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No. **ICC-01/14-01/18**
Date: **5 February 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Ngaïssona Defence Request for Formal Submission of Expert
Report and Associated Items Pursuant to Rule 68(3) of the Rules**

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(2), 67(1) and 69(2) of the Rome Statute (the ‘Statute’), Rules 68(1) and (3) of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 24(5) of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Ngaïssona Defence Request for Formal Submission of Expert Report and Associated Items Pursuant to Rule 68(3) of the Rules’.

I. Procedural history

1. The Chamber recalls the procedural history as set out in its ‘Decision on the Prosecution Request for Extension of Time to Respond to [the Yekatom Defence’s] Current and Prospective Requests under Rule 68(2)(b) and 68(3) of the Rules’.¹
2. On 18 January 2024, the Ngaïssona Defence requested to introduce under Rule 68(3) of the Rules the report and associated item of expert witness D30-4864 (the ‘Request’).²
3. On 24 January 2024, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request (the ‘Prosecution Response’). Whilst it defers to the Chamber’s discretion, it observes that as the report is ‘complete and fully comprehensible’, Rule 68(2)(b) of the Rules is a ‘more appropriate’ mechanism to introduce the report and its associated item.³
4. On 26 January 2024, the Yekatom Defence responded to the Request. Whilst it defers to the Chamber’s discretion ‘as to the opportunity of the Request’, it requests the Chamber to either grant the Request, or order the full *viva voce* testimony of D30-4864 on the basis that, *inter alia*, ‘it intends to question

¹ 30 November 2023, ICC-01/14-01/18-2229, paras 1-4.

² Request for the Submission of Expert Report and Associated Material pursuant to Rule 68(3), ICC-01/14-01/18-2310-Conf (public redacted version notified the same day, ICC-01/14-01/18-2310-Red), para. 1, p. 9.

³ Prosecution’s Response to the Ngaïssona Request for the Submission of Expert Report and Associated Material pursuant to Rule 68(3) (ICC-01/14-01/18-2310-Conf), ICC-01/14-01/18-2323-Conf, paras 1, 3-4.

[D30-4864] and present him with telecommunication material used during the trial’ (the ‘Yekatom Defence Request’).⁴

5. On 29 January 2024, the Ngaïssona Defence submitted a request for leave to reply to the Prosecution Response (the ‘Request for Leave to Reply’),⁵ arguing that it could not have anticipated that the Prosecution would implicitly request the Chamber to reject the Request, and at the same time present a ‘procedurally incorrect’ request under Rule 68(2)(b) of the Rules.⁶ It further argues that the Ngaïssona Defence could not have reasonably anticipated such an implicit request in the Prosecution Response as (i) ‘making a Rule 68(2)(b) request in a response against the opposing party’s [Rule 68(3)] request is surprising and at worst procedurally incorrect’; and (ii) the Prosecution’s ‘continued interest’ in interviewing D30-4864,⁷ ‘belies [the Prosecution] Response suggesting that no further testimonial evidence is deemed necessary’.⁸ It further argues that a reply is in the interests of justice.⁹
6. On 31 January 2024, the Prosecution responded to the Request for Leave to Reply, requesting that the Chamber dismiss it (the ‘Prosecution Response to the Request for Leave to Reply’). It submits, *inter alia*, that the Prosecution Response does not implicitly amount to a request under the Court’s regulatory framework and it unequivocally defers to the Chamber’s discretion in determining the Request.¹⁰

⁴ Yekatom Defence Response to the Ngaïssona’s “Request for the Submission of Expert Report and Associated Material pursuant to Rule 68(3)”, ICC-01/14-01/18-2310-Conf, ICC-01/14-01/18-2329-Conf, paras 1, 14-20, 22.

⁵ Ngaïssona Defence Request for Leave to Reply to the “Prosecution’s Response to the ‘Ngaïssona Request for the Submission of Expert Report and Associated Material pursuant to Rule 68(3)’ (ICC-01/14-01/18-2323-Conf)”, ICC-01/14-01/18-2333-Conf, para. 1, p. 7.

⁶ Request for Leave to Reply, ICC-01/14-01/18-2333-Conf, para. 10.

⁷ See Request for Leave to Reply, ICC-01/14-01/18-2333-Conf, paras 4-8 and references therein.

⁸ Request for Leave to Reply, ICC-01/14-01/18-2333-Conf, paras 11-13.

⁹ Request for Leave to Reply, ICC-01/14-01/18-2333-Conf, paras 14-19.

¹⁰ Prosecution Response to the “Ngaïssona Defence Request for Leave to Reply to the ‘Prosecution’s Response to the ‘Ngaïssona Request for the Submission of Expert Report and Associated Material pursuant to Rule 68(3)’ (ICC-01/14-01/18-2323-Conf)” (ICC-01/14-01/18-2333-Conf), ICC-01/14-01/18-2337-Conf, paras 1, 3-4, 11.

II. Analysis

A. Request for Leave to Reply

7. According to Regulation 24(5) of the Regulations, ‘a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated’.
8. Having reviewed the Prosecution Response, the Chamber observes that at no point did the Prosecution formally request the Chamber to introduce D30-4864’s evidence under Rule 68(2)(b) of the Rules, rather it merely suggests that it may be a more appropriate mechanism. The Chamber therefore finds that the requirements arising from Regulation 24(5) of the Regulations have not been fulfilled. Accordingly, the Chamber rejects the Request for Leave to Reply.

B. The Request

9. The Chamber incorporates by reference the applicable law as previously set out regarding Rule 68(3) of the Rules,¹¹ which is equally applicable to prior recorded testimonies sought to be introduced by the defence.

1. Submissions

10. The Ngaïssona Defence seeks to introduce the prior recorded testimony of expert witness D30-4864,¹² comprising one report¹³ and an associated item annexed to the report, which includes D30-4864’s *curriculum vitae*, a glossary, terms of reference and abbreviations used for mobile phone networks.¹⁴ It submits that D30-4864 is a qualified expert in telecommunications with notable experience before various international tribunals and that his report falls squarely within his area of expertise and is ‘both of general relevance to interpreting [Call Data

¹¹ Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926’s Evidence, 10 March 2021, ICC-01/14-01/18-907-Conf (public redacted version notified on 1 April 2021, ICC-01/14-01/18-907-Red), paras 8-16 (the ‘First Rule 68(3) Decision’). *See also* Decision on the Yekatom Defence Request for Leave to Appeal the Twelfth Rule 68(3) Decision regarding P-1704, 29 April 2022, ICC-01/14-01/18-1383, paras 4-17.

¹² Request, ICC-01/14-01/18-2310-Red, para. 1, p. 9.

¹³ CAR-D30-0018-0001.

¹⁴ CAR-D30-0018-0028.

Records (the ‘CDRs’)] and assessing Defence arguments as well as information that is relevant to specific CDRs or categories of CDRs’, has significant probative value and is reliable.¹⁵ The Ngaïssona Defence adds that the introduction of D30-4864’s prior recorded testimony would contribute to the expeditiousness of the proceedings and streamline its presentation of evidence.¹⁶

2. *The Chamber’s determination*

11. In his report,¹⁷ D30-4864 discusses the interpretation and limitations of CDRs and covers, *inter alia* (i) background information on CDRs; (ii) three specific CDRs (CAR-OTP-2054-1479, CAR-OTP-2019-2839 and CAR-OTP-2046-0766) and the conclusions that can and cannot be drawn from such material; and (iii) the observations made by an analyst that was engaged by the Prosecution but who was not called to testify (CAR-OTP-2126-2529).
12. Having considered the report and technical nature of D30-4864’s evidence, and noting the arguments in the Yekatom Defence Response,¹⁸ the Chamber will not consider introducing his prior recorded testimony pursuant to Rule 68(2)(b) of the Rules. At the same time, the Chamber does not find it necessary for D30-4864’s testimony to be presented orally in its entirety as (i) the Prosecution does not oppose the introduction of D30-4864’s prior recorded testimony under Rule 68(3) of the Rules; and (ii) its introduction would significantly cut the time for the Ngaïssona Defence’s examination of the witness, thereby promoting the expeditiousness of the proceedings.¹⁹
13. In light of the above and noting that the Ngaïssona Defence is the party seeking introduction, the Chamber considers that the introduction of D30-4864’s prior recorded testimony is not prejudicial to or inconsistent with the rights of the accused.

¹⁵ Request, ICC-01/14-01/18-2310-Red, paras 3, 9-20.

¹⁶ Request, ICC-01/14-01/18-2310-Red, para. 12.

¹⁷ CAR-D30-0018-0001.

¹⁸ See Yekatom Defence Response, ICC-01/14-01/18-2329-Conf, paras 1, 14-20, 22.

¹⁹ See Request, ICC-01/14-01/18-2310-Red, para. 12.

14. The Chamber further notes that D30-4864 used and explained in his report not only the associated item that the Ngaïssona Defence seeks to introduce,²⁰ but also the remainder of the aforementioned items described at paragraph 11 above. The Chamber thus considers that they all form an integral part of his testimony.²¹
15. Accordingly, the Chamber grants the Ngaïssona Defence's request to introduce D30-4864's prior recorded testimony²² and associated items under Rule 68(3) of the Rules, with the following exceptions: (i) Items CAR-OTP-2054-1479 and CAR-OTP-2019-2839 have already been recognised as submitted and therefore the Chamber need not rule on them again. (ii) Item CAR-OTP-2126-2529. Whilst the Chamber is considering introducing this item as an associated item to D30-4864's prior recorded testimony, given the nature of the item and noting that the Prosecution decided not to call the analyst who authored it to testify,²³ the Chamber considers it prudent to provide the participants with an opportunity to comment on the item's introduction should they wish to do so. The Chamber therefore instructs the participants to provide any submissions in relation to this item's introduction within one week of notification of this decision.²⁴
16. In light of the above findings, the Chamber finds that the Yekatom Defence Request is moot.

²⁰ See Request, ICC-01/14-01/18-2310-Red, para. 1, p. 9.

²¹ See also First Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 13.

²² CAR-D30-0018-0001.

²³ See Request, ICC-01/14-01/18-2310-Red, para. 16.

²⁴ Annex to Report, CAR-D30-0018-0028; CDR, CAR-OTP-2046-0766.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Reply;

DECIDES that, subject to the fulfilment of the legal requirements of Rule 68(3) of the Rules, the prior recorded testimony of D30-4864 is introduced pursuant to Rule 68(3) of the Rules:



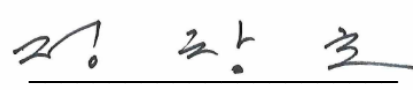
- **D30-4864**: Report, CAR-D30-0018-0001, together with its associated items CAR-D30-0018-0028 and CAR-OTP-2046-0766.

INSTRUCTS the participants to provide any submissions on the introduction of CAR-OTP-2126-2529, within one week of notification of this decision;

CONSIDERS MOOT the Yekatom Defence Request; and

RECLASSIFIES the Prosecution Response, ICC-01/14-01/18-2323-Conf; the Yekatom Defence Response, ICC-01/14-01/18-2329-Conf; the Request for Leave to Reply, ICC-01/14-01/18-2333-Conf; and the Prosecution Response to the Request for Leave to Reply, ICC-01/14-01/18-2337-Conf to public.

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

 <hr style="width: 80%; margin: 0 auto;"/> <p>Judge Péter Kovács</p>	 <hr style="width: 80%; margin: 0 auto;"/> <p>Judge Bertram Schmitt Presiding Judge</p>	 <hr style="width: 80%; margin: 0 auto;"/> <p>Judge Chang-ho Chung</p>
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Dated 5 February 2024

At The Hague, The Netherlands