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

Date: **19 March 2024**

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***

Public

Public redacted version of “Prosecution’s Response to the Ngaïssona Request for the Submission of Expert Report pursuant to Rule 68(3) (ICC-01/14-01/18-2351-Conf) (ICC-01/14-01/18-2361-Conf),” 15 February 2024

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

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I. INTRODUCTION

1. The Prosecution defers to the Trial Chamber V's ("Chamber") discretion on the 8 February 2024 Ngaïssona Defence Request for the Submission of Expert Report ("Report") pursuant to Rule 68(3) of the Rules of Procedure and Evidence ("Rules")¹ ("Request"), subject to the below observations.

2. Should the Chamber grant the Request, the Prosecution requests that the prior recorded testimony of D30-4885, which ensued from the interview it conducted with the Witness on 29 January 2024 pursuant to the Contact Protocol² and where he elaborated on the findings in his Report, be equally introduced in evidence pursuant to Rule 68(3) of the Rules.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC"), this document is filed as "Confidential", as it responds to a filing of the same designation. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

a. Prosecution's observations on the introduction of the Report under Rule 68(3)

4. The Prosecution refers to the applicable law on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, as previously set out by the Chamber.³

¹ ICC-01/14-01/18-2351-Conf.

² ICC-01/14-01/18-677-Anx5, paras. 30-40.

³ ICC-01/14-01/18-907-Red, paras. 8-16, *see also* ICC-01/14-01/18-1383, paras. 4-17.

5. While it defers to the Chamber's discretion on the Request as regards: (i) the expertise of the witness; and (ii) the relevance and probative value of the tendered Report, the Prosecution notes the following:

6. *First*, despite the Defence's claim that the user identification and authentication processes and their sufficiency are a central issues addressed by D30-4885,⁴ the Report does not draw from D30-4885's expertise when explaining the processes of user identification, verification, and authentication, but rather lists a series of definitions drawn from publicly available material.⁵ The interview with the Prosecution aimed at clarifying his opinion regarding these three processes.

7. *Second*, some of the Report's open source research on the 2012-2014 Facebook policies are inconclusive. For instance, on the Facebook policy related to the user identification and authentication in that period, the Report explains: "During this period, Facebook used standard authentication methods, such as username/password combinations. Additionally, they *might* have employed email or phone number verification for account recovery".⁶ Additionally, when asked about the possibility to delete Facebook messages, the Report mentions "There is *no information* indicating that this was *not possible* during the period of 2012-2014".⁷

8. *Third*, contrary to the Defence's assertion,⁸ the Report does not discuss or provide specific information on the Facebook communication [REDACTED]⁹ which was provided to D30-4885 by the Defence. In fact, in the interview with the Prosecution, D30-4885 confirmed that he did not look at any content-related material of the Facebook communications.

⁴ ICC-01/14-01/18-2351-Conf, paras. 12-13.

⁵ CAR-D30-0018-0040, at 0047-0048.

⁶ CAR-D30-0018-0040, at 0049, para. 2 (emphasis added).

⁷ CAR-D30-0018-0040, at 0051, para. 4 (emphasis added).

⁸ ICC-01/14-01/18-2351-Conf, paras. 18, 22.

⁹ CAR-OTP-2100-5221 or ICC-01/14-01/18-1874-Conf-Anx, entry #42.

b. Prosecution's interview with D30-4885 pursuant to the Contact Protocol

9. Should the Chamber grant the introduction of the Report under Rule 68(3) of the Rules, the Prosecution requests the introduction in evidence under Rule 68(3) of the Rules of D30-4885's prior recorded testimony, which ensued from the interview it conducted pursuant to the Contact Protocol¹⁰ on 29 January 2014.

10. In a similar situation, the Chamber previously granted the introduction in evidence of a prior recorded testimony which had not been included in the original request, as it provided the necessary background and context to understanding the statement for which a request of introduction in evidence had been made.¹¹

11. During the interview, D30-4885 clarified several aspects of his Report, including: a) the methodology employed in drafting the Report; b) his understanding of the identification, verification, and authentication processes; c) his view on Facebook verification of phone numbers, as it appears in CAR-OTP-2099-5634 at 5635; d) the connections and/or indicators one can look at, when assessing the user attribution of a Facebook account; e) the IP addresses and their accuracy in determining a person's location; f) the reverse engineering he operated on the Facebook application; and g) the limits of the Report to general Facebook-related questions, excluding an analysis of the Facebook communications.

12. Given the topics discussed during the interview with the Prosecution, D30-4885's prior recorded testimony is relevant to understanding the Report. The two form a whole and are inseparable.

13. Pursuant to the Contact Protocol,¹² the Prosecution provided the Ngaissona Defence with the audio recording of the interview. The Prosecution is currently

¹⁰ ICC-01/14-01/18-677-Anx5, paras. 30-40.

¹¹ ICC-01/14-01/18-1975-Conf, paras. 80, 88, 91.

¹² ICC-01/14-01/18-677-Anx5, para. 40.

waiting for the Ngaissona Defence to disclose the transcripts of this prior recorded testimony of their witness.¹³

IV CONCLUSION

14. Subject to the above observations, the Prosecution defers to the Chamber in deciding the Request. Should the Chamber grant the introduction of the Report under Rule 68(3) of the Rules, the Prosecution requests that his prior recorded testimony which ensued from the interview it conducted with D30-4885 be introduced in evidence pursuant to the same Rule.



Karim A. A. Khan KC, Prosecutor

Dated this 19th day of March 2024
At The Hague, The Netherlands

¹³ ICC-01/14-01/18-1892, paras. 20-21, ICC-01/14-01/18-2242, paras. 8-10, where the Chamber clarified that disclosure of the prior statements of Defence witnesses (at least as regards their prospective trial testimony) is required under Rule 78.