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**International
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Court**



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

Date: **2 September 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

**Prosecution's Response to the Yekatom Defence's "Motion for Finding a Disclosure
Violation and for Remedial Measures", ICC-01/14-01/18-301-Conf**

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”) requests Pre-Trial Chamber II (“Chamber”) to dismiss the YEKATOM Defence’s Motion for Finding of Disclosure Violation and for Remedial Measures (“Motion”),¹ joined by the NGAISSONA Defence.² The Prosecution has not violated article 67(2) and the requested relief is not necessary.

II. CONFIDENTIALITY

2. The Response is filed as “Confidential” as it responds to a Motion with the same designation.

III. SUBMISSIONS

A. The information about Witness P-0801 is publicly available and known to the Defence

3. The Prosecution rejects the assertion that the Defence’s chance to make effective use of the right provided in article 61(6) has been impeded in any appreciable way due to the inaccessibility of material bearing on the credibility of Witness P-0801.

4. As made clear in the Prosecution’s e-mail to the Defence dated 26 August 2019 (Annex B to the Motion), information regarding the credibility of Witness P-0801 arising out of the *Bemba et al.* case is readily available in the public sphere. A number of seminal filings and decisions, such as the Prosecution’s application for warrants of arrest,³ the Prosecution’s submission on the confirmation of charges,⁴ the Trial

¹ ICC-01/14-01/18-301-Conf and Confidential Annexes A and B.

² ICC-01/14-01/18-303-Conf.

³ ICC-01/05-01/13-19-Red, paras. 6, 9, 14, 111-112.

⁴ ICC-01/05-01/13-597-AnxB-Red, paras. 33-34, 44, 91, 140, 142-144, 147-154, 159, 162-164, 169, 174, 177, 219, 221, 225, 411, 420, and fns. 57, 349, 483.

Chamber VII's article 74 Decision,⁵ and the Appeals Chamber's final Judgement on the article 74 judgement of conviction,⁶ reference Witness P-0801's involvement in the offences charged in that case. Additional filings from the Accused in that case also detail Witness P-0801's involvement in the offences, including *inter alia*, submissions by the Bemba Defence, which comprised members of the current YEKATOM Defence.⁷

5. The Defence does not require access to the underlying evidence in the case to challenge or impugn the credibility of Witness P-0801, when it has access to a trial judgement which finds Witness P-0801 to have been involved in the crimes charged on facts proven, through the sworn testimony of the witnesses adduced beyond reasonable doubt. This is an established fact. The trial judgment is by far, the most cogent information the Defence can rely upon at the confirmation hearing to challenge the credibility of Witness P-0801. Indeed, at footnote 17 of paragraph 14 of the Motion, the Defence reference the extensive findings of the *Bemba et al.* Trial Judgement.

6. The transcripts of Witness P-0801's interview were disclosed to the Defence as incriminating evidence on 13 June 2019. Notably, YEKATOM's current Defence team, including Lead Counsel, Associate Counsel, and Case Manager all took part in the proceedings in the *Bemba et al.* case. All had/have access to the entire record of the proceedings – including filings, Prosecution disclosure⁸ and the statements of the witnesses that are the subject of their present requests. Moreover, they have

⁵ ICC-01/05-01/13-1989-Red (*see paras.* 125, 131, 136, 137, 142-144, 148-149, 153, 162, 313, 320, 323, 326-328, 331, 334, 339, 341-342, 344, 363, 389, 392, 394, 412-414, 417, 420, 424, 426-435, 451-453, 472, 509, 512-514, 528, 532, 716, and *fns.* 568, 570) ("Trial Judgement").

⁶ ICC-01/05-01/13-2276-Red, paras. 317-321.

⁷ *See e.g.*, ICC-01/05-01/13-2281-Red, ICC-01/05-01/13-2281-AnxB-Red (Bemba Defence); ICC-01/05-01/13-2145-Corr-Red (Arido Defence).

⁸ Members of Yekatom's Defence team were (and are still) on the Bemba Defence team in the *Bemba et al.* case; Yekatom's Associate Counsel was a member of the Mangenda Defence team on appeal. Thus, members of his Defence had/have access to all confidential filings in the *Bemba et al.* case, including the transcripts of the witnesses and their statements (now sought as article 67(2) regarding Witness P-0801). *See* ICC-01/05-01/13-2105 and ICC-01/05-01/13-2338 (Counsel Mylène Dimitri) and (Case Manager Yuqing Liu), and ICC-01/05-01/13-2101 (Associate Counsel Peter Robinson).

extensive personal knowledge of the legal and factual findings that the Trial Chamber made relating to Witness P-0801's conduct in that other case. Although the NGAISSONA Defence, which has joined the Motion,⁹ is not in the same position as the YEKATOM Defence *vis-à-vis* the *Bemba et al.* proceedings, the fact remains that the most pertinent information going to the credibility of Witness P-0801 is public, easily searchable, and accessible. Further, it is evident that the NGAISSONA Defence is in contact with the YEKATOM Defence regarding disclosure matters, given that they are in copy on the YEKATOM Defence's email and the Prosecution's response.

7. Given the public availability of information concerning Witness P-0801's involvement in the offences at issue in the *Bemba et al.* case, and the protected status of the witnesses and information sought, the Prosecution does not consider that the Defence has been unfairly deprived of article 67(2) information. The salient information is the same as that found in the public judgement and alleged in the public submissions of the Prosecution, which is also known particularly to those Counsel involved in the case.

B. The Defence has had sufficient time to review the public information on Witness P-0801

8. The Defence has had sufficient time to review the publicly available information involving Witness P-0801 in the *Bemba et al.* case, to seek access to the Court records of the case as appropriate, seize the Prosecution with a demand for it to prioritise any request for variances of applicable protective measures for any specific witnesses, and/or to make such other applications as may be necessary. Further, since the June disclosure of the identity of Witness P-0801, there has been ample time for the Defence to request additional materials ahead of the 23 August 2019 letter to the Prosecution, particularly knowing (in the case of the YEKATOM

⁹ ICC-01/14-01/18-303-Conf.

Defence) that information relevant to this issue in the Prosecution's possession (*i.e.*, witness statements) were protected by order of the Court.

9. Even if the Prosecution has not yet seized the relevant Chambers of the Court to vary protective measures – at a minimum – the Defence is not prejudiced by the inaccessibility of information in the Prosecution's possession, given that there is manifestly sufficient information on this limited and collateral issue publicly available. The Defence's decision not to seek access to the confidential record of the *Bemba et al.* case two months ago was not the result of a Prosecution failure, but of a Defence strategy to lie in wait, rather than raising the issue expeditiously. If there is any prejudice — which is disputed — that is its cause.

C. The information sought by the Defence is collateral

10. It is significant that the information bearing on Witness P-0801's involvement in the *Bemba et al.* offences (the gravamen of the Defence's complaint), does not concern any substantive circumstance, event, fact, or even the actual evidence provided by Witness P-0801 in *this* case and on which the Prosecution relies. It is a wholly collateral matter. In these particular circumstances, the Defence is fully able to challenge the Witness's credibility at the confirmation hearing through the publicly available material and bring forward their own arguments of relevance to the case to be weighed by the Chamber.

11. For the purposes of the confirmation hearing, it is therefore unnecessary to disclose any of the underlying evidence in the Prosecution's possession from the *Bemba et al.* case, given that this collateral material is already subsumed by the Trial Chamber's findings. Furthermore, P-0801's involvement in witness coaching is evident from, let alone the Prosecution's own submissions — such as, for instance, that Witness P-0801 was “involved in the Common Plan” and “illicitly coached

witnesses”,¹⁰ or that Witness P-0801 told a group of witnesses “that they would receive money and the chance to seek asylum in Europe in return for their false testimony”,¹¹ or that Witness P-0801 “illicitly coached D-2 and other potential witnesses on what to say.”¹² Accordingly, this is clearly not a disputed fact.

D. There is no compelling reason for Witness P-0801 to testify *viva voce* at the confirmation hearing

12. Article 61(5) states that the Prosecution may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial during the confirmation hearing. Due to the nature and purpose of the confirmation hearing, this Court has consistently decided that, absent compelling reasons to the contrary, the presentation of evidence in documentary form is the preferred modality by which evidence is introduced at this stage of the proceedings.¹³

13. In any event, the Chamber can, as appropriate, take judicial notice of filings and decisions concerning Witness P-0801 in the *Bemba et al.* case, including the Judgement and Appeal Judgement. On this, should the Defence genuinely intend to challenge Witness P-0801’s credibility on the basis of his involvement in the circumstances concerning the *Bemba et al.* case, the Chamber is well placed to weigh the information against the entirety of the available evidence on Witness P-0801. There is no compelling reason for a *viva voce* testimony.

14. As stated above, the information sought by the Defence is collateral. It does not go to the core or substance of any evidence provided by Witness P-0801 in this case. Further, Witness P-0801’s involvement and role in the article 70 offences, which go to

¹⁰ ICC-01/05-01/13-597-AnxB-Red, paras. 44, 221.

¹¹ ICC-01/05-01/13-597-AnxB-Red, para. 162.

¹² ICC-01/05-01/13-597-AnxB-Red, paras. 163,164, 225, 420.

¹³ *Prosecutor v. Bemba et al.*, Decision on “*Requête aux fins d’audition de témoins de la Défense à l’audition de confirmation des charges*” filed by the Defence of Aimé Kilolo Musamba, ICC-01/05-01/13-363, 25 April 2014, pp. 3-4.

his general credibility, was information well known to the Defence, given its very public nature. However, the Chamber should also bear in mind that members of the YEKATOM Defence in particular, actually have access to the requested information, disclosed through the *Bemba et al.* case in which they participated and continue to do so.

IV. CONCLUSION

15. For the above reasons, the Prosecution requests the Chamber to dismiss the Defence Motion.



Fatou Bensouda, Prosecutor

Dated this 2nd day of September 2019

At The Hague, The Netherlands