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Date: **5 June 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public redacted version of “Yekatom Defence Response to ‘Prosecution’s Request for submission of item CAR-OTP-2083-3166’ (ICC-01/14-01/18-2416-Conf)”, 2 April 2024, ICC-01/14-01/18-2430-Conf

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 Alfred Rombhot Yekatom ('Defence') hereby responds to the 'Prosecution's Request for submission of item CAR-OTP-2083-3166' ('Request').¹
2. The Request should be dismissed.
3. In the Request, the Prosecution misguidedly seeks to rely on *obiter* from a previous Chamber decision in an attempt to circumvent the established procedural framework for submission of evidence. In fact, the Prosecution's submission of CAR-OTP-2083-3166 appears to be the culmination of a strategy aimed at shielding the document, and the Prosecution's case thereon, from appropriate scrutiny by the Defence. In any event, the Prosecution's failure to respect the procedural framework has resulted in concrete and material prejudice to Mr Yekatom's rights, the effect of which substantially outweighs the probative value of the tendered document.

PROCEDURAL HISTORY

4. On 11 September 2023, the Prosecution formally closed its presentation of evidence.²
5. On 30 January and 11 March 2024, D29-P-3014 testified before the Chamber.
6. On 12 March 2024, the Prosecution submitted via email five CDR documents 'used' with D29-P-3014.³
7. On 14 March 2024, the Prosecution submitted the CDR Item, via email.⁴

¹ ICC-01/14-01/18-2416-Conf.

² ICC-01/14-01/18-2089.

³ Email from Prosecution to Chamber and parties, 12 March 2024 at 14:24.

⁴ Email from Prosecution to Chamber and parties, 14 March 2024 at 16:35.

8. On 15 March 2024, pursuant to a Chamber order, the Prosecution filed the Request, seeking the formal submission of the CDR Item.⁵

SUBMISSIONS

A. The Request impermissibly deviates from established procedure and merits dismissal on that basis alone.

9. The legal procedures governing submission of evidence adopted in the proceedings before the Court are not mere formalities. As the Appeals Chamber has held: ‘the procedure for the submission of evidence at trial [...] must be clear. This is a fundamental guarantee for the rights of the parties at trial’.⁶ The adoption of such a procedure – and indeed, its enforcement – is thus an important function of the Chamber’s overriding duty to ensure a fair and expeditious trial.⁷
10. In the same vein, it is pursuant to this function that regulation 40 of the Regulations of the Court requires that both the mode and order of presenting evidence be determined with the express aim of making the presentation of evidence ‘fair and effective for the determination of the truth’.⁸ The order of evidence presentation adopted by a Chamber thus must be understood to reflect *inter alia* an accused’s fundamental right to have meaningful notice of the case being brought against him by the Prosecution, and to prepare their defence accordingly. As such, the formal closure of the Prosecution case must be considered an event that bears consequences in respect of the Prosecution’s ability to subsequently bring further evidence against an accused.⁹

⁵ ICC-01/14-01/18-2416-Conf. See, Email from Chamber to parties, 15 March 2024 at 16:49.

⁶ ICC-01/05-01/13-2275-Red, para. 600.

⁷ Article 64(2), Rome Statute.

⁸ Regulation 43(a), Regulations of the Court.

⁹ Testament to this is the fact that, according to the Court’s jurisprudence, calling rebuttal evidence or reopening one’s case once closed are ‘exceptional’ events to which specific legal tests apply; see e.g., *Prosecutor v Lubanga*, Redacted Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWW-0005, [ICC-01/04-01/06-2727-Red](#), 28 April 2011, paras. 42-43 (wherein Trial Chamber I held that ‘calling rebuttal evidence is likely to be an exceptional event, and [...] it will be necessary for the prosecution to demonstrate, first, that an issue of significance has arisen *ex improvisio*, second, that the evidence on rebuttal

11. In these proceedings, in its Initial Directions, the Chamber adopted a procedure for the submission of evidence whereby a tendering party could submit evidence via any of three ways: (i) in writing, through a bar table motion; or through a witness i.e. following the use of an item with a witness during a hearing ii) via email or iii) orally.¹⁰ With regard to the organisation of the trial, the Chamber directed that the Prosecution's presentation of evidence would be followed first by that (if any) of the CLRV; and then by that (if any) of the Defence teams; and it further held that leave must be sought for the presentation of rebuttal or rejoinder evidence.¹¹
12. In the Request, the Prosecution seeks the submission of CDR CAR-OTP-2083-3166 ('CDR Item') in a manner that fails to respect the Chamber's procedural directions.
13. First, the Request comes over six months since the Prosecution formally closed its case-in-chief; and over three months into the Defence's ongoing presentation of evidence.¹²
14. Further, the CDR Item has not been submitted from the bar table: it does not confirm with the procedure in respect of bar table applications adopted by the Chamber;¹³ nor has the Prosecution sought an extension of the 25 August 2023 deadline to submit such applications.¹⁴

satisfies the admissibility criteria; and, third, this step will not undermine the accused's rights, in particular under Article 67 of the Statute [emphasis added].'); and see e.g. *Prosecutor v Bemba et al.*, Decision Closing the Submission of Evidence and Further Directions, [ICC-01/05-01/13-1859](#), 29 April 2016, para. 5 (wherein Trial Chamber VII held that, 'in order for the closing of the evidence presentation to have meaning and to ensure the fair and expeditious conduct of the proceedings, any applications to re-open the evidence presentation will be granted on a truly exceptional basis [emphasis added].').

¹⁰ ICC-01/14-01/18-631, para. 61.

¹¹ Ibid., para. 16.

¹² The Prosecution formally notified the Chamber and parties of the closure of its presentation of evidence on 11 September 2023, and the Defence's presentation of evidence has been ongoing since the Defence's opening statement on 28 November 2023, and the appearance of its first witness, on 11 December 2023; see, ICC-01/14-01/18-2089, and ICC-01/14-01/18-1892, para. 23.

¹³ ICC-01/14-01/18-631, para. 62.

¹⁴ ICC-01/14-01/18-1892, para. 5.

15. Nor has the CDR Item been submitted through a witness. While the Prosecution claims that its submission ‘arises’ from the evidence of D29-P-3014, the Prosecution did not include the CDR Item in its list of material for cross-examination ahead of his appearance;¹⁵ it did not use the CDR Item during his cross-examination; and it did not include the CDR Item among the documents it subsequently tendered through D29-P-3014 via the established email submission process.¹⁶
16. Instead, in the Request, the Prosecution seeks to rely on *obiter* from the Chamber’s decision on a previous Prosecution bar table motion (‘Decision’),¹⁷ in which the Prosecution’s submission en masse of 600 CDR documents was rejected without prejudice by the Chamber *inter alia* on the basis that the Prosecution had not established their *prima facie* relevance;¹⁸ specifically, on the fact that, in rejecting the admission of the documents, the Chamber noted that the Prosecution was ‘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’.¹⁹ The Prosecution argues in the Request that the CDR Item constitutes so-called ‘responsive evidence’, and thus tenders it on that basis.²⁰
17. The Prosecution’s approach is misguided. The Chamber’s above *obiter* merely emphasised the fact that the 600 CDR documents were rejected without prejudice. The Decision (notably, issued on 5 July 2022, i.e. over 16 months prior to the close of the Prosecution case) cannot be reasonably understood to authorise the Prosecution to subsequently tender the rejected CDRs via any procedure that the Prosecution saw fit to follow, on the basis that they could be

¹⁵ ICC-01/14-01/18-631, para. 42.

¹⁶ See, Email from Prosecution to Chamber and parties, 12 March 2024 at 14:24. See also, ICC-01/14-01/18-631, para. 63.

¹⁷ ICC-01/14-01/18-2416-Conf, paras 1, 5.

¹⁸ ICC-01/14-01/18-1499, para. 46.

¹⁹ *Ibid*, para. 49.

²⁰ ICC-01/14-01/18-2416-Conf, at III.B.

considered ‘responsive to the documentary evidence and testimony presented’, including after the Prosecution had formally closed its presentation of evidence.²¹

18. More broadly given the sweeping nature of the proposed category of ‘responsive’ evidence, allowing the Prosecution to submit evidence on this basis could very likely result in the Prosecution filing repeated requests for submission of the 600 rejected CDRs, throughout the duration of the Defence’s presentation of evidence. This is not mere speculation: the Prosecution has recently indicated its intention to introduce ‘responsive evidence’ for the purposes of ‘addressing mischaracterisations of evidence and misrepresentations of the Prosecution’s position’ – specifically, in response to Defence submissions on the relevance and probative value of Prosecution evidence tendered through a Defence witness.²² The Prosecution thus intends to expand the scope of this proposed ‘responsive evidence’ procedural exception, to include not only material tendered ‘in ‘response’ to the evidence presented at trial (such as the CDR Item), but also material tendered in ‘response’ to the Defence’s submissions on the evidence. In other words, the Prosecution has openly signalled its intention to continue to tender CDR documents ‘in response’ to the unfolding of Defence evidence and therefore to mould its case as the trial progresses.
19. The Prosecution’s attempt to carve out an exception to the established evidentiary submission procedure would thus be contrary to multiple inter-related fundamental fair trial principles, whether they be Mr Yekatom’s right to sufficient notice; his right to adequate preparation; his right to expeditious proceedings; his right against the reversal of the onus of proof; or his right to have the last word in his trial.

²¹ Contra *ibid.*, para. 5.

²² See, Email from Prosecution to Chamber and parties of 19 March 2024, at 16:52.

B. If granted, the Request would cause concrete and material prejudice to the fairness of the proceedings.

20. While the Chamber enjoys broad discretionary powers as regards the submission of evidence at trial, these powers must be exercised in accordance with the Chamber's overarching obligation to uphold Mr Yekatom's right to a fair hearing.²³
21. On that basis, the Request must fail, as it appears to represent the culmination of a premeditated attempt to circumvent the procedural framework, strategically aimed at shielding the CDR Item (and the Prosecution case thereon) from due scrutiny by the Defence.
22. In the Request, the Prosecution claims that the CDR Item is relevant and probative because it demonstrates contact between D29-P-3014 and an anonymous 'individual in MBAIKI on 31 January', which contact it claims is 'particularly proximate to [Monseigneur 'Rino'] PERIN's²⁴ meeting with the Accused YEKATOM and few days after the killings in BODA began, which prompted D29-P-3014 to organise a meeting at his house on 2 February 2014'.²⁵
23. This submission is without merit. The mere fact that on 31 January 2014, D29-P-3014's phone number is in contact with an unattributed and anonymous phone number that connects to the 'MBAIKI' cell site, is not probative of any fact of relevance; and the Prosecution's convoluted attempt to link this call with both i) the meeting at MBAIKI *Ste Jeanne d'Arc* Cathedral organised by Monseigneur 'Rino' PERIN (D29-P-5015) and attended by Mr Yekatom; and ii) the 29 January 2014 outbreak of violence in BODA is unavailing.
24. More importantly however, this argument, along with the Prosecution's claim that the Request 'arises' from the testimony of D29-P-3014, is somewhat

²³ See, *ibid.*, para. 38.

²⁴ Defence witness D29-P-5015.

²⁵ ICC-01/14-01/18-2416-Conf, para. 6.

disingenuous.²⁶ These Prosecution arguments appear to be little more than a smokescreen for the fact that the Prosecution primarily (or at least, also) seeks to rely on the CDR Item to attribute a second phone number – i.e. [REDACTED] ('Contested Attributed Number') – to Defence witness D29-P-3014, on the basis of an IMEI number²⁷ (i.e. mobile phone handset identification number) analysis conducted by the Prosecution.

25. As the Chamber will recall, the cross-examination of D29-P-3014 was initially postponed due to the Defence having objected to the Prosecution's intended use of lengthy CDR documents included in its list of material, on the basis that the Prosecution's untimely provision of the list left the Defence with insufficient time to prepare.²⁸ Immediately following this initial postponement, and pursuant to the Chamber's direction to the Prosecution to 'facilitate [the Defence's] preparation as much as possible',²⁹ the Defence and Prosecution communicated *inter partes* regarding the CDR documents in question, including in relation to the fact that Call Sequence Tables (CST) prepared and disclosed by the Prosecution appeared to indicate that the Prosecution intended to attribute the Contested Attributed Number to D29-P-3014.³⁰
26. On 30 January 2024, the Prosecution informed the Defence that the basis of this attribution was an IMEI (i.e. handset) analysis based on two CDR documents (necessarily read in combination): CAR-OTP-2019-1364 and the CDR Item;³¹ and specifically, on three calls found within these two documents. Firstly, in the

²⁶ Cf. ICC-01/14-01/18-2416-Conf, para. 6.

²⁷ IMEI stands for International Mobile Equipment Identity. See, regarding IMEI, ICC-01/14-01/18-T-272-ENG ET, 26:12-25.

²⁸ ICC-01/14-01/18-T-265-Red-ENG, 17:18-18:2; and Email from Defence to Chamber and parties, 30 January 2024 at 09:06.

²⁹ ICC-01/14-01/18-T-265-Red-ENG, 17:18-18:6.

³⁰ See, '[REDACTED] CST with row numbers (concerning Tab 2, 3, 24, 26)', attached to Email from Prosecution of 29 January 2024 at 20:44.

³¹ Email from Prosecution to Defence, 30 January 2024 at 18:22, available on request. In the email, the Prosecution stated: 'The Orange number [REDACTED] was attributed to D29-P-3014 because it is using the same IMEI number [REDACTED] as his Telecel number [REDACTED]. You can find this IMEI number in the records CAR-OTP-2083-3166 and CAR-OTP-2019-1364, disclosed in Pre-Trial INCRIM package 58 03 November 2020 and Pre-Confirmation INCRIM package 05 07 May 2019.'

CDR Item: on two calls on 31 January 2024, where D29-P-3014's (uncontested) phone number [REDACTED] appears to have been used with a handset with IMEI number [REDACTED] ('Handset');³² and secondly, in CAR-OTP-2019-1364: on a solitary call on 12 April 2014, where the Contested Attributed Number appears to have been used with the Handset.³³

27. Yet the CDR Item had not been included in the Prosecution's list of material for cross-examination of D29-P-3014, initially circulated at 16:11 on 29 January 2024;³⁴ nor was it included in the Prosecution's updated list of material, subsequently circulated at 20:44 on the same evening.³⁵ It is noteworthy that this updated list included a solitary additional item: CAR-OTP-2019-1364 – which as noted above, along with the CDR Item, constituted the evidentiary basis for Contested Attributed Number. The Prosecution did not subsequently seek to add the CDR Item to its list of material in the six weeks that ensued before the eventual resumption of D29-P-3014's testimony before the Chamber.³⁶
28. Yet in light of the Request, it now appears that since prior to D29-P-3014's first appearance before the Chamber on 30 January 2024 the Prosecution had in fact harboured an intention to rely on the CDR Item, and on the Contested Attributed Number. Indeed, in retrospect, the fact that during his cross-examination, Prosecution counsel specifically inquired as to whether D29-P-3014 gave his 'actual phone', i.e. his handset, 'to somebody to use'³⁷ – itself a line of questioning aimed at foreclosing a counter-argument to the Prosecution's IMEI analysis and Contested Attributed Number – further suggests the premeditated nature of the Request; as does the fact that the

³² See, CDR Item, [REDACTED] and [REDACTED].

³³ See, CAR-OTP-2019-1364, [REDACTED].

³⁴ See, Email from Prosecution to Chamber and parties, 29 January 2024 at 16:11.

³⁵ See, Email from Prosecution to Chamber and parties, 29 January 2024 at 20:44.

³⁶ The Prosecution's cross-examination of D29-P-3014 eventually took place on 11 March 2024.

³⁷ See, ICC-01/14-01/18-2416-Conf, para. 6.

Prosecution questioned D29-P-3014 regarding alleged contacts between the Contested Attributed Number and Mr Yekatom.³⁸

i) The Request, if granted, would concretely prejudice the fairness of the proceedings.

29. The Prosecution's failure to provide meaningful notice of its intention to rely on the CDR Item has materially impacted Defence preparations and its presentation of evidence; and as such, its submission at this stage would occasion concrete prejudice to the fairness of the proceedings.
30. These omissions do not appear to be inadvertent or merely coincidental; instead, the circumstances³⁹ suggest that the Prosecution's attempt to circumvent the applicable procedure for the submission of evidence was aimed at shielding the CDR Item and the Prosecution's attribution of the Contested Attributed Number from due scrutiny by the Defence – notably through D29-P-3014 and Ngaïssona Defence CDR expert witness Mr Duncan BROWN (D30-P-4864).
31. Whereas the Prosecution had previously informed the Defence that its IMEI attribution of the Contested Attributed Number was underpinned specifically by two documents read together – the CDR Item and CAR-OTP-2019-1364 – the CDR Item was not included in the Prosecution's list of material for D29-P-3014, as set out above.
32. Furthermore, ahead of the appearance of D29-P-3014, when the Prosecution circulated two call sequence tables indicating 'the rows intended to be used by the Prosecution from the call data records listed in' the Prosecution list of material,⁴⁰ which it subsequently clarified were a 'means to facilitate the Parties'

³⁸ ICC-01/14-01/18-T-274-CONF-FRA ET, 28:9-29:4.

³⁹ Not least the Prosecution's continuing lack of transparency as to the purpose(s) of its intended reliance on the CDR Item.

⁴⁰ Email from Prosecution of 29 January 2024 at 20:44.

and Participants' understanding' as to its potential lines of cross-examination,⁴¹ neither the CDR List, nor the two calls within the CDR List that underpin the IMEI analysis, were included therein.⁴²

33. In such circumstances – and given the Defence's expectation that the Prosecution would respect the Chamber's directions on the order of the presentation of evidence, and on the framework governing evidence – the Defence reasonably assumed that the Prosecution did not intend to rely on the CDR Item with D29-P-3104; and on that basis, the Defence opted against pursuing the matter of the Contested Attributed Number with D29-P-3014, whether through a re-opened examination-in-chief, or through re-examination.
34. For instance, the Defence did not seek to elicit information regarding this Contested Attribution Number: whether during the relevant period he used a second phone number at all; or whether the Contested Attributed Number may have belonged to a family member.
35. In the same vein, the Defence did not seek to elicit information regarding D29-P-3014's own mobile phone use. In this regard the Defence notes that the Request paints an incomplete picture of D29-P-3014's evidence on this matter: in fact, D29-P-3014 stated that it was possible that any of his 20 adult children could have used his mobile phone without authorisation, given that in the relevant period, he would have his telephone recharged at charging boutiques ('cabines de recharge').⁴³ In the circumstances however, the Defence did not seek to elicit further details on this practice – for instance, how often he would send his mobile phone to be charged; whose mobile phone (if any) he used to make

⁴¹ Email from Prosecution to Defence, 1 February 2024 at 16:34.

⁴² See, '[REDACTED] CST with row numbers (concerning Tab 2, 3, 24, 26)', attached to Email from Prosecution of 29 January 2024 at 20:44.

⁴³ ICC-01/14-01/18-T-274-CONF-FRA ET, 28:24-3 ('Je vous ai dit ici que nous n'avons pas l'électricité à la maison, nous envoyons souvent nos téléphones chez ceux qui tiennent les cabines de recharge pour que ce téléphone puisse être rechargé. Vous savez, aussi, j'ai beaucoup d'enfants majeurs. Parfois, il se peut qu'ils aient téléphoné avec mon téléphone sans mon autorisation.')

calls in the meantime; or which of his children would be responsible for this task – and notably, whether his son Habib SOUSSOU, who was an acquaintance and FACA colleague of Mr Yekatom, was among them, which would have been relevant given the alleged contact between the Contested Attributed Number and Mr Yekatom.⁴⁴

36. Nor did the Defence seek to elicit information as regards whether D29-P-3014 may have used his SIM card (and therefore his uncontested phone number) with someone else's handset.
37. This is potentially critical information in the circumstances. As set out above, the Prosecution argues that because i) D29-P-3014's (uncontested) phone number used the Handset on two calls on 31 January 2014; and ii) the Contested Attributed Number used the Handset for a single call on 12 April 2014, it follows from this that the Contested Attributed Number can also be attributed to D29-P-3014. This analysis is deeply flawed for multiple reasons⁴⁵ – one such reason being that it presupposes that the Handset belongs to D29-P-3014 in the first place, which itself presupposes that the two calls on 31 January 2014, where D29-P-3014's uncontested number uses the Handset, are sufficient to conclusively prove that the Handset is in fact his; and that these calls are not merely the result of D29-P-3014 having used his SIM card (and therefore the uncontested number) with the Handset as a 'one-off', etc. Due to the Prosecution's omissions however, the Defence did not inquire with D29-P-3014 as to whether he sometimes used his SIM card with someone else's handset (i.e. by 'swapping' SIM cards), whether as a one-off or regularly; or whether there was a shared handset available to him during the relevant period that he would occasionally use his SIM card with – for instance, a handset shared among members of his family; etc.

⁴⁴ See also *infra*, para. 56, regarding the probative value of the calls relied upon.

⁴⁵ See also *infra*, para. 55, regarding the reliability of the IMEI analysis.

38. The Defence also opted against inquiring as to the information regarding the handset(s) used by D29-P-3014 at the time – i.e. the manufacturing brand or model. Given that IMEI numbers specifically include this information,⁴⁶ D29-P-3014's handset information could have then been compared with the specific brand/model information indicated in the IMEI number of the Handset.
39. The Defence submits that the fact that the Prosecution cross-examined D29-P-3014 on alleged contact with Mr Yekatom, apparently on the basis of the Contested Attributed Number, does not nullify the effect of its non-inclusion of the CDR Item on its list, or constitute meaningful notice of its intention to rely thereon. Parties regularly question witnesses on the basis of information contained in documents that they have no intention of submitting, including in the hope that the witness will 'fill the gap' and provide the sought information themselves.
40. More broadly, given that the burden of proof lies solely on the Prosecution, the Defence is not obliged to anticipate and pre-emptively test all potential Prosecution allegations; only those of which meaningful notice is provided, pursuant to the applicable procedural framework. The Defence is thus within its rights to limit its examination and re-examination of witnesses to matters arising from the Prosecution case as led at the time.
41. In the same vein, in its assessment as to whether meaningful notice of the specific contours of the Prosecution case has been given, the Defence is entitled to rely on the assumption that the Prosecution will lead its case and its evidence in accordance with the applicable procedural framework. In other words, it was reasonable for the Defence to assume that if that Prosecution did intend to rely on the CDR Item to prove that the Contested Attributed Number could in fact be attributed to D29-P-3014, then it would have i) included the document in its

⁴⁶ ICC-01/14-01/18-T-272-ENG ET, 26:12-27:1.

list of material; ii) included the relevant calls in the circulated CSTs; and iii) used the document with him in its cross-examination; and inversely, in the absence of the above, to assume that the Prosecution did not intend to do so.

42. In the circumstances therefore, the Defence acted reasonably in opting not to embark on an extended re-examination regarding the CDR Item and/or the Contested Attributed Number.
43. In addition, the Prosecution's above omissions induced the Defence into deciding not to elicit evidence from CDR expert Duncan BROWN regarding the reliability of i) the Prosecution's IMEI analysis conclusions; ii) the Prosecution's case on the Contested Attributed Number more broadly; and iii) the CDR Item itself.⁴⁷
44. While the Defence did elicit evidence from Mr BROWN regarding IMEI attribution,⁴⁸ it did not subject the Prosecution's IMEI analysis to comprehensive scrutiny. In this regard, there is a substantial difference between the probative value of Mr BROWN's expert opinion on the Prosecution's IMEI analysis as posed in the abstract; as compared to that if the Defence had actually provided him with the two documents relied on for its IMEI attribution, specifically setting out the Prosecution's IMEI analysis, and on that concrete basis, had sought a conclusive opinion as to whether said IMEI analysis was a reliable basis for the Contested Attributed Number.
45. More broadly, the Defence did not seek his expert evidence on the Prosecution's attribution of the Contested Attributed Number to D29-P-3104 generally, i.e.

⁴⁷ The Defence notes in this regard that, when the Prosecution omitted to include the CDR List among its list of material for D29-P-3014, it was on notice of the fact that Ngaïssona Defence CDR expert witness Duncan BROWN (D30-P-4864) would testify on both IMEI attribution analysis and CDRs generally, which were expressly included as subjects in his expert report; see, CAR-D30-0018-0001, at 0017 (regarding IMEI attribution) and 0010-0018 (regarding CDRs generally); the report was disclosed to the parties on 24 November 2023, i.e. approximately two months before the Prosecution circulated its list of material for D29-P-3014; and three months before his cross-examination by the Prosecution.

⁴⁸ ICC-01/14-01/18-T-272-ENG ET, 26 :12-29:21 and 30:11-25.

not merely on the basis of the IMEI attribution; but on the basis of other information. In this respect, the Chamber will recall Mr BROWN's evidence regarding the potential complexity of IMEI attribution, and indeed attribution generally, i.e. the fact that attribution was the result of 'a collection of evidence types', that there were not only multiple potential attribution elements (in his report he lists 22), but also potential elements of 'dis-attribution'.⁴⁹ In the same vein, the Defence did not inquire with Mr BROWN as to what further factual information, if any, would have been relevant to the attribution analysis, which the Defence could then have sought from D29-P-3014 when his testimony resumed.

46. Lastly, the Defence did not elicit expert evidence from Mr BROWN regarding the reliability of the document itself. In this regard, the Defence notes that the CDR Item appears to be comprised of a particular type of CDR known as a 'cell dump', defined by Mr BROWN as CDRs responsive to a request for 'all of the numbers that have used a particular cell site in a period of time'.⁵⁰ The CDR Item specifically appears to be comprised of a compilation of 'cell dumps' for four different cell sites ('BOUCA', 'MBAIKI', 'BODA' and 'GUEN') for varying time periods.⁵¹ The production of the CDR Item thus appears to have involved a sufficient degree of manual manipulation, requiring multiple queries of at least one voluminous database, to constitute a document produced for the purposes of litigation; and therefore should not be considered to constitute a document kept by Telecel in the normal course of business. As the CDR Item appears to have an author and creator, it would have been relevant to explore these issues with that named individual, or at least with Mr BROWN, so as to determine the extent to which they may affect the reliability of the document.

⁴⁹ CAR-D30-0018-0001, at 0017-0018; see also, ICC-01/14-01/18-T-272-ENG ET, 29:8-13 (where Mr BROWN noted in respect of IMEI attribution that 'there are so many elements to be considered').

⁵⁰ ICC-01/14-01/18-T-273-ENG ET, 4:17-19. See also,

⁵¹ In the CDR Item, the Excel tabs have the following apparent date ranges: 'BOUCA': 5 to 11 September 2013; 'MBAIKI': 28 January 2014 to 1 February 2014; 'BODA': 28 to 29 January 2014 and 'GUEN': 30 January 2014 to 10 February 2014.

47. Lastly, the Chamber will recall its 22 February 2024 Decision, expressly ordering the Prosecution to disclose CSTs – along with specific references to lines in the underlying CDRs – it intended to use in its cross-examinations of the remaining Defence witnesses prior to the appearance of Mr BROWN, in light of his expertise, so as to allow the Defence the opportunity to analyse and use them ‘for purposes and in the context of the examination of this witness’.⁵² It is submitted that the Prosecution’s failure to provide meaningful notice of its intention to use the CDR Item, including its omission from the CSTs circulated ahead of D29-P-3014’s cross-examination,⁵³ is especially problematic in light of the spirit of said Chamber decision.
48. Due to the Prosecution’s disregard for established procedure, the above issues could not be explored and developed upon before the Chamber, while D29-P-3014 and Mr Brown were on the stand. This not only detrimentally impacted the fairness of the proceedings, but also deprived the Chamber of the opportunity to receive all relevant information pursuant to its truth-determination function, as it left areas and subjects of importance unclarified, and potentially misleading impressions unrectified.
- ii) The prejudicial effect of the formal submission of the CDR Item would substantially outweigh its probative value.*
49. These omissions do not appear to be inadvertent or merely coincidental. Instead, the circumstances suggest that the Prosecution had intended to tender the CDR Item via procedurally irregular means not provided for in the Initial Directions, long before the Prosecution’s eventual cross-examination of D29-P-3014, with the aim of shielding the CDR Item and its case on the Contested Attribution Number from scrutiny. Specifically, the Defence notes: i) the Prosecution’s initial delay in providing its list of material (and therefore notice

⁵² ICC-01/14-01/18-2375, paras 11-13.

⁵³ See *supra*, para. 32.

of the Second Attributed Number); ii) its repeated and continuous failure to provide notice to the Defence and add the CDR Item to its list(s) of material (in notable contrast to CAR-OTP-2019-1364); iii) its omission of the relevant calls from the CDR Item, in the CSTs circulated ahead of D29-P-3104's cross-examination; iv) its line of cross-examination regarding the 'individual in MBAIKI' deliberately aimed at manufacturing a 'link' between D29-P-3014 and the CDR Item; v) the timing of the submission of the CDR Item, i.e. following the conclusion of the testimonies of D29-P-3014 and Mr BROWN; and vi) the lack of transparency as to the Prosecution's intended reliance on the CDR Item i.e. to attribute the Contested Attributed Number to D29-P-3014.

50. However, even if the Chamber were not minded to find that the Prosecution's circumvention of the procedural framework was premeditated, the Request must fail regardless. In other words, whether the Prosecution's above conduct was deliberate or not, the fact remains that as a consequence thereof, the Defence did not meaningfully address the CDR Item, or the Contested Attributed Number, through either D29-P-3014 or Mr BROWN, having reasonably determined that there was no need to do so given the Prosecution's apparent lack of intention to rely on the CDR Item.
51. This has resulted in substantial prejudice to the Defence. Relying on the CDR Item, the Prosecution intends to argue that the Contested Attributed Number can indeed be attributed to D29-P-3014, and therefore that D29-P-3014 was in contact with Mr Yekatom on three occasions in 2014.⁵⁴ This allegation contradicts D29-P-3014's repeated denials as to such contact, and his insistence that he does not know Mr Yekatom personally; and by extension, that his evidence is not reliable on account of a purported bias in favour of Mr

⁵⁴ See, '[REDACTED] CST with row numbers (concerning Tab 2, 3, 24, 26)', attached to Email from Prosecution to Chamber and parties, 29 January 2024 at 20:44. The Prosecution relies on three alleged instances of contact with Mr Yekatom: specifically, [REDACTED], and [REDACTED]; and [REDACTED].

Yekatom.⁵⁵ More importantly, it also goes to the broader Prosecution strategy in respect of D29-P-3014 – i.e. to suggest that D29-P-3014 (and indeed, Mr Yekatom) can be somehow implicated, affiliated, or otherwise linked to the violence in BODA in early 2014, and to the Anti-Balaka Coordination that was established there; and therefore that his evidence is biased and therefore unreliable.⁵⁶ The Prosecution’s attempt to impeach D29-P-3014 in turn impacts the Defence’s case as regards the lack of reliability of Prosecution witness P-1962,⁵⁷ who has made multiple highly prejudicial allegations *inter alia* in respect of Freddy OUANDJO aka Coeur de Lion and his elements.⁵⁸

52. In sum, if granted, the Request would thus compromise an array of fair trial rights stemming not only from its procedural irregularity as set out above; but also his right to examine witnesses and evidence brought against him.
53. This prejudice substantially outweighs the probative value of the CDR Item. Even setting aside the potential reliability issues arising from the CDR Item document itself, both it and the Contested Attributed Number are not in fact probative of the Prosecution case regarding D29-P-3014.
54. First, the ostensible relevance of the CDR Item – i.e. the alleged contact with an ‘anonymous individual in MBAIKI’ – is lacking in even *prima facie* probative value and relevance, as set out above. The Prosecution’s entirely speculative reliance on this phone call clearly cannot ground a request for the submission of the CDR Item, especially one that so drastically deviates from the procedure adopted by the Chamber.

⁵⁵ ICC-01/14-01/18-T-274-CONF-FRA ET, 28:9-29:4. CAR-D29-0009-0355, paras 20-22.

⁵⁶ See, ICC-01/14-01/18-2416-Conf, para. 9, and Email from Prosecution to Chamber and parties, 12 March 2024 at 14:24. See also, Email from Defence to Chamber and parties, 15 March 2024 at 13:13. See also, ICC-01/14-01/18-2272-Conf, paras 6-7.

⁵⁷ See, ICC-01/14-01/18-2214-Conf, para. 17.

⁵⁸ See e.g., CAR-OTP-2068-0037, paras 28-35.

55. Second, the CDR Item is not probative of the Prosecution's attribution of the Contested Attributed Number to D29-P-3014, as the IMEI analysis itself is unreliable. When the Defence set out the basic, abstract terms of the Prosecution's IMEI analysis in its examination of Mr BROWN, he described it as 'the weakest possible attribution'.⁵⁹ More broadly, Mr BROWN stated that the amount of data at one's disposal was an 'important factor' for an IMEI attribution.⁶⁰ As set out above, the Prosecution's attempted attribution of the Contested Attribution Number to D29-P-3014 is based in its entirety on a mere three calls: specifically, two calls to link D29-P-3014's uncontested number with the Handset, and a solitary call to link the Contested Attributed Number with the Handset; and it is the Defence's understanding that there is not a single further instance of contact in the entirety of the Prosecution's CDR collection linking either number with the Handset. In this regard, the Defence recalls the evidence of Mr BROWN with regard to attribution of multiple phones to one individual: 'This technique should only be considered valid when both mobiles have sufficient CDRs for a reliable analysis'; and further, that 'One mobile telephone must also have a strong attribution'.⁶¹
56. Further, even assuming *arguendo* that the Contested Attributed Number can in fact be attributed to D29-P-3014, the probative value, if any, of these phone calls is further limited given i) the lack of information as to the content, and therefore the nature and purpose of this contact;⁶² and ii) their extremely short duration: the two calls on [REDACTED] (lasting five seconds and one second), and one call on [REDACTED] (lasting 45 seconds).

⁵⁹ ICC-01/14-01/18-T-272-ENG ET, 29:14-20.

⁶⁰ ICC-01/14-01/18-T-272-ENG ET, 27:8-10.

⁶¹ CAR-D30-0018-0001, 0018.

⁶² See, ICC-01/14-01/18-403-Conf, paras 159, 180.

CONFIDENTIALITY

57. This response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed forthwith.

RELIEF SOUGHT

58. In light of the above, the Defence respectfully requests that Trial Chamber V:
REJECT the Request.

RESPECTFULLY SUBMITTED ON THIS 5th DAY OF JUNE 2024



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