

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **6 June 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 with Confidential Annex

Public Redacted Version of “Yekatom Defence Request for disclosure of investigator’s notes regarding interviews with P-1339”, 06 March 2023, ICC-01/14-01/18-1785-Conf

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. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby files this request for a disclosure order in relation to material and exculpatory information regarding the Prosecution's interactions with witness P-1339.
2. During his testimony, witness P-1339, [REDACTED], was examined *inter alia* in relation [REDACTED]. Notably, the account provided by P-1339 under examination diverged in material aspects from the account he had provided to Prosecution investigators during meetings in [REDACTED], as set out in a Prosecution Investigation Report of [REDACTED] ('Investigation Report').¹ During his examination, the fact that the Investigation Report appeared to have been produced four years after the [REDACTED] meetings with P-1339 was raised twice by the Presiding Judge.
3. Following the completion of his testimony, the Defence engaged in *inter partes* discussions with the Prosecution, seeking disclosure of contemporary notes of Prosecution investigators' discussions with P-1339 on this specific matter ('Contemporary Notes'). While the Prosecution did provide exculpatory clarifying information in email correspondence regarding its follow-up inquiries into the Contemporary Notes ('Clarifications'), it refused Defence requests that it i) disclose the Contemporary Notes; ii) formally disclose the Clarifications in the form of an investigation report; or iii) recognise the Clarifications as 'agreed facts' for the purposes of Rule 69.
4. As a result of these refusals, the Defence 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 for the purposes of any future Article 74 judgment.

¹ CAR-OTP-2122-7725.

5. The Defence therefore respectfully seeks disclosure of the Contemporary Notes, and the information contained in the Clarifications, in a suitably usable form.

PROCEDURAL HISTORY

6. From 1 to 14 September 2022, P-1339 gave evidence before the Chamber.
7. On 12 September 2022, during P-1339's examination by the Defence, Prosecution Counsel referred to the Contemporary Notes that formed the basis for the Investigation Report that was discussed with the witness.²
8. On 15 September 2022, the Defence requested via *inter partes* email correspondence that the Prosecution disclose the Contemporary Notes.³
9. On 16 September 2022, the Prosecution responded by refusing to disclose the Contemporary Notes, arguing that they fell within the parameters of Rule 81(1); it further indicated that, after careful review of the Contemporary Notes, all material information had been duly disclosed.⁴
10. On 20 September 2022, the Defence requested, as an alternative to disclosure of the Contemporary Notes, confirmation that i) the Contemporary Notes were indeed taken contemporaneous to the Prosecution's [REDACTED] meeting with P-1339; ii) that the Investigation Report accurately reflects the Contemporary Notes; and iii) that the Contemporary Notes do not refer to an incident⁵ recounted during P-1339's testimony.⁶
11. On 29 September 2022, the Prosecution replied by providing the Clarifications.⁷

² ICC-01/14-01/18-T-158-CONF-ENG, 35:7-24.

³ See, Annex, Email from Defence to Prosecution of 15 September 2022 at 12:28.

⁴ See, Annex, Email from Prosecution to Defence of 16 September 2022 at 13:32.

⁵ See *infra*, para. 37.

⁶ See, Annex, Email from Defence to Prosecution of 20 September 2022 at 11:48.

⁷ See, Annex, Email from Prosecution to Defence of 29 September 2022 at 09:17.

12. On 9 November 2022, the Defence inquired as to whether it could be understood that the Prosecution's Clarifications constitute agreed facts for the purpose of Rule 69.⁸
13. On 24 November 2022, the Prosecution responded that it did not consider that the subject matter of the Clarifications fell under Rule 69, contending that the information did not comprise 'evidence' within the meaning of that rule.⁹
14. On 12 December 2022, the Defence replied by requesting that the Prosecution produce and disclose the Clarifications in the form of an investigation report, citing its inability to bring the exculpatory information contained therein to the attention of the Chamber, including for the purposes of any eventual Article 74 judgment.¹⁰
15. On 12 December 2022, the Prosecution refused to disclose the Clarifications in the form of an investigation report.¹¹

APPLICABLE LAW

Article 51(5) – Rome Statute

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 54(1)(a) and (c) – Rome Statute

1. The Prosecutor shall:
 - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
 - [...]
 - (c) Fully respect the rights of persons arising under this Statute.

Article 67(2) – Rome Statute

⁸ See, Annex, Email from Defence to Prosecution of 09 November 2022 at 16:31.

⁹ See, Annex, Email from Prosecution to Defence of 24 November 2022 at 13:53.

¹⁰ See, Annex, Email from Defence to Prosecution of 12 December 2022 at 13:20.

¹¹ See, Annex, Email from Prosecution to Defence of 12 December 2022 at 16:31.

2. 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 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.

Rule 81(1) – Rules of Procedure and Evidence

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

SUBMISSIONS

A. The Contemporary Notes and Clarifications are subject to disclosure pursuant to Article 67(2).

i) Witness P-1339 has provided materially inconsistent accounts in relation to the whereabouts of the Lists.

16. On [REDACTED], P-1339 was interviewed by Prosecution investigators.¹² He informed them that [REDACTED]; and that [REDACTED].¹³ According to further details set out in his statement, P-1339 stated that [REDACTED]¹⁴ [REDACTED].¹⁵ [REDACTED].¹⁶

17. On [REDACTED], P-1339 was again interviewed by Prosecution investigators, for the express objective of following up on [REDACTED].¹⁷ P-1339 told investigators that he had been unable to obtain [REDACTED]; he stated that they were with [REDACTED].¹⁸ He further claimed that on [REDACTED].¹⁹

18. Shortly before his testimony, during the statement-correction process, P-1339 modified the assertion in his statement that [REDACTED].²⁰ Notably, P-1339

¹² CAR-OTP-2122-7725, para. 1.

¹³ Ibid.

¹⁴ Later corrected to [REDACTED]; see *infra*, para. 18.

¹⁵ CAR-OTP-2041-0741, para. 60.

¹⁶ Ibid.

¹⁷ CAR-OTP-2122-7725, para. 2.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ CAR-OTP-2102-0105-R02 Modified by Witness (CAR-OTP-00000015-R01), para. 60.

did not make any further corrections to that paragraph – including to the claim that [REDACTED] and had not turned it over to P-1339; as well as his undertaking to provide [REDACTED].

19. P-1339 appeared before the Chamber from 1-14 September 2022. During cross-examination, P-1339 reiterated that [REDACTED]; however, he now stated that he had [REDACTED].²¹ He repeatedly and categorically denied [REDACTED], and stated on the contrary that he had informed investigators that he would be unable to [REDACTED]:

[REDACTED].²²

20. Further, he confirmed that the discussion with OTP investigators as regards [REDACTED] had ended at this juncture, and that he had not, at any point in time, attempted to obtain [REDACTED].²³

21. Defence Counsel then put to P-1339 his account regarding the whereabouts of [REDACTED] and his alleged attempts to obtain them, as set out in the Investigation Report:

[REDACTED]²⁴

22. P-1339's initial response to this inconsistent account having been put to him – i.e. to ask Defence Counsel [REDACTED] – is telling, and appears to be the instinctive response of a witness who has lost track of the details of the various untruths that he has told in the context of these proceedings; first, in interviews with Prosecution investigators, and subsequently, before the Chamber.²⁵

²¹ ICC-01/14-01/18-T-158-CONF-FRA, 26:8-19.

²² ICC-01/14-01/18-T-158-CONF-FRA, 26:20-27:4.

²³ ICC-01/14-01/18-T-158-CONF-FRA, 27:5-11.

²⁴ ICC-01/14-01/18-T-158-CONF-FRA, 27:22-26.

²⁵ See also, *infra*, paras 43-44.

23. P-1339 then claimed that he had in fact told investigators that he would endeavour to send [REDACTED] to attempt to obtain [REDACTED]; and then, that he had subsequently informed the investigators that [REDACTED].²⁶
24. When his prior claim (i.e. [REDACTED]) was put to him, P-1339 simply denied making such a claim at all.²⁷ This is despite the fact that this claim appears not only in the Investigation Report (having apparently been made twice,²⁸ in both the [REDACTED] and [REDACTED] meetings) but also in his witness statement, which was reviewed and signed by P-1339 in [REDACTED], and reviewed again in 2022.²⁹
25. Defence Counsel then put to P-1339 his prior claim that [REDACTED], which resulted in [REDACTED].³⁰ When asked whether he had in fact made this claim to investigators, P-1339 initially partially confirmed it, while effectively maintaining that [REDACTED]:
- [REDACTED].³¹
26. Yet when (re-)confronted with his specific claim, made in his [REDACTED] meeting with investigators, [REDACTED], he now simply denied knowing who [REDACTED] was at all:
- [REDACTED].³²

²⁶ ICC-01/14-01/18-T-158-CONF-FRA, 28:16-29:6; 30:10.

²⁷ ICC-01/14-01/18-T-158-CONF-FRA, 30:11-13.

²⁸ In an inconsistent manner with respect to the identity of [REDACTED]; see *supra*, paras 16-17.

²⁹ See, CAR-OTP-2122-7725, paras 1-2; and CAR-OTP-2102-0105-R02 Modified by Witness (CAR-OTP-00000015-R01), para. 60; note that according to the covering page of CAR-OTP-2102-0105-R02, an interpreter was present during the [REDACTED] interview session.

³⁰ ICC-01/14-01/18-T-158-CONF-FRA, 30:14-24.

³¹ ICC-01/14-01/18-T-158-CONF-FRA, 30:25-31:4.

³² ICC-01/14-01/18-T-158-CONF-FRA, 32:5-20.

27. Notably, this is despite him having confirmed, in his answer directly previous, that he had indeed told Prosecution investigators that [REDACTED], following P-1339's repeated requests that he attempt to obtain [REDACTED].³³
28. P-1339 then repeated that he did not know a [REDACTED]; and that on the contrary, he had told investigators that it was [REDACTED], in an incident unrelated to [REDACTED].³⁴
- ii) *The Contemporary Notes and Clarifications are exculpatory, as they affect the credibility of P-1339.*
29. As set out above, the evolving account provided by P-1339 during his evidence as regards the whereabouts of the [REDACTED], and his attempts (or lack thereof) by P-1339 (and others) to obtain them, is materially inconsistent with the account that he provided Prosecution investigators in [REDACTED], as set out in the Investigation Report (and indeed in his Statement). The Investigation Report thus affects the credibility of P-1339's evidence, and is therefore exculpatory in nature, pursuant to Article 67(2).
30. During P-1339's examination however, the Presiding Judge twice noted the apparent four-year gap between the date that the Investigation Report was produced ([REDACTED]) and the dates of the meetings between P-1339 and Prosecution investigators in relation to [REDACTED].³⁵
31. In response, Prosecution Counsel explained that 'normatively', investigation reports were often extracted from notes taken at the time of contact with a witness.³⁶
32. Indeed, as subsequently confirmed *inter partes* in the Clarifications, the Contemporary Notes, on which basis the Investigation Report was

³³ See *supra*, para. 25.

³⁴ ICC-01/14-01/18-T-158-CONF-FRA, 33:1-13; 35:11-36:1.

³⁵ ICC-01/14-01/18-T-158-CONF-ENG, 29:8-10; 34:15-36:2.

³⁶ ICC-01/14-01/18-T-158-CONF-ENG, 35:7-24.

subsequently produced, were in fact taken around the time of the meetings themselves.³⁷

33. The Contemporary Notes, as well as the Clarifications, are thus of material importance and relevance for a full and accurate appreciation of the reliability of the Investigation Report. In this regard, the Defence recalls the comment of the Presiding Judge in the context of his queries regarding the apparent four-year gap: 'I was really interested because, as I said, without further information, it strikes one that this was produced four years later [emphasis added]'.³⁸ To borrow the Presiding Judge's terms: the 'further information' can be found in the Contemporary Notes and the Clarifications.
34. In the same vein, the Contemporary Notes and the Clarifications would preclude any contrary reliability finding that might be based (ultimately erroneously) on the apparent date on which the Investigation Report was produced; or at the very least, on any perceived lack of clarity as to whether the information contained therein was originally recorded contemporaneous to the [REDACTED] meetings between P-1339 and investigators. In this regard, the fact that the Contemporary Notes and Clarifications would serve to assist the Chamber in its truth-finding function, by formally clarifying the above for the record, would further militate in favour of their disclosure to the Defence.
35. In addition to confirming the contemporary nature of the notes on which basis the Investigation Report was prepared, the Clarifications (and Contemporary Notes) also confirm that i) the Contemporary Notes are accurately reflected in paragraph two ³⁹ of the Investigation Report (i.e. the notes from the

³⁷ See, Annex, Email from Prosecution to Defence of 29 September 2022 at 9:17.

³⁸ ICC-01/14-01/18-T-158-CONF-ENG, 36:1-2.

³⁹ Which sets out P-1339's detailed account of [REDACTED] further to his attempt to retrieve [REDACTED]; see, CAR-OTP-2122-7725, para. 2

[REDACTED]), and ii) that they ‘contain no reference to an individual named [REDACTED], and [REDACTED], having [REDACTED].⁴⁰

36. Not only do the Contemporary Notes and Clarifications thus bolster the reliability of the Investigation Report; they also serve as further evidence that P-1339 has in fact provided materially inconsistent accounts of the whereabouts of [REDACTED], as well as of his efforts (or lack thereof) made to [REDACTED]. As such, they affect the credibility of P-1339 and are thus exculpatory in and of themselves.

iii) An ‘absence’ of information can be exculpatory in and of itself.

37. In *inter partes* correspondence, the Prosecution took the position that an absence of information cannot be, ‘without more’, exculpatory.⁴¹ The Defence understands this to be referring to the absence of any reference, in the Contemporary Notes, to the alleged incident in which P-1339 was [REDACTED].⁴²
38. While the Prosecution might reasonably disagree as regards the probative value of the absence of information in the Investigation Report and Contemporary Notes, there is no merit in the suggestion that an absence of information cannot be in and of itself exculpatory. Indeed, it is unclear on what basis the Prosecution asserts as much.
39. By way of contrary example: in the *Kalimanzira* case before the ICTR, the accused Kalimanzira was charged and convicted at first instance for aiding and abetting genocide for his role in the ‘Kabuye hill attack’.⁴³ On appeal, Kalimanzira argued that the Trial Chamber had erred in finding that the Prosecution had not violated its disclosure obligations, in failing to disclose in

⁴⁰ See, Annex, Email from Prosecution to Defence of 29 September 2022 at 9:17.

⁴¹ See, Annex, Email from Prosecution to Defence of 12 December 2022 at 16:31.

⁴² See *supra*, para. 28.

⁴³ *Kalimanzira v Prosecutor*, ICTR-O5-88-A, [Judgment](#), 20 October 2010, para. 16.

a timely manner, transcripts of witnesses' testimonies from a different trial, in relation to the same attack, in which no reference was made to Kalimanzira.⁴⁴ The Appeals Chamber ultimately held that the Trial Chamber had indeed erred in law in failing to find that the transcripts were potentially exculpatory, due to the absence of any reference to Kalimanzira's involvement in the attack.⁴⁵

40. As set out above: during his testimony, P-1339 denied ⁴⁶ having been [REDACTED], as set out in the Investigation Report; instead, he recounted the Alternative Incident.⁴⁷
41. The fact that reference to the Alternative Incident is nowhere to be found in the Investigation Report or the Contemporary Notes – despite P-1339 having expressly claimed to have recounted the Alternative Incident to investigators⁴⁸ – plainly affects his credibility. That this can be characterised as an 'absence' of information has no bearing on the exculpatory nature of this fact. What is of importance is the fact that, as expressly noted by the Presiding Judge,⁴⁹ P-1339's testimony in this regard is inconsistent with the Investigation Report; likewise, the Contemporary Notes and Clarifications.
42. The Defence also notes the comment of the Presiding Judge, to the effect that there exists a presumption that the Investigation Report (and by extension the Contemporary Notes) constitute an accurate record of Prosecution investigators' meetings with P-1339.⁵⁰
43. Should this be the case, P-1339 has done nothing to rebut that presumption; on the contrary, his lack of credibility was repeatedly made apparent throughout

⁴⁴ Ibid, paras 15-17.

⁴⁵ Ibid, paras 18-20.

⁴⁶ Notably, after having initially confirmed that he was [REDACTED], and that he had indeed recounted this incident to Prosecution investigators; see *supra*, para. 25.

⁴⁷ See *supra*, para. 28; and ICC-01/14-01/18-T-158-CONF-FRA, 35:11-36:1.

⁴⁸ ICC-01/14-01/18-T-158-CONF-FRA, 35:11-36:1.

⁴⁹ See, ICC-01/14-01/18-T-158-CONF-ENG, 34:9-12.

⁵⁰ ICC-01/14-01/18-T-158-CONF-FRA, 32:19-24.

the course of his testimony. In fact, P-1339's responses under examination on [REDACTED] and the Investigation Report were typical of the other responses he gave throughout his testimony when confronted with other irreconcilable prior inconsistencies, in their convoluted, evolving nature, and in the manner in which he simply reverted to implausible denials when faced with contrary evidence.

44. By way of illustrative example,⁵¹ the Chamber will recall that P-1339 claimed to have contemporaneously [REDACTED] of events and incidents that occurred [REDACTED].⁵² When confronted with the physical impossibility of his evidence in this regard, P-1339 denied that he recognised the photograph, initially (twice) suggesting that Prosecution investigators had [REDACTED].⁵³ He then claimed that he had transferred the content of [REDACTED].⁵⁴ Subsequently, he claimed that he had written [REDACTED] not in [REDACTED], but when he left the group at the end of [REDACTED];⁵⁵ before immediately reversing his position and stating that [REDACTED].⁵⁶ Finally, he stated that he [REDACTED].⁵⁷

iv) The Contemporary Notes and Clarifications are not exempt from disclosure pursuant to Rule 81(1) and should be disclosed in a suitably usable form.

45. In *inter partes* correspondence, the Prosecution refused to disclose the Contemporary Notes, and to formally disclose the Clarifications in the form of an investigation report, on the basis that they were exempted from disclosure pursuant to the 'internal work product' exemption in Rule 81(1).⁵⁸

⁵¹ The Chamber will recall two further examples of inconsistencies arising from the evidence of P-1339's evidence, as raised in previous Defence submissions, see ICC-01/14-01/18-1637-Conf, paras 20-23 and 32-43.

⁵² ICC-01/14-01/18-T-154-CONF-FRA, 18:1-24; ICC-01/14-01/18-T-160-CONF-FRA, 10:1-12.

⁵³ ICC-01/14-01/18-T-160-CONF-FRA, 10:1-11:1; 13:1-14:2.

⁵⁴ ICC-01/14-01/18-T-160-CONF-FRA, 14:4-11.

⁵⁵ ICC-01/14-01/18-T-160-CONF-FRA, 17:26-18:10.

⁵⁶ ICC-01/14-01/18-T-160-CONF-FRA, 18:11-21.

⁵⁷ ICC-01/14-01/18-T-160-CONF-FRA, 20:2-8.

⁵⁸ See, Annex, Email from Prosecution to Defence of 16 September 2022 at 13:32; see also, Email from Prosecution to Defence of 12 December 2022 at 16:31.

46. The Prosecution position in this regard is without merit. Pursuant to Article 51(5), the Prosecution's obligation to disclose exculpatory evidence, enshrined in Article 67(2), supersedes the 'internal work product' exception set out in Rule 81(1).⁵⁹ The Prosecution's statutory duty to fully respect the rights of an accused, as well as its duty to investigate incriminating and exonerating evidence equally, are further testament to the overriding nature of the Prosecution's obligation to disclose exculpatory evidence in its possession.⁶⁰
47. The Prosecution's refusal to formally disclose the Clarifications in the form of an investigator's report was also based on its position that the Prosecution has no 'obligation to positively generate evidence [...] especially when the information is available' to the Defence.⁶¹
48. At the outset, this refusal is based on a partial mischaracterisation of the facts. The content of the Clarifications effectively⁶² overlaps with the information already contained in the Contemporary Notes. In the circumstances therefore, compiling and disclosing this information in a suitably usable form cannot reasonably be understood as 'generating evidence' in the ordinary sense of that term.
49. Further, and in any event, the Defence submits that Article 67(2) does in fact encompass a corollary sub-obligation to compile exculpatory information in a form suitable for disclosure, where necessary. Such a reading of Article 67(2) would duly reflect the paramount importance of timely disclosure of exculpatory information to the defence, and its impact on the fairness of

⁵⁹ See also, Rules of Procedure and Evidence, Explanatory Note, which states in relevant part 'In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute.

⁶⁰ See, Article 54(1)(a) and (c).

⁶¹ See, Annex, Email from Prosecution to Defence of 12 December 2022, at 16:31.

⁶² The Prosecution's explanation (provided in the Clarifications) as to the difference between the exact date of contact with the witness and the date of addition of the notes to the Prosecution's internal contact database being usually due to the length of field missions and to remote internet access issues, would not appear to be itself part of the Sought Notes; however the Defence maintains that the remainder of the content of the Sought Notes and Clarifications would overlap; see, Annex, Email from Prosecution to Defence of 29 September 2022 at 9:17.

proceedings, as reflected in case law of the Court.⁶³ Nor can it be reasonably argued that reading this corollary sub-obligation into Article 67(2) would be unduly burdensome for the Prosecution, not least given that the Prosecution regularly produces and discloses investigation reports prepared on the basis of its internal notes, in line with its disclosure obligations, as explained by Prosecution Counsel during the evidence of P-1339.⁶⁴

50. Accordingly, in *Lubanga*, Trial Chamber I held that, where Prosecution ‘internal work product’ ‘contains disclosable information, it will be provided to the defence (in a suitably usable and intelligible form, either by way of disclosure of redacted documents or in a separate document) [emphasis added]’.⁶⁵ The Prosecution’s duty to disclose exculpatory information therefore extends beyond merely the substance of that information, to its form; merely making the exculpatory information ‘available’ to the Defence does not of itself suffice in this regard.
51. In the circumstances at hand: the Prosecution has transferred material, exculpatory information, which directly affects the credibility of a key Prosecution witness, in unsigned, effectively anonymous email correspondence, with no indication as to when, by whom, or in what circumstances this information was verified and compiled.⁶⁶ This email correspondence, in its current form, is therefore *prima facie* inappropriate for formal submission as evidence, not least given that the Defence will argue that this information should be weighed against the sworn testimony of a key Prosecution witness, whose evidence the Prosecution relies on for multiple charges and modes of liability brought against Mr Yekatom. It therefore cannot

⁶³ See, e.g., ICC-01/14-01/18-551-Conf, para. 25.

⁶⁴ ICC-01/14-01/18-T-158-CONF-ENG, 35:7-24.

⁶⁵ *Prosecutor v Lubanga*, Redacted Decision on the prosecution's disclosure obligations arising out of an issue concerning witness DRC-OTP-WWW-0031, 20 January 2011, [ICC-01/04-01/06-2656-Red](#), para. 18.

⁶⁶ See, Annex, Email from Prosecution to Defence of 29 September 2022 at 9:17.

be reasonably argued that the Prosecution has fulfilled its obligations for disclosure of this material 'in a suitably usable form'.

52. Despite this however, the Prosecution effectively declines any further cooperation, in refusing to formally disclose the Contemporary Notes, refusing to formally compile and disclose the Clarifications, and refusing to 'agree' to the Clarifications pursuant to Rule 69.
53. The Defence is therefore at an impasse as regards its ability to tender this exculpatory information as part of the evidentiary record in these proceedings, so as to ensure that it is duly among the material upon which basis the Chamber will make its final credibility assessment of P-1339 in any eventual Article 74 judgment. Even setting aside the question of whether the Prosecution's handling of this matter can be reconciled with its statutory duty to assist the Chamber to establish the truth, it is clear that the Prosecution's unduly narrow interpretation of its Article 67(2) obligations occasions concrete prejudice to Mr Yekatom's fair trial rights.

CONCLUSION

54. The Defence requests that the Chamber order the Prosecution to disclose the Contemporary Notes, in a 'suitably usable and intelligible form'.
55. In line with previous Prosecution practice, the preparation and disclosure of an Investigation Report with attendant indicia of reliability, such as dates and names of Prosecution investigators involved (redacted if necessary), would appear to be the most appropriate and procedurally sound form of disclosure of this information.
56. Lastly, the information set out in the Clarifications should be included in the Contemporary Notes, to the extent that it is not already present or otherwise cannot be deduced on the basis of the Contemporary Notes.

CONFIDENTIALITY

57. This request is filed on a confidential basis due to the references to the confidential transcripts of P-1339. The Annex is also classified as confidential as it depicts contact information of the staff of the Court. A public redacted version will be filed forthwith.

RELIEF SOUGHT

58. In light of the above, the Defence respectfully requests that Trial Chamber V:
ORDER that the Prosecution disclose, in suitably usable form, the Contemporary Notes, including the Clarifications, in accordance with paragraphs 54-56 above.

RESPECTFULLY SUBMITTED ON THIS 6th DAY OF JUNE 2023



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