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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 Request for disclosure following the notification of the “Lesser redacted confidential version of Prosecution’s views on the Second Defence Request regarding Restrictions on Contact for Mr Alfred Yekatom, 22 June 2022, ICC-01/14-01/18-1441-Conf-Red2”, 25 August 2022, ICC-01/14-01/18-1555-Conf-Exp

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) opposes the Yekatom Defence’s Request¹ for the: i) disclosure of all documents related to witness interference by [REDACTED]; ii) lifting of redactions at paragraphs 14 and 15 of the Prosecution’s 30 May 2022 views submitted to Trial Chamber V (“Chamber”);² and iii) lifting of all redactions applied to the Prosecution’s request for reconsideration of In-Court Protective Measures for witness P-0888 (“Reconsideration Request”)³ (collectively, the “Sought Material”). As set out below, the Request fails and should be dismissed.

2. The Request seeks the disclosure of information that is not demonstrably *material* to the Defence’s preparation. It is overbroad, speculative, and further, impinges on the scope of Rule 81(1) of the Rules of Evidence and Procedure (“Rules”), insofar as the Sought Material derives from or involves internal reports and memoranda prepared by the Prosecution in discharging of its article 68 obligations in preparation of the case and trial.

3. That certain information might potentially have a bearing on a given witness’s motivation to testify, does not render such information *generally* disclosable as a category, or otherwise create any such presumption. Nor, does the Request substantiate any inference that risks or threats to a given witness’s security has affected or would necessarily affect their evidence on any matter in controversy in this case. The assertion that such information “can be used in the appreciation of a witness’

¹ ICC-01/14-01/18-1523-Conf-Exp, Request for disclosure following the notification of the “Lesser redacted confidential version of Prosecution’s views on the Second Defence Request regarding Restrictions on Contact for Mr Alfred Yekatom, 30 May 2022, ICC-01/14-01/18-1441-Conf-Exp”, 22 June 2022, ICC-01/14-01/18-1441-Conf-Red2 (“Request”).

² ICC-01/14-01/18-1441-Conf-Red2 (“Prosecution Views”).

³ ICC-01/14-01/18-1241-Conf-Red.

evidence and his credibility”,⁴ is nothing more than a generalised supposition. It is manifestly insufficient to found a disclosure request.

4. In any event, even assuming *arguendo* that the Sought Material is disclosable — which it is not — non-disclosure would be fully warranted: (a) because the information derives from material prepared by Prosecution staff in connection with the case’s preparation; and/or (b) because the serious danger that its divulgence would present to the security and well-being of witnesses outweighs any *unfair* prejudice to the rights of the Accused. Contrary to the Request, non-disclosure is neither unjustified or inappropriate.⁵

5. The Court has a non-delegable statutory obligation to protect witnesses. Providing detailed sensitive information to a defendant regarding security threats and interference faced by witnesses — particularly as may involve the conduct of third parties [REDACTED] — undermines that obligation. It exposes witnesses to harm, exacerbating an already tenuous security situation that the Court does not have the means to effectively control. The [REDACTED] reported security incidents in this case alone attest to that fact.

6. The rationale advanced in the Request to obtain the Sought Material is unavailing, and it should therefore be rejected.

II. CONFIDENTIALITY

7. Pursuant to regulation 23bis(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential” *Ex parte*, available only to the Prosecution, the

⁴ Request, para. 19.

⁵ Request, para. 18.

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.

III. SUBMISSIONS

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

8. The allegations set out in the Prosecution’s Views and Reconsideration Request were properly directed at discrete issues, namely (a) regarding the exposure of witness’s to risks associated with their cooperation/testimony; and (b) substantiating the extension of the Chamber’s contact restrictions order regarding YEKATOM. The allegations made in these Prosecution filings unequivocally demonstrate that witnesses are exposed to risks outside the Court’s direct knowledge [REDACTED], thus justifying the specific relief requested. By contrast, the arguments advanced in the Request are transparent and self-serving.

9. The Defence’s contention that the Sought Material is material to YEKATOM’s preparation or affects the credibility of Prosecution witnesses is not *substantiated* factually or legally. The position that the information sought is material because details of witnesses’ claims regarding security threats and risks would allow the Defence to investigate and challenge them⁶ is unpersuasive. *First*, it is speculative. It presumes that any and all such claims and information bear on the witness’s testimony against YEKATOM — which is not established, nor a necessary inference. *Second*, the claims otherwise bear on matters separate and apart from, indeed collateral to, material facts at issue in the case or a plausible line of Defence. Merely asserting that the information might go to the credibility of the witness’s motivation to testify does not make it so, and in any event, absent any concrete link to the *substance* of their

⁶ Request, para. 21.

evidence (direct or indirect) does not substantiate the asserted materiality or implicate the witness's credibility.

10. As previously noted, the Prosecution's obligations pursuant to rule 77⁷ are not limitless. The Appeals Chamber observed in the *Banda & Jerbo case*, that "the right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will depend upon the specific circumstances of the case."⁸

11. The Court's jurisprudence has further elaborated the notion of 'materiality' in the *Al Hassan* and *Ongwen* cases. In the latter case, Trial Chamber IX held:

"[...] it is not sufficient to indicate that the database 'may potentially' include information ... without anything further such as a direct connection to the charges or a live issue in the case, this 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. Bearing in mind the above, the Chamber is not satisfied that the Defence has met the low threshold under Rule 77 of the Rules to show that the database 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."⁹

12. 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"¹⁰). The Sought Material falls into the former category. The Request provides only conjecture regarding the *potential* impact of security threats to witnesses concerning their motivation to testify, as opposed to their substantive evidence — what amounts to a collateral issue, without more.

⁷ ICC-01/04-01/06-3017 A5 A6, para. 10; ICC-01/11-01/11-392-Red-Corr, para. 39; ICC-02/05-03/09-501, para. 38.

⁸ See ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, para. 55; ICC-02/05-03/09 OA 4, para. 39; See also ICC-01/05-01/08-1594-Conf, para. 21; ICC-02/04-01/15-457, para. 13.

⁹ See ICC-02/04-01/15-1734, para. 22 (emphasis added); see also ICC-02/05-03/09-501 OA4, paras. 38-39, 42.

¹⁰ See Règle 77 du règlement de procédure et de preuve (emphasis added).

13. The Defence's further contention that only submissions by both Parties would enable the Chamber to make an informed decision as to witness credibility¹¹ highlights the Request's erroneous reasoning, and places the cart before the horse. The issue only arises where the information demonstrably bears on the witness's credibility in the first place. It is not by virtue of the fact that a witness is threatened, that this *necessarily* bears on their motivation to testify, much less on the credibility of the substance of their evidence. Such an inference is even weaker where the witness's statement was provided *before* the threat arose.

14. As noted, the allegations made by the Prosecution concerning the Sought Material relate to *conduct* and *risk* – as opposed to the *actual* impact of security incidents and threats on the witness. Moreover, this was never argued in support of, or to bolster, a witness's credibility.¹² Whether a witness is placed in harm's way, and whether they are *actually* harmed involve different logical and legal assessments. The Request conflates these distinct notions in order to expand the scope of prospective disclosure. However, in essence, the Request advances the same basis for materiality rejected in *Ongwen*, namely that the information '*may potentially*' bear on a matter of relevance.

15. 'Materiality', as expounded in both *Ongwen* and *Al Hassan* contemplate information that would "undermine the prosecution case or support a line of argument of the Defence", or "significantly assist the accused in understanding the incriminating and exculpatory evidence".¹³ It involves "a direct connection to the charges or a live issue in the case"¹⁴ and should have a material effect on Defence

¹¹ Request, para. 22.

¹² *Contra* Request, para. 20 (implying that the Presiding Judge's inquiry regarding the witness's security situation was elicited as substantive evidence).

¹³ ICC-01/05-01/08-1594-Conf, para. 21

¹⁴ ICC-02/04-01/15-1734, para. 22; see also, ICC-01/12-01/18-859-Red, paras. 9-10.

preparation.¹⁵ The Request patently does not meet this threshold regarding the Sought Material.

16. Moreover, in relation to the information contained in paragraph 14 of the Prosecution Views, it must be stressed that witness credibility is not at stake. The information in question does not relate to a trial witness, while the information referred to in paragraph 15 does not substantiate an active threat.

17. The Defence's submissions regarding witness [REDACTED] are similarly without merit. [REDACTED],¹⁶ [REDACTED]. Contrary to the Request, this material was not provided by the Chamber on the general grounds that it would "allow the Defence, and the Chamber, to assess the truthfulness of the witness' claims"¹⁷ but instead to afford the Defence an opportunity to understand and/or challenge the basis for any potential [REDACTED].

B. The non-disclosure of the Sought Material is not prejudicial or disproportionate

18. The Defence contends that the non-disclosure of the Sought Material is prejudicial because certain information was used to substantiate a request for in-court protective measures for witness P-0888 and to maintain contact restrictions, therefore affecting YEKATOM's right to family life. In fact, the non-disclosure of the Sought Material does not cause any *unfair* prejudice to the Accused.

19. *First*, the mere fact that information was provided to the Chamber to substantiate applications necessary to protect witnesses clearly does not make it *per se* disclosable.

¹⁵ ICC-01/04-01/06-2147, paras. 23-24.

¹⁶ [REDACTED].

¹⁷ Request, para. 21.

Second, the Accused's right to family life is collateral to a live issue in the trial or line of Defence.¹⁸

20. It is well-settled at the Court that the security and well-being of witnesses and the integrity of the proceedings are recognised countervailing factors and justifiable limitations on certain rights.¹⁹ Moreover, they fully warrant the imposition of contact restrictions on a detainee. It is precisely in this narrow context that the allegations of witness interference set out in the Prosecution Views were properly made.

21. In any event, when balancing the relative interests, the risk of danger to the safety of witnesses that would be caused by the disclosure of the Sought Material makes non-disclosure reasonably proportionate to any potential impact on the Accused's rights.²⁰

22. Here, [REDACTED]. The Registry has reported [REDACTED].²¹ Unsurprisingly, the Request omits any reference to these matters in advancing arguments concerning the proportionality and justification for non-disclosure. The propriety and proportionality of the same however, is clear.

23. The Defence's contention that information regarding witness's allegations of interference is disclosable because it "could affect the Chamber's perception of the accused's character and his respect for the integrity of the proceedings"²² is incongruous with his history. The Accused's character is well documented in the testimony and evidence before the Court. The suggestion providing the Sought

¹⁸ See ICC-01/05-01/08-1594-Conf, para. 21; ICC-02/04-01/15-1734, para. 22; *see also*, ICC-01/12-01/18-859-Red, paras. 9-10.

¹⁹ *See e.g.*, Article 68(2) (noting an exception to the application of article 67, regarding public hearings); *see also* subsection 5.

²⁰ ICC-01/05-01/08-85, para. 15; ICC-01/05-01/08-135-Conf, para. 25; ICC-01/05-01/13-1522, para. 5.

²¹ Registry reports ICC-01/14-01/18- 62-Conf-Red, paras. 10-11, ICC-01/14-01/18-467-Conf, paras. 25-26, ICC-01/14-01/18-592-Conf-Red, paras. 10-12, ICC-01/14-01/18-673-Conf-Red, paras. 12-13; ICC-01/14-01/18-1348-Conf-Red, para. 6; Pre-Trial Chamber II and Trial Chamber V decisions ICC-01/14-01/18-75, para. 15; ICC-01/14-01/18-485-Conf, para. 22; ICC-01/14-01/18-627, para. 16; ICC-01/14-01/18-727-Conf, paras. 17-18; ICC-01/14-01/18-1148-Conf, para. 9.

²² Request, para. 37.

Material will enable the Defence to address the Chamber's perception of YEKATOM's character to any greater extent than they may in respect of the evidence adduced at trial is specious, at best. The Prosecution's assertions about YEKATOM's violent reputation are not the result of bias, but manifest in *sworn* testimonies and evidence before the Chamber — some of which was elicited by the YEKATOM Defence itself.

24. The risk of divulging sensitive witness security information to a reputed violent Accused — [REDACTED] — is crystal clear. And, it is certainly not outweighed by unsubstantiated and tenuous arguments about the importance of the Sought Material to the Defence's "preparation", or the Accused right to a fair trial.

25. Importantly, the Prosecution also has a right to a fair trial.²³ This necessarily involves insulating witnesses from security threats and interference. Moreover, the Chamber cannot perform its truth seeking function if it is unlawfully deprived of reliable information and has to base its decision on compromised evidence. Several competing factors thus militate against disclosing the Sought Material and proportionately so — to the extent that the Chamber may reach that determination, notwithstanding the above.

26. Finally, the Defence's reference to 'equality of arms' is misleading.²⁴ The extension of an Accused's rights must necessarily take account of the Court's competing statutory obligations — here, due regard to the protection of victims and witnesses. This implicitly requires the Court to refrain from taking decisions and actions which may unreasonably jeopardise the safety and well-being of witness,²⁵ and which place the integrity of the proceedings at risk.

²³ See ICC-01/04-02/12-271-AnxA, para. 6 (Dis. Op. Judges Trendafilova and Tarfusser, noting that the right to a fair trial under article 64(2) also extends to other parties, including the Prosecution).

²⁴ Request, para. 33.

²⁵ See e.g., ICC-01/05-01/08-215-Conf, para. 26.

IV. CONCLUSION

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



Karim A. A. Khan QC, Prosecutor

Dated this 16th day of May 2023.

At The Hague, The Netherlands