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Internationale**



**International
Criminal
Court**

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

Date: 8 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

**Public
With Confidential Annex A**

Public Redacted Version of “Fourth Ngaïssona Defence request for leave to add items to the List of Evidence”, 21 June 2024, ICC-01/14-01/18-2542-Conf

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. The Defence for Mr Patrice-Edouard Ngaïssona ('Defence') hereby requests Trial Chamber V ('Chamber') leave to add 14 items to the List of Evidence ('List' or 'LoE') submitted on 17 November 2023 ('Request').¹
2. The items, listed in Annex A, consist of (i) open-source Facebook materials related to D30-4679; (ii) one presidential decree related to D30-4848; and (iii) a screenshot of metadata extracted from a picture used during P-2049's examination. D30-4679 and D30-4848 are scheduled to testify in the next block. The Defence came into possession of these items during recent investigations and seeks leave to add them to its LoE for the following reasons. *First*, they are of significant relevance and probative value in light of, *inter alia*: the Office of the Prosecutor's ('Prosecution') allegations regarding D30-4679's Facebook account and the importance the Prosecution has given the Facebook material in this case; and the lack of authenticity of a photograph used during P-2049's testimony. *Second*, their late addition to the List does not cause prejudice to the parties and participants.

II. CONFIDENTIALITY

3. In accordance with Regulation 23*bis*(1) of the Regulations of the Court, the present Request is filed as "confidential" as it contains confidential information pertaining to witnesses and Defence investigations. A public redacted version will be filed in due course.

¹ ICC-01/14-01/18-2215, with confidential Annex 2 ICC-01/14-01/18-2215-Conf-Anx2.

III. PROCEDURAL HISTORY

4. On 29 May 2023, the Chamber issued the 'Further directions on the Conduct of the Proceedings (Presentation of Evidence by the CRLV and the Defence)',² ordering the Defence to file its final LoE on 17 November 2023.
5. Between 17 May 2023 and 25 August 2023, the Office of the Prosecutor sought the submission of [REDACTED], through three bar-table motions.³
6. On 11 September 2023, the Prosecution filed the 'Prosecution's Notice of the Close of its Case-in-Chief'.⁴
7. On 17 November 2023, the Defence filed the 'Defence Submission of its Final List of Witnesses and its List of Evidence', including Witness D30- 4679.⁵
8. On 15 December, the Defence filed the 'Ngaïssona Defence request for leave to add items to the List of Evidence'.⁶
9. On 12 January 2024, the Defence filed the 'Second Ngaïssona Defence request for leave to add items to the List of Evidence'.⁷
10. On 08 April 2024, the Defence filed the 'Third Ngaïssona Defence request for leave to add items to the List of Evidence'.⁸

² ICC-01/14-01/18-1892.

³ ICC-01/14-01/18-1874; ICC-01/14-01/18-1956; ICC-01/14-01-18-2062.

⁴ ICC-01/14-01/18-2089.

⁵ ICC-01/14-01/18-2215, with Annex 1 ICC-01/14-01/18-2215-Conf-Anx1, and Annex 2 ICC-01/14-01/18-2215-Conf-Anx2.

⁶ ICC-01/14-01/18-2269, with Annex A ICC-01/14-01/18-2269-Conf-AnxA.

⁷ ICC-01/14-01/18-2297, with Annex A ICC-01/14-01/18-2297-Conf-AnxA.

⁸ ICC-01/14-01/18-2439, with Annex A ICC-01/14-01/18-2439-Conf-AnxA.

11. On 3 May 2024, the Defence requested leave to add Witness D30-4848 to its List of Witnesses pursuant to Articles 64(6)(d) and 69(3) of the Rome Statute.⁹ On 23 May 2024, the Chamber granted the addition request.¹⁰
12. On 03 June 2024, the Defence notified the Chamber and the parties and participants its intention to call D30-4679 and D30-4848 *viva voce* during the 34th evidentiary block.¹¹
13. On 21 June 2024, the Defence disclosed the items in question.

IV. SUBMISSIONS

Facebook items related to D30-4679

14. The Defence requests the addition of 12 Facebook items obtained by the Defence through open-source investigations.¹² The items are publicly available posts made through Facebook in late 2013. The items consist of Facebook activity 1) on the account “[REDACTED]” from [REDACTED] to [REDACTED], and 2) on the account “[REDACTED]” on [REDACTED].
15. Should the present request be granted, the Defence intends to use these items during D30-4679’s examination in Court. The Defence came into their possession during the preparation of D30-4679’s upcoming examination. D30-4679 will confirm in Court that the account “[REDACTED]” belongs to [REDACTED]. It is also probable that “[REDACTED]” account was in contact with D30-4679’s account “[REDACTED]”.¹³

⁹ ICC-01/14-01/18-2473-Conf, with confidential Annex A.

¹⁰ ICC-01/14-01/18-2506, page 6.

¹¹ Email from the Defence to the Chamber, parties and participants on 03 June 2024 at 13:07.

¹² CAR-D30-0009-0089; CAR-D30-0009-0090; CAR-D30-0009-0091; CAR-D30-0009-0092; CAR-D30-0009-0093 ; CAR-D30-0009-0094 ; CAR-D30-0009-0095; CAR-D30-0009-0096; CAR-D30-0009-0097; CAR-D30-0009-0098; CAR-D30-0009-0099 ; CAR-D30-0009-0099 ; CAR-D30-0007-0823 ; and CAR-D30-0005-0178.

¹³ See CAR-OTP-2132-3569, which consists of a Facebook conversation between “[REDACTED]” and “[REDACTED]” between [REDACTED].

16. The items are relevant in light of the Prosecution's allegations regarding the relevance and the probative value of the other purported Facebook messages authored by D30-4679's, who is considered by the Prosecution as "privity to key-insider information".¹⁴ D30-4679 is expected to testify, *inter alia*, on rumours circulating on Facebook and the internet about the situation in the country.¹⁵ The items are corroborative of D30-4679's expected testimony regarding the source of D30-4679's information during the Relevant Period. The items in question illustrate the circulation of information in public, particularly in the days prior to the 5 December. Additionally, they demonstrate the spreading of rumours about upcoming Anti-Balaka attacks on Bangui, and the alleged presence of certain individuals in specific places. The items show, *inter alia*, D30-4679's second Facebook account reposting [REDACTED], with whom D30-4679 was communicating on Facebook about the situation in Central African Republic during the Relevant Period.¹⁶ As the Prosecution relies upon numerous Facebook records, including those of D30-4679, the items will assist the Chamber in the assessment of the Prosecution's claims concerning the Facebook posts of D30-4679 as well as contributing to the assessment of Defence arguments concerning the wider corpus of Facebook content.

17. The addition sought will not cause prejudice to the parties and participants. To the contrary, the addition of the items would assist the Chamber in the determination of truth. The Defence was not in possession of the items in question when the original List of Evidence was submitted. The extent of Facebook content in the record is voluminous. The Prosecution submitted more than [REDACTED] proximate to the conclusion of its case, which required time and resources for the Defence to review. Given the breadth of content, and the sometimes-colloquial way information is expressed by the participants in the conversations, continual

¹⁴ ICC-01/14-01/18-1330, para. 13.

¹⁵ ICC-01/14-01/18-2055-Conf-Anx1-Corr, page 17.

¹⁶ See ICC-01/14-01/18-2062, page [REDACTED], para. [REDACTED]: "[REDACTED]".

review of this material is required, and it was through this iterative process that the Defence was able to identify the items which are the subject of this Request. As noted above, there is no prejudice that will result from granting the present Request: the items are brief, limited in their scope – comprising a mere 11 pages – and their content is factually straightforward.

18. *Second*, the Defence disclosed the items promptly and requested their addition to the LoE a month prior to D30-4679's testimony in Court. The parties and participants will have sufficient time to review the documents for the examination of the witness and conduct whatever investigations they consider necessary. In addition, the parties and participants will have the opportunity to question D30-4679's about the content of the items.

Document related to D30-4848

19. The Defence also requests to add document CAR-D30-0007-0823 to its LoE, which is a presidential decree dated [REDACTED] appointing D30-4848 as [REDACTED] in the Subprefecture of [REDACTED]. Given the addition of D30-4848 to its List of Witnesses last 24 May, *i.e.* less than a month ago, the Defence intensified its preparations of this witness' examination only recently. It is during its recent investigations that the Defence was able to retrieve this presidential decree, which is relevant to corroborating D30-4848's account with respect to [REDACTED]. The Defence intends to use this document during D30-4848's examination to further elicit his narrative.
20. The addition to the List of this publicly available decree will not cause prejudice to the parties and participants as its length and scope are very limited. This will therefore not require extensive review and analysis. Moreover, the parties and participants will have ample time to review them ahead of D30-4848's testimony, as this document was disclosed on 21 June 2024 and D30-4848 is set to commence his testimony on 4 July 2024.

Document related to P-2049

21. CAR-D30-0005-0178 is a screenshot of metadata extracted from a photograph¹⁷ discussed during P-2049's testimony. The metadata was extracted using the software 'exiftool'.¹⁸ It was provided to the Defence by the Registry on 7 June 2024 following an inspection of the photograph the previous day. The item is relevant as it contains information that challenges the reliability or credibility of the testimony P-2049. Specifically, it provides further confirmation that P-2049 was unconcerned or untruthful as to how he described items he provided to the Prosecution. The addition of the item to the Defence LoE is necessary to assist the Chamber's search for the truth.
22. The Defence disclosed this item as soon as practically possible upon identifying its significance. Granting the Defence request to add the item to its LoE will not cause the Prosecution prejudice as the item has not yet been submitted and the present request provides sufficient notice about its potential role in the Defence's case.
23. The metadata is relevant to the credibility of P-2049's description¹⁹ of CAR-OTP-2088-2207 and therefore the probative value that the Chamber could accord to it in relation to P-2049's testimony. Firstly, the metadata provides information²⁰ about

¹⁷ CAR-OTP-2088-2207 title provided by the Prosecution '[REDACTED]'. The Chamber granted the submission of this item by email on 2022-08-23 8:32 *see* 'Decision on Submitted Materials for P-2049'.

¹⁸ *See* <https://en.wikipedia.org/wiki/ExifTool> and <https://exiftool.org/>.

The Prosecution has disclosed numerous items containing metadata obtained with this tool. *See* for example: CAR-OTP-2061-2809.

¹⁹ *See* [REDACTED].

²⁰ The 'File Modification Date/Time' and 'File Creation Date/Time' contained in CAR-D30-0005-0178 indicate "2016:01:01 22:35:24+1:00".

the date of the photograph that is not consistent with the photograph being taken on 5 December 2013.²¹

24. Secondly, the metadata contains *indicia* that the item may have been obtained from the internet and possibly a blog or web-forum.²² This is significant to the Chamber's holistic assessment of the evidence in the case. P-2049 suggested that [REDACTED] is a photograph of "[REDACTED]" in [REDACTED] and depicted individuals who were allegedly killed during the 5 December attack on [REDACTED].²³ A recent but extensive re-review of material leads to the conclusion that [REDACTED] is, on its face, a photo taken at the same location as the open-source video, [REDACTED], which the Prosecution submitted through the bar table. The Prosecution submitted that this video was dated 31 December

²¹ See the metadata of CAR-OTP-2088-2207 on Nuix, which indicates [REDACTED]. See also [REDACTED].

²² The 'User Comment' field depicted in CAR-D30-0005-0178 contains the information "[REDACTED]." A google search for '[REDACTED]' suggests that this metadata is inserted by libgd when creating thumbnails. For example see "Some versions of libgd (commonly used in PHP web applications) seem to leave comments indicating the version of the library used and the quality the image was saved at: CREATOR: gd-jpeg v1.0 (using IJG JPEG v62), quality = 90" (<https://29a.ch/2017/02/05/jpeg-forensics-in-forensically>). 'libgd' is a software component that is commonly used in PHP web applications to alter jpeg files – see <https://libgd.github.io/pages/about.html>. A common usage of libgd is to resize images to create 'thumbnails' or smaller versions of the image for websites such as blogs, forums, and web-galleries. This process is done to reduce the amount of data that needs to be transferred when a user visits a website. This reduction in file-size shortens the time the user must wait for the page to load but the image quality is lower. As noted on the website of libgd, "GD is commonly used to generate charts, graphics, *thumbnails*, and most anything else, on the fly. It is lite weight and fits usages like web development, embedded, or any other usages you may need. [...] The library was originally developed [...] under the umbrella of PHP.net." (italic-underline added) PHP is a programming language (<https://www.php.net/manual/en/book.image.php> - 'Image Processing and GD') that is used extensively for creating web-pages. For example, it is used to create WordPress (<https://wordpress.org/about/requirements/>) which is among the most popular blogging software in the world (<https://en.wikipedia.org/wiki/WordPress>). Other common PHP applications include web-forums which also create thumbnails for images uploaded by users. For example, the website of phpBB, which is among the more popular forum software packages on the internet (<https://www.phpbb.com/>) explains on their website "For larger images, phpBB will automatically *create a thumbnail* when placing the image *in the post* to keep things looking neat." (<https://www.phpbb.com/about/features/#thumb> – italic underline added). phpBB also uses GD – see the list of optional requirements (<https://www.phpbb.com/support/docs/en/3.0/ug/quickstart/requirements/>) which state "The following PHP modules are optional, but will provide access to additional features. [...] GD support".

²³ See footnote 19 above.

2013, and it was filmed in Ali Babolo mosque in Bangui.²⁴ A comparison of these two items raises doubts as to the reliability of P-2049's testimony since the two items [REDACTED] and [REDACTED] cannot be of two different locations if they depict the same exact building.

25. The Chamber is also requested to consider the potential significance [REDACTED] holistically considering P-2049's testimony when he was confronted in cross-examination with information derived from video metadata²⁵ that suggested that a shocking video he provided²⁶ was not in fact created during the temporal jurisdiction and therefore was not what he claimed.

26. In sum, the metadata is relevant and significant because it is corroborative of the fact that P-2049's testimony concerning CAR-OTP-2088-2207 was not accurate or not truthful.

²⁴ ICC-01/14-01/18-1945-Conf-Anx, p.24, item 8.

²⁵ See [REDACTED].

²⁶ CAR-OTP-2088-2205.

V. RELIEF SOUGHT

For the reasons above, the Defence respectfully requests the Chamber to **GRANT** the present request for leave to add the Items listed in Confidential Annex A to the List of Evidence.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 8 July 2024

At The Hague, the Netherlands.