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**International
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Date: **23 May 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 Prosecution's "Request for Partial Reconsideration of the 'Decision on the Prosecution's request to add 21 Items to its List of Evidence and Extend Examination Time for P-0889' (ICC-01/14-01/18-1372-Conf)", ICC-01/14-01/18-1389-Conf, 02 May 2022

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Defence for Mr Ngaissona ("Defence") opposes the "Prosecution's Request for Partial Reconsideration of the 'Decision on the Prosecution's request to add 21 Items to its List of Evidence and Extend Examination Time for P-0889'"¹ ("Request"), and requests Trial Chamber V ("the Chamber") to reject the Request. The Prosecution has failed to substantiate how the "new facts" indicated in its Request² were not taken into consideration in the Chamber's decision ("the Prior Decision")³ and how there was an increase in the prospective significance of Items 3 and 12 ("the Two Items"). Furthermore, adding the Two Items to the List of Evidence would cause undue prejudice to the Defence's procedural rights.

II. Confidentiality

2. This response is filed as confidential pursuant to Regulation 23 (1) *bis* of the Regulations of the Court (the "Regulations"), as it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. Relevant Procedural History

3. On 16 July 2020, the Chamber ordered the Prosecution to disclose all incriminatory material by 9 November 2020 and to file a corresponding List of Evidence containing all the materials it intended to submit as evidence during trial by the same deadline.⁴ The Chamber indicated that, in order to add

¹ ICC-01/14-01/18-1372-Conf.

² ICC-01/14-01/18-1372-Conf, paras 5-6.

³ ICC-01/14-01/18-1301-Conf, paras 13-17.

⁴ ICC-01/14-01/18-589.

material to the List of Evidence after the deadline of 9 November 2020, leave should be sought by the Prosecution.⁵

4. On 17 February 2022, the Prosecution filed its “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”.⁶
5. On 04 March 2022, the Chamber granted the addition of eight items to the List of Evidence and rejected the request to add the remaining items, having found that their perspective significance did not outweigh the prejudice caused to the Defence by their late addition to the List of Evidence.⁷
6. On 20 April 2022, the Prosecution filed the Request,⁸ asking that the Chamber reconsiders its decision with respect to two items.⁹

IV. Applicable Law

7. Article 67(1)(a) and (b) of the Rome Statute provides that: “In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks and (b) To have adequate time and facilities for the preparation of the defence (...).”

⁵ *Ibid.*, para. 16.

⁶ ICC-01/14-01/18-1285-Conf.

⁷ ICC-01/14-01/18-1301-Conf, para. 14.

⁸ ICC-01/14-01/18-1372-Conf.

⁹ Item 3 (CAR-OTP-2131-3120) and Item 12 (CAR-OTP-2132-6963) in ICC-01/14-01/18-1285-Anx-Conf.

8. In the first decision the Chamber rendered on whether to grant the Prosecution leave to add items to its List of Evidence,¹⁰ 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”.¹¹ 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.¹²
9. Although the Statute does not provide guidance on reconsideration of judicial decisions, previous trial chambers have set an exceptionally high threshold to only allow reconsideration in exceptional cases when a clear error of reasoning has been demonstrated.¹³ New facts that have been discovered that were not known to the Chamber at the time it made its original decision may be relevant to this assessment.¹⁴

V. Submissions

10. In its Prior Decision, the Chamber found that 13 items, including the Two Items, did not bear sufficient prospective significance to the proceedings to outweigh the prejudice that their late addition to the List of Evidence would cause to the Defence.¹⁵ The Defence submits that: (a) the "new facts" indicated

¹⁰ ICC-01/14-01/18-989-Conf.

¹¹ *Ibid.*, para. 5.

¹² *Ibid.*, para. 5.

¹³ *Bemba*: ICC-01/05-01/13-1282, para. 8; *Kilolo*: ICC-01/05-01/13-1085, para. 4; *Al Hassan*: ICC-01/12-01/18-734, para. 11; *Ntaganda*: ICC-01/04-02/06-519, para. 12; *Kenyatta*: ICC-01/09-02/11-863, para. 11.

¹⁴ *Al Hassan*: ICC-01/12-01/18-734, para. 11; *Ntaganda*: ICC-01/04-02/06-519, para. 12; *Kenyatta*: ICC-01/09-02/11-863, para. 11; *Ruto*: ICC-01/09-01/11-1813, para. 19; *Ongwen*: ICC-02/04-01/15-468, para. 4.

¹⁵ ICC-01/14-01/18-1301-Conf, para. 14.

by the Prosecution in its Request do not increase the prospective significance of the Two Items, but rather weaken it; and (b) adding the Two Items to the List of Evidence would cause undue prejudice to the Defence's procedural rights.

A. The Prosecution has failed to show how the “new facts” increase the prospective significance of Items 3 and 12 thus warranting reconsideration

11. The Prosecution submits that new facts have arisen following the examination of witnesses P-0889 and P-0966, which increase the prospective significance of the Two Items and justify reconsideration of the Prior Decision which had rejected their addition to the List of Evidence.¹⁶ Notably, the Prosecution submits that P-0889's testimony corroborates the existence of a family link between [REDACTED],¹⁷ and that P-0966's testimony, read in conjunction with the Two Items, demonstrates that [REDACTED] was in Benzambe and joined the Anti-Balaka descending from Gobere.¹⁸ Contrary to the above, the Prosecution's interpretation misstates the content of the Two Items. The Two Items contradict rather than corroborate P-0889 and P-0966's testimonies.

12. *First*, the existence of a family link between [REDACTED] does not amount to a new fact which the Chamber had not taken into consideration in its Prior Decision. The Chamber was already aware of the alleged existence of a family link between the three well before P-0889's testimony.¹⁹ The Prosecution has qualified [REDACTED] in the annex²⁰ to its initial request.²¹ The Chamber found that the Two Items did not bear sufficient prospective relevance to the proceedings to outweigh the prejudice caused to the Defence despite the

¹⁶ ICC-01/14-01/18-1372-Conf, para. 2.

¹⁷ *Ibid.*, paras 9-10.

¹⁸ *Ibid.*, para. 9.

¹⁹ « Relevance/ Probative Value » of Item 3 (CAR-OTP-2131-3120) and Item 12 (CAR-OTP-2132-6963) in ICC-01/14-01/18-1285-Anx-Conf.

²⁰ *Ibid.*: [REDACTED].

²¹ ICC-01/14-01/18-1285-Conf.

Prosecution already informing the Trial Chamber of the familial links between [REDACTED].

13. *Second*, the Prosecution appears to inflate the prospective significance of the Two Items in light of the testimonies of P-0889 and P-0966. It interprets the conversations subjectively while ignoring significant inconsistencies in order to create a corroborative and hypothetical narrative. Notably, the Prosecution alleges that the Two Items corroborate that [REDACTED].²² Nevertheless, this is directly contradicting to the content of the Two Items.
14. In relation to Item 3, P-0889 wrote to [REDACTED].²³ P-0889 has clarified that [REDACTED]."²⁴ Therefore, unless the Prosecution is advancing that [REDACTED], P-0889's testimony can hardly be reconciled with the content of Item 3, as [REDACTED] are clearly identified as two separate individuals in the Item. Similarly, Item 12 shows that [REDACTED].²⁵ This clearly indicates that Items 3 and 12 are not corroborative but actually conflicting with P-0889's testimony. Should the Items be added to the List of Evidence, the Defence will not be able to clarify this contrasting information with P-0889, causing undue prejudice as will be shown below.
15. In relation to P-0966's testimony, the Prosecution alleges that the Two Items, read in conjunction with P-0966's testimony establish that [REDACTED] and then joined the Anti-Balaka descending from Gobere.²⁶ However, the content of P-0966's testimony does not corroborate the content of the Two Items, nor increase their prospective significance. *First*, P-0966 never indicated [REDACTED].²⁷ *Second*, P-0966's statement is unclear as to whether

²² ICC-01/14-01/18-1372-Conf, para. 9.

²³ CAR-OTP-2131-3120, page 3126.

²⁴ ICC-01/14-01/18-T-108-ENG ET, page 39, ln 2-6.

²⁵ CAR-OTP-2132-6963, page 6971.

²⁶ ICC-01/14-01/18-1372-Conf, para. 9.

²⁷ ICC-01/14-01/18-T-117-ENG ET, page 24. ln 25 to page 25, ln 1.

[REDACTED] Benzambe or between Koro-M'Poko and Bossangoa. ²⁸ *Third*, rather than supporting the Prosecution's allegation that [REDACTED], and that such person was in Benzambe [REDACTED], the Two Items directly refute these propositions. Namely, the messages in Item 3²⁹ show that [REDACTED] and P-0889 were *not* referring to [REDACTED] when discussing [REDACTED], given that: [REDACTED];³⁰ and [REDACTED],³¹ yet [REDACTED].³² *Fourth*, the language adopted in Item 3 does not allow to establish that [REDACTED] was unequivocally in Benzambe, given that P-0889 [REDACTED],³³ which indicates uncertainty. *Lastly*, the Defence notes that the conclusion that the words "Benz ville" would refer to Benzambe is the result of speculation on part of the Prosecution.³⁴ The above substantiates how the lack of consistency, the uncertainty and contrast between the Two Items and P-0889 and P-0966's testimonies weaken the Two Items' prospective significance rather than heighten it, thus not warranting a reconsideration of the Prior Decision.

B. Reconsideration would cause undue prejudice to the Defence's procedural rights

16. The Defence submits that the addition of the Two Items to the List of Evidence at this stage would cause undue prejudice to its procedural rights. As pointed out above, there appears to be a number of inconsistencies between information included in the Two Items and P-0889 and P-0966's testimonies.³⁵ However, as P-0889 and P-0966 already testified before the Chamber, the Defence has lost

²⁸ Compare ICC-01/14-01/18-T-116-CONF-ENG ET, page 15, lns 7-15 with ICC-01/14-01/18-T-117-ENG ET, page 24, lns 15-18.

²⁹ CAR-OTP-2131-3120, page 3122.

³⁰ *Ibid.*, pages 3126-3127.

³¹ CAR-OTP-2131-3120, page 3122.

³² CAR-OTP-2132-6963, page 6967.

³³ CAR-OTP-2131-3120, page 3122.

³⁴ *Ibid.*, footnote 12.

³⁵ See paras 14-15 above.

its opportunity to address such inconsistencies during the examination of said witnesses.

17. In light of the Chamber's decision to reject the Prosecution's request to add the Two Items to the List of Evidence, the Defence did not anticipate the need to put questions to P-0889 and P-0966 in order to clarify: (i) the alleged family links between [REDACTED], in light of the content of the Two Items; (ii) the identity of the person who was allegedly in Benzambe and whether this information only amounted to speculation; and (iii) the identity of [REDACTED] who would allegedly have joined the Anti-Balaka descending from Gobere. In particular P-0889, being one of the interlocutors in the Two Items, would have been in a unique position to clarify the content of the conversations and provide additional details. The addition of the Two Items to the List of Evidence in the absence of such clarifications would not assist the Chamber in its determination of the truth, but rather confuse the case record, by adding inconsistent and inconclusive information.

18. Confronting interlocutors with their Facebook conversations is an important way to test ambiguous or unclear evidence. Notably, the Defence recalls that during P-0889's examination, the witness was able to provide additional context that directly refuted the Prosecution's interpretation of certain Facebook conversations. For example, [REDACTED],³⁶ by [REDACTED].³⁷ In another instance, P-0889 refuted the Prosecution's interpretation that the Anti-Balaka conflated Muslims with the Seleka,³⁸ by pointing out that [REDACTED].³⁹ These examples are a demonstration of the importance of confronting a witness with Facebook conversations, in order to contextualise

³⁶ ICC-01/14-01/18-1285-Conf, para. 14.

³⁷ ICC-01/14-01/18-T-108-CONF-ENG ET, pp. 50-51.

³⁸ ICC-01/14-01/18-1285-Conf, para. 14.

³⁹ ICC-01/14-01/18-T-111-CONF-ENG ET, page 23.

and clarify them. This is especially important for P-0889's conversations, given that, during his testimony before the Chamber, [REDACTED].⁴⁰

19. In its Prior Decision, the Chamber found that the prospective relevance of the items to the proceedings did not outweigh the prejudice caused to the Defence by the addition of said items, 5 days before P-0889's testimony.⁴¹ Given that P-0889 has already testified, the prejudice caused to the Defence by the addition of the Two Items at this stage has only increased. Since, as outlined above, the "new facts" outlined in the Request do not increase the prospective significance of the Two Items, the balance struck by the Chamber has not been disturbed.

20. Moreover, the Defence notes with concern the Prosecution's assertion whereby "the relevance of some of the Facebook conversations will continue to become clearer and/or emerge as the trial unfolds".⁴² Having filed its Trial Brief one year and a half ago, the Prosecution should be well aware of which facts and allegations are relevant to its case, and which are not. Nonetheless, over one year after the beginning of trial, the Prosecution appears to be attributing relevance to brand new allegations, such as the presence of [REDACTED] in Benzambe and within the Anti-Balaka group descending from Gobere. This approach seriously affects the Defence's right to be informed promptly and in detail of the nature, cause and content of the charges and to have adequate time for the preparation of its defence.

21. In conclusion, the Defence respectfully requests the Chamber to reject the Prosecution's Request. The threshold for reconsideration is exceptional⁴³ and has been set at such level in order to achieve certainty and efficiency in the proceedings, maintain confidence in the criminal judicial system, ensure a

⁴⁰ ICC-01/14-01/18-T-108-CONF-ENG ET, page 44, ln 8-11.

⁴¹ ICC-01/14-01/18-1301-Conf, para. 14.

⁴² ICC-01/14-01/18-1372-Conf, para. 13.

⁴³ *Bemba*: ICC-01/05-01/13-1282, para. 8; *Kilolo* : ICC-01/05-01/13-1085, para. 4; *Al Hassan*: ICC-01/12-01/18-734, para. 11; *Ntaganda*: ICC-01/04-02/06-519, para. 12; *Kenyatta*: ICC-01/09-02/11-863, para. 11.

sense of finality to the Chamber's decisions and provide a strong presumption that a Chamber is bound by its own decisions.⁴⁴ As a result, Trial Chambers only depart from earlier decisions if a party can demonstrate a clear error of reasoning or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant.⁴⁵ The Chamber was well aware of the aspects and contents surrounding the Two Items in its Prior Decision.⁴⁶ The Prosecution has not demonstrated that the so-called new elements amount to new facts or arguments warranting reconsideration of the Prior Decision.⁴⁷ Thus, the Prosecution's reconsideration request is a mere attempt to re-litigate submissions the Chamber has carefully examined, analysed and rejected. Further, should the Request be entertained, it would be at the expense of the Defence's procedural rights.

VI. Relief sought

22. The Defence respectfully requests that the Chamber **REJECTS** the Prosecution's Request.

Respectfully submitted,



Mr. Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

⁴⁴ *Lubanga* at ICC-01/04-01/06-2705, paras 17-18.

⁴⁵ *Ongwen*: ICC-02/04-01/15-468, para. 4; *Bemba*: ICC-01/05-01/13-1282, para. 8.

⁴⁶ ICC-01/14-01/18-1285-Conf-Anx, Counts 3 and 12.

⁴⁷ ICC-01/14-01/18-1301-Conf, paras 10-20.

Dated this 23 of May 2022,

At The Hague, the Netherlands