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No.: ICC-01/14-01/18
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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Prosecution's Response to the YEKATOM Defence "Motion to Compel Inspection
of Documents Used to Obtain Call Location Records", ICC-01/14-01/18-294**

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. The Office of the Prosecutor (“Prosecution”) defers to Pre-Trial Chamber II (“Chamber”) discretion regarding the disposition of the YEKATOM Defence’s “Motion to Compel Inspection of Documents Used to Obtain Call Location [sic] Records” (“Motion”).¹ The Prosecution is prepared to disclose the RFAs and “resulting orders” in the interests of promoting the efficiency of the confirmation proceedings and reducing unnecessary litigation.

2. However, the factual basis and legal purpose advanced for the inspection or disclosure sought in the Motion is tenuous and therefore, not *prima facie* ‘material’ to the Defence’s preparation within the meaning of rule 77 of the Rules of Procedure and Evidence (“Rules”), particularly given the limited scope and purpose of the Confirmation Hearing. Nor, does the inspection sought fall within the meaning and spirit of the Chamber’s clear direction to disclose only what is *truly relevant* or necessary for the Confirmation Hearing.²

II. SUBMISSIONS

3. The Motion’s assertion that access to requests for assistance (“RFAs”) and resulting orders concerning the Prosecution’s acquisition of call data records (“CDR”) is ‘material’ for the Defence’s preparation for the Confirmation Hearing under rule 77 is tenuous at best. The purpose and scope of the Confirmation Hearing is to determine whether the Prosecution has substantiated the charges it has brought to the requisite legal standard. Efforts to expand its purpose and scope serve only to increase litigation, turn the process into a mini-trial, and reduce its expeditiousness.

¹ ICC-01/14-01/18-294.

² ICC-01/14-01/18-64-Red, para. 18

4. In prior pre-confirmation proceedings, Pre-Trial Chambers have rejected Defence attempts to expand the requirements of disclosure. In the *Bemba et al* case, as concerned a similar request for disclosure of RFAs, the Single Judge of Pre-Trial Chamber II recognised “that, as a matter of principle and as noted by the Prosecutor, requests for cooperation are *per se* irrelevant for the purposes of determining the admissibility of evidence which might be retrieved as a result of their implementation and are not intended as evidence themselves.”³

5. Additionally, the Prosecution does not ordinarily disclose RFAs or communications between the Prosecution and third parties on investigative matters. These are confidential and sensitive documents dealing with requests for information and are not intended to constitute evidence. Experience has shown that the effectiveness of future cooperation is harmed when State’s Parties confidences are disclosed.

6. The Defence’s reference to United States Supreme Court jurisprudence is inapposite. Even if it were arguably analogous in principle, it still misses the mark. The *Carpenter* case involved a dispute about constitutional limitations on the ability of law enforcement personnel to obtain CDR. It did not concern the disclosure of CDR-related materials during pre-trial proceedings.⁴ Ironically, were US federal law applied, the Defence’s stated intention to challenge the admissibility of the CDR evidence at this stage of the proceedings would fail: specifically, Rule 5.1(e) of the Federal Rules of Criminal Procedure prohibits objections to evidence on the ground that it was unlawfully acquired in the context of a preliminary hearing. The rationale for the rule applies equally here, given the present stage of the proceedings: “Allowing objections to evidence on the ground that evidence has been illegally obtained would require two determinations of admissibility, one before the

³ ICC-01/05-01/13-453, p. 4.

⁴ *Carpenter v. United States*, 138 S. Ct. 2206.

[preliminary hearing] and one in the [trial]. The objective is to reduce, not increase, the number of preliminary motions.”⁵

7. Lastly, the YEKATOM Defence’s nearly five-month delay in raising this issue belies, and is inconsistent with, its claim of ‘materiality’ regarding the information sought. The Defence were aware on 26 March 2019 of the Prosecution’s intention to rely on CDR evidence. As the Chamber is aware, the Defence’s first request for any related documentation was made on 22 August 2019, demanding a Prosecution response within 48 hours.

8. The established jurisprudence of the Court makes clear that the requested material does not fall under a routine or *per se* Prosecution disclosure obligation,⁶ but instead requires the establishment of a colourable claim of ‘materiality’. However, while the Defence’s substantiation of a legal or factual basis in the Motion for the material sought is arguable, the Prosecution nevertheless defers to the Chamber should it require the inspection or disclosure of the RFAs at this stage, in the interest of promoting the efficiency of the proceedings.

9. That said, such inspection or disclosure would require time. RFAs are not routinely disclosed, and are considered sensitive and highly confidential documents relating to State cooperation. As such, they are not maintained in a form that can be readily disclosed or inspected. Thus, to prepare the requested material for disclosure or inspection, the Prosecution will require at least three weeks to locate the responsive materials, register, review, and redact them as appropriate, given that they concern matters currently under investigation.

⁵ FED. R. CRIM. P. 5.1(e), available at https://www.law.cornell.edu/rules/frcrmp/rule_5.1 (emphasis added).

⁶ ICC-01/05-01/13-2275-Red, paras. 641-642.

III. CONCLUSION

10. For the foregoing reasons, the Prosecution defers to the Chamber discretion.



Fatou Bensouda, Prosecutor

Dated this 2nd day of September 2019

At The Hague, The Netherlands