



Original: English

No. ICC-01/14-01/18

Date: 24 July 2020

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***

Public

Decision on the Yekatom Defence Motion to Exclude Call Location Evidence

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Kweku Vanderpuye

Counsel for the Alfred Yekatom

Mylène Dimitri
Peter Robinson

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoop

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(8)(b), 64(9)(a), 69(4) and 74(2) of the Rome Statute (the ‘Statute’) and Rules 63(2) and 64(1) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Motion to Exclude Call Location Evidence’.

I. Procedural history and submissions

1. On 13 February 2015, the Prosecution sent a request for cooperation to the Central African Republic (the ‘CAR’) authorities.¹ Therein, the Prosecution requested the assistance of the CAR authorities to obtain call data records (the ‘CDRs’), including call location data (the ‘CLD’), of a list of suspects under the Prosecution’s investigation whom the CAR authorities had mentioned in its communications with it.² Two phone numbers attributed to Mr Yekatom were included in this request.³
2. On 5 June 2015, the Prosecution sent a second request for cooperation to the CAR authorities, requesting CDRs of three additional phone numbers attributed to Mr Yekatom.⁴
3. On 19 August 2019, the Prosecution filed its document containing the charges (the ‘DCC’),⁵ including references to CDRs attributed to Mr Yekatom.⁶
4. During the pre-trial phase, the Yekatom Defence (the ‘Defence’) requested and obtained permission to review the requests for cooperation sent to the CAR authorities concerning the CDRs and the ‘resulting orders’.⁷

¹ See CAR-OTP-2117-0109-R02.

² See CAR-OTP-2117-0109-R02, at 0111-0112.

³ See CAR-OTP-2117-0109-R02, at 0114.

⁴ See CAR-OTP-2117-0129-R02, at 0134.

⁵ Document Containing the Charges, Annex B1 to the Prosecution’s Notification of Filing of the Document Containing the Charges and List of Evidence, ICC-01/14-01/18-282-Conf-AnxB1 (public redacted version notified on 18 September 2019, ICC-01/14-01/18-282-AnxB1-Red).

⁶ See Call Sequence Tables, Annex J1 to the Prosecution’s Notification of Filing of the Document Containing the Charges and List of Evidence, 19 August 2019, ICC-01/14-01/18-282-Conf-AnxJ1, pp. 221-234.

⁷ See Motion to Compel Inspection of Documents Used to Obtain Call Location Records, 27 August 2019, ICC-01/14-01/18-294 (with confidential Annexes A and B), paras 1, 19; Prosecution’s Response

5. On 29 June 2020, the Defence filed a motion seeking to exclude all CLD (the ‘Motion’).⁸ It submits that the CDR were collected without judicial authorisation⁹ and that the CLD should therefore be excluded as evidence pursuant to Article 69(7) of the Statute.¹⁰ It requests a ruling that prior judicial authorisation is required to obtain CLD, and that CLD obtained without such authorisation should be excluded as evidence pursuant to Article 69(7) of the Statute.¹¹
6. In order to substantiate its motion, the Defence requests the Chamber to find: (i) that information concerning the movement of a person, which is contained in the CLD, is protected by the international human right to privacy;¹² (ii) that the fact that Prosecution obtained the CLD without a prior judicial determination violated this right to privacy;¹³ and (iii) that the admission of the CLD concerning Mr Yekatom would be antithetical to and seriously damage the integrity of the proceedings.¹⁴
7. As to the timing of the Motion, the Defence submits that it is not premature since the Prosecution continues to obtain such CLD and the Chamber needs to adjudicate whether this praxis can continue without prior judicial authorisation.¹⁵ Should the Chamber not rule on the Motion at this stage, the Defence requests that it ‘take it under submission until the Chamber is ready to rule on the issue’, instead of rejecting it as premature’.¹⁶

to the Yekatom Defence “Motion to Compel Inspection of Documents Used to Obtain Call Location Records”, ICC-01/14-01/18-294, 2 September 2019, ICC-01/14-01/18-309, paras 1, 10; Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions, 3 September 2019, ICC-01/14-01/18-315-Conf (public redacted version notified on 3 February 2020, ICC-01/14-01/18-315-Red), para. 86, pp. 26-27.

⁸ Motion to Exclude Call Location Evidence, ICC-01/14-01/18-574, para. 10.

⁹ Motion, ICC-01/14-01/18-574, paras 9-10.

¹⁰ Motion, ICC-01/14-01/18-574, paras 1, 43.

¹¹ Motion, ICC-01/14-01/18-574, paras 1, 43.

¹² Motion, ICC-01/14-01/18-574, paras 5, 17-22, 43.

¹³ Motion, ICC-01/14-01/18-574, paras 1, 5, 23-30, 43.

¹⁴ Motion, ICC-01/14-01/18-574, paras 5, 31-40, 43.

¹⁵ Motion, ICC-01/14-01/18-574, para. 41.

¹⁶ Motion, ICC-01/14-01/18-574, para. 42.

8. On 10 July 2020, the Prosecution responded to the Motion, requesting the Chamber to reject it.¹⁷ In essence, the Prosecution submits that the Defence ‘fails to substantiate the statutory basis to exclude such evidence, and further, mischaracterises the relevant international human rights jurisprudence’.¹⁸
9. First, the Prosecution submits that the Defence does not meet its burden to show that the CLD was obtained in violation of any recognised international human right,¹⁹ asserting, *inter alia*, that said data was obtained ‘according to CAR law and consistently with international human rights law’, and that its collection was both ‘necessary and proportionate’.²⁰
10. Second, the Prosecution argues that the Defence fails to establish any violation of the Statute.²¹ Specifically, it submits that the Statute mandates ‘deference to domestic evidence collection procedures’ and that the Court shall not rule on the application of a state party’s law, pursuant to Article 69(8) of the Statute.²² It further submits that the CAR’s legislation does not require judicial authorisation to obtain CLD²³ and that the Defence does not allege any violation of national law.²⁴
11. Third, the Prosecution submits that the Defence fails to show how the admission of the CLD would be antithetical to and seriously damage the integrity of the proceedings.²⁵ In support, it alludes, *inter alia*, to the fact that ‘the reliability and accuracy of the evidence is not compromised’ and that collecting the CLD with a judicial authorisation ‘would have produced the exact same information’.²⁶

¹⁷ Prosecution’s Response to Yekatom’s Motion to Exclude Call Location Evidence, ICC-01/14-01/18-574, ICC-01/14-01/18-584 (the ‘Response’), para. 21.

¹⁸ Response, ICC-01/14-01/18-584, para. 1.

¹⁹ Response, ICC-01/14-01/18-584, paras 5-7.

²⁰ Response, ICC-01/14-01/18-584, para. 8.

²¹ Response, ICC-01/14-01/18-584, para. 15.

²² Response, ICC-01/14-01/18-584, para. 15.

²³ Response, ICC-01/14-01/18-584, para. 16.

²⁴ Response, ICC-01/14-01/18-584, para. 17.

²⁵ Response, ICC-01/14-01/18-584, paras 5, 18.

²⁶ Response, ICC-01/14-01/18-584, para. 18.

12. On 17 July 2020, the Electronic Privacy Information Center (EPIC) requested leave to file *amicus curiae* submissions pursuant to Rule 103 of the Rules in order to ‘aid the Chamber [...] to rule in an informed and just manner’.²⁷
13. On 23 July 2020, the Prosecution filed a request for leave to respond to the *amicus* request (the ‘Request for Leave to Respond’).²⁸ In such response the Prosecution would address why it opposes the *amicus* request and does not consider it to have a genuine *amicus* function.²⁹ The Prosecution further requests that parts of the *amicus* request should be dismissed *in limine* since they contains substantive submissions³⁰

II. Analysis

14. The Chamber notes that a request invoking the procedural bar under Article 69(7) of the Statute necessarily implies that the evidence in question – irrespective of the evidence admission regime yet to be adopted by the Chamber – has already been submitted by a party or participant, pursuant to Article 69(3) of the Statute. However, the Chamber also takes note of the fact that the Defence itself acknowledges that it has filed its Motion ‘before the Prosecution has tendered the [CLD] through a witness or bar table motion’.³¹
15. The Chamber stresses that this does not prejudice the Defence in any way in its rights. Rule 64(1) of the Rules mandates the parties and participants to raise ‘issues relating to the relevance or admissibility [of evidence] [...] at the time when the evidence is submitted to a Chamber.’ Accordingly, the Defence is not deprived of its possibility to object to the evidence in question and to present its contentions at the time the Prosecution chooses to submit the evidence.
16. The Chamber further notes that Rule 64(1) of the Rules ‘exceptionally’ allows for objections to be raised later ‘when those issues were not known at the time

²⁷ Request for Leave to File *Amicus Curiae* Submission on Behalf of the Electronic Privacy Information Center (EPIC), ICC-01/14-01/18-591, paras 1, 11.

²⁸ Prosecution’s Request for Leave to Respond to the ‘Request for Leave to File Amicus Curiae Submission on Behalf of the Electronic Privacy Information Center (EPIC), ICC-01/14-01/18-591’, ICC-01/14-01/18-598.

²⁹ Request for Leave to Respond, ICC-01/14-01/18-598, paras 6-7.

³⁰ Request for Leave to Respond, ICC-01/14-01/18-598, paras 8-9, 11.

³¹ Motion, ICC-01/14-01/18-574, para. 41.

when the evidence was submitted'. The provision, however, does not provide for any other exception – namely, for objections to be raised *prior* to the submission of evidence. It is therefore clear that the parties and participants cannot raise any such objections before the time of submission.³²

17. Accordingly, under the specific circumstances, the Chamber considers the Motion to be premature and therefore rejects it without prejudice to any future application on the issues raised in the Motion.
18. Finally, in light of the above, the Chamber does not consider that it requires *amicus curiae* submissions from EPIC at this juncture and consequently rejects its request for leave to present observations.
19. Since the request for *amicus curiae* submissions is rejected, the Chamber consequently also rejects the Request for Leave to Respond.

³² See Appeals Chamber, The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution's list of evidence”, 3 May 2011, ICC-01/05-01/08-1386 (the ‘Bemba AC Judgment’), paras 48-49.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Motion,

REJECTS the EPIC's request for leave to file *amicus curiae* submissions,

REJECTS the Request for Leave to Respond.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt

Presiding Judge



Judge Péter Kovács



Judge Chang-ho Chung

Dated 24 July 2020

At The Hague, The Netherlands