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**International
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Court**

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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***

Confidential

**Prosecution's Response to "Yekatom Defence Request for Disclosure of
Telecommunication Related Material" (ICC-01/14-01/18-2038-Conf)**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the "Yekatom Defence Request for Disclosure of Telecommunication Related Material".¹ The Prosecution has discharged its disclosure obligations in relation to the call data record ("CDR") evidence in its possession. The Request fails because (a) the grounds advanced are generalised and speculative at best, and (b) there is no statutory basis for the further disclosure sought.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this document is classified as "*Confidential*" because it responds to a filing of the same designation. It can be re-classified as Public as the Chamber sees fit.

III. SUBMISSIONS

A. The Prosecution has discharged its disclosure obligations fully

3. The Prosecution has discharged its disclosure obligations fully by providing to the Defence all CDR gathered in the course of its investigation in the case for – at minimum – the Relevant Period of September 2013 through December 2014. This includes, but is not limited to, the CDR for telephone numbers attributed to the Accused and to Prosecution trial witnesses.

4. In fact, on careful evaluation, the Prosecution has assessed only a relatively small number of CDR in its collection as not material to the Defence's preparation under rule 77 of the Rules of Procedure and Evidence ("Rules") or as potentially exonerating under article 67(2).

¹ ICC-01/14-01/18-2038-Conf ("Request").

B. The Defence has failed to demonstrate the materiality of any undisclosed CDR

5. The Prosecution recognises that the Request is, at this stage, not for the undisclosed CDR itself, but for an inventory (specifically, both disclosed and undisclosed CDR). Nevertheless, this requires the same showing of materiality in relation to the undisclosed CDR, as a minimum basis for the provision of such an inventory.

6. The Defence fails to advance any argument as to how the limited number of undisclosed CDR of Mr YEKATOM and of Prosecution trial witnesses is material to its preparation, in that it goes to a live issue in the case.² Instead, the Request is generalised, speculative, and appears to have been prompted at this late stage only by the recent decision of Pre-Trial Chamber II in the *Mokom* case³ which, as noted below, was informed by distinguishable circumstances.

7. Here, the undisclosed CDR of the Accused and of Prosecution trial witnesses are limited in number and do not go to any live issues in the case. All post-date the Relevant Period, in most cases by years.

8. Further, there is no requirement, or utility, for the Prosecution to provide an inventory of all the CDR collected in its investigation of this case. As to the limited number of undisclosed CDR, there is no requirement to itemise non-material information for the Defence's consideration. In relation to another similarly speculative disclosure request, this Chamber has already confirmed that it is "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."⁴

² See ICC-01/12-01/18-859-Red, para. 10.

³ See ICC-01/14-01/22-219-Red, para. 41-43 ("*Mokom* CDR Disclosure Decision").

⁴ ICC-01/14-01/18-1438-Red, para. 19; *see also* ICC-01/05-01/08-632, para. 26 (noting "the Chamber rejects the defence submission that the prosecution has an obligation to provide the defence with all the material relating to

9. Finally, that Pre-Trial Chamber II required the Prosecution to produce a CDR inventory in the *Mokom* CDR Disclosure Decision is in no way binding upon this Chamber. In any case, the Appeals Chamber's established jurisprudence on the assessment of materiality under the Court's regulatory framework, that rule 77 "...leaves to the *Prosecution* the assessment of whether objects are 'material to the preparation of the Defence' ..." is more persuasive.⁵

C. The Call Sequence Tables are not subject to disclosure as internal work product

10. The Call Sequence Tables sought ("CST") are internal documents prepared by the Prosecution in connection with the investigation and preparation of the case under rule 81(1). The Prosecution produced CSTs as part of its internal analysis of the raw CDR evidence. They are not evidence in themselves and not subject to disclosure. The applicable rules are express and unambiguous. Disclosure under rule 77 is subject to the restrictions defined in rule 81 and 82.⁶

11. Although the Prosecution has introduced certain CSTs to facilitate the presentation of its evidence (for example, in its bar table motions to substantiate the relevance of CDR⁷), this does not render all other CSTs developed for the purposes of its investigation and trial preparedness evidentiary, or deprive them of their protection as internal work product. Any such "waiver" argument is unsubstantiated and non-existent in the Court's jurisprudence.

an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance. The prosecution does not have the obligation of 'handing the defence the keys to the warehouse' in this way").

⁵ See 01/04-02/06-1330, para. 23 (emphasis added); see also ICC-01/05-01/08-3336, para. 34 ("[...] Generally, the Prosecution holds responsibility for making such determinations.")

⁶ See rule 77 (providing, that inspection is mandated "*subject to the restrictions on disclosure* as provided for in the Statute and in rules 81 and 82") (emphasis added).

⁷ See ICC-01/14-01/18-1296-Conf-AnxA-Corr; ICC-01/14-01/18-2061-Conf-AnxA.

12. To the extent the Request relies on the *Mokom* CDR Disclosure Decision, it is misplaced. *First*, the Pre-Trial Chamber's approach in no way binds the Chamber or can otherwise constrain the Chamber's proper application of the statutory disclosure framework. *Second*, the circumstances in the *Mokom* case underpinning the Pre-Trial Chamber's rationale do not apply here — where the Defence has been in possession of the underlying extensive CDR information for years — as compared to *Mokom*. *Third*, the Chamber should apply the Appeals Chamber's well-established jurisprudence.⁸

D. The Call Sequence Tables are not material or otherwise disclosable

13. Even assuming *arguendo* that the Chamber considers that the CSTs are not *internal* documents prepared by the Prosecution in connection with the investigation or preparation of the case — which they clearly are — they are not 'material' under rule 77,⁹ or otherwise disclosable under article 67(2).

14. As the Appeals Chamber has held, there is no requirement to make further disclosures of CDR evidence where the "actual information" has already been disclosed.¹⁰ Where the underlying CDR evidence is not disclosed because it has been duly assessed as not falling under the Prosecution's rule 77 or article 67(2) obligations, it also should not be disclosed by way of a CST.

15. Not only are the CSTs not material, their disclosure would be of no marginal utility in the circumstances other than inappropriately revealing the Prosecution's internal lines of inquiry and investigation. The Defence rather has shown itself to be fully capable of analysing the CDR evidence and even producing their own CSTs for

⁸ See para. 9 above, and ICC-01/04-02/06-1330, para. 23.

⁹ See ICC-01/14-01/18-1438-Red, para. 7 (noting that disclosure of an item under rule 77 requires a two-stage assessment, namely: a determination of materiality, and the application of any restrictions).

¹⁰ See ICC-01/05-01/13-2275-Red, para. 56.

presentation in Court.¹¹ Accordingly, there is no factual or statutory basis for further disclosure.

16. The Request fails to advance any argument as to how the provision of CSTs for all numbers attributed to Mr YEKATOM – irrespective of their relation to the Relevant Period or charges – could be material to its preparation or go to a live issue in the case.¹² Instead, the Request advances only generalised and speculative assertions. These are manifestly insufficient to satisfy even the minimum threshold for the disclosure sought.

IV. CONCLUSION

17. For the reasons above, the Chamber should reject the Request.



Karim A. A. Khan KC, Prosecutor

Dated this 30th day of August 2023

At The Hague, The Netherlands

¹¹ See, for example, T-206-CONF-ENG, p. 44, l. 5 -p. 52, l. 1. For CSTs produced by the Defence, see CAR-D29-0004-0020, CAR-D29-0004-0023, CAR-D29-0004-0042, CAR-D29-0004-0044, CAR-D29-0004-0047, CAR-D29-0004-0048, CAR-D29-0004-0137, CAR-D29-0004-0148, CAR-D29-0004-1175, CAR-D29-0004-1185, CAR-D29-0004-1189, CAR-D29-0004-1194, CAR-D29-0004-1236, CAR-D29-0004-1239, CAR-D29-0004-1240, CAR-D29-0004-1241, CAR-D29-0004-1242, CAR-D29-0004-1249, CAR-D29-0004-1250, CAR-D29-0004-1251, CAR-D29-0004-1253, CAR-D29-0004-1394, CAR-D29-0004-1402, CAR-D29-0004-1424, CAR-D29-0004-1499, CAR-D29-0004-2371, CAR-D29-0004-2591, CAR-D29-0004-2594, CAR-D29-0004-2609, CAR-D29-0004-2616, CAR-D29-0004-2618, CAR-D29-0004-2619, CAR-D29-0004-2621, CAR-D29-0004-2650, CAR-D29-0004-3653, CAR-D29-0004-3743, CAR-D29-0004-3764, CAR-D29-0004-3815, CAR-D29-0004-3895, CAR-D29-0004-3897, CAR-D29-0004-3899, CAR-D29-0004-3907.

¹² See ICC-01/12-01/18-859-Red, para. 10.