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**No. ICC-01/14-01/18
Date: 22 February 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Yekatom Defence Urgent Request for Disclosure of
Telecommunication Material related to Defence Witnesses**

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiissona*, having regard to Articles 64, 67(2) and 68 of the Rome Statute (the ‘Statute’) and Rules 77 and 81 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Urgent Request for Disclosure of Telecommunication Material related to Defence Witnesses’.

I. Procedural history and submissions

1. The Single Judge recalls the procedural history as set out in the ‘Decision on the Yekatom Defence Request for Disclosure of Telecommunication Related Material’.¹
2. The Single Judge further recalls that in this decision, the Chamber rejected, without prejudice, the Yekatom Defence’s (the ‘Defence’) request for disclosure of all call sequence tables (the ‘CST’) produced by the Office of the Prosecutor (the ‘Prosecution’) regarding phone numbers attributed to Mr Yekatom, 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’.²
3. On 16 February 2024, the Defence submitted a request for disclosure of all CST in the Prosecution’s possession in relation to the remaining Defence witnesses (the ‘Witnesses’),³ as well as the underlying Call Data Records (the ‘CDR’) used to compile the CST pertaining to these Witnesses, if not yet disclosed (respectively, the ‘Requested Items’ and the ‘Request’).⁴

¹ 8 November 2023, ICC-01/14-01/18-2196 (the ‘First Decision’), paras 1-2.

² First Decision, ICC-01/14-01/18-2196, paras 1, 11-15. *For further details on Annex A, see* 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 to D) (a corrigendum of Annex A was notified on 2 March 2022, ICC-01/14-01/18-1296-Conf-AnxA-Corr), para. 3.

³ *Namely* D29-4011, D29-1989, D29-4013, D29-5013, D29-3010, D29-5012 and D29-3011.

⁴ Urgent Request for Disclosure of Telecommunication Material related to Defence Witnesses, ICC-01/14-01/18-2367, paras 1, 29, p. 9.

4. The Defence submits that (i) the Request is specific and conforms with the Chamber's First Decision;⁵ and (ii) the Requested Items are material to its preparation and are thus disclosable pursuant to Rule 77 of the Rules as, *inter alia*, their disclosure will allow it 'to fully understand' the Prosecution's case concerning the Witnesses' anticipated testimonies and will 'facilitate' its examination of the Witnesses. The Defence further argues that the Requested Items are required at this stage of the proceedings to give it time to analyse their content ahead of their presentation to the Witnesses, as well as to give it the opportunity to 'address any potential issue relevant to the reliability of [telecommunication] evidence during its examination of [D30-4864]', who is due to commence his testimony on 27 February 2024.⁶ Finally, it argues that, in accordance with the Prosecution's previous practice and jurisprudence of the Court, CST are not exempt from disclosure under Rule 81(1) of the Rules or any other exception.⁷
5. On 20 February 2024,⁸ the Common Legal Representatives of Victims of Other Crimes (the 'CLR2') and the Ngaïssona Defence informed the Chamber that they do not intend to file a response to the Request.⁹
6. On the same day, the Prosecution responded to the Request (the 'Prosecution Response').¹⁰ It submits that the Request should be rejected because (i) the Prosecution has complied with its disclosure obligations as all CDR that are material to the Defence's preparation, including in relation to the Witnesses, have been or will be disclosed;¹¹ and (ii) the Defence failed to show the materiality of the Requested Items.¹² In relation to the CST specifically, the

⁵ Request, ICC-01/14-01/18-2367, paras 11-13.

⁶ Request, ICC-01/14-01/18-2367, paras 14-21.

⁷ Request, ICC-01/14-01/18-2367, paras 22-28 *with further references*.

⁸ Noting the urgent nature of the Request, the Single Judge shortened the time limit for responses to 20 February 2024 (*see* email from the Chamber, 19 February 2024, at 17:28).

⁹ Email from the CLR2, 20 February 2024, at 09:42; email from the Ngaïssona Defence, 20 February 2024, at 17:03.

¹⁰ Prosecution's Response to the Yekatom Defence's 'Urgent Request for Disclosure of Telecommunication Material related to Defence Witnesses' (ICC-01/14-01/18-2367), ICC-01/14-01/18-2374 (a corrigendum to the Prosecution Response was notified on 21 February 2024, ICC-01/14-01/18-2374-Corr).

¹¹ Prosecution Response, ICC-01/14-01/18-2374-Corr, paras 1-2, 21-23, 26. *See also* Request, ICC-01/14-01/18-2367, para. 6, n. 7.

¹² Prosecution Response, ICC-01/14-01/18-2374-Corr, paras 15-21, 22.

Prosecution also argues that they are exempt from disclosure pursuant to Rule 81(1) of the Rules, as they are ‘internal analytical documents developed by the Prosecution for the purposes of the investigation and preparation of this case’.¹³

II. Analysis

7. The Single Judge recalls the applicable law in relation to the Prosecution’s disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules.¹⁴ In particular, he recalls, as held by the Appeals Chamber, that the assessment of whether an object is material to the preparation of the defence will depend upon the specific circumstances of the case.¹⁵
8. Turning to the Request, and for the reasons that follow, the Single Judge considers that the Defence has failed to show that the Requested Items are ‘material to the preparation of the Defence’ within the meaning of Rule 77 of the Rules.
9. First, the Single Judge notes that the Prosecution has disclosed, or is in the process of disclosing, all relevant CDR to the Defence.¹⁶ Therefore, the Single Judge has no reason to doubt that the Prosecution has fulfilled, or will shortly fulfil its disclosure obligations in this specific instance.
10. Second, as to the requested CST, the Single Judge considers that the mere fact that the underlying data in a CST relate to one of the Witnesses does not

¹³ Prosecution Response, ICC-01/14-01/18-2374-Corr, paras 1, 5-14.

¹⁴ See e.g. Decision on the Yekatom Defence Motion for Disclosure of Prior Statement of Witness P-0801, 15 June 2020, ICC-01/14-01/18-551-Conf (public redacted version notified the same day, ICC-01/14-01/18-551-Red), para. 25; Decision on the Ngaïssona Defence Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889, 30 May 2022, ICC-01/14-01/18-1438-Conf (public redacted version notified on 30 September 2022, ICC-01/14-01/18-1438-Red) (the ‘30 May 2022 Decision’), paras 6-9.

¹⁵ See Appeals Chamber, *The Prosecutor vs. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09-501 OA 4, para. 55. See also 30 May 2022 Decision, ICC-01/14-01/18- 1438-Red, para. 9 and the references cited therein.

¹⁶ See Prosecution Response, ICC-01/14-01/18-2374-Corr, paras 21-22. See also Request, ICC-01/14-01/18-2367, para. 6, n. 7.

automatically make the CST material within the meaning of Rule 77 of the Rules.

11. Nonetheless, the Single Judge notes the Prosecution's undertaking to 'include any relevant CSTs in the examination for the relevant witnesses'.¹⁷ In this regard, the Single Judge further notes that the Prosecution has specifically confirmed that (i) it will include 'the relevant CSTs that it intends to use in the questioning of Defence witnesses [D29-3010] and [D29-5013] in their respective examination lists', as well as 'any relevant line references in the underlying CDRs' (the 'Material Items'); and (ii) subject to it receiving additional attribution information, 'there will be no further CSTs used with any other remaining witnesses on the Yekatom Defence list'.¹⁸
12. Considering these circumstances, the Single Judge observes that the provision of the Material Items to the Defence will enable it to access all CST and the relevant line references in the underlying CDR which the Prosecution intends to use in its examination of the Witnesses.
13. The Single Judge appreciates the Prosecution's indication that it is amenable to providing the Material Items earlier than the existing deadline of one day prior to the relevant witness's testimony as set out in the Initial Directions on the Conduct of Proceedings.¹⁹ The Single Judge is of the view that the Material Items are material to the Defence's preparation at the *current* stage of the proceedings due to (i) the complexity of the Material Items; and (ii) the upcoming testimony of D30-4864, who is an expert in CDR and telecommunications evidence and scheduled to testify prior to D29-3010 and D29-5013. The Single Judge considers that in light of D30-4864's expertise, the Defence should be given the opportunity to analyse and use the Material Items for purposes and in the context of the examination of this witness. Therefore, the Single Judge orders the Prosecution to provide the Defence with the

¹⁷ Prosecution Response, ICC-01/14-01/18-2374-Corr, para. 14.

¹⁸ Prosecution Response, ICC-01/14-01/18-2374-Corr, para. 25.

¹⁹ Prosecution Response, ICC-01/14-01/18-2374-Corr, para. 24.

Material Items by 17:30 on 23 February 2024, so as to provide it with sufficient time to review them in advance of its examination of D30-4864.

14. Given the Prosecution's willingness to disclose the Material Items and in light of the fact that the Chamber does not consider the remainder of the Requested Items material, there is no need for the Single Judge to determine whether any restrictions on disclosure apply under the Statute and Rule 81 of the Rules.


FOR THESE REASONS, THE SINGLE JUDGE HEREBY

PARTLY GRANTS the Request with regard to the Material Items;

PARTLY REJECTS the Request with regard to the remainder of the Requested Items; and

ORDERS the Prosecution to provide the Material Items to the Defence by 17:30 on 23 February 2024 in accordance with its instructions in paragraph 13 above.

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



Judge Bertram Schmitt

Single Judge

Dated this 22 February 2024

At The Hague, The Netherlands