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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of “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), 8 July 2024**

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Ngaissona Defence’s request to strike the annex to the Prosecution’s motion to call D30-4885 as a Chamber witness.¹ To the extent that the Chamber has already determined that [REDACTED],² the present response is limited to the primary arguments raised in the Request concerning the disposition of the Annex.³

2. *First*, the Annex is an ‘exhibit’, not a ‘submission’ within the meaning of regulation 36(2) of the Regulations of the Court (“RoC”). Particularly, it does not advance substantive arguments supplementing the Prosecution’s Motion. Rather, it comprises an analysis of the Facebook evidence which the Prosecution intended to provide D30-4885 in his capacity as an expert witness called by the Ngaissona Defence to “[REDACTED].”⁴ The Annex thus falls squarely within the purview of D30-4885’s stated expertise. It is entirely appropriate to put the document to him and moreover, it is one which the witness expressly agreed to consider as an expert.⁵

3. *Second*, the Chamber is composed of professional judges charged with assessing and appropriately weighing the evidence before them. Clearly, in determining the reliability and probative value of Facebook *conversations* (like any evidence in this case), the Chamber need not be shielded from arguments thereon in view of future submissions or evidence. Its consideration and determination of several prior Defence motions attests to this fact.⁶ The circumstances here are analogous.

¹ See ICC-01/14-01/18-2543-Anx (“Annex”); ICC-01/14-01/18-2543 (“Motion”).

² Email Trial Chamber V, 26 June 2024 at 16:56 (Title “Decision on ICC-01/14-01/18-2550-Conf”), where it notes “[REDACTED]”; see also Email Trial Chamber V, 27 June 2024 at 11:57 (Title “Clarification regarding Decision on ICC-01/14-01/18-2550-Conf”).

³ ICC-01/14-01/18-2550-Conf (“Request”).

⁴ ICC-01/14-01/18-2410-Conf, para. 10 (emphasis added) (internal citations omitted).

⁵ See Transcript Summary, p. 59-60.

⁶ See *e.g.*, ICC-01/14-01/18-2460-Red (considering allegations impugning evidence underpinning Count 29); ICC-01/14-01/18-602 (considering allegations impugning evidence related to call data records); ICC-01/14-01/18-881 (considering allegations impugning evidence related to expert witness P-2926).

4. *Third*, there is no procedural impediment to the Prosecution's reference to its position on the evidence as set out in the Annex in either its closing submissions or closing brief. The Defence's position is both unsubstantiated and unwarranted. The Annex is not evidence in itself, and the Defence is not deprived of addressing the Prosecution's position in the presentation of its case, or prospective filings and arguments. Hence, no prejudice arises. To the extent that it is claimed, that is a wholly speculative assertion at this juncture.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(2) of the RoC, this submission 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

6. *First*, contrary to the Defence's position, the Annex does not contain 'submissions' within the meaning of regulation 36(2) of the RoC.⁷ No substantive positions relevant to, much less 'supplementing', the arguments put forward in the Motion are advanced therein.⁸ Rather, as noted the Annex merely *exhibits* the analysis that the Prosecution intended to provide to the expert witness for his evaluation. It thus shows *what* the Prosecution wanted to have the witness opine on in facilitating the Chamber's determination of the truth.⁹ The relationship of the Annex to the Motion in this respect is inarguable, despite the Defences assertions. The fact that the Annex does not supplement the submissions in the Motion is further underscored by

⁷ See Regulation 36(2)(b) of the RoC, (providing that "[a]n appendix shall not contain submissions).

⁸ See ICC-01/05-01/13-2275-Red, para. 778 (the Appeals Chamber interprets Regulation 36(2)(b) of the RoC as to preclude annexes where "comments included [therein] amount to submissions, *which supplement those in the [main filing]*") (emphasis added).

⁹ ICC-01/14-01/18-2543.

the Chamber's recognition that receiving the Defence's views on its content was unnecessary to its determination on whether to call D30-4885 as a Chamber witness.¹⁰

7. *Second*, the Defence's assertion that D30-4885 would not be in a position to comment on the "analysis" section of the Annex fails. The analysis provided in the Annex was prepared in anticipation of D30-4885's expert testimony, having been notified in the Defence witness lists of August 2023¹¹ and November 2023.¹² As a purported expert [REDACTED]¹³ admitted to the Court's list of experts,¹⁴ it was (and remains) entirely appropriate to provide concrete examples of evidence in the case record within the scope of his stated expertise for his review.¹⁵ Notably, and contrary to its present contentions, the Ngaissona Defence asserted that the Chamber will receive "valuable expert testimonial assistance from D30-4885" and that "D30-P-4885's testimony and the Report will bring greater clarity to the issues that are in dispute between the parties about the reliability and probative value of the Facebook conversations".¹⁶ Moreover, D30-4885's Report concerns the "[REDACTED]".¹⁷

8. In the course of D30-4885's January 2024 Prosecution interview,¹⁸ and in the presence of Defence Counsel, the witness agreed to review concrete examples of Facebook conversations analysed by the Prosecution, in respect of the basis on which their reliability and accuracy may be forensically assessed:

¹⁰ Email Trial Chamber V, 26 June 2024 at 16:56 (Title "Decision on ICC-01/14-01/18-2550-Conf"), where it notes "[REDACTED]"; see also Email Trial Chamber V, 27 June 2024 at 11:57 (Title "Clarification regarding Decision on ICC-01/14-01/18-2550-Conf").

¹¹ ICC-01/14-01/18-2055-Conf-Anx1, p. 5, entry 7.

¹² ICC-01/14-01/18-2215-Conf-Anx1-Corr, p. 3, entry 3.

¹³ Transcript Summary, p. 23-25.

¹⁴ See ICC List of Experts: <https://www.icc-cpi.int/sites/default/files/2024-06/26.06.2024-List-of-Experts-before-the-ICC.pdf>, p. 2 [last accessed 05/07/2024].

¹⁵ See ICC-02/05-01/20-T-152-ENG ET, p. 83, l. 25- p. 84, l. 6 ; p. 90, l. 9-11 (the Presiding Judge of Trial Chamber I noting particularly, "you should have shown these – you should have asked to see him, shown him the documents, got him to go through them in advance) (emphasis added).

¹⁶ ICC-01/14-01/18-2351-Conf, paras. 9-10 (emphasis added).

¹⁷ CAR-D30-0018-0040, p. 1.

¹⁸ See Transcript Summary, p. 45 *et seq.*

[REDACTED].”¹⁹

9. The Defence’s belated attempt to ‘walk back’ the scope of D30-4885’s expertise is self-serving and unpersuasive.²⁰ The expert is in a position to explain, for instance whether and to what extent : a) repeated and concurrent conversations and exchanges about the same subject matter as the events were unfolding, and b) the nature of the information discussed among participants in conversations - confirmed extrinsically (media articles, CDRs, testimony) or which accord with the individual’s real-life role and/or function - affect conclusions as to the actual (versus purported) identity of a given user.

10. For instance, D30-4885 can opine on whether the likelihood that [REDACTED] is the user of a Facebook account bearing the same name [REDACTED] increases, if : (a) the account connects with other members of [REDACTED] of which [REDACTED] was a member; (b) the user’s Facebook conversation confirm his being in YAOUNDE and being in contact with President BOZIZE’s spokesperson (*i.e.*, Levi YAKETE (“YAKETE”)), and *intrinsic* or *extrinsic* information confirms [REDACTED]’s location and contact with that person; (c) the user discusses the early formation of an organisation to bring back President BOZIZE to power (*i.e.*, FROCCA), naming certain members of this organisation, including YAKETE, and *extrinsic* information (*i.e.*, media articles, press releases) confirms the same; and d) whether the user discusses the delivery of materials to men on the ground and points to his source of information (*i.e.*, [REDACTED]) and *extrinsic* call data records confirm that his source was in telephone contact with persons in the know (*i.e.*, [REDACTED]).

11. *Third*, the Defence’s suggestion that “[REDACTED]”²¹ is ill-founded. The Chamber is comprised of experienced professional judges. As such, it is perfectly able to assess and decide on a procedural request without forming any views on the

¹⁹ See Transcript Summary, p. 59-60 (emphasis added).

²⁰ ICC-01/14-01/18-2577-Conf, paras. 16-19, 32.

²¹ ICC-01/14-01/18-2550-Conf, para. 14. See also para. 15 (“[REDACTED]”).

anticipated testimony of prospective witnesses. The Defence's argument that striking the Annex would somehow prevent the Chamber's exposure to it is equally unpersuasive. There is no basis to discount the Chamber's express and repeated assurances during the course of the trial that it will duly consider all of the evidence before it holistically and in its proper context, when determining what is true and what is not, as it has done throughout the proceedings.

12. *Fourth*, the Defence's alternate request should equally fail. The Request is not substantiated in this regard, as no procedural rule or practice limits a Party's ability to refer to its prior positions and submissions in argument. As such, the Prosecution should be able to refer in its closing brief or closing arguments to the positions and arguments it has previously discussed and/or advanced. The Request cites no precedent or practice that supports the Defence's untenable position. To the contrary, the Court's practice — as articulated in the *Bemba et al.* case refutes the Defence position in providing:

“'[t]here is no need to recapitulate the argumentation advanced in trial, as the parties' discussions are on record'. This direction makes it clear that all evidentiary submissions made during the trial phase, unless ruled upon in the course of trial, are available for consideration in the judgment.”²²

13. *Finally*, there is no prejudice to the Defence, which remains in a position to address the Prosecution's *position* on the Facebook evidence in the case record as expressed in the Annex. There is no reason to believe that it is not able to do so, particularly at this juncture, nor that the Chamber is not able to accord the Defence a meaningful opportunity to do so in the course of the proceedings.

²² ICC-01/05-01/13-1886, para. 20.

IV. CONCLUSION

14. For the reasons above, the Prosecution respectfully requests that the Chamber reject the Request in all respects.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 19th of July 2024

At The Hague, The Netherlands