

**Cour
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**International
Criminal
Court**



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Date: 19 January 2021

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 YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA***

Public

**Public Redacted Version of the “Response by the Common Legal Representatives
of the Victims of the Other Crimes to the ‘Motion for Finding of Disclosure
Violation of Exculpatory Material’”**

Source: Common Legal Representatives of Victims of Other Crimes

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri

Counsel for Patrice-Édouard Ngaïssona

Mr Geert-Jan Alexander Knoops

Legal Representatives of the Victims

Mr Dmytro Suprun

Legal Representatives of the Applicants

Mr Abdou Dangabo Moussa

Ms Marie Édith Douzima Lawson

Mr Yaré Fall

Ms Paolina Massidda

Ms Elisabeth Rabesandratana

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

Mr Dmytro Suprun

Mr Orchlon Narantsetseg

Ms Anne Grabowski

Ms Nadia Galinier

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representatives of the Victims of Other Crimes (the “Common Legal Representatives”) hereby file their response to the “Motion for Finding of Disclosure Violation of Exculpatory Material” (the “Motion”) by the Defence for Mr Alfred Yekatom (the “Defence”).¹

2. While the Common Legal Representatives do not intend to respond to the principal issue raised by the Motion, alleging a violation of disclosure of exculpatory evidence, which should be litigated between the parties, they wish to address the relief (the “Relief”) asked in said Motion which has a clear impact on the interests of the Victims they represent. In this regard, the Common Legal Representatives contend that the Defence’s request for the Chamber to draw factual presumptions, if the latter finds that a disclosure violation occurred, should be dismissed *in limine* because it is devoid of any legal basis. Moreover, the Common Legal Representatives argue that: (i) the Defence attempts to make a factual determination on disputed evidence which is a matter falling exclusively in the Chamber’s fact finding function to be exercised at trial; (ii) erecting any additional presumption against the Prosecution’s burden of proof is unnecessary and grossly disproportionate; and (iii) the granting of said Relief will prejudice the rights of the Victims to the truth.

¹ See the “Motion for Finding of Disclosure Violation of Exculpatory Material”, [No. ICC-01/14-01/18-753-Conf](#), 07 December 2020 (the “Motion”). A public redacted version was filed on 16 December 2020, [No. ICC 01/14 01/18 753-Red](#).

II. PROCEDURAL BACKGROUND

3. On 7 December 2020, the Defence filed the Motion.²

III. CLASSIFICATION

4. Pursuant to regulation 23bis (1) and (2) of the Regulations of the Court, the present submission is classified as confidential following the classification chosen by the Defence and because it refers to the content of documents likewise classified as confidential. A public redacted version will be filed in due course.

IV. SUBMISSIONS

5. At the outset, the Common Legal Representatives indicate that they do not intend to take a position on the principal issue raised by the Motion - the alleged violation of disclosure of exculpatory evidence - which is a matter it should be litigated between the parties. Consequently, said matter is respectfully left to the discretion of the Chamber.

6. However, the Common Legal Representatives note that the Motion concludes that:

“[...] The Trial Chamber is also requested to draw a presumption that the Boeing Mosque was destroyed at the latest on 8 December 2013 by members of the local population unrelated to Mr. Yekatom and that the Boeing Market traders, including [REDACTED], were combatants and engaged in combat. In light of this eighth violation, the Prosecution bears the burden of rebutting these presumptions. In addition the suggested sanction is reasonable. It is in line with the search for the truth as satellite imagery disclosed by the Prosecution, and relied upon by its own expert, now shows that on the 8th of December 2013, the Boeing Mosque was already destroyed.”³

² *Idem.*

³ *Ibid.*, para. 69.

7. Since this issue has a clear impact on the interests of the Victims they represent, the Common Legal Representatives wish to present to the Chamber the concerns of their clients in this regard.

8. The Common Legal Representatives firstly argue that the Relief is devoid of any legal basis. In its submissions, the Defence does not cite proper legal authorities supporting the remedy sought which is not contemplated by any statutory provisions or by the jurisprudence of the Court. For this reason only, the Relief should be rejected *in limine*.⁴

9. Secondly, the Defence asks the Trial Chamber to draw concrete factual determinations to the effect that the Boeing Mosque was: (i) “*destroyed at the latest on 8 December 2013 by members of the local population*”; (ii) who were “*unrelated to Mr. Yekatom*”; and (iii) “*the Boeing Market traders, including [REDACTED], were combatants and engaged in combat*”.⁵ In this regard, the Common Legal Representatives submit that the Trial Chamber - being the ultimate arbiter of fact⁶ - will be able to determine, in exercising its judicial function, at the end of the trial, whether the crimes (and corresponding facts) were in fact committed by the Accused. To draw said presumption at this point in time – without having heard the evidence presented by the Prosecution (and potentially by the Victims) – is inappropriate.

⁴ See the “Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-156](#), 22 March 2019, para. 17. See also, the “Decision on the Prosecutor’s request for authorisation of non-standard redactions” (Pre-Trial Chamber II), [No. ICC-02/04-01/15-383-Red](#), 24 December 2015, para. 2, the “Decision on the confirmation of charges against Dominic Ongwen (With public annex: List of participating victims)” (Pre-Trial Chamber II), [No. ICC-02/04-01/15-422-Red](#), 23 March 2016, para. 150 and the “Decision on the Defence request for leave to appeal the decision on the confirmation of charges” (Pre-Trial Chamber II), [No. ICC-02/04-01/15-428](#), 29 April 2016, para. 19.

⁵ See the Motion, *supra* note 1, para. 69.

⁶ See the “Judgment on the appeal of the Prosecutor against the ‘Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules’ of Pre-Trial Chamber I” (Appeals Chamber), [No. ICC-01/04-01/07-776](#), 26 November 2008, paras. 2 and 97, the “Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu”, [No. ICC-01/09-01/11-844](#), 07 August 2013, para. 12 and the “Decision on Prosecutor’s requests for lifting of certain redactions in victim application forms (ICC-02/11-01/15-465 and ICC-02/11-01/15-493)”, [No. ICC-02/11-01/15-506](#), 09 May 2016, para. 32.

10. Indeed, the evidence the Defence refers to in attempting to convince the Chamber to accept said purported factual determinations, as established facts at trial, is not only disputed between the parties but also it has not at all been submitted and discussed at trial. Pursuant to article 74(2) of the Statute, the Chamber's determination must be based on its evaluation of the evidence and the *entire proceedings* and, in particular, its decision must be based only on evidence *submitted and discussed* before it at trial. Yet, the fact that the Prosecution has disclosed it and/or included it in its list of evidence does not mean that the evidence in question has been properly submitted or discussed at trial.⁷ As the Appeals Chamber held, a trial chamber may not rely on items that have come to its knowledge but that have not been submitted and discussed at trial.⁸ While the Prosecution may submit many pieces of evidence in the course of the trial, it has discretion, as the case unfolds, and subject to the Trial Chamber's powers under article 69 (3) of the Statute, to rely on some and to abandon others.⁹

11. Therefore, in the practice of the Court, the phrase “*discussed before it at the trial*” encompasses not only the oral testimony, together with any documents and other items, such as video recordings, that were “*discussed*” during the hearings, but also any items of evidence that were “*discussed*” in the written submissions of the parties and the participants at any stage during the trial (*e.g.* documents introduced by Counsel in written applications).¹⁰ The key is that the evidence upon which the Chamber bases its judgment must have been introduced during the trial and have become part of the case record, through the assignment of an evidence number.¹¹ So far, none of these

⁷ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution's list of evidence’” (Appeals Chamber), [No. ICC-01/05-01/08-1386 OA5 OA6](#), 3 May 2011, paras. 43-44.

⁸ *Ibid.*, para. 45.

⁹ *Idem.*

¹⁰ See the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber I), [No. ICC-01/04-01/06-2842](#), 14 March 2012, para. 98 and the “Judgment pursuant to article 74 of the Statute” (Trial Chamber II), [No. ICC-01/04-01/07-3436-tENG](#), 20 April 2015, paras. 77-78.

¹¹ *Idem.*

important procedural steps has happened. Accordingly, the Defence's purported factual determination is nothing but a premature speculation.¹²

12. Moreover, no single piece of evidence is conclusive to make factual determinations concerning the guilt or innocence of the Accused. As mentioned above, pursuant to article 74(2) of the Statute, the Chamber's decision must be based on its evaluation of the evidence and *the entire proceedings*. In other words, the Chamber must assess the probative value of each piece of evidence in light or in the context of *the totality of the evidence* that was submitted and discussed by the Prosecution, Defence and, potentially, the Victims at trial.¹³ Indeed, the Chamber has already ruled that it will conduct its *holistic assessment of evidence* only when deliberating pursuant to article 74(2) of the Statute.¹⁴ Thus, no factual determination can possibly be made at this stage of the proceedings.

13. Thirdly, the Common Legal Representatives posit that erecting any additional or *ad hoc* presumption against the Prosecution's burden of proof is unnecessary. It is undisputed that, according to article 66 of the Statute, everyone shall be presumed innocent until proved guilty before the Court and the *onus* is on the Prosecutor to prove the guilt of the Accused. Indeed, in order to convict the latter, the Chamber must be convinced of his guilt beyond reasonable doubt. As recalled by the Appeals Chamber, the Trial Chamber is called upon to determine in respect of each of the counts charged whether it was satisfied beyond reasonable doubt, on the basis of the *totality* of the

¹² See the "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II" (Appeals Chamber), [No. ICC-02/04-179 OA](#), 23 February 2009, para. 36. The Appeals Chamber held that "*it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.*"

¹³ See the "Judgment" (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 08 July 2019, para. 262.

¹⁴ See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber V, Presiding Judge), [No. ICC-01/14-01/18-631](#), 26 August 2020, para. 53.

evidence, that every element of the crime in question charged, including each form of liability, has been established.¹⁵ The Prosecution already labours under a high standard of proof. Therefore, erecting an additional “*presumption*” concerning an incident single-handedly selected by the Defence will grossly deviate from the clear statutory provisions and the established practice of Chambers. In any case, the Relief sought is clearly disproportionate, compared to the level of significance of the alleged violation of disclosure in question.

14. Lastly, the Common Legal Representatives submit that granting the Relief will prejudice the rights of the Victims to the truth. Indeed, the Victims have a central interest in the outcome of the criminal proceedings at the Court in order to: (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.¹⁶ This interest can only be achieved by following the proper procedure for submitting and discussing all pieces of evidence tending to prove or disprove the essential elements of the charged crimes against the Accused in light of the totality of evidence presented at trial.

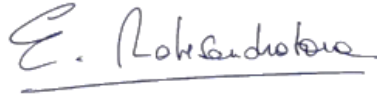
¹⁵ See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), [No. ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, para. 22.

¹⁶ See the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I), [No. ICC-01/04-01/07-474](#), 13 May 2008, para. 34.

Respectfully submitted.



Paolina Massidda



Elisabeth Rabesandratana



Yaré Fall



Abdou Dangabo Moussa



Marie-Edith Douzima-Lawson

Common Legal Representatives
Victims of Other Crimes

Dated this 19th day of January 2021

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle
(France) and Saint Louis (Senegal)