Upon receiving this material from the Irish authorities in March 2021, the Prosecution downloaded them into its internal servers (“Magnet AXIOM” programme). As soon as these items were downloaded, investigators and/or analysts reviewed them and filtered out irrelevant items, in order to avoid burdening the Chamber, the Parties and Participants with an overload of irrelevant material. The potentially relevant items were subsequently registered and reviewed to classify them legally, prepare them for disclosure, and to assess and implement redactions where necessary. After being processed by the Information and Evidence Unit, the Items were formally disclosed to the Defence in June 2021.¹¹ Subsequently, in preparation of P-0889’s testimony, on 11 January 2022, the Items were added to P-0889’s Examination List.

B. The documents are relevant and have significant probative value

11. The Items are extracted from P-0889’s Facebook account under the profile name “[REDACTED]”, which P-0889 confirmed as his during his interview.¹² He also confirmed the e-mail address and telephone number¹³ used to create the account.¹⁴

12. Consistent with the Initial Directions,¹⁵ the Prosecution has provided the Defence with an annex of the Items to obtain their respective positions regarding their bar table submission. However, because P-0889’s testimony is upcoming, the Prosecution has

¹⁰ Some of which were received from the Irish authorities in duplication.

¹¹ The specific dates of disclosure are set out in the Annex.

¹² CAR-OTP -2122-8036, at 8066-8067, l. 1054-1067.

¹³ [REDACTED]: *see* CAR-OTP-2122-7919, at 7950, l. 1090-1102 and CAR-OTP -2122-8036, at 8065, l. 1017-1019.

¹⁴ *See* CAR-OTP-2131-1012.

¹⁵ ICC-01/14-01/18-631, para. 62.

done so contemporaneously with the present filing, given that an expedited response time may be necessary.

13. The Items are listed in the Annex, by ERN, along with a description, the relevance/probative value, and the disclosure date.

14. As further detailed in the Annex, the Items show, amongst others, (i) the (military) organisation of the Anti-Balaka from July 2013 onwards in different areas in the Central African Republic (“CAR”), in the Democratic Republic of the Congo (“DRC”), and in Cameroon, as well as the communication/coordination of Anti-Balaka members across these areas; (ii) the participation of the Anti-Balaka in attacks in September 2013; (iii) the link between the Anti-Balaka and FROCCA; (iv) the planning and preparation of the 5 December 2013 attack on BANGUI; (v) the role of NGAISSONA – referred to as the ‘boss’ upon his return to BANGUI on 14 January 2014 and as one of the two ‘*créateurs du mouvement*’; (vi) the Anti-Balaka’s adoption of anti-Muslim rhetoric, disseminated earlier by BOZIZE and those within his circle, conflating the Seleka and Muslims; (vii) the whereabouts of certain Anti-Balaka members; and (viii) the attribution of particular telephone numbers.

C. Reliance on the documents causes no unfair prejudice to the Defence

15. In preparing P-0889’s examination and having concluded certain further analysis, the Prosecution has determined that the Items are relevant and seeks their addition to its LoE in advance of P-0889’s testimony.

16. The fact that several months passed since the disclosure of the evidence is not unreasonable in the circumstances.

17. This case is complex, and the messages contained in the Facebook accounts are voluminous and difficult to decipher. The interlocutors use French shorthand and/or slang (for example, ‘*slt*’ for ‘*salut*’), making the collection difficult to search

electronically. In addition, they use code-names and/or nick-names,¹⁶ and the relevance of the various interlocutors depends sometimes on a further analysis of their relationship and/or independent communications with the Accused or other actors in the case.¹⁷ In short, given the vast amount of information contained in the Facebook records, the *significance* of the messages is therefore not always immediately clear. This is to be expected in complex cases and neither undermines or detracts from the reasonable diligence exercised to discover or determine such information.

18. The ICTY *Popović, et al* case¹⁸ is illustrative. There, Trial Chamber allowed the Prosecution to re-open its case two months after its closure, to call three additional witnesses and to submit ten documents. In that case, information was discovered involving a mass grave leading to the revelation of Popović's presence there on the date of the execution of several prisoners. It was discovered that he had directed the execution separate and apart from several other executions for which he was charged. While Popović was *not charged* with this incident, the Prosecution sought to reopen the case as proof of his knowledge, intent, and pattern of conduct during the relevant time period (*i.e.*, evidence going to the *charged crimes*). In granting the Prosecution's request, the Chamber referred to three key factors in determining whether the Prosecution exercised diligence in identifying the evidence sought to be introduced: (1) the delayed execution of the relevant requests for assistance; (2) the complexity of the analyses involved; and (3) the limited resources and reasonable allocation of them (*i.e.*, the volume of other material and the resources available to conduct their analysis). The Chamber ruled that while some of the documents the Prosecution

¹⁶ For example upon further analysis, the Prosecution has concluded that the name DJAMBAR refers to Eugène NGAIKOSSET.

¹⁷ For example the relevance of P-0889's interlocutor [REDACTED] only became clear after a separate analysis of [REDACTED]'s interactions with NGAISSONA, including his message to NGAISSONA on 13 August 2013 to inform him of [REDACTED] (*see* CAR-OTP-2130-3641).

¹⁸ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T ("*Popović, et al*").

sought to submit were already in its possession, they could still be considered as ‘fresh evidence’ which required a demonstration of reasonable diligence.¹⁹

19. Significantly, the Chamber held that:

“[r]easonable diligence must be understood with regard to *the realities facing the parties*, not measured by what a party with infinite time and limitless investigative resources might have discovered or understood.”²⁰

20. It found that “the Prosecution exercised the requisite diligence in discovering this evidence”²¹ in circumstances similar to this case (*i.e.*, concerning material in the Party’s possession), specifying that:

“a different holding would impose an *unreasonable burden* on the parties; *one that would require virtual investigative perfection in spite of the circumstances*, rather than requiring reasonable diligence under the circumstances”.²²

21. The addition of the Items to the LoE and their recognition as formally submitted well within the presentation of the Prosecution’s case, does not cause unfair prejudice to the Accused. In contrast with the *Popović, et al* decision, the Prosecution case is not yet in an advanced stage.²³ And, while this Chamber has recognised that applications to add material to the LoE do not fall within the remit of regulation 35,²⁴ the circumstances underscore ‘good cause’ in any event, and the Prosecution’s exercise of reasonable diligence. Moreover, the Items provide *direct* evidence that is consistent with the theory of the case and the basis of the confirmed charges.

¹⁹ *Popović, et al*, IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 8 May 2008, in particular paras.23-39 (emphasis added), available at: <https://www.icty.org/x/cases/popovic/tdec/en/080509.pdf> [accessed 16 February 2022] (“*Popović* Decision”); *see also Popović, et al*, IT-05-88-T, Decision on Vujadin Popović’s Interlocutory Appeal against the Decision on the Prosecution’s Motion to Reopen its Case-in-Chief, 24 September 2008, in particular paras. 24-31 (dismissing the appeal), available at: <https://www.icty.org/x/cases/popovic/acdec/en/080924.pdf> [accessed 16 February 2022] (“*Popović* Appeal Decision”).

²⁰ *Popović* Decision, para. 31.

²¹ *Popović* Decision, para. 31.

²² *Popović* Decision, para. 31.

²³ To date, the Prosecution has called only 25 of its 96 anticipated live witnesses.

²⁴ ICC-01/14-01/18-989-Red, para. 5.

22. All Items were timely disclosed and are limited in volume (in total 192 pages). The Defence was further aware of the subject matter of the Items having been in possession of them since June 2021. Given their relationship to the persons and subject matter of the conversations, the Defence has always been in a better position than the Prosecution to recognise the materiality of the information. Moreover, the Defence has been aware of the significance of the Items in view of their 11 January 2022 inclusion in the List of Materials potentially to be used during the examination of P-0889.²⁵

D. Extension of P-0889's examination time

23. Although it is difficult to predict how P-0889's testimony will unfold, the Prosecution does not intend to seek many clarifications in respect of his prior recorded testimony. Rather, the Prosecution will focus on the Items or some of them (*i.e.*, to clarify or confirm the language used, the individuals mentioned, the circumstances in which the conversations took place, etc.), and therefore requests to extend the anticipated supplemental examination time from two to six hours, to ensure that it has enough time to do so properly. To this extent, the request does not substantially impact the Chamber's determination to receive P-0889's evidence pursuant to rule 68(3). Affording the Prosecution a reasonable opportunity to lead evidence on the Items through P-0889 will continue to advance the expeditious conduct of the proceedings. By contrast, converting his status to a fully *viva voce* witness would require at least twice the six hours now requested.

24. Separately, adding the Items to the LoE in advance of P-0889's testimony would also enhance judicial efficiency, as it would avoid lengthy discussion and litigation in Court on the extent to which the Items can be used during P-0889's examination,

²⁵ It should be noted that both Defence Teams also included Facebook messages from P-0889 that were received pursuant to the same RFA on their list of materials, namely CAR-OTP-2133-2844 and CAR-OTP-2133-7024 (YEKATOM Defence) and CAR-OTP-2133-7029 (NGAISSONA Defence). Their familiarity with these materials is undisputed.

including for instance, to refresh his memory.²⁶ In addition, recognising the Items as formally submitted in advance may reduce the need to use valuable Court time to address all the conversations involving P-0889, as opposed to only those Items for which additional clarifications may be necessary.

IV. CONCLUSION

25. The fair and expeditious conduct of the proceedings is not infringed by permitting the Prosecution to add the Items to the LoE at this stage, and recognising their formal submission. The Items are of significant probative value, their addition causes no unfair prejudice, and their introduction will advance the Chamber's mandate to search for the truth.

26. For the above reasons, the Prosecution requests the Chamber's leave to add the Items to its LoE, to recognise them as formally submitted, and to permit the extension of P-0889's supplementary examination from two to six hours.



Karim A. A. Khan QC, Prosecutor

Dated this 10th day of March 2022

At The Hague, The Netherlands

²⁶ For the purpose of refreshing the witness' memory, it is immaterial whether the documents are admissible as evidence or not. Documents used to refresh the recollection of a witness need not be included in the list of evidence, since their purpose is to elicit the *testimonial narrative* of the witness, and not necessarily to 'rely on' or admit the document itself. As this Chamber has already ruled in its Decision on Protocols at Trial, witnesses may refer to documents to refresh their memory only insofar as: a) the documents in question contain the personal recollections of the witness and b) copies of the document have been made available to the opposing party, who may rely on the parts referred to by the witness during its examination (*see* ICC-01/14-01/18-677-Anx1, para. 91). The Items fulfil both conditions.