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No. ICC-01/14-01/18

Date: 11 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

**Decision on the Prosecution Request to call D30-4885 as a Chamber Witness
pursuant to Articles 64(6)(d) and 69(3)**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64 and 69(3) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Prosecution Request to call D30-4885 as a Chamber Witness pursuant to Articles 64(6)(d) and 69(3)’.

I. Procedural history and submissions

1. On 17 November 2023, the Ngaïssona Defence (the ‘Defence’) informed the Chamber that it intended to call expert D30-4885¹ and that his testimony would be relevant for the ‘assessment of the reliability of the contents of Facebook material upon which the Prosecution bases allegations’.²
2. On 13 March 2024, the Chamber provisionally granted the introduction of D30-4885’s prior recorded testimony (the ‘Prior Recorded Testimony’)³ pursuant to Rule 68(3) of the Rules of Procedure and Evidence (the ‘Rules’), subject to the fulfilment of the legal requirements under this provision.⁴
3. On 1 May 2024, the Defence withdrew D30-4885 from its list of witnesses.⁵
4. On 21 June 2024, the Office of the Prosecutor (the ‘Prosecution’) requested the Chamber to call D30-4885 as a ‘Chamber witness’ and to recognise the formal submission of the Prior Recorded Testimony and a number of additional associated items under Rule 68(3) of the Rules⁶ (the ‘Additional Items’ and the ‘Main Prosecution Request’). Alternatively, it asked the Chamber to introduce

¹ D30-4885 was admitted to the Registry’s list of experts as an expert on ‘cybersecurity, operations security, anti-forensics’, see [List of Experts before the ICC as of 26 June 2024 \(icc-cpi.int\)](#).

² See Annex 1 to the Corrected version of the Defence Final List of Witnesses, 1 December 2023, ICC-01/14-01/18-2215-Conf-Anx1-Corr (original version notified on 17 November 2023), p.4.

³ D30-4885’s expert report (CAR-D30-0018-0040); D30-4885’s CV (CAR-D30-0018-0066); and the Office of the Prosecutor’s interview with the witness (CAR-OTP-00025690, CAR-OTP-00025691, CAR-OTP-00025692, CAR-OTP-00025693).

⁴ Decision on the Ngaïssona Defence Request for Formal Submission of D30-4885’s Expert Report pursuant to Rule 68(3) of the Rules, ICC-01/14-01/18-2410-Conf.

⁵ See email from the Defence, 1 May 2024, at 14:25.

⁶ This concerns items CAR-OTP-2099-3801, CAR-OTP-2100-5221 and CAR-OTP-2099-5634. The Chamber notes in this regard that these items have all been recognised as formally submitted in the Chamber’s Decision on the Seventh, Tenth and Seventeenth Prosecution Submission Requests from the Bar Table (Facebook Evidence), 15 April 2024, ICC-01/14-01/18-2390-Corr (original version notified on 1 March 2024).

D30-4885's Prior Recorded Testimony under Rule 68(2)(b) of the Rules (together, the 'Prosecution Request').⁷ The Prosecution Request was accompanied by an annex, containing the Prosecution's analysis of certain Facebook evidence, which it seeks to provide to D30-4885 for his evaluation (the 'Annex').⁸

5. On 25 June 2024, the Defence asked the Chamber to strike the Annex from the record of the case, or in the alternative, to grant it an extension of time to respond, as well as to order the Prosecution not to refer to the Annex in its closing brief or closing statements (the 'Defence Request' and the 'Alternative Defence Request').⁹
6. On 26 June 2024, the Single Judge found it unnecessary to receive responses from the Defence in relation to the Annex in order to adjudicate the Prosecution Request. Accordingly, he saw no need to extend the Defence's time limit to respond and rejected the Defence's request for an extension of time. He further indicated that the remainder of the Defence Request would be addressed in the decision on the Prosecution Request.¹⁰
7. On 5 July 2024, the Yekatom Defence responded to the Prosecution Request (the 'Yekatom Defence Response'). The Yekatom Defence 'defers to the Chamber's discretion as to whether to formally recognise the Prior Recorded Testimony [and Additional Items] and the appropriate procedural vehicle to do so', but takes issue with providing D30-4885 with the Annex.¹¹

⁷ Prosecution's Request to call D30-4885 as a Chamber witness pursuant to Articles 64(6)(d) and 69(3), ICC-01/14-01/18-2543-Conf (with one confidential annex, ICC-01/14-01/18-2543-Conf-Anx), paras 1, 22.

⁸ Annex to the Prosecution Request, ICC-01/14-01/18-2543-Conf-Anx.

⁹ URGENT Defence Request to strike out the Annex to the "Prosecution Request to call D30-4885 as a Chamber witness pursuant to Articles 64(6)(d) and 69(6)(30)" (ICC-01/14-01/18-2543), or in the alternative, Request for an extension of time to respond to ICC-01/14-01/18-2543, ICC-01/14-01/18-2550-Conf.

¹⁰ Email from the Chamber, 26 June 2024, at 16:56. *See further* email from the Defence, 26 June 2024, at 17:53 (seeking clarification of this email decision) and email from the Chamber, 27 June 2024, at 11:57 (reiterating its previous directions).

¹¹ 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, ICC-01/14-01/18-2576-Conf (with confidential Annex A), paras 2-11.

8. On the same day, the Defence responded to the Prosecution Request (the ‘Defence Response’). It requests that the Chamber reject the Prosecution Request. In the event that the Chamber decides to grant the Main Prosecution Request, the Defence requests the Chamber to order the Prosecution not to present the Annex to the witness and to limit the scope of his testimony to ‘technical aspects of Facebook’s operating methods’.¹²
9. On 8 July 2024, the Prosecution opposed the Defence Request (the ‘Prosecution Response’).¹³

II. Analysis

10. At the outset, the Chamber notes that it did not consider the Annex necessary to assess the Prosecution Request, given that it is – as acknowledged by the Prosecution – not a *submission*, but merely an *exhibit* to be put to D30-4885, should the Main Prosecution Request be granted.¹⁴ Consequently, the Chamber will not address the Defence’s submissions regarding the propriety of the Annex’s content for the purposes of the present decision, nor does it consider the requested ‘striking’ of the Annex from the case record necessary or appropriate.
11. Although the Annex therefore remains on the case record, it is neither evidence submitted before the Chamber, nor will it, as such, be taken into consideration as part of the Prosecution’s closing brief or statement for the purposes of the Chamber’s deliberations on the judgment pursuant to Article 74 of the Statute. Should the Prosecution wish for the Chamber to consider the information contained therein, it may include it in its closing brief and statement, in accordance with the page and time limits set by the Chamber. Accordingly, the Chamber rejects the Defence Request, but partly grants the Alternative Defence Request.

¹² Defence Response to “Prosecution’s Request to call D30-4885 as a Chamber witness pursuant to Articles 64(6)(d) and 69(3)” (ICC-01/14-01/18-2543-Conf), ICC-01/14-01/18-2577-Conf, para. 39.

¹³ Prosecution’s Response to “Defence Request to strike out the Annex, or in the alternative, Request for an extension of time to respond to ICC-01/14-01/18-2543” (ICC-01/14-01/18-2550-Conf), 25 June 2024, ICC-01/14-01/18-2580-Conf.

¹⁴ Prosecution Response, ICC-01/14-01/18-2580-Conf, para. 2.

12. Turning to the Prosecution Request, the Chamber recalls that it previously held that the witness's evidence could be of assistance to its determination of the truth.¹⁵ However, it notes that this assessment was made in the specific context of ruling on the Defence's request pursuant to Rule 68(3) of the Rules,¹⁶ and at an earlier stage of the proceedings. Thus, it does not automatically apply to the present assessment, as seemingly suggested by the Prosecution.¹⁷
13. In this respect, the Chamber notes that the decision of whether to call an individual as a Chamber witness lies entirely within its discretion. In reaching its determination on the Prosecution Request, the Chamber has taken into account (i) the limited nature of D30-4885's expected evidence; (ii) the Facebook evidence and numerous submissions concerning its content, reliability and probative value already on the case record; (iii) the advanced stage of the proceedings; and (iv) the Defence's withdrawal of D30-4885 and its submissions that he is 'not a Facebook expert' and will 'not assist the Chamber in its determination of the truth', as well as its stance that calling him as a Chamber witness would be prejudicial to Mr Ngaïssona's rights.¹⁸
14. In light of these considerations, the Chamber is not persuaded that it would be assisted in its determination of the truth by receiving D30-4885's evidence as a Chamber witness at this stage of the proceedings, neither live nor pursuant to Rule 68(2)(b) of the Rules.
15. In light of the above, the Chamber rejects the Prosecution Request in its entirety.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence Request;

PARTLY GRANTS the Alternative Defence Request;

¹⁵ Rule 68(3) Decision, ICC-01/14-01/18-2410-Conf, para. 13.

¹⁶ Request for the Submission of Expert Report pursuant to Rule 68(3), 8 February 2024, ICC-01/14-01/18-2351-Conf (with confidential Annexes A and B) (public redacted version notified on 20 March 2024).

¹⁷ Prosecution Request, ICC-01/14-01/18-2543-Conf, para. 7.

¹⁸ Defence Response, ICC-01/14-01/18-2577-Conf, paras 13, 21-25.

REJECTS the Prosecution Request;

ORDERS the Prosecution and the Defence to file public redacted versions or request reclassification of the Prosecution Request, ICC-01/14-01/18-2543-Conf; the Prosecution Response, ICC-01/14-01/18-2580-Conf; the Defence Request, ICC-01/14-01/18-2550-Conf; and the Defence Response, ICC-01/14-01/18-2577-Conf, respectively, within two weeks of notification of the present decision; and

ORDERS the reclassification of the Yekatom Defence Response, ICC-01/14-01/18-2576-Conf to public.

Done in both English and French, the English version being authoritative.

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 11 July 2024

At The Hague, The Netherlands