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**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/14-01/18

Date: 6 May 2022

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***

Confidential

**Decision on the Ngaiissona Defence Requests in relation to the Third Prosecution
Submission Request from the Bar Table (Call Data Records)**

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 Article 64, 67, 69 and 74 of the Rome Statute (the 'Statute'), Rules 64 and 68 of the Rules of Procedure and Evidence (the 'Rules') and Regulation 35 of the Regulations of the Court, issues this 'Decision on the Ngaïssona Defence Requests in relation to the Third Prosecution Submission Request from the Bar Table (Call Data Records)'.

I. Procedural history and submissions

1. On 1 March 2022, the Office of the Prosecutor (the 'Prosecution') filed a request submitting call data records and related evidence through the 'bar table' (the 'Submission Request').¹
2. On 4 March 2022, the Single Judge extended the time limit to respond to the Submission Request to 13 May 2022.²
3. On 25 April 2022, the Ngaïssona Defence (the 'Defence') requested the Chamber to (i) dismiss, *in limine*, certain attributions and allegations of contact made in the Submission Request and of items only used to support these attributions,³ as well as confirm that such attributions and allegations of contact do not form part of the allegations against Mr Ngaïssona that the Chamber will consider in its Article 74 deliberations (the 'Request to Dismiss');⁴ and (ii) suspend the time limit to respond to the Submission Request until certain conditions are satisfied (the 'Request to Suspend'; jointly, the 'Request').⁵
4. Specifically, the Defence argues that the Submission Request contains new contact and communication attributions mentioning ten individuals in relation to whom no 'notice of their relevance to the case' is included in the document containing the charges, the decision on the confirmation of charges, or the

¹ Prosecution's submission of call data records and related evidence *via* the "bar table", ICC-01/14-01/18-1296 (with confidential annexes A-D).

² Email from the Chamber, 4 March 2022, at 15:39.

³ Ngaïssona Defence Request for Dismissal of Certain Attributions and Allegations of Contacts and for Suspension of the Time-limit to Respond to the "bar table" on Call Data Records, ICC-01/14-01/18-1377-Conf (with confidential annexes A-C), paras 3, 15, 16.

⁴ Request, ICC-01/14-01/18-1377-Conf, paras 3, 15, 47(a)-(c).

⁵ Request, ICC-01/14-01/18-1377-Conf, paras 3, 16, 47(d).

Prosecution's trial brief.⁶ As such, according to the Defence, it 'cannot appreciate what role they play in the Prosecution's case'.⁷ The Defence submits that the Chamber 'should not permit the Prosecution to augment its PTB let alone its DCC' or 'to mould its case against the Accused during the course of the trial depending on how the evidence unfolds'.⁸

5. In addition, the Defence argues that it would be prejudiced in its response to the Submission Request⁹ and during the trial due to lack of notice,¹⁰ unless the time limit to respond is suspended until (i) a decision on the pending requests under Rule 68(2)(b) of the Rules in relation to witnesses P-2687 and P-2973 has been issued;¹¹ (ii) certain witnesses whose statements are relied upon in the Submission Request have testified;¹² and (iii) the Prosecution provides 'an exhaustive list of telephone attributions and contacts that it intends to rely upon within the [call data records]', indicating 'where the charging documents precisely refer to the attributions and communications'.¹³
6. On 26 April 2022, the Single Judge shortened the time limit to respond to the Request to 2 May 2022.¹⁴
7. On 29 April 2022, the Yekatom Defence indicated that it does not intend to respond to the Request.¹⁵
8. On 2 May 2022, the Prosecution responded, arguing that the Request is 'wholly unsubstantiated' and should therefore be rejected in its totality.¹⁶

⁶ Request, ICC-01/14-01/18-1377-Conf, para. 8.

⁷ Request, ICC-01/14-01/18-1377-Conf, para. 10.

⁸ Request, ICC-01/14-01/18-1377-Conf, para. 11.

⁹ Request, ICC-01/14-01/18-1377-Conf, para. 16.

¹⁰ Request, ICC-01/14-01/18-1377-Conf, paras 33-46.

¹¹ Request, ICC-01/14-01/18-1377-Conf, paras 19-22.

¹² Request, ICC-01/14-01/18-1377-Conf, paras 23-27.

¹³ Request, ICC-01/14-01/18-1377-Conf, paras 3(b)(iii), 28-46.

¹⁴ Email from the Chamber, 26 April 2022, at 12:47.

¹⁵ Email from the Yekatom Defence, 29 April 2022, at 16:47.

¹⁶ Prosecution's Response to "Ngaïssona Defence Request for dismissal of certain attributions and allegations of contacts and for suspension of the time-limit to respond to the "bar table" on Call Data Records" (ICC-01/14-01/18-1377-Conf), 25 April 2022, ICC-01/14-01/18-1388-Conf (the 'Prosecution Response'), paras 1, 29.

II. Analysis

A. The Request to Dismiss

9. In relation to the Request to Dismiss, the Chamber notes the Defence's argument that a number of allegations made by the Prosecution in relation to contact and communication attributions have not been made in any of the relevant documents containing the allegations and charges against Mr Ngaïssona, and that therefore the Defence is not in a position to appreciate their 'role' in the context of the Prosecution case.¹⁷
10. The Chamber considers the Defence to misapprehend the Prosecution's obligations in relation to providing notice. Pursuant to Article 67(1)(a) of the Statute, the accused has the right to be informed promptly and in detail of the 'nature, cause and content' of the charges, entitling the accused to receive notice of (i) the facts and circumstances underpinning the charges, including the time and place of the alleged crimes; and (ii) the legal characterisation of the facts to accord with the crimes under the jurisdiction of the Court and the precise mode(s) of liability under Articles 25 and 28 of the Statute.¹⁸ Importantly, the Prosecution is also, and in any event, bound by its statutory disclosure obligations, including with regard to the evidence it intends to use to prove its allegations.
11. However, this does not mean that the Prosecution is under an obligation to outline, in the documents filed before the commencement of the trial hearings, every argument in relation to each particular element of evidence it intends to submit to the Chamber with a view to *supporting* its allegations.¹⁹

¹⁷ Request, ICC-01/14-01/18-1377-Conf, paras 8, 10.

¹⁸ Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial, 29 October 2020, ICC-01/14-01/18-703-Conf (public redacted version notified on 30 October 2020, ICC-01/14-01/18-703-Red), para. 16, with further references. *See also* Appeals Chamber, Judgment on the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V of 29 October 2020 entitled 'Decision on motions on the Scope of the Charges and the Scope of Evidence at Trial', 5 February 2021, ICC-01/14-01/18-874, para. 38; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, paras 121-123.

¹⁹ *See also* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be

12. That certain allegations regarding attributions and communications in relation to call data records were not specified in the document containing the charges, the decision on the confirmation of charges, or the Prosecution's trial brief does not lead, in the Chamber's view, to the Defence not being on notice of the facts and circumstances underpinning the charges or their legal characterisation.²⁰
13. In light of the above, the Chamber does not consider it warranted to specifically 'confirm', at this stage, that such 'new allegations' 'do not form part of the allegations that the Trial Chamber will consider in its Article 74 deliberations'.²¹ The Chamber reiterates that, if and when items of evidence have been recognised as submitted before the Chamber, it will assess the standard evidentiary criteria – namely, relevance, probative value and potential prejudice – as part of its holistic assessment when deliberating its judgment pursuant to Article 74(2) of the Statute.²² No decision on the Submission Request has been issued to date, and any assessment of the relevance – or potential prejudice – of information contained within the call data records sought to be recognised as submitted would in any event be premature at this stage.
14. As regards the request of the Defence to dismiss those items 'exclusively used for these new attributions', highlighted in Annex A to the Request, the Chamber notes at the outset that a number of these items are not included in the Submission Request.²³ The Request to Dismiss in relation to these items is therefore moot.

subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, para. 90, n. 163: 'In the view of the Appeals Chamber, the term "facts" refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (1) (a) of the Statute.'

²⁰ The Chamber further notes in this regard that the Prosecution, both in its document containing the charges and the trial brief, relied on call data records and provided certain telephone attributions and call sequence tables in support of a number of allegations. *See* Annexes I1 and J1 to the Prosecution's Notification of Filing of the Document Containing the Charges and List of Evidence, ICC-01/14-01/18-282-Conf-AnxI1; ICC-01/14-01/18-282-Conf-AnxJ1; Annex D to the Prosecution's Trial Brief, ICC-01/14-01/18-723-Conf-AnxD.

²¹ *See* Request, ICC-01/14-01/18-1377-Conf, para. 12.

²² Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, para. 53.

²³ *See* Annex A to the Request, ICC-01/14-01/18-1377-Conf-AnxA, p. 3 (first two items highlighted), p. 4 (first item highlighted).

With regard to the remaining items, that is, those included in the Submission Request, the Chamber will consider them in its decision on the Submission Request.

15. In relation to the argument that the Prosecution did not comply with the 'Initial Directions on the Conduct of the Proceedings' (the 'Initial Directions') with regard to the process of *inter partes* consultations before filing a 'bar table' request,²⁴ the Chamber takes note of the Prosecution's contention that it provided the Defence with all relevant parts of the annexes to its Submission Request – *i.e.* those parts which list the items which it intends to submit – in advance of filing the Submission Request.²⁵ Importantly, the Chamber also notes that the items mentioned by the Defence contained in Annex C to the Submission Request, which appear not to have been part of the consultation process, are included in the first part of that annex which does not contain items submitted from the 'bar table', but rather the arguments and/or evidence used by the Prosecution in support of the attributions.²⁶ Similarly, Annex A to the Submission Request, containing so-called 'call sequence tables', is clearly not a list of items submitted to the Chamber, but an outline of the Prosecution's arguments in relation to telephone number and contact attributions.²⁷ The items mentioned in this annex are, as such, not subject to the Submission Request.²⁸ Therefore, the Prosecution was not under an obligation to provide this annex to the Defence as part of the *inter partes* consultation process. Thus, the Chamber considers that there was no violation of the Initial Directions in this regard in the current context.
16. In light of the above, the Request to Dismiss is rejected.

²⁴ Request, ICC-01/14-01/18-1377-Conf, para. 9.

²⁵ Prosecution Response, ICC-01/14-01/18-1388-Conf, paras 3, 18-21. *See also* Submission Request, ICC-01/14-01/18-1296, para. 6.

²⁶ *See* Submission Request, ICC-01/14-01/18-1296, para. 12; Confidential Annex C, ICC-01/14-01/18-1296-Conf-AnxC, p. 2-25.

²⁷ Submission Request, ICC-01/14-01/18-1296, paras 3, 10 (referring to the 'evidentiary propositions' contained in the annex); Confidential Annex A, ICC-01/14-01/18-1296-Conf-AnxA-Corr.

²⁸ Subject to the submission request are the items listed in annexes B, C (part 2) and D. *See* Submission Request, ICC-01/14-01/18-1296, paras 11-13, 24.

B. The Request to Suspend

17. At the outset, the Chamber recalls that 'the mere fact of an item of documentary evidence being related to a request under Rule 68(2) of the Rules which is still under consideration by the Chamber does not, as such, render submission of that item through a different avenue procedurally improper'.²⁹
18. In relation to the request at hand, the Chamber considers that the fact that requests under Rule 68(2) of the Rules are pending in relation to two witnesses linked to the production of call data records does not prevent the Defence from making arguments on the relevance, probative value or potential prejudice of the call data records and related documents subject to the Submission Request. The Prosecution's arguments in relation to the items submitted are outlined in that request, and the Defence fails to point out in which specific way it would be 'highly prejudicial' for it to respond to these arguments. The Defence's argument relating to the Chamber potentially not recognising submission of the statements at issue is hypothetical at this stage and, as such, does not impact on the Defence's ability to provide a response to the Submission Request.
19. Similar considerations apply with regard to the argument that the time limit to respond to the Submission Request should be suspended until certain witnesses have testified.³⁰ The submission that 'the Defence will need to supplement or replace its position on the Bar-Table Motion response after each of the 10 witnesses testifies'³¹ is speculative at best. Other than asserting a general 'prejudice' because the Defence would have to 'hedge its arguments' which would be 'less final and conclusive',³² the Defence does not point to any concrete reason for which it would not be in a position to respond to the arguments made in the Submission Request before the witnesses' testimonies are heard by the Chamber.

²⁹ Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), 12 April 2022, ICC-01/14-01/18-1359, para. 21.

³⁰ Request, ICC-01/14-01/18-1377-Conf, paras 23-27.

³¹ Request, ICC-01/14-01/18-1377-Conf, para. 25.

³² Request, ICC-01/14-01/18-1377-Conf, para. 27.

20. Finally, the Defence requests a suspension of the time limit to respond to the Submission Request until the Prosecution has provided an 'exhaustive list of telephone attributions and contacts that it intends to rely upon' in the call data records it submits, also indicating 'where the charging documents precisely refer to the attributions or communications'.³³ The Defence appears to argue that without such 'exhaustive list', it is not in a position to adequately respond to the Submission Request,³⁴ and, more generally, that it would be 'ambushed' during trial proceedings as it would not be in a position to formulate objections to questions which concern 'previously unnotified alleged attributions and communications'.³⁵
21. As outlined above, the Chamber considers that the Defence fails to distinguish between the obligation of notice in relation to the charging documents, and the Prosecution's use of evidence in the course of trial proceedings with a view to supporting its allegations. More importantly, the Submission Request outlines the arguments of the Prosecution in relation to the alleged relevance and probative value of the submitted items. The general arguments presented by the Defence do not provide any particular indication as to why it would not be possible to respond to these arguments unless and until it receives an 'exhaustive list of telephone attributions and contacts'. Similarly, the Chamber considers without merit the Defence's contention that it would be 'ambushed' in the course of the trial proceedings if it does not receive such a list, as it is on notice of the allegations brought against the accused as well as the evidence on which the Prosecution intends to rely to prove these allegations.
22. Considering the above, the Request to Suspend is equally rejected.

³³ Request, ICC-01/14-01/18-1377-Conf, para. 3(b)(iii).

³⁴ Request, ICC-01/14-01/18-1377-Conf, paras 31-32.

³⁵ Request, ICC-01/14-01/18-1377-Conf, paras 33-34, 37-38, 43, 45-46.

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FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the Ngaïssona Defence and the Prosecution to file public redacted versions of filings ICC-01/14-01/18-1377-Conf and ICC-01/14-01/18-1388-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 6 May 2022

At The Hague, The Netherlands