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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

Public redacted version of "Prosecution's Response to the Yekatom Defence Urgent application for redaction lift in document CAR-OTP-2130-0140 (ICC-01/14-01/18-1599-Conf)", 11 October 2022, ICC-01/14-01/18-1606-Conf

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should dismiss the Yekatom Defence’s request for the lifting of redactions regarding an Investigation Report¹ (“Request”)² duly disclosed by the Office of the Prosecutor (“Prosecution”).

2. The Request fails to demonstrate the materiality of the identity of B.3–0335 and a telephone number with which the individual communicated with Prosecution investigators (“Information Sought”). The arguments advanced under rule 77 of the Rules of Evidence and Procedure (“Rules”) and article 67(2) are conclusory or otherwise predicated on mere conjecture. Finally, as concerns the retention of the standard redactions to the identity of B.3–0335 as an innocent third party, the Request misunderstands and misapplies the Chamber’s 8 October April 2020 Decision on Protocols at Trial.³

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential “*Ex parte*, available only to the Prosecution, the Yekatom Defence and the Registry,” as it responds to a document bearing this classification. A public redacted version will be filed as soon as practicable.

¹ See CAR-OTP-2130-0140.

² ICC-01/14-01/18-1599-Conf (“Request”).

³ ICC-01/14-01/18-677.

III. SUBMISSIONS

A. The Information Sought is not material and is not disclosable under rule 77 or article 67(2)

4. The Court's jurisprudence is clear, in that 'materiality' is not established under rule 77 on conclusory assertions that information is interesting, or that it *might* turn out to be helpful in some way. Rather, the assessment, whether made *proprio motu* by the Prosecution, or as conveyed to it by the Defence must be concrete, not speculative. Where information is not otherwise assessed as 'material' by the Prosecution, the burden is on the Defence to demonstrate the materiality of the information. Several cases speak to this issue, including *Ongwen*,⁴ *Al Hassan*,⁵ and *Lubanga*.⁶

5. Disclosure is unquestionably warranted where the items under consideration "are material" to the preparation of the Defence. The standard is not precatory or speculative. Rather, it is a concrete one. For instance, Trial Chamber III has held that "the Prosecution is required to make *fact-specific* decisions for each such item to determine whether it is disclosable pursuant to Rule 77 or Article 67(2)."⁷ Speculation is not a basis for statutorily warranted disclosure. By contrast, the Request is rife with conjecture.

6. Absent an *affirmative assessment* of the *effective* materiality of the Information Sought, rule 77 does not apply. Nor, would any claim under article 67(2) lie. Thus, in the *Lubanga* case, Trial Chamber I held that where the disclosure of information

⁴ See ICC-02/04-01/15-1734.

⁵ ICC-01/12-01/18-859-Red.

⁶ See ICC-01/04-01/06-2147.

⁷ See ICC-01/05-01/08-3336, para. 12 ; ICC-01/14-01/18-1438-Conf, para. 9 (noting that "[t]he determination of which objects are 'material to the preparation of the defence depends upon the specific circumstances of the case").

“would have no material effect ... [i]t does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules.”⁸

7. By contrast, the Request suggests that items are disclosable for the mere asking unless the Prosecution demonstrates that they are not material. However, the burden is clear under the Court’s jurisprudence — an item is *only* disclosable under rule 77 where its provisions (in this case ‘materiality’) are affirmatively demonstrated. The Request ignores this well-settled principle.

i. [REDACTED] Identity is collateral and not material

8. Significantly, the circumstances regarding “[REDACTED]” as related by P-1839, do not concern any incident or crime of consequence in this case. The “allegations”⁹ made by P-1839 do not form part of the charges against Yekatom or any part of the narrative underpinning the charged events in this case.

9. The Information Sought concerns a *collateral* issue, at best. Even if it did not, there is no founded assertion that B.3–0335 actually is [REDACTED] (not ‘might be’, or ‘potentially could be’). To the contrary, as the Investigation Report suggests,¹⁰ B.3–0335 was never positively identified as [REDACTED]. As such, he must be regarded as an innocent third-party within the meaning of the Protocol. That Prosecution investigators may have concluded that B.3–0335 could be [REDACTED] is (a) normatively internal work product;¹¹ and (b) immaterial in any event, as the Defence appears to acknowledge.¹²

10. The argument that the Prosecution’s assessment requires the Defence to “accept[] that it is mere coincidence that the individual who happened to answer the phone

⁸ ICC-01/04-01/06-2147, para. 24.

⁹ ICC-01/14-01/18-1599-Conf, para. 2, 5.

¹⁰ CAR-OTP-2130-0140.

¹¹ See e.g., ICC-01/04-01/07-249, paras. 46-49; ICC-01/04-01/07-361, paras. 50-53.

¹² ICC-01/14-01/18-1599-Conf, para. 19 (asserting materiality “investigators’ conclusions notwithstanding”).

number of “[REDACTED]” was not in fact “[REDACTED]” and further, that he, like “[REDACTED]”, was also allegedly tortured by the Anti-Balaka, and was rendered handicapped (whether permanently or otherwise) as a result”,¹³ misses the point entirely.

11. The issue here is not whether or not there is a coincidence, but whether there is ascertainable certainty about a set of facts that *is material*. The premise of the Defence’s claim of ‘materiality’ here turns the Court’s disclosure paradigm on its head.

12. Further, the contention that P-1839’s narrative “regarding [REDACTED]’s arrest and torture at the hands of Mr Yekatom’s group are highly prejudicial” does not negate that the Information Sought is collateral.

13. Even if not collateral, the Information Sought is not material. Rather, it is cumulative to a wealth of other cogent evidence before the Chamber. Both the disclosure that has preceded the present disagreement, as well as the testimony elicited before the Chamber establishes that [REDACTED]’s case is cumulative and of marginal import (a) because it does not relate to any charge; and (b) the facts to which it goes, namely the conduct of Yekatom’s Group acting in a similar manner is already well-established in the record of the proceedings. Contrary to the Defence’s contentions, the materiality of the information sought is not only *not* “self-evident”, but non-existent. As the Court has recognised, albeit in another context, “[t]he “materiality” of a given fact depends on the nature of the case.¹⁴ It is not a mere academic or theoretical abstraction.

14. Moreover, as this Chamber (and others) has made clear, “it is not for the prosecution to offer everything in its possession on an issue to the defence for

¹³ ICC-01/14-01/18-1599-Conf, para. 20.

¹⁴ ICC-01/09-01/11-475, para. 11 (citations omitted).

inspection, in order for the latter to make its own selection.”¹⁵ In effect, the Request merely disagrees with the principle that it is for the Prosecution to decide which material in its possession is relevant to the Defence. It has done so in this case, which not only accounts for the Prosecution having previously lifted redactions regarding [REDACTED]’s phone number provided by P-1839, placing the Defence in a position to investigate, but also in providing internal work product.

ii. Provision of the Information Sought would have no material effect

15. The further disclosure of the Information Sought would have no ‘material effect’ on any matter of consequence to the proceedings. As noted, the Defence’s assertion that the Information Sought is material to establishing [REDACTED]’s identity is misguided. [REDACTED]’s identity is not a *material* issue in this case, nor is it necessarily related to one.

16. As is clear, the Prosecution does not have definitive information concerning his identity. The Defence confounds and confuses the legal standard triggering disclosure under the Court’s established jurisprudence. To be clear, the Prosecution is not required to disclose information as ‘material’ under rule 77 when it cannot (on the information available to it) affirmatively make an assessment as to a state of facts that is not otherwise *speculative*.

17. Regardless of the Prosecution investigators’ opinions about the identity of the individual who answered the phone, the fact is that the Prosecution has no affirmative information concerning their actual identity. For that reason, the Prosecution cannot assess that either this person’s call back number or their identity is material to the preparation of the Defence; its “potential” to be is not the standard, as elaborated below.

¹⁵ ICC-01/14-01/18-1438-Red, para. 19 (citing with emphasis ICC-01/05-01/08- 632, para. 20)

B. The Request advances speculative inferences and fails to meet the low threshold for disclosure

18. As Trial Chamber IX has observed, information which “may potentially” bear on an issue:

“without anything further such as a direct connection to the charges or a live issue in the case, 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.”¹⁶

19. Nothing in the Request avers, much less, substantiates the “low threshold under Rule 77 of the Rules to show that the [information] 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*.”¹⁷ Instead, the Request offers conjecture, asserting alternative and hypothetical arguments. For instance, to support its claim for the Information Sought under article 67(2), the Request speculates:

“... if “B.3 – 0335” is not in fact “[REDACTED]” – this would suggest that the number provided by P-1839 to Prosecution investigators is not that of “[REDACTED]”, which would then potentially affect the credibility of P-1839’s broader allegations regarding the latter.”¹⁸

However, the Request is silent on exactly why such a scenario is not merely speculative, does not exclude a simple error, or is not otherwise explainable as a number through which [REDACTED] could be reached as opposed to a defining a proprietary interest in the number. The fact that there is uncertainty as to the state of facts undermines the claim that there is a rule 77 issue, much less article 67(2) one.

¹⁶ See ICC-02/04-01/15-1734, para. 22; see also ICC-02/05-03/09-501 OA4, paras. 38-39, 42

¹⁷ See ICC-02/04-01/15-1734, para. 22 (emphasis added); see also ICC-01/12-01/18-859-Red, paras. 9-10.

¹⁸ ICC-01/14-01/18-1599-Conf, para. 21.

And, to the extent that the uncertainty itself may be material, it is already at the disposal of the Defence.

20. As previously noted, the Court's jurisprudence draws a clear distinction between the disclosability of documents that may be 'interesting' or even 'helpful' to the Defence versus those which are actually and presently material to its preparation (*i.e.*, "*nécessaires à la préparation de la défense de l'accusé*").¹⁹ This is the essence, and failing of the Request.

21. Thus, Trial Chamber X has explained that:

"When seizing the Chamber, the party making the request should be specific and demonstrate materiality of the information sought pursuant to Article 67(2) of the Statute or Rule 77 of the Rules, and particularly how the information has a *direct connection to the charges or a live issue in the case*."²⁰

The Request fails to demonstrate either.

C. The redactions to the Investigation Report remain fully justified

22. The contention that the Prosecution has not met its burden concerning the necessity to protect the safety of the individual concerned (*i.e.*, B.3-0335), should be rejected outright.

23. The circumstances under which this trial has proceeded thus far, not the least of which, has involved Yekatom's repeated circumvention of the Chamber's contact restrictions order,²¹ as well as leaks of confidential information, instances of witness

¹⁹ See *Règle 77 du règlement de procédure et de preuve* (emphasis added).

²⁰ ICC-01/12-01/18-768-Conf, para. 13 (emphasis added).

²¹ ICC-01/14-01/18-1602-Conf-Exp (as recently as 10 October 2022, the Registry alerted the Chamber to another of Yekatom's suspect conversations had from the Detention Centre).

intimidation, threats, and physical interference, amply justify the caution exercised in relation to the retention of appropriate redactions to marginally relevant information.

24. Moreover, B.3–0335 has been properly assessed to be an innocent third-party. The arguments advanced in Request are circular and misread the Chamber’s Protocols Decision.²² In essence, the Defence argues that because it *assumes* that B.3–0335 is [REDACTED] “it can be inferred that “B.3 – 0335” would fall squarely within the above exception to category B.3 redactions.”²³

25. *First*, the Defence advances a conclusion which is the same as the assumption on which its argument is premised — i.e., it is circular. *Second*, even if it were not so, B.3–0335 remains properly designated an innocent third-party for other reasons.

26. The Protocol Decision provides that the designation of an innocent third-party is a determination to be made by the disclosing Party. Specifically, it states that “[a]n assessment of whether or not information is relevant to a known issue in the case is an assessment that the disclosing party is expected to make, on a case-by-case basis, in good faith.”²⁴ The Request simply refuses to accept the Protocol Decision and the Prosecution’s good faith assessment here, arguing that:

“granting the Prosecution the prerogative to unilaterally designate individuals whose names and identifying information have come up in its investigations as ‘innocent third parties’ ... would create a problematic disincentive to pursue investigative leads that would suggest the contrary, so as to obstruct Defence investigations.”²⁵

²² ICC-01/14-01/18-1599-Conf, paras. 25-27 (citing ICC-01/14-01/18-677, para. 71 (“Protocols Decision”).

²³ ICC-01/14-01/18-1599-Conf, para. 21.

²⁴ ICC-01/14-01/18-677, para. 73 (see also, para. 72 rejecting the Yekatom Defence’s proposed amendments to the Redaction Protocol, in view of arguments set out at, *inter alia*, at para. 66-68).

²⁵ ICC-01/14-01/18-1599-Conf, para. 28.

27. This contention was previously advanced in one form or another by the Yekatom Defence, and simply re-litigates the Protocol Decision rejecting it, among others.²⁶ Whether or not the Prosecution chose to conduct “follow-up inquiries with the aim of verifying “B.3-0335’s” claims”²⁷ regarding to an event that is *not charged* does not thereby render the issue *material*. Nor, does it diminish the scope and propriety of the Protocol Decision.

28. Lastly, the contention that if B.3–0335 is not [REDACTED] “his claim to have been tortured at the hands of the Anti-Balaka disqualifies him as an “innocent third party”, given that it implies he was “physically present at the scene of an alleged crime”, misreads the Protocol Decision.

29. The reference to an individual’s presence ‘at the scene of an alleged crime’, is not an abstract notion. The Protocol Decision refers to a crime of consequence to the proceedings, if not one expressly charged; not just any crime, and not just any crime by the Anti-Balaka in this case. Followed to its logical extension, the Defence position would nullify the protection extended to innocent third-parties contemplated by the Protocol Decision, when such an individual may have knowledge of any crime committed anywhere at any point in time. This is clearly not the object of the Protocol Decision. Taken on its face, the position put forward in the Request would erode the statutory underpinnings — particularly article 68(1), which lie at the heart of the Protocol Decision and which, as applied here, are necessary and appropriate.

²⁶ ICC-01/14-01/18-677, para. 72.

²⁷ ICC-01/14-01/18-1599-Conf, para. 27.

IV. CONCLUSION

30. For the reasons above, the Prosecution requests that the Chamber reject the Request.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 18th day of October 2022
At The Hague, The Netherlands