

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER V

Before: Judge Beti Hohler , Presiding Judge
Judge Joanna Korner
Judge Keebong Paek

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public Document

Public Redacted Version of the "Defence Response to 'Prosecution's Request to call D30-4885 as a Chamber witness pursuant to Articles 64(6)(d) and 69(3)" (ICC-01/14-01/18-2543-Conf)", 5 July 2024, ICC-01/14-01/18-2577-Conf

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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D30

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I. INTRODUCTION

1. On 21 June 2024, the Prosecution filed the “Prosecution’s Request to call D30-4885 as a Chamber witness pursuant to Articles 64(6)(d) and 69(3)” (‘Request’).¹ In the Request, the Prosecution submits that D30-4885 should be called as a Court witness under rule 68(3) of the Rules of Procedure and Evidence (‘Rules’). As an alternative relief, it requests the Chamber to receive D30-4885’s expert report and associated exhibits under rule 68(2)(b) of the Rules.² In addition to the Request, the Prosecution filed a 98-page analytical annex that it wished to present to Witness D30-4885 before the Defence withdrew him as a witness (‘Annex’).³
2. The Prosecution’s Request should be rejected, as (i) D30-4885’s evidence will not assist the Chamber; (ii) calling him at the Prosecution’s request would breach Mr Ngaïssona’s fair trial rights; and (ii) the Request does not meet the requirements of rules 68(3) and 68(2) of the Rules. Granting the Request would amount to a breach of Mr Ngaïssona’s fair trial rights by indirectly obliging the Defence of Mr Ngaïssona (‘Defence’) to present evidence which it had previously determined would not be in the interests of Mr Ngaïssona’s case.

II. PROCEDURAL HISTORY

3. On 17 November 2023, the Defence filed its Final List of Witnesses and its List of Evidence, in which it included D30-4885.⁴
4. On 29 January 2024, the Prosecution conducted an interview with D30-4885 pursuant to the Protocol on the handling of confidential information (‘Protocol’).⁵

¹ ICC-01/14-01/18-2543-Conf (‘Prosecution’s Request’).

² ICC-01/14-01/18-2543-Conf, para. 1.

³ ICC-01/14-01/18-2543-Conf-Anx (‘Prosecution’s Annex’); ICC-01/14-01/18-2543-Conf, para. 8.

⁴ ICC-01/14-01/18-2215-Conf.

⁵ ICC-01/14-01/18-677-Anx5. The Prosecution Interview audios are found at CAR-OTP-00025690, CAR-OTP-00025691, CAR-OTP-00025692, CAR-OTP-00025693 (‘Prosecution’s 29 January 2024 interview’). The Prosecution also disclosed an internal transcript of its interview with D30-4885 by email on 12 February 2024 at 18:02.

5. On 13 March 2024, the Chamber granted the Defence's request for the formal submission of D30-4885's expert report pursuant to rule 68(3) of the Rules.⁶
6. After several postponements of his testimony,⁷ on 1 May 2024, the Defence withdrew Witness D30-4885 from its List of Witnesses, as it no longer intended to rely on his evidence.⁸
7. On 21 June 2024, the Prosecution filed the Request, along with the Annex.⁹
8. On 25 June 2024, the Defence filed an urgent request to the Chamber, requesting as a primary relief that the Prosecution's Annex be stricken from the case record.¹⁰ The Annex essentially amounts to closing submissions seeking to show how the Prosecution has discharged its burden of proof regarding the key factual issues of this case, in complete disregard of Regulation 36(2) of the Regulations of the Court ('the Regulations').¹¹
9. On 26 June 2024, the Chamber held that it did not consider it necessary to receive responses from the Defence in relation to the Prosecution's Annex to adjudicate the Request.¹²
10. On 27 June 2024, the Defence submitted a clarification request in respect of the Chamber's ruling. The Chamber rejected the request and reiterated that it did not consider it necessary for the Defence to respond to the Annex.¹³
11. On the same day, the Defence filed a disclosure request to the Prosecution requesting access to key documents related to D30-4885's testimony in the *Abd-Al-*

⁶ ICC-01/14-01/18-2410-Conf; ICC-01/14-01/18-2351-Conf (with confidential Annexes A and B).

⁷ Email from the Defence to the Chamber, 5 February 2024, at 12:27; Email from the Defence to the Chamber, 13 March 2024, at 13:05; Email from the Defence to the Chamber, 8 April 2024, at 14:21.

⁸ Email from the Defence to the Chamber, 1 May 2024, at 14:25.

⁹ ICC-01/14-01/18-2543-Conf.

¹⁰ ICC-01/14-01/18-2550-Conf.

¹¹ ICC-01/14-01/18-2550-Conf, paras 6-18.

¹² Email from the Chamber to the Defence, 26 June 2024, at 16:56.

¹³ Email from the Defence to the Chamber, 26 June 2024, at 17:53; Email from the Chamber to the Defence, 27 June 2024, at 11:57.

Rahman case.¹⁴ On 28 June 2024, the Prosecution responded that it refused to disclose those documents to the Defence, indicating that it did not consider the documents material to the present response.¹⁵

III. CONFIDENTIALITY

12. In accordance with Regulation 23*bis*(1) of the Regulations, the present response is filed as “confidential” as it contains information related to filings that have the same classification.

IV. SUBMISSIONS

A. The Prosecution’s Request to call D30-4885 as a Chamber witness should be rejected

- i. D30-4885’s evidence will not assist the Chamber with Facebook user account attribution and will not assist in the determination of the truth

13. D30-4885 is not a “Facebook expert”. This is clear from the witness’ credentials¹⁶ and his report.¹⁷ It became further evident during the Prosecution’s interview with D30-4885 pursuant to the Protocol.¹⁸ The Defence initially sought to call D30-4885 to discuss precise technical aspects that impact the understanding of Facebook evidence. D30-4885 admitted that he did not have particular knowledge, or experience with Facebook evidence, especially with respect to Facebook’s activities in 2013-2014.¹⁹

14. The Defence’s decision to withdraw Witness D30-4885 is completely consistent with the objectives of allowing the non-calling party to interview the calling party’s

¹⁴ Email from the Defence to the Prosecution, 27 June 2024, at 8:54. The pseudonym of D30-4885 in the *Abd-Al-Rahman* case is D-0037.

¹⁵ Email from the Prosecution to the Defence, 28 June 2024, 17:39.

¹⁶ CAR-D30-0018-0067 (D30-4885’s CV), also found at ICC-01/14-01/18-2351-Conf-AnxB.

¹⁷ CAR-D30-0018-0040 (D30-4885’s report with reference 2023/05/D06/N249) also found at ICC-01/14-01/18-2351-Conf-AnxA.

¹⁸ Prosecution’s 29 January 2024 interview: CAR-OTP-00025690, CAR-OTP-00025691, CAR-OTP-00025692 and CAR-OTP-00025693; D30-4885’s limited skills and knowledge in relation to Facebook evidence further transpired more recently during his testimony in the *Abd-Al-Rahman* case, *see for instance* ICC-02/05-01/20-T-152-ENG, page 101, line 1 to page 102, line 15.

¹⁹ For instance, *see* Prosecution’s 29 January 2024 interview, CAR-OTP-00025691, from [00:41:00] to [00:42:20]: [REDACTED] (Emphasis added).

witnesses prior to their anticipated testimony. In *The Prosecutor v. Lubanga*, Trial Chamber I found that allowing such interviews may assist in the efficient management of the proceedings.²⁰ An inexhaustive list of examples that Trial Chamber I included under ways of ensuring “the efficient management of the proceedings” included: identifying irrelevant lines of questioning, which allows the calling party to discard them, and assisting in clarifying lines of enquiry for future investigative steps.²¹ Here, the Defence took the necessary time to assess the arguments it intended to advance through Witness D30-4885 and considered the Prosecution’s approach adopted in its 29 January 2024 interview. The Defence concluded that D30-4885’s anticipated testimony would not assist the Chamber in its determination of the truth or its understanding of the Defence’s arguments. In the interest of the efficient management of the proceedings, the Defence made the decision to withdraw Witness D30-4885.

15. In its Request, the Prosecution does not point to any technical or digital forensics related issue upon which D30-4885’s knowledge could assist the Chamber, as the ultimate arbiter of fact and law.²² Contrary to the Prosecution’s suggestions,²³ D30-4885 was never intended to be called to give his opinion on the Prosecution’s factual conclusions²⁴ drawn from Facebook evidence, which is outside D30-4885’s competence and role as an expert.²⁵ The Prosecution’s apparent plan to leverage

²⁰ *Prosecutor v. Lubanga*, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, ICC-01/04-01/06-2192-Red, para. 49.

²¹ *Ibid.*

²² *Prosecutor v. Ntaganda*, Decision on Defence preliminary challenges to Prosecution’s expert witnesses, ICC-01/04-02/06-1159, para. 8.

²³ Prosecution’s Request, paras 9-12.

²⁴ See, for example, ICC-01/14-01/18-2351-Conf, para. 2 (“D30-P-4885’s report [...] addresses technical matters that are important to the interpretation of conversations that the Prosecution has obtained from Facebook”), para. 10 (“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”), para. 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”), para. 17 (“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”), para. 21 (“The information contained in the report provides technical explanations that will enable the Chamber to put Defence arguments in perspective”), and para. 22 (“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.”) (Emphasis added).

²⁵ This is clear from the initial instructions provided to D30-4885, see Report, CAR-D30-0018-0040, at 0043 and 0051; ICC-01/14-01/18-2351-Conf; see also ICC-01/14-01/18-2410-Conf, para. 12.

D30-4885 to draw factual conclusions relating to Facebook user attribution, which has no bearing on Facebook's operating methods, transpires through the Request,²⁶ the Annex,²⁷ as well as the Prosecution's interview with D30-4885.²⁸ For instance, during the 29 January 2024 interview, the Prosecution announced that it wished for D30-4885 to effectuate a "fact finding operation". D30-4885 correctly insisted that it was not his role:

[REDACTED]²⁹

16. D30-4885 explained both in his interview with the Prosecution and in his report that the exercise of attributing Facebook user accounts is not a technical one.³⁰ He indicated that attribution involves the exercise of "searching for connections", which relies on factual elements.³¹ The finding of "connections" requires comprehensive knowledge of the case file, as well as the relationships binding the various players in the Central African Republic ('CAR') 2013-2014 crisis, as well as underlying cultural elements of language used by CAR nationals during the Relevant Period. This goes well beyond D30-4885's skills, expertise and role as a (withdrawn) expert witness. During the interview, D30-4885 even expressed concerns about being improperly influenced as an expert if he were to be exposed to the substantive elements of the case.³² He admitted that he was not interested in the

²⁶ In the Request, the Prosecution argues that it wished to present D30-4885 with its "chronological and topical assessment of the Facebook material and independent corroboration, such as emails, CDR, as well as documentary and testimonial evidence in the case." It also indicates that it wishes D30-4885 to provide "expert opinion regarding the concrete examples set out in the Prosecution's Facebook analysis would clearly assist the Chamber, particularly in evaluating the evidence of relevant 'connections and indicators' to attribute a given user to an account", Prosecution's Request, paras 8-9.

²⁷ See Prosecution's Annex, which is a compilation of the OTP's own factual analysis of Facebook user attribution and its substantive analysis of the evidence to the allegations made against Mr Ngaïssona which the Prosecution wishes to show D30-4885; *see also* ICC-01/14-01/18-2550-Conf.

²⁸ Emphasis added. Prosecution's 29 January 2024 interview, CAR-OTP-00025693, from [00:49:19] to [00:51:109].

²⁹ Emphasis added. Prosecution's 29 January 2024 interview, CAR-OTP-00025693, from [00:49:19] to [00:51:109].

³⁰ See D30-4885's report, CAR-D30-0018-0040, at 0051; *See also* Prosecution's 29 January 2024 CAR-OTP-00025691, from [00:35:44] to [00:38:15].

³¹ Prosecution's 29 January 2024, CAR-OTP-00025691, from [00:35:44] to [00:38:15]: [REDACTED] (Emphasis added).

³² *See below*, para. 38; Prosecution's 29 January 2024 interview, CAR-OTP-00025691, from [00:08:02] to [00:08:35].

substance of the Facebook conversations.³³ This is compatible with his role as a digital forensics' expert. For these reasons, D30-4885's evidence will not assist the Chamber.

17. To illustrate this point: the Chamber does not need a digital forensics expert to (1) assist in deciding whether it is more, or less, likely that a Facebook account belongs to an individual when there is evidence showing that a phone number associated with that same individual appears on the Facebook user account information sheet; (2) assess whether an individual using their name in a given Facebook conversation or writes something personal such as "happy birthday" may have probative value in respect to attributing a primary user at that time;³⁴ or (3) assess the relevance – or not – that an individual is associated with a Facebook account when the user is "Facebook friends" with individuals whom that person seems to know outside Facebook.³⁵ The Chamber, who has heard testimony in the case and has access to other evidence, will not be assisted by D30-4885's testimony in determining (1) the truth of the Prosecution's factual argument as to the primary user of the Facebook; and (2) whether at a given moment the person who wrote the message was in fact the alleged person(s).³⁶ The appraisal of these questions lies within the Chamber's own competence, and "[is] a [matter] upon which the parties can make submissions at the relevant time".³⁷ An expert report or testimony must not usurp the functions of the Chamber.³⁸ Yet, the Prosecution seeks D30-4885 to testify as a Chamber witness, despite the above exercises involving a holistic weighing of the evidence.³⁹

18. During the Prosecution's 29 January 2024 interview, D30-4885 admitted he was unable to provide an answer to even the most basic questions relating to the

³³ Prosecution's 29 January 2024 interview, CAR-OTP-00025690, from [00:40:06] to [00:40:35] [REDACTED] (Emphasis added).

³⁴ Prosecution's 29 January 2024 interview, CAR-OTP-00025692, from [01:02:49] to [01:02:53] [REDACTED].

³⁵ See Prosecution's Request, para. 11.

³⁶ Prosecution's Request, para. 10; Prosecution's Annex.

³⁷ *Prosecutor v. Ntaganda*, Decision on Defence preliminary challenges to Prosecution's expert witnesses, ICC-01/04-02/06-1159, para. 22.

³⁸ *Ibid.*

³⁹ Prosecution's Request, paras 8-12, where the Prosecution explains how it intends to present D30-4885 the substantive Annex and question the witness on its own factual conclusions of the evidence.

functioning of Facebook⁴⁰ and at times resorted to speculation.⁴¹ D30-4885 admitted that he was not well placed to effectuate the analysis which the Prosecution sought for him to perform.⁴² The information which D30-4885 could provide is “too general a nature to assist the Chamber in determining the concrete issues in dispute”.⁴³ In relation to the Prosecution’s Request, D30-4885 is not “a person who, by virtue of some specialised knowledge, skill or training can assist the Chamber to understand an issue of a technical nature that is in dispute, without undue difficulty” with respect to the Facebook evidence.⁴⁴

19. Moreover, in the Request, the Prosecution argues that D30-4885 assisted Trial Chamber I and would therefore be able to assist the Chamber in the present case as well. This parallel is inapposite. *First*, the scope of D30-4885’s testimony was narrow and limited to one issue (i.e. the username of one of Mr Abd-Al-Rahman’s son’s Facebook account),⁴⁵ whereas here, the Prosecution wishes to generally bolster the reliability of all the Facebook evidence it presented since the beginning of trial through D30-4885.⁴⁶ *Second*, the Prosecution undermines its own argument by refusing to disclose the underlying materials of D30-4885’s testimony in the *Abd-Al-Rahman* case to the Defence.⁴⁷ The Prosecution’s refusal and admission that this material was not “material” is an indication that D30-4885’s purported assistance

⁴⁰ For example, Prosecution’s 29 January 2024 interview, CAR-OTP-00025691, from [00:46:59] to [00:48:39]: [REDACTED] (Emphasis added); *See also* ICC-02/05-01/20-T-152-ENG ET, page 101 line 1 to page 102 line 15, where D30-4885 admits he does not possess knowledge about the basic function of “tagging” on Facebook.

⁴¹ An example is where D30-4885 speculates with respect to the question of account verification: Prosecution’s 29 January 2024 interview, CAR-OTP-00025692, from [00:26:40] to [00:28:20] [REDACTED] (Emphasis added).

⁴² Prosecution’s 29 January 2024 interview, CAR-OTP-00025693, from [00:50:19] to [00:50:33] [REDACTED]; D30-4885 even indicated that his colleague would be better placed to answer some answers relating to the Facebook applications: Prosecution’s 29 January 2024 interview, CAR-OTP-00025691, from [00:47:49] to [00:48:40] [REDACTED] (Emphasis added).

⁴³ *Prosecutor v. Ntaganda*, Decision on Defence preliminary challenges to Prosecution’s expert witnesses, ICC-01/04-02/06-1159, para. 22. For example, on the subject of IP addresses, D30-4885 explained that “it is not rocket science”, rather “it is just type in who is who and push on enter” on any browser and choose any website: *See* Prosecution’s 29 January 2024 interview, CAR-OTP-00025693, From [00:27:40] to [00:29:00] [REDACTED] (Emphasis added); The simplicity of the process was clearly illustrated by the Prosecution’s ability to replicate it on the spot : Prosecution’s 29 January 2024 interview, CAR-OTP-00025693, From [00:31:21] to [00:32:01] [REDACTED] (Emphasis added).

⁴⁴ *Prosecutor v. Ruto and Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, ICC-01/09-01/11-844, para 11.

⁴⁵ ICC-02/05-01/20-T-152-ENG ET, page 5, lines 17 to page 6, line 17.

⁴⁶ *See* Prosecution’s Annex; Prosecution’s Request, para. 8.

⁴⁷ Email from the Prosecution to the Defence, 28 June 2024, at 18:40.

to Trial Chamber I is not actually relevant to the present case. *Third*, in *Abd-Al-Rahman*, D30-4885 was formally called by the Defence in that case, prompting the possibility for the Prosecution to submit questions and documents to the witness, whereas here, the Defence specifically withdrew D30-4885 from its Final List of Witnesses.⁴⁸ *Fourth*, during his testimony in the *Abd-Al-Rahman* case, D30-4885 indicated that he cannot attach “much value” to his interview with the Prosecution on 29 January 2024, because the circumstances under which he was questioned “were unpleasant” and he felt pressured to continue.⁴⁹ D30-4885 continued to express significant professional discomfort and “troubles with [his] conscience”⁵⁰ during his testimony in the *Abd-Al-Rahman* case based on the methodology presented to him by the Prosecution. It also transpired during his testimony that D30-4885 does not possess the skills required to testify on Facebook records, nor is he is familiar with the Facebook end-user experience.⁵¹

20. Although the Defence’s rule 68(3) request for D30-4885 was granted, it was done so only provisionally given the criteria of rule 68(3) can only be fulfilled by a

⁴⁸ ICC-02/05-01/20-T-152-ENG ET, page 39, lines 8-25 to page 40, lines 1-12.

⁴⁹ ICC-02/05-01/20-T-152-ENG ET, page 58, line 23 to page 59, line 11.

⁵⁰ ICC-02/05-01/20-T-152-ENG ET, page 73, lines 7-15.

⁵¹ For instance, see ICC-02/05-01/20-T-152-ENG ET, pages 101-102: “5 A. [15:57:39] I cannot answer that question. But I can't use any social media 6 because of my work, I'm very cautious here. If that's the case, I can easily find out, 7 but it seems like tagging, but I can only say it seems like tagging because I'm not 8 allowed to use social media because of the type of work I do. So I can't talk about it. 9 PRESIDING JUDGE KORNER: [15:58:23] I'm sorry, sir, I'm not sure I quite follow 10 that. If you're -- as you've been -- as you've been accepted as an expert in Facebook, 11 even if you can't use social media yourself, isn't that something you should know 12 about? 13 THE WITNESS: [15:58:44](Interpretation) That's true. And I often get that question. 14 There are two reasons why a digital forensic investigator makes little or no use of 15 social media. (...) That's the 20 common rule in the type of work I do. 21 PRESIDING JUDGE KORNER: [15:59:43] Sir, I'm sure you have very good reasons, 22 and the ones you've expressed sound very sensible, but I'm just querying that when it 23 was put to you by Ms Whitford that, “the second comment there's text in bold that 24 says 'Nana Nana'. That is an example of” -- well, it says “tapping”, that's not what 25 you said -- tagging, sorry, I can't read it. And you said you didn't know. 1 But haven't you come across this before in your investigations? 2 THE WITNESS: [16:00:21] (Interpretation) No. I understand tagging as being 3 a name with a hashtag before it or with an @ sign before it. That's how I -- that's the 4 way I have seen tagging before. A name that is simply printed in bold might be 5 a name in bold and not necessarily a tag. 6 PRESIDING JUDGE KORNER: [16:00:47] All right. So, sorry, it's not that you 7 haven't come across it, you say that those two names printed in bold are not, in your 8 view, what you would consider to be tagging? 9 THE WITNESS: [16:00:59] (Interpretation) This is something I would like to look into 10 further; it's something I would want to look at more closely. I'm not saying that 11 you're wrong. It could indeed be tagging, that's quite possible. And I also believe 12 what you're telling me. 13 But if you ask me -- and if somebody just gives me this and asks me “What do you see 14 here?” I would just say, Well, this is a name that is in bold print or Nana Nana in bold 15 script.” (Emphasis added).

witness who appears before the Chamber.⁵² Providing notice of a Defence witness, and subsequent interviews with the witness pursuant to the Protocol, is not the same as formally calling the witness on the stand.

- ii. Allowing D30-4885 to testify as a Chamber witness would be prejudicial to or inconsistent with the rights of Mr Ngaïssona

21. *First*, the Request generally undermines the Defence's discretion to withdraw witnesses; calling D30-4885 as a Chamber witness at the Prosecution's request would obliquely deprive the Defence of using such discretion. As held by the Chamber, "the calling party retains a broad discretion to organise its presentation of evidence and it is the calling party's prerogative to withdraw witnesses in the exercise of this discretion".⁵³ Here, the Prosecution unjustly seeks to impose withdrawn Defence material into the record, in particular material which goes beyond the scope of D30-4885's expertise and the Defence's anticipated questioning.⁵⁴

22. *Second*, the Defence's discretion to withdraw a witness engages Mr Ngaïssona's right to silence as guaranteed by Article 67(1)(g) of the Statute.⁵⁵ Here, the Prosecution wishes to turn D30-4885 into a Prosecution witness by having him testify as a Chamber witness. Allowing D30-4885 to testify as a Chamber witness at the Prosecution's request would amount to indirectly compelling the Defence to present evidence which it intentionally decided not to present.⁵⁶

23. *Third*, through its Request, the Prosecution indirectly seeks to reverse the burden of proof, guaranteed by Article 66 of the Statute, by requesting the Chamber to call a withdrawn Defence witness to support its case. As held by the Appeals Chamber, "the non-presentation of available evidence at trial can be a defence

⁵² See Prosecution's Request, para. 7; according to rule 68(3), a prior recorded testimony may only be introduced if a witness "does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings." (Emphasis added).

⁵³ ICC-01/14-01/18-1831-Conf, para. 7; ICC-01/14-01/18-685, para. 23; ICC-01/14-01/18-882-Conf, para 7.

⁵⁴ Prosecution's Request, paras. 8-12; Prosecution's Annex.

⁵⁵ See Prosecution's Request, para. 15.

⁵⁶ *Prosecutor v. Ongwen*, Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021, para. 2; *Prosecutor v. Kenyatta et al.*, Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-02/11-48)", ICC-01/09-02/11-77, para. 33; *Prosecutor v. Bemba et al.*, Directions on Defence Presentation of Evidence, ICC-01/05-01/13-1450, para. 2.

strategy. An accused person clearly has the right to refrain from presenting any evidence in his or her defence and to argue that the Prosecutor has not met his or her burden of proof.”⁵⁷ The Prosecution misconstrues the role of the Defence by faulting the Defence for withdrawing D30-4885.⁵⁸ The burden lies solely on the Prosecution to bring evidence to support the charges beyond reasonable doubt.⁵⁹ Moreover, it would be prejudicial to Mr Ngaïssona’s fair trial rights for the Chamber to endorse the Prosecution’s lack of diligence by enabling it to achieve indirectly what it has not sought to achieve directly.

24. By requesting the Chamber to call D30-4885 as a Chamber witness, the Prosecution wishes to present its own arguments and investigations as the view of an independent and impartial expert and thereby incorrectly strengthen the perception of the reliability of the Facebook conversations.⁶⁰ Over several years of trial, the Prosecution elected not to call any expert witness to provide testimony on the reliability of its Facebook evidence or to call someone from Facebook who alone could provide information about the systems from which the conversations were drawn. The Prosecution had ample opportunity to do so. It would be unfair for the Defence to see a witness it withdrew be called by the Chamber to indirectly remedy this strategic prosecutorial decision, and the Prosecution’s own shortcomings. The Prosecution’s attempt to remedy its failures in this manner amounts to an abuse of process. The Request also goes against the very nature of a *proprio motu* Chamber-appointed witness, whom should not be called at a party’s request. In sum, the prejudice caused to the Defence significantly outweighs any

⁵⁷ *Prosecutor v. Lubanga*, Public redacted document Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, para. 75; *see also Prosecutor v. Mbarushimana*, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the confirmation of charges'", ICC-01/04-01/10-487, para. 11.

⁵⁸ Request, para. 4 : “(...) the Prosecution considers that D30-4885’s 21 May 2024 withdrawal as a witness by the Ngaïssona Defence should not operate to impede the Chamber’s critical evaluation of the Facebook conversations and technical evidence in this case” (Emphasis added).

⁵⁹ Article 66(2), Rome Statute. Unlike the Prosecution, the Defence’s role is limited to defending an accused’ rights in accordance with the core legal texts of the International Criminal Court and the Code of Professional Conduct for Counsel ICC-ASP/4/Res.1, *inter alia* Article 24(2) which provides “Counsel is personally responsible for the conduct and presentation of the client’s case and shall exercise personal judgement on the substance and purpose of statements made and questions asked.”; *See also Prosecutor v. Ongwen*, Preliminary Directions for any LRV or Defence Evidence Presentation, ICC-02/04-01/15-1021, para. 2.

⁶⁰ Prosecution’s Request, paras 8-12; Prosecution’s Annex.

potential benefits of allowing D30-4885's report and associated exhibits to be submitted into the case record.

25. *Fourth*, the Prosecution argues there is no prejudice because the Defence was the "proponent of the request to submit D30-4885's expert report under rule 68(3)".⁶¹ However, this argument ignores that the Defence withdrew D30-4885 as a witness and that the Defence's previous rule 68(3) is now moot. In its decision granting the Defence rule 68(3) request, the Chamber considered that there was no prejudice to the right of Mr Ngaïssona given that the Defence was the party seeking the introduction of D30-4885's prior recorded testimony.⁶² However, this consideration no longer applies in light of the Defence's withdrawal of D30-4885.⁶³

iii. D30-4885's prior recorded testimony and associated exhibits do not meet the requirements of rule 68(3) and should therefore be rejected

26. *First*, for reasons detailed above, the introduction of D30-4885's report and associated exhibits at the request of the Prosecution, would be prejudicial and inconsistent with the rights of Mr Ngaïssona, as it would amount to: negating Mr Ngaïssona's right to silence; nullifying the Defence's discretion to withdraw witnesses; and reversing the burden of proof.⁶⁴

27. *Second*, although the Chamber previously held that granting the submission of D30-4885's prior recorded testimony would "streamline the proceedings", this is no longer the case.⁶⁵ At this stage, calling D30-4885 would only extend the proceedings and delay the closing of the trial.⁶⁶ It would raise the possibility for further litigation and investigations, which were not foreseeable given the inopportune timing of the Prosecution's attempt to elicit Facebook expert evidence.⁶⁷

⁶¹ Prosecution's Request, footnote 32 and para. 21.

⁶² ICC-01/14-01/18-2410-Conf, para. 15.

⁶³ See Prosecution's Request, para. 14.

⁶⁴ Rule 68(1), Rules of Procedure and Evidence. See above, paras 21-25.

⁶⁵ ICC-01/14-01/18-2410-Conf, para. 13.

⁶⁶ ICC-01/14-01/18-907-Conf, para. 15, relying on the Appeals Chamber decision *Prosecutor v Gbagbo and Blé Goudé*, Appeals Judgment, ICC-02/11-01/15-744, para. 61.

⁶⁷ See Prosecution's Annex.

28. *Third*, D30-4885's evidence is not corroborated by any other evidence in the case file.⁶⁸ No other witness has provided testimony in relation to the large body of Facebook evidence.

iv. The Prosecution's alternative request to submit the report and the associated exhibits pursuant to rule 68(2)(b) does not meet the requirements of rule 68(2)(b) and should be rejected

29. Given the submission of prior recorded testimony amounts to an exception to the principle of orality, the Statute provides multiple safeguards to ensure the rights of the accused are not violated in the process. Here, the criteria of rule 68(2)(b) are not met.

30. *First*, granting the Prosecution's alternative relief of submitting D30-4885's report and associated exhibits would be prejudicial and inconsistent with the rights of Mr Ngaïssona as it would deprive the Defence of the possibility to test D30-4885's prospective evidence, in particular the Prosecution's interview of 29 January 2024.

31. *Second*, as indicated above, the prior recorded testimony and associated exhibits are "materially in dispute".⁶⁹

32. *Third*, the introduction of D30-4885's report and the associated exhibits cannot serve the interests of justice.⁷⁰ As mentioned above, D30-4885 lacks the proper skills and qualifications to offer opinion evidence on the issues advanced by the Prosecution.⁷¹ Moreover, granting the Prosecution's alternative request pursuant to rule 68(2) would enable the Prosecution to evade the inconvenient gaps in its case while improperly interfering with the presentation of the Defence's case to

⁶⁸ On the criterion of corroboration, see ICC-01/14-01/18-907-Conf, relying inter alia on *Prosecutor v. Gbagbo and Blé Goudé*, Decision on the Prosecutor's application to introduce prior recorded testimony under rules 68(2)(b) and 68(3), ICC-02/01-01/15-573-Conf, para. 9.

⁶⁹ ICC-01/14-01/18-1874-Conf; ICC-01/14-01/18-1956-Conf; ICC-01/14-01/18-2062-Conf; ICC-01/14-01/18-1999-Conf; ICC-01/14-01/18-2065-Conf; ICC-01/14-01/18-2115-Conf.

⁷⁰ ICC-01/14-01/18-1907-Conf, paras 109 and 186.

⁷¹ See above, paras 13-25.

correct its own mistakes. This is heightened by the apparent repudiation by D30-4885 of the contents of his interview with the Prosecution on 29 January 2024.⁷²

33. *Fourth*, the requirement that the prior recorded testimony be of “a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony on similar facts” is not met. No witness has provided testimony on the Prosecution’s interpretation of evidence.

34. *Fifth*, it is unclear whether D30-4885 would agree to submit his 29 January 2024 interview with the Prosecution given that he felt pressured to continue with answering the Prosecution’s questions and that he does not “attach that much value to what [he] said then”.⁷³

35. *Sixth*, D30-4885’s report does not have sufficient indicia of reliability. For instance, D30-4885’s report is not peer-reviewed in substance and some of the sources relied upon in the report are private, and not easily accessible.⁷⁴ In addition to the arguments presented above, D30-4885’s lack of comfort with English in respect to discussing his subject area of knowledge means that answers provided in the Prosecution’s 29 January 2024 interview should be construed as potentially imprecise.⁷⁵

⁷² ICC-02/05-01/20-T-152-ENG ET, pages 58-59: 25 A. [12:51:14] I have not seen this text before. I’m seeing it now for the first time. 1 I presume that I said what I’m seeing here in writing, that I said it back then 2 I would add that that afternoon was an unpleasant afternoon. The circumstances 3 under which I was questioned back then were unpleasant. I wanted to stop as soon 4 as possible, but I had to keep going for some time. I don’t want to go into too much 5 detail about this, but, basically, that afternoon was not a pleasant experience and, in 6 the back of my mind, I simply had the idea we were supposed to spend one hour on 7 this but we just spent four hours on this, it’s time to stop now. It also meant that I 8 had to work that night. I also had that going on in the back of my mind. I believe 9 that I said all of this, but this is the first time that I’ve actually seen this text. Even I 10 don’t attach that much value to what I said then. I need to -- I would need to read 11 this again and take the time to look at it. (Emphasis added).

⁷³ ICC-02/05-01/20-T-152-ENG ET, page 59, lines 17-18.

⁷⁴ Prosecution’s 29 January 2024 interview, CAR-OTP-00025691, from [00:29:57] to [00:32:24]; See ICC-01/14-01/18-2016-Conf, para. 59; *Prosecutor v. Ntaganda*, Decision on Defence preliminary challenges to Prosecution’s expert witnesses, ICC-01/04-02/06-1159, para. 8; ICTY, *Prosecutor v. Stanislav Galić*, Decision On The Prosecution Motion For Reconsideration Of The Admission Of The Expert Report Of Prof. Radinovic, IT-98-29-T, 21 February 2003, para. 9.

⁷⁵ Prosecution’s 29 January 2024 interview, CAR-OTP-00025691, from [00:29:57] to [00:32:24]: [REDACTED] (Emphasis added); See ICC-01/14-01/18-2016-Conf, para. 59; *Prosecutor v. Ntaganda*, Decision on Defence preliminary challenges to Prosecution’s expert witnesses, ICC-01/04-02/06-1159, para. 8; ICTY, *Prosecutor v. Stanislav Galić*, Decision On The Prosecution Motion For Reconsideration Of The Admission Of The Expert Report Of Prof. Radinovic, IT-98-29-T, 21 February 2003, para. 9.

B. Should the Chamber grant the Request, the Annex should not be presented to D30-4885

36. The Defence incorporates by reference its prior submissions and requests in relation to the Annex specifically, which are *sub judice*.⁷⁶

37. Contrary to the Prosecution's assertions, D30-4885 did not specifically agree to review the Prosecution's Annex.⁷⁷ Rather, during the interview, the Prosecution asked D30-4885 if he would be willing "to look at some data" and that it was "not necessarily raw data".⁷⁸ Although D30-4885 appeared to agree generally to assist the Prosecution, he expressed reluctance in doing so, given that reviewing the data would be a factual, or investigative, exercise.⁷⁹ Later, D30-4885 admitted that he felt pressured to continue with the interview.⁸⁰ During the interview, the Prosecution did not show the Annex to the witness nor did it explain to D30-4885 that the Annex went well beyond the Facebook evidence, that it incorporated the near-totality of the Prosecution's case against Mr Ngaïssona, and that it referred to hundreds of external documents including Call Data Records and witness statements to which D30-4885 does not have access. D30-4885 clearly indicated it was not for a technical investigator to "assess the likelihood" of the provenance of a Facebook account based on the conversations. D30-4885 also indicated "you don't need that a [sic] digital knowledge", and that it was "exaggerated to let [him] do that", that it was "a little bit overkill [...] for an official digital forensic investigator" but that he was willing to do it.⁸¹

38. Presenting Annex to D30-4885 would not only be wholly outside the purview of D30-4885's prospective evidence and expertise, but it would also improperly

⁷⁶ ICC-01/14-01/18-2550-Conf.

⁷⁷ Prosecution's Request, para. 8; the Prosecution reasserted this position in its response to an *inter partes* clarification request filed by the Defence team of Mr Yekatom, Email from the Prosecution to the Defence of Mr Yekatom, dated 28 June 2024, at 18:37.

⁷⁸ Prosecution's 29 January 2024 interview, CAR-OTP-00025693, from [00:47:51] to [00:48:15]: [REDACTED] (Emphasis added).

⁷⁹ Prosecution's 29 January 2024 interview, CAR-OTP-00025693, from [00:50:22] to [00:51:11]: [REDACTED] (Emphasis added).

⁸⁰ ICC-02/05-01/20-T-152-ENG ET, page 59, line 1-11.

⁸¹ Prosecution's 29 January 2024 interview, CAR-OTP-00025693, from [00:49:30] to [00:51:11] [REDACTED] (Emphasis added).

influence D30-4885 to such an extent that the probative value of his testimony would be diminished.⁸² During his interview with the Prosecution, D30-4885 expressed concerns relating to the possibility of being improperly influenced should he be shown the substance of Facebook conversations.⁸³ It is for this reason that in the event the Chamber would grant the Prosecution's request to call D30-4885 as a Chamber witness, the Defence requests the Chamber to significantly limit the scope of D30-4885's testimony to *technical* aspects of Facebook's operating methods, and not to comment on the substance of the Facebook conversations or the Annex.

V. RELIEF SOUGHT

39. For the reasons presented above, the Defence respectfully requests the Chamber to:

- **REJECT** the Prosecution's request to call D30-4885 as a Chamber witness and **REJECT** the Prosecution's request to submit D30-4885's prior recorded testimony and associated exhibits pursuant to rule 68(3) of the Rules;
- **REJECT** the Prosecution's alternative request to submit D30-4885's prior recorded testimony and associated exhibits pursuant to rule 68(2)(b);

In the event the Chamber would call D30-4885 as a Chamber witness pursuant to rule 68(3), the Defence requests the Chamber to:

- **ORDER** the Prosecution to not present the Annex to D30-4885;
- **LIMIT** the scope of D30-4885's testimony to technical aspects of Facebook's operating methods.

⁸² See ICC-01/14-01/18-2550-Conf, para. 13.

⁸³ Prosecution's 29 January 2024 interview, CAR-OTP-00025691, from [00:08:02] to [00:08:35]: [REDACTED] (Emphasis added).

Respectfully submitted,



G. G. J. Alexander Knoop
on behalf of
Patrice-Edouard Ngaïssona

Dated this 19 February 2026

At The Hague, the Netherlands