

Pursuant to Trial Chamber V's instructions dated 13.04.2023, this document is reclassified as Public

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 March 2023

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***

Confidential

**Prosecution's response to "Corrected version of 'Confidential redacted version of
"Yekatom Defence Motion for Orders in relation to withdrawn Prosecution
witness P-2582" ICC-01/14-01/18-1789-Conf-Exp, 9 March 2023"**

Source: Office of the Prosecutor

Pursuant to Trial Chamber V's instructions dated 13.04.2023, this document is reclassified as Public

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Landry Omissé-Namkeamaï
Ms Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the "Yekatom Defence Motion for Orders in relation to withdrawn Prosecution witness P-2582" ("Request").¹ The Request lacks merit, is unsupported by the Court's jurisprudence, and should be summarily dismissed.

2. The Request advances self-serving serving, speculative, and unfounded assertions to avoid an otherwise baseless attempt to circumvent rule 81(1) of the Rules of Procedure and Evidence ("Rules"), and to otherwise expand the Court's disclosure paradigm. As the unambiguous language of rule 81(1) provides:

"internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case *are not subject to disclosure*."²

3. Although the Defence is undoubtedly entitled to tangible material and evidence within the Prosecution's possession and control under rule 77 and article 67(2), the Prosecution's *reasons* for the withdrawal of P-2582 comprise neither. Moreover, they are manifestly strategic and *internal* – whether tangible or not. The Defence's claim with respect to article 54(1) is equally unavailing, predicated solely on conjecture.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis* of the Regulations of the Court ("RoC"), response is filed as "Confidential", as it responds to a filing of the same designation. A public redacted version will be submitted as soon as practicable.

III. SUBMISSIONS

¹ ICC-01/14-01/18-1785-Conf.

² See rule 81(1).

5. The Defence's contention that the Prosecution should "be ordered to provide reasons for the withdrawal of P-2582 in the interests of justice and due transparency"³ has no basis in the Court's statutory framework, which expressly regulates the disclosure paradigm. It is this fundamentally flawed reasoning which underpins all of the arguments advanced in the Request in one form or another.

6. As the *inter partes* correspondence between the Prosecution and the Defence makes clear, as noted, the Prosecution's determination and decision on whether or not to call a given witness in its case-in-chief is inherently strategic and internal.⁴ A distinction is to be made between the 'reasons' for the Prosecution's decision — as the Defence seeks⁵ — and disclosable items of evidence which may inform that decision. That distinction was made abundantly clear in the Prosecution's correspondence.

7. As the Prosecution has made clear, the disclosure of information going to the credibility of a witness who it is not calling does not fall under article 67(2) — as concerns *that witness*. To the extent that such material affects the credibility of the Prosecution case or other witnesses, it would. Nothing to the contrary is indicated in the Prosecution's correspondence. The Request thus plainly misrepresents the Prosecution's position.⁶

8. The Request's reference to other cases in which the Prosecution has provided particulars concerning the reasons for withdrawing witnesses in other proceedings is unavailing.⁷ Obviously, the Court's disclosure paradigm does not *preclude* the Prosecution from providing more information than required under the Statute. However, the inverse does not hold true, namely that the Prosecution may be *compelled* to provide material that is expressly exempt from disclosure under the Court's regulatory framework.

³ ICC-01/14-01/18-1789-Conf-Red-Corr, para. 4.

⁴ ICC-01/14-01/18-1789-Conf-Exp-AnxA.

⁵ ICC-01/14-01/18-1789-Conf-Red-Corr, para. 4, 44.

⁶ ICC-01/14-01/18-1789-Conf-Red-Corr, para. 8; *contra* ICC-01/14-01/18-1789-Conf-Exp-AnxA, p.1.

⁷ See ICC-01/14-01/18-1789-Conf-Red-Corr, para. 47.

9. The Defence's efforts to invite the Chamber's adoption of a 'policy' position to effectively curtail the express language of the Rules, must fail. Although a clever attempt, the Request cites no legal authority or substantiation for such a position in the Court's jurisprudence. There is none. While the Defence cites to the need to obtain the reasons for the withdrawal of witnesses to mitigate ostensible "wasted expenditure of time and resources",⁸ it engages in protracted and unnecessary litigation without factual or legal substantiation.⁹

10. As the Defence is fully aware, there can be no suggestion that the Prosecution has heretofore knowingly included witnesses on its Witness List that it intends to withdraw. With that said, the Request seems to advance the same without *any* factual basis whatsoever.¹⁰ The Defence unfortunately once again seeks to obtain information to which it is clearly not entitled in a manner wholly at odds with the Court's established legal framework and practice.

11. The Prosecution incorporates by reference herein the arguments advanced in its correspondence,¹¹ and particularly as regards its representations concerning its ongoing investigation under article 70, as well as its position in respect of its continuing discharge of its obligations under article 54(1). The Prosecution thus refutes and rejects the Defence's speculative and unfounded contentions to the contrary, as set out in the Request.

⁸ See ICC-01/14-01/18-1789-Conf-Red-Corr, para.49.

⁹ ICC-01/14-01/18-1789-Conf-Exp-AnxA, pp. 4-5.

¹⁰ ICC-01/14-01/18-1789-Conf-Exp, paras. 51-53

¹¹ See ICC-01/14-01/18-1789-Conf-Exp-AnxA.

Pursuant to Trial Chamber V's instructions dated 13.04.2023, this document is reclassified as Public

IV. CONCLUSION

12. For the above reasons, the Chamber should dismiss the Request in its entirety.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a small dot.

Karim A. A. Khan KC, Prosecutor

Dated this 20th day of March 2023

At The Hague, The Netherlands