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**International
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Court**

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

Date: **27 May 2024**

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 Motion for limited
inspection of material obtained by VWU", 12 March 2024, ICC-01/14-01/18-
2406-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 Motion requesting that the Chamber order the Registry to facilitate a limited inspection of the mobile phone of CLR1 witness CAR-V45-P-0002.
2. The sought inspection would be limited to an examination of V45-P-0002's mobile phone conversation(s) with a single interlocutor, i.e. former Prosecution intermediary and VPRS/CLR1 intermediary P-2580 ('Limited Inspection'), to be conducted in the presence of VWU personnel; as well as the Prosecution and CLR1 Counsel (should they wish to participate).
3. Ordering the sought Limited Inspection would act to ensure due respect of Mr Yekatom's fundamental fair trial rights – notably, by ensuring that the Defence be duly granted reasonable investigative opportunities in relation to the systematic evidence fabrication scheme that continues to affect the reliability of the evidence of several key Prosecution witnesses on whom the Prosecution continues to rely.
4. Lastly, the extremely restricted scope of the sought Limited Inspection would nullify any privacy-related concerns that might arise; and further, would ensure that the expeditiousness of the proceedings remains unaffected by the Limited Inspection.

PROCEDURAL HISTORY

5. On 21 to 27 September 2023, Common Legal Representative for former child soldiers witnesses CAR-V45-P-0001 and CAR-V45-P-0002 ('CLR1 Witnesses') testified before the Chamber. During their cross-examination by the Defence, both CLR1 Witnesses were confronted *inter alia* with evidence that they had testified under false identities with the aim of thwarting verification of their

accounts of their purported ‘experiences’ as child soldiers in Mr Yekatom’s group.¹

6. On 8 January 2024, the Victims and Witnesses Unit (‘VWU’) filed a report (‘VWU Report’) in which it informed the Chamber, Parties and participants *inter alia* that in the course of its threat and risk assessment for the CLR1 Witnesses, both of whom were the subject of witness protection referrals, it found ‘several indications’ on the mobile phone of CAR-V45-P-0001 that he had testified in these proceedings under a false identity.² VWU also stated in respect of the mobile phone of CAR-V45-P-0002 that while ‘[REDACTED],’ it could ‘not definitively state that a forensic examination of the two phones by a competent authority may not disclose further information that may be relevant’.³ VWU informed the Chamber that it stood ready to ‘either keep the phones for a limited period of time or hand them over to a competent authority for forensic investigation’.⁴
7. On 16 January 2024, the CLR1 responded to the VWU Report, requesting *inter alia* that the information indicating that CAR-V45-P-0001 had testified under a false identity be excluded under article 69(7) (‘First CLR1 Response’).⁵
8. On 22 January 2024 VWU filed its observations to the First CLR1 Response.⁶
9. On the same day, the Defence filed its response to the First CLR1 Response, in which it *inter alia* requested that the Chamber order that, as proposed by VWU, the CLR1 Witnesses’ phones be provided to a competent authority for forensic

¹ See, ICC-01/14-01/18-T-246-CONF-FRA CT, 3:17-75:15; ICC-01/14-01/18-T-247-CONF-FRA CT, 42:23-62:4; ICC-01/14-01/18-T-248-CONF-FRA CT2, 3:5-38:11.

² ICC-01/14-01/18-2290-Conf, para. 11. The Report was filed pursuant to an order by the Single Judge; see, Trial Chamber V Email Order of 21 December 2023 at 17:09.

³ ICC-01/14-01/18-2290-Conf, para. 14.

⁴ *Ibid.*, para. 15.

⁵ ICC-01/14-01/18-2305-Conf-Red, paras. 32-33.

⁶ ICC-01/14-01/18-2320-Conf-Red. The observations were filed pursuant to an order by the Single Judge; see, Trial Chamber V Email Order of 17 January 2024 at 12:13 (‘TCV Email Order of 17 January’).

examination; and further, to order that any relevant material identified during said examination be disclosed ('Defence Response').⁷

10. On 30 January 2024, the CLR1 responded to the Defence Response, requesting that it be rejected.⁸
11. On the same day, the Prosecution responded to the Defence Response, *inter alia* on the basis that the forensic examination by a competent authority was an unjustified and 'unnecessary' 'fishing expedition' in light of the CLR1 Witnesses' right against self-incrimination and right to privacy, and given that the matter of investigating the false identities of the CLR1 Witnesses was 'essentially collateral to these proceedings'.⁹
12. On 23 February 2024, the Chamber issued its Decision, *inter alia* rejecting the Defence's request that, as proposed by VWU, the CLR1 Witnesses' phones be provided to a competent authority for forensic examination ('Decision').¹⁰

SUBMISSIONS

A. The Limited Inspection should be ordered.

13. As has previously been submitted, it is the Defence's position that both V45-P-0002 and are P-2580 co-conspirators in a wide-ranging fraudulent scheme aimed at fabricating and presenting falsified evidence against Mr Yekatom for illicit personal gain.¹¹
14. The trial record indicates that P-2580 and V45-P-0002's respective misconduct in the context of these proceedings is intertwined.

⁷ ICC-01/14-01/18-2321-Conf, paras 22-27. The Defence Response was filed pursuant to the TCV Email Order of 17 January.

⁸ ICC-01/14-01/18-2335-Conf.

⁹ ICC-01/14-01/18-2336-Conf, paras 4-12.

¹⁰ ICC-01/14-01/18-2376-Conf, paras 19-21.

¹¹ See e.g. ICC-01/14-01/18-2240-Conf, paras 9-11; 13; 15; 18; 23-24; 26-28; 68-72; 74-79.

15. In [REDACTED], V45-P-0002 completed a victim application form containing an apparently falsified account of his purported experience of as a ‘former child soldier’ in Mr Yekatom’s group.¹² His form exhibits indicia of the *modus operandi* discernable from similar victim application forms completed by other fraudulent ‘former child soldier’ co-conspirators: specifically, the use of false identities for the applicants and their parents, and annexed fraudulent ‘proof of identity’ declarations signed by the same [REDACTED].¹³ One such similar fraudulent victim application form was completed by P-2580’s own [REDACTED], with an accompanying [REDACTED] ‘consent form’ completed by P-2580 himself.¹⁴ Said [REDACTED] (i.e [REDACTED]) attests to [REDACTED].¹⁵ He also attests to [REDACTED].¹⁶
16. Further, during his subsequent testimony in September 2023, V45-P-0002 stated that [REDACTED].¹⁷
17. In light of the above, it would therefore appear that P-2580 and V45-P-0002 have been in contact for the purposes of the evidence fabrication scheme since at least [REDACTED]; and that said contact continued (or at least, was re-established) in the period [REDACTED].
18. It thus follows that there exist reasonable grounds to believe that i) P-2580 and V45-P-0002 were in contact, including mobile phone contact, [REDACTED] to the period around [REDACTED]; and ii) that this mobile phone contact, including any messages exchanged, would be probative of a central aspect of

¹² See, ICC-01/14-01/18-2240-Conf, paras 9-11; and CAR-V45-00000007, pp 2-5; see also, ICC-01/14-01/18-2240-Conf-AnxA, p. 5 (at ‘11 April 2019’).

¹³ See, ICC-01/14-01/18-2240-Conf, paras 10-11 and fns 9-16.

¹⁴ See, CAR-OTP-00002009. See also, ICC-01/14-01/18-2240-Conf-AnxA, pp 4-5 ([REDACTED]). The Chamber exceptionally ordered the disclosure of this rejected application form on the basis of its potential materiality to the Defence’s investigations concerning Count 29; see, ICC-01/14-01/18-2168-Conf, paras 17-18.

¹⁵ [REDACTED], paras 17-21.

¹⁶ Ibid, paras 22, 24-27. See also, para. 28, where [REDACTED] (at CAR-V45-00000009). See also, [REDACTED].

¹⁷ ICC-01/14-01/18-T-247-CONF-FRA CT, 49:22-25.

the Defence's case in these proceedings – i.e. that false evidence has been systematically fabricated and led against Mr Yekatom in these proceedings.

19. While evidence of this years-long, multi-conspirator scheme has previously been brought to the attention of the Chamber, its full extent and scope remains to be ascertained.
20. More importantly, there is no indication that the Prosecution intends to withdraw its reliance on those of its witnesses who appear to have conspired directly with P-2580 in their furtherance of this scheme; namely, his ESF-affiliate [REDACTED] P-1974 and P-2018, and key Prosecution witness P-2475, whose account of his 'experience' as a 'former child soldier' in Mr Yekatom's group continues to underpin the Prosecution case on multiple charges spanning multiple 'crime bases' in these proceedings. In fact, the Prosecution has recently reiterated that it considered P-2475's evidence regarding his alleged participation in Mr Yekatom's group to be '[REDACTED]'.¹⁸
21. As such, the Defence remains duty-bound to continue its investigations into this evidence fabrication scheme, including through the pursuit of information demonstrating the extent and scope of P-2580's misconduct which, by extension, tends to affect the reliability and credibility of the evidence provided by his co-conspirators, Prosecution witnesses P-1974, P-2018 and P-2475.
22. The Defence thus respectfully submits that, in such circumstances, and in accordance with full respect of Mr Yekatom's fair trial rights, it should be allowed to pursue reasonable investigative opportunities in respect of relevant communications between V45-P-0002 and P-2580, where any such communications potentially affect the credibility of Prosecution evidence and/or are material to the preparation of Mr Yekatom's defence. This is

¹⁸ ICC-01/14-01/18-2249-Conf, para. 11.

especially so, where said communications would already be in the possession of the Registry and can therefore be readily made available with negligible expenditure of Parties' and participants time and resources.

23. In the interests of expeditiousness and of privacy concerns, the sought Limited Inspection would be restricted to the identification and examination of communications exchanged between V45-P-0002 and P-2580 in the period [REDACTED]¹⁹ to 15 December 2023²⁰ inclusive.
24. Relevant communications would be identified by means of accessing and examining messaging and/or telecommunications applications and data on the mobile phone; specifically:
 - messaging conversation(s) (in SMS/text messages and in messaging applications e.g. Whatsapp, Facebook messenger, Signal, etc); and,
 - records of phone calls (via mobile network and telecommunications application e.g. Whatsapp, Facebook, Signal, Skype, etc).
25. Further, such conversations/records would be examined only for relevant communications, i.e. those identified as those involving:
 - phone number '[REDACTED]', attributed to P-2580;²¹ and/or

¹⁹ On the basis that the 'former child soldier' group meetings organised by the Registry and ESF-affiliated co-conspirators were [REDACTED] (to the Defence's knowledge); see, CAR-OTP-2135-4183, para. 6; see also, ICC-01/14-01/18-2240-Conf-AnxA, pp. 4-5.

²⁰ On the basis that on this day VWU alerted the Chamber to 'material of a potentially evidentiary nature in the case' contained in the CLR1 Witnesses' mobile phones; see, Trial Chamber V Email Order of 21 December 2023 at 17:09. While the Defence understands that VWU obtained the written consent of the CLR1 Witnesses for verification and analysis of the phones on [REDACTED], it is not known to the Defence when the phones were physically handed over to VWU. Further, the fact that V45-P-0002 was not in possession of his phone after that point does not necessarily mean that no relevant communications with P-2580 were received by that phone after the phone was handed over. In such circumstances, it is submitted that 15 December 2023 is an appropriate cut-off date for the Limited Inspection.

²¹ See (where this phone number is attributed to P-2580), CAR-OTP-00001381; CAR-OTP-2135-4188-R01, para. 2.

- interlocutor(s) bearing the name(s) and or nickname(s) of P-2580 (i.e. [REDACTED]) and any variations thereof.

26. In the spirit of *inter partes* cooperation, efficiency, and transparency, the Defence would not oppose the passive attendance for purposes of observation of the Prosecution and CLR1 Counsel while the Limited Inspection is conducted.

B. The Sought Inspection would not violate the rights of V45-P-0002.

27. The Defence notes that both the Prosecution and CLR1 have previously argued, in opposing the VWU-proposed comprehensive forensic examination of the CLR1 Witnesses' mobile phones by a competent authority, that such a course of action would violate the CLR1 Witnesses' right against self-incrimination²² and right to privacy.²³
28. While the Sought Limited Inspection differs materially from the comprehensive forensic examination proposed by VWU,²⁴ the Defence nonetheless submits here that the Sought Limited Inspection would violate neither of said rights of V45-P-0002 (and where applicable, of P-2580).
- i) *The right against self-incrimination.*
29. Any suggestion that the Sought Limited Inspection would constitute a violation of V45-P-0002's right against self-incrimination would be without merit.
30. The privilege against self-incrimination does not protect against self-incriminating conduct *per se*.²⁵ Following his decision to testify as a CLR1 witness in these proceedings, V45-P-0002 submitted to a threat and risk

²² A highly telling argument in its own right.

²³ See, ICC-01/14-01/18-2305-Conf-Red, paras 29-31; ICC-01/14-01/18-2335-Conf, paras 20-27; ICC-01/14-01/18-2336-Conf, paras 4-8.

²⁴ See *infra*, paras 44-47.

²⁵ ECHR, *Ibrahim and Others v. the United Kingdom*, [nos. 50541/08 and 3 others](#), 13 September 2016 (Ibrahim and Others Judgment'), para. 267.

assessment by VWU; and to this end, voluntarily provided his mobile phone to VWU.

31. In the absence of any reliable indication of coercion, oppression, or subterfuge meaningfully affecting his decision to do so, the mere fact that the mobile phone that V45-P-0002 provided to VWU might contain evidence of his potentially criminal misconduct cannot of itself ground a claim that his privilege against self-incrimination has been violated.²⁶ Nor is there any reasonable basis to assert that V45-P0002's right against self-incrimination would be violated in the course of the Limited Inspection as the claim would not extend to pre-existing phone content which is in any case non-testimonial.²⁷

ii) The right to privacy.

32. The sought Limited Inspection would be consistent with due respect of the privacy interests of V45-P-0002 and P-2580.
33. The Appeals Chamber has held that the right to privacy is not absolute, and 'may be subject to legitimate interference in accordance with the law and as necessary for the protection of important public interests, such as [...] the protection of the rights and freedoms of others'.²⁸

²⁶ Ibid. See also, ECHR, *H. and J. v. the Netherlands* (dec.), [nos. 978/09 and 992/09](#), 13 November 2014, para. 64-75, where the use of prior self-incriminating statements made in the context of the applicants' asylum claims, in their subsequent criminal prosecution, was not considered as a violation of their right against self-incrimination, the court noting the volitional and non-coercive nature of their initial asylum claims. See also, paras 75-78, where the court held that the transfer of said asylum claims containing incriminating admissions, from the Dutch Ministry of Justice to the public prosecution service, was not deemed a violation of that individual's privilege against self-incrimination, the court finding *inter alia* that 'a practice of confidentiality appropriate to the processing of asylum requests should not be allowed to shield the guilty from condign punishment.'

²⁷ See further ECHR, *Case of De Legé v. The Netherlands*, [no. 58342/15](#), 4 October 2022, paras 75-76 where court reiterated that the privilege against self-incrimination does not extend to the use in criminal proceedings of materials obtained from an accused through methods of coercion when these materials have an existence independent of his or her will.

²⁸ *Prosecutor v Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", [ICC-01/05-01/13-2275-Red](#), 8 March 2018, para. 285 and references cited therein.

34. Similarly, the Appeals Chamber of the Special Tribunal for Lebanon has held that ‘any limitation on [the right to privacy] must be provided for by law, be necessary for reaching a legitimate aim and be proportionate’.²⁹
35. First, it is uncontroversial that it would lie well within the statutory powers of the Chamber to order the sought Limited Inspection. Ultimate responsibility for the fair and expeditious conduct of this trial, in full respect for the rights of Mr Yekatom, lies with the Chamber; and to this end, the Chamber is vested with wide-ranging statutory powers, including to rule on any ‘relevant matters’.³⁰ This would include the power to issue orders allowing the Defence to obtain or access information in the possession of the Registry.³¹
36. Moreover, the sought Limited Inspection is both necessary and proportionate.
37. The Registry has previously indicated to the Defence that, absent a judicial order, it was unable to share information with the Defence regarding VWU’s assessment of the CLR1 Witnesses’ mobile phones, including information as to the search terms utilised by VWU.³²
38. Further, there is no indication that VWU’s prior assessment of V45-P-0002’s phone involved a search for and/or analysis of his communications with P-2580. Instead, said assessment appears to have been limited to the specific question of whether V45-P-0002 testified under a false identity.³³
39. By contrast, the sought Limited Inspection will concern correspondence potentially exchanged between co-conspirators V45-P-0002 and P-2580, going to proof specifically of the extent and scope of P-2580’s conduct in the wider

²⁹ STL, *Prosecutor v Ayyash et al.*, Decision on Appeal by Counsel for Mr Oneissi against the Trial Chamber’s Decision on the legality of the transfer of call data records, [STL-11-01/T/AC/AR126.9](#), 28 July 2015, para. 48.

³⁰ Rome Statute, article 64(2) and (6)(f).

³¹ See e.g., ICC-01/14-01/18-1828-Conf, paras 3, 6 and 11.

³² Email from Registry to Defence, 15 January 2024 at 16:46 (available on request).

³³ See, ICC-01/14-01/18-2290-Conf, paras 10-12, 14, especially VWU’s statement that ‘The same assessment was conducted on the phone of CAR-V45-P-0002 [REDACTED].’

evidence fabrication and presentation scheme that continues to affect the Prosecution case against Mr Yekatom.

40. As such, unless and until the Prosecution withdraws its reliance on P-2580's direct co-conspirators, the sought Limited Inspection is necessary to allow the Defence to continue its legitimate pursuit of information potentially tending to demonstrate the full extent of P-2580's misconduct and evidence fabrication in the context of these proceedings – and by extension, that of his co-conspirator Prosecution witnesses; and further, to bring any such information to the attention of the Chamber via the presentation of Mr Yekatom's defence.
41. These are legitimate aims, going to the protection of Mr Yekatom's fundamental rights – specifically, his right to a fair trial (which necessarily implies the right to a trial free from fabricated evidence and false testimony); his right to effective defence preparation; and his right to examine witnesses and evidence brought against him.³⁴
42. Lastly, the sought Limited Inspection would be proportionate, given the extremely restricted scope as set out above. i.e. the examination of V45-P-0002's correspondence with a single interlocutor – i.e. P-2580.
43. In the same vein, the Defence notes that at this stage that physical access to the information in question would be limited to those present at the sought Limited Inspection, all of whom are bound by professional and ethical confidentiality obligations.

C. This Motion does not constitute a request for reconsideration of the Decision.

44. This Motion cannot be characterised as a request for reconsideration of the Decision, given the multiple material differences between the relief sought in

³⁴ Rome Statute, article 67(1) *chapeau*; 67(1)(b) and (e).

this Motion, and that sought in the Defence Request (i.e. ‘to provide the phones to a competent authority for forensic investigation’).³⁵

45. The VWU-proposed comprehensive forensic investigation, as envisaged and requested by the Defence (and ultimately rejected by the Chamber), was itself characterised by the engagement of an external ‘competent authority’; the production of a ‘forensic extraction report’; and the systematic analysis of all extracted data by the Registry on the basis of proposed search terms submitted by the Parties and participants.³⁶
46. By contrast, the sought Limited Inspection would be vastly more expeditious and resource-efficient for all Parties involved, in that it would be undertaken entirely in-house and completed within a matter of mere hours, at most.
47. The sought Limited Inspection also differs from the VWU-proposed comprehensive forensic examination, in respect of the information ‘targeted’: whereas the latter sought to identify and extract evidence of the CLR1 Witnesses’ false identities and testimonies, and the involvement of co-conspirator [REDACTED],³⁷ the sought Limited Inspection constitutes a restricted examination of communications reasonably expected to demonstrate the scope and extent of P-2580’s attempts to fabricate evidence against Mr Yekatom along with his CLR1 and Prosecution co-conspirator witnesses, including those on whom the Prosecution continues to heavily rely in its case against Mr Yekatom. In the same vein, any privacy-related concerns would also be nullified given this restricted scope of the sought Limited Inspection, which in and of itself constitutes another material difference in relief sought between this Motion and the Defence Request.

³⁵ ICC-01/14-01/18-2321-Conf, paras 22-23.

³⁶ Ibid, paras 24-26.

³⁷ See, ICC-01/14-01/18-2321-Conf, para. 26.

CONFIDENTIALITY

48. This Motion is filed on a confidential basis due to references made to confidential concerning protected witnesses. A public redacted version will be filed forthwith.

RELIEF SOUGHT

49. In light of the above, the Defence respectfully requests that Trial Chamber V:

ORDER the sought Limited Inspection, as set out in paragraphs 23 to 26 of this Motion.

RESPECTFULLY SUBMITTED ON THIS 27th DAY OF MAY 2024



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The Hague, the Netherlands