

Cour
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Criminal
Court



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

Date: 4 March 2024

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 Request for Leave to Reply to the "Prosecution's Response to the Yekatom Defence's request for the forensic examination of V45-P-0001's and V45-P-0002's mobile phones (ICC-01/14-01/18-2321)", 31 January 2024, ICC-01/14-01/18-2336-Conf", 5 February 2024, ICC-01/14-01/18-2345-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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 Section

1. Pursuant to Regulation 24(5) of the Regulations of the Court ('RoC'), the Defence for Mr. Yekatom ('Defence') seeks leave to file a brief reply to the "Prosecution's Response to the Yekatom Defence's request for the forensic examination of V45-P-0001's and V45-P-0002's mobile phones (ICC-01/14-01/18-2321)" ("Response").¹
2. The Defence has identified four discrete new issues which warrant a reply as the Defence could not have reasonably anticipated that the Prosecution would respond to its request for the forensic examination of V45-P-0001's and V45-P-0002's mobile phones² which concerned a reply to submissions made by the CLRV1³ regarding material obtained by VWU⁴ further to which Trial Chamber V ordered the "participants" to respond.⁵ Given the Prosecution's lack of involvement in this matter to date, the Defence could not have expected that it would intervene at this stage and oppose the forensic examination of V45-P-0001's and V45-P-0002's mobile phones.
3. The issues are as follows:
 - a) Articles 64(2), 64(6)(d) and 64(6)(f) of the Rome Statute ("Statute") provide the necessary legal basis for the issuance of a judicial order for any forensic examination of the CLRV1 Witness's mobile phones.⁶ A judicial order for the forensic examination to be conducted by a competent authority (including, for example, the Dutch authorities) is further warranted in accordance with Rule 165(1),⁷ in light of the Prosecution's apparent unwillingness to obtain the requisite information

¹ ICC-01/14-01/18-2336-Conf.

² ICC-01/14-01/18-2321-Conf.

³ ICC-01/14-01/18-2305-Conf-Red.

⁴ ICC-01/14-01/18-2290-Conf.

⁵ Email from Trial Chamber V to the Registry and Parties and Participants, dated 17 January 2024 at 12:13.

⁶ *Contra* Response, para. 1.

⁷ Rule 165(1) of the Rules of Procedure and Evidence ("Rules"): "The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, **on the basis of information communicated by a Chamber or any reliable source** (emphasis added)".

necessary to determine the nature and scope of potential violations under Article 70 of the Statute (First Issue).

- b) The right against self-incrimination as articulated by the Prosecution does not apply to the content of mobile phones. It is a right which applies to testimonial evidence in the course of existing or anticipated criminal proceedings (Second Issue).⁸
- c) The 'explicit and specifically informed' consent of an individual is not required in circumstances where there is *prima facie* indication of criminal conduct and where the forensic examination is necessary, proportionate and court-ordered (Third Issue).⁹
- d) The further investigative steps requested by the Defence are not collateral to these proceedings and the scope of the information which could potentially be derived from the forensic assessment of the phones exceeds the Prosecution's assessment thereof.¹⁰
 - i. To date, the scope of the material collected by VWU as part of its preliminary search is unknown. Search terms provided by the Defence, as suggested, – including for example telephone numbers attributed to [REDACTED] (P-2580) – would allow for a proper determination with regard to CAR-V45-P-0001 and CAR-V45-P-0002's identification. It would also shed further light in relation to the extent of the fabrication of evidence in these proceedings as submitted by the Defence and contested, to various degrees, by other parties and participants.

⁸ As was the case in the *Bemba et al.* reference cited by the Prosecution see Response, para. 5 and fn. 3. See also Rule 74 of the Rules.

⁹ *Contra* Response, para. 8.

¹⁰ *Contra* Response, paras. 9 to 12.

- ii. Irrespective of whether the Defence's request for disclosure is granted, there are compelling reasons justifying the forensic examination given that the repercussions of [REDACTED] (P-2638) and [REDACTED] (P-2580) conduct exceed the scope of these proceedings and criminal investigations need to be conducted in their regard and with respect to their associates.
 - iii. Further, since the forensic examination has yet to be conducted, the Prosecution is not in a position to assess whether the material obtained by VWU is sufficient (Fourth Issue) (collectively "Four Issues").
4. Should leave to reply be granted, the Defence would also draw a parallel between the Prosecution's position on the Defence's proposed course of action and the measures initiated by the Prosecution following [REDACTED] testimony during which a Prosecution investigator [REDACTED] recorded conversations held with [REDACTED] without the latter's consent. The Defence would recall that these conversations were recorded prior to [REDACTED].¹¹
5. A limited and focused reply to the Four Issues would be necessary for the fair and considered determination of the "Yekatom Defence Response to CLRV1 Response of 17 January 2024 to VWU Submissions" by providing clarification of the legal arguments put forward by the Prosecution and is otherwise in the interests of justice.

CONFIDENTIALITY

¹¹ In this regard, see CAR-OTP-2130-4047 and CAR-OTP-2130-4076.

6. This request is filed on a confidential basis in accordance with Regulation 23bis(1) of the Regulations of the Court as it concerns filings of the same designation. A public redacted version will be filed forthwith.

RELIEF SOUGHT

7. In light of the above, the Defence respectfully requests the Trial Chamber to grant the request for leave to reply in respect of the Four Issues.

RESPECTFULLY SUBMITTED ON THIS 4th DAY OF MARCH 2024



Me Mylène Dimitri
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