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No.: **ICC-01/14-01/18**
Date: **20 February 2024**

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 the Yekatom Defence's 'Urgent Request for Disclosure of Telecommunication Material related to Defence Witnesses'
(ICC-01/14-01/18-2367)

Source: **Office of the Prosecutor**

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

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I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the Yekatom Defence's request for the disclosure of telecommunications material related to Defence witnesses ("Request").[1] The Request is overbroad, speculative, and calls for the Chamber to disregard Rule 81(1) of the Rules of Evidence and Procedure in seeking to compel disclosure of internal analytical documents developed by the Prosecution for the purposes of the investigation and preparation of this case. The Prosecution notes additionally that all relevant call data records ("CDR") underlying these CSTs have already been disclosed to the Defence. The Prosecution has therefore complied with its disclosure obligations.

2. The Request should be summarily dismissed.

II. SUBMISSIONS

A. The Chamber's Prior Decision does support the Request

3. The Yekatom Defence has previously sought the disclosure of Call Sequence Tables ("CST") prepared by the Prosecution on the basis of Call Data Records ("CDR") duly disclosed to the Defence.[2] The Prosecution opposed the application on the basis that, as documents prepared by its analysts in connection with the investigation and preparation of the case, CSTs fall *outside* the Court's statutory disclosure framework. The Chamber thus rightly rejected the Defence application, albeit without having to reach this question ("Prior Decision").[3]

4. The Chamber's Prior Decision rejecting the previous application to compel the disclosure of CSTs does not support the present Request. The Defence's reading of the

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[1] ICC-01/14-01/18-2367.
[2] ICC-01/14-01/18-2038-Conf.
[3] ICC-01/14-01/18-2196 ("CST Disclosure Decision").

Prior Decision is flawed and speculative. That the Chamber dismissed the Defence's application because it was not sufficiently specific, in no way implies that the material sought were otherwise properly subject to disclosure.[4] Indeed, as the Prior Decision details, specificity in the disclosure demand was necessary for the Prosecution to identify whether the CSTs sought exist as a first step.[5] Thus, the Chamber did not broach the general question of whether CSTs fall within the scope of Rule 81(1) because the previous Defence application was fatally deficient on its face. As the Chamber confirmed, "there is no need for [it] to determine whether any restrictions on disclosure apply under the Statute and Rule 81 of the Rules."[6]

5. While the Defence interprets this holding to mean that "[a]t no point did the Chamber consider that the CSTs were exempt from disclosure in accordance with Rule 81(1) despite the Prosecution's advancement of this position,"[7] this does not help or justify the Request. Rather, per the rationale of the Prior Decision, consideration of the provision would only now apply, to the extent that the Request purports to cure the deficiencies of the previous application leading to its dismissal. Nevertheless, the Defence still fails to overcome the operation of Rule 81(1) as a procedural bar to the disclosure of the CSTs.

B. Prosecution CSTs are not subject to disclosure

6. It is beyond any reasonable dispute that, to the extent they may exist, the CSTs sought are *internal* documents prepared by the Prosecution 'in connection with' the

[4] *Contra* ICC-01/14-01/18-2367, para. 11 (acknowledging that "the Chamber directed the Defence to identify the 'specific additional CST it is seeking disclosure of').
[5] ICC-01/14-01/18-2196, para. 13.
[6] ICC-01/14-01/18-2196, para. 10.
[7] ICC-01/14-01/18-2367, para. 22.

preparation of the case.[8] Rule 81(1) is unambiguous and exempts the following class of material from *compelled* disclosure:

> "Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case <u>*are not subject to disclosure*</u>."

On its face, the Court's statutory disclosure paradigm does not apply to such reports, memoranda or other *internal* documents.

7. The Request acknowledges the scope of Rule 81(1),[9] yet seeks the disclosure of Prosecution CSTs relying on principally on a decision of Pre-Trial Chamber II which concluded, *inter alia* that "CSTs are not reports, memoranda or internal documents susceptible of revealing the Prosecution's internal strategies as they merely organise CDRs in a manner which is easily readable."[10] However, neither this decision nor the contentions on which it rests is binding or persuasive.

8. *First*, other than as relates to a decision on the confirmation of charges, a trial chamber is not bound by a pre-trial chamber's interpretation of the law.[11] This is even more clear in the context of a separate case.

9. *Second,* as the Chamber previously stated, "the situation in the *Mokom* Case needs to be distinguished from the case at hand",[12] noting the extensive disclosure in the present case of the underlying CDR — to the tune of over 700 items,[13] as compared to

[8] ICC-01/14-01/18-2070, para. 10-12.
[9] ICC-01/14-01/18-2367, para. 23.
[10] ICC-01/14-01/18-2367, para. 25, 26 (*see* ICC-01/14-01/22-219-Red, para. 46).
[11] ICC-01/14-01/18-703-Red, para. 25 (internal citations omitted) ; *see also* para. 50 ("[a]ny judicial pronouncement by the Pre-Trial Chamber before the trial has commenced cannot be taken to prejudge the Trial Chamber's later interpretation of the applicable statutory provisions").
[12] ICC-01/14-01/18-2196, para. 7.
[13] ICC-01/14-01/18-2196, para. 7.

the more limited disclosure relative to the confirmation of charges process in the *Mokom* case.

10. *Third*, the Pre-Trial Chamber's suggestion that Rule 81(1) applies only to material "susceptible of revealing the Prosecution's internal strategies"[14] does not reflect the Court's established jurisprudence, and without explanation or authority restricts the express text of the provision. Put simply, nowhere in the Court's statutory texts is the application of Rule 81(1) conditioned on whether the documents at issue are susceptible of revealing the Prosecution's internal strategies. Even if that were the case — which it is not — the provision of CSTs in advance of the Prosecution's examination of a witness for instance, *would* reveal the strategy it intends to pursue.

11. *Fourth*, there is an obvious distinction between *voluntary* and *compelled* disclosure. The suggestion that the Prosecution "[having] itself chosen to disclose several CSTs to the Defence … it is now contradictory for it to generally argue that this material is non-disclosable",[15] conflates the two. The Prosecution's prior *voluntary* disclosure or use of *certain* CSTs does not amount to waiver of Rule 81(1) in respect of all such material. And, as the prosecution has previously noted, there is no general waiver doctrine in the Court's jurisprudence.

12. The Request fails for the same reasons. The Prosecution's description of CSTs as presenting the *underlying* CDRs in "an easily readable and accessible format" and "to facilitate the Chamber and/or the Parties' understanding of the disclosed CDR"[16] in no way removes them from the scope of Rule 81(1), whose application is unqualified. That is, internal documents created in preparation for the investigation or the case

[14] ICC-01/14-01/22-219-Red, para. 46.
[15] ICC-01/14-01/22-219-Red, para. 46.
[16] ICC-01/14-01/18-2367, para. 24.

"are not subject to disclosure", regardless of their potential utility in the proceedings. What is disclosable are *non-internal* documents – hence, material CDRs.

i. The Defence fails to show that CSTs are not internal documents

13. To the extent that Rule 81(1) is applicable on its face to Prosecution generated CSTs, it imposes a burden on the Defence to rebut its *prima facie* application here. It is not for the Prosecution to present

> "viable argument[s] as to why it cannot provide CST's which have been specifically identified, are in its possession, and more pertinently, would necessarily facilitate the Defence and Chamber's understanding of its case and the examination of the witness."

14. It is squarely and solely within the prerogative of the Prosecution to determine whether or not to provide to the Parties and Participants *internal* documents, memoranda, or reports prepared in relation to this case. To the extent that this may assist in the proceedings, the Prosecution has voluntarily undertaken as much. However, it maintains that the Statute does cannot be interpreted as to *compel* the Prosecution's production and provision of internal analytical documents — as the Defence has again sought to do here. Notwithstanding, the Prosecution undertakes to include any relevant CSTs in the examination materials for the relevant witnesses.[17]

C. The Defence Request fails to establish Materiality

[17] *See* ICC-01/14-01/18-631, para. 42.

15. The Prosecution notes that the mere fact that a given CDR record pertains to a given witness without more does not satisfy the very low threshold required for demonstrating 'materiality' under the Court's regulatory framework.

16. The Defence asserts that Prosecution generated CSTs:

> "are material for the preparation of the Defence as they will allow the Defence to fully understand the Prosecution's case concerning their anticipated testimony and review the relevant sources which form the basis of communications purportedly attributed to Defence witnesses by the Prosecution"

Both the contention and the rationale are unpersuasive.

17. *First*, the claim that a given item might advance the Defence's general understanding of the case alone does not sufficiently meeting the low threshold to substantiate its materiality.

18. *Second*, the subjects here are *Defence Witnesses*. Presumably, the Defence has been and is well-placed to have determined the nature and extent of relevant and/or material communications that its witnesses have had in respect of this case.

19. Thus, while the Request contends for instance that "the disclosure of the Targeted CSTs and related CDRs are necessary to the Defence preparation of its examination"[18] of P-4684. In fact the Defence does not require the relevant CSTs to examine D30-4864 regarding the underlying CDRs. It already has the relevant underlying CDRs in its possession and is at liberty to examine this witness on any

[18] ICC-01/14-01/18-2367, para. 28.

matter that it deems necessary. Contrary to the Defence's suggestion, there is no urgency in obtaining the CSTs prior to his testimony.

20. In any event, the Request fails to explain how or why the requested items are material to its preparation, offering up only an unsubstantiated assertion. This is manifestly insufficient. As Trial Chamber IX observed in the *Ongwen* case:

> "without anything further such as a direct connection to the charges or a live issue in the case, this would not in and of itself amount to information 'material to the preparation of the Defence' within the meaning and for the purposes of Rule 77 of the Rules. Bearing in mind the above, the Chamber is not satisfied that the Defence has met the low threshold under Rule 77 of the Rules to show that the database would have been 'material to the preparation of the Defence' in the sense of undermining the Prosecution case or supporting a line of argument of the Defence."[19]

21. *Finally*, there are a few important points that the Chamber should consider in evaluating the Request, namely: (a) that the Defence has been in possession of the relevant underlying CDR (for the most part, for years) from which Prosecution analytical CSTs have been generated, which belies the 'materiality' of the CSTs sought; (b) the Defence has generated, used and submitted its own CSTs in the proceedings, and the Request identifies no disability in Defence being able to do so in the prevailing circumstances; and (c) the Prosecution has undertaken to disclose any CDRs pertaining to Defence witnesses P-4011, P-1989, P-4013, P-5013, P-3010, P-5012 and P-3011 that are in fact material to the Defence's preparation.

D. All Relevant CDRs have been disclosed

[19] ICC-02/04-01/15-1734, para. 22 (followed in *Al Hassan – see* ICC-01/12-01/18-859-Red, paras. 9-10)

22. The Prosecution refers to and incorporates its previous submissions that it has fully discharged its disclosure obligations in relation to providing the Defence with all CDR material to its preparation.[20] Again, the current Request does not explain how any undisclosed CDR of its prospective witnesses is material to its preparation.[21] Rather, the Request is impermissibly generalised and speculative. And, insofar as the Defence's ability to prepare for the CSTs that the Prosecution may use in its examination of the Defence witnesses, this is addressed by the conduct of proceedings decision which provides for the Parties and Participants to prepare and provide lists of the documents they intend to use in the examination of witnesses.

23. The Request fails to provide any compelling exception for CDR evidence, and particularly CDR evidence that has long been in the Defence's possession.

E. CSTs of Witnesses P-3010 and P-5013

24. The Prosecution will already be including the relevant CSTs that it intends to use in the questioning of Defence witnesses P-3010 and P-5013 in their respective examination lists . These will of course include any relevant line references in the underlying CDRs. This should already address the Defence's concerns without the need for further intervention. Yet, should the Chamber deem it necessary for the Defence to receive these CSTs at an earlier time, the Prosecution is amenable to providing them earlier than the existing deadline of one day prior to the witness's testimony.[22]

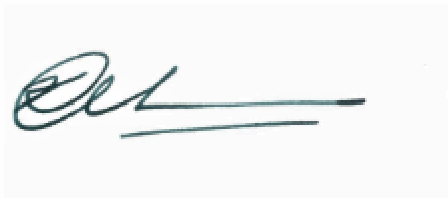
25. The Prosecution can confirm that, based on the current information at its disposal, there will be no further CSTs used with any other remaining witnesses on

[20] ICC-01/14-01/18-2070, paras. 3-4.
[21] *See* ICC-01/12-01/18-859-Red, para 10.
[22] *See* ICC-01/14-01/18-631, para. 42.

the Yekatom Defence list. This is however subject to change, should the Prosecution be provided with any additional attribution information.

III. CONCLUSION

26. For the above reasons, the Chamber should dismiss the Request in all respects



Karim A. A. Khan KC, Prosecutor

Dated this 20th day of February 2024
At The Hague, The Netherlands