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**International
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Court**

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Date: **29 June 2022**

TRIAL CHAMBER V

Before:

**Judge Bertrand 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 AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

Public Redacted Version of “Defence response to the ‘Request for leave to add 103 items to the List of Evidence’”, ICC-01/14-01/18-1330, 27 May 2022

Source: Defence of Patrice-Edouard Ngaïssona

Document to be notified in accordance with regulation 31 of the *Regulations of the Court*
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I. Introduction

1. On 24 March 2022, the Prosecution filed its “Request for leave to add 103 items to the List of Evidence” (‘Prosecution Request’),¹ which marked the fifth time in a span of just six months that the Prosecution has requested Trial Chamber V (‘the Chamber’) to entertain yet another request for leave to add items to the Prosecution List of evidence.² The frequency with which the Prosecution makes such requests is staggering, especially in the context of the past six requests being made after the Chamber expressly ordered the Prosecution to “thoroughly review its List of Evidence for completeness and request any additions thereto on an exceptional basis and in a timely manner”.³ The recurring nature of the requests, on its own, reveals a complete disregard for the express orders from the Chamber. The present Prosecution Request further demonstrates this disregard by the unprecedented amount of material sought to be added to the Prosecution List of Evidence and its prejudicial nature.
2. The 103 items subject to the Prosecution request consist of thousands of pages of Facebook material involving several interlocutors, some of whom the Prosecution qualifies as individuals who held key insider information⁴ or who were in “proximity to Ngaïssona at the time the Anti-Balaka were organizing themselves from Cameroon”.⁵ The Defence for Patrice-Edouard Ngaïssona (‘the Defence’) opposes the Prosecution Request because the Prosecution’s reliance on the material would cause undue prejudice to Mr Ngaïssona’s procedural rights.

¹ ICC-01/14-01/18-1330.

² The Defence notes five requests being filed since 29 September 2021. ICC-01/14-01/18-1144; ICC-01/14-01/18-1164; ICC-01/14-01/18-1212; ICC-01/14-01/18-1285; ICC-01/14-01/18-1330. The latest request to add items to the Prosecution’s List of Evidence, to which the Defence already responded was filed by the Prosecution on 19 May 2022. ICC-01/14-01/18-1415.

³ ICC-01/14-01/18-1206, para. 8 *citing* Email from the Chamber, 29 September 2021 at 10:00.

⁴ Prosecution Request, paras 13-14.

⁵ Prosecution Request, para. 16.

II. Confidentiality

3. The present request is filed on a confidential basis pursuant to regulation 23bis(1) of the Regulations of the Court as it responds to a request of the same classification. A public redacted version will be filed as soon as practicable.

III. Applicable Law

4. In the first decision the Chamber rendered on whether to grant the Prosecution leave to add items to its List of Evidence,⁶ the Chamber found that it “must be determined 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”.⁷ In making this determination, the factors to be considered include *inter alia*: (1) the extent to which the requested addition is opposed by the Defence; (2) the time when the addition was sought; (3) the nature and the amount of the material concerned; (4) the intended purpose of the Prosecution’s requested reliance on such material; and (5) its prospective significance in light of the charges brought against the accused and the rest of the available evidence.⁸

IV. Submissions

5. The Defence opposes the Prosecution Request to add several thousand pages of Facebook communications to its List of Evidence for the following three reasons: (1) the request is highly untimely and its untimeliness could have been prevented had the Prosecution exercised due diligence in its investigation against Mr Ngaïssona; (2) the purpose for which the Prosecution seeks to rely on the material relates almost entirely to allegations on which almost all the

⁶ ICC-01/14-01/18-989-Conf.

⁷ Ibid., para. 5.

⁸ Ibid., para.5.

Prosecution insiders have already testified or to allegations for which the Prosecution does not present any witness, thereby causing irreparable prejudice to the Defence's right to test this material; and (3) the sheer volume of the material that the Prosecution seeks to add is prejudicial to Mr Ngaïssona's rights to adequate time and facilities to prepare his defence.

A. The Prosecution Request is highly untimely, and its untimeliness could have been prevented, or in the very least mitigated, had the Prosecution exercised due diligence in its investigation against Mr Ngaïssona

6. Despite filing the Prosecution Request more than one year after its presentation of evidence began in its case against Mr Ngaïssona, the Prosecution claims that the request is timely, and that it exercised reasonable diligence in its investigations. The Prosecution bases this claim on two premises: (1) the [REDACTED] being unable to process the Prosecution's Request for Assistance ('RFA') on an expedited basis due to the delays caused by the COVID-19 pandemic;⁹ and (2) the volume and the complexity of the material was such that it was reasonable for the Prosecution to take nine months after disclosing the items to identify the material it wished to add to its List of Evidence.¹⁰ These two explanations gloss over important information and are thus insufficient to justify the Trial Chamber finding the request timely.
7. When the Prosecution's conduct with respect to requesting and then processing the Facebook material is fully examined, it demonstrates that a Prosecution did not exercise reasonable diligence. With diligence, it would have been foreseen that: (1) its RFA to the [REDACTED] in June 2020 would have never been processed in time for the November 2020 disclosure deadline set by the

⁹ Prosecution Request, para. 8.

¹⁰ Ibid., para. 11.

Chamber, and (2) that the RFA would yield an extraordinary amount of material that would be difficult to decipher and piece together.

8. The Chamber has already considered the circumstances surrounding the obtaining of Facebook records subject to the present Prosecution Request in the decision it rendered on the Prosecution's request to add 21 items relating to Facebook material of [REDACTED] to the Prosecution List of Evidence.¹¹ The Single Judge found that the receipt of the items past the disclosure deadline was beyond the Prosecution's control.¹² This is an element that is not in dispute. The element in dispute with respect to the untimeliness of the Prosecution Request is the foreseeability of the delay in: (1) obtaining the material from the [REDACTED], (2) processing the material for the Prosecution team for disclosure, and (3) identifying the material to be added to the List of Evidence.
9. Prior to the RFA, which yielded the Facebook material subject to the Prosecution Request, the Prosecution made two other RFAs to the [REDACTED] regarding Facebook records; one was made on 23 May 2017¹³ and the second one was made on 12 April 2018.¹⁴ It appears the OTP obtained the material subject to the May 2017 request seven months later, in December 2017,¹⁵ whereas the material for the 12 April 2018 request was obtained in late January 2019, nine months after the Prosecution sent its RFA.¹⁶
10. The RFA from 12 April 2018 requested Facebook records relating to over twenty accounts, and the Prosecution received several thousand pages of material as a

¹¹ ICC-01/14-01/18-1301.

¹² *Ibid.*, para. 12.

¹³ CAR-OTP-2130-0259.

¹⁴ CAR-OTP-2130-0268.

¹⁵ See *e.g.* chain of custody for documents CAR-OTP-2066-3221; CAR-OTP-2066-3221; CAR-OTP-2066-2142; CAR-OTP-2066-3003.

¹⁶ CAR-OTP-2099-1340.

result of that RFA nine months later.¹⁷ Therefore, when the Prosecution made its RFA to the [REDACTED] in June of 2020 requesting material relating to 19 Facebook accounts,¹⁸ it was well aware that such a request would take time for the [REDACTED] to process and that it would yield an extraordinary amount of material. The Prosecution could have assumed that it would take the [REDACTED] nine months to process its request given its experience with its request made prior to the COVID-19 pandemic in April of 2018. Indeed, the [REDACTED] had almost the exact same turnaround time for both requests,¹⁹ despite only one request being processed during the COVID-19 pandemic. While the Prosecution did request that the [REDACTED] process the June 2020 request on an expedited basis, it could have foreseen that even if the [REDACTED] were able to do so, it would take several months for the Prosecution investigators to analyze the material relating to 19 Facebook accounts.

11. The Prosecution was well placed to know how long it would take to identify the relevant material since it had just conducted the same exercise in January 2019 when it obtained the Facebook material from the 23 April 2018 request. It knew that the exercise was complex and required deciphering thousands of messages that were difficult to understand.

12. The foreseeability of the Prosecution seeking to add these thousands of pages of material to its List of Evidence at such an untimely stage in the trial is what distinguishes the present request from the request made in the *The Prosecutor v. Popović et al*, which the Prosecution cites in the Prosecution Request.²⁰ In *Popović*,

¹⁷ See e.g. Pre-Trial INCRIM package 55 19 October 2020.

¹⁸ See Prosecution Request, para. 9, in which the Prosecution states that the material related to 19 accounts.

¹⁹ Both requests took nine months. The Prosecution received the Facebook material subject to the June 2020 RFA in March of 2021 whereas the Prosecution received the Facebook material subject to the April 2018 RFA in January of 2019. Prosecution Request, paras 7-8; CAR-OTP-2099-1340.

²⁰ Prosecution Request, para. 25.

the ICTY Trial Chamber granted the prosecution's request to reopen its case, which included calling a few witnesses and submitting ten documents.²¹ In determining whether the prosecution acted with reasonable diligence, one conclusion was dispositive for the Chamber's determination, namely that "the Prosecution could not reasonably have understood that 'the direct involvement and direction of one of the Accused in an execution and burial [...] would emerge from the exhumation of a relatively small number of bodies in an area previously unknown to the Prosecution.'"²²

13. Here, the Prosecution could have understood, and indeed anticipated, that its June 2020 RFA to the [REDACTED] would yield material, on which it wished to rely on in its case against Mr Ngaïssona. This is evidenced from the express language of the RFA in which the Prosecution stated that it has "reasons to believe that the Anti-Balaka leaders made general use of email and social media accounts to communicate with another, including in relation to the commission of crimes."²³ The RFA also described the specific circumstances of each of the five individuals whose Facebook records are subject to the Prosecution request.²⁴

14. In its descriptions of [REDACTED] to the [REDACTED], the Prosecution was already aware that his Facebook name was [REDACTED], and alleged that he was a "right-hand man" of President Bozizé and that he exchanged information on Anti-Balaka activities and operations in the field.²⁵ Similarly, for [REDACTED], the Prosecution informed the [REDACTED] that he was a [REDACTED] and member of the Anti-Balaka who participated in activities

²¹ *Prosecutor v. Popovic et al*, Case No. IT-05-88-T, International Criminal Tribunal for the former Yugoslavia (ICTY), Decision on Motion to Reopen the Prosecution Case, 8 May 2008.

²² *Ibid.*, para. 31.

²³ CAR OTP 2127 9187, para. 16.

²⁴ *Ibid.*, paras 18-39.

²⁵ *Ibid.*, para. 20.

meant to bring Mr Bozizé back to power.²⁶ It is also apparent from the RFA that the Prosecution was already aware in June 2020 that the Facebook account for [REDACTED] belonged to [REDACTED] who was [REDACTED] of former President Bozizé.²⁷ The RFA further alleged that he formed part of Mr Bozize's inner circle that supported Anti-Balaka activities.²⁸ With respect to the RFA's descriptions of [REDACTED] and [REDACTED], the Prosecution specifically mentioned their alleged connection to Mr Ngaïssona.²⁹

15. The circumstances of the Prosecution obtaining this evidence are diametrically opposed to those of *Popović* where it was completely unexpected that the exhumation of a small mass grave would reveal the participation of one of the accused in an execution and burial of the individuals found therein.³⁰ Here, the Prosecution had a clear idea of the information it expected to obtain from the Facebook conversations of the five individuals. Given the foreseeability of the alleged importance of these Facebook records to the Prosecution's case regarding the structuring of the Anti-Balaka and Mr Ngaïssona's alleged role therein, the Prosecution should have made its RFA well in advance of the November 2020 deadline, especially if its intention was to add all the material it deemed relevant from the Facebook records transferred by the [REDACTED].

16. Moreover, the Prosecution knew, when the Chamber ordered in September 2021 that the Prosecution make its requests for leave to add items to its List of Evidence on an exceptional basis and in a timely manner, that it would not be able to respect the Chamber's order since it was still in the process of identifying

²⁶ Ibid., para. 19.

²⁷ Ibid., para. 27.

²⁸ Ibid.

²⁹ Ibid., paras 22-23, 26.

³⁰ *Prosecutor v. Popović et al*, Case No. IT-05-88-T, International Criminal Tribunal for the former Yugoslavia (ICTY), Decision on Motion to Reopen the Prosecution Case, 8 May 2008. para. 31.

the material subject to the Prosecution Request.³¹ The Prosecution claims that it proceeded in this fashion in order to be more efficient rather than doing a broad-based dump of possibly incriminating material, or doing piece-meal motions.³² However, self-perceived interests of efficiency do not justify disregarding the Chamber's order.

17. The Prosecution should have notified the Chamber and the parties of its intention to file such a request several months ago, and at the very least, after being put on notice of the Chamber's instruction to file any additions on an exceptional basis and a timely manner. While the Chamber has instructed the parties and participants to not file submissions anticipating future requests,³³ the Prosecution did on a previous occasion file such observations regarding future requests, which were entertained by the Chamber, and for which the Chamber provided guidance.³⁴

18. On 15 September 2020, the Prosecution filed its "Observations on its intended approach to Rule 68(3) in the presentation of its case",³⁵ in which it outlined its intended approach to extensively use Rule 68 in the current proceedings. The Chamber considered these observations and provided guidance as to the limits of the use of Rule 68 and the impact it could have on allocated witness examination time.³⁶

19. Here, the Prosecution could have informed the Chamber and the parties that it had received an extraordinary amount of data from the [REDACTED] in March 2021 and that it intended to add to its List of Evidence all the material that it deemed relevant. It could have requested guidance as to how to proceed with a

³¹ See Prosecution Request, para. 11.

³² Ibid., para. 24.

³³ ICC-01/14-01/18-T-012-ENG ET, page 6, lines 20-22.

³⁴ ICC-01/14-01/18-685.

³⁵ ICC-01/14-01/18-655.

³⁶ ICC-01/14-01/18-685.

request to add so many items to its List of Evidence after the trial had already commenced. This would have put the Defence on notice as to the Prosecution's potential use of this material. The Defence would have then thoroughly reviewed the items with the mindset that at some point they may be submitted as evidence, and therefore it would have prepared its examinations of the insider witnesses with whom the Prosecution links the messages differently. These examinations are now made illusory since all these witnesses have already appeared in Court.

B. The material subject to the Prosecution Request relates almost entirely to allegations on which almost all the Prosecution insiders have already testified or to allegations for which the Prosecution does not present any witness, thereby causing irreparable prejudice to the Defence's right to test this evidence

20. In the Prosecution Request, the Prosecution argues that the trial is not yet in an advanced stage since only 30 of the 96 witnesses it anticipates to call have testified.³⁷ What the Prosecution fails to mention is that, with the exception of [REDACTED], almost all the witnesses who could comment on the Facebook material it seeks to add to its List of Evidence have already testified.³⁸

21. Therefore, it is far too late for the Defence and the Chamber to have the opportunity to contextualize these items with the benefit of witness testimony. The Defence cannot request the Chamber to recall all the witnesses that have testified on alleged Cameroonian preparations,³⁹ and the Bangui Coordination.⁴⁰

³⁷ Prosecution Request, para. 25.

³⁸ The Prosecution in substantiating the significance of the evidence cites the testimony of witnesses [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]. See Prosecution Request, paras 13-17. The Prosecution also cites a withdrawn witness and a witness who was disclosed as PEXO. Ibid., para. 14, fn 29; Ibid. para 13 fn 21. The Defence did not take these submissions into account since they will not form part of the record.

³⁹ [REDACTED], [REDACTED], [REDACTED], [REDACTED].

⁴⁰ [REDACTED], [REDACTED], [REDACTED], [REDACTED].

While the Defence was in possession of the items prior to the testimony of some of these insiders, it was not on notice that the Prosecution would seek to add them to its List of Evidence. The prejudice is therefore irreparable, and it is particularly pertinent for Facebook conversations in which one of the interlocutors is a Prosecution witness who has already testified. This is the case for the Facebook communications of [REDACTED], [REDACTED], and [REDACTED].⁴¹ Similarly, Facebook conversations which mention a witness who has already testified also cannot be contextualized with the benefit of the Witness' testimony. While there is no explicit prohibition against relying upon hearsay evidence at the ICC, Trial Chambers have recognised that in some circumstances this material must be rejected in light of the prejudice its use creates for the proceedings.⁴² This is the case for conversations mentioning for example Witnesses [REDACTED] or [REDACTED].⁴³

22. The proceedings are therefore at a very advanced stage for the purposes of allowing this material to be added to the Prosecution's List of Evidence. The

⁴¹ CAR-OTP-2133-6457; CAR-OTP-2131-6546; CAR-OTP-2133-1610; CAR-OTP-2133-7875; CAR-OTP-2133-7875; CAR-OTP-2131-4793; CAR-OTP-2131-4793; CAR-OTP-2131-1420; CAR-OTP-2133-1610; CAR-OTP-2131-1303.

⁴² See, for example, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, , and on the Blé Goudé Defence no case to answer motion, ICC-02/11-01/15-1263-AnxB-Red, 16 July 2019:

44. It is important to emphasise that simply knowing the identity of the source is not sufficient. Just as in the case of in-court testimony, in order to determine what weight should be given, it is necessary to have reliable information about how the source of the information came to know it, if there are any concerns about his or her memory and whether or not there may be reasons to think that the source may have deliberately given information which he or she did not believe to be correct.

45. Accordingly, when the only evidence in relation to a particular proposition is based primarily on anonymous hearsay or hearsay without adequate information about the reliability and credibility of the source, the Chamber must conclude that such a proposition is unsupported.

⁴³ CAR-OTP-2133-3390; CAR-OTP-2132-2869; CAR-OTP-2132-1276; CAR-OTP-2132-5658; CAR-OTP-2132-1004; CAR-OTP-2133-7449; CAR-OTP-2133-5725.

prejudice of adding these items to the List is particularly undue in the circumstances of this case where the Prosecution could have mitigated it by structuring its presentation of evidence so that the order of witnesses was different. As demonstrated above, the Prosecution knew in June of 2020 that it would have to wait for the [REDACTED] to first process its request for Facebook material and subsequently its Prosecution team to identify which material was relevant to the establishing of the alleged Anti-Balaka group prior to the 5 December attack and Mr Ngaïssona's role therein. It is therefore incomprehensible that the Prosecution would in this situation choose, in November of 2020, when it still had not received the Facebook material, to have all the witnesses relating to the alleged Cameroonian group, and Bangui coordination testify at the start of the trial.⁴⁴ The prejudice resulting from the late addition of this material could, in part, have been mitigated by changing the witness order such that all, or at least many, of these insiders would not have testified before the Prosecution completed its review of the Facebook material subject to the Prosecution Request.

23. However, even if such mitigation measures were applied, they would not overcome the prejudice stemming from the inability for Mr Ngaïssona to test most Facebook conversations where his alleged acts and conduct are mentioned, in the course of an adversarial hearing. For example, in one of the conversations the user [REDACTED] alleges to [REDACTED] that Mr Ngaïssona has travelled to the border with pharmaceutical products with Bernard Mokom. Neither [REDACTED], nor [REDACTED] nor Bernard Mokom are witnesses to these proceedings, and therefore the accuracy or the exact meaning of this message cannot be tested during this trial.⁴⁵ Moreover, the Defence has not identified one Prosecution witness who corroborates the allegation that Mr Ngaïssona travelled

⁴⁴ ICC-01/14-01/18-724-Conf-AnxB, page 2-3.

⁴⁵ CAR-OTP-2133-7723.

to the border at that time with pharmaceutical products. Therefore, allowing the Prosecution to rely on such items is prejudicial.

C. The sheer volume of the material that the Prosecution seeks to add is prejudicial to Mr Ngaïssona's right to adequate time and facilities to prepare his Defence

24. The Prosecution Request is comprised of 103 items, which comes to a total of 5,595 pages of Facebook conversations and data between multiple users.⁴⁶ This is by far the most voluminous request of the Prosecution to add items to its List of Evidence. The volume of the material is one of the factors expressly considered by the Chamber in weighing the prejudice of granting a request for leave to add items to the List of Evidence.

25. The Defence must have sufficient time to thoroughly review the material to determine both the full extent of its significance. The Defence avers it was able to benefit from an extension of time from the Chamber to review the material subject to the Prosecution Request. However, due to competing tasks ranging from the preparation of witnesses, investigative missions and preparing other concurrent filings, the Defence was forced to limit its review to answer the narrow legal question presented by the Prosecution's Request. This means that the Defence is not yet able to fully appreciate the prejudice that would result from the Chamber granting the Prosecution's Request. Given it took the Prosecution nine months to understand the evidence and identify relevant material to add to its List of Evidence, then all other things being equal, the Defence-which has significantly less human resources-must also be afforded a sufficient amount of time to fully contextualise this material, especially that it has now received the Prosecution's notice of intended use.

⁴⁶ Email from the Ngaïssona Defence to Trial Chamber V, dated 25/3/2022 at 11:48am.

26. In sum, the untimely nature of the Prosecution Request, the extraordinary volume of the material subject to the request, and the prejudice that would result to Mr Ngaïssona's procedural rights if the Prosecution were allowed to rely on the material militate in favour of rejecting the Prosecution's Request.

V. Relief sought

27. The Defence respectfully requests the Chamber to:

- REJECT the Prosecution's Request.

Respectfully submitted,



Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 29 June 2022,

At The Hague, the Netherlands