

**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 'Request for disclosure following the notification to the Defence 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', 22 July 2022, ICC-01/14-01/18-1523-Conf-Exp

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. Pursuant to Article 67(2) of the Rome Statute and Rules 77 and 84 of the Rules of Procedure and Evidence of the Court ('Rules'), the Defence for Mr. Alfred Rombhot Yekatom ('Defence') hereby respectfully requests the Chamber to order the Prosecution to i) disclose all documents in the Prosecution's possession which relate to alleged witness interference on the part of [REDACTED], including but not limited to the documents¹ used in support of its allegations of interference ('Undisclosed Documents') as formulated within the views it submitted before the Chamber on 30 May 2022;² ii) lift the redactions contained at paragraph 14 and 15 of the same views,³ and in particular the identity of the individuals allegedly responsible for disclosing and/or [REDACTED]; and iii) lift all redactions contained in the reconsideration request it filed on 11 January 2022⁴ (collectively the 'Sought Material').
2. Considering the materiality of the redacted information and the Undisclosed Documents, the prejudicial nature of the allegations and the absence of any justification for the non-disclosure, the Defence requests the disclosure of the Sought Material.

PROCEDURAL HISTORY

3. On 11 January 2022, the Prosecution filed an *ex parte* and confidential redacted version of the 'Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0888', ('Reconsideration Request').⁵ The Prosecution argumentation in relation to the fact that "P-0888 faces an objective

¹ Including documents found at [ICC-01/14-01/18-1441-Conf-Red2](#), fn. 11-12 and ICC-01/14-01/18-1441-Conf-Exp-AnxA, ICC-01/14-01/18-1441-Conf-Exp-AnxB and ICC-01/14-01/18-1441-Conf-Exp-AnxC.

² [ICC-01/14-01/18-1441-Conf-Red2](#).

³ [ICC-01/14-01/18-1441-Conf-Red2](#).

⁴ ICC-01/14-01/18-1241-Conf-Exp; [ICC-01/14-01/18-1241-Conf-Red](#).

⁵ ICC-01/14-01/18-1241-Conf-Exp; [ICC-01/14-01/18-1241-Conf-Red](#).

risk of harm” relied inter alia on the assertion that this witness “still often encounters [REDACTED] [REDACTED]”.⁶

4. On 2 February 2022, the Chamber issued its decision on the Reconsideration Request, and rejected it.⁷
5. From 8 April 2022 to 13 April 2022, P-0888 testified publicly before the Chamber.⁸
6. On 19 April 2022, the Defence filed the ‘Yekatom Defence Response to the “Fifth Registry Report on the Implementation of the Restrictions on Contact for Mr Alfred Yekatom Ordered by Trial Chamber V”, 6 April 2022, ICC-01/14-01/18-1348-Conf-Exp’ (‘Defence Response’),⁹ and requested the Chamber to add [REDACTED], on the list of non-privileged contacts (‘Request for Additional Contact’).
7. On 20 May 2022, the Chamber issued the ‘Sixth Decision on Mr Yekatom’s Restrictions on Contacts and Communications’,¹⁰ in which it ordered the Prosecution to provide its views on the Request and deferred its decision on the specific issue of the additional contact.
8. On 30 May 2022, the Prosecution filed an *ex parte* and a redacted confidential version of the ‘Prosecution’s Views on the Second Defence Request regarding Restrictions on Contact for Mr Alfred Yekatom’¹¹ with three *ex parte* annexes.¹² The Prosecution notably alleged that “[REDACTED]”.¹³

⁶ [ICC-01/14-01/18-1241-Conf-Red](#), para. 11.

⁷ [ICC-01/14-01/18-1268-Conf](#).

⁸ ICC-01/14-01/18-T-120-Conf-ENG (ET); ICC-01/14-01/18-T-121-ENG (ET); ICC-01/14-01/18-T-122-Conf-ENG (ET); ICC-01/14-01/18-T-123-ENG (ET).

⁹ [ICC-01/14-01/18-1366-Conf-Exp](#).

¹⁰ [ICC-01/14-01/18-1420-Conf-Exp](#).

¹¹ ICC-01/14-01/18-1441-Conf-Exp; [ICC-01/14-01/18-1441-Conf-Red](#).

¹² See [ICC-01/14-01/18-1460-Conf-Exp](#), fn. 5: “with confidential *ex parte* Annexes A, B and C, only available to the Prosecution, ICC-01/14-01/18-1441-Conf-Exp-AnxA, ICC-01/14-01/18-1441-Conf-Exp-AnxB and ICC-01/14-01/18-1441-Conf-Exp-AnxC”

¹³ [ICC-01/14-01/18-1441-Conf-Red](#), para. 17.

9. On 15 June 2022, the Chamber issued the 'Decision on Mr Yekatom's Request to Add an Individual to his Non-Privileged Contact List', rejected the request for an additional contact, and ordered the Prosecution to file a lesser redacted confidential version of its Views ('Decision').¹⁴
10. On 22 June 2022, the Prosecution filed the lesser redacted confidential version of its Views.¹⁵
11. On 30 June 2022, through *inter partes* correspondence, the Defence requested the Prosecution to disclose the Sought Material and lift the redaction contained at paragraph 16 of the Views¹⁶ ('Disclosure Letter').¹⁷
12. On 8 July 2022, the Prosecution, in its response to the Disclosure Letter, notably¹⁸ indicated that i) all documents in support of the interference allegations were not material to the Defence, that ii) the information contained at paragraphs 14 and 15 of the Views was also not material and; iii) that the information within the Reconsideration Request is not disclosable under article 67(2) or Rule 77, thereby rejecting the Defence disclosure request.¹⁹
13. On 12 July 2022, the Prosecution filed a request seeking authorisation of the court to not disclose the information contained at paragraph 16 of its Views.²⁰

APPLICABLE LAW

14. Article 67 (2) of the Rome Statute

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the

¹⁴ [ICC-01/14-01/18-1460-Conf-Exp.](#)

¹⁵ [ICC-01/14-01/18-1441-Conf-Red2.](#)

¹⁶ The information at paragraph 16 of the Views is addressed within the Defence's response to filing [ICC-01/14-01/18-1508-Conf-Red.](#), filed concurrently.

¹⁷ Letter ARY-2022-0223 from the Yekatom Defence to the Prosecution, sent on 30 June 2022, at 14:42.

¹⁸ The information at paragraph 16 of the Views is addressed within the Defence's response to filing [ICC-01/14-01/18-1508-Conf-Red.](#), filed concurrently.

¹⁹ Email from the Prosecution to the Yekatom Defence, sent on 8 July 2022, at 21:15.

²⁰ See [ICC-01/14-01/18-1508-Conf-Red.](#)

innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

15. Rule 77 of the Rules

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

16. Rule 84 of the Rules

In order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber shall, in accordance with article 64, paragraphs 3 (c) and 6 (d), and article 67, paragraph (2), and subject to article 68, paragraph 5, make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber.

SUBMISSIONS

17. Pursuant to Article 67(2) and Rules 77 and 84 of the Rules and in accordance with the guidelines provided by the Chamber during the First Status Conference,²¹ the Defence respectfully requests the intervention of the Chamber to order the disclosure of all Undisclosed Documents, and to lift the redactions contained at paragraph 14 and 15 of the Views and in the Reconsideration Request.
18. The Defence respectfully submits that (A) the Sought Material is material to the preparation of the Defence pursuant to Rule 77; (B) that its non-disclosure is prejudicial to Mr. Yekatom's rights; and (C) that its non-disclosure is unjustified and disproportionate.

²¹ ICC-01/14-01/18-T-012-ENG ET, p. 13, lines 6 to 10.

A. The Sought Material is material to Defence preparations pursuant to Article 67(2) and Rule 77

19. It is the Defence's position that the reasons given and claims underlying a Prosecution witness' motivations and willingness, or absence thereof, to testify with or without protective measures, can be used in the appreciation of the reliability a witness' evidence and his credibility.
20. Indeed, the importance of this information is reflected in the fact that it has formed part of the testimony of witnesses in this case. For example, during P-0876's testimony, the Presiding Judge specifically inquired about the witness' allegation regarding his security situation and potential threats made against him.²² Also, following P-0954's [REDACTED].²³
21. Consequently, information that would allow the Defence, and the Chamber, to assess the truthfulness of a witness' claims on such issues is as material to Defence preparations as any information going to a witness's broader credibility. It follows that details of such claims, and the underlying evidence supporting it, should be disclosed to the Defence so that it can properly investigate them, and consequently decide as whether to challenge these claims and/or his credibility.
22. This is also true for element not elicited directly from a witness so long as they could bolster or hinder the credibility of his or her motivations or concerns, especially when they are relied upon to allege [REDACTED]. Only then could the eventual evaluation by the Chamber of the witness' credibility be fully informed, on the basis of submissions received by both the Prosecution and the Defence, pursuant to the equality of arms and the principle of *audi alteram partem*, both of which being keystones of adversarial proceedings.

²² ICC-01/14-01/18-T-089-CONF-ENG ET, p. 33-36; see also Email from the Chamber to the Parties and Participants sent on 25 March 2022, at 15:48.

²³ ICC-01/14-01/18-T-113-CONF-Red-ENG ET, p. 2, lines 13-15.

23. Following this, and the fact that in both its Views and its Reconsideration Request, the Prosecution alleges and/or implies that [REDACTED] have created a risk to the security of P-0888 justifying the implementation of in-court protective measures,²⁴ [REDACTED],²⁵ the Sought Material is material to the preparation of the Defence.
24. Indeed, paragraph 15 of the Views seems to contain information reported directly by a trial witness in relation to [REDACTED], and which deterred him from testifying.
25. Further, and contrary to the Prosecution's argument, the fact that [REDACTED]²⁶ [REDACTED]. [REDACTED].
26. As to paragraph 14, the fact that its content "does not relate to a trial witness"²⁷ does not in fact affect its materiality, given that the Prosecution specifically uses this information to bolster the credibility of the trial witness's claim made at paragraph 15, going so far as to expressly note that [REDACTED].²⁸ The same reasoning potentially applies to paragraph 16, despite the fact that this other Prosecution witness allegedly [REDACTED].²⁹
27. Further, paragraph 14 describes an "incident" which allegedly shows [REDACTED], and [REDACTED], which is in and of itself a serious and prejudicial allegation. The Prosecution would be free to refer to this incident in support of the credibility of any future witnesses who might express reservations about testifying based on safety concerns related to [REDACTED]. As such, this information may affect the credibility of one or multiple trial witnesses, and is also material to the Defence.

²⁴ [ICC-01/14-01/18-1241-Conf-Red](#), paras. 10-13.

²⁵ [ICC-01/14-01/18-1441-Conf-Red2](#), paras. 13-18.

²⁶ Email from the Prosecution to the Yekatom Defence, sent on 8 July 2022, at 21:15

²⁷ Email from the Prosecution to the Yekatom Defence, sent on 8 July 2022, at 21:15.

²⁸ [ICC-01/14-01/18-1441-Conf-Red2](#), para. 15.

²⁹ [ICC-01/14-01/18-1508-Conf-Red](#), para. 6.

28. Finally, the Reconsideration Request appears to contain information reported by P-0888 relating to his security, allegedly involving [REDACTED].³⁰
29. The Defence recalls that the Chamber found in relation to material collected during an Article 70 investigation – which the Prosecution did not itself identify as falling under its disclosure obligation – that “the Material may impact on the credibility of the Prosecution evidence” and that “non-disclosure may affect the preparation of the Defence and may risk causing prejudice to the accused’s right to a fair trial”.³¹
30. In sum, the disclosure of the Sought Information is necessary in order to enable the Defence to decide whether it challenges the credibility of certain witnesses in this case, which is part of its preparation.

B. The non-disclosure of the Sought Material is prejudicial to the Accused

31. Within the Reconsideration Request, the Sought Material is used in support of a request for additional in-court protective measures sought for P-0888, which itself constitutes an exception to the right of the accused to a public trial.³² Within the Observations, the Material is used to maintain contact restrictions on Mr. Yekatom therefore affecting his right to family life. In both instances, the Material is also used to allege [REDACTED].
32. Therefore, not only does the Sought Material fall within the disclosure obligations of the Prosecution pursuant to Article 67(2) of the Statute and Rule 77 of the Rules, but its non-disclosure is also prejudicial to Mr. Yekatom’s rights.
33. The non-disclosure of the Sought Material affects Mr. Yekatom’s right to a fair trial. Indeed, the right to have the knowledge of, and the opportunity to

³⁰ [ICC-01/14-01/18-1241-Conf-Red.](#)

³¹ [ICC-01/14-01/18-1063-Conf](#), para. 9.

³² Rome Statute, Article 67, see also *Pretto and others v Italy*, Application No. 7984/77, “Judgment”, 8 December 1983, para. 21; *B and P v United Kingdom*, Application No. 36337/97 and 35947/97, “Judgment”, 24 April 2001, para. 36

comment on allegations which may affect the Chamber's appreciation of the evidence stems from the principle of equality of arms which is "to ensure the defence is placed insofar as possible on an equal footing with the prosecution."³³

In turn, this is a fundamental pillar of a fair trial.³⁴

34. The Chamber has already ruled that "resort to *ex parte* proceedings should be limited" and, in that instance, ordered "the Prosecution [...] to keep the necessity of this classification under review".³⁵ It also recognized that *ex parte* communications relating to an ongoing investigation and their non-disclosure "may risk causing prejudice to the accused rights to a fair trial".³⁶
35. It is clear from this that the Prosecution's position that there is no prejudice so long as the redacted or undisclosed information does not go to the substance of a witness testimony³⁷ is incompatible with such principle and the Chamber's ruling.
36. A prejudice that could have materialized would have been that P-0888 testified with in-court protective measures as opposed to testifying in public.³⁸ This would have impeded the right to a public trial as guaranteed by Article 67, and yet, the Defence would have not been given an opportunity to fully respond to the allegations supporting such measures.
37. Further, there is a real risk that the allegations as formulated within the Views could affect the Chamber's perception of [REDACTED]. While the Defence is cognisant that the Chamber is composed of professional judges, it nonetheless

³³ *The Prosecutor v Thomas Dyilo*, Decision on Defence's Request to Obtain Simultaneous French Transcripts, 14 December 2007, [ICC-01/04-01/06-1091](#), para. 18.

³⁴ See also, *The Prosecutor v Thomas Dyilo*, Decision on Defence's Request to Obtain Simultaneous French Transcripts, 14 December 2007, [ICC-01/04-01/06-1091](#), para. 18; see also ECHR, *Brandstetter v. Austria*, 11170/84, 12876/87, 13468/87, "Judgment", 28 August 1991, para. 67.

³⁵ [ICC-01/14-01/18-1063-Conf](#), para. 14.

³⁶ [ICC-01/14-01/18-1322-Conf](#), para 3.

³⁷ [ICC-01/14-01/18-1508-Conf-Red](#), para. 2.

³⁸ [ICC-01/14-01/18-1241-Conf-Red](#); [ICC-01/14-01/18-1268-Conf](#).

remains contrary to the fairness of proceedings to allow the Prosecution [REDACTED], and to deny him the opportunity to defend himself therefrom.

38. On this point, the initial position of the Prosecution regarding the Defence Request³⁹ was that the allegations supported by the Material are not prejudicial considering that they [REDACTED].⁴⁰
39. However, the Prosecution relies on these allegations to state that it has strong grounds to believe that “[REDACTED]”,⁴¹ thereby implying the [REDACTED].
40. This confirmation bias on the part of the Prosecution is concerning of itself; however, more concerning is the misguided Prosecution assumption that the Chamber would share the same. This is erroneous and, to the contrary, the prejudicial nature of this allegation reinforces the right of the Defence to have access to the full picture and the information underpinning such allegations in order to fully respond to them.
41. Finally, there is an already materialized prejudicial impact of those allegations on Mr. Yekatom’s right to family life. Indeed, the rejection of the Request for Additional Contact, preventing Mr. Yekatom [REDACTED] to have the possibility to have actively monitored calls,⁴² directly impacted Mr. Yekatom’s fundamental right for private and family life,⁴³ although he was not made privy to [REDACTED] and consequently did not have the opportunity to make meaningful representation and respond to it.

³⁹ See email from the Prosecution to the Defence sent on 30 June 2022, at 15:45.

⁴⁰ See email from the Prosecution to the Defence sent on 30 June 2022, at 15:45.

⁴¹ [ICC-01/14-01/18-1441-Conf-Red2](#), para. 18.

⁴² [ICC-01/14-01/18-1460-Conf-Exp](#).

⁴³ *The Prosecutor v. Dominic Ongwen*, Decision on Request for Disclosure and Related Orders concerning Mr. Ongwen’s Family, 12 February 2019, [ICC-02/04-01/15-1444](#), para. 23, referencing Art. 17 of the International Convention of Civil and Political Rights; art. 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 11(2) of the Inter-American Convention on Human Rights. See also UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 17 December 2015, A/RES/70/175 (annex), rule 106 (‘Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both.’)

42. Therefore, because the Sought Material has the potential to affect the credibility of witness(es) in this case, the granting of in-court protective measures, the [REDACTED], the Defence should be made privy to it, *i.e.* be put on an equal footing with the Prosecution and, consequently, be in a position to make meaningful submissions on the allegations.
43. In this regard, and reiterating the principle of equality of arms, the Defence considers that the Material should have been and should be communicated to the Defence.

C. The non-disclosure of the Sought Material is unjustified and disproportionate

44. The Prosecution failed to put forward arguments supporting that the Sought Material would fall under any disclosure exception in accordance with Rule 81, and to the contrary gave indications that such exceptions would not find application.
45. Indeed, with regard to paragraph 14 the Prosecution specifically indicates that the information does not relate to a trial witness. With regard to paragraph 15, the Trial Witness did “[REDACTED]”, implying that [REDACTED] does not give rise to safety concerns for this witness and thus that Rule 81 (4) does not apply in this case.
46. As for the information contained within the Reconsideration Request, P-0888’s testimony is completed and to the Defence’s knowledge, no security incident preceded or followed his testimony. In addition, the Chamber has already ruled that P-0888 had not reported [REDACTED].⁴⁴ It also found that the request of the Prosecution did not in fact contain [REDACTED], but merely information

⁴⁴ [ICC-01/14-01/18-1268-Conf](#), para. 12.

about encounters between P-0888 and [REDACTED],⁴⁵ making the redactions unwarranted.

47. The absence of any justification for the non-disclosure weighted against the prejudice as described above is wholly disproportionate.

CONCLUSION

48. In light of the materiality of the Sought Material, the prejudicial nature of the allegations underpinned by the Sought Material, and the fact that non-disclosure is not justified and/or does not fall within any exception of the legal framework of the Court, the Defence submits that the disclosure of the Material is warranted.

CONFIDENTIALITY

49. This request is filed on a confidential *ex parte* basis corresponding to the classification of the Decision.

RELIEF SOUGHT

50. In light of the above, the Defence respectfully requests the Trial Chamber V to:
- GRANT** the Request;
- ORDER** the Prosecution to disclose the Undisclosed Documents;
- ORDER** the Prosecution to lift the redactions found at paragraphs 14 and 15 of the Views, and;
- ORDER** the Prosecution to lift all redactions found in the Reconsideration Request.

⁴⁵ [ICC-01/14-01/18-1268-Conf](#), para. 12.

RESPECTFULLY SUBMITTED ON THIS 16TH DAY OF MAY 2023

A handwritten signature in blue ink, appearing to read 'Mylène Dimitri'.

Me Mylène Dimitri

Lead Counsel for Mr. Yekatom

The Hague, the Netherlands