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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Prosecution's Response to Yekatom's Motion to Exclude
Call Location Evidence, ICC-01/14-01/18-574**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber V (“Chamber”) dismiss YEKATOM’s Motion to exclude call location evidence (“Motion”).¹ The Motion fails to substantiate the statutory basis to exclude such evidence, and further, mischaracterises the relevant international human rights jurisprudence.

II. SUBMISSIONS

2. Under Article 69(7), evidence obtained by means of a violation of the Rome Statute or internationally recognised human rights shall not be admissible if: (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.² Article 69(8) further qualifies the nature of the Court’s analysis, providing that the Court “shall not rule on the application of the State’s national law” when deciding on the relevance or admissibility of evidence collected by that State.³

3. As part of its key findings in *Bemba et al.*, the Appeals Chamber confirmed that under article 69(8), there is no legal basis under the Statute allowing a chamber to review the application of national law as part of an assessment of whether evidence is inadmissible under article 69(7).⁴ The Appeals Chamber clarified that a State’s collection and transmission of evidence to the Court is *presumed* to constitute a

¹ ICC-01/14-01/18-574.

² Rome Statute Article 69(7); *see also* rule 63(5) of the Rules of Procedure and Evidence (precluding Chambers from applying national laws governing evidence).

³ Rome Statute Article 69(8).

⁴ ICC-01/05-01/13-2275-Red, paras. 2, 287-290, and 298 (“*Bemba et al. AJ*”).

sufficient indication that the domestic authorities complied with the applicable procedures under their national law in the collection of such evidence.⁵

4. As held in *Mbarushimana*⁶ and *Katanga and Ngudjolo Chui*,⁷ when challenging the admissibility of evidence, the Defence bears the burden of persuasion to show that the elements of article 69(7) are met, namely: that the evidence was obtained in violation of the Statute or an internationally recognised human right, and that the violation would cast substantial doubt on its reliability, or its admission would be antithetical to and would seriously damage the integrity of the proceedings.⁸

5. Since the reliability of the call location evidence is explicitly not the subject of the Motion,⁹ this response solely addresses the remaining elements of article 69(7). To this extent, the Motion fails to justify the exclusion of call location evidence *in limine*, because the Defence has not met its burden to show: (1) the collection of call location evidence violated an internationally recognised human right; and (2) assuming *arguendo* there was such a breach, admitting this evidence would be antithetical to or would seriously damage the integrity of the proceedings.

A. The Defence fails to show that the call location evidence was obtained in violation of any recognised international human right

6. Contrary to the Motion,¹⁰ there has been no violation of the right to privacy in obtaining the call location evidence in this case. As the Motion notes,¹¹ the Appeals Chamber has held that the internationally recognised right to privacy is not absolute, but may be subject to legitimate interference when necessary for the protection of

⁵ *Bemba et al.* AJ, paras. 3, 288, 330 (emphasis added).

⁶ ICC-01/04-01/10-465-Red, paras. 58, 60.

⁷ ICC-01/04-01/07-717, para. 98

⁸ Article 69(7).

⁹ Motion, para. 15.

¹⁰ Motion, para 30.

¹¹ Motion, para 23.

important public interests, including law enforcement.¹² The Chamber must consider the proportionality of the interference with the right to privacy by balancing the nature of the information concerned against the investigate need warranting such access.¹³

7. The Motion alleges the violation of YEKATOM's privacy rights stems from the call location evidence having been obtained without the oversight of a judicial body.¹⁴ While the Motion cites case law supporting this proposition in some common law countries,¹⁵ it ignores that such authorisation is not *per se* required under the law of the Central African Republic ("CAR"),¹⁶ as well as France,¹⁷ the European Court of Human Rights ("ECHR"),¹⁸ or at the Special Tribunal for Lebanon ("STL").¹⁹

8. While the collection of call location evidence (specifically, the approximate location of a cell tower to which a cell phone connects during a phone call) may arguably interfere with a suspect's right to privacy, such evidence in this case was obtained according to CAR law and consistently with international human rights law. The collection of historical call location evidence in a war crimes investigation over a two year period is both necessary and proportionate. The alleged interference does not outweigh the need for such information in an investigation of ongoing war crimes and crimes against humanity spanning years, in this case, since 1 August

¹² *Bemba et al.* AJ, para. 285.

¹³ *Bemba et al.* AJ, para. 333; Cf. *Prosecutor v. Ayyash*, Case No. STL-11-01/T/AC.AR126.9, Decision on Appeal by Counsel of Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records, 28 July 28 2015, para. 48 ("STL July 2015 Appeal Decision").

¹⁴ Motion, para. 26.

¹⁵ Motion, paras. 18-19.

¹⁶ *Infra.*, para. 16.

¹⁷ Compare France, Code de procédure pénale, article 77-1-1 and 77-1-2 (citing Article 60-2) (permitting collection of evidence with authorisation of the Prosecutor) with articles 230-32, 230-35, and 230-41 (requiring judicial authorisation for tracking someone in real-time); see also France, Cour de cassation, crim, 29 June 2016, No. 15-82747; France, Cour de cassation, crim, June 27, 2001, No. 01-82578; France, Cour de cassation, crim, Aug. 8, 2001, No. 01-82490 (noting that access to communications metadata did not require judicial authorisation since it was information collected in the regular course of business and the right to privacy only concerned communication intercepts).

¹⁸ *Infra*, paras. 10-11.

¹⁹ *Infra*, para. 12; see also STL July 2015 Appeal Decision, para. 27 (Riachy, Dissenting) (concluding that "as yet there is no international customary rule that metadata should be afforded the protections of human rights law").

2012. This is in contrast to other cases involving a more significant intrusion on privacy, such as seeking the real-time monitoring of a suspect's location or content of his communications, or the collection of the CDRs of an entire country.

- a. Historical call location data entails lower privacy interests than real-time monitoring of calls or locations

9. Monitoring a suspect's communications or location in real time involves a greater privacy interest than obtaining historical data of the locations of cell towers to which his phone connects. In support of its arguments alleging a violation of YEKATOM's privacy interests, the Motion refers to the fact that the Prosecution obtained authorisation from the Pre-Trial Chamber ("PTC") to intercept telephone communications in the *Bemba et al.*²⁰ However, that case is clearly distinguishable in that intercepts involve the active and ongoing recording or monitoring of a person's current communications (and thus a greater privacy interest). By contrast, the historical call location evidence at issue in this case concerns a person's past approximate location (and thus a lesser privacy interest).

10. The ECHR recognised this distinction in 2018 in the *Ben Faiza* case, when it affirmed that prosecutors in France could obtain historical call data records ("CDRs"), including call location information, without judicial authorisation for the purposes of a criminal investigation.²¹ Indeed, the one ECHR case cited in the Motion,²² *Big Brother Watch and Others v. United Kingdom*, explicitly affirms this finding:

"In adopting this approach, the Court distinguished between methods of investigation which made it possible to identify the past geographical position of a person and those which made it possible to geolocate him or her

²⁰ Motion, para. 2

²¹ *Ben Faiza v. France*, 8 February 2018, No. 31446/12, at paras. 72-73.

²² Motion, para. 19.

in real time, indicating that the latter was more likely to violate the right to respect for private life. Consequently, in the view of the Court, the transmission to a judicial authority of existing data held by a public or private body was to be distinguished from the establishment of a surveillance system such as the ongoing monitoring of a telephone line or the placing of a tracking device on a vehicle.”²³

11. As such, the ECHR upheld the French Code of Criminal Procedure which requires judicial authorisation for intercepts or geolocation in real time, but not for historical call location evidence. It further affirmed that there is a lower level of intrusion when, as in the present case, the transmission of data already held by a public or private body is at issue.

- b. Obtaining call location data for one person, or even a small group of people, entails a lesser privacy interest than the call location data of an entire nation

12. The Motion suggests the two-year time span for which the Prosecution requested YEKATOM’s call location evidence impermissibly infringed upon his privacy interests.²⁴ However, this argument ignores the reality of international criminal investigations that examine conduct of perpetrators and their associates over the course of several years. At the STL’s Appeals Chamber, although three different opinions were issued, an overall majority concluded that the absence of judicial control when requesting CDRs over a seven year period of the *entire country of Lebanon* did not violate any international human rights standard on the right to privacy when balancing the legitimate interest of the Lebanese public and international community to properly investigate crimes.²⁵ Both the Trial and Appeals

²³ ECHR, *Big Brother Watch and Others v. United Kingdom*, 13 September 2018, No. 58170/13, paras. 461-462 (citing ECHR, *Ben Faiza v. France*, 8 February 2018, No. 31446/12, paras. 72-73).

²⁴ Motion, paras. 35, 38.

²⁵ STL July 2015 Appeal Decision, para 60.

Chambers held that the collection and transfer of seven and a half years of CDRs for the whole country was necessary and proportionate to the aim of investigating Prime Minister Rafic Hariri's killing on 14 February 2005, and that prior judicial authorisation was not required.²⁶ By comparison, the collection of two or more years of CDRs, including, when available, call location data of a suspect and his associates in CAR cannot seriously be considered an infringement of a privacy interest that rises to the level of an unnecessary or disproportionate violation of human rights in this case.

13. The Motion further cites the *Digital Rights Ireland*²⁷ case before the Court of Justice of the European Union ("CJEU") to support the proposition that failure to provide judicial review for the government's collection of CDRs violates the right of privacy.²⁸ However, this is only part of the story – in *Digital Rights Ireland*, part of the reason the CJEU invalidated a law in the United Kingdom ("UK") which did not provide for judicial review was that, unlike in the instant case, there was no link to an existing investigative need. In particular, the CJEU found that EU Directive 2006/24 breached articles 7, 8, and 52(1) of the EU Charter of Fundamental Rights, by constituting a *disproportionate* intrusion into private life and personal data.²⁹ The Directive permitted EU member states to mandate telecommunication companies to store communications metadata for periods of between six months and two years for *every EU citizen* so that national authorities could later access them for investigative purposes, if needed.³⁰ The CJEU found that the retention of data of persons who were not linked to any crimes or any criminal investigations was inconsistent with the rights to data protection and privacy, particularly given the absence of any legal framework or clear rules as to how authorities should access or use that data.³¹ By

²⁶ STL July 2015 Appeal Decision, paras. 56-60.

²⁷ CJEU, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, et al.*, Judgment, C-293/12 and C-594/12, Judgement, 8 April 2014 (hereinafter, "*Digital Rights Ireland*").

²⁸ Motion, para. 19.

²⁹ *Digital Rights Ireland*, para. 69.

³⁰ *Digital Rights Ireland*, paras. 56, 64.

³¹ *Digital Rights Ireland*, paras. 64-69.

contrast, in this case, the proportionality test was satisfied. Obtaining historical call location data for a two year time frame regarding YEKATOM and his associates furthered a legitimate and important investigation into serious international crimes. Moreover, that investigation was not only undertaken upon referral by the CAR government pursuant to the Statute, but upon the express sanction of this Court.

14. The Motion further suggests that the ECHR struck down the law in question in *Big Brother Watch* due to an absence of a provision for judicial review of requests for CDRs.³² But, the Motion omits the important fact that *Big Brother* is distinguishable from the present case because the problematic UK law allowed for the retention of data to investigate any crime (even minor offenses), rather than only serious crimes.³³ As such, the law was found to have disproportionately interfered with the right to privacy because the relatively low investigative need to pursue minor offenses did not outweigh the significant privacy interests of a large group of people (i.e. anyone suspected of committing a low level offense in the entire UK). This case is different, in that the investigation pertains to a much smaller group of people, and the commission of undoubtedly serious crimes.

B. The Defence failed to show that the call location evidence was obtained in violation of the Statute

15. In addition to failing to establish a violation of international human rights, the Motion fails to establish any violation of the Statute – the alternative basis for exclusion under article 69(7). The Statute mandates deference to domestic evidence collection procedures. Article 86, 93, and 96 require member states fully cooperate with the Court,³⁴ including in the service³⁵ and provision of documents,³⁶ while

³² Motion, para. 19.

³³ *Big Brother Watch*, paras. 467-468.

³⁴ Rome Statute, articles 86, 93, and 96.

³⁵ Rome Statute, article 93(1)(d).

³⁶ Rome Statute, article 93(1)(i).

Article 99 requires this be done in a manner that is *in accordance with domestic law*.³⁷ Even though ICC investigative activities are not measured against domestic law - according to the Appeals Chamber, its violation “is neither a necessary nor sufficient condition of exclusion under Article 69(7)” - adherence to domestic law can be a factor to consider in determining admissibility of evidence.³⁸

16. When considering this factor, it is important to note that the CAR Code of Criminal Procedure does not require judicial authorisation to obtain call location evidence (the Motion refers to this fact as “not dispositive”).³⁹ In fact, lawful restrictions on the right to privacy of communications, including telephonic and electronic communications, are expressly permitted in Article 16 of the CAR Constitution.⁴⁰ Notably, the CAR Code of Criminal Procedure requires the Prosecutor of the Republic comply with requests from assistance from the ICC or OTP.⁴¹

17. Despite having the burden of persuasion, the Motion cites no CAR law or procedure to support its arguments that the absence of a court order makes the collection of call location data a violation of privacy rights. It has made no showing that the CAR authorities’ collection and transmission of CDRs was not done “in accordance with the law” of CAR.⁴² The Defence does not dispute that the contested

³⁷ Rome Statute, article 99(1) (emphasis added).

³⁸ *Bemba et al.*, AJ, para. 330. *See also Bemba et al.*, Decision on Requests to Exclude Dutch Intercepts and Call Data Records, 29 April 2016, at para. 14.

³⁹ Motion para 27.

⁴⁰ Constitution of the Central African Republic of 30 March 2016 art. 16, available at <http://www.ilo.org/dyn/natlex/docs/SERIAL/104713/127839/F1101593134/CAF-104713.pdf> (« [l]e secret de la correspondance ainsi que celui des communications postales, électroniques, télégraphiques et téléphoniques sont inviolables. Il ne peut être ordonné de restriction aux dispositions ci-dessus qu’en application d’une loi. »). The previous Constitution contained the same provision. *See* Constitution of the Central African Republic, 2004, art. 13, available at: <https://www.legal-tools.org/doc/6049f7/pdf/>.

⁴¹ *Code de procédure pénale centrafricain*, Loi N°10.002, 6 January 2010, art. 344, 346 (available at <http://www.ilo.org/dyn/natlex/docs/SERIAL/88120/100660/F498635820/CAF-88120.pdf>) (« Les demandes d’entraide sont exécutées, selon les cas, par le Procureur de la République ou par un des Juges d’Instruction du tribunal de grande instance de Bangui qui agissent sur l’ensemble du territoire national en présence, le cas échéant, du Procureur près la Cour Pénale Internationale ou de son Représentant ou de toute autre personne mentionnée dans la demande de la Cour Pénale Internationale »).

⁴² *Bemba et al.*, AJ, para. 285; *Bemba et al.*, Decision on Requests to Exclude Dutch Intercepts and Call Data Records, 29 April 2016, ICC-01/05-01/13-1855, at para. 14.

data was appropriately requested and transmitted by the CAR government pursuant to its domestic administrative action. The Appeals Chamber has made clear that such State action benefits from a *presumption* that it has complied with its national law.⁴³ The Motion does not rebut the presumption, much less even allege that CAR law was violated in any way.

C. The Defence failed to show how the admission of the call location evidence would be antithetical to and seriously damage the integrity of the proceedings.

18. Even assuming *arguendo* that YEKATOM's right to privacy was infringed (which it was not), the Defence has not satisfied its burden of persuasion as to the remaining prong of article 69(7) warranting the exclusion of the call location evidence. Specifically, the Defence fails to show how the admission of this evidence would be antithetical to and would seriously damage the integrity of the proceedings.⁴⁴ The Motion makes only a conclusory argument in relation to this prong, that the admission of the call location evidence would "condone the wholesale violation of the right to privacy in one's location over an extended period of time."⁴⁵ There can be no damage to the integrity of the proceedings, however, where, as here, the reliability and accuracy of the evidence is not compromised, and where following the requested procedure of judicial authorisation would have produced the exact same information.

19. In the present case, the Prosecution submitted the requests for assistance ("RFAs") for CDRs, including historical cell site location records, in accordance with procedures established with the CAR authorities. The Prosecution cannot influence how the CAR authorities chose to store or access CDRs within CAR. Whether they

⁴³ *Bemba et al.*, AJ, para. 330.

⁴⁴ Article 69(7).

⁴⁵ Motion, para. 38.

request judicial authorisation prior to obtaining this information is a matter of their discretion and compliance with domestic law.

20. Accordingly, and in light of the seriousness of the crimes, and the need for the discovery of the truth under the Statute, the Defence have not shown how admitting the call location evidence risks seriously damaging the integrity of the proceedings.

III. RELIEF SOUGHT

21. For the above reasons, the Prosecution requests the Chamber deny the Motion in full.



Fatou Bensouda, Prosecutor

Dated this 10th day of July 2020
At The Hague, The Netherlands