

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 March 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
NGAÏSSONA***

PUBLIC with CONFIDENTIAL ANNEXES A & B

**Public Redacted Version of 'Request for the Submission of Expert Report
pursuant to Rule 68(3)' (ICC-01/14-01/18-2351-Conf), 8 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. The Defence for Mr Ngaissona ('Defence') requests Trial Chamber V ('Chamber') to receive the formal submission of the report¹ ('Report') of expert [REDACTED] ('D30-P-4885') in accordance with Rule 68(3) of the Rules of Procedure and Evidence ('RPE') and the "Initial Directions on the conduct of the proceedings"² ('Directions').
2. D30-P-4885's report (Confidential Annex A) addresses technical matters that are important to the interpretation of conversations that the Prosecution has obtained from Facebook. The Prosecution has argued that the conversations are incriminating evidence that prove various allegations set out in the Decision on the Confirmation of Charges.³ One Defence argument raised against this, is that the Facebook conversations contain *indicia* that more than one individual is using an account,⁴ and thus the evidence does not support the purported relevance and probative value that the Prosecution asserts. Therefore, evaluating Defence arguments and any Prosecution counterarguments, will involve technical knowledge and understanding of subjects such as internet infrastructure and information and communication technology ('ICT') security practices that are not within the standard education of lawyers, judges, or the public.
3. For this reason, receiving testimony on the subject matter of the Report is necessary and its subject matter is relevant to the trial. At the same time, due to its technical nature and content, should the Chamber accept the written Report pursuant to Rule 68(3) then the parties will be able to focus *viva voce* questioning upon matters

¹ CAR-D30-0018-0040.

² ICC-01/14-01/18-631.

³ ICC-01/14-01/18-1874-Conf, para. 11.

⁴ See, for example, ICC-01/14-01/18-T-016-ENG CT, p. 24; ICC-01/14-01/18-T-23-CONF-ENG CT, pp. 69-70; ICC-01/14-01/18-1999-Conf, para. 15; ICC-01/14-01/18-2065-Conf, paras 9-10; and ICC-01/14-01/18-2115-Conf, paras 8, 9, 12, and 17.

that will move the Chamber's understanding of the issues forward rather than taking Court time to present the whole report in oral form.

4. The Report was drafted by a qualified expert and its content reflects D30-P-4885's respective areas of expertise, specialisation, and knowledge. The Report is reliable, relevant, and probative. D30-P-4885's will attest to the content of the Report, accede to its submission, and the parties, participants, and the Chamber will have an opportunity to question D30-P-4885 in Court.

II. CONFIDENTIALITY

5. The present Request is filed as confidential pursuant to Regulation 23(1)*bis* of the Regulations of the Court, as it contains the name of D30-P-4885 which has yet to be made public pending input from the Victims' and Witnesses Section ('VWS'). The Defence will prepare a public redacted version in due course.

III. APPLICABLE LAW

6. Provided an expert report satisfies the procedural prerequisites of Rule 68 of the RPE, the Chamber may receive its submission.⁵ An expert report may be submitted via Rule 68(3) provided that the formal requirements of Rule 68(3) are met during the examination.⁶
7. Rule 68(3) of the Rules allows the introduction of prior recorded testimonies of witnesses who are present before the Chamber, provided that the witness does not object to the submission of the previously recorded testimony and the Prosecutor,

⁵ Initial Directions on the Conduct of the Proceedings, [ICC-01/14-01/18-631](#), para. 67 *citing* Trial Chamber VII, *Prosecutor v. Jean-Pierre Bemba et al*, Decision on Request for Formal Submission of D23-1's Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rules 68(3) and 67, 19 February 2016, [ICC-01/05-01/13-1641](#), para. 4 and Trial Chamber IX, *Prosecutor v. Dominic Ongwen*, Initial Directions on the Conduct of the Proceedings, [ICC-02/04-01/15-497](#), para. 33. *See also* [ICC-01/14-01/18-907-Red](#), para. 12.

⁶ [ICC-01/05-01/13-1641](#), para. 11.

the defence and the Chamber have the opportunity to examine the witness during the proceedings.

8. For a report and supporting material to be admitted, the Court's jurisprudence sets out that following requirements must be met: (i) the witness is an expert as defined by the Court's jurisprudence;⁷ (ii) the testimony in the subject area of expertise would be of assistance to the Chamber; (iii) the content of the report and/or the anticipated testimony falls within the area of expertise of the witness; and (iv) the content of the report and/or the anticipated testimony does not usurp the functions of the Chamber as the ultimate arbiter of fact and law.

IV. SUBMISSIONS

A. D30-P-4885's testimony and the introduction of his Report pursuant to Rule 68(3) would assist the Chamber

9. The Chamber will receive valuable expert testimonial assistance from D30-P-4885 in evaluating the Facebook material. D30-P-4885's prospective testimony and Report will provide information that brings depth to an important category of material in the trial, that to date has not been examined with independent expert or technical input.
10. 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. Absent D30-P-4885's testimony, the Chamber may be put in the position of evaluating competing technical claims originating from parties to litigation rather than actual witnesses.

⁷ See footnotes 12, 13, and 14 *below*.

B. The Report was produced by a qualified expert and the subject of it falls within the expertise of D30-P-4885

11. An expert witness is a person who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute.⁸
12. In its responses to Prosecution Bar Table applications, the Defence has disputed the premise that a username that appears in a conversation is a reliable indicator of the individual who typed a given message.⁹ This introduced the issue of whether the Facebook user identification and authentication processes were sufficiently robust for the Chamber to rely upon the names to find facts beyond a reasonable doubt. D30-P-4885's Report is aimed at this subject.
13. For the Chamber to consider this argument about the reliability of an authentication and user identification mechanism requires resort to knowledge of computer systems and services connected to the internet. Other practical knowledge such as the use of encryption and commercial security practices are also implicated. D30-P-4885 has the requisite knowledge, skills, and experience to provide expert opinion evidence on this issue and several others raised in his

⁸ Trial Chamber I, *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman*, 30 November 2023, Decision on the Defence Request to admit Dr Philippe Gout as an Expert Witness, [ICC-02/05-01/20-1044](#), para. 9; Trial Chamber X, *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence's proposed expert witnesses and related applications seeking to introduce their prior recorded testimony under Rule 68(3) of the Rules, 28 April 2022, [ICC-01/12-01/18-2206](#), para. 9; Trial Chamber X, Decision on Prosecution's proposed expert witnesses, 5 August 2020, [ICC-01/12-01/18-989-Red](#), para. 14; Trial Chamber VI, *Prosecutor v Bosco Ntaganda*, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, [ICC-01/04-02-06-1159](#), para. 7; Trial Chamber V-A, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupéu, 7 August 2013, [ICC-01/09-01/11-844](#), para. 11; Referring to ICTY, *Prosecutor v Vujadin Popović et al*, [Decision on Joint Defence Interlocutory Appeal Concerning Status of Richard Butler as an Expert Witness](#), 30 January 2008, IT-05-88-AR73.2, para. 27; ICTY, *Prosecutor v Ratko Mladić*, [Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports](#), 19 October 2012, IT-09-92-T, para. 8.

⁹ See for example ICC-01/14-01/18-T-23-CONF-ENG CT, pp. 69-70; ICC-01/14-01/18-1999-Conf, para. 15; ICC-01/14-01/18-2065-Conf, paras 9-10; ICC-01/14-01/18-2065-Conf-Anx1, entries #1, #2, #3 and #4; and ICC-01/14-01/18-2115-Conf, paras 8, 9, 12, and 17; ICC-01/14-01/18-2115-Conf-Anx1, entries #1, #73, #102, #137, #162, #164, #171, and #177.

report. This will be evidenced by his imminent admission onto the ICC list of experts upon assessment by the Registry. The Defence will inform the Chamber once the admission is confirmed.

14. D30-P-4885 has “specialised knowledge, skill [and] training”.¹⁰ D30-P-4885 has dedicated his career¹¹ to ICT with an emphasis upon digital networks and security and thereby acquired valid expertise.¹²

15. D30-P-4885 has decades of experience working with ICT as illustrated in his CV.¹³ His experience is focused upon ICT, networks, and cyber-security but he has accumulated this experience through various professional and personal pursuits. This includes professional experience as a network manager, malware analyst, and digital forensic investigator. [REDACTED].¹⁴ Furthermore, D30-P-4885 has undertaken numerous professional certification courses that concern computer networks and cyber security over the last two decades. This includes certification as a Cisco Certified Security Professional at the start of his career and more recent courses that qualify him as Certified Ethical Hacker and Digital Forensic Investigator.

¹⁰ Trial Chamber I, *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman*, 30 November 2023, Decision on the Defence Request to admit Dr Philippe Gout as an Expert Witness, [ICC-02/05-01/20-1044](#), para. 9; Trial Chamber X, *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence’s proposed expert witnesses and related applications seeking to introduce their prior recorded testimony under Rule 68(3) of the Rules, 28 April 2022, [ICC-01/12-01/18-2206](#), para. 9; Trial Chamber X, Decision on Prosecution’s proposed expert witnesses, 5 August 2020, [ICC-01/12-01/18-989-Red](#), para. 14; Trial Chamber VI, *Prosecutor v Bosco Ntaganda*, Decision on Defence preliminary challenges to Prosecution’s expert witnesses, 9 February 2016, [ICC-01/04-02-06-1159](#), para. 7; Trial Chamber V-A, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupéu, 7 August 2013, [ICC-01/09-01/11-844](#), para. 11; Referring to ICTY, *Prosecutor v Vujadin Popović et al*, [Decision on Joint Defence Interlocutory Appeal Concerning Status of Richard Butler as an Expert Witness](#), 30 January 2008, IT-05-88-AR73.2, para. 27; ICTY, *Prosecutor v Ratko Mladić*, [Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports](#), 19 October 2012, IT-09-92-T, para. 8.

¹¹ 30 November 2023, ICC-02/05-01/20-1044, paras 24-25.

¹² 30 November 2023, ICC-02/05-01/20-1044, para. 23.

¹³ The English Version of D30-P-4885’s CV is registered under CAR-D30-0018-0066 (Confidential Annex B)

¹⁴ <https://www.bitsoffreedom.nl/>.

C. The Report is relevant to issues at trial

16. D30-P-4885's Report was prepared in relation to disputed issues in the proceedings that concern a voluminous body of material.
17. The Facebook related material is indisputably paramount to the Prosecution's case theory of Mr Ngaiissona's alleged contributions to the charged crimes and his alleged Anti-Muslim animus.¹⁵ In the present case, the Prosecution disclosed approximately [REDACTED] Facebook related items and sought the formal submission of [REDACTED] of them – totalling 31,906 pages – through three (3) Bar Table applications.¹⁶ The Prosecution also included a lengthy annex to its Trial Brief concerning Facebook communications.¹⁷
18. The Report provides information and expertise in response to Defence questions that are of general relevance to evaluating and assessing Defence arguments concerning the unreliability of the attribution of authors of messages in this large body of Facebook material.¹⁸ The Report also provides information about specific Facebook materials, the submission of which are sought by the Prosecution through its 7th and 17th Bar Table applications.¹⁹
19. Therefore, the information contained in the Report will assist in the Chamber in concluding whether a given range of allegations stemming from the conversations obtained from Facebook are more or less likely.²⁰

¹⁵ ICC-01/14-01/18-723-Conf, e.g. paras 71-79, 265, 276-278, 286, 442, and entire subsection IV. G. iii.

¹⁶ ICC-01/14-01/18-1874-Conf; ICC-01/14-01/18-1956-Conf; ICC-01/14-01/18-2062-Conf.

¹⁷ ICC-01/14-01/18-723-Conf-AnxC.

¹⁸ See for example ICC-01/14-01/18-T-23-CONF-ENG CT, pp. 69-70; ICC-01/14-01/18-1999-Conf, para. 15; ICC-01/14-01/18-2065-Conf, paras 9-10; ICC-01/14-01/18-2065-Conf-Anx1, entries #1, #2, #3 and #4 ; and ICC-01/14-01/18-2115-Conf, paras 8, 9, 12, and 17; ICC-01/14-01/18-2115-Conf-Anx1, entries #1, #73, #102, #137, #162, #164, #171, and #177.

¹⁹ ICC-01/14-01/18-1874-Conf-Anx, entry #42; ICC-01/14-01/18-2062-Conf-AnxA, entry #73.

²⁰ Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [ICC-01/04-01/07-2635](#), para. 16 (“If the evidence tendered makes the existence of a fact at issue more or less probable, it is relevant. Whether or not this is the case depends on the purpose for which the evidence is adduced.”)

D. The Report has probative value

20. The Report is probative because it will impact upon the Chamber's interpretation and understanding of conversations that the Prosecution argues are probative and incriminatory.²¹ The answers that D30-P-4885 provides to the Defence questions in the Report are aimed at communicating complex issues to non-specialists.
21. The information contained in the report provides technical explanations that will enable the Chamber to put Defence arguments in perspective. The Report sets out D30-P-4885's experience²² which will enable the Chamber to assess D30-P-4885's basis to answer the questions put to him in the Report.
22. Secondly, the Facebook conversation discussed in the Report²³ has been previously submitted by the Prosecution. The Report offers information that will assist the Chamber to interpret the contents of other Facebook conversations sharing similar features. The primary example of this are those items in which IP addresses are present.

E. No prejudice will result from receiving the report and doing so is in the interests of justice

23. The Prosecution will not be prejudiced by granting the present request. To the extent that the Prosecution might raise issues of prejudice, these can be addressed in examination with D30-P-4885.
24. The decision of the Prosecution to not call any witness to testify²⁴ about the Facebook material is a glaring omission. The Defence recalls that on the date the Prosecution filed its final list of evidence and witnesses,²⁵ it had disclosed at least [REDACTED] Facebook related items. The Defence opening statement also

²¹ See ICC-01/14-01/18-1874-Conf; ICC-01/14-01/18-1956-Conf; ICC-01/14-01/18-2062-Conf.

²² See Confidential Annex B for the English version.

²³ CAR-OTP-2100-5221.

²⁴ See Annex ICC-01/14-01/18-724-Conf-AnxA.

²⁵ 9 November 2020.

addressed the subject of the Facebook conversations. Therefore, the Prosecution could have anticipated the need for a witness and even could have sought leave to add them following the provision of the original list of witnesses.

25. The Report is precisely the type of statement that is suitable for submission through Rule 68(3). The Defence leading its whole contents through direct examination would be arduous and time consuming.²⁶ With technical issues, the details are often very important and receiving D30-P-4885's Report through Rule 68(3) will streamline his testimony to the extent possible. Unlike a fact witness, where fully oral testimony may enable the Chamber to appreciate the quality of the witness's recollection or observe relevant body language,²⁷ the fully *viva voce* presentation of the Report will not assist judicial economy. Even in light of the Defence's indication that it would introduce the Report through Rule 68(3), the total time estimated by the parties amounts to four days of testimony. If the Report is not accepted through this mechanism the time could expand further.

26. Additionally, the Report provides information that will facilitate the Chamber evaluating existing Defence arguments and further arguments that may be presented in the Defence final brief. Should the Chamber not receive the report, the Defence will be prejudiced by being deprived of a basis upon which it can provide depth and substance to some of the points it has and seeks to make.

²⁶ Citing Appeals Chamber Judgment [ICC-02/11-01/15-744](#), para. 61, Trial Chamber V has stressed that "expeditiousness is also a factor relevant to the application of Rule 68(3) of the Rules, since its use in principle aims at reducing the amount of time devoted to hearing oral testimony in court. In this regard, the Chamber recalls that when resorting to Rule 68(3) of the Rules, the calling participant is expected to streamline its questioning considerably." [ICC-01/14-01/18-907-Red](#), para. 15.

²⁷ See, for example, ICC-01/14-01/18-1661-Conf-Corr, para. 92 where the Chamber rejected a Rule 68(3) request and instead required testimony *viva voce* in its entirety because "[i]n this way, the Chamber and all participants will be in a position to fully oversee the witness's testimony under oath, observe his natural and spontaneous account as well as reactions, demeanor and composure, and to immediately seek clarifications as necessary and appropriate." Some of the reasons behind this decision included that the prior recorded testimony lacked reliability (para. 89), coherence (para. 90) and also, that the witness may have had strong negative views concerning the Co-Accused that could impact upon the witness's credibility (para. 91).

V. RELIEF SOUGHT

For the reasons above, the Defence requests the Chamber to grant the submission of the Report pursuant to Rule 68(3) of the RPE.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized name or set of initials, located below the text 'Respectfully submitted,'.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaissona

Dated this 20 March 2024

At The Hague, the Netherlands.