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**No. ICC-01/14-01/18
Date: 27 September 2023**

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 Sixteenth Prosecution Submission Request from the Bar Table
(supplementary 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 Ngaïssona*, 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, issues this ‘Decision on the Sixteenth Prosecution Submission Request from the Bar Table (supplementary Call Data Records)’.

I. Procedural history

1. On 5 July 2022, the Chamber issued its ‘Decision on the Third Prosecution Submission Request (Call Data Records)’ (the ‘First CDR Decision’).¹
2. On 25 August 2023, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution’s Sixteenth supplementary submission of call data records and related evidence via the “bar table”’ (the ‘Request’ and the ‘Items’, respectively).²
3. On 7 September 2023, the Yekatom Defence and the Ngaïssona Defence (collectively, the ‘Defence’) responded (the ‘Yekatom Defence Response’ and the ‘Ngaïssona Defence Response’, respectively).³

II. Analysis

4. The Chamber recalls the applicable law for submission of evidence from the bar table.⁴ 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

¹ ICC-01/14-01/18-1499.

² ICC-01/14-01/18-2061 (with confidential Annexes A-C).

³ Yekatom Defence Response to ‘Prosecution’s Sixteenth supplementary submission of call data records and related evidence via the “bar table”’, 25 August 2023, ICC-01/14-01/18-2061, ICC-01/14-01/18-2079-Conf; Defence Response to “Prosecution’s Sixteenth supplementary submission of call data records and related evidence via the ‘bar table’” (ICC-01/14-01/18-2061), filed 25 August 2023, ICC-01/14-01/18-2085-Conf.

⁴ 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.

subject to any statutory exclusionary rules, including procedural bars, obstacles, and preconditions.

5. The Request concerns the submission of eight items,⁵ including one call data record (the ‘CDR’) and seven items relevant to phone number attributions.⁶ The Prosecution provides further details and explains the relevance of the CDR in annexes A and B⁷ and of each of the remaining seven items in annex C to the Request.⁸
6. In support of the submission of the Items, the Prosecution incorporates by reference its earlier general arguments concerning the relevance, reliability, and authenticity of CDR.⁹ Therein, it had argued, *inter alia*, that the probative value of the requested items outweighed any prejudicial effect, that the items were highly relevant and reliable and would assist the Chamber in the determination of the truth, and that the Defence had sufficient notice of their content.¹⁰

1. CDR

7. Turning first to the request concerning the CDR, CAR-OTP-2103-0675, the Chamber notes that the Yekatom Defence does not oppose its submission.¹¹ The Ngaïssona Defence opposes its submission on the grounds that (i) the Prosecution has failed to satisfy the criteria for reconsideration of the rejection of this item;¹² (ii) the item is not reliable because no witness involved in the process of its production has authenticated it;¹³ and (iii) the prejudice from its submission outweighs its probative value.¹⁴ In respect of the latter, it adds that the Prosecution is seeking ‘resubmission of an item appearing to claim new significance when the

⁵ CAR-OTP-2103-0675; CAR-OTP-2103-2375; CAR-OTP-2103-2407; CAR-OTP-2103-2529; CAR-OTP-2130-5493; CAR-OTP-2136-0310; CAR-OTP-2112-1398; CAR-OTP-2112-1405.

⁶ Request, ICC-01/14-01/18-2061, para. 6.

⁷ Annex A to the Request, ICC-01/14-01/18-2061-Conf-AnxA, p. 4. Annex B to the Request, ICC-01/14-01/18-2061-Conf-AnxB, p. 2.

⁸ Annex C to the Request, ICC-01/14-01/18-2061-Conf-AnxC, pp. 2, 4.

⁹ Request, ICC-01/14-01/18-2061, para. 7 *referring to* Prosecution’s submission of call data records and related evidence via the “bar table”, 1 March 2022, ICC-01/14-01/18-1296 (with confidential Annexes A-D) (the ‘First CDR Bar Table Application’), paras 7-12, 15-23.

¹⁰ First CDR Bar Table Application, ICC-01/14-01/18-1296, paras 15-23.

¹¹ Yekatom Defence Response, ICC-01/14-01/18-2079-Conf, para. 3.

¹² Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, paras 4-10.

¹³ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, paras 11-14.

¹⁴ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, paras 15-20.

record shows [that] it could have anticipated this in March 2022'; and that this is an example of trial by ambush by the Prosecution.¹⁵

8. First, the Chamber finds that the Prosecution did not need to fulfil the criteria for reconsideration when submitting CAR-OTP-2103-0675 again. The Chamber recalls that it had rejected its formal submission in the First CDR Decision as the Prosecution had not stated the *prima facie* relevance of this item and not complied with the Chamber's directions concerning 'bar table' applications.¹⁶ For this reason, the rejection was 'without prejudice to future submission requests'.¹⁷ The First CDR Decision also held that the Prosecution was not precluded from submitting additional CDR in response to issues arising from documentary evidence and testimony presented at trial, should it wish to do so later.¹⁸ It further found 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.¹⁹
9. Second, in the view of the Chamber, the remaining arguments made by the Ngaïssona Defence concern reliability and the probative value of the item and do not raise any procedural bars. In this regard, the Chamber emphasises that non-authentication by a witness of an item does not constitute a procedural bar. The Chamber will, in any event, have regard to these arguments when assessing the item during its deliberation of the judgment pursuant to Article 74(2) of the Statute.
10. Third, the Chamber rejects the Ngaïssona Defence's arguments concerning trial by ambush as speculative. The Chamber considers that, given its directions in the First CDR Decision, the Prosecution was not precluded from submitting additional CDR at a later stage.²⁰ The Chamber notes that the Prosecution

¹⁵ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, para. 20.

¹⁶ First CDR Decision, ICC-01/14-01/18-1499, paras 46-48.

¹⁷ First CDR Decision, ICC-01/14-01/18-1499, para. 51; *see also* Annex D to the Prosecution's submission of call data records and related evidence via the "bar table", ICC-01/14-01/18-1296-Conf-AnxD, pp. 41-42, entry 404.

¹⁸ First CDR Decision, ICC-01/14-01/18-1499, para. 49.

¹⁹ First CDR Decision, ICC-01/14-01/18-1499, para. 50.

²⁰ *See* First CDR Decision, ICC-01/14-01/18-1499, para. 12.

submitted the item again, complying with its earlier directions and providing, *inter alia*, the description of the asserted relevance and probative value of the item pursuant to Rule 64(1) of the Rules, as required. In this respect, the Chamber finds that the Defence had the opportunity to review the item and make submissions on it, including raising procedural bars and/or challenging its *prima facie* relevance.

11. In light of the above and having reviewed the item, the Chamber finds that there are no procedural bars to its submission. Further, noting that the Defence does not raise any other statutory exclusions, the Chamber recognises it as formally submitted.

2. Facebook related items

12. The Prosecution requests formal submission of three Facebook related items, namely CAR-OTP-2103-2375, CAR-OTP-2103-2407 and CAR-OTP-2103-2529.²¹ In support of this request, it identifies specific portions of these items that relate to a phone number of an alleged Anti-Balaka member.²²
13. The Yekatom Defence opposes their submission ‘to the extent that the Prosecution tenders these documents in their entirety’.²³ It argues that ‘the wholesale submission of these documents would potentially induce the Prosecution to seek to rely on them “in a manner not reasonably anticipated by the Defence” and therefore pose a risk to Mr Yekatom’s right to timely notice of the Prosecution case’.²⁴ The Ngaïssona Defence also opposes the submission of the items in their entirety on similar grounds and adds that submitting such voluminous material for ‘three mentions of a telephone number’ is disproportionate.²⁵
14. As regards the specific portions of these items relied upon by the Prosecution to attribute phone numbers, the Yekatom Defence defers to the Ngaïssona

²¹ Annex C to the Request, ICC-01/14-01/18-2061-Conf-AnxC, p. 4, entries 1-3,

²² These portions are CAR-OTP-2103-2375 at 2376-77; CAR-OTP-2103-2407 at 2426; CAR-OTP-2103-2529 at 2531. *See* Annex C to the Request, ICC-01/14-01/18-2061-Conf-AnxC, p. 2.

²³ Yekatom Defence Response, ICC-01/14-01/18-2079-Conf, paras 8, 10-14, 22.

²⁴ Yekatom Defence Response, ICC-01/14-01/18-2079-Conf, para. 10.

²⁵ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, paras 21-22.

Defence.²⁶ The Ngaïssona Defence cross-references its earlier submissions concerning Facebook material and argues that without contextualisation in court, it is not possible to know whether these items, and portions thereof, can be relied upon to support the Prosecution’s assertions concerning telephone attributions.²⁷ It also provides its arguments on the probative value of these specific portions.²⁸

15. The Chamber notes that these three items have also been requested as part of the Prosecution’s seventh ‘bar table’ application concerning Facebook related material (the ‘Prosecution’s Seventh Bar Table Application’),²⁹ to which the Defence has provided further responses concerning the entirety of these items.³⁰
16. Having regard to the Defence’s arguments concerning the submission of these items as a whole and further noting that the Defence has had an opportunity to review these items in full when responding to the Prosecution’s Seventh Bar Table Application, the Chamber defers its determination on the submission of these three items. It will consider the Defence’s arguments on these items as a whole, and their specific portions, together when deciding on these items’ submission in the context of the Prosecution’s Seventh Bar Table Application.

3. *Items related to P-0965*

17. The Prosecution requests formal submission of two items related to P-0965’s phone numbers, CAR-OTP-2112-1398 and CAR-OTP-2112-1405, to attribute an additional phone number to him.³¹ Item CAR-OTP-2112-1398 contains P-0965’s

²⁶ Yekatom Defence Response, ICC-01/14-01/18-2079-Conf, para. 15.

²⁷ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, paras 23-26.

²⁸ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, paras 24-26.

²⁹ See Annex to the Prosecution’s Seventh Application for Submission of Facebook Evidence from the Bar Table, 17 May 2023, ICC-01/14-01/18-1874-Conf-Anx, p. 101 [CAR-OTP-2103-2375 and CAR-OTP-2103-2407]; p. 102 [CAR-OTP-2103-2529].

³⁰ See Annex A to the Yekatom Response to “Prosecution’s Seventh Application for Submission of Facebook Evidence from the Bar Table”, 17 May 2023, ICC-01/14-01/18-1874, 21 July 2023, ICC-01/14-01/18-1996-Conf-AnxA, pp. 187-88 [CAR-OTP-2103-2375]; pp. 188-89 [CAR-OTP-2103-2407]; pp. 189-90 [CAR-OTP-2103-2529]; Annex 1 to the Defence Response to the “Prosecution’s Seventh Application for the Submission of Evidence from the Bar Table” ICC-01/14-01/18-1874-Conf, 21 July 2023, ICC-01/14-01/18-1999-Conf-Anx1, pp. 292-93 [CAR-OTP-2103-2375]; p. 294 [CAR-OTP-2103-2407]; p. 296 [CAR-OTP-2103-2529]. See also Defence Response to the “Prosecution’s Seventh Application for the Submission of Evidence from the Bar Table” ICC-01/14-01/18-1874-Conf, 21 July 2023, ICC-01/14-01/18-1999-Conf, paras 65-68 generally for the Ngaïssona Defence’s response to the Facebook related material generating from the concerned interlocutor involved in items CAR-OTP-2103-2375, CAR-OTP-2103-2407 and CAR-OTP-2103-2529.

³¹ Annex C to the Request, ICC-01/14-01/18-2061-Conf-AnxC, p. 4, entries 4-5; see also p. 3.

consent form listing this additional phone number. Item CAR-OTP-2112-1405 contains, according to the Prosecution, data extracted from P-0965's phone, with tab 'SIM Data', row 8 indicating the same phone number. The Prosecution further submits that this phone number was used to communicate with P-1521 between May 2014 and December 2014.³²

18. The Yekatom Defence opposes both items because their submission would be contrary to Mr Yekatom's statutory fair trial rights, including his right to timely notice and to examine witnesses brought against him.³³ It argues, *inter alia*, that the Prosecution provided late notice of the attribution of this phone number to P-0965 and therefore, the Yekatom Defence could not 'cross-examine P-0965 on this matter during his appearance before the Chamber [including on] whether P-0965 was himself using this phone number during the events and/or during the period in which the calls relied upon by the Prosecution took place'.³⁴ Additionally, in respect of CAR-OTP-2112-1405, it argues that there is no indication from the Prosecution as to what steps were taken, if any, to preserve the integrity of the original data and, in the absence of this, the *prima facie* reliability of this item cannot be established.³⁵
19. The Ngaïssona Defence makes submissions on the relevance and probative value of the two items; it adds that their submission should be rejected due to the prejudice to the accused, particularly on account of the volume of the material contained therein.³⁶ It also points out that the Prosecution did not use the opportunity to clarify with P-0965 whether the additional number was used by him during the charged period.³⁷
20. Having reviewed both items, the Chamber finds that there are no procedural bars to their submission. The Chamber considers that the Prosecution could have used

³² Annex A to the Request, ICC-01/14-01/18-2061-Conf-AnxA, pp. 5-7.

³³ Yekatom Defence Response, ICC-01/14-01/18-2079-Conf, paras 16, 19.

³⁴ Yekatom Defence Response, ICC-01/14-01/18-2079-Conf, para. 17.

³⁵ Yekatom Defence Response, ICC-01/14-01/18-2079-Conf, para. 20 *referring to* Yekatom Defence Response to the Prosecution's "Request for leave to add one item to the List of Evidence", ICC-01/14-01/18-1702-Conf, 15 December 2022, 10 February 2023, ICC-01/14-01/18-1747-Conf (with confidential Annex A) (public redacted version notified the same day).

³⁶ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, paras 27-31.

³⁷ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, para. 27.

these items during P-0965's testimony to seek further clarification, as necessary, and this would have permitted the parties to examine the witness fully on this aspect. However, in the view of the Chamber, this, in itself, does not constitute a procedural bar to the submission of these items.

21. The Chamber will consider the Defence's submissions concerning the items' relevance, reliability, and probative value in its deliberation of the judgment pursuant to Article 74(2) of the Statute.

4. Remaining Items

22. The Prosecution seeks submission of item CAR-OTP-2136-0310 containing Maxime Mokom's business card providing his phone numbers. Having reviewed the item, the Chamber finds that there are no procedural bars to its submission. Further, noting that the Defence does not object,³⁸ the Chamber recognises it as formally submitted.
23. The Prosecution seeks submission of item CAR-OTP-2130-5493, which at page 5610 contains phone numbers attributable to P-2843. The Yekatom Defence opposes the submission of this item in its entirety and defers to the Ngaïssona Defence concerning the submission of specific portions of this document to attribute telephone numbers.³⁹ The Ngaïssona Defence submits that this item is too voluminous for the purpose of attributing one phone number and makes further submissions on the reliability and probative value of the document.⁴⁰ It also argues that it is prejudicial for the Prosecution to submit this item without discussing it with P-2843, who could have clarified the issues raised in the Ngaïssona Defence Response.⁴¹
24. The Chamber notes that item CAR-OTP-2130-5493 has also been requested as part of the Prosecution's eleventh 'bar table' application (the 'Prosecution's

³⁸ Yekatom Defence Response, ICC-01/14-01/18-2079-Conf, para. 7; Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, para. 37, p. 16.

³⁹ Yekatom Defence Response, ICC-01/14-01/18-2079-Conf, paras 8, 13, 15, 22.

⁴⁰ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, paras 33-36.

⁴¹ Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, para. 36.

Eleventh Bar Table Application’).⁴² The Chamber further notes that, in its response to the Prosecution’s Eleventh Bar Table Application, the Yekatom Defence deferred to the Ngaïssona Defence.⁴³ The Ngaïssona Defence, in turn, indicated that, while it had no objections to the submission of the item, it may provide further objections on authenticity, reliability and relevance in its formal response due on 29 September 2023.⁴⁴

25. Having regard to the Defence’s arguments concerning the specific portions of this item and further noting that the Ngaïssona Defence will have an opportunity to review this item in full when responding to the Prosecution’s Eleventh Bar Table Application, the Chamber defers its determination on the submission of this item. It will consider the Defence’s arguments on this item as a whole, as well as the specific portions concerning P-2843, together when deciding on this item’s submission in the context of the Prosecution’s Eleventh Bar Table Application.

⁴² See Annex to the Prosecution’s Eleventh Application for the Submission of Open-source Evidence from the Bar Table, 31 July 2023, ICC-01/14-01/18-2010-Conf-Anx, p. 23; Prosecution’s Eleventh Application for the Submission of Open-source Evidence from the Bar Table, 31 July 2023, ICC-01/14-01/18-2010-Conf.

⁴³ Annex A to the Yekatom Defence Response to ‘Prosecution’s Eleventh Application for the Submission of Open-source Evidence from the Bar Table’, 21 August 2023, ICC-01/14-01/18-2037-Conf-AnxA, pp. 30-31.

⁴⁴ Annex to the Prosecution’s Eleventh Application for the Submission of Open-source Evidence from the Bar Table, 31 July 2023, ICC-01/14-01/18-2010-Conf-Anx, p. 23. See also email from the Chamber, 11 August 2023, at 18:15 granting an extension of time to respond until 29 September 2023.

FOR THESE REASONS, THE CHAMBER HEREBY

PARTLY GRANTS the Request;

RECOGNISES as submitted, the following items: CAR-OTP-2103-0675; CAR-OTP-2112-1398; CAR-OTP-2112-1405; CAR-OTP-2136-0310;

ORDERS the Registry to reflect that these items have been so recognised in the JEM code;

DEFERS its determination on items CAR-OTP-2103-2375; CAR-OTP-2103-2407; CAR-OTP-2103-2529; CAR-OTP-2130-5493; and

ORDERS the Yekatom Defence and Ngaïssona Defence to file public redacted versions, or request reclassification to public, of the Yekatom Defence Response, ICC-01/14-01/18-2079-Conf and the Ngaïssona Defence Response, ICC-01/14-01/18-2085-Conf, respectively, within one week of notification of this decision.

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

 Judge Péter Kovács	 Judge Bertram Schmitt Presiding Judge	 Judge Chang-ho Chung
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Dated 27 September 2023

At The Hague, The Netherlands