

**Cour
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**International
Criminal
Court**

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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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA

Public

Public Redacted Version of "Yekatom Defence Response to CLR V1
Response of 17 January 2024 to VWU Submissions (ICC-01/14-01/18-2305-
Conf-Red)", 22 January 2024, ICC-01/14-01/18-2321-Conf

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. Pursuant to Trial Chamber V's email instructions of 17 January 2023,¹ the Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby files this response to the 'Response of the Common Legal Representative of the Former Child Soldiers to the Registry's Submissions (No. ICC-01/14-01/18-2290-Conf, dated 8 January 2024) and Urgent Request for an order to the VWU to complete the security risk assessment with respect to Witnesses CAR-V45-P-0001 and CAR-V45-P-0002 and implement protective measures as appropriate (No. ICC-01/14-01/18-2305-Conf-Exp, dated 16 January 2024)' ('CLR1 Response').²
2. The Defence takes no position on the sought order to the Victim and Witness Unit ('VWU').³
3. The Defence opposes the CLR1 request that the Chamber find the material collected by VWU inadmissible ('Exclusion Request'), on the basis that it relies on ill-founded accusations themselves premised on mischaracterisations of the underlying facts; and is in any event premature.
4. Lastly, the Defence requests that the Chamber order the forensic examination of the mobile phones of V45-P-0001 and V45-P-0002, as proposed by VWU; and that relevant material identified during said examination be disclosed to the Defence.

SUBMISSIONS

¹ Email from Trial Chamber V to Registry, Parties and participants, 17 January 2024 at 12:13.

² ICC-01/14-01/18-2305-Conf-Red.

³ Ibid., paras 34-46.

A. The Exclusion Request should be rejected.

i) *VWU's access of the CLR1 Phones was neither ultra vires nor a violation of the CLR1 Witnesses' rights.*

5. The CLR1's claim that VWU's access, analysis and disclosure of the content of the mobile phones of V45-P-0001 and V45-P-0002 ('CLR1 Witnesses') constituted an *ultra vires* breach of neutrality and a violation of their human rights is unavailing.
6. The Defence notes that contrary to VWU, the CLR1 submits that his clients' mobile phones were obtained by VWU without their consent.⁴ While the Defence is not privy to the exact circumstances under which the phones were provided to VWU, it submits that the CLR1 Witnesses' post-facto denials – [REDACTED] – should be assessed against the mounting, multi-faceted evidence of his clients' potentially criminal misconduct.⁵ These denials should also be assessed against the CLR1 Witnesses' clear motivation to retrospectively deny having provided this consent with the aim of ensuring that the incriminating content contained in their mobile phones could not be used against them in these proceedings. The Defence also notes that this is not the first time that discrepancies have arisen in respect of V45-P-0002's retrospective account of his interactions with VWU in the context of this case.⁶
7. The Defence further notes that VWU has taken possession of the mobile phone of at least one Defence witness (after receiving his express consent in this regard) who had been referred to VWU for protection. The access and analysis of referred witnesses' mobile phones [REDACTED] – again, irrespective of the

⁴ ICC-01/14-01/18-2305-Conf-Red, para. 30; contra, ICC-01/14-01/18-2290-Conf, para. 11. In email communications with the Defence, the Registry has reiterated this position, i.e. that [REDACTED]; see, Email from Registry of 15 January 2024 at 16:46, available on request.

⁵ See *infra*, para. 12. The Defence also notes that P-6025's testimony, which will commence on 25 January 2024, [REDACTED].

⁶ See, [REDACTED]; and Email from CLR1 to Trial Chamber V, 22 September 2023 at 08:52.

referring Party or participant – which undermines the CLR1’s accusations as to VWU’s supposed breach of neutrality.

8. Further, in accusing VWU of acting *ultra vires* and breaching neutrality in disclosing the material contained within his clients’ phones,⁷ the CLR1 appears to ignore the fact that: (i) VWU provided specific and discrete phone records as examples of potential criminal conduct, and (ii) the material was shared by VWU with the Parties and participants pursuant to an express Chamber order to this effect – and this, precisely because the false identities of the CLR1’s clients was a matter in dispute.⁸ In this regard, the CLR1 has failed to demonstrate that: (i) there was any infringement of the rights of CLR1 Witnesses, (ii) the material was disclosed absent a judicial order and (iii) any such purported infringement was either disproportionate or unnecessary.
9. Lastly, while the CLR1 appears to take issue with VWU’s suggestion that it was ‘asked to assess and include a person in’ the ICC Protection Programme,⁹ the Defence recalls that V45-P-0001 expressly asked, during his testimony, to be granted relocation to a ‘country in Africa’.¹⁰

ii) The Exclusion Request is premised on mischaracterisations and unfounded accusations.

10. In the CLR1 Response, the CLR1 accuses VWU of having breached its duty of neutrality by accessing and analysing the phone records of his clients; specifically, in investigating ‘specific elements in support to the Yekatom Defence’s challenges against’ their purported identities; cross-checking their phone records ‘in an attempt to confirm the allegations made by’ the Defence; and ‘deliberately interfering in a legal issue materially in dispute’.¹¹

⁷ ICC-01/14-01/18-2305-Conf-Red, para. 30.

⁸ Email from Trial Chamber V to Registry, Parties and participants, 21 December 2023 at 17:09.

⁹ ICC-01/14-01/18-2305-Conf-Red, para. 28.

¹⁰ ICC-01/14-01/18-T-245-CONF-FRA CT, 41:6-9.

¹¹ *Ibid.*, paras 23-26.

11. The CLR1 thus portrays VWU's access, analysis and disclosure of information contained in his clients' phones as improperly motivated by a supposed desire to 'support' Defence allegations, contrary to the VWU's duty of neutrality. This portrayal is unfounded and misleading.
12. The Defence has previously brought to the attention of the Chamber the existence of a far-reaching scheme to defraud the Court via the systematic fabrication and presentation of false accusations against Mr Yekatom, over a period of years.¹² Among the various individuals who have engaged in this scheme are CLR1 intermediary [REDACTED], CLR1 Witness V45-P-0001 [REDECTED]; and CLR1 Witness V45-P-0002 [REDACTED], who successfully conspired to have the latter two present false accounts of their 'experience' as 'former child soldiers' in Mr Yekatom's group, under the fabricated identities of [REDACTED] and [REDACTED] respectively.¹³
13. As part of its presentation of evidence, the Defence intends to call a number of witnesses who will testify on this potentially criminal misconduct on the part of [REDACTED].¹⁴ The Chamber has previously granted protective measures in respect of [REDACTED], having found that objectively justifiable risks to their legitimate interests exist, citing *inter alia* their 'fears of retaliation' and/or actual threats [REDACTED].¹⁵ To cite one example: P-6017 was threatened [REDACTED].¹⁶ The Defence has referred [REDACTED] for this same reason, i.e. the threat to the security and well-being of Defence witnesses posed by [REDACTED].
14. The question of the false identities of the CLR1 Witnesses is thus a fundamental component of both i) the fraudulent scheme in which they and [REDACTED]

¹² See, ICC-01/14-01/18-2240-Conf.

¹³ *Ibid.*, paras 10-11, 25-26.

¹⁴ See, [REDACTED].

¹⁵ ICC-01/14-01/18-2205-Conf-Exp, paras 12-16.

¹⁶ ICC-01/14-01/18-2288-Conf, para. 27.

engaged, and ii) the anticipated evidence of certain at-risk Defence witnesses. Moreover, it is precisely because [REDACTED] and CLR1 Witnesses have conspired to *inter alia* create and testify under false identities, [REDACTED], that risks to the latter arise.

15. The question of the false identities of the CLR1 Witnesses is thus directly related to the safety and security of these Defence witnesses. It should therefore come as little surprise that these false identities would be deemed relevant to VWU's risk assessment in respect of the latter witnesses. In this regard, far from constituting a breach of VWU's statutory duty of neutrality, VWU's 'investigation' into the CLR1 Witnesses' phones thus would appear to fall squarely within its remit as an organ of the Court tasked with collecting material for the purposes of conducting security assessments in respect of all referred witnesses, irrespective of the referring Party or participant.
16. The VWU, in the legitimate execution of its mandate, has uncovered evidence that the CLR1 Witnesses who were referred to it have adopted false identities; and has duly alerted the Chamber. This course of action would be expected irrespective of whether the identity of a witness was in dispute, given the ensuing consequences concerning fraudulent testimony and immigration fraud. The mere fact that these false identities had previously been brought to the attention of the Chamber by the Defence, on the basis of entirely separate evidence, does not render VWU's conduct improper or inappropriate. Neutrality, contrary to the CLR1 suggestion, does not constitute closing one's eyes to criminal misconduct in the context of Court proceedings, or indeed brushing it under the carpet, simply because a certain Party or participant has chosen to dispute the fact that this misconduct has taken place.

iii) *The sought exclusion would be contrary to the fairness and integrity of the proceedings.*

17. More broadly, the CLR1's attacks on VWU for having sought the guidance of the Chamber following its discovery of evidence that his clients falsified their identities and by extension, their testimonies, are contrary to the integrity of the proceedings. In this respect, the Defence finds the CLR1 position deeply regrettable, especially given that the CLR1 is fully aware of the mounting evidence of the above-mentioned evidence fabrication and witness interference scheme engaged in by *inter alia* his very own clients and intermediaries.¹⁷ The Defence also recalls that while the identities of the vast majority of the CLR1's Category A participating victim clients remains inaccessible to the Defence, an apparently systematic identity fabrication scheme can nonetheless be discerned on the basis of those that are available.¹⁸
18. Simply put, VWU should not be criticized for alerting the Chamber to potentially criminal misconduct on the part of witnesses; especially when this misconduct is discovered during the legitimate execution of its witness protection mandate. On the contrary – it is not an exaggeration to state that VWU's conduct in this regard was to the benefit of the integrity of these proceedings, and to the moral standing and reputation of the Court. Indeed, VWU's conduct was all the more necessary given not only the CLR1's seeming indifference towards the evidence of his clients' misconduct on the part of his clients;¹⁹ but also given the Prosecution's protracted investigative failures and wilful blindness towards the broader evidence fabrication scheme mentioned above.²⁰

¹⁷ ICC-01/14-01/18-2240-Conf, paras 10-11, 25-26. The Defence position, and underlying evidence, in this regard was also made clear to CLR1 during the Defence's cross-examination of the CLR1 Witnesses (see, [REDACTED] and [REDACTED]) as well as in Defence submissions on the evidence submitted through the CLR1 Witnesses (see e.g. Emails from the Defence to Trial Chamber V, Parties and participants of 26 September 2023 at 9:24, and 3 October 2023 at 10:44).

¹⁸ ICC-01/14-01/18-2240-Conf, paras 10-11 and 25, and fns 10-16, 68-71.

¹⁹ On 18 January 2024, [REDACTED]; Email from CLR1 to Defence of 18 January 2024 at 15:47 (available on request).

²⁰ ICC-01/14-01/18-2240-Conf; see esp., Part II.

19. Moreover, the CLR1's attacks have a chilling effect on any potential whistleblowers who might uncover misconduct that has taken place in the context of proceedings before the Court. These attacks are thus detrimental not only to the fairness of these proceedings, but also to the work and mandate of the Court as a whole. They should be rejected wholesale.

iv) The Exclusion Request is premature.

20. The content of the CLR1 Witnesses' phones is yet to be made available to the Parties or (the Defence understands) to the Chamber, let alone been tendered for admission into evidence. It is therefore inappropriate for the CLR1 to seek a finding from the Chamber as to the admissibility of the material in question at this stage. As such, the Defence will not at this stage address the merits of the Exclusion Request.

21. That said, the irony of the CLR1 seeking to block the Chamber's access to (further) proof of false testimony in the context of this case, citing a purported detrimental impact on the integrity of the proceedings, is not lost upon the Defence.

B. Forensic examination of the CLR1 Witnesses' phones should be conducted, and any information evidencing V45-P-0001's false identity should be disclosed.

22. The Defence notes the VWU's submissions that: [REDACTED]; that VWU can 'not definitively state that a forensic examination of the [CLR1 Witnesses'] phones by a competent authority may not disclose further information that may be relevant for this matter'; and that VWU stands ready to provide the phones to a competent authority for forensic investigation.²¹

23. The Defence respectfully submits that VWU's proposed course of action would be in the interests of justice and the preservation of the integrity of proceedings.

²¹ ICC-01/14-01/18-2290-Conf, para. 14.

24. The forensic examination of the mobile phones by a competent authority is a necessary follow-up to VWU's preliminary discovery of evidence of potential criminal misconduct in the context of these proceedings. It will ensure that further material evidence suggesting that CLR1 Witnesses gave false testimony before the Chamber, can be made available to the latter in a comprehensive and useful format – for instance, in the form of a forensic extraction report. In addition, this further step is necessary given the broader repercussions of this matter [REDACTED].
25. Should the extraction process be conducted by a third party external to the Court, the Defence proposes that the analysis of the data collected should be conducted by the Registry, as a neutral and competent body in these proceedings. In the spirit of facilitating this process, should the Chamber be minded to order the proposed forensic examination, the Defence respectfully suggests that Parties and participants be provided the opportunity to submit proposed search terms, which may assist in ensuring that relevant information is duly identified. For example: additional telephones numbers attributed by the Defence to known contacts of P-0001 and P-0002, including other individuals of interest relevant to the broader evidence fabrication scheme in the context of Count 29; or specific timeframes of interest.
26. Further, the Defence respectfully requests that following the analysis of the extracted material, any information evidencing the false identities and testimony of the CLR1 Witnesses, [REDACTED], that is extracted pursuant to said forensic examination be disclosed to the Defence. This includes, *inter alia*, the underlying phone records already identified by VWU.²²
27. Such information would constitute further evidence of the wider evidence fabrication scheme that is the subject of a pending motion for exclusion of

²² ICC-01/14-01/18-2290-Conf, paras 11-13.

evidence; and would also corroborate the testimony of multiple Defence witnesses who will testify on this scheme.²³ Said information would therefore go directly to proof of critical elements of the Defence's counter-case on Count 29, and would thus be both material to defence preparations and potentially exculpatory.

CONFIDENTIALITY

28. This response is filed on a confidential basis, corresponding to the classification of the CLR1 Request, and given that it contains reference to Defence witnesses' security concerns. A public redacted version will be filed forthwith.

RELIEF SOUGHT

29. In light of the above, the Defence respectfully requests that Trial Chamber V:
DENY the Exclusion Request;
ORDER the forensic examination of the CLR1 Witnesses' phones;
and, should said forensic examination be ordered and conducted,
ORDER that all information discovered during said examination, relating to the matter of the identities of V45-P-0001 and V45-P-0002 and/or to [REDACTED], be disclosed to the Defence.

RESPECTFULLY SUBMITTED ON THIS 4th DAY OF MARCH 2024



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²³ See *supra*, paras 12-13.