

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 22 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**

**Public Redacted Version of "Defence Observations on the Potential Submission  
of  
CAR-OTP-2126-2529 as Associated Material to the Report of D30-P-4864  
(ICC-01/14-01/18-2346)", ICC-01/14-01/18-2358-Conf, 12 February 2024**

**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. On 5 February 2024, Trial Chamber V ('Chamber') invited the participants to provide observations by 12 February 2024 on the submission of CAR-OTP-2126-2529<sup>1</sup> ('Swiss Report') as associated material to the report of Mr Duncan Brown ('D30-P-4864').<sup>2</sup> The Ngäissona Defence ('Defence') hereby provides observations. In summary the Defence observations are that:

- a. The Swiss Report has 106 technical annexes that references numerous call-data records ('CDR') and this makes it unsuitable to receive as 'associated material'; and
- b. Receiving the Swiss Report would not advance the proceedings, yet characterisation of it as 'associated material' could impact upon the fairness of proceedings.

2. The Defence reserves the right to address broader legal and factual matters related to the Swiss Report in future submissions, as the Chamber's current invitation for observations has a narrow focus.

## II. CONFIDENTIALITY

3. The present Observations are filed as confidential pursuant to Regulation 23(1)*bis* of the Regulations of the Court, as they refer to information about the source of the Swiss Report which is presently confidential.

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<sup>1</sup> The Defence disclosed an English translation of the Swiss Report on 7 February 2024 (CAR-D30-0018-0068). This translation was prepared following an order of the Chamber (ICC-01/14-01/18-2225-Anx41-Red).

<sup>2</sup> [ICC-01/14-01/18-2346](#), p. 8.

### III. SUBMISSIONS

4. Even if the Swiss Report were recognised as submitted, the application of the Court's jurisprudence would foreclose resort to it for most purposes. Yet at the same time, its characterisation as associated material would introduce potential issues of fairness.

#### A. The Swiss Report is unsuitable for submission as associated material

5. The Chamber's practice of recognising 'associated material' to statements submitted through Rule 68 concerns an evaluation of whether the material "forms an integral part of the testimony itself"<sup>3</sup>.

6. The extensive quantity of items that are integral part of the Swiss Report itself are precisely why it is not suitable to consider the Swiss Report as integral to D30-P-4864's report. The Swiss Report has 106 annexes<sup>4</sup> which are related to its creation. This material includes an SQLite<sup>5</sup> database containing 220,415<sup>6</sup> records and that were reduced from an initial 14,593,141<sup>7</sup> records. This database was used to generate most of the text of the Swiss Report concerning patterns of contact. Examination of this database requires specialised software.<sup>8</sup> Evaluating whether the database was created with sufficient skill and care necessitates specialised skills in writing SQL<sup>9</sup> database queries. Other annexes include *.anb* files. These are files created with i2's Analyst's Notebook.<sup>10</sup> Again, use of this software requires specialised knowledge both to create the files but also to evaluate whether they

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<sup>3</sup> ICC-01/14-01/18-907-Red, para. 13 ("The notion of 'prior recorded testimony' also includes any annex to a witness statement, or document otherwise associated with it, as long as it is used or explained by the witness in their statement and thereby forms an integral part of the testimony itself").

<sup>4</sup> Swiss Report at 2562 to 2564.

<sup>5</sup> Swiss Report at 2562, annex 2 "CAR\_CDRImporter.sqlite". See <https://www.sqlite.org/index.html>.

<sup>6</sup> Swiss Report at 2535.

<sup>7</sup> Swiss Report at 2532.

<sup>8</sup> See <https://sqlitebrowser.org/>.

<sup>9</sup> See <https://www.sqlite.org/lang.html>.

<sup>10</sup> See <https://i2group.com/i2-analysts-notebook>.

were made with sufficient skill. Moreover, the analyst received 1018 items to work with most of which appear to be CDRs.<sup>11</sup>

7. Logically this voluminous material should also be characterised as associated material and be included if the Chamber receives the Swiss Report itself as associated material. However, D30-P-4864 did not examine the annexes or comment upon them. As such, it would be unfair to flood the casefile with material that the Prosecution did not raise during its case, the Defence did not seek to submit, and which to-date have not been a part of litigation or proceedings.
8. Receiving the voluminous material as associated material to D30-P-4864's report would also be prejudicial because these items have not been used or tested in hearings given that the Prosecution did not signal an intention to rely upon the 106 annexes, nor on the Swiss Report itself. Despite the Prosecution noting it might call a CDR expert on 9 July 2020,<sup>12</sup> it did not do so by the time of the closing of its case on 11 September 2023.<sup>13</sup>
9. In contrast, D30-P-4864 was asked specific and clarifying questions about certain paragraphs in the Swiss Report and was not provided the voluminous 106 annexes. The answers in D30-P-4864's report<sup>14</sup> are self-contained and do not require resort to the wider text of the Swiss Report or the items associated with it. Given all this, the Defence observes that the Swiss Report is unsuitable for submission as associated material to the report of D30-P-4864 and it would not be in the interests of justice in the present circumstances.

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<sup>11</sup> CAR-OTP-2126-2529, at 2531.

<sup>12</sup> ICC-01/14-01/18-T-012-ENG, p. 41, lines 17-21 ("we've been gearing up for this case for a very long time and there are a number of expert witnesses and we already instructed ahead of the confirmation process, and those would consist of experts in child soldiers, trauma, satellite imagery, demographics, and I believe we have one on CDR").

<sup>13</sup> [ICC-01/14-01/18-2090](#).

<sup>14</sup> CAR-D30-0018-0001 at 0023, para. 5.3.1 to 0025, para. 5.3.17.

**B. Receiving the Swiss Report as associated material would not advance the proceedings or aid elucidating the truth**

10. In addition to the above reasons militating against submission that are intrinsic to the Swiss Report itself, receiving the Swiss Report as associated material would not advance the proceedings or the pursuit of the truth. CAR-OTP-2126-2529 was prepared by [REDACTED] at the request of the Prosecution, which means that using it as an associated item for deliberations are – at best – limited by procedural rules.
11. Firstly, the submission of the Swiss Report should have been sought pursuant to Rule 68. The report was prepared in a context of legal proceedings by an individual who appears to be aware that their work was to be used by the ICC.<sup>15</sup> Moreover, this item has the *indicia* of a report prepared by an technically trained person (i.e. potential expert).<sup>16</sup> Absent submission through Rule 68, the Swiss Report cannot be relied upon for the truth of its content<sup>17</sup> in its entirety and the Chamber cannot characterise its author as an expert without further rounds of litigation.
12. Secondly, receiving the Swiss Report as associated material risks impacting upon the fairness of proceedings if its use is not carefully constrained by the Chamber. As noted by the Chamber, the Prosecution did not call [REDACTED],<sup>18</sup> and the Prosecution has closed its case. D30-P-4864 will be questioned by the Parties and Participants as part of an ordinary trial process, but it is worth underlining that the Defence is bringing D30-P-4864 to make discrete points as part of adversarial

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<sup>15</sup> CAR-OTP-2126-2529 at 2529 (“Dans le cadre de ses activités d’enquête dans la situation en République Centrafricaine, le Bureau du Procureur de la CPI [...]).

<sup>16</sup> At present, the Defence does not take a position on this stage (para. 2 *above*). For the core legal criteria see the Defence request leading to the Chamber’s invitation to provide observations ([ICC-01/14-01/18-2310-red](#), para. 7).

<sup>17</sup> Rule 68 of the Rules is applicable in cases where the tendering party wishes to adduce the prior recorded testimony for the truth of its contents. See [ICC-01/09-01/20-299](#), para. 11.

<sup>18</sup> [ICC-01/14-01/18-2346](#), para. 15, footnote 23.

proceedings. Adversarial proceedings mean that the Prosecution has had its opportunity to make its case, and it did so without relying on the Swiss Report.

#### IV. CONCLUSION

13. The Defence submits that the Chamber should not receive the Swiss Report as associated material to the report of D30-P-4864.

A handwritten signature in black ink, appearing to be a stylized name or set of initials.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 22 February 2024

At The Hague, the Netherlands.