

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **18 May 2020**

**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 Redacted**

**Public Redacted Version of “Prosecution’s Response to Motion for Disclosure of  
Prior Statement of Witness [REDACTED]”  
13 May 2020 (ICC-01/14-01/18-513-Conf)**

**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. Trial Chamber V (“Chamber”) should reject the YEKATOM Defence’s request for an order requiring the disclosure of a statement given by Witness [REDACTED] concerning [REDACTED] (“Request”).<sup>1</sup> *First*, the Request is premature and ignores the Pre-Trial Chamber’s prior decision on the matter. *Second*, and in the alternative, the Request is unfounded and attempts to circumnavigate the appropriate procedure to obtain [REDACTED] statement. As such, the Chamber should further direct the YEKATOM Defence to file an application to vary the relevant protective measures.

2. The Prosecution is aware of the NGAISSONA Defence’s intention to join in the Request. However, this request was advanced in an email to the Chamber on 11 May 2020, and since the question of whether a formal filing is required appears unresolved<sup>2</sup>, the Prosecution declines to address the NGAISSONA Defence’s position in this Response.

## II. CONFIDENTIALITY

3. In accordance with regulation 23*bis*(2) of the Regulations of the Court, this filing is classified as “Confidential” as it responds to a filing of the same designation. A public redacted version will be filed as soon as practicable.

## III. SUBMISSIONS

### A. The Request is Premature

4. The Request is premature and should be rejected on this basis alone.

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<sup>1</sup> ICC-01/14-01/18-506-Conf.

<sup>2</sup> See NGAISSONA Defence email to Trial Chamber V, dated 11 May 2020, at 16:01; see email Response of the Trial Chamber, dated 11 May 2020, at 17:27 ([REDACTED]).

5. The YEKATOM Defence seeks the disclosure of a 2016 Prosecution interview of [REDACTED] (“[REDACTED] Statement”).<sup>3</sup> As is known to the Defence, the [REDACTED] Statement does not concern the investigation of this case. Thus, its primary relevance derives from its possible effect on the credibility of [REDACTED] as a prospective *trial* witness, [REDACTED].

6. However, the Prosecution has not completed its selection of trial witnesses, which necessarily involves an assessment of [REDACTED] relevance in view of the availability (or not) of other prospective evidence, including other witnesses. [REDACTED].<sup>4</sup>

7. It is because of this threshold question — that is, whether [REDACTED] will be a Prosecution *trial* witness at all — that in January 2020, the Pre-Trial Chamber dismissed YEKATOM’s 17 December 2019 ‘Application to Vary Protective Measures [REDACTED]’<sup>5</sup> *in limine* in deference to this Chamber, observing in relevant part:

- i. “[w]hen stating that ‘Witness [REDACTED] *will be a witness at trial*’, the Defence for Yekatom confirms that this *matter* essentially revolves around the *relevance of the evidence* at stake; as such, it is now best left to the consideration of the Trial Chamber”<sup>6</sup>; and
- ii. “while the Defence for Yekatom seems indeed persuaded at this stage that this witness will be part of the evidence relied upon at trial, there is no indication as to the type, extent and purpose of the reliance of either party on this evidence, or even any certainty that either party will indeed rely on it”: this makes it even more appropriate to refrain from intervening in a

<sup>3</sup> ICC-01/14-01/18-506-Conf, para. 1.

<sup>4</sup> See ICC-01/14-01/18-474-Conf, paras. 10, 11, 22, and 25, *see also* ICC-01/14-01/18-488-Conf, paras. 6-7.

<sup>5</sup> See ICC-01/14-01/18-407-Conf (“Variance Application”).

<sup>6</sup> ICC-01/14-01/18-422-Conf, para. 6 (emphasis added) (“January 2020 Decision”).

matter the relevance of which for the future stages of the proceedings is yet to materialise in its specific details”.

8. The YEKATOM Defence’s choice to pursue the Request rather than renew its Variance Application before this Chamber, as the Pre-Trial Chamber’s January 2020 Decision plainly suggests, is unclear.<sup>7</sup> Regardless of the Defence’s strategy — procedurally, a variance application should have preceded the Request. Doing so may also have avoided burdening the Chamber with unnecessary litigation.

## **B. The Request is unfounded**

a. The Defence seeks to circumnavigate the proper process

9. Were the Chamber to consider its merits, the Request fails nevertheless for failing to follow the appropriate procedure for the modification of the related protective measures.

10. The Pre-Trial Chamber dismissed the YEKATOM’s Defence’s Variance Application,<sup>8</sup> deciding that the matter should be addressed and adjudicated by the Trial Chamber.<sup>9</sup> Although disagreeing about the application of regulation 42(3), the Prosecution did not oppose the Variance Application.<sup>10</sup> As the Pre-Trial Chamber correctly noted:

“Whilst disagreeing with the Defence for Yekatom as to whether regulation 42(3) of the Regulations of the Court (the ‘Regulations’) may also apply to scenarios where a protective measure is adopted as a result

<sup>7</sup> See ICC-01/14-01/18-506-Conf, para. 14.

<sup>8</sup> See ICC-01/14-01/18-407-Conf, para. 24.

<sup>9</sup> ICC-01/14-01/18-422-Conf, p. 6.

<sup>10</sup> ICC-01/14-01/18-415-Conf, para. 10 (“the Prosecution does not oppose the Application on the basis that it is founded on regulation 42(3), and defers to the Chamber’s discretion on the question of its application. In any event, the Prosecution considers that the Parties and Participants should be provided access to the relevant materials.”).

of assurances under rule 74 of the Rules, *the Prosecutor agrees that the parties and participants should be provided access to the materials and defers to the Chamber as to the correct legal basis to address the matter*".<sup>11</sup>

11. Despite this agreement, the YEKATOM Defence is nonetheless required, whether under rule 87 or regulation 42(3), to apply for a variation of protective measures to the Chamber. The Defence cannot simply circumvent Court-ordered protective measures by requesting the disclosure of materials, and making unsubstantiated claims that the Prosecution has committed a disclosure violation.

a. The Request mischaracterises the Prosecution's position

12. The Prosecution has been consistent in its position since this issue arose in August 2019. Nothing has changed.<sup>12</sup> Yet, rather than direct the Chamber to the Pre-Trial Chamber's succinct assessment of the Parties' relative positions, the Request instead mischaracterises the Prosecution's — incorrectly asserting that "[t]he Prosecution has gone to great lengths to avoid disclosure of this statement".<sup>13</sup>

13. The facts here are to the contrary. The Prosecution has consistently maintained that it considers the Chamber's intervention and authorisation a necessary predicate to removing impediments to its disclosure resulting from protective measures put in place under rules 87 or 74(7), or related thereto. The Defence has been made aware of this since at least August 2019.<sup>14</sup> Despite the Defence's persistent conflation of *access*<sup>15</sup> and *disclosure* issues (respectively, the Registry's and the Prosecution's concerns), the

<sup>11</sup> ICC-01/14-01/18-422-Conf, para. 2 (emphasis added).

<sup>12</sup> ICC-01/14-01/18-349-Conf, para. 9 (noting the Prosecution's position [REDACTED] "the Prosecution recognised that the witness' involvement in the fabrication of evidence was relevant to his credibility, but declined to disclose any of the material in its possession, suggesting that the Defence had to apply to the court before whom the fabrication occurred to obtain the exculpatory evidence").

<sup>13</sup> ICC-01/14-01/18-506-Conf, para. 22.

<sup>14</sup> ICC-01/14-01/18-330-Conf, para. 6 *et seq.* ([REDACTED]) (emphasis added); *see also*, ICC-01/14-01/18-301-Conf-AnxB ([REDACTED]).

<sup>15</sup> *See e.g., Prosecutor v. Blagojevic & Jokic*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, paras. 6, 8.

Prosecution identified the material for which it considers *access* is specifically required<sup>16</sup> and further, proposed to the Pre-Trial Chamber how best to resolve the matter.<sup>17</sup>

14. The Prosecution has no strategic interest in retaining [REDACTED] Statement. To do so in order to avoid a challenge to the witness' credibility — on an entirely collateral matter — on the basis of information and evidence readily available in the public record [REDACTED] makes no sense. This is even more so, given that the Prosecution informed the Defence [REDACTED].<sup>18</sup> Moreover, taking such a position would conflict with the Prosecution's previous proposal "[REDACTED]".<sup>19</sup>

15. Nevertheless, the Prosecution has a duty to respect protective measures ordered in prior cases, and the disclosure of [REDACTED] Statement may potentially undermine them.<sup>20</sup> As previously noted, [REDACTED].<sup>21</sup> They were specifically implemented [REDACTED] to protect the legitimate interests of their beneficiaries, as the Pre-Trial Chamber also recognised in its January 2020 Decision.<sup>22</sup>

16. It is also worth noting that, had the Prosecution withheld [REDACTED] Statement without a colourable basis, the Pre-Trial Chamber surely would have ordered its immediate disclosure without qualification rather than dismiss the Variance Motion *in limine*. This is even clearer, given the Prosecution's August 2019 concurrence that [REDACTED] fall within article 67(2), [REDACTED].<sup>23</sup> The Pre-Trial

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<sup>16</sup> See ICC-01/14-01/18-415-Conf, para.1, *contra* ICC-01/14-01/18-506-Conf, para.22 (erroneously asserting that "[w]hen the defence sought to modify the protective measures, the Prosecution did not include the statement in the items that would be *disclosed* if the protective measures were modified") (emphasis added).

<sup>17</sup> See ICC-01/14-01/18-415-Conf, para. 9 (concerning *access* and *related* material).

<sup>18</sup> See ICC-01/14-01/18-301-Conf-AnxB.

<sup>19</sup> See ICC-01/14-01/18-330-Conf, para. 15.

<sup>20</sup> See rule 74(7) (b) (providing that a Chamber may "[o]rder that the identity of the witness and the content of the evidence given *shall not be disclosed, in any manner, and provide that the breach of any such order will be subject to sanction under article 71*") (emphasis added).

<sup>21</sup> ICC-01/14-01/18-330-Conf, para. 7.

<sup>22</sup> See ICC-01/14-01/18-422-Conf, para. 7.

<sup>23</sup> See ICC-01/14-01/18-330-Conf, paras. 6, 11; *see also* ICC-01/14-01/18-301-Conf-AnxB [REDACTED]

Chamber however, did not direct disclosure of the [REDACTED] Statement because of an actual concern<sup>24</sup> that doing so might adversely affect, *inter alia*, [REDACTED].<sup>25</sup>

- b. The Request misrepresents the Prosecution's reply to the Defence's disclosure demand

17. The Request misrepresents the Prosecution's March 2020 reply to the YEKATOM Defence's 13 December 2019 disclosure demand (the Request erroneously references 19 December). By deliberately juxtaposing its request for the [REDACTED] interview (*i.e.*, the [REDACTED] Statement) against the Prosecution's reply to the Defence's demand for material regarding [REDACTED] interview transcripts<sup>26</sup>, the Request misleads. Clearly, the [REDACTED] interview and [REDACTED] Statement are not one and the same, nor does the Prosecution's reply to the Defence's demand confuse the matter.

18. The Request omits to mention that the Prosecution's 12 March 2020 reply (again, the Request erroneously references 3 March) addressed a particularised demand for material concerning the Prosecution's [REDACTED] interview of [REDACTED].<sup>27</sup> Contrary to the Request, it is not the case that "when the Defence sought disclosure of the [REDACTED] interview, the Prosecution claimed to have disclosed all previous interviews or statements".<sup>28</sup> There are several obvious reasons why the Prosecution's 12 March 2020 cannot have been understood to include [REDACTED] Statement.

19. *First*, the Prosecution's reply expressly referenced the pinpoint cites provided by the Defence in its 13 December 2019 demand, namely CAR-OTP-2074-1965-R01 and CAR-OTP-2074-2554-R01. These transcripts correspond to [REDACTED],

<sup>24</sup> ICC-01/14-01/18-422-Conf, paras. 5, 7 and 8; *Contra* ICC-01/14-01/18-506-Conf, paras. 24, 25.

<sup>25</sup> See ICC-01/14-01/18-330-Conf, paras. 6, 7, 12, and 13.

<sup>26</sup> ICC-01/14-01/18-506-Conf.

<sup>27</sup> CAR-OTP-2074-1965-R01 and CAR-OTP-2074-2554-R01, [REDACTED].

<sup>28</sup> See ICC-01/14-01/18-506-Conf, para. 22.



respectively. They further reflect [REDACTED], as the interview location — not [REDACTED], as [REDACTED] 9 November 2019 interview with the YEKATOM Defence confirms.<sup>29</sup> Having questioned the Witness about the circumstances of the [REDACTED] interview, the YEKATOM Defence also had the opportunity to question [REDACTED] about its content — indeed, the issue at hand. The Request however, makes no mention of this.

20. *Second*, the case record demonstrates that the [REDACTED] Statement does not fall under rule 76 as a ‘prior statement’ in this case.<sup>30</sup> Indeed, the Defence concedes, as is further supported by their 9 November 2019 interview [REDACTED], that the [REDACTED] Statement concerned the witness’s knowledge of *that* case — not this one.<sup>31</sup> Thus, contrary to the Request<sup>32</sup>, the Prosecution’s 12 March 2020 reply indicating that all documents registered under the relevant interview have been disclosed, in no way could have been understood to include the [REDACTED] Statement as a ‘prior statement’ of the Witness or otherwise.

21. *Third*, the Prosecution had already made clear to the Defence on several occasions that it considered the disclosure of the [REDACTED] Statement, even as potentially redacted in an effort to “[REDACTED].”<sup>33</sup> Accordingly, the Defence’s 13 December 2019 demand for the [REDACTED] Statement under article 67(2) both, warranted no further response and received none in the Prosecution’s 12 March 2020 reply.

c. There is no basis for any finding of a disclosure violation

<sup>29</sup> ICC-01/14-01/18-506-Conf-AnxA, p. 3-4.

<sup>30</sup> See ICC-01/04-02/06-1330, paras. 11, 16; see also ICC-01/05-01/13-1227, para. 9.

<sup>31</sup> ICC-01/14-01/18-506-Conf, para. 1.

<sup>32</sup> ICC-01/14-01/18-506-Conf, para. 24.

<sup>33</sup> ICC-01/14-01/18-330-Conf. para. 12 and 13 (and citing ICC-01/14-01/18-315-Conf, para. 86(c)) (emphasis added).

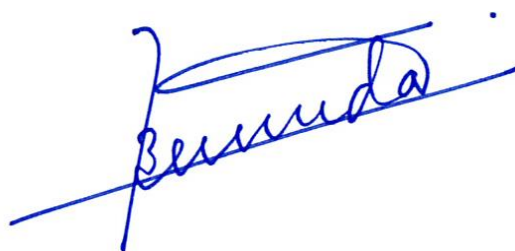
22. As explained above, the Prosecution has been consistent in its position that judicial authorisation is necessary for the disclosure of material which may violate existing protective measures ordered in a previous case. The Defence's refusal to acknowledge this limitation is unavailing, and does not translate into the substantiation of its position. To the contrary, the procedural history in this matter and the Pre-Trial Chamber's dismissal *in limine* of the Variance Application underscore that the Defence's claims lack any foundation, and are fatal to its request for the Chamber to find a disclosure violation.

23. The Defence cannot circumvent Court-ordered protective measures by advancing baseless claims that the Prosecution has improperly withheld material. Allowing this, would render hollow the assurances and protections provided to witnesses and victims by Chambers in the interests of advancing the Court's mandate. As regards protections given in conjunction with assurances under rule 74, the result would be further deleterious.

24. Lastly, it is telling that the word 'prejudice' appears *nowhere* in a defence request for disclosure ostensibly based on the Prosecution's improper withholding of article 67(2) material in a case as serious as this. Its absence belies the Request.

#### IV. CONCLUSION

25. For the foregoing reasons, the Prosecution requests that the Chamber dismiss the Request as premature. Alternatively, the Chamber should dismiss the Request on its merits as unfounded, and further direct the YEKATOM Defence to file an appropriate application to vary the relevant protective measures.



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**Fatou Bensouda, Prosecutor**

Dated this 18<sup>th</sup> day of May 2020  
At The Hague, The Netherlands