

Pursuant to Trial Chamber V's Single Judge instruction, dated 17 August 2023, this document is reclassified as "Public".

**Cour
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**International
Criminal
Court**

Original: English

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

Date: 17 March 2023

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***

Confidential

**Prosecution's response to "Yekatom Defence Request for disclosure of
investigator's notes regarding interviews with P-1339
(ICC-01/14-01/18-1785-Conf)"**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the "Yekatom Defence Request for disclosure of investigator's notes regarding interviews with P-1339"¹ ("Request"). The Request lacks merit, is unsupported by any substantive law, and should be summarily dismissed.

2. The Defence concedes that it is already in possession of the information in question, duly disclosed by the Prosecution in the form of an Investigation Report.² What is sought here, is an order for the Prosecution to further provide the mechanism by which the Defence may introduce this information into the record. This is solely within the responsibility of the Counsel — not the Prosecution. Moreover, the information is already in the case record. The Investigation Report was not only available to, but relied upon by, the Defence during the cross-examination of P-1339. The Prosecution has no obligation to artificially generate additional evidence either for the purposes of providing previously disclosed information in an additional format, or for the purposes of confirming the absence of information that is not in its possession.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis* of the Regulations of the Court ("RoC"), this Request is filed as "Confidential", as it responds to a filing of the same designation and contains information concerning a witness that may not be made public. A public redacted version will be submitted as soon as practicable.

III. SUBMISSIONS

4. As noted, the Request seeks that "the Chamber order the Prosecution to disclose the Contemporary Notes [of the Prosecution investigators' discussion with P-1339 on

¹ ICC-01/14-01/18-1785-Conf.

² CAR-OTP-2122-7725.

11 December 2016], in a '*suitably usable and intelligible form*'"³ and that such notes should include "the information set out in the Clarifications"⁴ provided by the Prosecution to the Defence in *inter partes* e-mail exchanges.⁵

5. *First*, the Prosecution has already produced an Investigation Report containing the information sought. It was duly disclosed on 7 October 2020.⁶ Information that is material to the preparation of the Defence was extracted from the OTP investigators' internal notes on witness contacts database ('internal database') and included in the Investigation Report for the *very purpose* of facilitating the provision of this otherwise *internal* information to the Defence. The Investigation Report contains all information from the original contact note assessed as disclosable by the Prosecution. It is also 'usable and intelligible'. It is not for the Prosecution to provide the mechanism by which the Defence introduces evidence. That is solely within the duties and responsibility of Counsel. In any event, the Defence's reliance on the Investigation Report to cross-examine P-1339⁷ underscores its clear sufficiency.

6. *Second*, there is no need to provide an additional Investigation Report to capture clarifications provided to the Defence in *inter partes* communications. These clarifications comprise (i) the Prosecution's confirmation of the accuracy of its previously disclosed Investigation Report; (ii) a confirmation that information that is absent from the Investigation Report was not omitted, but is simply not in the Prosecution's possession (*e.g.* a further confirmation that the original Investigation Report is accurate and is not missing references to additional names that may be material for the preparation of the Defence), and; (iii) a clarification in relation to the date when the notes were registered in the internal database.⁸ The latter was an explanation as to the Prosecution's internal practices, clarifying that a difference

³ ICC-01/14-01/18-1785-Conf, para. 54 (emphasis added).

⁴ ICC-01/14-01/18-1785-Conf, para. 56.

⁵ ICC-01/14-01/18-1785-Conf-Anx, p. 3, see email of 29 September 2022, at 09:17.

⁶ CAR-OTP-2122-7725.

⁷ See ICC-01/14-01/18-T-158-Conf-Eng ET, p.28-36.

⁸ ICC-01/14-01/18-1785-Conf-Anx, p. 3, see email of 29 September 2022, at 09:17, clarifying that notes relating to the 11 December 2016 contact with P-1339 were added to the internal database on 5 January 2017.

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between the exact date of contact with a witness, and the date the notes are added to the internal database, "is usually attributed / due to the length of the various field missions and also to remote internet access issues."⁹

7. Requesting that the Prosecution artificially generates Investigation Reports for the purposes of providing previously disclosed information in an additional or so-called "suitable" format, or for the purposes of confirming the accuracy of its previously disclosed Investigation Reports, exceeds the scope of the statutory disclosure framework and not otherwise justified in this case.

8. As previously stated,¹⁰ the Court's regulatory framework imposes no obligation on the Prosecution to positively generate tangible items – that do not yet exist.¹¹ This is especially so when the underlying information has already been disclosed to the Defence. The Prosecution is also not under any obligation to generate *evidence* for the purposes of confirming information that is not in its possession. Thus, the Request cites no statutory provision, persuasive case law, or even practice to the contrary. The Request is a mere device designed to achieve a disposition of evidence in this case that the Defence has previously sought through a proposed stipulation which the Prosecution has expressly and properly declined.

9. *Third*, the Defence's contention that it is "at an impasse as regards its ability to formally bring exculpatory information to the attention of the Chamber, and to ensure that this information duly forms part of the evidentiary record" is erroneous. As stated above, the Defence fully exploited the information contained in the Investigation Report during P-1339's cross-examination, bringing to the Chamber's attention and putting on the case record various asserted inconsistencies in P-1339's evidence on the

⁹ ICC-01/14-01/18-1785-Conf-Anx, p. 3, see email of 29 September 2022, at 09:17.

¹⁰ ICC-01/14-01/18-1785-Conf-Anx, p. 1, see email of 12 December 2022, at 16:31.

¹¹ See rule 77 (requiring inspection of "any books, documents, photographs and other *tangible* objects in the possession or control of the Prosecutor") (emphasis added).

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narrow topic in question. The Chamber is thus already in possession of all the relevant evidence on the issue, as expressly acknowledged by the Presiding Judge.¹²

10. On its merits, the Request fails. And, the Defence's resort to using the vast majority of its 17-page Request as a vehicle to collaterally attack P-1339's credibility, is as unfortunate as it is transparent and unavailing.

IV. CONCLUSION

11. For the above reasons, the Chamber should summarily dismiss the Request, as the Defence is already in possession of the material in question, and no further Prosecutorial obligation arises under the Court's regulatory framework.



Karim A. A. Khan KC, Prosecutor

Dated this 17th day of March 2023
At The Hague, The Netherlands

¹² See the intervention of the Presiding Judge at ICC-01/14-01/18-T-158-Conf-Eng ET, p. 36, l. 23-25, stating "I think we have to move on. We have it now on the record, and we have this -- we have a document and we have the witness statement".