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**International
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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***

Public with confidential Annex A

Yekatom Defence Response to the 'Prosecution's submission of call data records and related evidence *via* the "bar table"', 1 March 2022, ICC-01/14-01/18-1296

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr. Yekatom (“Defence”) hereby responds (“Response”) to the Prosecution’s submission of call data records and related evidence via the “bar table” (“Request”).¹
2. The Defence here includes its observations on the four annexes appended to the Request, it also refers to Annex A of this Response which provides detailed submissions on each item contained in Annex C of the Request.

PROCEDURAL BACKGROUND

3. On 17 January 2022, the Prosecution through *inter partes* correspondence and in accordance with the Initial Directions on the Conduct of the Proceedings (“Initial Directions”) ² sought the Defence’s and the Ngaissona Defence’s position on the items listed in three annexes (Annexes B, C and D) for the purpose of a bar table motion in relation to 688 “INCRIM” items.³
4. On 18 January 2022, the Prosecution, in response to an inquiry by the Defence,⁴ confirmed it would not provide Annex A in advance of the formal filing of its bar table motion.⁵
5. On 28 January 2022, the Defence provided the Prosecution with its position for each individual item.
6. On 1 March 2022, the Prosecution filed its Request, asking for the formal submission of 686 INCRIM items.⁶

¹ [ICC-01/14-01/18-1296](#).

² [ICC-01/14-01/18-631](#), para. 62

³ Email from the Prosecution to the Defence sent on 17 January 2022, at 15:40.

⁴ Email from the Defence to the Prosecution sent on 18 January 2022, at 08:22.

⁵ Email from the Prosecution to the Defence sent on 18 January 2022, at 09:05

⁶ [ICC-01/14-01/18-1296](#), para. 1.

7. On 2 March 2022, the Ngaïssona Defence requested an extension of time, until 13 May 2022, to respond to the Prosecution's Request.⁷ On 4 March 2022, the Chamber granted the extension of time.⁸
8. On 12 April 2022, the Trial Chamber issued the Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence)⁹ notably stating that "the requirement of a 'short description of the asserted relevance and probative value' of an item submitted through written filing as set in the Initial Directions does not preclude the submitting party from making the same or similar arguments wholesale for a number of items within a certain category of documents, as long as the said 'short description' is sufficiently clear and applicable to the item."¹⁰
9. On 25 April 2022, the Ngaïssona Defence filed the "Ngaïssona Defence Request for dismissal of certain attributions and allegations of contacts and for suspension of the time-limit to respond to the 'bar table' on Call Data Records."¹¹ The Ngaïssona Defence submitted that there was a lack of notice and to avoid undue prejudice the time limit to respond should be suspended until relevant witnesses either appeared to testify or a decision on the submission of their statements was issued. The Ngaïssona Defence also submitted that the Prosecution should be ordered to provide 'an exhaustive list of telephone attributions.
10. On 2 May 2022, the Prosecution responded to the request for dismissal.¹²
11. On 6 May 2022, the Trial Chamber rejected the Ngaïssona Defence's request for dismissal.¹³

⁷ Email from the Ngaïssona Defence to the Chamber sent on 10 January 2022 at 16:47.

⁸ Email from the Chamber to the Parties sent on 11 January 2022 at 14:47.

⁹ [ICC-01/14-01/18-1359](#).

¹⁰ [ICC-01/14-01/18-1359](#), para. 8.

¹¹ [ICC-01/14-01/18-1377-Conf](#).

¹² [ICC-01/14-01/18-1388-Conf](#).

¹³ [ICC-01/14-01/18-1392-Conf](#).

APPLICABLE LAW

12. Article 64 (9) (a) of the Rome Statute:

The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to: (a) Rule on the admissibility or relevance of evidence;

13. Article 69 (4) of the Rome Statute:

The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

14. Rule 64 of the Rules of Procedure and Evidence:

1. Procedure relating to the relevance or admissibility of evidence 1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 137, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

SUBMISSIONS

15. Following the “Submission Approach” adopted in this case,¹⁴ the present submissions relate to the admissibility of evidence through the bar table motion of the Prosecution.

16. Three key factors need to be assessed when making a determination on admissibility: (i) the *prima facie* relevance to the issues at trial; (ii) the *prima facie*

¹⁴ [ICC-01/14-01/18-631](#), para. 52.

probative value; and (iii) the prejudicial effect as weighed against the probative value.¹⁵

17. The jurisprudence of the Court has determined that the relevance of an item is established “[i]f the evidence tendered makes the existence of a fact at issue more or less probable.”¹⁶ It has further indicated that the “[p]robative value is determined by two factors: the reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case.”¹⁷
18. Reliability is determinative of admissibility: “A piece of evidence may be so lacking in terms of the indicia of reliability that is not ‘probative’ and is therefore inadmissible.”¹⁸ This is as true under the Submissions Approach as it is under other regimes, or else it would compromise fair trial rights of the accused.

I. Annex A and B of the Prosecution’s Request

19. The Defence does not oppose the call sequence tables (“CSTs”) contained in Annex A nor the call data records (“CDRs”) contained in Annex B section I.¹⁹ The Defence is satisfied, in this instance and despite the lack of information about the process by which CDRs were transformed into CSTs, that there is sufficient reliability for purposes of admissibility.
20. On review of Annex A, the transformation of the raw CDRs into an understandable format appears satisfactory after verification. However, the Defence reserves its right to make further submissions about the reliability of

¹⁵ *Prosecutor v. Bemba et al*, [Public redacted version of “Prosecution’s First Request for the Admission of Evidence from the Bar Table”](#), 23 June 2013, ICC-01/05-01/13-1013-Red, para. 8.

¹⁶ *Prosecutor v. Germain Katanga*, [Decision on the Prosecutor’s Bar Table Motions](#), 19 December 2010, ICC-01/04-01/07-2635, para. 16.

¹⁷ *Prosecutor v. Germain Katanga*, [Decision on the Prosecutor’s Bar Table Motions](#), 19 December 2010, ICC-01/04-01/07-2635, para. 18.

¹⁸ *Prosecutor v. Dario Kordic and Mario Cerkez*, [Decision on Appeal Regarding Statement of a Deceased Witness](#), 21 July 2000, IT-95-14/2-AR73.5, para. 24.

¹⁹ Respectively [ICC-01/14-01/18-1296-Conf-AnxA-Corr](#) and [ICC-01/14-01/18-1296-Conf-AnxB](#) section “Documents containing Call Data Records”.

any future CSTs tendered by the Prosecution. The Defence notes that the submission of the CSTs is not accompanied by any evidence about the creation, storage or retrieval of the CDRs, nor about the process by which CDR data was transformed into CSTs. Thus, and without a Prosecution witness statement outlining those points, the Defence necessarily requires time to extensively review any future tendered CSTs.

21. Finally, the Defence opposes all five documents containing cell site information in Annex B ('Part II. Documents containing cell site data').²⁰ The Prosecution has made no showing of reliability beyond a tendered (but not admitted) witness statement, *i.e.* that of P-2687.²¹ The witness does not validate the tendered cell site documents, nor explain the critical details needed to decipher the reliability of individual cell sites. This is necessary to test the Prosecution's case that a phone's location may be derived from cell site activations. First, the range of cell coverage (the predicted geographic area within which a phone is most likely to connect to a cell) has not been established with sufficient specificity, and is very much a live issue: contrary to the Prosecution's position that "the cell radius of Orange cell sites in BANGUI was limited to 4 kilometers,"²² ORANGE's own data indicates that phones may activate sites 19 kilometers apart.²³ In addition, cell site activations are subject to a myriad of factors including the load capacity and switch rates of individual sites, if and how often a company tune cell radio frequencies, the topography and interference of other objects, if a company measures the site location, and what steps a company takes to ensure that damage does not impact propagation. Without information of this sort – which the Prosecution could provide by tendering cell site documents through a witness – there is insufficient reliability for admission.

²⁰ Corresponding to CAR-OTP-2002-4276, CAR-OTP-2036-0246, CAR-OTP-2082-1026-R02, CAR-OTP-2092-0021, CAR-OTP-2092-3914.

²¹ See CAR-OTP-2134-0124-R01.

²² Request, Annex A, p. 4.

²³ CAR-OTP-2082-1009.

22. In addition to failing to provide the necessary details of cell site workings, the Prosecution has failed to provide sufficient evidence as to how the cell site information was generated, stored, or extracted. Without this information, and given there is no indicia of reliability within the documents themselves, they cannot be considered reliable for submission purposes.
23. Finally, the Prosecution has not tendered any other indicia of reliability or demonstrated how reliable this data is, beyond citing internal consistency. This is mere circular logic. When, as here, the Prosecution has not demonstrated any further reliability, it cannot be enough to satisfy the submissions standard.

II. Annex C of the Prosecution's Request

24. Regarding Part I of Annex C, the Defence does not consider it appropriate to make submissions at this point on the alleged attributions contained therein and takes it that the purpose of the table was to provide an overview of the items to be introduced or for which submission was sought,²⁴ as opposed to substantive arguments going to attribution. In other words, the Defence will either contest or confirm, in the course of the trial and through the relevant witnesses the purported attribution contained in the documents listed in Annex C.
25. Regarding Part II of Annex C, the annex appended to this filing ("Annex A") identifies, for each item mentioned in Annex C, the Defence's position as to their admissibility and the arguments of the Defence in support of its position. The Defence addresses three particularly problematic categories of documents below.

A. Items linked to a witness

26. Items 14, 16, and 17²⁵ are inextricably linked to witnesses such that they cannot be tendered via a bar table motion to ensure the fairness of the proceedings.

²⁴ [ICC-01/14-01/18-1388-Conf](#), para. 20.

²⁵ Respectively CAR-OTP-2041-0779-R03, CAR-OTP-2062-0086 and CAR-OTP-2062-0088.

Only the witnesses by whom they were produced or obtained can establish the provenance of the documents and thus their reliability.²⁶ There is otherwise nothing on the face of the documents to provide even *prima facie* reliability.

27. The Chamber should not admit the documents at this time and the Defence reiterates that, as it stands, the Prosecution's attempts to introduce those items forces the Defence to address the submission of those items at two different occasions, (once in the present response and a second time to during the witness testimony) and once with limited and lacunar information which goes against judicial economy.

B. Item linked to a dropped witness

28. The Prosecution originally had on its list a witness who could have provided evidence regarding Item 1; however it chose to drop the witness, and now tenders the document via this motion. This deprives the Chamber and Defence of ascertaining the reliability of such a critical document.
29. The Prosecution has made no other efforts to secure the necessary information to establish the reliability of this document. There is no information as to how P-0283 collected these phone numbers and established the list, or whether he was the only person involved in creating this document, and whether these numbers were verified.
30. To establish the reliability of a document is not a mere formality. As a clear example, during P-0287's cross-examination, the Defence demonstrated that a number attributed to Mr. Yekatom included on a phone list provided by P-0287 was also attributed to a "Chadian cattle herder" in the very same document and on the very same page.²⁷ A similar issue was apparent in another phone list

²⁶ See on this issue, the Defence's submissions in [ICC-01/14-01/18-1341-Conf](#) para. 47 and [ICC-01/14-01/18-1379-Conf](#) paras. 16 to 23 (Public Redacted Version available : [ICC-01/14-01/18-1379-Red](#)).

²⁷ See, CAR-OTP-2019-1383 at 1387 ; [ICC-01/14-01/18-T-021-CONF-ENG](#), pages 57-58.

provided by the witness,²⁸ for the same phone number, attributed to Mr. Yekatom at line 139 and to a Chadian cattle herder at line 132. When prompted to explain how such an error could happen, P-0287 insisted on the fact that the phone lists in question were “working documents”, and as such could contain errors.²⁹

31. For all the reasons above the request for admission of CAR-OTP-2001-5365, Item 1 of Annex C Part II, should be rejected.

C. Reports

32. Items 21 to 28, and Items 30, 31, 33, and 34³⁰ appear to be complex technical reports produced by extracting data from handsets and SIM cards. The range of data is voluminous (for instance, CAR-OTP-2094-2023 contains 1374 records with metadata for each), and includes far more than what the Prosecution relies upon in the Request. The relevance of the vast majority of the remaining records is therefore unclear.
33. Amidst the clutter of irrelevant Facebook information, numbers, notes, and file information, the reports singularly lack any description of the process by which the information was extracted: e.g. the system used, the steps taken (if any) to protect the integrity of the original data, or the differences between the various outputs within each report. Consequently, it is not clear how the relied-upon attributions were extracted. Again taking CAR-OTP-2094-2023 as an example, this contact list was extracted through the Prosecution’s own efforts; it therefore has the information in its holdings to illustrate how it came into possession of the phone,³¹ how it extracted the data,³² and the period in time for which the

²⁸ See CAR-OTP-2020-0156.

²⁹ [ICC-01/14-01/18-T-021-CONF-ENG](#), page 61.

³⁰ Respectively CAR-OTP-2023-0768, CAR-OTP-2094-2013, CAR-OTP-2094-2014, CAR-OTP-2094-2023, CAR-OTP-2094-2024, CAR-OTP-2098-0197, CAR-OTP-2098-0198, CAR-OTP-2098-0211, CAR-OTP-2102-1730, CAR-OTP-2102-1732, CAR-OTP-2112-1406 and CAR-OTP-2117-0389.

³¹ See CAR-OTP-2094-0097 (Evidence bag for seized SAMSUNG 935F and SIM card within).

³² See CAR-OTP-2094-2028 (Prosecution report on CELLBRITE extraction of SIM card data).

data relates. Without such information for each phone extraction report, there is such little indication of reliability that the reports should not be considered sufficiently probative.

III. Annex D of the Prosecution's Request

34. The Defence opposes the submission of all items contained within Annex D.
35. By its own admission, the Prosecution does not rely upon the 605 CDRs tendered in this annex: "these items of CDR are not relied upon specifically to prove allegations set out in the Prosecution's Trial Brief."³³
36. The Prosecution further states that the purpose of submitting those items is to assist the Chamber and parties in the future³⁴ but fails to provide the relevance of those items for the case, despite this being a clear statutory obligation on the Prosecution as the calling party.³⁵
37. This alone should lead the Chamber to reject the submission of the CDRs in Annex D.
38. Due to their formatting and general size, CDRs are basically unintelligible without translation into CSTs.³⁶ This is implicit in the Prosecution's decision to tender CSTs in Annex A derived from CDRs in Annex B.
39. However, in Annex D the Prosecution is effectively trying to create relevance wholesale by submitting gigabytes of unintelligible data now, rather than waiting until the relevance of those items is apparent. This is putting the cart before the horse.

³³ Request, para. 13.

³⁴ Request, para. 14.

³⁵ Article 69(3); see also, Rule 64(1).

³⁶ See *Prosecution v Ayyash et al (Judgment)* TL-11-01/T/TC (18 August 2020) (TC) [375]; *Prosecutor v Ayyash et al (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution)* STL-11-01/T/TC (6 May 2015) (TC) [113].

40. Should the Prosecution (or defence teams) have need to rely upon a selection of these CDRs in order to respond to documentary evidence or testimony, then a submission setting out its relevance and probative value can be made. This altogether conventional practice (which the Prosecution is already otherwise following) assists the Trial Chamber by linking the relied-upon evidence to the matter at hand, rather than needlessly cluttering the trial record.
41. It is to be noted more generally that the submission of CDRs wholesale has been deemed unnecessary in other cases.³⁷ Doing so goes against efficiency and judicial economy, as it augments the volume of evidence admitted in the case without providing new or more probative information.
42. Moreover, the Prosecution's failure to plead the relevance of these items is a clear indication that their non-admission at this stage would not be unduly prejudicial.
43. To the contrary however, allowing the admission into evidence of over 605 unaddressed CDRs, without any indication as to their purported relevance to the Prosecution case, would occasion multi-faceted prejudice to Mr Yekatom's interlinked right to effective defence preparations and his right to notice;³⁸ and more broadly, his right to fair and expeditious proceedings.

CONCLUSION

44. The Defence submits that the five cell site documents listed in Annex B section II, 22 items forming part of Annex C and the totality of annex D do not meet the admissibility requirements.

³⁷ See *Prosecution v Ayyash et al* ([Judgment](#)) TL-11-01/T/TC (18 August 2020) (TC) [375]; *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [113].

³⁸ See, *Prosecutor v. Ongwen*, [Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'](#), ICC-02/04-01/15-1562, 17 July 2019, para. 69.

CONFIDENTIALITY

45. Pursuant to regulation 23bis(1) of the Regulations of the Court, Annex A appended to this filing is classified as “Confidential” as it relates to evidence disclosed *inter partes* and contains information that should not be revealed to the public.

RELIEF SOUGHT

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

REJECT in part the Request; and

DECLARE inadmissible the following evidence:

CAR-OTP-2002-4276, CAR-OTP-2036-0246, CAR-OTP-2082-1026-R02, CAR-OTP-2092-0021, CAR-OTP-2092-3914; CAR-OTP-2001-5365; CAR-OTP-2006-0763-R01; CAR-OTP-2030-0521; CAR-OTP-2041-0779-R03; CAR-OTP-2050-0273-R03; CAR-OTP-2062-0086; CAR-OTP-2062-0088; CAR-OTP-2079-0054; CAR-OTP-2094-0408; CAR-OTP-2094-2013; CAR-OTP-2094-2014; CAR-OTP-2094-2023; CAR-OTP-2094-2024; CAR-OTP-2098-0197; CAR-OTP-2098-0198; CAR-OTP-2098-0211; CAR-OTP-2102-1730; CAR-OTP-2102-1732; CAR-OTP-2112-1406; CAR-OTP-2117-0389; and all 605 items contained within Annex D.

RESPECTFULLY SUBMITTED ON THIS 13TH DAY OF MAY 2022



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