

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 26 July 2023

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***

Confidential

Prosecution's Request for Leave to Reply to the NGAISSONA Defence's Response to the "Prosecution's Seventh Application for the Submission of Evidence from the Bar Table" (ICC-01/14-01/18-1874-Conf), (ICC-01/14-01/18-1999-Conf)

Source: Office of the Prosecutor

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. Pursuant to regulation 24(5) of the Regulations of the Court ("RoC"), the Prosecution requests leave to reply to the NGAISSONA Defence's Response to the "Prosecution's Seventh Application for the Submission of Evidence from the Bar Table" ("Response").¹

2. To the extent Trial Chamber V ("Chamber") may, in the exercise of its discretion, require the authentication of the Facebook items as a threshold condition for their formal submission² either at this stage or in its deferred holistic assessment of the standard evidentiary criteria, the Prosecution considers that a limited and focused reply addressing the applicable law would assist the Chamber in its determination of the motion, as well as the disposition of similar applications going forward.

3. The Defence's arguments on the requirement that Facebook items be authenticated through user identification in particular (relying principally on US case law) could not have been anticipated by the Prosecution.³ However, they merit clarification and exposition to the extent that the law and practice cited may yet inform the Chamber's analysis per article 21(c).

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the RoC, this document is classified as "*Confidential*" as it concerns filings of the same designation. A public redacted version will be filed as soon as practicable.

¹ See ICC-01/14-01/18-1999-Conf.

² See ICC-01/14-01/18-1999-Conf, para. 15.

³ The Chamber has previously declined to consider authentication in respect of 'formal submission', noting its intention to defer its assessment of the standard evidentiary criteria to its deliberation of the judgment pursuant to article 74(2) of the Statute, *see* Initial Directions on the Conduct of the Proceedings, ICC-01/14-01/18-631, para. 53; Decisions on Submitted Materials for P-0291 and for P-2193 (Emails Trial Chamber V, on 01/10/2021, at 12:31; on 04/05/2021, at 11:44, respectively).

III. SUBMISSIONS

5. The Prosecution requests leave to reply on three related issues arising from the Response, as follows:

(1) *Whether authentication is required either as a threshold condition to a determination on formal submission at the ICC, or to a deferred assessment of the standard evidentiary criteria at the article 74 stage;*

a. If so, to what extent, and what standard or burden of proof applies at the respective stages.

(2) *Whether user identification is necessary to authenticate the Facebook items,⁴ or if a Chamber may properly consider other circumstantial indicia of authenticity similarly to the assessment of other types of evidence under either admissibility or submission regimes, such as the item's provenance, contents, etc;*

a. In particular whether records obtained through legal and official means from a service provider as their custodian demonstrates sufficient authenticity for the purposes of their submission into evidence⁵

(3) *Whether the Chamber's consideration of circumstantial evidence is limited in determining the credibility and weight of any submitted Facebook items, including whether an item is ultimately what it purports to be.*

⁴ See ICC-01/14-01/18-1999-Conf, para. 15, based on a 2012 and two 2016 US case law.

⁵ See Facebook Bar table Application ICC-01/14-01/18-1874-Conf, paras. 9-10, 50-51.

IV. RELIEF SOUGHT

6. For the above reasons, the Chamber should allow a reply to the Response.



Karim A. A. Khan KC, Prosecutor

Dated this 26th day of July 2023
At The Hague, The Netherlands