

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 05 July 2024

**TRIAL CHAMBER V**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Péter Kovács  
Judge Chang-ho Chung  
Judge Beti Hohler, Alternate Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II  
IN THE CASE OF *THE PROSECUTOR v.*  
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Confidential with Confidential Annex A**

**Yekatom Defence Response to 'Prosecution's Request to call D30-4885 as a  
Chamber witness pursuant to Articles 64(6)(d) and 69(3)', 24 June 2024,  
ICC-01/14-01/18-2543-Conf**

**Source: Defence for Mr. Alfred Rombhot Yekatom**

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

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Mr Mame Mandiaye Niang  
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**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

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**REGISTRY**

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**Victims and Witnesses Unit**  
Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

1. On 24 June 2024, the Prosecution requested Trial Chamber V to call witness D30-4885 as a Court witness under rule 68(3) ('Rule 68(3) Request').<sup>1</sup> In the alternative, the Prosecution requests the Chamber to receive D30-4885's evidence pursuant to rule 68(2) ('Rule 68(2)(b) Request').<sup>2</sup> In relation to both the Rule 68(3) Request and Rule 68(2)(b) Request, the Prosecution requests the Chamber to recognise the formal submission of: (i) D30-4885's expert report,<sup>3</sup> (ii) D30-4885's OTP interview dated 29 January 2024,<sup>4</sup> and (iii) associated exhibits<sup>5</sup> (collectively 'Prior Recorded Testimony').
2. Recalling its prior position, the Defence defers to the Chamber's discretion as to whether to formally recognise the Prior Recorded Testimony and the appropriate procedural vehicle to do so.<sup>6</sup>
3. In doing so however, the Defence notes the ambiguous language utilised by the Prosecution in relation to the appended annex to the Request entitled 'Analysis of Facebook Messages' ('Annex'). This is a 97-page memorandum, dated 21 June 2024 (i.e. the date of the Request) and addressed to D30-4885 from the Office of the Prosecutor. Despite describing it as an 'analysis that the Prosecution planned to provide D30-4885 ahead of his scheduled testimony for his consideration and in contemplation of his examination',<sup>7</sup> the Prosecution offers no explanation, either in the Request or in *inter partes* communications,<sup>8</sup> as to the proposed procedural modalities and timing in which it intends to use the Annex with D30-4885.

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<sup>1</sup> ICC-01/14-01/18-2543-Conf ('Request'), paras 6 to 16.

<sup>2</sup> Request, paras 17 to 21.

<sup>3</sup> CAR-D30-008-0040.

<sup>4</sup> CAR-OTP-00025690, CAR-OTP-00025691, CAR-OTP-00025692, CAR-OTP-00025693. An internal transcript was also circulated by the Prosecution see Email from Prosecution to Trial Chamber V, Parties and Participants dated 28 February 2024 at 17:12 ('OTP Transcript').

<sup>5</sup> CAR-D30-0018-0066, CAR-OTP-2099-3801, CAR-OTP-2100-5221 and CAR-OTP-2099-5634.

<sup>6</sup> ICC-01/14-01/18-2371 and Email from Defence to Trial Chamber, Parties and Participants dated 5 March 2024 at 17:40.

<sup>7</sup> Request, para. 8.

<sup>8</sup> Email from Prosecution to Defence dated 28 June 2024 attached as Annex A.

4. Contrary to the Prosecution's submissions,<sup>9</sup> how the Annex is intended to be used – either in whole or in part - and when it is intended to be shown to the witness is of direct relevance to the Chamber's determination of the Request. Any argument that such questions are premature would beg the question as to why then the Prosecution sought to append the Annex to the Request in the first place.
5. It is in this vein that the Defence therefore sets out its remarks in relation to the Prosecution's intended reliance on the Annex and the scope in which the contents therein can be introduced through D30-4885.
6. At the outset, evidently the Annex cannot fall within the current parameters of the Prior Recorded Testimony for the purposes of either the Rule 68(3) Request or the Rule 68(2)(b) Request. The witness has never seen the contents of the Annex and has not been provided with an opportunity to provide his comments.<sup>10</sup> Any attempt to remotely elicit D30-4885's comments on the Annex by the Prosecution would be procedurally untimely and prejudicial at this stage of the Defence case and in any case, would require a separate request from the Prosecution with an additional opportunity for the Defence to be heard on the matter.
7. Further, it is noted that the Annex is divided across three sections entitled (i) 'Method of Information Selection',<sup>11</sup> (ii) 'Users of the Facebook Accounts',<sup>12</sup> and (iii) 'Analysis'.<sup>13</sup> With regard to sections (i) and (ii) of the Annex,<sup>14</sup> these appear to concern the purported 'connectors and indicators' relied upon by the Prosecution in support of its attribution of the user of a given Facebook

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<sup>9</sup> Annex A.

<sup>10</sup> Request, para. 8 and Annex A.

<sup>11</sup> Annex, pp. 1 to 2.

<sup>12</sup> Annex, pp. 2 to 29.

<sup>13</sup> Annex, pp. 29 to 97.

<sup>14</sup> Annex, pp. 1 to 29.

account.<sup>15</sup> Insofar as the Prosecution intends to provide sections (i) and (ii) of the Annex to the witness for his comment ahead of any cross-examination for the purposes of its Rule 68(3) Request, it is submitted that the witness should be provided with pages 1 to 29 of the Annex, as well as the underlying material cited therein, in advance of his testimony; and that the witness should be asked to provide a suitable timeframe for his review. D30-4885's response in this regard will inform the balancing exercise to be conducted by the Chamber in its assessment of the Rule 68(3) Request as weighed against, *inter alia*, Mr. Yekatom's right to an expeditious trial.

8. In particular, the Defence notes that the Prosecution's reliance on D30-4885's testimony in the *Abd Al Rahman* case is inapposite. First, and as repeatedly noted by Trial Chamber I, the witness was vocally uncomfortable with commenting on Facebook material and conducting an 'investigation live' whilst on the stand and without having seen the underlying material beforehand.<sup>16</sup> Of note, is the fact that in the *Abd Al Rahman* proceedings, D30-4885 was being asked to comment on indicators, including several other connected Facebook accounts, in relation to the attribution of the user of a single Facebook account. By comparison, the Prosecution is asking D30-4885 to review the users of 25 different Facebook accounts.<sup>17</sup> This issue is further compounded by the exercise in which the Prosecution seeks to put to the witness, other Facebook accounts and underlying material in support of the attribution of each of the 24 accounts.
9. Further, and in contrast to D30-4864 who had extensive experience as an expert in international criminal proceedings,<sup>18</sup> D30-4885 expressed his surprise at the volume and degree of issues put to him in advance of compiling his expert

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<sup>15</sup> Request, para. 9.

<sup>16</sup> ICC-02/05-01/20-T-152-ENG ET, pp. 61, 62, 67, 73, 75, 77, 83, 84, 85, 88, 89, 90, 96, 101 and 102.

<sup>17</sup> Annex, section (ii).

<sup>18</sup> See D30-0018-0028. In this regard, the Defence recalls that it provided D30-4864 with the underlying CDRs, CSTs and CST Guides which it intended to use with the witness in advance of D30-4864's scheduled appearance, with leave of the Chamber, and to allow for him to provide his expert opinion in the course of his testimony see Email from Trial Chamber V to Parties and Participants dated 23 February 2024.

report.<sup>19</sup> Moreover, he is not a social media user,<sup>20</sup> and has had to rely on other colleagues in compiling his report both in these proceedings, as well as in *Abd Al Rahman*.<sup>21</sup> It would therefore be a futile exercise to expect the witness to provide comment during the course of his sworn testimony without providing him with a meaningful opportunity to review.

10. Second, the witness' so-called 'willingness to consider the Prosecution's analysis of the Facebook evidence'<sup>22</sup> evidently conflates what was put to the witness and indeed his express response in this regard such as to put doubt as to whether the witness is indeed able or willing to undertake the review envisaged by the Prosecution or to be called as a Court witness to testify on the contents of the Annex. As the Chamber will recall, D30-4885 was asked to consider whether he would look at material 'in relation to the content of the messages and for instance to the social networks',<sup>23</sup> in order to 'assess the likelihood of the provenance of an account'.<sup>24</sup> In doing so, it was presented as a reading exercise and resulted in D30-4885's reflection that such an exercise did not require his digital investigative skillset.<sup>25</sup> More pertinently, D30-4885's apparent willingness to look at the content of Facebook messaging for the Prosecution was subject to time constraints associated with his busy schedule,<sup>26</sup> and must be read with caution, noting that D30-4885 subsequently testified to the 'unpleasant' circumstances under which he was questioned by the Prosecution.<sup>27</sup> As such, insofar as the Chamber is being asked to consider 'D30-4885's expert opinion regarding the concrete examples set out in the Prosecution's Facebook analysis [i.e. the Annex]',<sup>28</sup> as a reason for calling him

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<sup>19</sup> OTP Transcript, p. 6.

<sup>20</sup> ICC-02/05-01/20-T-152-ENG ET, p. 101.

<sup>21</sup> OTP Transcript, pp. 19 to 22 and ICC-02/05-01/20-T-152-ENG ET, pp. 14, 15, 23 and 24.

<sup>22</sup> Request, para. 8.

<sup>23</sup> OTP Transcript, pp. 59-60.

<sup>24</sup> OTP Transcript, p. 60.

<sup>25</sup> OTP Transcript, p. 60.

<sup>26</sup> OTP Transcript, p. 60.

<sup>27</sup> ICC-02/05-01/20-T-152-ENG ET, p. 59.

<sup>28</sup> Request, para. 9.

as a Court witness, it is necessary to ascertain whether D30-4885 is actually in a position to undertake such an exercise in advance of assessing the Rule 68(3) Request.

11. Finally, with respect to section (iii) of the Annex entitled 'Analysis', the Defence notes that the information contained in this section has no relevance to D30-4885's digital investigative skillset in that it neither relates to intrinsic indicators or connectors concerning the attribution of a user to an account but rather amounts to final conclusions as to the user of Facebook accounts and how such users fit into the Prosecution's wider case theory.<sup>29</sup> As advanced by the Prosecution in the *Abd Al Rahman*, final conclusions as to the user of Facebook profiles are not for D30-4885 to pronounce on,<sup>30</sup> and are more appropriately raised in final arguments. It is then for the Chamber to make the ultimate evaluation as concerns the weight of the Prosecution's analysis as set out in section (iii) of the Annex. As such, the Defence submits that in the event that the Chamber considers that the Annex should be provided to D30-4885 ahead of cross-examination under rule 68(3) conditions, either directly or via the parties, it should be transmitted without section (iii).

### CONFIDENTIALITY

12. The present response is filed on a confidential basis corresponding to the classification of the Request. The Defence does not oppose the reclassification of its response as public.

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<sup>29</sup> At this juncture the Defence's position is limited to the procedural modalities concerning the Annex. The Defence intends to provide its submissions as concerns the veracity of the Prosecution's analysis and weight to be provided to the proposed findings in the Annex at the appropriate stage following sufficient time to review and analyse the contents therein. In doing so, the Defence will also provide its own analysis and arguments concerning the direct and/or self-attribution of Facebook accounts relevant to the Defence case.

<sup>30</sup> ICC-02/05-01/20-T-152-ENG ET, p. 46.

**RELIEF SOUGHT**

13. Subject to the above observations, the Defence respectfully defers to the Chamber's discretion in its determination of the Prosecution's Rule 68(3) Request or, in the alternative, the Rule 68(2)(b) Request.

**RESPECTFULLY SUBMITTED ON THIS 5<sup>th</sup> DAY OF JULY 2024**



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