

**Cour
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**International
Criminal
Court**

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No.: **ICC-01/14-01/18**

Date: **3 October 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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Public Redacted Version of the “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”, 7 September 2023, ICC-01/14-01/18-2079-Conf**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Mr Karim Asad Ahmad Khan
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Mr. Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel
Mr Gyo Suzuki

Counsel for Mr. Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamai
Ms Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun

Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby responds to the 'Prosecution's Sixteenth supplementary submission of call data records and related evidence via the "bar table"'¹ ('Motion').
2. The Motion should be partially denied: the Prosecution tenders lengthy documents in their entirety, while purportedly seeking to rely only on select portions therein, contrary to judicial economy and potentially compromising Mr Yekatom's right to timely notice; as well as documents attributing a phone number to a Prosecution witness after their testimony, rendering the Defence unable to cross-examine that witness on this alleged attribution, also contrary to Mr Yekatom's fair trial rights.

SUBMISSIONS

A. Call data records (Annex B)

3. The Defence does not oppose the submission into evidence of the call data records ('CDRs') tendered in Annex B of the Motion.²
4. This is without prejudice to the Defence's position as to the Prosecution case on the relevance and probative value of the contact(s) and the attribution of phone numbers that feature in these CDRs.
5. Further, this position is premised on the Chamber's findings in respect of CDRs tendered in a previous Prosecution bar table motion: i.e. that the Chamber would 'remain amenable to the Defence raising further evidentiary objections' should the Prosecution 'seek to rely upon any submitted evidence in a manner not reasonably anticipated by the Defence'.³

¹ ICC-01/14-01/18-2061.

² CAR-OTP-2103-0675.

³ ICC-01/14-01/18-1499, para. 12

B. Attribution evidence (Annex C)

6. Again, the Defence takes no position at this stage as regards the Prosecution's attributions of phone numbers as set out in Part I of Annex C.⁴
7. The Defence does not oppose the submission into evidence of **Item 7**.⁵
8. The Defence opposes the submission into evidence of **Items 1-3 and 6**,⁶ to the extent that the Prosecution tenders these documents in their entirety.
9. The wholesale submission into evidence of these lengthy documents is contrary to judicial economy and efficiency, and would only serve to clutter the already-substantial trial record with pages of irrelevant material. These four Items come to a combined total of 343 pages, of which the Prosecution ostensibly intends to rely only on five.
10. Further, and especially with regard to Items 1-3, which constitute Facebook conversations, 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,'⁷ and therefore pose a risk to Mr Yekatom's right to timely notice of the Prosecution case.
11. Nor is this risk speculative. The Prosecution appears to be continually reviewing and assessing its evidentiary holdings (and in particular, Facebook material) as the trial has progressed, and by extension, moulding certain aspects of its case. The Prosecution has all but conceded as much: as the Chamber will recall, the Prosecution has previously 'note[d] that the relevance of some of the Facebook conversations will continue to become clearer and/or emerge as the trial unfolds, and particularly as new information is provided by witnesses

⁴ See, ICC-01/14-01/18-1408, para. 24.

⁵ CAR-OTP-2136-0310.

⁶ CAR-OTP-2103-2375, CAR-OTP-2103-2407, CAR-OTP-2103-2529 and CAR-OTP-2130-5493.

⁷ See *supra*, para. 5.

(whom were all interviewed by the Prosecution before the Facebook conversations were obtained from the Irish authorities).⁸

12. While the Defence does not argue that such an approach is impermissible per se, there is necessarily a point at which any concomitant transformation of the Prosecution case will compromise the Mr Yekatom's right to timely notice of the nature, cause and content of the charges being brought against him.
13. To ensure that the Prosecution's reliance on these documents is limited to the purpose for which they were submitted, the Prosecution should be barred from submitting these Items wholesale.
14. Nor could this possibly unduly prejudice the Prosecution. In this regard, the Defence recalls that the Prosecution has previously opted to tender select portions of lengthy documents via the bar table (as opposed to tendering them in their entirety), which portions were subsequently formally recognised as submitted by the Chamber.⁹ The Chamber has also previously held, with regard to the submission of lengthy documents via witnesses, that 'it cannot be excluded that there may be circumstances warranting that only parts of a single item be submitted into evidence'; and that any such requests 'will be assessed on a case-by-case basis.'¹⁰
15. The Defence would defer to the Ngaïssona Defence as to the submission of the specific portions relied upon by the Prosecution in **Items 1-3 and 6** for the purposes of attributing phone numbers.¹¹

⁸ ICC-01/14-01/18-1372-Conf, para. 13.

⁹ See e.g., ICC-01/14-01/18-1428, paras 8-9.

¹⁰ See, Email Decision on Submitted Material for P-2841, 2 July 2021, at 14:07.

¹¹ As set out in the 'Relevance' column in Annex C, Part II of the Motion.

16. The Defence opposes the submission of **Items 4 and 5**,¹² which the Prosecution relies on to attribute a phone number to P-0965, on the basis that its submission would be contrary to Mr Yekatom's statutory fair trial rights.
17. First, the Prosecution has failed to provide timely notice of its attribution case in this regard. As a result, the Defence has been deprived of the opportunity to cross-examine P-0965 on this matter during his appearance before the Chamber¹³ – for instance, as regards 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.¹⁴ The Prosecution's failure in this regard is especially significant given that P-0965 stated [REDACTED], which differs from that which the Prosecution now seeks to attribute to him; and given that Items 4 and 5 are respectively dated 21 June 2019 and 22 July 2019.¹⁵
18. In the same vein, given the Prosecution's intention to rely on these documents to impeach the credibility of P-1521,¹⁶ basic fairness to the latter would dictate that the Prosecution ought to have established that P-0965 was actually using this phone number at the time of the calls relied upon.
19. In the circumstances therefore, the submission of Items 4 and 5 would contravene Mr Yekatom's right to timely notice, and his right to examine witnesses brought against him.¹⁷
20. In addition, with regard to **Item 5**: as was the case in respect of mobile phone data extraction reports previously tendered by the Prosecution, no indication as to what steps were taken (if any) to preserve the integrity of the original data

¹² CAR-OTP-2112-1398 and CAR-OTP-2112-1405.

¹³ P-0965 testified from 1-3 September 2021.

¹⁴ See, Annex A, pp 4-6.

¹⁵ See, CAR-OTP-2046-0055, l. 378-393; see also, ICC-01/14-01/18-T-062-CONF-ENG CT, 74:3-75:11; 77:4-22.

¹⁶ See, Annex A, pp 4-6, and fn. 4.

¹⁷ *Contra* articles 67(1)(a) and (e) of the Statute. See also, ICC-01/14-01/18-1408, paras 26-27.

has been provided by the Prosecution.¹⁸ In this regard, and in the interests of judicial economy, the Defence respectfully refers the Chamber to its previous submissions on pre-extraction mobile phone data integrity.¹⁹ In the absence of this basic information, the *prima facie* reliability of this document cannot be established; as such, its formal submission should be denied.

CONFIDENTIALITY

21. This Response is filed on a confidential basis corresponding to the classification of the annexes to the Motion to which reference is made. The Defence would not oppose its reclassification as public.

RELIEF SOUGHT

22. In light of the above, the Defence respectfully requests that Trial Chamber V:
DENY the Motion in respect of CAR-OTP-2103-2375, CAR-OTP-2103-2407, CAR-OTP-2103-2529 and CAR-OTP-2130-5493, to the extent that the Prosecution tenders these documents in their entirety; and
DENY the Motion in respect of CAR-OTP-2122-1398 and CAR-OTP-2112-1405.

RESPECTFULLY SUBMITTED ON THIS 3rd DAY OF OCTOBER 2023



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands

¹⁸ See, also, ICC-01/14-01/18-1408, paras 32-33.

¹⁹ See, ICC-01/14-01/18-1747-Conf, paras 20-26, and reference cited therein.