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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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Confidential

**Defence Response to the "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: Defence of Patrice-Edouard Ngaiissona

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
 Mr Mame Mandiaye Niang
 Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
 Mr Richard Omissé-Namkeamaï
 Ms Marie-Hélène Proulx
 Ms Lauriane Vandeler

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
 Mr Thomas Hannis
 Ms Anta Guissé

Legal Representatives of the Victims

Mr Abdou Dangabo Moussa
 Ms Elisabeth Rabesandratana
 Mr Yaré Fall
 Ms Marie-Edith Douzima-Lawson
 Ms Paolina Massidda
 Mr Dmytro Suprun

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Osvaldo Zavala Giler

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

I. Introduction

1. The Defence of Mr Ngaïssona (the "Defence") opposes the "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)" dated 26 July 2023 (the "Request") for two reasons.¹ First, the Request merely consists of the Prosecution's attempt to get a second chance to enter into substantive discussions by requesting to make submissions on issues which should have been raised in the "Prosecution's Seventh Application for the Submission of Evidence from the Bar Table" ("Seventh Application") or in earlier applications.² The issues are not novel and could have been anticipated. Second, allowing further submissions on the issues would not assist the Chamber in its determination of the Seventh Application. Rather, allowing such submissions would be inconsistent with principles of judicial economy, since the Chamber is already well placed to decide on the matter under scrutiny. Since the three (3) issues upon which the Prosecution seeks leave to reply fall outside the permissible scope of a reply under regulation 24(4) and (5) of the Regulations of the Court ("RoC"), the Chamber should reject the Request.

II. Confidentiality

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

¹ ICC-01/14-01/18-2007-Conf.

² ICC-01/14-01/18-1874-Conf.

III. Applicable Law

3. In the interests of judicial economy, regulation 24(5) of the RoC limits the submissions a party may make with respect to a certain matter under judicial scrutiny. It requires leave of the Chamber for a participant to reply to a response, and "unless otherwise permitted by the Chamber" limits the scope of a reply to "new issues raised in the response, which the replying participant could not reasonably have anticipated."³ While the regulation does not define the factors that the Chamber should consider, the Court's jurisprudence shows that leave to reply should be granted in cases where further submissions are necessary for the adjudication of the matter under scrutiny.⁴

IV. Submissions

A. The issues should have been addressed in the Seventh Application or former submissions

4. *First*, the issues identified by the Prosecution in its Request fail to meet the criterion of novelty found in regulation 24(5) of the RoC.
5. In relation to the first issue raised in the Request, the Prosecution starts with the assumption that the Chamber "may, in the exercise of its discretion, require the authentication of the Facebook items as a threshold condition for their formal submission [...]"⁵ On the basis of this assumption, it then seeks to provide further submissions on the stage of the proceedings this condition would apply.⁶

³ Regulation 24(5) of the RoC.

⁴ See ICC-01/04-02/06-1813.

⁵ Request, para. 2.

⁶ Request, para. 5(1).

6. The question as to “whether” authentication is a requirement at all, and at which stage this requirement might be triggered, is an elementary question that certainly does not arise from the Defence response to the Seventh Application (the “Response”)⁷ but from the nature and subject-matter of the Seventh Application itself. It is puzzling that the Prosecution seeks to provide supplementary legal submissions on the authentication requirement, when it could have presented these submissions in the Seventh Application or, to the extent that this question extends to other types of evidence, in previous bar table motions. Authenticity is one of the main criteria for admissibility of evidence and, given the volume of Facebook evidence in this case, this question could even have been anticipated during the discussions that took place prior to or right after the issuance of the Initial Directions on the Conduct of Proceedings, when the submission regime was first adopted in the present case.⁸ This first “issue” could have clearly been anticipated by the Prosecution and does not even directly arise from the Response as it seeks to elaborate on general legal principles that have already been ruled upon.
7. Likewise, the Prosecution’s submissions regarding the second issue, *i.e.* “[w]hether user identification is necessary to authenticate the Facebook items [...]” are an attempt to supplement its earlier submissions by raising arguments that could unquestionably have been anticipated.⁹ This issue is clearly not new. As expressly underscored by the Defence in the Response, the question of user identification in the context of Facebook items’ authentication has been raised by the Defence several times in the course of the proceedings, and as early as in the Defence’s opening submissions.¹⁰ The reasoning presented by the Defence in paragraph 15 of the Response, as well as the jurisprudence cited, is

⁷ ICC-01/14-01/18-1999-Conf.

⁸ ICC-01/14-01/18-631, paras 53, 62.

⁹ Request, para. 5(2).

¹⁰ Response, para. 15, referring to ICC-01/14-01/18-T-016-ENG CT, page 24 and P-1847: ICC-01/14-01/18-T-23-CONF-ENG CT, pages 69-70.

the mere reiteration and development of previous oral submissions, in which Lead Counsel specifically referred to "an abundance of jurisprudence to say that the communication which takes place allegedly between Facebook accounts cannot, as such, demonstrate that these accounts were actually used by their legitimate owners".¹¹ Also, in its "Defence Response to the "Prosecution's Application for Submission of Yahoo Email Evidence from the Bar Table Pursuant to Article 64(9)""", the Defence made extensive submissions regarding the lack of authenticity of email accounts, *i.e.*, a type of evidence that is directly associated with Facebook items,¹² and in particular the necessity to ascertain user identification.¹³

8. Moreover, this second issue is embedded in the Seventh Application itself. The Defence merely responded to the Prosecution's arguments made in its Application that certain individuals were the respective effective users of certain specific Facebook accounts.¹⁴ It also further responded to the Prosecution's submissions according to which factors affecting the authenticity of evidentiary material include "its origin, the context in which it was created, the method with which the information contained therein was compiled, and the availability of corroborative evidence".¹⁵
9. Therefore, submissions on the necessity, or the absence thereof, of user identification to authenticate the Facebook items could have been developed in the Prosecution's Seventh Application, which the Prosecution chose not to do.
10. Finally, for the same reasons, the third issue identified by the Prosecution, which relates to the credibility and weight the Chamber may attribute to submitted Facebook items, and the extent circumstantial evidence may be

¹¹ P-1847: ICC-01/14-01/18-T-23-CONF-ENG CT, pages 69-70.

¹² See Prosecution's submissions in ICC-01/14-01/18-1450-Conf, paras 40-41, 77.

¹³ ICC-01/14-01/18-1546-Conf, paras 6-22.

¹⁴ Seventh Application, paras 13, 19-20, 26, 31-32, 38-40, 46.

¹⁵ *Ibid.*, para. 50.

considered in this respect, is not new either and could have been anticipated by the Prosecution. The Defence has challenged countless times the credibility and probative value of Facebook items, or excerpts thereof, such as those that had not been previously shown or discussed with a witness.¹⁶ The Defence raised the same concerns in relation to email accounts.¹⁷ The Prosecution has had ample opportunities to present complete submissions regarding these aspects.

B. The further submissions the Prosecution seeks to make on all three (3) issues are not necessary for the Chamber to make its decision

11. *Second*, supplementary submissions by the Prosecution by means of a reply would not assist the Chamber in its determination of the underlying Seventh Application or future similar applications. Since the beginning of trial, the Chamber has set out the applicable law for the adopted submission regime and has made clear determinations on the "issues" raised by the Prosecution in its several rulings pertaining to the submission of evidence, either by way of formal filing or by email, following witnesses testimonies.¹⁸ These legal considerations the Prosecution offers to provide a limited focus on have not suddenly appeared but are basic evidentiary issues pertaining to the authentication of evidence. They may apply across different types of evidence, such as email items. Therefore, the Chamber has already had to consider these issues, without any further assistance of the Prosecution, when ruling on previous requests for the submission of evidence.

12. It is apparent that the Prosecution merely disagrees with the Defence's submissions without providing any submissions as to why further information

¹⁶ See, for instance, Defence email dated 30 January 2023 at 20:52; Defence email dated 26 September 2022, at 17:15.

¹⁷ ICC-01/14-01/18-1546-Conf, paras 24, 28, 44, 65.

¹⁸ ICC-01/14-01/18-631, paras 53, 62. See also, for instance, ICC-01/14-01/18-1359, paras 10-12; ICC-01/14-01/18-1428, para. 5; ICC-01/14-01/18-1632-Conf.

is necessary for the Chamber to adjudicate the issues. Mere disagreement with an opposing party's arguments is not sufficient to warrant a leave to reply.¹⁹

13. In conclusion, leave to reply on the Prosecution's "issues" would be tantamount to giving the Prosecution a second chance to enter into substantive discussions, which is not in the interests of justice.

RELIEF SOUGHT

In light of the foregoing, the Defence respectfully requests the Chamber to:

- **REJECT** the Prosecution's Request.

Respectfully submitted,

A rectangular box containing a handwritten signature in dark ink. The signature is cursive and appears to read 'H. Knoops'. Above the signature, there is a faint, horizontal line that looks like a signature or a mark.

Mr. Knoops, Lead Counsel

Dated this
16 August 2023
At The Hague, the Netherlands

¹⁹ See ICC-01/04-02/06-1994, para. 13.