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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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Decision on the Third Prosecution Submission Request (Call Data Records)

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, having regard to Articles 64(2) and (9), 69 and 74(2) of the Rome Statute (the ‘Statute’) and Rules 63 and 64 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Third Prosecution Submission Request (Call Data Records)’.

I. Procedural history and submissions

1. On 1 March 2022, the Office of the Prosecutor (the ‘Prosecution’) sought formal submission of 686 items (the ‘Request’) comprising call data records (the ‘CDR’), items containing cell site information, and telephone attribution information (collectively, the ‘Items’).¹ The Items consist of ‘644 individual items containing CDR and 42 items of related materials’.² Further details about the Items are outlined in the annexes to the Request (‘Annex A’,³ ‘Annex B’,⁴ ‘Annex C’,⁵ and ‘Annex D’,⁶ respectively).
2. In support of the submission of the Items, the Prosecution provides general arguments concerning their reliability and authenticity.⁷ Arguing that their probative value outweighs any prejudicial effect, the Prosecution adds that the Items are highly relevant and reliable; they will assist the Chamber in the determination of the truth; and the Defence have had sufficient notice of their content.⁸
3. The submitted Items are listed in (i) Annex B, titled ‘Underlying Documents containing CDR and Cell Site Data’; (ii) Annex C, titled ‘Telephone Attributions’, Part 2; and (iii) Annex D, titled ‘Remaining Documents containing CDR’.

¹ Prosecution’s submission of call data records and related evidence via the “bar table”, ICC-01/14-01/18-1296 (with confidential Annexes A to D) (a corrigendum of Annex A was notified on 2 March 2022, ICC-01/14-01/18-1296-Conf-AnxA-Corr).

² Request, ICC-01/14-01/18-1296, para. 5.

³ Annex A to the Request, ICC-01/14-01/18-1296-Conf-AnxA-Corr.

⁴ Annex B to the Request, ICC-01/14-01/18-1296-Conf-AnxB.

⁵ Annex C to the Request, ICC-01/14-01/18-1296-Conf-AnxC.

⁶ Annex D to the Request, ICC-01/14-01/18-1296-Conf-AnxD.

⁷ Request, ICC-01/14-01/18-1296, paras 15-22.

⁸ Request, ICC-01/14-01/18-1296, para. 23.

4. On 13 May 2022,⁹ the Yekatom Defence and the Ngaïssona Defence (collectively, the ‘Defence’) filed their responses.¹⁰

II. Analysis

5. The Chamber recalls the applicable law for submission of evidence from the bar table.¹¹ Accordingly, the Chamber notes the participants’ arguments on the relevance and probative value of the Items and defers its consideration of these arguments to its deliberation of the judgment pursuant to Article 74(2) of the Statute. At this stage, the Chamber will only consider whether the Items are subject to any statutory exclusionary rules, including procedural bars, obstacles, and preconditions.

A. Annex A

6. Annex A to the Request contains Call Sequence Tables (the ‘CST’) that consist of ‘relevant call data relied upon in the Prosecution’s case as pleaded in its Trial Brief.’¹² While the Defence take a position on Annex A,¹³ the Chamber notes that the Prosecution does not request submission of these CST but rather of the underlying CDR contained in Annex B, as discussed below.¹⁴ In light of this, no further action is required by the Chamber at this stage in respect of Annex A.

⁹ Upon the Defence’s request, the Chamber extended the deadline to respond to the Request until 13 May 2022. *See* email from the Chamber, 4 March 2022, at 15:39; *see also* email from the Ngaïssona Defence, 2 March 2022, at 17:00; email from the Yekatom Defence, 2 March 2022, at 18:19.

¹⁰ 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, ICC-01/14-01/18-1408 (with confidential Annex A, ICC-01/14-01/18-1408-Conf-AnxA) (the ‘Yekatom Defence Response’); Ngaïssona Defence Response to ‘Prosecution’s submission of call data records and related evidence via the “bar table”’ (ICC-01/14-01/18-1296), ICC-01/14-01/18-1409-Conf (with three confidential annexes) (the ‘Ngaïssona Defence Response’).

¹¹ Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), 12 April 2022, ICC-01/14-01/18-1359, paras 10-12 *referring to* Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631 (the ‘Initial Directions’), paras 53-54, 62.

¹² Request, ICC-01/14-01/18-1296, para. 3; *see* Annex A, ICC-01/14-01/18-1296-Conf-AnxA-Corr.

¹³ *See* Yekatom Defence Response, ICC-01/14-01/18-1408, paras 19-20; Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, paras 10-13.

¹⁴ *See* Request, ICC-01/14-01/18-1296, para. 24. *See also* Decision on the Ngaïssona Defence Requests in relation to the Third Prosecution Submission Request from the Bar Table (Call Data Records), 6 May 2022, ICC-01/14-01/18-1392-Conf, para. 15.

B. Annex B

7. Annex B to the Request contains two parts. Part 1 contains a list of 39 CDR, some of which are referred to in the CST in Annex A (the ‘CDR in Annex B’). Part 2 consists of a list of five items containing cell site tower information (the ‘Cell Site Items’).¹⁵

I. CDR in Annex B

8. At the outset, the Chamber notes that one of these 39 items has already been recognised as submitted, namely, CAR-OTP-2112-1538,¹⁶ and therefore, the Chamber need not rule on it again.
9. As regards the remaining CDR in Annex B, the Yekatom Defence does not oppose their submission,¹⁷ whereas the Ngaïssona Defence provides arguments concerning their reliability, relevance and authenticity.¹⁸
10. The Chamber notes that the Defence did not raise any issues concerning any statutory exclusionary rules affecting the submission of the CDR in Annex B.
11. The Chamber further considers the Ngaïssona Defence’s argument that ‘the prejudice of admission outweighs the probative value of the items’ to be speculative as it is grounded on an unsubstantiated ‘indication’ that the Prosecution’s approach so far may lead to ‘trial by ambush’.¹⁹
12. As regards the Ngaïssona Defence’s claims that the Prosecution provided insufficient clarity as to how it intends to use the CDR in Annex B, the Chamber notes that the asserted relevance and probative value for each item has been provided for each CDR in Annex B. Furthermore, Annex A contains a table of

¹⁵ Request, ICC-01/14-01/18-1296, para. 3; *see* Annex B, ICC-01/14-01/18-1296-Conf-AnxB.

¹⁶ Decision on Submitted Materials for P-2841, email from the Chamber, 2 July 2021, at 14:07.

¹⁷ Yekatom Defence Response, ICC-01/14-01/18-1408, para. 19.

¹⁸ Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, paras 14-19. In addition to this, the Ngaïssona Defence had previously objected to the wholesale submission of items CAR-OTP-2054-1480, CAR-OTP-2054-1481, and CAR-OTP-2054-1482; *see* email from Ngaïssona Defence to the Chamber, 17 December 2021, at 21:35. The Trial Chamber did not recognise its submission as it had not been requested by the Prosecution at that time. *See* Decision on Submitted Materials for P-0876, email from the Chamber, 25 May 2022, at 09:33.

¹⁹ Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, paras 20-21.

information outlining how certain CDR in Annex B relate to its case.²⁰ Should the Prosecution seek to rely upon any submitted evidence in a manner not reasonably anticipated by the Defence, the Chamber will remain amenable to the Defence raising further evidentiary objections.²¹

13. In light of this, and having reviewed the CDR in Annex B and identified no procedural bars to their submission through the Request, the Chamber recognises these items as submitted.

2. Cell Site Items

14. The Defence oppose the submission of the Cell Site Items on grounds that the Prosecution has provided insufficient information about their reliability.²² The Ngaiissona Defence further questions the relevance of these items²³ and adds that the ‘limited clarity as to relevance and reliability creates prejudice to the Defence in itself’.²⁴

15. At the outset, the Chamber notes that the Defence did not articulate what prejudice would be caused by the recognition of these items as submitted. In particular, the Chamber notes that it has raised no issues pursuant to Article 69(7)(i) of the Statute.²⁵ Further, the Chamber notes that, to the extent that information concerning the reliability of the contents of the Cell Site Items was available, the Defence have indeed provided their views.²⁶

²⁰ See also Request, ICC-01/14-01/18-1296, para. 10. This relates to nine of the 39 CDR in Annex B that also appear in Annex A linked to other evidence in the case: CAR-OTP-2008-0483; CAR-OTP-2054-1479; CAR-OTP-2054-1480; CAR-OTP-2054-1481; CAR-OTP-2054-1482; CAR-OTP-2054-1483; CAR-OTP-2068-0033; CAR-OTP-2068-0034; CAR-OTP-2089-1765.

²¹ See also Trial Chamber IX, *The Prosecutor vs. Dominic Ongwen*, Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615, para. 25.

²² Yekatom Defence Response, ICC-01/14-01/18-1408, paras 21-23; Ngaiissona Defence Response, ICC-01/14-01/18-1409-Conf, paras 22-29.

²³ Ngaiissona Defence Response, ICC-01/14-01/18-1409-Conf, paras 22-29.

²⁴ Ngaiissona Defence Response, ICC-01/14-01/18-1409-Conf, para. 26.

²⁵ In this regard, the Chamber notes that the Yekatom Defence has previously argued, *inter alia*, that CDR obtained in the CAR were collected without judicial authorisation and therefore violated the international human right to privacy. It requested that the call location data based on these CDR should be excluded as evidence pursuant to Article 69(7) of the Statute. The Chamber considered it premature to rule on any such challenge as no CDR had been submitted to the Chamber at that stage, without prejudice to any future application on the matter. See Decision on the Yekatom Defence Motion to Exclude Call Location Evidence, 24 July 2020, ICC-01/14-01/18-602; see also Motion to Exclude Call Location Evidence, 29 June 2020, ICC-01/14-01/18-574.

²⁶ Yekatom Defence Response, ICC-01/14-01/18-1408, paras 21-23; Ngaiissona Defence Response, ICC-01/14-01/18-1409-Conf, paras 22-29.

16. The Chamber reiterates that it has deferred the assessment of relevance and probative value of the items to the deliberations pursuant to Article 74(2) of the Statute. This will necessarily include an assessment of the reliability of the submitted evidence based on further information received during the trial, including any testimonial evidence that may still be presented. Until such time, the Defence is free to articulate statutory exclusions in respect of the items, in compliance with Rule 64(1) of the Rules, should they arise during the remainder of the trial.
17. Having reviewed the Cell Site Items and identified no procedural bars to their submission through the Request, the Chamber recognises these items as submitted.

C. Annex C

18. Annex C to the Request also contains two parts. Part 1 consists of a table of attributions of individual phone numbers to their users and the corresponding supporting evidence (the ‘Annex C.1’ or the ‘Table of Attributions’). Part 2 consists of a table listing 37 pieces of evidence ‘relied upon to substantiate the attribution of each telephone number to an individual user’ and sought to be submitted (the ‘Annex C.2’ or the ‘Telephone Attribution Items’).²⁷

1. Table of Attributions

19. The Prosecution does not seek recognition of submission of the Table of Attributions but only the Telephone Attribution Items.²⁸ In light of this, no further action is required by the Chamber at this stage in respect of Annex C.1.

2. Telephone Attribution Items

20. Turning to Annex C.2, the Yekatom Defence provides its ‘position as to their admissibility’ and supporting arguments concerning individual Telephone

²⁷ Request, ICC-01/14-01/18-1296, para. 3; *see* Annex C, ICC-01/14-01/18-1296-Conf-AnxC.

²⁸ Request, ICC-01/14-01/18-1296, para. 24. The Ngaïssona Defence provides its itemised views in respect of Table of Attributions, *see* Annex C to the Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf-AnxC, Part 1, pp. 2-80. The Yekatom Defence did not consider it appropriate to make submissions on the Table of Attributions at this stage. It stated that it will contest or confirm the information therein during the course of trial and through the relevant witnesses. *See* Yekatom Defence Response, ICC-01/14-01/18-1408, para. 24.

Attribution Items.²⁹ It does not oppose the submission of five items³⁰ and defers to the Ngaissona Defence in respect of nine items.³¹ The Ngaissona Defence opposes the submission of all items, including those that have already been submitted; in respect of the latter, it ‘oppose[s] the purpose’ for which they are being submitted.

21. Out of the 37 items mentioned in Annex C.2, four have already been recognised as submitted³² and therefore, the Chamber need not recognise them again as submitted. In respect of three of these items, namely, CAR-OTP-2100-2602, CAR-OTP-2030-0403 and CAR-OTP-2104-0298, the Ngaissona Defence opposes ‘the purpose’ for which they are being submitted in the Request.³³ The Chamber notes that these arguments relate to relevance, reliability and probative value of the items which it will consider as part of its deliberations pursuant to Article 74 of the Statute.
22. Further, the Defence argue that several items are testimonial in nature and therefore are barred from submission and/or may not be submitted through a ‘bar table’.³⁴ These include (i) items associated with witness statements and/or provided by witnesses (collectively, the ‘Witness Related Items’);³⁵

²⁹ Yekatom Defence Response, ICC-01/14-01/18-1408, para. 25; Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1408-Conf-AnxA, pp. 2-7.

³⁰ Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1408-Conf-AnxA referring to CAR-OTP-2003-1010; CAR-OTP-0352; CAR-OTP-2023-0768; CAR-OTP-2122-6333; CAR-OTP-2122-9846.

³¹ Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1408-Conf-AnxA referring to CAR-OTP-2010-2505; CAR-OTP-2014-0763; CAR-OTP-2030-0403; CAR-OTP-2030-0460; CAR-OTP-2030-0518; CAR-OTP-2039-0274; CAR-OTP-2087-9028; CAR-OTP-2092-1735; CAR-OTP-2129-0219.

³² This concerns items CAR-OTP-2100-2602; CAR-OTP-2104-0298; CAR-OTP-2039-0020; CAR-OTP-2030-0403.

³³ Annex C to the Ngaissona Defence Response, ICC-01/14-01/18-1409-Conf-AnxC, Part 1, p. 96, entry 29 concerning CAR-OTP-2100-2602; p. 98, entry 32 concerning CAR-OTP-2104-0298. Ngaissona Defence also opposes the ‘admissibility for the purpose advanced by the Prosecution’ in respect of item CAR-OTP-2030-0518 that has been addressed in paragraphs 31-32 below.

³⁴ Ngaissona Defence Response, ICC-01/14-01/18-1409-Conf, para. 36; Yekatom Defence Response, ICC-01/14-01/18-1408, para. 26.

³⁵ CAR-OTP-2062-0088; CAR-OTP-2062-0086; CAR-OTP-2041-0779; CAR-OTP-2087-9028; CAR-OTP-2001-5365; CAR-OTP-2014-0763; and CAR-OTP-2079-0054 referred to as ‘Annexes to ICC Statements’ by the Ngaissona Defence. See Ngaissona Defence Response, ICC-01/14-01/18-1409-Conf, paras 40-41. The Yekatom Defence includes items CAR-OTP-2062-0088; CAR-OTP-2062-0086; CAR-OTP-2041-0779 as ‘Items linked to a witness’ and item CAR-OTP-2001-5365 as ‘Item linked to a dropped witness’. See Yekatom Defence Response, ICC-01/14-01/18-1408, paras 26-31.

(ii) interviews by the French Judicial Police;³⁶ and (iii) a *dossier* from the courts in Bangui.³⁷

23. In relation to two items, the Ngaïssona Defence argues that since they were obtained from a deceased individual and it would not be in a position to question this individual as regards their contents, their submission should be rejected because their prejudicial effect would outweigh any probative value.³⁸
24. These categories of items will be addressed in turn below.

i. Items associated with witness statements and/or provided by witnesses

25. The Defence argue that seven³⁹ Witness Related Items should not be recognised as submitted since they qualify as testimonial evidence.⁴⁰ The Chamber notes that the Witness Related Items are either annexes to witness statements, discussed as part of their interviews with the Prosecution and/or provided by the witnesses themselves.⁴¹

³⁶ CAR-OTP-2030-0460 and CAR-OTP-2030-0518 referred to as ‘Non-ICC Statements’ by Ngaïssona Defence. See Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, para. 38. The Yekatom Defence defers to Ngaïssona Defence in respect of these items. See Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1408-Conf-AnxA, p. 2, entries 9-10.

³⁷ CAR-OTP-2003-1010 referred to as ‘Non-ICC court records and investigative reports’ by Ngaïssona Defence. See Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, para. 39. The Yekatom Defence does not oppose its submission. See Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1408-Conf-AnxA, p. 2, entry 2.

³⁸ CAR-OTP-2010-2505 and CAR-OTP-2129-0219. See Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, paras 79-80. The Yekatom Defence defers to Ngaïssona Defence in respect of these items. See Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1408-Conf-AnxA, pp. 2, 7, entries 4, 37.

³⁹ CAR-OTP-2062-0088; CAR-OTP-2062-0086; CAR-OTP-2041-0779; CAR-OTP-2087-9028; CAR-OTP-2001-5365; CAR-OTP-2014-0763; and CAR-OTP-2079-0054.

⁴⁰ Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, paras 40-41 referring to ‘Annexes to ICC statements’ consisting of CAR-OTP-2062-0088; CAR-OTP-2062-0086; CAR-OTP-2041-0779; CAR-OTP-2087-9028; CAR-OTP-2001-5365 and CAR-OTP-2014-0763. Annex C to the Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf-AnxC, p. 90, entry 18 referring to CAR-OTP-2079-0054. On the basis of this argument, the Yekatom Defence opposes the submission of four documents. See Yekatom Defence Response, ICC-01/14-01/18-1408, paras 26-31 referring to ‘Items linked to a witness’ consisting of CAR-OTP-2062-0088; CAR-OTP-2062-0086; CAR-OTP-2041-0779; and ‘Item linked to a dropped witness’, CAR-OTP-2001-5365 in respect of which Yekatom Defence makes submissions concerning its reliability. In respect of two items, CAR-OTP-2014-0763 and CAR-OTP-2087-9028, the Yekatom Defence defers to the Ngaïssona Defence who opposes their submission. See Annex A to the Yekatom Defence Response, ICC-01/14-01/18-1408-Conf-AnxA, pp. 2, 4, entries 5, 19.

⁴¹ Item CAR-OTP-2001-5365 was provided by the witness; items CAR-OTP-2014-0763; CAR-OTP-2062-0086; CAR-OTP-2062-0088; and CAR-OTP-2041-0779 are annexes to witness statements; items

26. In support of this argument, the Ngaiissona Defence argues that the ‘content of annexes that were used or explained by the witness in their statements qualifies equally as testimonial in nature since when explaining or providing these materials the witnesses knew that they were providing information that might be relied on in the context of proceedings before the ICC’.⁴²
27. The Chamber takes note of the Defence’s arguments that such evidence, which forms part of the related witness’s ‘prior recorded testimony’, is testimonial in nature and thus procedurally barred from submission. The Chamber considers that it may include items annexed to or otherwise associated with a witness statement, which form an integral part of the ‘prior recorded testimony’ when assessing requests pursuant to Rule 68 of the Rules.⁴³ However, such items by virtue of being integral part of a prior recorded testimony do not become testimonial themselves.
28. Further, the Yekatom Defence argues that three such items are ‘inextricably’ linked to witnesses and cannot be tendered via bar table for that reason;⁴⁴ and in relation to one item concerning a witness not on the Prosecution’s Final Witness List, it makes arguments concerning the reliability of information contained therein.⁴⁵
29. The Chamber understands this to be an issue of the different avenue adopted by the Prosecution in submitting these items, i.e. through a ‘bar table’ request as opposed to through Rule 68 of the Rules. The Chamber reiterates that the manner through which an item is submitted is immaterial for the purpose of its deliberations.⁴⁶ It recalls further that documentary evidence introduced through

CAR-OTP-2079-0054 and CAR-OTP-2087-9028 were discussed with the respective witnesses as part of their interviews.

⁴² Ngaiissona Defence Response, ICC-01/14-01/18-1409-Conf, para. 40; see also para. 41 *referring to* Trial Chamber IX, *The Prosecutor vs. Dominic Ongwen*, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, (the ‘Ongwen Rule 68(2)(b) Decision’) para. 10.

⁴³ *Ongwen* Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 10; *see also* para. 14.

⁴⁴ Yekatom Defence Response, ICC-01/14-01/18-1408, paras 26-27 concerning CAR-OTP-2062-0088; CAR-OTP-2062-0086; CAR-OTP-2041-0779.

⁴⁵ Yekatom Defence Response, ICC-01/14-01/18-1408, paras 28-31 concerning CAR-OTP-2001-5365.

⁴⁶ Decision on the Fourth Prosecution Submission Request from the Bar Table (Recruitment and Use of Children), 24 May 2022, ICC-01/14-01/18-1428 (the ‘Decision on the Fourth Bar Table Request’), para. 12.

an in-court witness or as materials associated with a Rule 68(2)(b) or 68(3) statement remains documentary evidence; the manner of introduction does not transform it into testimonial evidence.⁴⁷ Further, there is no requirement that evidence be tested with a witness in order for it to be submitted.⁴⁸

30. In light of this, the Chamber does not consider Witness Related Items to be testimonial in nature. Having reviewed these documents and having identified no other procedural bars, the Chamber recognises the Witness Related Items as submitted.

ii. Interviews by the French Judicial Police

31. Another set of items opposed concerns two interviews taken by the French judicial police in the framework of a preliminary examination, namely items CAR-OTP-2030-0460 and CAR-OTP-2030-0518.⁴⁹
32. The Chamber notes that it has previously declined the submission of item CAR-OTP-2030-0518 on grounds that it was testimonial in nature,⁵⁰ and therefore need not rule on this item again. Finding that CAR-OTP-2030-0460 similarly contains information of testimonial nature, the Chamber rejects its submission.

iii. Dossier from the courts in Bangui

33. Turning to item CAR-OTP-2003-1010, which is a compilation of statements taken for proceedings in the courts in Bangui, the Chamber notes that the Prosecution requests submission because it contains telephone numbers attributed to persons of interest in the case, namely on pages 1024 and 1026.⁵¹ The Ngaïssona Defence argues that this item is testimonial in nature as it ‘includes witnesses or defendants’ statements’.⁵²

⁴⁷ Trial Chamber IX, *The Prosecutor vs. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, 28 March 2017, ICC-02/04-01/15-795 (the ‘*Ongwen* Decision on Submission’) para. 14.

⁴⁸ *Ongwen* Decision on Submission, ICC-02/04-01/15-795, para. 15.

⁴⁹ Annex C, ICC-01/14-01/18-1296-Conf-AnxC, p. 28, entries 9-10.

⁵⁰ See Decision on Submitted Materials for P-0306, email from the Chamber, 11 March 2022, at 17:32.

⁵¹ Annex C, ICC-01/14-01/18-1296-Conf-AnxC, p. 27, entry 2.

⁵² Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, paras 39-40.

34. After reviewing the item, the Chamber finds that it contains information of testimonial nature and accordingly rejects its submission.

iv. Items related to a deceased individual

35. In relation to two items, CAR-OTP-2010-2505 and CAR-OTP-2129-0219, the Ngaïssona Defence argues that they concern a deceased individual who cannot be questioned about the information contained therein; and for this reason, their ‘admission would be highly prejudicial’.⁵³
36. Both items largely contain names and phone numbers. Item CAR-OTP-2010-2505 contains a list of phone numbers and contacts extracted from the individual’s mobile phone and item CAR-OTP-2129-0219 is an address book containing, *inter alia*, a compilation of phone numbers and calling cards.
37. The Chamber notes that while the individual concerned is deceased, the material in question does not fall within the definition of Rule 68(2)(c) of the Rules as these items, in themselves, do not amount to ‘prior recorded testimony’. The Chamber reiterates that ‘[t]here is no requirement that evidence be tested with a witness in order for it to be submitted’.⁵⁴ Accordingly, and having identified no other procedural bars, the Chamber recognises these items as submitted.

v. Remaining items in Annex C.2

38. There are 21 items in respect of which the Defence do not raise any procedural bars.⁵⁵ Having reviewed these items and finding no procedural bars, the Chamber recognises them as submitted.

⁵³ Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, paras 79-80 *referring to* CAR-OTP-2010-2505 and CAR-OTP-2129-0219 (emphasis in the original omitted).

⁵⁴ Decision on the Second Prosecution Submission Request from the Bar Table (P-0889), 24 May 2022, ICC-01/14-01/18-1429, para. 15 *referring to Ongwen* Decision on Submission, ICC-02/04-01/15-795, para. 15.

⁵⁵ CAR-OTP-2006-0763; CAR-OTP-2020-0352; CAR-OTP-2092-1735; CAR-OTP-2122-6333; CAR-OTP-2122-9846; CAR-OTP-2050-0273; CAR-OTP-2039-0274; CAR-OTP-2023-0768; CAR-OTP-2117-0389; 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. In relation to item CAR-OTP-2030-0521, an intelligence report provided by the French government, the Defence submit that the prejudicial information contained therein outweighs its probative value. Annex C to the Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf-AnxC, p. 86, entry 11; Annex A to the Yekatom

39. The Defence make several arguments concerning relevance and probative value of items in Annex C.2 as well as general submissions about telephone attributions. The Chamber notes these arguments for its deliberations pursuant to Article 74 of the Statute.
40. Finally, for all items in Annex C, the Ngaïssona Defence reserves its right to make further submissions.⁵⁶ The Chamber recalls that the Defence continue to have the possibility to raise issues pursuant to Rule 64(1) of the Rules if and when they become known later.⁵⁷

D. Annex D

41. Annex D to the Request contains ‘the remaining original CDR submitted in its totality’ comprising 605 items (the ‘Annex D’).⁵⁸ It consists of requisition reports, lists and tables containing the details of communications.
42. The Prosecution does not rely upon these items to ‘prove allegations’ set out in its Trial Brief.⁵⁹ It seeks their submission on the basis that these items are ‘responsive to issues arising from documentary evidence and testimony presented at trial, as well as for completeness’.⁶⁰ It adds that the submission of these items at this stage would put the entire CDR collection at the disposal of the Chamber and the participants and facilitate the examination of witnesses by obviating the need to submit individual items later.⁶¹ It further adds that there are no impediments to the formal recognition of these items as submitted given that the determinations on the standard evidentiary criteria and weight accorded to the evidence are deferred until the Chamber’s deliberations on the judgment pursuant to Article 74 of the Statute.⁶²

Defence Response, ICC-01/14-01/18-1408-Conf-AnxA, pp. 2-3, entry 11. The Chamber notes that the arguments concern the source of the information and reliability of the report; they do not raise any procedural bars.

⁵⁶ See Ngaïssona Defence Response, ICC-01/14-01/18-1409-Conf, paras 33-35.

⁵⁷ Decision on the Fourth Bar Table Request, ICC-01/14-01/18-1428, para. 13; *Ongwen* Decision on Submission, ICC-02/04-01/15-795, para. 16.

⁵⁸ Request, ICC-01/14-01/18-1296, para. 3; see Annex D, ICC-01/14-01/18-1296-Conf-AnxD.

⁵⁹ Request, ICC-01/14-01/18-1296, para. 13.

⁶⁰ Request, ICC-01/14-01/18-1296, para. 13.

⁶¹ Request, ICC-01/14-01/18-1296, para. 14.

⁶² Request, ICC-01/14-01/18-1296, para. 14.

43. The Defence oppose the submission of all items contained in Annex D. They submit, *inter alia*, that given the volume of the items and the lack of information about their relevance or probative value, the fairness of the proceedings is affected.⁶³
44. The Chamber notes that one item in Annex D has already been submitted.⁶⁴ The Chamber need not rule on this item again.
45. In respect of four items in Annex D, the Prosecution provides additional information linking the document to a person of interest in the case.⁶⁵ Finding that no procedural bars exist for these items, the Chamber recognises them as submitted.
46. For the remaining 600 items (the ‘Remaining Items in Annex D’), the Prosecution indicates generally that the items are ‘submitted to form part of the entire CDR collection in this case’.⁶⁶ The Chamber notes that while the Prosecution does argue that these items are generally reliable and authentic,⁶⁷ it does not state their *prima facie* relevance.
47. When assessing the information concerning their relevance to the Prosecution’s case, the Chamber is not convinced that the submission of the remainder of the CDR collection is required to make sense of the material recognised as submitted above in paragraphs 13, 17, 30, 37, 38, 45.
48. The Chamber recalls that bar table applications shall contain (i) a short description of the item (and/or relevant portions therein); and (ii) a short description of the asserted relevance and probative value pursuant to Rule 64(1) of the Rules.⁶⁸ The Chamber emphasises that its deferred consideration of the

⁶³ Yekatom Defence Response, ICC-01/14-01/18-1408, paras 36-43; Ngaissona Defence Response, ICC-01/14-01/18-1409-Conf, para. 84.

⁶⁴ Annex D, ICC-01/14-01/18-1296-Conf-AnxD, p. 31, entry 287 concerning CAR-OTP-2057-0440. *See also* Decision on Submitted Materials for P-0965, email from the Chamber, 21 February 2022, at 08:42.

⁶⁵ *See* Annex D, ICC-01/14-01/18-1296-Conf-AnxD, entries 267 (CAR-OTP-2054-1478), 325 (CAR-OTP-2060-0032), 341 (CAR-OTP-2068-0032), 342 (CAR-OTP-2068-0178). *See also* Annex C, ICC-01/14-01/18-1296-Conf-AnxC, p. 4 referring to CAR-OTP-2068-0032; p. 12 referring to CAR-OTP-2054-1478; p. 24 referring to CAR-OTP-2068-0032 and CAR-OTP-2068-0178; p. 25 referring to CAR-OTP-2054-1478.

⁶⁶ Request, ICC-01/14-01/18-1296, para. 14.

⁶⁷ Request, ICC-01/14-01/18-1296, paras 15-22.

⁶⁸ *See* Initial Directions, ICC-01/14-01/18-631, para. 62.

standard evidentiary criteria until its deliberations pursuant to Article 74 of the Statute does not absolve a party from complying with this direction.

49. The Chamber further notes that the Prosecution is not precluded from submitting additional call related data in response to ‘issues arising from documentary evidence and testimony presented at trial’, should it wish to do so later. Depending on the volume of material, such submission may also be done through another ‘bar table’ application.
50. The Chamber considers that, notwithstanding the ‘piecemeal’ nature of such submission(s), this would be in the interest of fairness to the parties, in compliance with its earlier directions, and provide greater assistance to the Chamber in assessing the asserted relevance and probative value of the concerned items.
51. Accordingly, the Chamber rejects the submission of these 600 items without prejudice to future submission requests.
52. In total, the Chamber thus recognises the submission of (i) 38 CDR in Annex B; (ii) five Cell Site Items in Annex B; (iii) 30 Telephone Attribution Items in Annex C.2; and (iv) four items in Annex D.

FOR THESE REASONS, THE CHAMBER HEREBY**PARTLY GRANTS** the Request;**REJECTS** the submission of items CAR-OTP-2030-0460; CAR-OTP-2003-1010; and the Remaining Items in Annex D;**RECOGNISES** as submitted the following items:

CAR-OTP-2008-0482;	CAR-OTP-2112-1435;	CAR-OTP-2006-0763;
CAR-OTP-2008-0483;	CAR-OTP-2112-1439;	CAR-OTP-2020-0352;
CAR-OTP-2019-1361;	CAR-OTP-2112-1443;	CAR-OTP-2092-1735;
CAR-OTP-2019-1362;	CAR-OTP-2112-1449;	CAR-OTP-2030-0521;
CAR-OTP-2019-1364;	CAR-OTP-2112-1468;	CAR-OTP-2122-6333;
CAR-OTP-2019-2839;	CAR-OTP-2112-1513;	CAR-OTP-2122-9846;
CAR-OTP-2054-1479;	CAR-OTP-2112-1517;	CAR-OTP-2050-0273;
CAR-OTP-2054-1480;	CAR-OTP-2112-1518;	CAR-OTP-2039-0274;
CAR-OTP-2054-1481;	CAR-OTP-2112-1534;	CAR-OTP-2023-0768;
CAR-OTP-2054-1482;	CAR-OTP-2112-1539;	CAR-OTP-2117-0389;
CAR-OTP-2054-1483;	CAR-OTP-2112-1550;	CAR-OTP-2094-0408;
CAR-OTP-2054-1484;	CAR-OTP-2112-1551;	CAR-OTP-2094-2013;
CAR-OTP-2057-0421;	CAR-OTP-2002-4276;	CAR-OTP-2094-2014;
CAR-OTP-2057-0462;	CAR-OTP-2036-0246;	CAR-OTP-2094-2023;
CAR-OTP-2068-0033;	CAR-OTP-2082-1026;	CAR-OTP-2094-2024;
CAR-OTP-2068-0034;	CAR-OTP-2092-0021;	CAR-OTP-2098-0197;
CAR-OTP-2068-0179;	CAR-OTP-2092-3914;	CAR-OTP-2098-0198;
CAR-OTP-2069-0479;	CAR-OTP-2001-5365;	CAR-OTP-2098-0211;
CAR-OTP-2071-1116;	CAR-OTP-2014-0763;	CAR-OTP-2102-1730;
CAR-OTP-2089-1765;	CAR-OTP-2062-0086;	CAR-OTP-2102-1732;
CAR-OTP-2093-0590;	CAR-OTP-2062-0088;	CAR-OTP-2112-1406;
CAR-OTP-2093-0596;	CAR-OTP-2041-0779;	CAR-OTP-2054-1478;
CAR-OTP-2112-1395;	CAR-OTP-2079-0054;	CAR-OTP-2060-0032;
CAR-OTP-2112-1427;	CAR-OTP-2087-9028;	CAR-OTP-2068-0032;
CAR-OTP-2112-1431;	CAR-OTP-2010-2505;	CAR-OTP-2068-0178;
CAR-OTP-2112-1432;	CAR-OTP-2129-0219;	and

DIRECTS the Ngaissona Defence to file a public redacted version of its response, ICC-01/14-01/18-1409-Conf, within one week of notification of the present decision;

Done in both English and French, the English version being authoritative.



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 5 July 2022

At The Hague, The Netherlands