

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **16 February 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**

**Urgent Request for Disclosure of Telecommunication Material related to  
Defence Witnesses**

**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 requests Trial Chamber V (“Chamber”) to order the Prosecution to disclose all Call Sequence Tables in its possession in relation to the remaining Yekatom Defence witnesses, more specifically P-4011, P-1989, P-4013, P-5013, P-3010, P-5012 and P-3011, (“Targeted CSTs”) as well as their underlying Call Data Records (“CDRs”) used to compile each of the Targeted CSTs, if not yet disclosed.

## PROCEDURAL HISTORY

2. On 21 August 2023, the Defence submitted to the Chamber a request for disclosure of Prosecution telecommunication material, including all CSTs produced by the Prosecution on numbers attributed to Mr Yekatom (“First Request for CSTs”).<sup>1</sup>
3. On 30 August 2023, the Prosecution opposed the Defence First Request for CSTs.<sup>2</sup>
4. On 8 November 2023, the Chamber issued its decision<sup>3</sup> in which it rejected the Defence’s request for CSTs without prejudice and directed the Defence to “(i) consider, by reference to Annex A and any other materials it considers appropriate, the *specific* additional CST it is seeking disclosure of; and (ii) engage with the Prosecution in further *inter partes* discussions regarding the availability and provision of the same.”<sup>4</sup> The Chamber further instructed the Parties to seize the Chamber “only should further disagreements arise as to the provision of specific CST”.<sup>5</sup>

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<sup>1</sup> ICC-01/14-01/18-2038-Conf, para. 1(b).

<sup>2</sup> ICC-01/14-01/18-2070, paras. 10-11.

<sup>3</sup> ICC-01/14-01/18-2196 (“Decision of 8 November 2023”).

<sup>4</sup> ICC-01/14-01/18-2196, para. 13.

<sup>5</sup> ICC-01/14-01/18-2196, para. 14.

5. On 22 November 2023, the Defence requested from the Prosecution material in its possession related to Defence witnesses and/or items that will be used during their examination of Defence witnesses pursuant to Article 67 of the Statute and Rule 77 of the Rules.<sup>6</sup>
6. On 27 November 2023, the Prosecution indicated that the disclosure of any Rule 77 materials associated with remaining witnesses on the Defence Final Witness List was finalised and "new undisclosed items" that are considered material would be disclosed on a rolling basis.<sup>7</sup>
7. On 1 February 2024, the Defence communicated a disclosure request to the Prosecution for the Targeted CSTs as mentioned in paragraph 1 of the present request pursuant to Rule 77 of the Rules and the Chamber's Directions ("Defence's Email"). The Defence requested the Prosecution to indicate foremost whether it was in possession of the specific Targeted CSTs and disclosure of the underlying CDRs if not already disclosed.
8. On the same day, the Prosecution rejected the Defence request and indicated that it considers that CSTs are exempt from disclosure falling within the definition of Rule 81(1) of the Rules as they constitute internal documents prepared in connection with its investigation or preparation of the case.<sup>8</sup> In doing so, the Prosecution did not indicate that it was not in possession of the Targeted CSTs.

## **APPLICABLE LAW**

9. Rule 77 of the Rules states that:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents,

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<sup>6</sup> Letter ARY-2023-0290 sent on 22 November 2023 by email from the Defence to the Prosecution at 10:10 (available upon request).

<sup>7</sup> Email from the Prosecution to the Defence on 27 November 2023 at 16:12 (available upon request).

<sup>8</sup> Email from the Prosecution to the Defence on 1<sup>st</sup> February 2024 at 19:37 (available upon request).

photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

10. The jurisprudence of the Court has consistently held that the term “material to the preparation of the defence” present in Rule 77 of the Rules must be construed broadly, referring to all objects relevant to the preparation of the defence.<sup>9</sup>

## **SUBMISSIONS**

### **A. The request for the Targeted CSTs is specific and conforms with the Chamber’s Decision of 8 November 2023**

11. As noted above, in its Decision of 8 November 2023, the Chamber directed the Defence to identify the ‘*specific* additional CST it is seeking disclosure of’. In doing so, the Chamber directed the Defence to consider Annex A to the Prosecution’s Call Data Records BTM,<sup>10</sup> as well as any other materials it considers appropriate. The Chamber’s directions were not therefore limited to CSTs as referenced in the Prosecution’s Call Data Records BTM and intended to ensure that, going forward, the Defence would provide additional detail to identify which CSTs it sought to disclosure of. As noted by the Chamber, the requirement for specific detail would allow for the Prosecution ‘to inform [the Defence] whether such CST[s] were prepared at all’.
12. The present Request complies with the Chamber’s direction in that it is limited to specific CSTs which are in the Prosecution’s possession and relate solely to telephone numbers attributed to the remaining Defence witnesses intended to testify *viva voce* or in accordance with Rule 68(3) of the Rules, more specifically P-4011, P-1989, P-4013, P-5013, P-3010, P-5012 and P-3011.

<sup>9</sup> *Lubanga v. Prosecutor*, Appeals Chamber, Decision on Mr Thomas Lubanga's request for disclosure, 11 April 2013, [ICC-01/04-01/06-3017](#), para. 10.

<sup>10</sup> See Decision of 8 November 2023, para. 13 with reference to ICC-01/14-01.18-1296-Conf.

13. The precise parameters of the Request allow for the Prosecution to identify and confirm whether such CSTs exist and to disclose accordingly. In this regard, the Defence reiterates that during the course of *inter partes* discussions, the Prosecution has not stated that it is not in possession of the Targeted CSTs or the underlying CDRs used to compile them.

**B. The Targeted CSTs are material to the preparation of the Defence**

14. The Defence submits that the Targeted CSTs are material to its preparation and are disclosable under Rule 77 of the Rules.
15. The CSTs in the possession of the Prosecution in relation to Defence witnesses who will be examined before the Chamber are material for the preparation of the Defence as they will allow the Defence to fully understand the Prosecution's case concerning their anticipated testimony and review the relevant sources which form the basis of communications purportedly attributed to Defence witnesses by the Prosecution. This will inevitably facilitate both the Defence's preparations and the eventual examination of the witnesses as accepted by the Prosecution in recent correspondence in which it provided two CSTs ahead of its cross-examination of P-3014 'as a means to facilitate the Parties' and Participants' understanding as to some of the Prosecution's potential lines of questioning'.<sup>11</sup>
16. The Defence requires adequate time to properly analyse the content of CSTs and their underlying CDRs ahead of their presentation to Defence witnesses during their examination. Such analysis can be lengthy depending on the volume of data in question and often requires the assistance of a telecommunication specialist. In this regard, it is significantly onerous to expect the Defence to trawl through many hundreds of rows of CDRs in the midst of a witness examination in order to respond to questions and arguments put

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<sup>11</sup> Email from the Prosecution to the Defence on 1 February 2024 at 16:34 (available upon request).

forward by the Prosecution which may very well be based on an unreliable reading of the underlying data or where for example, the identification of a single row of call record is taken out of context or where multiple rows can all represent one single call due to various forms of duplicates contained in CDRs.

17. Indeed, the necessity of the Targeted CSTs for the Defence at this stage of the proceedings has been recently highlighted by the exchanges before the Chamber on telecommunication material in the possession of the Prosecution with regard to P-3014 and the necessary delays for the Defence to properly analyse the material.<sup>12</sup> As the Prosecution has indicated, it intended to cross-examine P-3014 on his alleged contact with *inter alia* former Prosecution witness P-2138, as compiled in a Prosecution-produced CST setting out P-3014's alleged phone activity. It was only due to the unforeseen postponement of P-3014's cross-examination that the Defence was able to undertake the uniquely time-consuming task of analysing and verifying said CST; and eventually, to determine that the evidentiary basis of attribution in respect of P-2138 had not been disclosed to the Defence. Following *inter partes* correspondence on this matter, it appears now that the Prosecution no longer intends to rely on this attribution at all.<sup>13</sup> In other words, had the Defence not been afforded the additional time to prepare for the Prosecution's examination of P-3014, and in the absence of the (in the event) timely disclosure of this CST, the Prosecution would likely have attempted to impeach the credibility of P-3014, unchecked by the Defence, on the basis of apparently unfounded allegations regarding his phone contacts during the events.
18. The Targeted CSTs are also of assistance to the Chamber and the Parties in order to follow the examination of Defence witnesses by the Prosecution. While the

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<sup>12</sup> See Email from the Yekatom Defence to the Chamber, Parties and Participants at 09:06. See also ICC-01/14-01/18-T-265-CONF-ENG ET, p.16 – 21.

<sup>13</sup> Email from the Prosecution to the Defence of 8 February 2024 at 14:35 (available upon request).

latter may put a series of questions to a witness in relation to various telephone contacts they may or may not have had, the interests of expeditiousness of the proceedings are better served if the Defence can swiftly follow the basis of the Prosecution's questioning in that regard. Any proposition not supported by attribution or successful phone contact can be raised by the Defence at the time or in re-examination. In that sense, the Targeted CSTs are "material" to the preparation".

19. The Targeted CSTs are also material to the Defence at this current stage of the proceedings due to the upcoming testimony of witness P-4864. The sought material will allow the Defence to assess the telecommunication evidence to be brought by the Prosecution with Defence witnesses and address any potential issue relevant to the reliability of evidence during its examination of P-4864. In this regard, the Defence highlights the value of CSTs in these proceedings in order to fully comprehend the underlying CDRs which are complicated numerical sequences and, in this particular case, have been supplied by CAR telecommunication providers in a piecemeal and unformatted manner. CSTs have therefore been used by the parties – as with other investigations - to present analytical submissions and advance 'evidentiary propositions'.<sup>14</sup>
20. The Prosecution's argument that "the Defence may not abdicate its responsibilities to examine and analyse evidence duly disclosed and placed at its disposal"<sup>15</sup> is unwarranted. The Defence's right to be informed of the Prosecution's case in regard to its defence witnesses and its abilities to have appropriate time to prepare its defence accordingly falls squarely under the rights of the accused under Article 67(1) of the Statute. Given the voluminous nature of telecommunication evidence, this right is only given effect with

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<sup>14</sup> ICC-01/14-01/18-1296, para. 10.

<sup>15</sup> Email from the Prosecution to the Defence on 27 November 2023 at 16:12 (available upon request).



additional detail concerning the targeted number(s) and communication relied upon by the Prosecution.

21. Moreover, it is equally misguided for the Prosecution to aver that “it is not the responsibility of the Prosecution to create and/or produce reports and analyses to facilitate the preparation of the Defence, where the underlying material which is the subject of such reports or analyses are disclosed.”<sup>16</sup> As the Prosecution fully knows, the Defence has not been disclosed all CDRs in the possession of the Prosecution, nor has it been disclosed all information attributing phone numbers to specific individuals, and as such, the Defence is precluded from creating CSTs which are based on non-disclosed CDRs.<sup>17</sup>

### **C. The Targeted CSTs are not exempt from disclosure**

22. The Defence submits that CSTs are not exempt from disclosures under Rule 81(1) of the Rules or any other exception.<sup>18</sup> This position is consistent with the Decision of 8 November 2023 whereby the Chamber had rejected a request for CSTs without prejudice due to a lack of specificity. At no point did the Chamber consider that the CSTs were exempt from disclosure in accordance with Rule 81(1) despite the Prosecution’s advancement of this position.<sup>19</sup>
23. Under Rule 81(1) of the Rules, internal work products refer to “reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case”.<sup>20</sup> This has been considered to include “*inter alia*, the legal research undertaken by a party and its development of legal theories, the possible case

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<sup>16</sup> Email from the Prosecution to the Defence on 27 November 2023 at 16:12 (available upon request).

<sup>17</sup> ICC-01/14-01/18-2070, para. 4.

<sup>18</sup> The Defence reiterates its submissions on the nature of CSTs as not falling under the scope of internal work product under Rule 81(1) of the Rules, see ICC-01/14-01/18-2038-Conf, paras 24-26.

<sup>19</sup> ICC-01/14-01-18-2070, paras 10-12.

<sup>20</sup> Rule 81(1) of the Rules.

strategies considered by a party, and its development of potential avenues of investigation.”<sup>21</sup>

24. The Prosecution has previously communicated CSTs to present in “an easily readable and accessible format the relevant call data relied upon in the Prosecution’s case as pleaded in its Trial Brief”<sup>22</sup> or “to facilitate the Chamber and/or the Parties understanding of the disclosed CDR”.<sup>23</sup> Following the Prosecution’s description of CSTs, it cannot be reinterpreted for the purpose of restricting disclosure as containing additional information revealing the Prosecution’s internal strategies or potential avenues of investigations.
25. This approach is also consistent with the jurisprudence of this Court whereby in the *Mokom* case, the Pre-Trial Chamber II ruled explicitly that:

“CSTs are not per se exempt from disclosure. CSTs are not reports, memoranda or internal documents susceptible of revealing the Prosecution’s internal strategies as they merely organise CDRs in a manner which is easily readable. In addition, the Prosecution has itself chosen to disclose several CSTs to the Defence, and it is now contradictory for it to generally argue that this material is non-disclosable in the absence of specific arguments [...]”<sup>24</sup>

26. The distinction made by the Prosecution on the circumstances in the *Mokom* case regarding the above decision due to the availability of underlying CDRs for years in this case<sup>25</sup> is irrelevant to the Pre-Trial Chamber’s ruling of the disclosable nature of CSTs and its rejection of the characterisation of CSTs as internal work product.<sup>26</sup>
27. Further still, any argument that the provision of CST’s thus far does not constitute a general waiver is both irrelevant – in that Rule 81(1) does not apply

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<sup>21</sup> *Prosecutor v. Lubanga*, Trial Chamber I, Redacted Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information" of 5 December 2008, [ICC-01/04-01/06-1924-Anx2](#), para. 31.

<sup>22</sup> ICC-01/14-01/18-1296, para. 3.

<sup>23</sup> Email from the Prosecution to the Defence on 27 November 2023 at 16:12 (available upon request).

<sup>24</sup> ICC-01/14-01/22-219-Red, para. 46.

<sup>25</sup> ICC-01/14-01/18-2070, para. 9.

<sup>26</sup> ICC-01/14-01/22-219-Red, para. 46.

– but further unwarranted. The Prosecution presents no viable argument as to why it cannot provide CST's which have been specifically identified, are in its possession, and more pertinently, would necessarily facilitate the Defence and Chamber's understanding of its case and the examination of the witness. There is no concrete prejudice to the Prosecution nor strategical gain to be had in withholding the provision of the Targeted CST's in such circumstances.

28. The present request is filed as an urgent request considering the upcoming testimony of P-4684 for which the disclosure of the Targeted CSTs and related CDRs are necessary to the Defence preparation of its examination.

### **RELIEF SOUGHT**

29. In light of the above, the Defence respectfully requests Trial Chamber V to:
- ORDER** the Prosecution to disclose all CSTs in its possession in relation to Defence witnesses P-4011, P-1989, P-4013, P-5013, P-3010, P-5012 and P-3011;
- ORDER** the Prosecution to disclose their underlying CDRs used to compile each of the Targeted CSTs if not yet disclosed; and
- ORDER** that any submissions in response to this request be filed within a shortened deadline at the discretion of the Chamber.

**RESPECTFULLY SUBMITTED ON THIS 16<sup>th</sup> DAY OF FEBRUARY 2024**



Me Mylène Dimitri  
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The Hague, the Netherlands