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

Date: **8 November 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Yekatom Defence Request for Disclosure of Telecommunication
Related Material**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, 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 Request for Disclosure of Telecommunication Related Material’.

I. Procedural history

1. On 21 August 2023, the Yekatom Defence (the ‘Defence’) requested the Chamber to order the Office of the Prosecutor (the ‘Prosecution’) to disclose the following telecommunication related material pursuant to Rule 77 of the Rules:
 - (i) Inventories of all call data records (the ‘CDR’ and ‘CDR Inventories’, respectively) obtained by the Prosecution, irrespective of whether or not they have already been disclosed, related to Mr Yekatom’s phone numbers and phone numbers attributed to witnesses of the Prosecution (the ‘First Request’); and
 - (ii) All call sequence tables (the ‘CST’) produced by the Prosecution regarding phone numbers attributed to Mr Yekatom (the ‘Second Request’) (together ‘the Request’).¹
2. On 30 August 2023, the Prosecution responded, submitting that the Request should be rejected because the Prosecution has discharged its obligations fully in relation to the CDR evidence in its possession and ‘the grounds advanced are generalised and speculative’ (the ‘Response’).²

II. Analysis

3. The Chamber 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.³ In

¹ Yekatom Defence Request for Disclosure of Telecommunication Related Material, ICC-01/14-01/18-2038-Conf, paras 1, 29.

² Prosecution’s Response to “Yekatom Defence Request for Disclosure of Telecommunication Related Material” (ICC-01/14-01/18-2038-Conf), ICC-01/14-01/18-2070-Conf, paras 1, 17.

³ 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-

particular, it 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.⁴

A. The First Request

4. Turning to the First Request, and for the reasons that follow, the Chamber considers that the Defence has failed to show that the CDR Inventories are ‘material to the preparation of the Defence’ within the meaning of Rule 77 of the Rules.
5. The Chamber notes the Defence’s submission that the disclosure of the CDR Inventories is material to its preparation because of ‘the relative importance of telecommunication evidence in the present case’, as demonstrated by the Prosecution’s reliance on telecommunication data in its Trial Brief, in-court examination of witnesses and written filings.⁵ It further argues that the disclosure of the CDR Inventories will enable it ‘to assess the telecommunication evidence in possession of the Prosecution and, should it be necessary, lead to specific disclosure request[s] of still undisclosed CDRs’.⁶ According to the Defence, its request is in line with a recent decision in the case of *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka* (the ‘Mokom Case’) which ‘considered such documents as material to the preparation of the defence and thus disclosable’.⁷

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.

⁴ 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.

⁵ Request, ICC-01/14-01/18-2038-Conf, paras 12-15.

⁶ Request, ICC-01/14-01/18-2038-Conf, para. 15.

⁷ Request, ICC-01/14-01/18-2038-Conf, para. 17 referring to Pre-Trial Chamber II, *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, Decision on the Defence’s requests for disclosure and rectification of disclosure metadata, 5 June 2023, ICC-01/14-01/22-219-Conf (the ‘Mokom Decision’) (public redacted version notified on 3 July 2023, ICC-01/14-01/22-219-Red), paras 42-43.

6. The Chamber is not persuaded by the Defence's arguments that the provision of CDR Inventories is material to the preparation of the Defence in this instance.
7. First, the Chamber is of the view that the situation in the *Mokom* Case needs to be distinguished from the case at hand. In particular, when the request was made in the *Mokom* Case, the defence had only received CDR limited to (i) those disclosed in the present case; and (ii) those included in an annex to the Document Containing the Charges in the *Mokom* Case.⁸ By comparison, the Chamber observes that, and as the Defence itself acknowledges,⁹ the Prosecution has disclosed over 700 items labelled as CDR in the present case. Further, the Prosecution also reiterates that it has fully discharged its disclosure obligations in relation to the CDR and that it 'assessed only a relatively small number of CDR in its collection as not material to the Defence's preparation',¹⁰ because they do not go to any live issues in the case and post-date the relevant period, often by years.¹¹
8. The Chamber considers that the Defence has not advanced any arguments which contradict the Prosecution's assertion that it does not have further CDR to disclose. The Chamber has no reason to doubt that the Prosecution has fulfilled its disclosure obligations in this specific instance.
9. Second, and in this regard, the Chamber recalls its previous findings that 'the obligation of the prosecution is to permit inspection of any documents, and other items as listed in Rule 77 of the Rules, which are material to the preparation of the defence [...] [and] *not for the prosecution to offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection*'. Rule 77 of the Rules therefore *requires* the Prosecution to decide which material in its possession is relevant to the Defence, and provide the latter

⁸ *Mokom* Decision, ICC-01/14-01/18-219-Red, paras 16-17.

⁹ Request, ICC-01/14-01/18-2038-Conf, para. 14.

¹⁰ Response, ICC-01/14-01/18-2070-Conf, paras 3-4, 7.

¹¹ Response, ICC-01/14-01/18-2070-Conf, para. 7. *See also* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Remedies in Light of Disclosure Violations, 22 April 2020, ICC-02/04-01/15-1734, para. 22.

with such material.¹² The Defence's suggestion that it should be allowed to review the CDR Inventories in order to issue, where necessary, specific disclosure requests for undisclosed CDRs appears to be a 'fishing expedition' and clearly conflicts with the purpose of the provision.¹³

10. In light of the above, there is no need for the Chamber to determine whether any restrictions on disclosure apply under the Statute and Rule 81 of the Rules. Accordingly, the Chamber rejects the First Request.

B. The Second Request

11. At the outset, the Chamber notes that in March 2022, the Prosecution requested the submission of CDR and related evidence through a 'bar table' application (the 'Submission Request'). Annexed to the Submission Request, the Prosecution also provided certain CST that consist of 'relevant call data relied upon in the Prosecution's case as pleaded in its Trial Brief' (the 'Annex A').¹⁴ As the Prosecution did not request submission of these CST but rather of the underlying CDR,¹⁵ no further action was taken by the Chamber in respect of Annex A.¹⁶
12. The Chamber further observes that certain CST included in Annex A, *inter alia* CST 9, 10, 13, 14 and 15, already contain data regarding telephone numbers attributed to Mr Yekatom and communications of such numbers with numbers attributed to specific individuals within a particular time period.¹⁷
13. Therefore, the Chamber is of the view that, at this stage, the Yekatom Defence should first indicate with more specificity which CST it would like to be provided with, in order for the Prosecution to inform it whether such CST were prepared at all. Therefore, the Chamber directs the Defence to (i) consider, by reference to

¹² 30 May 2022 Decision, ICC-01/14-01/18-1438-Red, para. 19 *with further reference to* Trial Chamber III, *The Prosecutor vs. Jean-Pierre Bemba Gombo*, Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, ICC-01/05-01/08-632, para. 20 (emphasis added).

¹³ Request, ICC-01/14-01/18-2038-Conf, para. 15.

¹⁴ 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.

¹⁵ Submission Request, ICC-01/14-01/18-1296, para. 24.

¹⁶ Decision on the Third Prosecution Submission Request (Call Data Records), 5 July 2022, ICC-01/14-01/18-1499, para. 6.

¹⁷ See Annex A, ICC-01/14-01/18-1296-Conf-AnxA-Corr, pp. 245-249, 258, 385-725.

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.

14. The parties are directed to seize the Chamber only should further disagreements arise as to the provision of specific CST.
15. In light of the above, the Chamber rejects, without prejudice, the Second Request.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the First Request;

REJECTS, without prejudice, the Second Request;

DIRECTS the Yekatom Defence and the Prosecution to proceed in accordance with paragraphs 13 and 14, as set out above; and

ORDERS the Yekatom Defence and the Prosecution to file public redacted versions, or request reclassification to public, of the Request, ICC-01/14-01/18-2038-Conf, and the Response, ICC-01/14-01/18-2070-Conf, respectively, within one week of notification of this decision.

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

Judge Péter Kovács

Judge Bertram Schmitt

Presiding Judge

Judge Chang-ho Chung

Dated 8 November 2023

At The Hague, The Netherlands