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

Date: **3 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Corrected version of “Prosecution’s Response to
“Fourth Ngaïssona Defence request for leave to add items to the List of Evidence”
(ICC-01/14-01/18-2542-Conf)”, ICC-01/14-01/18-2558-Conf, 27 June 2024”,
ICC-01/14-01/18-2558-Conf-Corr, 28 June 2024**

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the ‘Fourth Ngaïssona Defence request for leave to add items to the List of Evidence’.¹ The addition of the 14 proposed items is unjustified, and the Request fails to establish that they are each of sufficient ‘significance’ to the proceedings to meet the well-established legal threshold for the relief sought. Moreover, the Defence fails to set out any plausible explanation for the delay.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“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

12 Facebook Items

3. The Request asserts the Defence’s intention to use 12 Facebook items with witness D30-4679 in his prospective testimony, and that their late addition to its list of evidence is necessary because “[t]he Defence was not in possession of the items in question when the original List of Evidence was submitted”² and only “came into [the Defence’s] possession during the preparation of D30-4679’s upcoming examination.”³ The Defence submissions are not persuasive.

4. D30-4679 first appeared in the Defence’s preliminary witness list nearly a year ago,⁴ and he remained among the witnesses notified in the Defence’s final list of witnesses filed in November 2023.⁵ It bears recalling that D30-4679 [REDACTED] draft

¹ ICC-01/14-01/18-2542-Conf (“Request”).

² ICC-01/14-01/18-2542-Conf, para. 17.

³ ICC-01/14-01/18-2542-Conf, para. 15.

⁴ See ICC-01/14-01/18-2055-Conf-Anx, p.17 (line item 26).

⁵ See ICC-01/14-01/18-2542-Conf, para. 7.

statement⁶ was provided to the Defence in November 2020.⁷ Moreover, D30-4679's direct participation [REDACTED] was plainly discussed in the course of his 2020 interview. Thus, it behoves the Defence to explain its apparent laxity in pursuing [REDACTED] attributed and relevant to a witness whom it has intended to call for nearly a year. Indeed, the delay belies its claim that the proposed 12 Facebook conversations are "of significant relevance and probative value."⁸

5. Apart from the absence of a plausible explanation for the delay in seeking the addition of the 12 Facebook items to the list of evidence, the Request fails to meaningfully address the separate question of the resultant prejudice to the Parties and Participants. Instead, the Defence simply dismisses potential prejudice in stating, despite the brevity of the material, "[t]he parties and participants will have sufficient time to review the documents for the examination of the witness *and conduct whatever investigations they consider necessary*."⁹ The Prosecution does not consider that the Defence is in a position to make this assertion. Nor, does the Defence substantiate it such that the Chamber can make a reasonable determination.

6. In any event, should the Chamber be minded to permit the addition of the proposed 12 publicly available Facebook posts to the Defence's list of evidence for use with D30-4679, their reliability is a further issue of which the Chamber should take cognisance. Notably the Request itself suggests "that items obtained from the internet and possibly a blog or web-forum" may be susceptible to infirmities, such as modifications to the Facebook user names which can retroactively affect publicly available account data.¹⁰

⁶ See CAR-OTP-2130-0280.

⁷ The draft statement was disclosed on 9 November 2020.

⁸ ICC-01/14-01/18-2542-Conf, para. 2.

⁹ ICC-01/14-01/18-2542-Conf, para. 18.

¹⁰ See ICC-01/14-01/18-2542-Conf, para. 24; *see e.g.*, public testimony of Duncan CASTELLVI in *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/20-T-152-ENG ET, at <https://www.icc-cpi.int/court-record/icc-02/05-01/20-t-152-eng>, p. 7, l. 5-p. 22, l. 13, *in particular* at p. 7, l. 6-18 "Your Honour, Mr Duncan Castellvi is a Dutch digital forensics investigator [...] his report covers matters about [...] how a

CAR-D30-0007-0823 (Presidential Decree)

7. The Defence's submission that the proposed April 2006 presidential decree [REDACTED] is sufficiently significant to the proceedings as to warrant its late addition to the list of evidence is unavailing. The standard for such relief is not met by merely asserting an item's *relevance* to the proceedings, but instead by establishing its clear *significance* to matters of consequence. The Request fails to do so.

8. Although the addition of this document would not cause it undue prejudice, the absence thereof does not dispose of the remaining cumulative requirement that the proponent demonstrate its 'significance'. The proposed addition of the document to corroborate D30-4848 prospective account with respect to the time-frame he spent [REDACTED] and the circumstances in which he left to venture into other activities — as asserted by the Defence — is not "significant" to these proceedings. In any case, the Request fails to reflect why it would be.

9. In addition to failing to meet the specific criteria for the relief sought, the Request further provides no plausible explanation for the Defence's late addition of the document. It is clearly not enough to say "it is during its recent investigations that the Defence was able to retrieve this presidential decree"¹¹ without more. And, once again, the delay belies any assertion of the item's materiality to the Defence case or matter at issue.

person can change his or her Facebook profile name, and the retroactive effect, if any, of a name change on earlier posts made by that account holder" and p. 17, l. 24-p. 19, l. 5, "A. [10:21:08] I changed her name from "Eva Kalb" to "eva.jansen25" [...] Q. [10:24:23]: Okay, and let's just quickly scroll through the last four. And again, and again, and again. For each of the posts that we saw before that indicated the post as being Eva Kalb, is the name now "Eva Jansen"? A. [10:24:54] Yes, that is correct.", p. 22, l. 9-12 "Q. [10:34:14] So after Eva Kalb changed her name to Eva Jansen, was there any indication in the timeline, at the top of the timeline, saying anything along the lines of Eva Jansen -- "Eva Kalb has changed her name to Eva Jansen"? A. [10:34:45] No. I specifically looked for that, but that was not the case."

¹¹ ICC-01/14-01/18-2542-Conf, para. 19.

CAR-D30-0005-0178 (Screenshot of metadata)

10. The proposed addition of a screenshot of metadata extracted from a photograph discussed during P-2049's testimony should also be rejected. The Defence's conclusory assertion that the information is "necessary to assist the Chamber's search for the truth" in that it may "challenge[] the reliability or credibility of the testimony []"¹² is not compelling.

11. *First*, P-2049 testified well over two years ago, in February 2022.¹³ While the Defence, in this instance, at least attempts to explain when and how it came into the information it now seeks to add, it nevertheless fails to explain why – after the Chamber granted the Prosecution's request to submit the photograph at issue (CAR-OTP-2088-2207)¹⁴ on 23 August 2022, it took the better part of a year and a half for the Defence to seek and acquire the proposed item.

12. *Second*, the use of the document is prejudicial and would be patently unfair to the witness, to the extent that any purported inconsistencies it may present regarding P-2049's testimony¹⁵ were never put to the witness to explain or refute when he testified before the Chamber, despite the Defence's claim to the contrary.

13. As the Request does not meet the well-established test for the late addition of material to a Party's list of evidence, it must necessarily fail.

¹² ICC-01/14-01/18-2542-Conf, para. 21.

¹³ See ICC-01/14-01/18-T-101-Conf-Eng, *et seq.*

¹⁴ Note that CAR-OTP-2088-2207 (the photograph from which the metadata was extracted) was disclosed to the Defence in excess of five years ago, on 17 May 2019.

¹⁵ See ICC-01/14-01/18-2542-Conf, paras. 21-24.

IV. CONCLUSION

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

A handwritten signature in black ink, appearing to be 'K.A.K.', with a horizontal line underneath it.

Karim A. A. Khan KC, Prosecutor

Dated this 3rd of July 2024
At The Hague, The Netherlands