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

Date: **15 June 2022**

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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Prosecution’s Third Request for the Appointment of
Duty Counsel pursuant to Rule 74”, 15 June 2022**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber V (“Chamber”) to direct the Registry to identify and appoint, as necessary, qualified counsel to advise witness P-1339 on self-incrimination, pursuant to rule 74 of the Rules of Procedure and Evidence (“Rules”).

2. Although the “Initial Directions on the Conduct of the Proceedings” (“Initial Directions”)¹ required all rule 74 requests to be filed by 11 January 2021,² the Prosecution regrettably overlooked such an application concerning P-1339 who was interviewed four years prior. While the witness was interviewed pursuant to article 55(2), as he declined the audio recording of his questioning under rule 112(1)(a), the resultant Statement was taken in accordance with rule 111. The latter internal designation appears to have led to the oversight regarding the rule 74 application. Consistent with sub-rule 8, the Prosecution is nevertheless obliged to advise the Chamber of the potential for self-incrimination regarding P-1339’s testimony in advance. And, as is clear from his Statement, the Chamber should consider and impose the measures outlined in sub-rule 7 as appropriate, to ensure that the witness can testify without undermining his fundamental right against self-incrimination.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this Request as *Confidential* because it contains information that should not be made public. A public redacted version will be filed as soon as practicable.

¹ ICC-01/14-01/18-631.

² ICC-01/14-01/18-631, para. 37.

III. SUBMISSIONS

4. The Prosecution expects that P-1339's prospective testimony will raise issues of self-incrimination and advises the Chamber accordingly.³ P-1339's interview took place in accordance with the Prosecution's founded belief that he had contributed to the commission of crimes within the Court's jurisdiction under article 55(2). A signed formal statement of the witness's interview was recorded under rule 111, and in accordance with rule 112(1)(a), following P-1339's objection for the interview to be audio-recorded.⁴ The interview was further conducted in the presence of a Witness Counsel.⁵

5. P-1339's Prior Statement provides several objective reasons for concern regarding possible self-incrimination. *First*, he was a member of YEKATOM's Anti-Balaka Group during the Relevant Period,⁶ [REDACTED]⁷ [REDACTED].⁸ *Second*, P-1339 directly or indirectly contributed to the criminal policy or purpose of the group, by participating in the preparation and execution of Anti-Balaka crimes. In particular, the witness describes, *inter alia*, (i) receiving military training "so we could kill Muslims and Selekas";⁹ (ii) [REDACTED];¹⁰ (iii) participating in the 5 December 2013 attack on BANGUI [REDACTED];¹¹ and (iv) [REDACTED].¹²

6. The standard of potential 'self- incrimination' does not require that all of the underlying elements of a given mode of liability are satisfied. Here, although the assignment of Duty Counsel does not require it, P-1339's prospective testimony would

³ See rule 74(8) ("[w]here the Prosecutor is aware that the testimony of any witness may raise issues with respect to self-incrimination, he or she shall ... advise the Chamber of this, in advance of the testimony of the witness").

⁴ See CAR-OTP-2041-0741, at 0742-0743, paras. 5-9.

⁵ See CAR-OTP-2041-0741, at 0742, paras. 1, 7.

⁶ As defined in the Prosecution's Trial Brief, from September 2013 through December 2014: ICC-01/14-01/18-723-Red para. 5.

⁷ See CAR-OTP-2041-0741, at 0749, para. 58.

⁸ See CAR-OTP-2041-0741, at 0751, para. 69.

⁹ See CAR-OTP-2041-0741, at 0746, paras. 38-39.

¹⁰ See CAR-OTP-2041-0741, at 0747-0748, 0754, 0756, paras. 41, 43-44, 48-50, 91, 103.

¹¹ See CAR-OTP-2041-0741, at 0751-0752, paras. 67-72, 77.

¹² See CAR-OTP-2041-0741, at 0749, para. 53.

support his individual criminal responsibility minimally, under article 25(3)(d). As his statement suggests, P-1339's prospective testimony could establish *any* 'contribution' made by act or omission to the Anti-Balaka's commission of crimes either directly or indirectly, and with knowledge (a) of the *group's* intention to commit these types of crimes, or (b) in furtherance of the *group's* criminal purpose or activity. This would effectively establish accessorial criminal liability under article 25(3)(d), particularly given that it attaches where the contribution affects any aspect of the *commission* of a crime – (*i.e.*, at any stage — conception, preparation, attempt, *or* execution), including its subjective *or* objective elements.¹³

7. Any question eliciting P-1339's knowledge of ongoing Anti-Balaka activities (*i.e.*, the group's crimes or intention to commit them), or any testimony establishing or bearing on the witness's own actions (or omissions) in respect of his knowledge of the group's 'commission' of crimes or its criminal policy during the relevant period, is incriminating. The assignment of Duty Counsel in advance of P-1339's testimony is thus appropriately justified, and will obviate potential disruption or delay during trial.¹⁴

8. The Prosecution is mindful that P-1339 already benefits from in-court protective measures in the form of a pseudonym and face and voice distortion.¹⁵ With these measures in place, the risk of self-incrimination may be further mitigated through the use of closed or private sessions, on a case-by-case basis, where it is envisioned that the witnesses will provide answers that may incriminate him or allow for his identification.

¹³ See ICC-01/04-01/07-3436, paras. 1635-1636; ICC-01/04-01/10-465-Red, para. 287. By analogy to article 25(3)(c), *see also* ICC-01/05-01/13-2275-Red, para. 1399: In this case, the principal perpetrator committed the crime, knowing that he or she would receive assistance in the aftermath; ICC-01/04-01/10-465-Red, Diss. Op. Judge Monageng, paras. 82, 87, 99-101. *See also* more generally ICC-01/14-01/18-723-Conf, paras. 243-246.

¹⁴ See rule 74(10) (“[i]f an issue of self-incrimination arises in the course of the proceedings, the Chamber shall suspend the taking of the testimony and provide the witness with an opportunity to obtain legal advice if he or she so requests for the purpose of the application of the rule”).

¹⁵ ICC-01/14-01/18-906-Conf-Red, p. 45.

9. Should the Chamber grant the Request, the Prosecution considers the following is further in line with the Court's practice: (1) it is incumbent on the Registry to make the necessary arrangements to appoint a qualified and non-conflicted lawyer to provide independent legal advice to P-1339 regarding his potential self-incrimination during testimony;¹⁶ (2) the Prosecution will provide Duty Counsel with the witness's statement and any other relevant material upon notice of their appointment by the Registry; and (3) Duty Counsel should be directed to inform the witnesses of the offence defined in article 70(1)(a), in accordance with rule 66(3).¹⁷

IV. CONCLUSION

10. Based on the foregoing, the Chamber should direct the Registry to identify and appoint, as necessary, qualified counsel to advise witness P-1339 on self-incrimination, pursuant to rule 74.



Karim A. A. Khan QC, Prosecutor

Dated this 15th of June 2022
At The Hague, The Netherlands

¹⁶ ICC-01/09-01/11-847-Corr, para. 29; ICC-01/04-02/06-619, para. 44.

¹⁷ ICC-01/04-02/06-619, para. 46.