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**International
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Court**

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Date: **24 October 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

**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 the “Yekatom Defence Motion for judicial
order to use Prosecution good offices” 4 September 2024, ICC-01/14-01/18-
2669-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 respectfully requests that Trial Chamber V order the Prosecution to use its good offices to seek and obtain [REDACTED] into evidence fabrication perpetrated by former Prosecution and VPRS intermediary [REDACTED] (P-2580).
2. The sought order ('Sought Order') is warranted in the circumstances.
3. Article 54(1) obliges the Prosecution to investigate 'exonerating circumstances', which extends to making reasonable efforts to obtain information that may be potentially exculpatory.
4. On [REDACTED], the Prosecution [REDACTED] P-2580's apparent involvement in the fabrication of Prosecution witness P-2475's [REDACTED]. In light of the evidence demonstrating P-2475's direct involvement in the fabrication of these documents, and given the Prosecution's continued reliance on the testimonial evidence of P-2475, [REDACTED] comprising 'exonerating circumstances' enlivening the Prosecution's investigative obligations; and in the same vein, the Prosecution must make reasonable efforts to obtain information [REDACTED], also pursuant to article 54(1).
5. Lastly, the Defence has standing to move for the Sought Order, given Mr Yekatom's standing to seek appropriate relief for any issues that may detrimentally affect the fairness of his trial.

SUBMISSIONS

- I. **The [REDACTED] comprises 'exonerating circumstances' that give rise to Prosecution investigatory obligations.**

6. The Prosecution [REDACTED] former Prosecution and VPRS intermediary P-2580 [REDACTED],¹ following the Defence's repeated notifications as to his involvement as a primary conspirator in a widespread evidence fabrication and witness interference scheme dating back to 2019.²
7. According to the Prosecution, [REDACTED] concerned P-2580's involvement in 'the creation of false official documents regarding (Prosecution) witness P-2475 – namely a purported Baptism Certificate ('Fabricated Baptism Certificate') and two certificates from CAR educational institutions'.³
8. It is the Defence's position that Prosecution witness P-2475 conspired with P-2580 to produce the Fabricated Baptism Certificate the subject of [REDACTED], which document was provided to the Prosecution and relied on as evidence in these proceedings.⁴ The Defence has tendered evidence to this end, including a Facebook conversation that took place on [REDACTED], i.e. in the midst of P-2580's Prosecution-assigned mission to procure a baptism certificate for P-2475, in which P-2475 discussed the production of a fraudulent baptism certificate with [REDACTED] co-conspirator [REDACTED].⁵
9. Given the evidence linking P-2475 to the fabrication of the fraudulent Baptism Certificate that P-2580 provided to the Prosecution, the [REDACTED] encompasses the involvement and misconduct of P-2475 himself. In other words, any investigation into the fabrication of P-2475's baptism certificate is in

¹ ICC-01/14-01/18-2275-Conf, para. 9. On [REDACTED], the Defence was notified of the [REDACTED] (see, Email from Trial Chamber V to Defence and CLRVs of 29 April 2024 at 16:31). While the Prosecution has not provided information as to the exact [REDACTED], it is the Defence's understanding that it was based on the extensive evidence of P-2638's involvement in evidence fabrication and witness interference that has been brought to the attention of the Prosecution by the Defence (and indeed, by the Victim and Witness Section); see e.g. ICC-01/14-01/18-2240-Conf, paras 9-31; ICC-01/14-01/18-2213-Conf, paras 25-28; 29-32; 33-36; 37-40; 41-44; 45-48; 49-52; 53-56; 69-72; 76-79; 80-83; 92-95; and 96-99; and ICC-01/14-01/18-2290-Conf, paras 11-13.

² See e.g., ICC-01/14-01/18-2240-Conf, paras 9-15, 18, 23-24, 118-121.

³ ICC-01/14-01/18-2275-Conf, paras 9(a)-(b). P-2580's involvement in interference with potential Defence witnesses [REDACTED]

⁴ ICC-01/14-01/18-2240-Conf, paras 18, 74-79; and ICC-01/14-01/18-2240-Conf-AnxA, pp 12-13. The Prosecution has since indicated that it no longer intended to rely on the Baptism Certificate; see Email from Prosecution to Trial Chamber V and Parties, 6 June 2022 at 21:00.

⁵ CAR-D29-0020-0367, at 0421-0423; see, ICC-01/14-01/18-2611-Conf-AnxA, item #146.

fact simultaneously an investigation into misconduct on the part of both P-2580 and P-2475.

10. In the circumstances therefore, and in light of the Prosecution's continued reliance on P-2475 in these proceedings,⁶ [REDACTED] be understood as comprising 'exonerating circumstances', in that [REDACTED], will potentially 'affect the credibility of' P-2475.⁷ In the same vein, information as to said developments must be understood as 'potentially exculpatory information' that the Prosecution is obliged to make reasonable efforts to obtain, pursuant to article 54(1)(a).⁸
11. Furthermore, the Prosecution has itself expressly characterised – and thusly instrumentalized – its investigation of P-2580 as action taken pursuant to its article 54(1) duties. In response to the Defence's submission that the Prosecution had violated its article 54(1) obligations to investigate exonerating circumstances, as set out in its motion for exclusion of fabricated Prosecution evidence (including that of P-2475),⁹ the Prosecution argued that it had not in fact violated its article 54(1) obligations, claiming that 'when alerted by the Defence of the mere possibility of alleged misconduct, the Prosecution acted immediately to [...] [REDACTED].'¹⁰

⁶ See *infra*, para. 21.

⁷ *Prosecutor v Ruto & Sang*, Lesser public redacted version of Decision on Joint Defence Application for Further Prosecution Investigation Concerning the Asylum Application Records of Certain Prosecution Witnesses, [ICC-01/09-01/11-1655-Red2](#), 17 November 2014, para. 32. See also, article 67(2) of the Rome Statute, governing the Prosecution's disclosure obligations vis-à-vis 'exculpatory evidence': '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 [...] may affect the credibility of prosecution evidence.'

⁸ *Ibid.*, para. 33.

⁹ See, article 69(7) of the Rome Statute; and ICC-01/14-01/18-2240-Conf.

¹⁰ ICC-01/14-01/18-2313-Conf, para. 15, notably under sub-header: 'Article 54(1) was not breached' (see, p. 5). See also, more recently, ICC-01/14-01/18-2639-Conf, para. 5 (where the Prosecution 'opposed' the Defence's notification of an incident potentially involving interference with Defence investigations on the basis of a purported 'lack of standing', similarly claiming that the Prosecution had 'acted diligently by promptly [...] [REDACTED] concerning the Defence's assertions [regarding P-2580's interference]'). The Defence notes that in support of this claimed investigatory diligence, the Prosecution cited the Chamber's decision rejecting the Defence's motion for exclusion of fabricated evidence (see, ICC-01/14-01/18-2639-Conf, para. 5 and fn. 6), and in so doing, it appears to have thus confirmed the Defence's warning that in rejecting the exclusion motion, the Chamber will have 'effectively condoned the Prosecution's conduct, by fixing thereon a de facto stamp of judicial approval'; see, ICC-01/14-01/18-2468-Conf, para. 48.

12. Where the Prosecution itself deems that its decision to investigate P-2580's evidence fabrication falls within the remit of its investigative obligations, it would be incoherent to suggest that any developments or results in the investigation, [REDACTED], would not also fall within the same remit, and by extension, that they can simply be ignored by the Prosecution. Such a superficial view of the Prosecution's article 54(1) duties would be at odds with the fact that the Prosecution's duty to investigate exonerating circumstances is not a mere box-ticking exercise, but in fact is a fundamental component of a fair trial before this Court.¹¹ Indeed, the mere fact that [REDACTED], in of itself, does nothing to ensure that Mr Yekatom's fair trial rights are respected.
13. Further, nine months have passed since the Prosecution [REDACTED]. It can reasonably be expected that [REDACTED] surrounding the fabrication of official documents by P-2580, P-2475, and [REDACTED], as well as any other co-conspirators who may also have been involved;¹² in other words, that the information that is to be sought and obtained by the Prosecution (i.e. information as to developments in [REDACTED] exists or indeed, that potentially exculpatory information has been discovered [REDACTED]).¹³
14. This is especially so, given that the Prosecution has been in possession of evidence of P-2475 and [REDACTED] involvement in the fabrication of P-2475's baptism certificate since 17 November 2023, i.e. a matter of mere days prior to [REDACTED].¹⁴ As such, given that the Prosecution's investigative duties

¹¹ See *infra*, paras 30-31, and fn. 26.

¹² Again, given the Prosecution's repeated instrumentalization of [REDACTED], it would be deeply opportunistic for the Prosecution to now seek the dismissal of this motion on the basis that it is speculative to suggest that there have been developments in [REDACTED], or that it cannot be reasonably expected that potentially exculpatory information has been discovered further thereto.

¹³ The Defence notes that, if the Prosecution were to learn that the [REDACTED], this would in turn be relevant to the question as to whether [REDACTED] would be consistent with the Prosecution's article 54(1) obligations and whether the Prosecution would be obliged to [REDACTED], further to its investigative duties.

¹⁴ See, CAR-D29-0020-0367, at 0421-0423; this document was disclosed on 17 November 2023. The Defence has also provided oral and written submissions on said document, and on P-2475's involvement in the fabrication of his baptism certificate; see e.g., Defence opening statement of 28 November 2023; and ICC-01/14-01/18-2240-Conf-AnxA, p. 12, and ICC-01/14-01/18-2240-Conf, paras 13 and 18.

would necessarily require the Prosecution to have duly transmitted this information, in the appropriate form and in a timely manner, [REDACTED] to the involvement of P-2475 himself.

15. That being said, the Defence notes that if the Prosecution has not in fact provided this highly material information [REDACTED], and has instead withheld it, this would not only expose the hollowness of the Prosecution's claims of investigative diligence, it would necessarily give rise to grave concerns as to the Prosecution's motivations underlying [REDACTED] the fabrication of P-2475's official documents [REDACTED].¹⁵
16. In the same vein, as the Chamber is aware, the Prosecution has repeatedly complained of a purported failure on the part of the Defence to sufficiently assist the Prosecution in its 'investigation' into the misconduct of P-2580 (including while he remained a Prosecution intermediary) by opting against disclosing the identities of potential Defence witnesses who were subjected to interference by P-2580, in the midst of the Prosecution's presentation of evidence.¹⁶ It would be a regrettable irony indeed if it turns out that during the entire time these Prosecution accusations were being levelled at the Defence, the Prosecution had been wilfully withholding highly material [REDACTED].

¹⁵ In the same vein, as the Chamber is aware, the Prosecution has repeatedly complained of a purported failure on the part of the Defence to sufficiently assist the Prosecution in its investigation into the misconduct of P-2580 – a Prosecution employee – by opting against disclosing the identities of potential Defence witnesses who were subjected to interference by P-2580, in the midst of the Prosecution's presentation of evidence; see e.g., ICC-01/14-01/18-2275-Conf, paras 2 ('It bears recalling in this regard that the Defence refused to provide to the Prosecution the names of any witnesses or potential witnesses purportedly subject to alleged interference by P-2580 when specifically asked.') and 13 ('It is important to note that the Defence refused to provide the names of the potential witnesses or witnesses that were purportedly interfered with when requested by the Prosecution.'). ICC-01/14-01/18-2313-Conf, para. 15 ('Having sought the Defence's cooperation in respect of the latter, it is notable that the Defence declined to provide any additional information for strategic reasons.'). It would be a regrettable irony indeed if it turns out that during the entire time these Prosecution accusations were being levelled at the Defence, the Prosecution had been wilfully withholding [REDACTED]

¹⁶ See e.g., ICC-01/14-01/18-2275-Conf, paras 2 ('It bears recalling in this regard that the Defence refused to provide to the Prosecution the names of any witnesses or potential witnesses purportedly subject to alleged interference by P-2580 when specifically asked.') and 13 ('It is important to note that the Defence refused to provide the names of the potential witnesses or witnesses that were purportedly interfered with when requested by the Prosecution.'). ICC-01/14-01/18-2313-Conf, para. 15 ('Having sought the Defence's cooperation in respect of the latter, it is notable that the Defence declined to provide any additional information for strategic reasons.').

17. Sunlight being the best disinfectant, the Defence notes that nothing stops the Prosecution from acting to dispel any suggestion that [REDACTED] was in fact motivated by a desire to absolve itself of its duty to [REDACTED] involvement in the fabrication of evidence and to thus shield its linchpin witness from meaningful scrutiny, [REDACTED] involvement in the fabrication of his Baptism Certificate; and specifying when such information was provided.
18. The Sought Order would not be unduly onerous on the Prosecution. It would simply be a matter of utilising established, [REDACTED].¹⁷ The Defence notes that [REDACTED].¹⁸ In the circumstances therefore, [REDACTED] would be well within the definition of 'reasonable efforts' [REDACTED].
19. Furthermore, any logistical, administrative or similar obstacles that the Prosecution might raise should be afforded little weight in the Chamber's consideration of this motion. For one, the Defence notes that the Sought Order comprises two discrete steps, the first of which being simply to seek [REDACTED]; and the second being to obtain it. Moreover, any purported such obstacles should not be taken into consideration by the Chamber in the abstract; rather, they should only be deemed potentially relevant if and when they actually materialise.
20. The Defence further notes that should any such obstacles be cited by the Prosecution, this would only cast further doubt on the judiciousness of the Prosecution's decision to [REDACTED] in the first place. In other words, if the Prosecution had [REDACTED] in full awareness of the existence of obstacles that could compromise its ability to remain apprised of developments therein, this would further undermine the suggestion that [REDACTED] was in fact in furtherance of the Prosecution's article 54(1) obligations. In the same vein, as a

¹⁷ See, Email from Prosecution to Trial Chamber V, 16 April 2024 at 10:13.

¹⁸ ICC-01/14-01/18-2275-Conf, para. 12.

matter of fairness, having repeatedly instrumentalized its [REDACTED] in arguing its compliance with article 54(1), the Prosecution should be barred from opposing this motion on the basis of any such obstacles.

21. Lastly, the Defence notes that, while the Prosecution has indicated that it no longer intends to rely on P-2475's fabricated documents provided via its intermediary P-2580, the Prosecution nonetheless maintains that the remainder of his account remains 'reliable' – despite effectively having accepted that P-2475's central claim to have been a child soldier in Mr Yekatom's group was fabricated.¹⁹
22. This strategic repositioning is irrelevant for the purposes of the present motion. A witness's involvement in evidence fabrication remains relevant to their credibility as a witness generally. The Prosecution's decision to withdraw P-2475's fabricated documents has no bearing on the exculpatory nature of the investigation into the fabrication of the documents, given the evidence indicating P-2475's involvement therein. Likewise, the Prosecution's newfound position on the matter of P-2475's true age. P-2475's evidence remains on the trial record and the Prosecution intends to rely on it against Mr Yekatom; unless and until those circumstances change, P-2475's credibility remains a live issue,²⁰ and information that may affect his credibility thus must be understood as 'potentially exculpatory'.

II. The Defence has standing to request the Sought Order.

23. The Defence reiterates that the Sought Order is requested pursuant to the Prosecution's article 54(1) obligations and the Chamber's overarching duty to

¹⁹ ICC-01/14-01/18-2249-Conf, para. 11.

²⁰ In this regard, the Defence recalls in particular that multiple Defence witnesses have given evidence contradicting P-2475's claim to have been a member of the Anti-Balaka, including D29-P-6018, D29-P-6016, D29-P-6036 and D29-P-6048. See also, ICC-01/14-01/18-2581-Conf, paras 31 and 40. See also, para. 20.(regarding the Defence's long-standing outright contestation of P-2475's account).

ensure a fair trial; they are not sought on the basis of the Prosecution's article 70 powers of investigation and prosecution.

24. While the Defence may not have standing to request or obtain information regarding the progression of article 70 investigations per se,²¹ the same cannot be said for its standing to request the Sought Order. Self-evidently, Mr Yekatom has standing to seek appropriate relief for any issues that may detrimentally affect the fairness of his trial, and the Prosecution's due compliance with article 54(1) is a matter that can squarely be characterised as such.²²
25. As set out above, the P-2475 Documents Investigation enlivens the Prosecution's article 54(1) duties by virtue of its subject-matter; and further, the Prosecution has itself previously characterised and instrumentalized the [REDACTED] pursuant to article 54(1). The fact that P-2580 and P-2475 appear to have committed misconduct potentially amounting to crimes under article 70 does not negate the fact that [REDACTED] itself constitutes 'exonerating circumstances' that must be investigated by the Prosecution; nor does it relieve the Prosecution of its duty to make reasonable efforts to obtain information as to [REDACTED]²³ [REDACTED] can be thus 'dual-hatted', as it were.
26. The Defence notes that the Prosecution has previously argued that the Defence had no standing to 'request or obtain' any information regarding the [REDACTED] and has suggested that the Defence request that the Chamber issue [REDACTED] should it wish to obtain such information.²⁴

²¹ ICC-01/14-01/18-2639-Conf, para. 6.

²² See *infra*, paras 30-32.

²³ In this regard, the Defence also recalls the comments of the Presiding Judge to Prosecution Counsel during the testimony of P-2475, when it became clear that his baptism certificate had been fabricated, following Prosecution's Counsel's undertaking to 'check into' the fabrication of the document matter and 'report back to the Chamber and to the Defence': i.e. that 'there is a need to explain one or the other thing'; see, ICC-01/14-01/18-T-133-CONF-ENG ET, 74:22-75:6.

²⁴ ICC-01/14-01/18-2639-Conf, para. 6. The Prosecution has also failed to respond to a previous Defence request seeking [REDACTED] (see, Email from Defence to Trial Chamber V and Prosecution, 30 April 2024 at 18:24).

27. The Defence clarifies that it does not seek through this motion the disclosure of information regarding [REDACTED]; the Sought Orders are requested without prejudice to whether any information as to developments [REDACTED], once obtained by the Prosecution, are ultimately deemed subject to disclosure pursuant to article 67(2).
28. In any event, the Prosecution position is without merit: [REDACTED] would be inapposite relief in the circumstances, not least given that the Defence is not seeking at this stage relief in the form of disclosure, but rather, in the form of ensuring Prosecution compliance with article 54(1). It would also be both unnecessary and inappropriate, at this stage, to invoke the [REDACTED].
29. That said however, the Defence notes that the Prosecution's very suggestion that the Defence seek [REDACTED] would indicate that the Prosecution recognises the 'dual-hatted' nature of [REDACTED] and by extension, that the Defence does in fact have, at the very least, standing to move the Chamber to order the Prosecution to receive updates.

III. The Chamber has the power and duty to issue the Sought Order.

30. As is set out above, the Sought Order would be grounded in the Prosecution's duty to investigate exonerating circumstances. As has been previously raised, this Prosecution duty was adopted by the drafters of the Rome Statute to ensure that an accused's fundamental fair trial right of equality of arms would be respected in proceedings before the Court, notwithstanding the inherent disparity in investigative resources and ability of access between the Office of the Prosecutor and the accused.²⁵

²⁵ See, *Prosecutor v Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, [ICC-01/04-01/06-1049](#), 30 November 2007, para. 45 ('The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence, for which the Statute and Rules of the ad hoc tribunals do not provide. [...] Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth.');

Bergsmo, Morten, 'Article 54', in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1999, para. 2 ('In dealing with the most

31. In other words, the Prosecution's due compliance with article 54(1) is thus a precondition for the due preservation of an accused's right of equality of arms in trials before the Court; and by extension, is thus a fundamental component of a fair trial guaranteed to an accused under article 67(1).
32. The Chamber thus is empowered, and indeed duty-bound, to issue the Sought Order, pursuant to its overarching obligation to ensure that these proceedings are 'fair and expeditious and [are] conducted with full respect for the rights of the accused', enshrined in article 64(2).²⁶ As previously submitted, chambers of this Court have repeatedly found that oversight responsibility vis-à-vis the Prosecution's compliance with article 54(1) duly lies with them.²⁷

serious crimes of concern to the international community as a whole, it should be borne in mind that the main focus of the Court will be to bring to justice those offenders at the highest level of responsibility. To achieve this will require considerable investigative work, including activities as wide ranging as exhuming mass graves and conducting forensic work at such sites, sending investigators to many countries to interview witnesses, and accessing and sifting large volumes of governmental records. To properly perform these functions, it is likely that the office of the Prosecutor would prefer to enlist the assistance of Governments. In contrast, most suspects or accused would not be able to wield similar authority to enlist support or assistance with a view to preparing the defence as broadly, if necessary. This is one area where the civil law approach of an investigative judge showed the way to a workable solution to this problem, which relates essentially to potential inequality of resources between parties.'); Proposal Submitted by Germany for Article 44(a), Preparatory Committee on the Establishment of an International Criminal Court, [A/AC.249/WP.37](#), 23 August 1996 ('The first step to guarantee a fair trial and equity for both sides is to oblige the prosecutor to extend the taking of evidence to all facts being of importance for the verdict'); and Proposal Submitted by Germany for Article 26, Preparatory Committee on the Establishment of an International Criminal Court, [A/AC.249/WP.1](#), 15 August 1996. See also, e.g., ICC-01/14-01/18-2468-Conf, para. 35. In fact, the Prosecution's decision (and ability) to [REDACTED] is a prime illustration of this structural disparity.

²⁶ See e.g., *Prosecutor v Ongwen*, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", [ICC-02/04-01/15-2022-Red](#), 15 December 2022, para. 364.

²⁷ See, *Prosecutor v Ruto & Sang*, Decision on Joint Defence Application for Further Prosecution Investigation Concerning [REDACTED] of Certain Prosecution Witnesses, [ICC-01/09-01/11-1655-Red](#), 12 January 2015 ('Ruto TC Decision'), para. 38 ('Great caution is called for when the Prosecution purports to assert its 'independent role' under the Statute, whenever the Statute imposes an explicit or implicit duty on the Prosecution—such as Article 54 of the Statute does in the present context. In those circumstances, the Prosecution may not correctly assert an 'independent role' in any way that suggests that it is 'best placed' to determine whether or not it has discharged the duty so imposed. The Chamber retains the amplitude of the power to adjudicate that question whenever it is presented before the Chamber [emphasis added].'); *Prosecutor v Banda*, Public redacted "Decision on the 'Defence Request for Termination of Proceedings'", [ICC-02/05-03/09-535-Red](#), 30 January 2014 ('Banda Decision'), para. 50 ('At the outset, the Chamber underlines that, it has a review power over the prosecution's obligation to "investigate incriminating and exonerating circumstances equally" under Article 54(1)(a) of the Statute in the context of its general obligation to ensure the fairness of the trial pursuant to Article 64(2) of the Statute [emphasis added]); *Prosecutor v Katanga*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", [ICC-01/04-01/07-1336](#), 27 July 2009 ('Katanga TC Decision'), para. 26 ('[A]s was emphasised by the Appeals Chamber, it is the responsibility of the Chamber to safeguard that the Prosecution's right to continue investigating does not in any way undermine the right of the defence to have adequate time and facilities for the preparation of the trial, in accordance with article 64(3)(c) [emphasis added].'), citing *Prosecutor v Lubanga*, Judgment on the Prosecutor's

33. The Chamber is also empowered to issue the Sought Order pursuant to its broad prerogative to rule on 'any relevant matters' in performing its functions²⁸ during the course of a trial pursuant to article 64(6)(f) of the Statute; as well as its power to order the production of evidence, including with the assistance of State Parties, within articles 64(6)(b) and (d).²⁹
34. The Sought Order would not comprise improper intervention or interference with the Prosecution's article 70 prerogative or powers. The Chamber is not asked to make any determination as to whether an article 70 investigation is warranted, or determinations on each of the Prosecution's investigative steps or choices; it is not asked to make any sort of binding request on the Prosecution to initiate an article 70 investigation; [REDACTED].³⁰

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 ('Lubanga AC Decision'), para. 55. See also, where Chambers have assessed Prosecution compliance (or non-compliance) with article 54: ICC-01/14-01/18-883-Red, paras 8-10; see especially, para. 8 (where the Chamber held that 'failing to take statements may constitute a violation of the Prosecution's investigative obligations under this provision, if the Prosecution does not make sufficient efforts to question witnesses about their knowledge of the case in the course of its investigation.'). See similarly: *Prosecutor v Bemba et al*, Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the Witness List, [ICC-01/05-01/13-1202](#), 31 August 2015, paras 12-15 (where Trial Chamber VII found that article 54(1)(a) 'obligates the Prosecution to make sufficient efforts to question witnesses about their knowledge of the case in the course of its investigation'; and proceeded to consider whether 'the Prosecution's conduct could be understood as falling short of its investigative obligations'); and *Prosecutor v Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, [ICC-01/09-02/11-728](#), 26 April 2013, para. 123 (where the majority of Trial Chamber V held that 'the Prosecution should have conducted a more thorough investigation prior to confirmation in accordance with its statutory obligations under Article 54(1)(a) of the Statute. '); and, 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](#), 31 March 2014, para. 88 (where Trial Chamber V raised 'serious concerns regarding the timeliness and thoroughness of Prosecution investigations in this case - including, in accordance with its responsibilities under Article 54(1)(a) of the Statute, in verifying the credibility and reliability of the evidence upon which it intended to rely at trial.' and moreover, found it appropriate to expressly caution the Prosecution in that regard.).

²⁸ These functions would necessarily include ensuring due respect for an accused's right to a fair trial.

²⁹ Article 64(6)(b) and (d) respectively state that 'In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: [...] (b) Require the [...] production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute; [...] (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties'. In this regard the Defence notes that at the *ad hoc* tribunals, Trial Chambers' general powers to issue orders 'necessary for the purposes of an investigation or for the preparation or conduct of the trial' and to order a party 'to produce additional evidence' has been the foundation for judicial orders to the Prosecution to use its good offices to obtain information from States; see e.g, MICT-18-116-PT, *Prosecutor v Turinabo et al.*, [Decision on Joint Defence Motion for Issuance of an Order of Mandamus](#), 13 May 2019, p. 4, fn. 17 and references cited therein.

³⁰ Cf. ICC-01/14-01/18-2507-Conf, para. 6; Banda Decision, para. 50; and *Prosecutor v Ntaganda*, Public redacted version of 'Decision on Defence request seeking the Chamber to order the Prosecution to conduct an investigation into the testimony of Witness [REDACTED] under Article 70', [ICC-01/04-02/06-1580-Red](#), 13 October 2016, para. 3.

35. To sum up therefore: P-2475's credibility being a live issue in these proceedings, the Prosecution is obliged to effectively and meaningfully investigate the circumstances surrounding the involvement of P-2475 (and P-2580) in evidence fabrication in the context of these proceedings.
36. In turn, it is ultimately the Chamber's responsibility to ensure that the Prosecution does so – which includes ensuring that [REDACTED], and with it evidence of P-2475 and P-2580's misconduct, does not simply get swept under the rug [REDACTED]. The Sought Order thus represents a step in the correct direction.
37. Lastly, the Sought Order should be standing in nature; in other words, the Prosecution should be ordered to [REDACTED] on an ongoing basis. In this respect, the Defence clarifies that the imminent close of the Defence's presentation of evidence, and likely commencement of the Chamber's article 74 deliberations have no bearing on this motion and nor on the Sought Order, if issued. The Prosecution's investigative obligations and Mr Yekatom's fair trial guarantees are continuing in nature; in fact, they remain operative and in effect even after any verdict has been issued in these proceedings.³¹ As such, for as long as the Prosecution continues to seek to rely on P-2475, the Prosecution's duty to remain apprised regarding the [REDACTED] should be ongoing accordingly.

CONFIDENTIALITY

³¹ See e.g., article 84 of the Statute, whereby *inter alia* a convicted person or the Prosecution can seek revision of a conviction or sentence where it is 'newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified', or on the basis of 'newly discovered evidence'; and see also, Code of Conduct for the Office of the Prosecutor, [OTP2013/024322](#), 5 September 2013, paras 49-50 (mandating that staff members 'report to the Prosecutor concerns which, if substantiated, would tend to render a previous conviction made by the Court unsafe', thereby indicating that the Prosecution's duty to pursue exonerating circumstances even continues post-conviction).

38. This Motion is filed on a confidential basis as it contains information regarding [REDACTED], and information regarding protected witnesses. A public redacted version will be filed forthwith.

RELIEF SOUGHT

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

ORDER the Prosecution to seek and obtain information as to developments in the [REDACTED], on an ongoing basis.

RESPECTFULLY SUBMITTED ON THIS 24th DAY OF OCTOBER 2024



Me Mylène Dimitri
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