

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **27 August 2019**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public with Confidential Annexes A and B

**Motion to Compel Inspection of Documents Used to Obtain
Call Location Records**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully move, pursuant to Rule 77, that the Chamber order the Prosecution to allow the Defence to inspect all Requests for Assistance (“RFAs”) from the Office of the Prosecutor, and the resulting judicial or administrative orders from domestic jurisdictions or ICC Judges or Chambers, used to obtain the mobile telephone records referenced in the Document Containing the Charges (“DCC”) and its annexes. These items are material to the preparation of the Defence, which plans to bring a motion to exclude call location evidence at or before the confirmation hearing if that evidence had not been obtained pursuant to a judicial order supported by sufficient facts.

RELEVANT PROCEDURAL HISTORY

2. On 19 August 2019, the Prosecution filed its DCC.¹ A review of the DCC indicates that the Prosecution has obtained call data records for mobile phones of Mr. Yekatom as well as a large number of other persons associated with the Anti-Balaka.² Those call data records include call location data that provides information on the location of Mr. Yekatom or others at a given place and time by recording the particular cell tower used to connect the call.³
3. On 22 August 2019, the Defence requested that the Prosecution allow it to inspect the documents requested in this motion. The Defence explained that such information was material to the preparation of a motion, pursuant to Article 69(7), to exclude the call data before the confirmation hearing.⁴

¹ [ICC-01/14-01/18-282-Conf-AnxB1](#).

² [ICC-01/14-01/18-282-Conf-AnxJ1](#).

³ See, for example, [ICC-01/14-01/18-282-Conf-AnxJ1](#), pp. 221-222 placing Mr. Yekatom at Mbaiki and Pissa at times relevant to crimes alleged in the DCC.

⁴ Yekatom Defence letter ARY-2019-0056 (attached as Annex A).

4. On 23 August 2019, the Prosecution declined to furnish the requested material.⁵

RELEVANT PROVISION

5. Rule 77 provides that:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

6. Article 69(7) provides that:

Evidence obtained by means of a violation of this Statute or internationally recognized 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.

ARGUMENT

7. The Appeals Chamber has held that the provisions of Rule 77 must be construed broadly.⁶ In a more recent decision, the Appeals Chamber further clarified that “any assessment of whether information is material to the preparation of the defence pursuant to rule 77 should indeed be made on a *prima facie* basis. This places a low burden on the defence. It is emphasised that rule 77 concerns material that the defence is entitled to have disclosed to it in order to prepare its defence. It may be that information that is material to the

⁵ A copy of the email from the Prosecution is attached as Annex B.

⁶ *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, [ICC-01/04-01/06-1433](#), 11 July 2008, paras 77-78; *Prosecutor v. Banda & Jerbo*, 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”, [ICC-02/05-03/09-501](#), 28 August 2013, para. 38.

preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of the *prima facie* assessment.”⁷

8. In the *Bemba et al.* case, the Appeals Chamber held that the legal framework of the Court does not contain any provision stipulating that RFAs must be disclosed to the accused person. Whether a request for assistance must be disclosed under Rule 77 necessarily depends on the content, context, and purpose of any individual request for assistance in the specific circumstances of each case to determine if its disclosure is material to the preparation of the defence.⁸
9. While the specific RFAs to Cameroon that were the subject of that appeal were found not to be material to the preparation of the defence, RFAs that were issued to the Government of Austria to obtain Western Union records, as well as the subsequent administrative and judicial orders in Austria, were fully disclosed to the Defence when the admissibility of the Western Union records were challenged pursuant to Article 69(7) and were an essential ingredient in the consideration of the question of whether the evidence should have been excluded pursuant to Article 69(7).⁹

⁷ *Prosecutor v. Banda & Jerbo*, 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”, [ICC-02/05-03/09-501](#), 28 August 2013, para. 42.

⁸ *Prosecutor v. Bemba*, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aime Kilolo Musmaba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidele Babala Wandu and Mr. Narcisse Arido against the Decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, [ICC-01/05-01/13-2275-Red](#), 8 March 2018, para. 641.

⁹ *Prosecutor v. Bemba*, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aime Kilolo Musmaba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidele Babala Wandu and Mr. Narcisse Arido against the Decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, [ICC-01/05-01/13-2275-Red](#), 8 March 2018, paras. 227-232.

10. The records being sought by the Defence are of the same nature (RFAs and the resulting orders) and sought for the same purpose (Article 69(7) motion) as those disclosed in the *Bemba et al.* case.
11. The Appeals Chamber has ordered the disclosure of RFAs pursuant to Rule 77 in other circumstances where they were related to an issue in dispute.¹⁰ In the *Ongwen* case, the Single Judge of the Trial Chamber held that RFAs that led to information that the Prosecution relied upon as incriminating evidence must be disclosed as material to the preparation of the defence.¹¹
12. In a case directly on point from the Special Tribunal for Lebanon, the Trial Chamber ordered disclosure of the RFAs used to obtain telephone call records where the defence indicated that the RFAs were necessary to allow it to challenge the legality and make a motion to exclude the evidence for violation of the right to privacy.¹²
13. The fact that the Article 69(7) motion will be brought at the confirmation hearing, rather than the trial, is of no moment. A suspect has the right to seek the exclusion of evidence pursuant to Article 69(7) at the confirmation hearing. In the *Lubanga* case, the Pre-Trial Chamber fully considered Lubanga's Article 69(7) motion challenging the search and seizure of items from his home, although ultimately declining to exclude the material in light of the limited scope of the confirmation hearing.¹³ In the same vein, the limitation of the scope

¹⁰ *Prosecutor v. Lubanga*, Decision on Mr. Thomas Lubanga's Request for Disclosure, [ICC-01/04-01/06-3017](#), 11 April 2013, para. 11.

¹¹ *Prosecutor v. Ongwen*, Decision on Disclosure Issues Arising Out of First Status Conference, [ICC-02/04-01/15-457](#), 7 June 2016, paras. 12-14.

¹² *Prosecutor v. Ayyash et al.*, Decision Reconsidering 'Decision on the Oneissi Defence Motion for Disclosure of Requests for Assistance', 7 November 2014, [STL-11-01/T/TC/F1875](#), 6 March 2015, para. 20.

¹³ *Prosecutor v. Lubanga*, Décision sur la confirmation des charges, [ICC-01/04-01/06-803](#), 3 February 2007, paras. 62-90.

and purpose of the confirmation proceedings has no bearing on the Prosecution's disclosure obligation under Rule 77.

14. Article 69(8), which provides that "when deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law", does not make the RFAs or resulting orders from the State immaterial to an Article 69(7) challenge. In fact, inspection of the RFAs and resulting orders are necessary to determine if the telephone records were obtained in application of a State's national law, and how. In the *Bemba et al.* case, it was only when comparing the dates of the RFAs and resulting court orders with the dates that the Prosecution received the material that the Defence was able to develop the grounds for its Article 69(7) motion that the Prosecution had inspected the Western Union records before the order had been signed.¹⁴
15. Therefore, the RFAs and resulting domestic orders are material to the preparation of the Article 69(7) motion that the Defence wishes to bring at or before the confirmation hearing. Absent inspection of that material, the Defence cannot even determine whether the telephone records relied upon by the Prosecution were obtained pursuant to a court order or not, let alone know the contents of any court order and the facts provided to obtain it.
16. As reflected in the DCC, the Prosecution proposes to prove at the confirmation hearing, through the telephone records, that Mr. Yekatom was at certain locations at the time the crimes charged in the indictment took place.¹⁵ The Defence will contend that Mr. Yekatom has a privacy interest in telephone

¹⁴ *Prosecutor v. Bemba et al.*, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aime Kilolo Musmaba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidele Babala Wandu and Mr. Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", [ICC-01/05-01/13-2275-Red](#), 8 March 2018, para. 252.

¹⁵ [ICC-01/14-01/18-282-Conf-AnxJ1](#), pp. 221-222.

records that reveal his location and that this privacy interest requires that the Prosecution obtain a court order supported by sufficient facts before being allowed to review those records.

17. The Defence's position is supported by a 2018 decision of the United States Supreme Court in *Carpenter v. United States*. In that case, the Court held that a court order signed by a judicial officer and based on "probable cause" was required to obtain cell phone records that revealed the location of an individual when making or receiving a call.¹⁶ While this case is binding only in one national jurisdiction, it represents an emerging recognition of privacy rights in digital records.¹⁷
18. The Defence expects to contend, depending on the RFAs and resulting administrative and court orders, that the telephone records in his case were obtained in violation of his right to privacy, without a court order based on sufficient facts, and that therefore their admission would be antithetical to the integrity of the confirmation proceedings. Mr. Yekatom needs the RFAs and resulting administrative and judicial orders to do so.

CONCLUSION

19. The Defence has demonstrated that the RFAs and resulting orders are material to the preparation of the defence. The Pre-Trial Chamber is respectfully requested to order the Prosecution to make them available for inspection by the Defence forthwith.

¹⁶ *Carpenter v. United States*, 138 S.Ct 2206 (2018).

¹⁷ Margot E. Kaminiski, 'Carpenter v. United States: Big Data is Different', George Washington Law Review (2 July 2018) (available at <https://www.gwlr.org/carpenter-v-united-states-big-data-is-different/>).

RESPECTFULLY SUBMITTED ON THIS 27TH DAY OF AUGUST 2019



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