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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 Six Email Threads 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 Ngaïssona*, having regard to Articles 64(2) and 67 of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Prosecution Request to Add Six Email Threads to its List of Evidence’.

I. Procedural history and submissions

1. On 9 November 2020, the Office of the Prosecutor (the ‘Prosecution’), in accordance with the time limit set by the Chamber,¹ filed its lists of witnesses and of evidence.²
2. On 16 April 2021, the Prosecution filed a request to add six Yahoo email threads (the ‘Emails’) to its list of evidence (the ‘Request’).³ The Prosecution argues that adding the Emails to its list of evidence is warranted and appropriate as (i) it obtained the Emails only after the time limit to file its list of evidence ended; and (ii) addition of ‘these few items at the start of trial’ does not infringe the fair and expeditious conduct of the proceedings.⁴ According to the Prosecution, the Emails are of significant probative value and their addition to its list of evidence does not cause undue prejudice to the accused.⁵ The email threads consist, in total, of 34 ERNs.⁶

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

² 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).

³ Prosecution’s Request for leave to add six Yahoo email threads to the List of Evidence, ICC-01/14-01/18-958-Conf.

⁴ Request, ICC-01/14-01/18-958-Conf, para. 1.

⁵ Request, ICC-01/14-01/18-958-Conf, paras 1, 3.

⁶ See Request, ICC-01/14-01/18-958-Conf, para. 1, n. 1: CAR-OTP-2130-3276; CAR-OTP-2130-3279; CAR-OTP-2130-3282; CAR-OTP-2130-3288; CAR-OTP-2130-3291; CAR-OTP-2130-3294; CAR-OTP-2130-3295; CAR-OTP-2130-3296; CAR-OTP-2130-3297; CAR-OTP-2130-3298; CAR-OTP-2130-3299; CAR-OTP-2130-3300; CAR-OTP-2130-3301; CAR-OTP-2130-3303; CAR-OTP-2130-3305; CAR-OTP-2130-3306; CAR-OTP-2130-3373; CAR-OTP-2130-3374; CAR-OTP-2130-3375; CAR-OTP-2130-3377; CAR-OTP-2130-3379; CAR-OTP-2130-3381; CAR-OTP-2130-3382; CAR-OTP-2130-3406; CAR-OTP-2130-3407; CAR-OTP-2130-3408; CAR-OTP-2130-3466; CAR-OTP-2130-3490; CAR-OTP-2130-3493; CAR-OTP-2130-3496; CAR-OTP-2130-3497; CAR-OTP-2130-3501; CAR-OTP-2130-3504; CAR-OTP-2130-3505. See also Request, ICC-01/14-01/18-958-Conf, para. 9.

3. The Ngaïssona Defence opposes the Request (the ‘Ngaïssona Response’).⁷ It submits that the Request is prejudicial to the right of Mr Ngaïssona to have adequate time to prepare for trial, exacerbated by the Prosecution not disclosing ‘the entire body of the 5365 emails with 885 attachments’ received, but rather disclosing only those it considered relevant.⁸ The Ngaïssona Defence argues that it is necessary for the Prosecution to disclose all emails received ‘in order for the six threads to be viewed in their proper context and to determine whether prejudice exists’.⁹ The Ngaïssona Defence submits that prejudice results from (i) the unjustified untimely filing of the Request, several months after the material was received by the Prosecution;¹⁰ (ii) the fact that the Prosecution did not disclose the entirety of the material received in response to its request for assistance;¹¹ and (iii) concerns relating to the authenticity and reliability of the Emails.¹² Alternatively to rejecting the Request, the Ngaïssona Defence asks the Chamber, before deciding on the Request, to order the Prosecution to disclose ‘all the requests for assistance made by the Prosecution to the [REDACTED] authorities, all the emails received as a result, as well as reports on how the data was extracted and processed’ (the ‘Ngaïssona Alternative Request’).¹³
4. The Yekatom Defence defers to the Chamber’s discretion with regard to the Request.¹⁴

II. Analysis

5. The Single Judge notes that a request to add items to a list of evidence does not constitute a request for the variation of a time limit in accordance with Regulation 35 of the Regulations of the Court, but rather a request for leave from the Chamber to add items in accordance with its decision fixing the time limit for

⁷ Defence response to “Prosecution’s Request for leave to add six Yahoo email threads to the List of Evidence”, 29 April 2021, ICC-01/14-01/18-973-Conf, para. 1.

⁸ Ngaïssona Response, ICC-01/14-01/18-973-Conf, para. 1.

⁹ Ngaïssona Response, ICC-01/14-01/18-973-Conf, para. 1.

¹⁰ Ngaïssona Response, ICC-01/14-01/18-973-Conf, paras 7-8.

¹¹ Ngaïssona Response, ICC-01/14-01/18-973-Conf, para. 9.

¹² Ngaïssona Response, ICC-01/14-01/18-973-Conf, paras 10-12.

¹³ Ngaïssona Response, ICC-01/14-01/18-973-Conf, para. 13.

¹⁴ Email from the Yekatom Defence, 29 April 2021, at 15:53.

filing the initial list of evidence.¹⁵ 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.¹⁶ Factors to be considered in this determination include, *inter alia*, the extent to which the requested addition is opposed by the Defence, the time when the addition was sought, the nature and amount of the material concerned, the intended purpose of the Prosecution's requested reliance on such material, and its prospective significance in light of the charges brought against the accused and the rest of the available evidence.¹⁷

6. In this regard, the Single Judge also notes that while the Prosecution's list of evidence is an important guarantee for the trial preparation of defence teams before the Court,¹⁸ certain relevant materials may be received only after the time limit for the provision of the Prosecution's list of evidence expires, or the relevance of certain others may only become apparent with the development of the trial proceedings which are necessarily dynamic in nature.¹⁹ Indeed, 'it would be unreasonable for the Chamber, to which a truth-seeking function is assigned by the Statute, to determine that potentially relevant evidence could not, under any circumstance, be used by the Prosecution at trial if not itemised in the list of evidence [...] before the trial commences'.²⁰
7. Turning to the specific circumstances at hand, the Single Judge notes that the Ngaïssona Defence opposes the Request.

¹⁵ See Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), 22 November 2016, ICC-02/04-01/15-600, para. 14; Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence', 2 December 2016, ICC-02/04-01/15-619 (hereinafter: '*Ongwen* Decision 619'), para. 10; Decision on Prosecution's Request to Add Updated Forensic Report to its List of Evidence, 22 August 2017, ICC-02/04-01/15-956-Corr (corrigendum notified on 25 August 2017), para. 10; Decision on Prosecution's Request to Add 14 Items to its List of Evidence, 24 August 2017, ICC-02/04-01/15-957 (hereinafter: '*Ongwen* Decision 957'), para. 6.

¹⁶ *Ongwen* Decision 619, ICC-02/04-01/15-619, para. 10; *Ongwen* Decision 957, ICC-02/04-01/15-957, para. 6.

¹⁷ *Ongwen* Decision 619, ICC-02/04-01/15-619, para. 10; *Ongwen* Decision 957, ICC-02/04-01/15-957, para. 6; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Add 14 Items to its List of Evidence, 24 July 2018, ICC-02/04-01/15-1314, para. 7.

¹⁸ *Ongwen* Decision 619, ICC-02/04-01/15-619, para. 7.

¹⁹ *Ongwen* Decision 619, ICC-02/04-01/15-619, para. 8.

²⁰ *Ongwen* Decision 619, ICC-02/04-01/15-619, para. 8.

8. The Single Judge further notes that while the Prosecution requests addition of the Emails almost six months after the time limit to file its list of evidence, this is mainly due to the fact that it received the Emails only after its expiration. Moreover, the Single Judge observes that the Prosecution sought access to the material in question well before the time limit for the Prosecution's list of evidence was set by the Chamber.²¹ In addition, it appears that the Prosecution proceeded to a reasonably swift review and, as applicable, disclosure of the material it received in response to its request for assistance.²² The Single Judge considers that in this context, contrary to the argument of the Ngaiissona Defence,²³ no undue prejudice arises from the timing of the filing of the Request.
9. Further, the Single Judge takes note that while the Emails consist, in total, of 34 ERNs, the items usually comprise no more than three pages at most and the information in the Emails to be reviewed is in part duplicative.²⁴
10. Moreover, bearing in mind the Prosecution's submission that the Emails are of 'significant probative value', 'including with regard to [Mr Ngaiissona's]

²¹ See Request, ICC-01/14-01/18-958-Conf, para. 6, indicating that the material was officially transmitted on 22 January 2021, after sending the relevant request for assistance on 5 March 2020. The e-court metadata indicates that the Emails were disclosed to the Defence on 4 and 10 February 2021, respectively. Items CAR-OTP-2130-3276; CAR-OTP-2130-3279; CAR-OTP-2130-3282; CAR-OTP-2130-3288; CAR-OTP-2130-3291; CAR-OTP-2130-3294; CAR-OTP-2130-3295; CAR-OTP-2130-3296; CAR-OTP-2130-3297; CAR-OTP-2130-3298; CAR-OTP-2130-3299; CAR-OTP-2130-3300; CAR-OTP-2130-3301; CAR-OTP-2130-3303; CAR-OTP-2130-3305; and CAR-OTP-2130-3306 appear to have been disclosed as part of INCRIM package 85 on 4 February 2021: see Annex to the Prosecution's Communication of the Disclosure of Evidence on 4 February 2021, 4 February 2021, ICC-01/14-01/18-872-Conf-Anx (notified on 5 February 2021), pp. 2-3. Items CAR-OTP-2130-3373; CAR-OTP-2130-3374; CAR-OTP-2130-3375; CAR-OTP-2130-3377; CAR-OTP-2130-3379; CAR-OTP-2130-3381; CAR-OTP-2130-3382; CAR-OTP-2130-3406; CAR-OTP-2130-3407; CAR-OTP-2130-3408; CAR-OTP-2130-3466; CAR-OTP-2130-3490; CAR-OTP-2130-3493; CAR-OTP-2130-3496; CAR-OTP-2130-3497; CAR-OTP-2130-3501; CAR-OTP-2130-3504; and CAR-OTP-2130-3505 appear to have been disclosed as part of Rule 77 package 28 on 10 February 2021: see Annex to the Prosecution's Communication of the Disclosure of Evidence on 9 and 10 February 2021, 10 February 2021, ICC-01/14-01/18-880-Conf-Anx (notified on 11 February 2021), pp. 3-6.

²² See Request, ICC-01/14-01/18-958-Conf, para. 7.

²³ Ngaiissona Response, ICC-01/14-01/18-973-Conf, paras 7-8.

²⁴ See, for example, CAR-OTP-2130-3276, CAR-OTP-2130-3279, and CAR-OTP-2130-3283; CAR-OTP-2130-3288, CAR-OTP-2130-3291 and CAR-OTP-2130-3294; CAR-OTP-2130-3295, CAR-OTP-2130-3296, CAR-OTP-2130-3297, CAR-OTP-2130-3298, CAR-OTP-2130-3299 and CAR-OTP-2130-3300; CAR-OTP-2130-3301, CAR-OTP-2130-3303, CAR-OTP-2130-3305 and CAR-OTP-2130-3306; CAR-OTP-2130-3373, CAR-OTP-2130-3377 and CAR-OTP-2130-3379; CAR-OTP-2130-3374 and CAR-OTP-2130-3381; CAR-OTP-2130-3375 and CAR-OTP-2130-3382; CAR-OTP-2130-3490 and CAR-OTP-2130-3493; CAR-OTP-2130-3501 and CAR-OTP-2130-3504.

intention to plan and contribute to the crimes charged’,²⁵ the Single Judge also considers that the items seem to bear prospective significance to the proceedings.

11. As concerns the Defence’s submission regarding the authenticity and reliability of the Emails,²⁶ the Single Judge reiterates that the Chamber will, as part of its deliberation of the judgment pursuant to Article 74(2) of the Statute, assess the evidence holistically, and in that context consider the relevance and probative value of the items of evidence submitted at trial, including any related arguments raised by the participants during the proceedings.²⁷ This equally applies to the Emails, if and when they may be submitted into evidence before the Chamber. Further recalling that the Request does not concern the submission into evidence of the Emails, but rather their inclusion on the Prosecution’s list of evidence, the Single Judge sees no need to further address any arguments regarding the reliability or authenticity of the items. Therefore, the Single Judge is also of the view that no prejudice arises to the Defence through the addition of the items to the list of evidence based on the concerns relating to authenticity and reliability raised by the Ngaïssona Defence.
12. The Ngaïssona Defence further argues that prejudice arises from the Prosecution not disclosing the entirety of the material it received in response to its request for assistance,²⁸ and that all emails received need to be disclosed for the Emails ‘to be viewed in their proper context and to determine whether prejudice exists’.²⁹ Related to this is also the Ngaïssona Alternative Request.³⁰
13. The Single Judge considers that the nature and extent of the prejudice alleged by the Ngaïssona Defence remains unclear. In particular, the assertion that ‘the Defence cannot overrule the possibility that there may have been potentially exculpatory evidence, or evidence material to the preparation of the Defence, which was considered by the Prosecution as irrelevant and therefore not

²⁵ Request, ICC-01/14-01/18-958-Conf, para. 8. *See also* para. 26.

²⁶ Ngaïssona Response, ICC-01/14-01/18-973-Conf, paras 10-12.

²⁷ *See* Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, para. 53; email from the Chamber, 4 May 2021, at 11:44.

²⁸ Ngaïssona Response, ICC-01/14-01/18-973-Conf, para. 9.

²⁹ Ngaïssona Response, ICC-01/14-01/18-973-Conf, para. 1.

³⁰ Ngaïssona Response, ICC-01/14-01/18-973-Conf, para. 13.

disclosed'³¹ is speculative. The Prosecution, having gathered material in the context of its investigations, must comply with its disclosure obligations under the Statute and the Rules of Procedure and Evidence, and is presumed discharging such obligations in good faith.³² Without anything further, the Single Judge sees no reason to doubt that the Prosecution has complied with its obligations. As such, the Single Judge is of the view that an order such as that requested by the Ngaïssona Defence is not warranted at this stage. The Single Judge also considers that no prejudice arises to the Ngaïssona Defence by virtue of addition of the Emails to the Prosecution's list of evidence on the basis of the fact that the items were received as part of a bigger collection of materials which has currently in part not been disclosed to the Defence.³³ For the reasons stated, the Ngaïssona Alternative Request is equally rejected.

14. For all the reasons stated above, the Single Judge grants the Request.

³¹ Ngaïssona Response, ICC-01/14-01/18-973-Conf, para. 9.

³² *See also* Decision on the Yekatom Defence Motion for Disclosure of Screening Notes, 10 August 2020, ICC-01/14-01/18-618, para. 13; Decision on the Yekatom Defence Motion for Disclosure of Draft Witness Statements, 1 June 2020, ICC-01/14-01/18-593, para. 27.

³³ In this regard, the Single Judge notes that at least some material in addition to the Emails has in fact been disclosed. *See*, in particular, Annex to the Prosecution's Communication of the Disclosure of Evidence on 9 and 10 February 2021, ICC-01/14-01/18-880-Conf-Anx, pp. 3-8.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request to add items CAR-OTP-2130-3276; CAR-OTP-2130-3279; CAR-OTP-2130-3282; CAR-OTP-2130-3288; CAR-OTP-2130-3291; CAR-OTP-2130-3294; CAR-OTP-2130-3295; CAR-OTP-2130-3296; CAR-OTP-2130-3297; CAR-OTP-2130-3298; CAR-OTP-2130-3299; CAR-OTP-2130-3300; CAR-OTP-2130-3301; CAR-OTP-2130-3303; CAR-OTP-2130-3305; CAR-OTP-2130-3306; CAR-OTP-2130-3373; CAR-OTP-2130-3374; CAR-OTP-2130-3375; CAR-OTP-2130-3377; CAR-OTP-2130-3379; CAR-OTP-2130-3381; CAR-OTP-2130-3382; CAR-OTP-2130-3406; CAR-OTP-2130-3407; CAR-OTP-2130-3408; CAR-OTP-2130-3466; CAR-OTP-2130-3490; CAR-OTP-2130-3493; CAR-OTP-2130-3496; CAR-OTP-2130-3497; CAR-OTP-2130-3501; CAR-OTP-2130-3504; CAR-OTP-2130-3505 to the Prosecution's list of evidence;

REJECTS the Ngaïssona Alternative Request; and

ORDERS the Prosecution and the Ngaïssona Defence to file public redacted versions of filings ICC-01/14-01/18-958-Conf and ICC-01/14-01/18-973-Conf, respectively, within one week of notification of this decision.

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



Judge Bertram Schmitt

Single Judge

Dated 30 September 2022

At The Hague, The Netherlands