

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **16 May 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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public redacted version of “Yekatom Defence Response to ‘Registry Request to Establish a Procedure following the Disclosure of Intermediaries’ Identities’ (ICC-01/14-01/18-1853-Conf)”, 12 May 2023, ICC-01/14-01/18-1864-Conf

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Mr Karim Asad Ahmad Khan
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Mr. Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Mr Gyo Suzuki

Counsel for Mr. Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamaï
Ms Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun

Legal Representatives of Applicants

Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

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

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby respectfully responds to the 'Registry Request to Establish a Procedure following the Disclosure of Intermediaries' Identities' ('Request') of 1 May 2023.¹
2. The Request should be denied.
3. VPRS's proposed test for disclosure of intermediaries' identifying information contravenes the existing applicable legal framework and should be dismissed.
4. In the same vein, the protocol for disclosure of such information proposed by VPRS in the Request ('Proposed Protocol') should not be adopted. Its 'one-size-fits-all' approach is at odds with the broader case-by-case approach to disclosure established in the applicable legal framework. The Proposed Protocol also envisages an unjustifiably elevated role for VPRS that would accord it an inappropriate and prejudicial degree of influence over Defence investigations. Lastly, the Proposed Protocol is superfluous, and improperly curtails judicial discretion.

APPLICABLE LAW

Article 67(1)(b) – Rome Statute

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
[...]
(b) To have adequate time and facilities for the preparation of the defence[.]

Article 68(1) – Rome Statute

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence

¹ ICC-01/14-01/18-1853-Conf.

against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Rule 81(4) – Rules of Procedure and Evidence

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

SUBMISSIONS

A. Preliminary issue: the initial *ex parte* nature of VPRS's application.

5. At the outset, the Defence notes that the relief sought by VPRS was initially requested in an *ex parte* email application to the Chamber.²
6. Given that the Proposed Protocol would limit the Defence's ability to conduct field investigations, it was self-evidently inappropriate for VPRS to attempt to seize the Chamber without notifying the Defence of these proposed limitations, let alone providing the Defence the opportunity to be heard on them. So much is also clear from the fact VPRS did not apply any redactions to the substance of the Request or its Annexes when they were eventually filed pursuant to the Chamber's orders.³
7. VPRS's apparent disregard for the basic fair trial rights of *audi alteram partem* and the publicity of proceedings is regrettable.

B. VPRS's proposed test for disclosure of intermediaries' identifying information contravenes the existing applicable legal framework.

8. In the Request, VPRS suggests that 'VPRS intermediaries' contact information or any other identifying information should only be disclosed to the parties in

² Ibid., para. 10 and Annex 2.

³ See, Email from Trial Chamber V to Parties and participants of 24 April 2023 at 11:35.

exceptional circumstances where there is an overriding legal interest for disclosure established by the relevant Chamber' ('Proposed Test').⁴

9. In so doing, VPRS is effectively suggesting that its Proposed Test replace the existing jurisprudential framework governing the application and maintaining of redactions on identifying information – including that of Court intermediaries specifically – established in the Court's case law.
10. In these proceedings, the Single Judge has previously recalled the applicable law as follows:

Specifically with regard to Rule 81(4) of the Rules, the Single Judge notes the Appeals Chamber's findings that 'permitting redactions to be made on this basis pursuant to rule 81(4) in principle necessarily does not mean that they will be granted wherever sought' and that 'a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the [C]hamber'. Further, and according to the Appeals Chamber, in making this assessment, the Chamber should consider whether 'disclosure of the information concerned would pose a danger to the particular person' and, in the affirmative, consider the following factors in relation to the alleged risk of danger:

(i) whether there is 'an objectively justifiable risk to the safety of the person concerned' which arises from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large;

(ii) whether the non-disclosure of the information is 'necessary', namely that there is no alternative measure short of redaction which is available and feasible in the circumstances; and

(iii) whether the non-disclosure of the information is 'proportionate', in that it is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Lastly, the Single Judge recalls that '[t]he overriding principle is that full disclosure should be made' and non-disclosure is the exception.⁵

⁴ ICC-01/14-01/18-1853-Conf, para. 14.

⁵ See, ICC-01/14-01/18-1578-Conf, paras 25 and 26, and fns 41-43, citing: *Prosecutor v Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", [ICC-01/04-01/07-475](#), 13 May 2008 ('Katanga Decision'), paras 59, 71-73; *Prosecutor v Ntaganda*, Redacted First Decision on the Prosecutor's Requests for

11. More specifically, the *Lubanga* Trial Chamber has established a framework for disclosure of identifying information of intermediaries as follows:

The threshold for disclosure is whether prima facie grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal contradiction or by other evidence. In these circumstances, the intermediary's identity is disclosable under Rule 77 of the Rules.⁶

12. Lastly, in these proceedings, the Chamber has also previously held that identifying information of 'individuals who have in any other way acquired or established knowledge of the events or circumstances part of a witness's narrative' cannot be redacted pursuant to the redaction category B.5 (i.e. 'other redactions under Rule 81(4) of the Rules') – which latter category has previously been held to be applicable to Registry intermediaries.⁷
13. The above legal framework thus carefully balances the competing statutory considerations of protection of victims and witnesses on the one hand, and on the other, due respect of fundamental fair trial rights of an accused; it leaves sufficient room for judicial discretion and provides appropriate guidance for its application; in short, it is nuanced, judicious, and reasoned.
14. VPRS' Proposed Test is none of those things.
15. By requiring that 'exceptional circumstances' be established, the Proposed Test runs outright contrary to the established overriding principle that authorisation of non-disclosure is the exception; and thus fails to take into account fundamental disclosure-related fair trial protections.⁸ By the same token, it

Redactions and Other Related Requests, [ICC-01/04-02/06-117-Red3](#), 3 July 2014, para. 21; and ICC-01/14-01/18-670-Conf-Red, para. 10.

⁶ *Prosecutor v Lubanga*, Redacted Decision on Intermediaries, [ICC-01/04-01/06-2434-Red2](#), 31 May 2010 ('Lubanga Decision on Intermediaries'), para. 139(a); see also, ICC-01/14-01/18-1305-Conf, para. 35, citing *Prosecutor v Lubanga*, Redacted Decision on the disclosure of information from victims' application forms (a/0225/06, a/0229/06, a/0270/07), [ICC-01/04-01/06-2586-Red](#), 4 February 2011, paras 41, 33 and 48.

⁷ See, ICC-01/14-01/18-677, paras 71-72; and ICC-01/14-01/18-1578-Conf, paras 30-31.

⁸ *Contra, supra*, para 10; see also, *Prosecutor v Gbagbo & Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, [ICC-02/11-01/15-915-Red](#), 31 July 2017 (Gbagbo & Blé Goudé Decision), para. 61; and Katanga Decision, para. 70.

unfairly reverses the burden for justification of non-disclosure, and places the onus on the party seeking access to the information in question – also contrary to the existing framework.⁹ The Proposed Test's facile, 'one-size-fits-all' approach fails to take into account the requirement that matters of disclosure of intermediaries' identities be considered on a case-by-case basis.¹⁰

16. VPRS's suggestion that its one-sided, prejudicial, and ill-considered Proposed Test should replace, or even play a part within, the existing framework applicable to disclosure of intermediaries' identifying information is misconceived. It is devoid of any merit and should be dismissed

C. The Proposed Protocol is ill-conceived and superfluous, and its adoption would prejudice the fairness of the proceedings.

17. In the Request, VPRS seeks the adoption of the Proposed Protocol, which would govern the disclosure of intermediaries' identities as follows:
 - a. following the disclosure of identifying information of an intermediary to a Party/participant, VPRS would be empowered to inform that intermediary 'as to whom, in the current proceedings, holds which information about them';
 - b. a Party/participant would be required to notify VPRS of its intent to contact said intermediary;
 - c. VPRS would then inform said intermediary of that Party/participant's intent in this regard;
 - d. said intermediary's prior consent to be contacted by that Party/participant would need to be obtained, via VPRS; and,
 - e. if/where such consent is obtained, VPRS would inform the Party/participant about 'the safest manner' to contact said intermediary.¹¹

18. The Proposed Protocol should be denied.

⁹ See, Gbagbo & Blé Goudé Decision, paras 60-62; see also, ICC-01/14-01/18-677-Anx3, para. 6.

¹⁰ Lubanga Decision on Intermediaries, para. 139(a).

¹¹ ICC-01/14-01/18-1853-Conf, paras 16-17.

19. *First*, the Proposed Protocol's 'one-size-fits-all' approach fails to respect the broader principle that matters relating to disclosure of identifying information of intermediaries should be determined on a case-by-case basis, as outlined by Trial Chamber I in *Lubanga*:

Given the markedly different considerations that apply to each intermediary (or others who assisted in a similar or linked manner), disclosure of their identities to the defence is to be decided on an individual-by-individual basis, rather than by way of a more general, undifferentiated approach.¹²

20. In this regard, the specific circumstances underpinning the Defence's request¹³ for disclosure of the identities of certain VPRS intermediaries bear repeating here.
21. [REDACTED] (P-2580), a VPRS intermediary, has been involved in procuring falsified evidence that [REDACTED].¹⁴ On at least two occasions known to the Defence, [REDACTED] has interfered [REDACTED].¹⁵ [REDACTED] has also solicited money from [REDACTED] on at least two occasions.¹⁶
22. Like [REDACTED], [REDACTED] (P-2018), a VPRS intermediary, has repeatedly solicited money [REDACTED]; [REDACTED].¹⁷
23. [REDACTED] (P-2638), a VPRS intermediary, has himself provided the Prosecution with false information and falsified documents concerning *inter alia* [REDACTED].¹⁸
24. Multiple VPRS intermediaries have thus engaged in *prima facie* illegal conduct within the jurisdiction of the Court, through which they have occasioned untold damage to the integrity of these proceedings.

¹² Lubanga Decision on Intermediaries, para. 139(a).

¹³ ICC-01/14-01/18-1790-Conf-Exp.

¹⁴ See, ICC-01/14-01/18-1790-Conf-Exp, para. 39, fn. 31 and references cited therein.

¹⁵ See, CAR-OTP-2135-4188, paras 12 and 15.

¹⁶ See, ICC-01/14-01/18-1790-Conf-Exp, para. 35, fn. 32 and references cited therein

¹⁷ See, ICC-01/14-01/18-1790-Conf-Exp, para. 40, fn. 41 and references cited therein; and ICC-01/14-01/18-T-226-CONF-FRA, 74:23-76:18.

¹⁸ See, ICC-01/14-01/18-1790-Conf-Exp, para. 28, fn. 23 and references cited therein.

25. In such circumstances, the Defence submits that it would be inappropriate to automatically notify [REDACTED] VPRS intermediaries that their identifying information has been disclosed to the Defence, or that the Defence may seek to contact them; or to require that their prior consent be obtained before the Defence attempt to contact them. Investigations into the conduct of these individuals necessitate a suitably discreet, cautious approach – for instance, to ensure that evidence of misconduct is not destroyed or otherwise lost, or to ensure that potential witnesses to such misconduct, which could include other innocent intermediaries, are not interfered with.
26. In this regard, the Defence notes that VPRS's submissions in the Request are couched in terms that would imply that the Prosecution would also be bound by the Proposed Protocol.¹⁹ As such, should the Proposed Protocol be adopted, if the Prosecution wished to conduct investigations into potential misconduct on the part of VPRS intermediaries, whether pursuant to article 54(1) or article 70 (or for that matter, into potential core crimes to which VPRS intermediaries might have been witness), then it too would be required to jump through the hoops envisaged in the Proposed Protocol: specifically, to wait for prior notice via VPRS, to seek prior consent from these individuals via VPRS, and to be dictated the manner in which to contact these individuals. It is difficult to imagine that the Prosecution would be willing to cede control of its investigations to a non-judicial administrative sub-organ such as VPRS,²⁰ through such a procedure.
27. To be clear, the Defence is not suggesting that it would never be appropriate to provide prior notice to intermediaries that their identifying information has been disclosed to the Parties/participants pursuant to a judicial order. On the

¹⁹ See, ICC-01/14-01/18-1853-Conf, paras 16-17, where the Proposed Protocol refers to unspecified 'parties and participants'.

²⁰ See, article 43(1).

contrary, the Defence's broader opposition to this aspect of the Proposed Protocol stems from the fact that it fails to take into account the potentially wide range of individual applicable circumstances, and leaves no room for judicial discretion in the determination as to whether prior notification is appropriate in a given case.

28. *Second*, the Proposed Protocol envisages an inappropriate and prejudicial degree of intervention – if not outright interference – in Defence investigations on the part of VPRS.
29. It should be recalled that, prior to any disclosure of identifying information of intermediaries, any 'objectively justifiable risk' to their safety that might arise from said disclosure will necessarily have been considered by the Chamber in its application of the governing legal framework, as set out above. VPRS's role in this process should be limited to providing the Chamber with any relevant information that it wishes the Chamber to take into consideration in its determination as to whether disclosure is appropriate in the circumstances. In this regard, VPRS is free to make reasonable suggestions as regards any need for prior notice to be provided to intermediaries, or to raise any reasonable safety-related concerns regarding the manner in which intermediaries might be approached by a Party/participant. Should it be determined that disclosure is appropriate, the Chamber is empowered to issue any relevant accompanying orders that it sees fit, taking into account individual circumstances, as well as the Chamber's overriding statutory duty to ensure a fair trial.²¹
30. However, VPRS's attempt to accord itself the role of 'gatekeeper' for Defence investigations involving individuals who have acted as VPRS intermediaries is fundamentally inappropriate, and if granted, could detrimentally affect the fairness of these proceedings.

²¹ See, article 64(2).

31. By way of illustrative example: defence preparations often require that investigations be conducted on an urgent basis – for instance, while the Defence is in the midst of examining a witness, or while Defence teams members are on a field mission of limited duration. Where time is thus of the essence, delays can have serious consequences for the Defence investigations and by extension, for Mr Yekatom's fair trial rights.
32. Adopting the Proposed Protocol, and according VPRS the role envisaged therein, would inevitably result in such investigative delays. Specifically: in the event that disclosure of an intermediary's identifying information is deemed appropriate, prior to receiving this information, the Defence would be required to wait for VPRS to make contact with the intermediary and to inform them of this fact. If the Defence then wished to contact an intermediary, it would first need to inform VPRS, and wait for VPRS to then inform the intermediary and to obtain their consent to be contacted; and should consent be obtained, the Defence would then need to wait for VPRS to determine 'the safest manner' to contact the intermediary – all this, before the Defence is permitted to even reach out to the intermediary to determine whether they might be willing to cooperate with the Defence, to any degree.
33. In this regard, limb (e) of Proposed Protocol is particularly ill-conceived. VPRS fails to explain on what basis the 'safest manner' to contact an intermediary would be determined: for instance, whether this determination would be made in consultation with the Defence, taking into account the latter's practical capacities, needs and limitations, as well as considerations of investigative strategy. VPRS also fails to explain whether its suggested manner of contact should bind the Defence; and if so, what legal authority it considers could underpin its interference in Defence investigations. Nor does VPRS explain how disagreements regarding the matter would be adjudicated – for instance, which party would have the onus of establishing the appropriate manner of contact;

the criteria to be applied in the adjudication of the matter; and whether any specific timeframes would apply to this litigation.

34. VPRS's Proposed Protocol, if adopted, thus would inevitably occasion (potentially lengthy) delays, thereby greatly increasing the risk that urgent investigative opportunities may be irremediably lost due to bureaucratic delays on the part of VPRS. In this regard, the Proposed Protocol is prejudicial to and inconsistent with the rights of Mr Yekatom and the fairness of these proceedings, contrary to article 68(1).
35. Such a prospect, arising from VPRS's envisaged administration of the Proposed Protocol, thus serves to highlight the inappropriateness of the role proposed for and by VPRS. With all due respect to the work of VPRS, it is fundamentally improper to grant an administrative sub-organ the degree of influence, over a matter of such fundamental importance as Defence investigations, that VPRS seeks – not least given that VPRS is a non-party to the proceedings and, unlike the Chamber or Prosecution,²² is not accountable in any meaningful sense for due respect of the rights of an accused. Such a role or responsibility is not within the competency or remit of VPRS. Indeed, nothing in the Court's legal framework would support such a role.
36. Further, given the manifest supervisory failures on the part of VPRS, the fact that the Proposed Protocol would effectively allow VPRS to curtail legitimate investigations into the *prima facie* illegal conduct of its own intermediaries, and would be overseen by VPRS itself, further militates against granting the Request. In this regard, the Defence notes VPRS's previous claims as regards its process of identifying potential intermediaries:

The identification of reliable intermediaries is a **delicate exercise** that entails an assessment of an individual's empathy and availability, his/her capacity to communicate with victims, convey complex legal concepts, **abide by ethical**

²² See e.g., article 64(2) and 68(1); and article 54(1)(c).

principles, maintain confidentiality and follow best practices in terms of security. This assessment process commences the moment the Registry identifies a potential intermediary and continues throughout the training exercises and the actual completion of victim application forms. **Having in mind to preserve the integrity of the proceedings and ensure, to the extent possible, the safety and security of victims, the Registry is very cautious and selective in the persons it chooses as its intermediaries** [emphasis added].²³

37. Given the information that has since come to light regarding grave misconduct on the part of multiple VPRS intermediaries in the context of these proceedings, it must be noted that there is something of a credibility gap between VPRS's claims as to the quality of its intermediary recruitment process and the reality on the ground. In any event, in such circumstances, the very fact that VPRS has requested the adoption of the Proposed Protocol, in full knowledge of the misconduct of its own intermediaries, betrays a fundamental lack of self-scrutiny on the part of VPRS, and thus further demonstrates the extent to which VPRS is unsuited for the role it seeks.
38. Lastly, the Proposed Protocol is superfluous.
- ~~39.~~ As set out above, the Chamber is best placed to determine whether there is any need for relevant directions or orders to accompany the disclosure of identifying information of intermediaries.²⁴ Nothing refrains VPRS from providing the Chamber with all information it believes is relevant for this determination. In this regard, limbs (b), (c) and (e) of the Proposed Protocol are thus superfluous at best, and at worst, improperly impose on judicial discretion and the powers of the Chamber.
40. Likewise, the proposed requirement of prior consent (limb 'd'). The privacy interests of intermediaries are duly protected through the existing applicable legal framework, set out in part above. The relevant safeguards thus fall within the remit of the Chamber, which will determine the appropriateness of

²³ ICC-01/14-01/18-216-Anx-Red, para. 30.

²⁴ See, *supra*, para. 29.

disclosure of identifying information, on a case-by-case basis and in accordance with that framework. Implicit in that determination is an understanding that any ensuing investigations would potentially involve direct contact between the Defence and the intermediary in question.

41. In such circumstances therefore, VPRS fails to justify why, once disclosure of identifying information of intermediaries has been deemed appropriate and ordered, the Defence should be barred from approaching said intermediary to inquire as to whether they might be willing to assist the Defence, to whatever degree they might be comfortable with. If an intermediary does not wish to cooperate with the Defence, then they can simply inform the Defence as much, if and when they are contacted.

42. Nor should not come as a surprise to intermediaries that, by agreeing to perform work in any capacity for the Court, parties and participants to proceedings may seek to contact them, and that to this end, their identifying information may be disclosed. Indeed, the very fact that an express article to this effect is included in the Court's 'Model Contract for Intermediaries' is testament to this.²⁵ The Defence also notes that those VPRS intermediaries whose identities were disclosed pursuant to the Chamber's instructions had assisted applicants in filling out victims' application forms,²⁶ thereby engaging in the Court process.²⁷ In such circumstances, if VPRS has omitted to inform its intermediaries prior to engaging them (whether through formal contracts or otherwise) of the possibility that parties/participant may seek to contact them on account of their involvement in the work of the Court, then this is a failure

²⁵ See, ['Model Contract for Intermediaries'](#), March 2014, article 10.

²⁶ With the exception of two, both of whose identities and status as VPRS intermediaries were already known to the Defence.

²⁷ See, *Prosecutor v Gbagbo & Blé Goudé*, Decision on the Legal Representative of Victims' requests to maintain redactions to information relating to certain intermediaries, [ICC-02/11-01/15-202](#), 2 September 2015, paras 15-16.

on the part of VPRS, for which it would be inappropriate to penalise Mr Yekatom and the exercise of his right to effective defence preparations.

43. The implication appears to be that the very fact that VPRS intermediaries are even approached by the Defence is a threat to their safety, privacy and well-being. This suggestion is as regrettable as it is baseless.

CONFIDENTIALITY

44. This response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed forthwith.

RELIEF SOUGHT

45. In light of the above, the Defence respectfully requests that Trial Chamber V:
DENY the Request.

RESPECTFULLY SUBMITTED ON THIS 16th DAY OF MAY 2023



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands