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

Date: **27 May 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 Defence consolidated request for leave to add D30-P-4848 to its List of Witnesses and for in-Court protective measures for D30-P-4848” (ICC-01/14-01/18-2473-Conf)”,
13 May 2024, ICC-01/14-01/18-2490-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

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

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Counsel for Patrice-Edouard Ngaïssona

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

Legal Representatives of Victims

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

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) opposes the “NGAISSONA Defence’s consolidated request for leave to add D30-P-4848 to its List of Witnesses and for in-Court protective measures for D30-P-4848” (“Request”).¹ Trial Chamber V (“Chamber”) should reject the Request as it fails to show due diligence. There is no proper justification for the lateness of the Request, and the Defence’s contentions regarding the relevance of his evidence fail in light of the numerous similar witnesses (including an expert witness), who were dropped by the Defence without any explanation, either then or now.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential, *EX PARTE*, only available to the Prosecution and Registry”, as it contains material which has not yet been disclosed to the Defence. A confidential redacted version will be filed simultaneously.

III. SUBMISSIONS

There is no proper justification for the lateness of the Request

3. The request to add D30-4848 comes almost six months after the **17 November 2023** deadline set by the Chamber for the Defence to file its final list of witnesses.² That deadline moreover followed the Chamber’s **May 2023** express direction to the Defence: “to organise their presentation of evidence in the following thematic order, to the extent possible: contextual/background evidence, individual criminal responsibility, Attack in Bangui on 5 December 2013 and events thereafter...”³ and

¹ ICC-01/14-01/18-2473-Conf.

² ICC-01/14-01-18-1892, para. 21 (i).

³ ICC-01/14-01/18-1892, para. 25.

“withing this thematic order” [...] “to agree between themselves in which order they will call witnesses”.⁴

4. Nearly a year later after the **May 2023** directions,⁵ the Defence proposes to add D30-4848 without a reasonable justification for its delayed action. On its face, the Chamber should reject the Request as it fails to establish that the Defence acted with reasonable diligence.

5. *First*, D30-4848’s name [REDACTED] is mentioned in 38 Facebook communications derived from six Facebook accounts.⁶ All were all disclosed to the Defence as INCRIM in **October and November of 2020**.⁷ A simple word search on D30-4848’s name in the evidence collection provided would have enabled to Defence to properly question D30-4848 on these Facebook communications when they screened him on **14 July 2021**.⁸

6. *Second*, the link between D30-4848 and his account ‘[REDACTED]’ (as he now also confirmed to be his)⁹ is readily apparent from the profiles themselves. For example, in his conversation with [REDACTED], D30-4848 (writing under the profile name ‘[REDACTED]’ signs his message with ‘[REDACTED]’.¹⁰ Likewise, in his conversation with [REDACTED], the latter addresses the message to ‘[REDACTED]’.¹¹

⁴ ICC-01/14-01/18-1892, para. 26.

⁵ ICC-01/14-01/18-1892, para. 26.

⁶ [REDACTED].

⁷ CAR-OTP-2100-3674, CAR-OTP-2100-5917, CAR-OTP-2100-5724, CAR-OTP-2100-8499, CAR-OTP-2101-5451, CAR-OTP-2101-6011, CAR-OTP-2101-7703, CAR-OTP-2101-7817, CAR-OTP-2101-8032, CAR-OTP-2101-9277, CAR-OTP-2102-2520, CAR-OTP-2102-1757, CAR-OTP-2102-1950, CAR-OTP-2102-3203, CAR-OTP-2102-4653, CAR-OTP-2102-4062, CAR-OTP-2102-4833, CAR-OTP-2102-4269, CAR-OTP-2102-4497, CAR-OTP-2102-5143, CAR-OTP-2102-5471, CAR-OTP-2102-6699, CAR-OTP-2102-6174, CAR-OTP-2102-6552, CAR-OTP-2102-6596, CAR-OTP-2102-6348, CAR-OTP-2102-7585, CAR-OTP-2102-7745, CAR-OTP-2102-7759, CAR-OTP-2102-7947, CAR-OTP-2103-2200, CAR-OTP-2103-3637, CAR-OTP-2103-4312, CAR-OTP-2103-4456, CAR-OTP-2103-4593, CAR-OTP-2103-4757, CAR-OTP-2103-4741.

⁸ ICC-01/14-01/18-2473-Conf, para. 23.

⁹ ICC-01/14-01/18-2473-Conf-AnxA, para. 27.

¹⁰ For example [REDACTED].

¹¹ For example [REDACTED].

These profiles were disclosed in **September** and **October 2020**, allowing the Defence to consult them in respect of the witness's **14 July 2021** screening.¹²

7. *Third*, as early as **17 March 2023**, the Prosecution provided the Defence with an annex containing the first group of Facebook-related items to be submitted from the bar table.¹³ The annex identifies D-30-P-4848's name and particular relevant messages sent through his Facebook account '[REDACTED]', and contained in the Facebook profiles of [REDACTED],¹⁴ [REDACTED],¹⁵ [REDACTED].¹⁶

8. *Fourth*, on **17 May 2023**, *i.e.*, well in advance of the 17 November 2023 deadline set by the Chamber for the Defence to file its final list of witnesses, the Prosecution explicitly identified D30-4848 as the user of Facebook account "[REDACTED]" in its further application for the submission of Facebook evidence from the bar table.¹⁷

9. Contrary to what the Defence contends, it was thus not "on the eve of the summer recess 2023" that the relevance of D30-4848 would have "slowly started to emerge".¹⁸ In fact, the Defence has had ample opportunity not only to screen D30-4848 properly on the matter in July 2021, but also to conduct further witness interviews or follow-up that it deemed necessary in preparing its case. There is little question that this matter could have (and should have) been addressed timely by the Defence in organising the presentation of its case-in-chief. The Request provides no plausible explanation for this omission.

10. Furthermore, contrary to the Defence's allegation, D30-4848 does not constitute a mere 'replacement' for D30-4747. His evidence is distinct. It is also insignificant.

¹² ICC-01/14-01/18-2473-Conf, para. 23.

¹³ E-mail of the Prosecution to the Defence, 17 March 2023, at 16:40.

¹⁴ For example CAR-OTP-2102-5471, CAR-OTP-2103-4312, CAR-OTP-2103-4456, CAR-OTP-2103-4757, and CAR-OTP-2102-4269.

¹⁵ For example CAR-OTP-2101-5248 and CAR-OTP-2101-7733.

¹⁶ For example CAR-OTP-2101-8550.

¹⁷ ICC-01/14-01/18-1847-Conf, para. 37, footnote 147.

¹⁸ ICC-01/14-01/18-2473-Conf, para. 23.

11. While both witnesses are [REDACTED], D30-4747 is deemed a purported insider who: [REDACTED].

12. On the other hand, D30-4848 is allegedly a linkage witness who fled after the 23 March 2013 *coup d'Etat* to [REDACTED]. D30-4848 is thus an additional and unique witness, not a mere replacement for D30-4747 as the Defence contend. Moreover, the distinct issues to which his evidence speaks is not sufficiently significant to any matter in controversy that is material to the case, so as to justify his addition to the list of witnesses at this late stage.

The Defence's contentions regarding the relevance of his evidence fail in light of the numerous similar witnesses (including an expert witness) who were dropped by the Defence without any explanation, either then or now

13. The Defence contentions that D30-4848's evidence is critical regarding – in particular – to show that the Facebook evidence is flawed, does not justify his late addition to their list of witnesses.¹⁹

14. The Defence not only elected to drop its 'Facebook expert' D30-4885,²⁰ but has likewise dropped several 'fact' witnesses, ostensibly in a position to testify about Facebook communications, including [REDACTED],²¹ [REDACTED].²² The Defence's contentions that it has now decided to approach the matter 'from a different angle' are not only misplaced,²³ but also unpersuasive.

15. In sum, notwithstanding the fact that the reliability of the Facebook communications is seemingly no longer a concern for the NGAISSONA Defence since the withdrawal of not only the Facebook expert D30-4885, but also the other witnesses

¹⁹ ICC-01/14-01/18-2473-Conf, paras. 30-33.

²⁰ Email NGAISSONA Defence, 1 May 2024, at 14:25, title "Ngaïssona Defence anticipated witness order (1 May 2024)".

²¹ Email NGAISSONA Defence, 3 October 2022, at 09:59, title "CONFIDENTIAL - Contacts with witness", available upon request.

²² ICC-01/14-01/18-2055-Conf-Anx1-Corr, entries 9, 17, 28.

²³ ICC-01/14-01/18-2473-Conf, para. 39.

concerned, it is clear that the Defence in the diligent preparation of its case could have timely digested the relevant information. Its failure to do so is manifestly without justification.

Regarding the requested in-court protective measures

16. The Prosecution submits that this related request should equally fail, *in limine*.

17. Should the Chamber be minded to allow the addition of D30-4848 to the Defence list of witnesses, the Prosecution submits that there are no objectively justifiable risks regarding D30-4848's legitimate interests, given that the protective measures are solely requested on the basis of the witness's perceived subjective fears: "[REDACTED]",²⁴ and on the general security situation in CAR. Following this logic, all witnesses would require protective measures.

18. Further, there seems to be little or no evidence supporting the NGAISSONA Defence's claims, such as "[REDACTED]".²⁵ [REDACTED].²⁶

IV. CONCLUSION

19. For the above reasons, the Chamber should reject the Request.



Karim A. A. Khan KC, Prosecutor

Dated this 27th day of May 2024

At The Hague, The Netherlands

²⁴ ICC-01/14-01/18-2473-Conf, para. 44.

²⁵ ICC-01/14-01/18-2473-Conf, para. 44.

²⁶ [REDACTED].