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**International
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Date: **23 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 A**

**Public Redacted Version of ‘Yekatom Defence Response to the
‘Prosecution’s Request for an order concerning the cooperation with
[REDACTED]’, ICC-01/14-01/18-1859-Conf, 8 June 2023’, 29 June 2023, ICC-
01/14-01/18-1898-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 responds to the Prosecution's "Request for an order concerning the cooperation with [REDACTED]" ('Request').¹
2. The Defence opposes the request for Trial Chamber V's intervention to obtain the cooperation of [REDACTED] on the basis that: (A) redactions applied to the Prosecution's correspondence with [REDACTED] are unjustified; (B) the Prosecution fails to demonstrate the requirement of necessity to seek judicial intervention and; (C) the Prosecution's Request is unjustifiably untimely and inappropriate at the present stage of the proceedings.

PROCEDURAL HISTORY

3. On 8 May 2023, the Defence was notified of the Request in which the Prosecution sought requested the Chamber's intervention to seek the cooperation of [REDACTED] to provide the documents listed in its paragraph 7 ('Sought Documents').²
4. On the same day, the Defence requested urgently the disclosure of the request for assistance sent by the Prosecution to [REDACTED] ('RFA') and its corresponding response, mentioned in the Request, so as to be in a position to properly respond to the latter.³
5. On 9 May 2023, the Prosecution responded, indicating that the "requested correspondence contains confidential information pertaining to international

¹ ICC-01/14-01/18-1859-Conf.

²[REDACTED].

³ Email sent by the Yekatom Defence to the Prosecution on 08 May 2023 at 17:26; ICC-01/14-01/18-1859-Conf, para. 10.

cooperation matters which would require significant redactions” and providing the Defence with a summary⁴ of its exchanges with [REDACTED].⁵

6. On 10 May 2023, the Defence requested that the Chamber’s order the Prosecution to disclose the RFA and the ensuing response from [REDACTED].⁶
7. On 11 May 2023, the Prosecution provided its position on the Defence’s request for disclosure and submitted that “the Defence has at its disposal sufficient information to assess whether the requirements for judicial intervention to seek the cooperation of [REDACTED] are made out”.⁷
8. On the same day, the Defence reiterated its request for disclosure.⁸
9. On 15 May 2023, the Chamber instructed the Prosecution to file its correspondence with [REDACTED] related to their requests for assistance *ex parte*, as well as a confidential version with redactions applied as necessary.⁹
10. On 16 May 2023, the Defence was notified of the ‘*Prosecution’s Notice of Compliance with “Order regarding Filing ICC-01/14-01/18-1859-Conf”*’¹⁰ with redacted exchanges between the Prosecution and [REDACTED] (‘Correspondence’) [REDACTED].¹¹
11. On 17 May 2023, citing the extensive and unjustified redactions applied to the substance of the Correspondence, the Defence requested the Chamber to order the Prosecution to either re-disclose the Correspondence with

⁴ This summary was incomplete; see *infra*, para. 22.

⁵ Email sent by the Prosecution to the Defence on 09 May 2023 at 18:49.

⁶ Email sent by the Yekatom Defence to the Trial Chamber V on 10 May 2023 at 14:49.

⁷ Email sent by the Prosecution to the Trial Chamber V on 11 May 2023 at 10:55.

⁸ Email sent by the Yekatom Defence to the Trial Chamber V on 11 May 2023 at 15:01.

⁹ Email sent by the Trial Chamber V to the Parties and Participants on 15 May 2023 at 17:30.

¹⁰ ICC-01/14-01/18-1871-Conf.

¹¹ [REDACTED].

redactions applied pursuant to the redaction protocol, or to justify the redactions in accordance with the applicable legal framework.¹²

12. On 17 May 2023, the Chamber noted the absence of justification by the Prosecution of any legal basis for the necessity of the redactions applied to the Correspondence and instructed the Prosecution to justify the redactions applied to the Correspondence in accordance with the applicable framework.¹³
13. On 19 May 2023, the Prosecution provided its position on the redactions, arguing that they were applied under article 87 and 93(8)(a) of the Rome Statute ('Statute') and fell under the "Court's jurisprudence with respect to confidential communications concerning matters of international cooperation". It added that "it is incumbent on the Defence to substantiate a sufficient degree of materiality of the information sought to overcome the presumption that '[d]ocuments related to cooperation between the Prosecution and national authorities are not disclosable per se'".¹⁴
14. On 22 May 2023, citing the Prosecution's failure to provide meaningful justification for the redactions, the Defence requested the Chamber to re-order the Prosecution to comply with the applicable procedure for redactions; or alternatively, to dismiss *in limine* the Request.¹⁵
15. On 23 May 2023, the Chamber rejected the Defence's request, finding that the Defence "possesses the necessary information to respond to the Request" and noting that "the redacted information is not determinative in the adjudication of the Request, and that any prejudice caused to the Yekatom Defence in responding to the Request, if any, is minimal" ('23 May Decision').¹⁶

¹² Email from the Defence to the Trial Chamber V on 17 May 2023 at 11:10.

¹³ Email from the Trial Chamber V to the Parties and Participants on 17 May 2023 at 17:34.

¹⁴ Email from the Prosecution to the Trial Chamber V on 19 May 2023 at 17:42.

¹⁵ Email from the Defence to the Trial Chamber V on 22 May 2023 at 10:18.

¹⁶ Email from the Trial Chamber V to the Parties and Participants on 23 May 2023 at 08:23.

SUBMISSIONS

A. The Request should be dismissed *in limine*, given the Prosecution's unjustified refusal to lift redactions applied to the Correspondence.

16. First, the Prosecution's justification for the redactions is spurious. The Prosecution's reliance on article 93(8)(a) is misplaced.¹⁷ Article 93(8) governs the use of information transmitted to the Court by State Parties on a confidential basis, and is thus inapplicable here.¹⁸ Article 93(8)(a) cannot be severed from the remainder of article 93(8) to justify redactions in disclosed¹⁹ documents; not least given that it i) expressly provides for exceptions to confidentiality 'as required for the investigation and proceedings', and ii) does not refer to (and therefore does not distinguish between) confidentiality vis-à-vis parties to proceedings, and vis-à-vis third parties.²⁰ The Statute must be read as a whole, and its provisions in their specific context. Nor has the Prosecution cited any meaningful support for its position in this regard.²¹
17. Even if, *arguendo*, article 93(8)(a) could be isolated in this manner, a general obligation on the Court to 'ensure the confidentiality of documents and information' could not constitute a valid stand-alone ground for restricting disclosure of information to the Defence. Should the Prosecution's argument be followed, given the broad and vague phrasing in article 93(8)(a), all

¹⁷ *Contra*, Email from the Prosecution to the Trial Chamber V on 19 May 2023 at 17:42.

¹⁸ Contrary to article 93(8), [REDACTED] is not a State Party; there no suggestion that [REDACTED] has transmitted the redacted portions on a confidential basis; and the Prosecution has 'used' the redacted information not for the purpose of generating new evidence, but by filing it onto the record in support of its Request; see, ICC-01/14-01/18-1871-Conf.

¹⁹ For clarity, the term 'disclosure' in this section refers broadly to formally making information available to the Defence, e.g. via filing information onto the trial record, or otherwise providing information pursuant to judicial instruction; it does not include informal *inter partes* sharing of information (e.g. via "courtesy copies").

²⁰ The Defence notes that the confidentiality protocol established in these proceedings is couched in language mirroring that of article 93(8): section III. governs the 'Use of confidential documents and information in investigations'; paragraph 6 refers to a 'general obligation not to disclose to third parties any confidential document or information [emphasis added]', and to 'conditions and procedures in which the disclosure of confidential documents or information to third parties as part of investigative activities' is permissible; and paragraph 7 refers to minimising risk of exposing confidential information '[t]hroughout the investigation and proceedings'; all of which would indicate that article 93(8)(a) is aimed at maintaining confidentiality vis-à-vis third parties and not parties to proceedings; see, ICC-01/14-01/18-677-Anx5, paras 6-7.

²¹ See, Email from the Defence to the Trial Chamber V on 22 May 2023 at 10:18.

‘documents and information’ in the possession of the Court, received pursuant to cooperation with third parties, would thus automatically be imbued with a presumption of confidentiality. This would comprise an extremely broad umbrella category of evidentiary material that the Prosecution would be free to withhold, by default, from the Defence. The Prosecution’s attempt to carve out a novel redaction category thus contravenes the well-established ‘overriding principle’ regarding redactions, previously upheld in these proceedings, ‘that full disclosure should be made and non-disclosure is the exception’.²²

18. It is also simply unworkable in practice. The Prosecution appears to argue (contrary to appellate jurisprudence),²³ that the specific materiality of each redacted portion of information, purportedly presumed confidential under article 93(8)(a), must be demonstrated prior to the lifting of redactions. Not only would this mean, contrary to judicial economy, that materiality must be litigated twice: once in respect of the document itself, and again in respect of specific redacted portion; it would also effectively reverse the burden of justifying redactions onto the receiving party,²⁴ given the extremely broad potential application of this novel category (i.e. all information received pursuant to third party cooperation). In other words, the sheer broadness of this ‘justification’ would allow the Prosecution to apply wholesale redactions to such documents (including documents deemed material, exculpatory, or otherwise subject to disclosure) and thereby impose the Kafkaesque obligation on the receiving party to demonstrate – first *inter partes*, and failing that, to the Chamber – the materiality of whole portions of such documents, with little to no idea of what each specific portion might contain. On grounds

²² See, ICC-01/14-01/18-1578-Conf, para. 26, fn. 43, and references cited therein.

²³ See, *infra*, paras 23-24.

²⁴ See, *contra*, ICC-01/14-01/18-677, para. 73.

of judicial economy alone, the Prosecution's ill-considered reliance on article 93(8)(a) should be rejected.

19. To be clear, the Defence does not argue that the relevance of information to defence preparation is an irrelevant consideration in the determination of whether redactions are justified.²⁵ Relevance is indeed a consideration to be balanced against legitimate justifications for redactions;²⁶ however it is not a sufficient reason, in of itself, to withhold such information from the Defence.
20. Similarly, the Prosecution's determination that unredacted portions of the Correspondence are 'sufficient to the disposition of the Request' does not constitute justification for redactions. It is fundamentally contrary to the principle of equality of arms for the Prosecution to withhold information from the Defence, in adversarial proceedings such as these, on this basis. As held in *Ruto & Sang*, '[w]hen disputes arise involving claims that the Prosecution has not complied with their disclosure obligations, it is not open to the Prosecution to simply respond without clear explanation that it was 'unnecessary' to make the disclosure to the Defence'.²⁷
21. Nor is the fact, the Defence respectfully submits, that redacted portions of the Correspondence are 'not determinative in the adjudication of the Request'.²⁸ It cannot be controversial that the Defence (or indeed, any party to proceedings) approaches, analyses, and understands information from a perspective not available to other parties, or to the Chamber. This difference underpins adversarial proceedings, and lies at the heart of the principle of

²⁵ See, *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 AC Decision'), para. 72(c).

²⁶ *Ibid.*, paras 71-73.

²⁷ *Prosecutor v Ruto & Sang*, Decision on Response to Prosecution Application Regarding the Disclosure of the Identities of Certain Individuals Who Will not Appear as Trial Witnesses, [ICC-01/09-01/11-886](#), 28 August 2013, para. 10 ('Ruto & Sang Decision').

²⁸ Unless the Chamber's adjudication of the Request will consist of its *in limine* dismissal.

audi alteram partem and the procedural safeguards within the Court's disclosure/redaction framework.

22. The unfortunate lack of clarity, consistency and completeness in the information provided by the Prosecution as regards the content of the Correspondence aptly illustrates the importance of upholding transparency in adversarial proceedings. In this respect, the Defence recalls:

- the Prosecution's initial *inter partes* claim that '[REDACTED] effectively declined' to provide the information it sought, subsequently modified to '[REDACTED] responded without providing the requested information' once the Chamber was seized of the matter;²⁹
- the Prosecution's initial *inter partes* claim that besides [REDACTED] generic response received in March 2019, [REDACTED] did not reply to any other of the Prosecution's requests' – which claim was inexact, given that [REDACTED] and the Prosecution exchanged 'follow-up' correspondence prior to the March 2019 [REDACTED] response;³⁰ and,
- the Prosecution's failure to mention the existence of the 'additional letter' sent by the Prosecution to [REDACTED] on 13 March 2019.³¹

23. Second, it is established in the Court's case law, in respect of documents subject to disclosure, that disclosure obligations extend 'to the entire document and not only to the "relevant" portions of information contained within such a document'.³² The Appeals Chamber has applied this principle ('Principle') not only to documents disclosed under rule 77,³³ but also to those disclosed under rule 111.³⁴ The Principle can thus be understood to apply irrespective of the specific provision (if any) under which documents are

²⁹ See, Email sent by the Prosecution to the Defence on 09 May 2023 at 18:49; and Email sent by the Prosecution to the Trial Chamber V on 11 May 2023 at 10:55.

³⁰ See, Email sent by the Prosecution to the Defence on 09 May 2023 at 18:49; and ICC-01/14-01/18-1871-Conf, para. 2.

³¹ See, ICC-01/14-01/18-1871-Conf, para. 3.

³² *Prosecutor v. Lubanga*, Decision on the Prosecutor's request for non-disclosure in relation to document "OTP/DRC/COD-190/JCCD-pt", [ICC-01/04-01/06-3031](#), 27 May 2013 ('Lubanga AC Decision of 27 May 2013'), para. 12.

³³ *Ibid.*

³⁴ See, Katanga AC Decision, paras 89-98.

disclosed to an accused; likewise, irrespective of the method by which documents are disclosed to an accused.³⁵

24. It therefore cannot be correct that the Principle does not apply to the Correspondence simply because the Chamber did not expressly deem the latter material to defence preparation when it ordered that it be disclosed, or because it was filed on the record. Such an unduly narrow reading of the Principle would be at odds with the appellate jurisprudence in which it has been applied, if not in letter, then in spirit. More broadly, it would be inconsistent with the above-mentioned 'overriding principle' that 'full disclosure should be made' and that '[i]t should always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule';³⁶ likewise, with the fact that the Court's 'Statute and the Rules of Procedure and Evidence place much importance on disclosure to the defence'.³⁷ Allowing the Prosecution to apply unjustified redactions to documents on this basis would amount to endorsing a loophole in the disclosure/redaction framework, thereby allowing the Prosecution to withhold information from an accused, unchecked by the safeguards established in the Court's Statute, rules, and case law on the basis of a mere technicality.

25. In any event, even assuming *arguendo* that the Principle applied strictly to documents that are 'material' pursuant to rule 77, the Correspondence, as a whole, would qualify as such. The Defence's opposition to the Request is based in large part on the Prosecution's failure to demonstrate that the Chamber's intervention is 'necessary', given its failure, as evidenced in the

³⁵ See also, where Trial Chamber V(A) held, citing the Lubanga AC Decision of 27 May 2013: 'The Appeals Chamber's recent decision considers that the entirety of documents containing disclosable information do fall under the Prosecution's disclosure obligations', Ruto & Sang Decision, para. 10.

³⁶ *Supra*, para. 18; see, Lubanga AC Decision of 27 May 2013, para. 10; and Katanga AC Decision, para. 70.

³⁷ *Prosecutor v Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", [ICC-01/04-01/06-568](#), 13 October 2006, para. 37.

Correspondence, to specifically and clearly request the Sought Documents.³⁸ Defence 'preparations' necessarily include the drafting of legal submissions in interlocutory litigation, and the Correspondence was itself centrally relevant to the preparation of the Defence's below submissions on the merits.³⁹

26. The Prosecution's failure to meaningfully justify the redactions to the Correspondence should thus ground the *in limine* dismissal of the Request.
27. Should this request for *in limine* dismissal be deemed to constitute a request for reconsideration of the 23 May Decision, the applicable threshold is met.⁴⁰
28. To the extent that, in that Decision the Chamber i) accepted the Prosecution's reliance on article 93(8)(a) as legitimate justification for redactions;⁴¹ and/or ii) found that the Principle did not apply because the Correspondence was not expressly deemed subject to disclosure pursuant to rule 77; and/or iii) found that the Correspondence was not, as a whole, material to defence preparations; and/or iv) failed to provide sufficient reasoning in authorising non-disclosure,⁴² the Decision contains clear errors of reasoning.
29. To the extent that failure to dismiss the Request *in limine* would amount to endorsing the Prosecution's circumvention of the established disclosure/redaction framework, which *inter alia* preserves the principle of equality of arms and *audi alteram partem*, reconsideration is also necessary to prevent an injustice.

³⁸ See *infra*, paras 33-42.

³⁹ See, ICC-01/14-01/18-1438-Conf, paras 8-9.

⁴⁰ See e.g., *Prosecutor v Al Hassan*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', [ICC-01/12-01/18-734](#), 9 April 2022, para. 11, and references cited therein.

⁴¹ Not least with respect to the additional letter, or the OTP correspondence with [REDACTED], given that these cannot in any sense comprise documents received pursuant to third party cooperation.

⁴² See, Katanga AC Decision, para. 101; and *Prosecution v Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", [ICC-01/04-01/06-773](#), 14 December 2006, para. 20.

B. The Prosecution failed to demonstrate the necessity of the Chamber's intervention

30. The Defence contends that the Prosecution's Request does not meet the requirement of necessity to seek the Chamber's intervention. On previous rulings on cooperation requests, the Chamber considered whether the requesting Party "exhausted all available avenues before approaching the Chamber" to "satisfy the element of 'necessity'".⁴³

31. In the present case, the Prosecution has (i) failed to specifically request the Sought Documents from [REDACTED]; (ii) misinterpreted the requirement of necessity to seek the Chamber's intervention; and (ii) possesses powers equal to those of the Chamber to seek [REDACTED] cooperation under Article 87(6) of the Statute.

i) The Prosecution failed to request the Sought Documents directly from [REDACTED]

32. The Defence submits that the Prosecution failed to request the Sought Documents directly from [REDACTED] through RFAs as prior cooperation efforts by the Prosecution were either targeting different material, or formulated without sufficient precision to be reasonably understood by [REDACTED] as including the Sought Documents.

33. [REDACTED]⁴⁴ [REDACTED].⁴⁵

34. Further, the RFA sent by the Prosecution on 4 July 2018,⁴⁶ seeking [REDACTED] assistance to obtain documentation, requested *inter alia*:

[REDACTED].⁴⁷

⁴³ ICC-01/14-01/18-1470, paras. 8-9, ICC-01/14-01/18-1531-Conf-Red, para. 9.

⁴⁴ [REDACTED].

⁴⁵ ICC-01/14-01/18-1871-Conf-Anx-Red, p. 4.

⁴⁶ [REDACTED].

⁴⁷ Email sent by the Prosecution to the Defence on 09/05/2023 at 18:49.

35. The above category comprises an overly broad scope of documents and fails to specify any of Sought Documents.
36. Even if the five categories of Sought Documents could, technically speaking, have fallen under this broad scope of documents requested under the sub-point (i) of the July 2018 RFA⁴⁸, the Prosecution failed to rectify [REDACTED] understanding of the documents it sought. [REDACTED] response on 15 February 2019 in the chain of the July 2018 RFA sought confirmation of its understanding of “ICC’s specific request” which it understood as a query for “[REDACTED].”⁴⁹
37. Following its clarification request, Prosecution responded to [REDACTED] on 18 February 2019 by referring them to the previously sent email, which was already available to [REDACTED] at that point in time. The Prosecution did not correct [REDACTED]’s understanding of the July 2018 RFA, nor did it provide further clarifications to [REDACTED] that would indicate that their request for [REDACTED] was not to be understood as [REDACTED].
38. Under these circumstances, the subsequent response of [REDACTED] on 12 March 2019 regarding sub-point (i), referring the Prosecution to documentation on [REDACTED] is a reasonable response, in line with the scope and details of the Prosecution’s request.
39. Contrary to the Prosecution’s assertion in *inter partes* exchanges with the Defence, in which it held that in March 2019, “[REDACTED]”⁵⁰, [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ ICC-01/14-01/18-1871-Conf-Anx-Red, p. 8

⁵⁰ Email sent by the Prosecution to the Defence on 09/05/2023 at 18:49. (See Annex A).

40. Similarly, the December 2019 RFA submitted by the Prosecution⁵¹ [REDACTED] and its follow-up⁵² were formulated to specifically obtain “[REDACTED]” which self-evidently does not correspond with the of the Sought Documents as identified in the Request.

41. Based on the information available to the Defence,⁵³ it appears from the Correspondence that the Sought Documents were never specifically requested from [REDACTED] by the Prosecution. The absence of communication of the Sought Documents does not result from any effective refusal to cooperate by [REDACTED] in this regard, as their communication of documents was broadly in line with the Prosecution requests. The onus was on the Prosecution to draft its requests with specificity, as it did for other targeted documents in the RFAs. Nothing prevented the Prosecution from attempting to obtain the Sought Documents directly from [REDACTED], and an apparent strategic decision of the Prosecution to concentrate its investigation efforts on other documents does not constitute grounds for the Chamber’s intervention.

ii) The Prosecution misinterprets the requirement of necessity to seek the Chamber’s intervention

42. The Prosecution provides two further arguments to justify the necessity of the Chamber’s intervention in the Request. It submits that “the interest [REDACTED] seems to be shared by the YEKATOM Defence”⁵⁴ and that [REDACTED] “will significantly assist the Chamber in its truth seeking function.”⁵⁵

⁵¹ ICC-01/14-01/18-1871-Conf-Anx-Red, p. 16

⁵² ICC-01/14-01/18-1871-Conf-Anx-Red, p. 16

⁵³ [REDACTED].

⁵⁴ ICC-01/14-01/18-1859-Conf, para. 10.

⁵⁵ ICC-01/14-01/18-1859-Conf, para. 10.

43. The Prosecution's arguments, based on an 'interest' in obtaining the Sought Documents by the Prosecution, the Defence or even the Chamber, confuses the requirement of relevance with that of necessity.

44. The three requirements for any cooperation request are cumulative; they must be established individually.⁵⁶ The establishment of the relevance of the documents to the case thus does not discharge the Prosecution from its obligation to substantiate its claim that the Chamber's intervention is necessary. To meet the necessity requirement, the Prosecution has to exhaust "all available avenues before approaching the Chamber" leaving it with no other means of gaining access to these documents.⁵⁷

iii) The Prosecution possesses the relevant authority to seek [REDACTED]'s cooperation independently under the Article 87(6) of the Rome Statute.

45. The Defence submits that the Prosecution has the authority to independently seek the cooperation of [REDACTED] under Article 87(6) of the Statute, which renders superfluous any intervention on the part of the Chamber, which is not empowered with additional authority to seek or enforce [REDACTED]'s cooperation.

46. Article 87(6) of the Statute provides that the "Court may ask any intergovernmental organization to provide information or documents".

47. As found by Trial Chamber IV in *Banda & Jerbo*, "an international organization is under no obligation to cooperate with the Court pursuant to Part 9 of the Statute"⁵⁸ and "the Chamber is only empowered to "ask" the organization to provide such cooperation in accordance with Article 87(6) of the Statute".⁵⁹

⁵⁶ ICC-01/14-01/18-1470, paras. 8; ICC-01/14-01/18-1531-Conf-Red, para. 4; ICC-01/14-01/18-1159-Red, para. 6.

⁵⁷ ICC-01/14-01/18-1470, paras. 8-10; 1 July 2011, ICC-02/05-03/09-170, para. 25.

⁵⁸ ICC-02/05-03/09, para. 9.

⁵⁹ ICC-02/05-03/09, para. 11.

48. Trial Chamber V(B) in the case of *Kenyatta* interpreted “the Court” under Article 93(1) of Statute as including the Prosecution and accordingly recognized that “it is not solely the Chamber who is empowered to issue a request for cooperation”⁶⁰ and “confirm the independent authority of the Prosecution to make requests for cooperation”.⁶¹
49. Following Trial Chamber V(B)’s reasoning with regard to requests for cooperation to States Parties by the Prosecution under the Chapter 9 of the Statute, under the Article 87(6), the Prosecution must be understood as an entity not distinct from the “Court” possessing the relevant authority to issue requests for cooperation to organizations.
50. Article 87(6) thus does not confer any further authority to the Chamber to obtain an organization’s cooperation than it confers to any other organs recognized as “the Court” under this provision, such as the Prosecution.
51. Indeed, the Request remains ambiguous on what the Chamber’s intervention with [REDACTED] would entail and does not provide any submission on the legal basis which would confer the Chamber the authority to take any further measure to ensure [REDACTED]’s cooperation which would be unavailable to the Prosecution. Despite the Prosecution’s reference to the [REDACTED], it fails to provide any submissions on the additional authority this agreement would provide to the Chamber.
52. Therefore the Prosecution can independently seek the cooperation of [REDACTED] to obtain the Sought Documents. Nothing prevents the Prosecution from including its suggestions as mentioned in paragraph 11 of

⁶⁰ *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, [ICC-01/09-02/11-908](#), para. 30.

⁶¹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, [ICC-01/09-02/11-908](#), para. 27.

the Request to its own RFA addressed to [REDACTED].⁶² The Chamber's intervention to issue what would effectively amount to a request mirroring that which the Prosecution is empowered to submit, would thus be unwarranted; it is thus not 'necessary' within the meaning of the cooperation criteria.

C. The Prosecution's Request is unjustified and inappropriate at the present stage of the proceedings

53. More than three years have passed since the confirmation of charges hearings where the investigations of the Prosecution should have been largely completed.⁶³ Although the Defence does not contend the Prosecution is impeded to conduct further investigations after the confirmation of charges, the Defence notes the complete absence of any claim made in the Request as to any impediments to seeking the Chamber's intervention earlier in these proceedings.

54. The information used by the Prosecution to argue the Sought Documents' relevance were not discovered during the recent testimonies of P-2018 and P-1974, contrary to the Prosecution's assertion.⁶⁴

55. [REDACTED].⁶⁵

56. [REDACTED] ;⁶⁶ [REDACTED].⁶⁷

57. [REDACTED].⁶⁸ [REDACTED].⁶⁹ [REDACTED].⁷⁰

⁶² ICC-01/14-01/18-1859-Conf, para. 11

⁶³ ICC-01/14-01/18-1597-Conf, para. 23. *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges", 30 May 2012, [ICC-01/04-01/10-514](#), para. 44.

⁶⁴ ICC-01/14-01/18-1859-Conf, para. 9.

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ CAR-OTP-2071-0259, paras. 60-61.

⁶⁸ CAR-OTP-2071-0259, paras 21, 51.

⁶⁹ CAR-OTP-2068-0222-R05, para. 70; see also CAR-OTP-2072-0457-R02, at 0458.

⁷⁰ CAR-OTP-2072-0457-R02, at 0458.

58. The Defence also notes the Prosecution's claim on "the procedural facility with which any interested person may obtain [REDACTED].⁷¹ [REDACTED].⁷² [REDACTED].

59. The absence of a request to [REDACTED] for the Sought Documents, contrary to its attempts to secure other identified documents in the RFAs, illustrates the Prosecution's strategic decision to concentrate its investigative efforts on evidence of Mr Yekatom's alleged *mens rea* [REDACTED] rather than on the reliability of the evidence regarding [REDACTED]. This is despite the fact that by April and May 2019 at latest, the Prosecution had been on notice, through multiple of its witnesses, that [REDACTED].⁷³

60. Considering that the Request relies on information which did not emanate from a new discovery, the Prosecution's Request is inappropriate and its lateness unjustified. It should have anticipated the potential relevance of the Sought Documents years ago and attempted to secure appropriately the Sought Documents.

61. The Prosecution's lack of diligence to complete its investigations in due time on elements it considers essential to its evidence cannot be rectified though the Request and the Chamber's intervention at this stage of the proceedings.

62. The granting of the Request would unduly prejudice the fair and expeditious conduct of the proceedings. It can be reasonably expected that the pursuit of the Sought Documents with [REDACTED] would involve administrative delays to seek its cooperation and for any processing of the request.⁷⁴ Even if the Sought Documents were to be obtained at some undetermined point in

⁷¹ ICC-01/14-01/18-1859-Conf, para. 10

⁷² CAR-OTP-2105-1025.

⁷³ CAR-OTP-2105-0970, paras 50-51, 57, 67-68, 70-72 ; CAR-OTP-2109-0452, para. 45 ; CAR-OTP-2110-0556, paras 199-203, 205 ; CAR-OTP-2110-0333, para. 49, 26 ; CAR-OTP-2117-0043, p. 5.

⁷⁴ The Defence notes as an example the Trial Chamber V decision on 28 July 2022 (ICC-01/14-01/18-1531-Conf-Red) granting the Defence's request to obtain the cooperation of a State (ICC-01/14-01/18-1492-Red) which was executed the 3 March 2023.

the future, any attempt by the Prosecution to rely on them would involve further procedural litigation and delays.

63. The potential reliance on the Sought Documents by the Prosecution at a future stage would also give rise to serious concerns regarding procedural rights of Mr Yekatom, notably regarding the Defence's inability to question Prosecution witnesses who testified specifically related to the [REDACTED] on the content of these documents, given that they have all completed their testimony before the Chamber. Nor would recall be an appropriate remedy, given the delays this would entail.

64. As the Prosecution is expected to conclude its presentation of evidence imminently,⁷⁵ the potential procedural repercussions of obtaining the Sought Documents, including conceivably the reopening of the Prosecution case, would unduly prejudice the Defence and the fair and expeditious conduct of the proceedings. The pursue of this investigative step is all the more inappropriate at the present stage of the proceedings as the Chamber issued on 29 May 2023 "Further Directions on the Conduct of the Proceedings" in order to streamline the continuation of the proceedings.⁷⁶

65. Therefore, the Defence contends that the Prosecution's Request is unjustified, and the Prosecutions should not be allowed to correct its investigations, when it lacked reasonable diligence to secure the Sought Documents itself, in due time and through the appropriate channels. The Request is inappropriate at the present stage of the proceedings and granting it would be contrary to the interests of justice.

⁷⁵ Email from the Prosecution to the Trial Chamber V, Parties and Participants on 25 May 2023 at 17:49.

⁷⁶ ICC-01/14-01/18-1892

CONFIDENTIALITY

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

RELIEF SOUGHT

67. In light of the above, the Defence respectfully requests the Trial Chamber V to:

DISMISS the Request *in limine; or alternatively, to*

REJECT the Request.

RESPECTFULLY SUBMITTED ON THIS 23th DAY OF JUNE 2023



Me Mylène Dimitri
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