

ANNEX 12

Public Redacted

Version

From: Trial Chamber V Communications
Sent: 17 May 2023 17:34
To: OTP CAR IIB; D29 Yekatom Defence Team; D30 Ngaissona Defence Team; 'V44 LRV Team'; V44 LRV Team OPCV; V45 LRV Team
Cc: Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber V Communications
Subject: Order regarding Filing ICC-01/14-01/18-1871-Conf

[ICC] RESTRICTED

Dear Counsel,

The Single Judge takes note of the Prosecution's filing ICC-01/14-01/18-1871-Conf, as well as the Yekatom Defence's request below (email from the Yekatom Defence, 17 May 2023, at 11:10).

Having reviewed the filing and its annex, the Single Judge notes that the Prosecution does not provide a legal basis for the necessity of the redactions applied to ICC-01/14-01/18-1871-Conf-Anx-Red.

The Single Judge therefore instructs the Prosecution to justify by email, by Friday 19 May 2023 at 17:30, the redactions in question in accordance with the applicable legal framework.

Accordingly, the Single Judge suspends the deadline for participants to respond to filing ICC-01/14-01/18-1859-Conf until further notice.

Kind regards,

TC V

From: [REDACTED]
Sent: 17 May 2023 11:10
To: Trial Chamber V Communications [REDACTED]; OTP CAR IIB [REDACTED]; D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team OPCV [REDACTED] V44 LRV Team [REDACTED] V45 LRV Team [REDACTED]
Cc: Associate Legal Officer-Court Officer [REDACTED]; Chamber Decisions Communication [REDACTED]
Subject: RE: Order regarding Filing ICC-01/14-01/18-1859-Conf

[ICC] RESTRICTED

Dear Trial Chamber V,

The Yekatom Defence takes note of the 'Prosecution's Notice of Compliance with "Order regarding Filing ICC-01/14-01/18- 1859-Conf"' ('Notice'), to which is annexed the Prosecution's correspondence with [REDACTED] ('Correspondence').

At the outset, the Defence notes that the Correspondence includes i) multiple email exchanges between the Prosecution and [REDACTED] personnel dating to 2018, and ii) a further Prosecution RFA sent in March 2019 – the existence of neither of which appear to have been mentioned by the Prosecution in *inter partes* exchanges with the Defence, or in the Prosecution's 11 May 2023 email to the Chamber.

Extensive redactions are applied to the substance of the Correspondence (see Annex, pp 7, 11-15, 18-19). The Defence recalls that the Chamber has previously held that the burden of justifying redactions lies with the disclosing party (ICC-01/14-01/18-677, para. 73). No explanation or justification for these redactions is provided by the Prosecution in the Notice, though the Defence notes that the Prosecution has made reference to 'confidential communications' in its 11 May 2023 email to the Chamber. The redactions are not applied pursuant to the applicable Redaction Protocol in these proceedings; nor do they *prima facie* appear to fall within the rule 81 disclosure restriction categories, not least given that for the most part, the Prosecution has not redacted the identifies of the Prosecution and [REDACTED] staff involved in these exchanges. The Defence also recalls that, as the Appeals Chamber has held, and as recalled by the Single Judge in these proceedings, 'the overriding principle is that full disclosure should be made and non-disclosure is the exception' (ICC-01/14-01/18-1578-Conf, paras 26, and fn. 43).

It remains unclear to the Defence as to why the Prosecution continues to seek to deviate from the applicable and established procedural framework for matters in relation to disclosure and redaction. The Defence thus respectfully requests that the Prosecution be ordered to either re-disclose the Correspondence with redactions applied pursuant to the Redaction Protocol; or alternatively, to justify the redactions applied to the Correspondence in accordance with the applicable legal framework.

Lastly, the Defence requests that deadline to respond to the "Prosecution's Request for an order concerning the cooperation with [REDACTED] (ICC-01/14-01/18-1859-Conf), notified on 8 May 2023 remain suspended (as of the Chamber's 15 May email Order) until the matter is resolved.

Best regards,

[REDACTED]
Legal Assistant, Yekatom Defence

From: Trial Chamber V Communications [REDACTED]
Sent: 15 May 2023 17:30
To: OTP CAR IIB [REDACTED] D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team [REDACTED] V44 LRV Team OPCV [REDACTED] [REDACTED] V44 LRV Team [REDACTED]; V45 LRV Team [REDACTED]
Cc: Associate Legal Officer-Court Officer [REDACTED]; Chamber Decisions Communication [REDACTED]; Trial Chamber V Communications [REDACTED]
Subject: Order regarding Filing ICC-01/14-01/18-1859-Conf

[ICC] RESTRICTED

Dear Counsel,

The Single Judge takes note of the Prosecution's cooperation request (ICC-01/14-01/18-1859-Conf) (the 'Request'), as well as the emails below.

Having reviewed the Request, the Single Judge is of the view that the Chamber would be further assisted by obtaining the respective requests for assistance sent by the Prosecution to [REDACTED] as well as the latter's responses thereto (see ICC-01/14-01/18-1859-Conf, para. 10). The Prosecution is thus instructed to file the additional documentation on the record on an *ex parte* basis, latest by tomorrow at 16:00.

The Prosecution is further instructed to file a confidential redacted version thereof, applying redactions as necessary, by the same deadline.

In light of the above, the deadline for the participants to respond to the Request is suspended until the additional documentation in question has been notified.

Kind regards,

TC V

From: Dimitri, Mylene [REDACTED]
Sent: 11 May 2023 15:01
To: OTP CAR IIB [REDACTED]; Trial Chamber V Communications [REDACTED]
Cc: D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team [REDACTED]; V44 LRV Team OPCV [REDACTED]; V45 LRV Team [REDACTED]
Subject: Re: Yekatom Defence requests in relation to filing 1859-Conf

[ICC] RESTRICTED

Dear Trial Chamber V,

The Yekatom Defence respectfully reiterates its request for disclosure of the sought RFA and response.

The Defence notes that whereas the Prosecution has previously informed the Defence that [REDACTED] 'effectively declined' the Prosecution's July 2018 cooperation request, no such submission is made to the Chamber below. In the same vein, the Defence has learned for the first time of 'confidential communications', which was not mentioned in by the Prosecution *inter partes*.

The lack of clarity in this regard demonstrates the risk inherent in simply relying on the Prosecution's subjective interpretation of the nature of the Prosecution's interactions with [REDACTED] in respect of its efforts to obtain information from them. More broadly, it is contrary to basic fairness in adversarial proceedings to allow the Prosecution, as the moving party, to withhold documentary material that is clearly relevant to the determination of this litigation, unless there is a specific legal basis to do so. The Prosecution's unilateral determination that the information is 'not necessary', or that the Defence had 'sufficient information' in the form of the Prosecution's own subjective interpretation of the sought material, is not one of them.

There are procedures that apply to the present circumstances; there is no reason to deviate from them here. The Prosecution does not appear to dispute that the RFA and response are material to defence preparation pursuant to Rule 77. Moreover, if there is confidential information in these documents, the Prosecution is free to redact it in accordance with the established redaction protocol. To allow the Prosecution to withhold this information in such circumstances is procedurally unsound and contrary to the fair trial principle of *audi alteram partem*, and would set an undesirable precedent.

The Prosecution's reliance on the previous filing ICC-01/14-01/18-1531-Conf-Red is entirely misplaced. In that litigation, the Defence had been expressly and directly informed that the sought cooperation would not be possible without a

court order (see, ICC-01/14-01/18-1492-Red, para. 52), and as such there was little, if any, ambiguity as to whether the intervention of the Chamber was ‘necessary’; no such claim is made by the Prosecution as regards its cooperation requests with [REDACTED]. The *ex parte* status of that litigation was justified *inter alia* by the need to protect ongoing Defence investigations, as argued by the Defence (see, ICC-01/14-01/18-1492-Red, para. 67). Again, no such claim is made by the Prosecution here; and moreover, if that were the case, the Prosecution is free to seek to redact that information pursuant to the categories expressly envisioned in the applicable redaction protocol for that purpose. With respect, the Prosecution’s attempts to disregard the applicable procedural safeguards should be disallowed.

Kind regards,
Mylène Dimitri

From: OTP CAR IIB [REDACTED]
Sent: 11 May 2023 10:55
To: [REDACTED]; Trial Chamber V Communications
 [REDACTED]
Cc: OTP CAR IIB [REDACTED]; D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team [REDACTED]; V44 LRV Team OPCV [REDACTED]; V45 LRV Team [REDACTED]
Subject: RE: Yekatom Defence requests in relation to filing 1859-Conf

[ICC] RESTRICTED

Dear Trial Chamber,

First, the Prosecution considers that in the context of *inter partes* communications, 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. To be clear, the Prosecution has advised the Defence of substantial information regarding the efforts and processes pursued to obtain material relevant to [REDACTED] going back to 2015.

This includes a 2015 request:

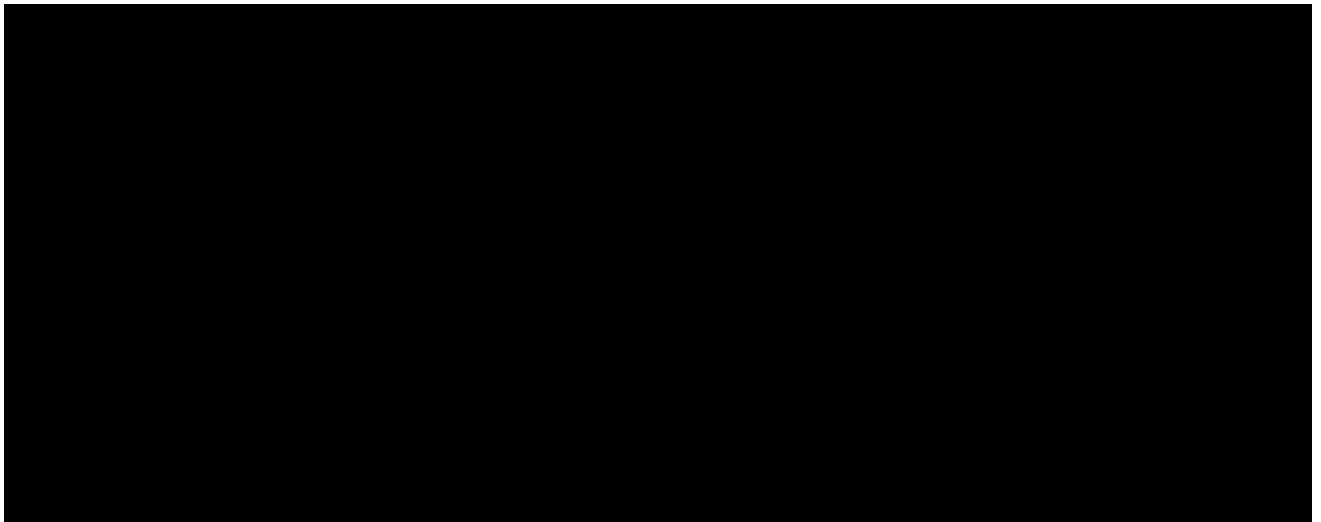
- For “the transmission of copies of the following documents:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

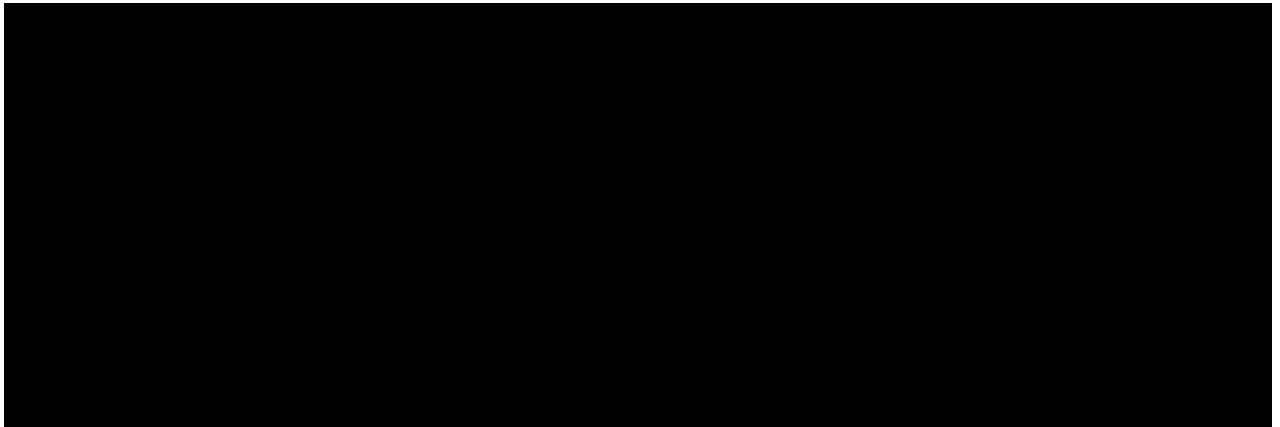
- To authorise members of the OTP in Bangui to speak to [REDACTED] to discuss the types of information regarding [REDACTED] held by [REDACTED], and the format in which such data and information is held.”

In July 2018, the Prosecution further requested:

- [REDACTED]



As noted, on 12 March 2019, [REDACTED] responded without providing the requested information, instead, it provided the Director of the former Judicial Cooperation and Complementarity Division of the OTP with links to the following publicly available information, which we provide here below:



We do not believe that any further disclosure is necessary for the Defence to respond effectively. The Prosecution considers that, because of the nature of its interaction with [REDACTED] including confidential communications exchanged in following up on the above-mentioned requests in 2019 and 2020, the Chamber is best suited to determine whether – for the *limited purposes* of the pending Request, disclosure of any further details is necessary.

Second, we recall that in a previous Defence request for similar intervention, the Chamber proceeded to dispose of the matter without providing an opportunity to respond altogether (*see* ICC-01/14-01/18-1531-Conf-Red, *see also* email from the Prosecution, 10 August 2022, at 12:07). Even so, given the Defence's own ostensible efforts to obtain material from [REDACTED] germane to the subject matter of the charges, the Prosecution considers that the requested intervention is in the interests of the Parties and the advances the truth finding function of the Chamber. Thank you.

Kind regards,
Kweku Vanderpuye

From: [REDACTED]
Sent: 10 May 2023 14:49
To: Trial Chamber V Communications [REDACTED]
Cc: OTP CAR IIB [REDACTED] D29 Yekatom Defence Team [REDACTED]; D30
 Ngaissona Defence Team [REDACTED] V44 LRV Team [REDACTED]; V44

LRV Team OPCV [REDACTED]; V45 LRV Team [REDACTED]

Subject: Yekatom Defence requests in relation to filing 1859-Conf

Dear Trial Chamber V,

Dear all,

The Defence for Mr. Yekatom ("Defence") takes note of the "Prosecution's Request for an order concerning the cooperation with [REDACTED]" (ICC-01/14-01/18-1859-Conf), notified on 8 May 2023 ("Prosecution's Request").

Following an analysis of the Prosecution's Request, the Defence respectfully requests that the Prosecution be ordered to disclose the Request for Assistance it sent to [REDACTED] (see Prosecution's Request, paragraph 10) and the ensuing response from [REDACTED] (see Prosecution's Request, footnote 22).

The Defence recalls that it is well established in the jurisprudence that a Chamber "may seek cooperation for intergovernmental organisations when the requirements of (i) specificity (ii) relevance and (iii) necessity have been met" (ICC-02/05-03/09-170, para. 14). Absent the provision of the RFA sent to [REDACTED] and the ensuing response, the Defence is deprived from the necessary information it needs in order to respond on the "necessity" criterion. Provision of the RFA would allow a proper comparison between the Prosecution's Request at paragraph 7, and the original request sent to [REDACTED]. The fact that the Prosecution expressly indicated its willingness to provide the RFA response to the Chamber in a footnote within its submissions addressing the 'necessity' criterion (see, Prosecution Request, para. 10, fn. 22) should be understood as a concession that the RFA Response is clearly relevant to the Chamber's assessment of the Request; and by extension, to defence preparation in respect of the Request. It is also recalled that the Defence shared with all Parties and Participants its initial requests to the [REDACTED] when it sought the Chamber's intervention on the matter (see ICC-01/14-01/18-612-Conf-AnxB); and its own requests to [REDACTED] ([REDACTED]).

The Defence engaged in *inter partes* discussions with the Prosecution on this matter and received an answer yesterday evening. The Prosecution contends that because the RFA they sent to [REDACTED] "contains confidential information pertaining to international cooperation matters which would require significant redactions", they would not disclose it to the Defence. Instead, they provided details regarding their interaction with [REDACTED]. It is submitted that provision of the original documents sent to [REDACTED] should be ordered in order to fully assess the original request and, consequently, what [REDACTED] refused to provide. In addition, the assertion that the RFA contains confidential information pertaining to international cooperation is unsubstantiated as it doesn't, on its face, fall into any disclosure exception rule.

Any confidentiality concerns should be alleviated by the fact that investigations in CAR have been formally concluded by the Prosecutor on [16 December 2022](#), and that redaction might be applied on names and contact of individuals not related to the current proceedings if really necessary. Moreover, to date the Prosecution disclosed dozens of its Request for Assistance which demonstrate that such type of documents are not irreversibly confidential (*see as an example an RFA sent to [REDACTED] to [REDACTED], to [REDACTED], or to [REDACTED]*).

Should the Chamber grants the request and order the Prosecution to provide the documents sent to [REDACTED] (and received), the Defence also respectfully requests a suspension of the deadline to respond to the Prosecution's Request until the documents have been disclosed.

Kind regards,

[REDACTED]
Legal Consultant
Yekatom Defence

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