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**International
Criminal
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No: *ICC-01/14-01/18*

Date: 18 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

**Public redacted version of
'Request for the Submission of Expert Report
and Associated Material pursuant to Rule 68(3)'
(ICC-01/14-01/18-2310-Conf), filed 18 January 2024**

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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I. INTRODUCTION

1. The Defence for Mr Ngaïssona ('Defence') requests Trial Chamber V ('Chamber') to receive the formal submission of the report¹ ('Report') of expert [REDACTED] ('D30-P-4864') and associated material,² in accordance with Rule 68(3) of the Rules of Procedure and Evidence ('RPE') and the "Initial Directions on the conduct of the proceedings"³ ('Directions').
2. D30-P-4864's report concerns call-data records ('CDRs'). The Prosecution's case theory turns in part upon establishing patterns of contact that depend upon CDRs that the Prosecution has obtained from various telecommunication providers.⁴ The Report provides information about CDRs and analyses three CDRs. Two of the CDRs discussed in the Report have already been submitted into evidence by the Prosecution.⁵ The Chamber receiving the Report and taking it into account during deliberations will bring greater clarity to the issues that are in dispute between the parties about the reliability and probative value of CDRs.
3. The Report was drafted by a qualified expert and its content reflects D30-P-4864's respective areas of expertise, specialisation, and knowledge. The Report is reliable, relevant, and probative. D30-P-4864's will attest to the content of the Reports, accede to its submission, and the Parties, Participants, and the Chamber will have an opportunity to question D30-P-4864's in Court.

¹ CAR-D30-0018-0001 and Report Annex: CAR-D30-0018-0028.

² The associated material comprises: CAR-D30-0018-0028.

³ ICC-01/14-01/18-631.

⁴ See, for example, [ICC-01/14-01/18-723-Red](#), paras 413, 431, 434-435, and 439; [ICC-01/14-01/18-1296](#), para. 9 footnote 6; see also [ICC-01/14-01/18-2061](#).

⁵ The Defence objected to the submission of CAR-OTP-2054-1479 and CAR-OTP-2019-2839. Their submission was recognised in [ICC-01/14-01/18-1499](#).

II. CONFIDENTIALITY

4. The present Request is filed as confidential pursuant to Regulation 23(1)*bis* of the Regulations of the Court, as it contains the name of D30-P-4864 which has yet to be made public pending input from the Victims' and Witnesses Section ('VWS'). A public redacted version will be filed concurrently. When D30-P-4864's name is made public, the Defence considers that the filing can be reclassified public.

III. APPLICABLE LAW

5. Provided an expert report satisfies the procedural prerequisites of Rule 68 of the Rules of Procedure and Evidence, the Chamber may receive its submission.⁶ An expert report may be submitted via Rule 68(3) provided that the formal requirements of Rule 68(3) are met during the examination.⁷
6. Rule 68(3) of the Rules allows the introduction of prior recorded testimonies of witnesses who are present before the Chamber, provided that the 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.
7. For a report and supporting material to be admitted, the Court's jurisprudence sets out that following requirements must be met: (i) the witness is an expert as defined by the court's jurisprudence;⁸ (ii) the testimony in the subject area of expertise would be of assistance to the Chamber; (iii) the content of the report and/or the anticipated testimony falls within the area of expertise of the witness; and (iv) the content of the

⁶ Initial Directions on the Conduct of the Proceedings, [ICC-01/14-01/18-631](#), para. 67 *citing* Trial Chamber VII, *Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Request for Formal Submission of D23-1's Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rules 68(3) and 67, 19 February 2016, [ICC-01/05-01/13-1641](#), para. 4 and Trial Chamber IX, *Prosecutor v. Dominic Ongwen*, Initial Directions on the Conduct of the Proceedings, [ICC-02/04-01/15-497](#), para. 33. *See also* [ICC-01/14-01/18-907-Red](#), para. 12.

⁷ [ICC-01/05-01/13-1641](#), para. 11.

⁸ *See* footnote 9 *below*.

report and/or the anticipated testimony does not usurp the functions of the Chamber as the ultimate arbiter of fact and law.

IV. SUBMISSIONS

8. CDRs are records produced by mobile network operators for billing and network management purposes that can be extracted and prepared for use by law enforcement and judicial processes. The practice of the ICC Prosecution and other international tribunals consistently involves the testimony and reports of experts with specialised knowledge about CDRs.⁹ This is because CDR material implicates technical knowledge, experience, and expertise about subjects such as computer networks, network protocols, database software, radio transmitters and other specialised analytic software that is not within the experience or education of most legal professionals nor the public.

A. The Report was produced by a qualified expert and the subject of it falls within the expertise of D30-P-4864

9. An expert witness is a person who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a

⁹ See, for example, Trial Chamber VII, *Prosecutor v. Jean-Pierre Bemba et al.*, [ICC-01/05-01/13-1989-Red](#), para. 221, footnote 227 (“Witnesses P-433 and P-361 gave evidence on how to read and understand these logs. P-433 also provided lists of relevant communications purportedly sent by the ICC Detention Centre or intercepted by national authorities, see Transcript of Hearing, 30 September 2015, ICC-01/05-01/13-T-11-Red-ENG WT [...]; Transcript of Hearing, 1 October 2015, ICC-01/05-01/13-T-12-Red-ENG WT; Document, CAR-OTP-0090-0724; Transcript of Hearing, 8 October 2015, ICC-01/05-01/13-T-16-Red2-ENG WT [...]; Transcript of Hearing, 9 October 2015, ICC-01/05-01/13-T-17-Red2-ENG WT [...]; Expert Report, CAR-OTP0090-1825.”); *Prosecutor v. Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi & Assad Hassan Sabra*, STL-11-01/T/TC, 18 August 2020, [STL-11-01/T/TC, F3840/20200818/R331795-R331944/EN/dm](#), para. 107 (“The Prosecution’s case relies upon expert cell site analysis of the call data records of mobiles it attributed to the four Accused, and Mr Badreddine. Mr John Edward Philips, an expert in cell site analysis and telecommunications, gave extensive opinion evidence on the telecommunications data provided by the two Lebanese telecommunications providers, Alfa and Touch, relating to particular mobiles. This was to identify their approximate geographic location and to track their movements.”).

technical nature that is in dispute.¹⁰ As noted above, CDR material is an area that involves complex and specialised technical knowledge. The Report addresses matters that fall squarely within D30-P-4864's area of expertise and knowledge. As detailed below, the Report is relevant to issues that have arisen during the trial.

10. D30-P-4864 has the requisite knowledge, skills, and experience to provide expert opinion evidence. This has been confirmed by the Registry following his application to the ICC list of experts following an assessment by the Registry.
11. A cursory review of D30-P-4864's background also illustrates that is well placed to assist the Chamber. D30-P-4864's professional career involved over 30 years of experience in telecommunications, and he has extensive knowledge concerning the development and launch of mobile phone networks. In addition to his experience with UK telecommunication providers, D30-P-4864 has worked in various capacities within international tribunals. Moreover, given his extensive experience as both a Prosecution and Defence expert witness, D30-P-4864 is well placed to clarify and explain technical issues and this experience underlines his independence and impartiality.

¹⁰ Trial Chamber I, *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman*, 30 November 2023, Decision on the Defence Request to admit Dr Philippe Gout as an Expert Witness, [ICC-02/05-01/20-1044](#), para. 9; Trial Chamber X, *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence's proposed expert witnesses and related applications seeking to introduce their prior recorded testimony under Rule 68(3) of the Rules, 28 April 2022, [ICC-01/12-01/18-2206](#), para. 9; Trial Chamber X, Decision on Prosecution's proposed expert witnesses, 5 August 2020, [ICC-01/12-01/18-989-Red](#), para. 14; Trial Chamber VI, *Prosecutor v Bosco Ntaganda*, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, [ICC-01/04-02-06-1159](#), para. 7; Trial Chamber V-A, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupéu, 7 August 2013, [ICC-01/09-01/11-844](#), para. 11; Referring to ICTY, *Prosecutor v Vujadin Popović et al.*, [Decision on Joint Defence Interlocutory Appeal Concerning Status of Richard Butler as an Expert Witness](#), 30 January 2008, IT-05-88-AR73.2, para. 27; ICTY, *Prosecutor v Ratko Mladić*, [Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports](#), 19 October 2012, IT-09-92-T, para. 8.

12. The Report is precisely the type of statement that is suitable for submission through Rule 68(3). The Defence leading its whole contents through direct examination would be arduous and time consuming.¹¹ Unlike a fact witness, where fully oral testimony may enable the Chamber to appreciate the quality of the witness's recollection or observe relevant body language,¹² the fully *viva voce* presentation of the Report will not assist judicial economy.

B. The Report is relevant to issues at trial

13. D30-P-4864's Report was prepared with reference to the proceedings and against a background of disputed issues. D30-P-4864's Report provides information and expertise that is both of general relevance to interpreting CDRs and assessing Defence arguments as well as information that is relevant to specific CDRs or categories of CDRs.
14. The Report is relevant to the factual allegations brought against Mr Ngaïssona that are allegedly supported with the CDR material and Cell-Site information put forward by the Prosecution.¹³ For the Chamber to draw the conclusions suggested by the Prosecution, the Chamber must conclude that the material referred to in each instance is/are reliable. This involves technical considerations that are addressed in D30-P-4864's Report, and that are discussed in a general and accessible way. Therefore, the information contained in the Report will assist in the Chamber in concluding whether

¹¹ Citing Appeals Chamber Judgment [ICC-02/11-01/15-744](#), para. 61, Trial Chamber V has stressed that "expeditiousness is also a factor relevant to the application of Rule 68(3) of the Rules, since its use in principle aims at reducing the amount of time devoted to hearing oral testimony in court. In this regard, the Chamber recalls that when resorting to Rule 68(3) of the Rules, the calling participant is expected to streamline its questioning considerably." [ICC-01/14-01/18-907-Red](#), para. 15.

¹² See, for example, ICC-01/14-01/18-1661-Conf-Corr, para. 92 where the Chamber rejected a Rule 68(3) request and instead required testimony *viva voce* in its entirety because "[i]n this way, the Chamber and all participants will be in a position to fully oversee the witness's testimony under oath, observe his natural and spontaneous account as well as reactions, demeanour and composure, and to immediately seek clarifications as necessary and appropriate." Some of the reasons behind this decision included that the prior recorded testimony lacked reliability (para. 89), coherence (para. 90) and also, that the witness may have had strong negative views concerning the Co-Accused that could impact upon the witness's credibility (para. 91).

¹³ See *inter alia* [ICC-01/14-01/18-1296](#); see also [ICC-01/14-01/18-2061](#).

a given range of CDR related allegations are more or less likely,¹⁴ and will assist the Chamber with interpreting CDRs more generally.

15. The Report is also relevant to three specific CDR items. The Defence identified anomalies in certain CDRs and presented these to D30-P-4864. D30-P-4864's report provides information that is relevant to the reliability of these items and by extension whether allegations made by the Prosecution based on these items can be confirmed by the Chamber. Receiving the submission of the Report pursuant to Rule 68(3) will aid the Chamber in evaluating Defence arguments about these items.
16. Finally, there are groups of questions that concern (1) the use of Cell-Site information to geo-locate the users of phones and (2) the adequacy of the quality of the CDR information as a *corpus* to conduct certain types of analysis. These questions are derived from short observations made by a Swiss analyst that was engaged by the Prosecution but who was not called to testify.¹⁵ Again, the Report's discussion of these two groups of questions will assist the Chamber in evaluating Defence arguments.
17. The Defence also seeks the submission of CAR-D30-0018-0028, as associated material. This item is the annex to D30-P-4864's Report which includes D30-P-4864's CV, a glossary, terms of reference, and abbreviations used for mobile phone networks. It is relevant because it is necessary to understand the Report. Pursuant to the Chamber's practice, it is properly characterised as 'associated materials' to the statement as it is integral to the Report itself.¹⁶

C. The Report has probative value

18. The Report has probative value. The overview information about CDR material is a synthesis of some of D30-P-4864's extensive and wide knowledge and experience with

¹⁴ Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [ICC-01/04-01/07-2635](#), para. 16 ("If the evidence tendered makes the existence of a fact at issue more or less probable, it is relevant. Whether or not this is the case depends on the purpose for which the evidence is adduced.")

¹⁵ CAR-OTP-2126-2529, at 2533 (section 2.6) and 2534 (section 2.7).

¹⁶ [ICC-01/14-01/18-907-Red](#), para. 14.

this kind of evidence. The Report sets out D30-P-4864's experience and qualifications that demonstrate his ability and authority to provide such information.

19. The Report is also probative with respect to the specific CDR items addressed in it. D30-P-4864 set out his methodology when answers to Defence questions required examinations of the CDRs. In such instances the methodology is easy to grasp, and the techniques are neither obscure, novel, nor controversial.
20. Two CDRs discussed in the Report have been previously submitted by the Prosecution. The Report offers novel information that could have implications regarding the reliability of the information contained about these. Thus, the Report provides information that will enable the Chamber to better assess these items during deliberations.

D. No prejudice will result from receiving the report and doing so is in the interests of justice

21. The Prosecution will not be prejudiced by granting the present request. To the extent that the Prosecution might raise issues of prejudice, these can be addressed in examination with D30-P-4864.

V. RELIEF SOUGHT

For the reasons above, the Defence requests that the Report and its associated items are admitted pursuant to Rule 68(3).

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 18 January 2024

At The Hague, the Netherlands.