

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **26 January 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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Confidential

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

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Mr Karim Asad Ahmad Khan
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Mr. Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel
Mr Florent Pages-Granier

Counsel for Mr. Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamaï
Ms Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun

Legal Representatives of Applicants

Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. Counsel for Mr Alfred Rombhot Yekatom ("Defence") hereby responds to the Ngaïssona's Defence "Request for the Submission of Export Report and Associated Material pursuant to Rule 68(3)" notified on 18 January 2024 ("Request").¹ The Request relates to the mode of testimony of CAR-D30-P-4864, an expert witness in the field of Call Data Records ("CDR") and use of telecom evidence in judicial proceedings.²
2. The Defence defers to the Chamber's discretion as to the opportunity of the Request. It however submits that to preserve the rights of Mr Yekatom, in light of the importance of telecommunication evidence in the present proceedings, the Defence intends to question P-4864 and present him with telecommunication material used during the trial.
3. As such, it requests the Chamber to ensure that its chosen mode of testimony for P-4864 will entail its appearance before the court, *i.e* to either grant the Request for an appearance under Rule 68(3) or order a full *viva voce* testimony.

PROCEDURAL HISTORY

4. On 10 November 2020, the Prosecution included P-1932 and P-2973 as two witnesses related to "CDR evidence" in their Final List of Witnesses.³
5. On 2 March 2021, the Defence opposed to the submission of P-1932's and P-2973's prior recorded testimony pursuant to Rule 68(2)(b). It was argued that their cross-examination was necessary due to their evidence "*as to the generation, storage, and extraction of the CDRs which may be tendered by the Prosecution*".⁴

¹ ICC-01/14-01/18-2310-Conf.

² *Ibid*, paras 9-11.

³ ICC-01/14-01/18-724-Conf-AnxA.

⁴ ICC-01/14-01/18-845-Corr-Red, para. 61.

6. On 30 June 2021, the Prosecution asked for P-2687 to be added on its list of witnesses, *in lieu* of P-1932 who was withdrawn.⁵
7. On 12 July 2021, as with P-1932 and P-2973, the Defence opposed the request to submit P-2687's evidence pursuant to Rule 68(2)(b) of the Rules as it deemed necessary to cross-examine him.⁶
8. On 5 June 2023, the Chamber rejected the submission of P-2973 and P-2687 prior recorded testimonies pursuant to Rule 68(2)(b), indicating that in light of their expected evidence, on the generation and storage of CDR, interest of justice would best be served with an introduction of their evidence pursuant to Rule 68(3).⁷
9. On 3 August 2023, the Chamber decided that it will not receive P-2687's evidence "neither oral nor written".⁸ On 21 and 22 August 2023, P-2973 testified before the Chamber.⁹
10. On 18 January 2024, the Ngaissona's Request was notified.¹⁰
11. On 24 January 2024, the Prosecution's response to the Ngaissona's Request was notified. The Prosecution defers to the Chamber's discretion, but suggests that a formal submission of P-4864's material pursuant to Rule 68(2)(b) of the Rules would be more appropriate.¹¹

SUBMISSIONS

⁵ ICC-01/14-01/18-1043-Red.

⁶ ICC-01/14-01/18-1060-Red.

⁷ ICC-01/14-01/18-1907-Conf, paras 109-111 and paras 186-188 respectively.

⁸ ICC-01/14-01/18-2016-Red, para. 54.

⁹ ICC-01/14-01/18-T-241-ENG & ICC-01/14-01/18-T-242-ENG

¹⁰ ICC-01/14-01/18-2310-Conf.

¹¹ ICC-01/14-01/18-2323-Conf, para. 1.

12. The Defence notes that P-4864 is a forensic expert in telecommunication evidence with notable experience before various national and international tribunals.¹²
13. During the course of the proceedings the Defence used a number of Call Sequence Tables ("CST") and CDR during its examination of witnesses. The Defence also included 40 documents whose types are "Call Data Records" in its Final List of Evidence, which include 26 documents created by the Defence itself.¹³
14. The Defence intends to question P-4864 as regard to the methodology used to create to CSTs and as to the conclusion that can be inferred from various telecommunication material.
15. An in-court examination of P-4864, where he will be shown documents prepared by the Defence in his domain of expertise, is imperative in order to preserve the rights of Mr Yekatom. Indeed, his answers will have an importance as regard to the reliability of the evidence submitted by the Defence, corollary impacting relevance of said evidence for its holistic assessment by the Chamber during its deliberation.
16. The Defence stresses that P-4864's testimony greatly differs from P-2973 and P-2687, for whom the Chamber ultimately decided to only hear one of them. Indeed, while those two witnesses were to testify as to the generation, storage and extraction of CDRs, Ngaïssona's Defence witness P-4864 will have additional expertise in the domain of CST's and use of telecommunication data as part of criminal proceedings. Moreover, P-2973, who despite his profession was not an expert, was unable to provide definite answers to some Defence's questions, such as on telecommunication data related to cell sites

¹² **P-4864** : CAR-D30-0018-0028 at 0030-0033.

¹³ See ICC-01/14-01/18-2212-Conf-AnxD, items 108 to 133, item 769, item 807, items 816-817, item 822, items 833 to 839, item 943, item 1152.

data of company Orange;¹⁴ appearance of P-4864 is thus crucial in order for the Defence to be in a position to ask some technical questions for which the answers remain pending. P-4864's testimony is thus unique.

17. Further, it is submitted that the Prosecution's reliance on the Chamber's decision as regard to expert P-0925 to aver that no prejudice to the accused would arise from a Rule 68(2)(b) introduction is misplaced.¹⁵ Indeed, as regard to Expert P-0925 the Chamber ruled that the potential prejudice to the accused could *"be mitigated by duly taking into account the absence of any examination in court as part of the Chamber's ultimate assessment of the First Report during its judgment deliberation"*.¹⁶ The situation is starkly different as regard to P-4864 as his evidence would not be restricted to his expert report, but also directly impact the technical evidence (such as CDRs and CSTs) that the Defence intends to present him given his particular area of expertise.
18. Of importance is also the fact that P-4864's expert report was prepared on the sole instructions of the Ngaiissona's Defence team.¹⁷ While the instructions of the Ngaiissona Defence team mainly related to the reliability of the CDRs provided by the Prosecution,¹⁸ the Yekatom Defence, on its part, intends to use P-4864's expertise as to ascertain the reliability of its own CSTs which sometime derives from CDRs whose reliability appears to sometimes be challenged by the calling party.
19. The interests of both Defence teams as regard to P-4864, while not fully opposed, are still different, which warrants an examination by the Yekatom Defence. The Defence also takes the opportunity of this response to indicate that, after a thorough review of P-4864's expert report and of the

¹⁴ **P-2973** : ICC-01/14-01/18-T-241-ENG CT at 11:44:20.

¹⁵ ICC-01/14-01/18-2323-Conf, para. 4, fn. 4.

¹⁶ ICC-01/14-01/18-2016-Conf, para. 61.

¹⁷ **P-4864** : CAR-D30-0018-0001 at 0001 : "On instructions of : NGAÏSSONA defence team"

¹⁸ **P-4864** : CAR-D30-0018-0001 at 0020-0024

telecommunication material used throughout the trial, the Defence estimates that its 2-3 hours of expected examination will not be sufficient,¹⁹ and is increased to 5 hours.²⁰

20. Consequently, in order to preserve the rights of Mr Yekatom to effectively raise defences and to present evidence, the Defence respectfully requests the Chamber to ensure that its chosen mode of testimony for P-4864 will entail its appearance before the court.

CONFIDENTIALITY

21. The present response is filed on a confidential basis corresponding to the classification of the Request. The Defence does not oppose the reclassification of its response as public.

RELIEF SOUGHT

22. In light of the above, the Defence respectfully requests Trial Chamber V to:

GRANT the Request;

Or alternatively,

ORDER the full viva-voce testimony of P-4864

RESPECTFULLY SUBMITTED ON THIS 26th DAY OF JANUARY 2024



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands

¹⁹ See email from the Ngaïssona Defence to the Chamber and Parties “*Ngaïssona Defence's Witness Order and Schedule for Block 29*” dated 17 January 2024 at 11:12.

²⁰ The Defence will engage in *inter partes* correspondence with the Ngaïssona so the increased examination time is taken into account.