



Original: English

No. ICC-01/14-01/18

Date: 23 April 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Yekatom Defence Request for the Exclusion of Allegedly
Fabricated Evidence**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, having regard to Articles 54(1), 67(1)(e) and (2), and 69(7) of the Rome Statute (the ‘Statute’) and Rule 64(1) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Request for the Exclusion of Allegedly Fabricated Evidence’.

I. Procedural history and submissions

1. On 5 December 2023, the Yekatom Defence (the ‘Defence’) filed a ‘Request for the Exclusion of Fabricated Evidence’ (the ‘Request’).¹ The Defence requests the Chamber to exclude, pursuant to Article 69(7) of the Statute, the evidence of (i) witnesses P-2475, P-2018 and P-1974, who were called by the Office of the Prosecutor (the ‘Prosecution’ or the ‘OTP’), including ‘associated exhibits used with these witnesses’; (ii) witnesses V45-0001 and V45-0002, who were called by the Common Legal Representative of the Former Child Soldiers (the ‘CLR V1’), including ‘associated exhibits used with these witnesses’; and (iii) items related to the withdrawn Prosecution witnesses P-2620 and P-2582, which have been recognised as formally submitted (jointly, the ‘Allegedly Fabricated Evidence’).²
2. The Defence submits that the present proceedings have been ‘the target of a deliberate and concerted effort to present false evidence on the part of OTP witnesses, OTP and Registry intermediaries, alleged “former child soldier” participating victims, and other individuals relied on by the OTP in its

¹ ICC-01/14-01/18-2240-Conf (with confidential Annexes A-C and public Annex D) (public redacted version notified on 9 February 2024, ICC-01/14-01/18-2240-Red). The Chamber notes that Annex A contains a ‘Chronology’ of events, compiled by the Defence; Annex B contains email communications between the Defence and the Prosecution; Annex C contains a full list of the Allegedly Fabricated Evidence for which the Defence seeks exclusion; and Annex D contains a ‘Table of Authorities’.

² Request, ICC-01/14-01/18-2240-Red, paras 5, 153; Annex C to the Request, ICC-01/14-01/18-2240-Conf-AnxC. The Chamber notes that the Defence requested an extension of the page limit to 80 pages for its Request (*see* email from the Defence, 13 November 2023, at 10:47), which was opposed by the Prosecution (*see* email from the Prosecution, 15 November 2023, at 09:01) as well as the CLR V1 and Common Legal Representatives for the Victims of Other Crimes (the ‘CLR V2’ and, jointly, the ‘CLR V’) (*see* email from the CLR V, 15 November 2023, at 09:16). The Defence subsequently sought leave to reply to the Prosecution and the CLR V (*see* email from the Defence, 15 November 2023, at 12:33). The Single Judge partly granted the extension request, allowing the Defence to file up to 50 pages. He further granted the same extension to the other participants for their responses, if any (*see* email from the Chamber, 15 November 2023, at 14:51).

investigation and prosecution of Count 29³ (the ‘Alleged Conspirators’ and the ‘Alleged Conspiracy’).⁴

3. The Defence argues that the ‘systematic collusion amongst this network’ was the direct result of the ‘OTP’s continued investigative failures’ and ultimately led to the ‘fabrication of substantive evidence concerning Count 29’. It avers that, if the Prosecution had ‘respected basic investigative principles and exhibited due diligence, the array of misconduct would have been evident at the early stages of its investigation’. Furthermore, it claims that the Prosecution ‘was wilfully blind to the manifest *indicia* of misconduct and unreliability of its witnesses and evidence’ and that its ‘protracted failures in this regard’ led to the violation of Mr Yekatom’s fundamental rights, ‘in a manner that casts substantial doubt on the reliability of the affected evidence [concerning Count 29] and bring[s] the integrity of these proceedings into serious disrepute’.⁵
4. The Defence submits that the Prosecution’s investigative failures⁶ and mischaracterisation of exculpatory material as non-disclosable amount to violations of Articles 54(1), 67(1)(e) and (2) of the Statute.⁷ According to the Defence, these violations ‘directly resulted in the gathering of the [Allegedly] Fabricated Evidence’ and thus satisfy the first limb of Article 69(7) of the Statute, namely whether the Allegedly Fabricated Evidence was ‘obtained by means of a violation of the Statute or internationally recognised human rights’.⁸ The second limb of this provision is, in the Defence’s submission, also met because ‘[t]he [A]rticle 54(1) and [A]rticle 67 violations cast substantial doubt on the reliability

³ Count 29 concerns Mr Yekatom’s alleged ‘conscription, enlistment and use of children under the age of fifteen years to participate actively in hostilities, pursuant to and prohibited by article 8(2)(e)(vii) of the Statute, for the conscription and/or enlistment of children into his group at various locations, including Boeing, Sekia and Pissa along the PK9-Mbaiki axis and in Batalimo along the Pissa-Mongoumba axis, and the assignment of a variety of tasks to them, such as, *inter alia*, participating in hostilities, including the 5 December 2013 Attack, between at least December 2013 and August 2014, as set out in paragraphs 359-360 of the [Document Containing the Charges] and paragraphs 144-152 of the [Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona] (Count 29)’. *See* Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 14 May 2020, ICC-01/14-01/18-403-Conf-Corr (the original decision was notified on 11 December 2019).

⁴ Request, ICC-01/14-01/18-2240-Red, paras 2-3.

⁵ Request, ICC-01/14-01/18-2240-Red, para. 4.

⁶ Request, ICC-01/14-01/18-2240-Red, paras 53-113.

⁷ Request, ICC-01/14-01/18-2240-Red, paras 114-122.

⁸ Request, ICC-01/14-01/18-2240-Red, paras 33-35, 114-123.

of the [Allegedly] Fabricated Evidence’ and ‘[t]he admission of the [Allegedly] Fabricated Evidence would be antithetical to and would seriously damage the integrity of the proceedings’.⁹

5. On 19 January 2024,¹⁰ the Prosecution opposed the Request, arguing that it is ‘legally flawed and procedurally untenable’ (the ‘Prosecution Response’). Specifically, it argues that (i) ‘the Request does not fall within the scope of [A]rticle 69(7)’ of the Statute; (ii) ‘assuming *arguendo* that the [Allegedly Fabricated] Evidence was obtained by means of a violation of the Statute, this neither casts substantial doubt on its reliability on the whole, nor would its retention in the record for the Chamber’s assessment undermine the integrity of the proceedings’; and (iii) ‘the Request presents an [A]rticle 69(4) issue’ and thus essentially requires reconsideration of the Chamber’s prior determinations on the formal submission of the Allegedly Fabricated Evidence, which must fail as the applicable legal criteria are not fulfilled.¹¹
6. On the same day, the CLRV1 also opposed the Request (the ‘CLR V1 Response’). He argues that it should be dismissed as ‘(i) it lacks a procedural basis; (ii) it does not meet the requirements under [A]rticle 69(7) of the [Statute]; and (iii) the exclusion of the contested evidence would be prejudicial to the fairness and integrity of the proceedings’.¹²

⁹ Request, ICC-01/14-01/18-2240-Red, paras 129-150.

¹⁰ On 8 December 2023, the Prosecution filed a request pursuant to Regulation 35 of the Regulations for an extension of time to respond to the Request until 19 January 2024 (*see* Prosecution’s Request for Variation of Time Limit pursuant to Regulation 35, ICC-01/14-01/18-2251, paras 1, 11). The CLRV supported the Prosecution’s request and requested an equivalent extension of time to respond (*see* email from the CLRV1, 11 December 2023, at 08:36; email from the CLRV2, 11 December 2023, at 08:47). The Defence indicated that it did not oppose the Prosecution’s request (*see* Yekatom Defence Response to ‘Prosecution’s Request for Variation of Time Limit pursuant to Regulation 35’ (ICC-01/14-01/18-2251-Conf), 11 December 2023, ICC-01/14-01/18-2254, para. 2). On 14 December 2023, the Single Judge granted the Prosecution’s extension request until 19 January 2024 and noted that the extension also applied to the other participants (*see* Decision on the Prosecution Request for Extension of Time to Respond to Yekatom Defence’s Request to Exclude Evidence, ICC-01/14-01/18-2261).

¹¹ Prosecution Response to the Yekatom Defence ‘Request for the Exclusion of Fabricated Evidence’ (ICC-01/14-01/18-2240-Conf), ICC-01/14-01/18-2313-Conf (public redacted version notified on 12 February 2024, ICC-01/14-01/18-2313-Red), paras 1-4.

¹² Response of the Common Legal Representative of the Former Child Soldiers to the Yekatom Defence’s ‘Request for the Exclusion of Fabricated Evidence’, ICC-01/14-01/18-2314-Conf (public redacted version notified on 13 February 2024, ICC-01/14-01/18-2314-Red), para. 1.

7. On 31 January 2024, the Single Judge rejected¹³ a request for leave to reply by the Yekatom Defence,¹⁴ which was opposed by the Prosecution.¹⁵

II. Analysis

8. The Chamber recalls that in line with the ‘Submission Approach’ it does not rule on the admissibility of each item of evidence during the course of the proceedings, unless items are subject to an exclusionary rule.¹⁶ Article 69(7) of the Statute, which forms the basis of the Request, is one such exclusionary rule. Thus, the Chamber will rule on the admissibility of the Allegedly Fabricated Evidence at this juncture.

A. Applicable law – Article 69(7) of the Statute

9. As previously held,¹⁷ Article 69(7) of the Statute envisages two consecutive inquiries. First, it must be determined whether the evidence at issue was ‘obtained by means of a violation of th[e] Statute or internationally recognized human rights’.
10. Only if such violation has been found, does a chamber need to consider whether (a) ‘[t]he violation casts substantial doubt on the reliability of the evidence’; or (b) ‘[t]he admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’. The evidence concerned is inadmissible in case of an affirmative answer to either of these two questions.¹⁸

¹³ Decision on the Yekatom Defence Consolidated Request for Leave to Reply to Responses to the ‘Request for the Exclusion of Fabricated Evidence’, ICC-01/14-01/18-2339.

¹⁴ Consolidated Request for Leave to Reply to Responses to the ‘Request for the Exclusion of Fabricated Evidence’, 25 January 2024, ICC-01/14-01/18-2326.

¹⁵ Prosecution Response to the Yekatom Defence ‘Consolidated Request for Leave to Reply to Responses to the ‘Request for the Exclusion of Fabricated Evidence’ (ICC-01/14-01/18-2326-Conf), 31 January 2024, ICC-01/14-01/18-2331.

¹⁶ See Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, paras 52-55.

¹⁷ See Decision on the Thirteenth Prosecution Submission Request from the Bar Table (Anti-Balaka and Governmental Documents), 10 November 2023, ICC-01/14-01/18-2199-Conf (public redacted version notified the same day), para. 13.

¹⁸ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Conf (public redacted

11. In the Chamber’s opinion, the requirement of obtaining the evidence ‘by means of a violation’ further requires a causal link between the violation and the gathering of the evidence in question. This requirement must therefore be assessed in light of the circumstances in which specific evidence was gathered.¹⁹
12. The burden of proof lies with the party seeking the exclusion of evidence and thus, in this instance, with the Defence.²⁰

B. The Chamber’s determination under Article 69(7) of the Statute

1. Whether the Allegedly Fabricated Evidence was obtained ‘by means of a violation of the Statute’

13. The Defence contends that the Prosecution obtained the Allegedly Fabricated Evidence in violation of Articles 54(1), 67(1)(e) and (2) of the Statute.²¹

i. Article 54(1) of the Statute

14. With regard to Article 54(1) of the Statute, the Defence argues that the Prosecution failed to execute its statutory duties pursuant to this article because (i) ‘[t]here was a heightened need to investigate allegations concerning the fraudulent representation of “former child soldiers” from the outset’ in light of the phenomenon of fraud in post-conflict demobilisation programmes for alleged former child soldiers in the wider central African region; (ii) ‘[t]he OTP improperly delegated its investigative duties to [*Enfant sans Frontières* (the

version notified the same day, ICC-01/05-01/13-2275-Red) (the ‘*Bemba Appeals Chamber Decision*’), para. 280.

¹⁹ See Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on requests related to the submission into evidence of Mr Al Hassan’s statements, 17 May 2021, ICC-01/12-01/18-1475-Conf (public redacted version notified on 20 May 2021, ICC-01/12-01/18-1475-Red) (the ‘*Al Hassan 69(7) Decision*’), paras 33, 41, 43. See also Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on the Request to Exclude Audio Recordings Pursuant to Article 69(7) of the Statute, 14 February 2022, ICC-01/09-01/20-284-Conf-Exp, confidential *ex parte*, only available to the Prosecution (public redacted version notified on 18 February 2022), para. 45; Ambos, ‘Article 69(7)’ in K. Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article Commentary* (2022), para. 4396: ‘The phrase “obtained by means of” contemplates some sort of causal relationship between the violation and the collection of the evidence. It will be up to the Court to determine the degree of causality required. This degree could vary depending on the right or procedure violated’.

²⁰ See for example *Al Hassan 69(7) Decision*, ICC-01/12-01/18-1475-Red, para. 37 with further references.

²¹ Request, ICC-01/14-01/18-2240-Red, paras. 114, 123.

‘ESF’)]-affiliated intermediaries without adequate supervision despite their apparent conflict of interest and misconduct’; (iii) the OTP was aware of P-2018’s ‘clear and identifiable breaches and attempted breaches’ of the Code of Conduct for Intermediaries (the ‘Intermediary Code’)²² as of 2019; (iv) the OTP ‘rewarded’ P-2580’s ‘clear and identifiable breaches and attempted breaches of the Intermediary Code’; and (v) ‘[t]he OTP’s negligent reliance on ESF-affiliated intermediaries is compounded by its failure to competently and diligently investigate its sources’ and verify the evidence it seeks to rely on.²³

15. Article 54(1) of the Statute sets out the Prosecution’s obligations with regard to its investigations. Subrule (a) obliges the Prosecutor to ‘extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally’, in order to establish the truth. Subrule (b) stipulates that the Prosecution shall ‘[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses [...]’. Subrule (c) obliges the Prosecution to ‘[f]ully respect the rights of persons arising under this Statute’.
16. The Chamber observes that Article 54(1) of the Statute does not provide any parameters regarding the scope of the Prosecution’s investigation nor does it define ‘appropriate measures’. Article 42(1) of the Statute further recognises the independence of the Prosecution and its responsibility for conducting investigations.²⁴ Thus, barring statutory exceptions of judicial control, the Prosecution enjoys discretion in conducting its investigations within the

²² Code of Conduct for Intermediaries (March 2014) on [icc-cpi.int](https://www.icc-cpi.int/sites/default/files/CCI-Eng.pdf) (23 April 2024), <https://www.icc-cpi.int/sites/default/files/CCI-Eng.pdf>

²³ Request, ICC-01/14-01/18-2240-Red, paras 53-113.

²⁴ See also Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, para. 63. See also Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, Decision regarding applications related to the Prosecution’s ‘Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request’, 3 September 2021, ICC-02/17-156 (the ‘PTCII Afghanistan Decision’), para. 22.

framework of Article 54(1) of the Statute.²⁵ As a result, the Chamber only has a very limited role in reviewing whether the Prosecution complied with its duties under Article 54(1) of the Statute.

17. Bearing these limitations in mind, and for the reasons that follow, the Chamber is not persuaded that the Prosecution violated Article 54(1) of the Statute.

a. Article 54(1)(a)

18. The Chamber cannot discern any ‘wilful blindness’, ignoring of exonerating evidence, or other similar acts or omissions on the Prosecution’s part, as alleged by the Defence.²⁶
19. First, the Chamber does not consider that the publicly available information on the ‘phenomenon of fraud in post-conflict demobilisation programmes for alleged “former child soldiers”’ in the wider central African region or in the Central African Republic (the ‘CAR’)²⁷ obliged the Prosecution to investigate such allegations in the present case. Even assuming that the Prosecution was aware of this general phenomenon, it cannot be expected to investigate such matters absent an indication that a potential fraud had occurred in the specific case under investigation.
20. Second, the information provided by the Defence does not demonstrate that the Alleged Conspiracy and alleged investigative failures were clearly detectable at the investigation stage. Rather, as is apparent from the Defence’s own submissions, they were only identified retrospectively by the Defence during the trial, after it expended significant efforts to explore the chronology of the alleged interactions between the Alleged Conspirators.
21. The Defence implicitly acknowledges this, when it submits that it was only able to file its Request after ‘having reviewed the full scope of the [Prosecution’s]

²⁵ See also Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the “Request by Ms. Moraa Gesicho to Appear as Amicus Curiae”, 12 April 2011, ICC-01/09-02/11-54, para. 13: ‘[...] according to articles 42(1) and 54 of the Statute, the Prosecutor enjoys discretion’; PTCII Afghanistan Decision, ICC-02/17-156, para. 22: ‘[...] article 54 of the Statute does not provide for judicial oversight of the Prosecution’s compliance with article 54(1) as such’.

²⁶ See e.g. Request, ICC-01/14-01/18-2240-Red, paras 4, 84, 135.

²⁷ See Request, ICC-01/14-01/18-2240-Red, para. 56.

investigative failures – some of which only became apparent following the CLRV1’s case and during the course of Defence investigations’.²⁸ The Chamber considers this submission to be at odds with the Defence’s claim that the Alleged Conspiracy and alleged investigative failures were ‘blindingly obvious’²⁹ during the investigation phase. It appears contradictory that the Defence criticises the Prosecution’s unawareness of the Alleged Conspiracy during the investigation phase, but at the same time justifies the tardiness of its Request³⁰ by claiming unawareness itself.

22. Third, even if the Prosecution was aware of the Alleged Conspiracy potentially affecting the evidence concerning Count 29 in this case and should have investigated this possibly exonerating theme, the Chamber cannot discern any causal link to the obtaining of the Allegedly Fabricated Evidence.
23. In this respect, it notes that witnesses P-2475, P-2018, P-1974, V45-0001 and V45-0002 all testified before the Chamber. Their evidence was thus clearly not obtained by means of a violation of the Statute. Rather, it was obtained directly by the Chamber, pursuant to the applicable procedures and with ample opportunities for the Defence to question and challenge these witnesses’ accounts.³¹ In relation to V45-0001 and V45-0002, the Chamber additionally finds it incomprehensible how these witnesses’ evidence could have been affected by the alleged investigative failures, given that they were called by the CRLV1, and not by the Prosecution.
24. As regards the remainder of the Allegedly Fabricated Evidence,³² the Defence likewise fails to demonstrate that it was obtained by means of a violation. Even if the alleged investigative failures were taken at face value, it is unclear how

²⁸ Request, ICC-01/14-01/18-2240-Red, para. 6.

²⁹ Request, ICC-01/14-01/18-2240-Red, para. 31.

³⁰ The first sentence of Rule 64(1) of the Rules stipulates: ‘An issue relating to relevance or admissibility *must be raised at the time when the evidence is submitted to a Chamber*. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known. [...]’ (*emphasis added*). The Chamber also notes the CLRV1’s submissions in this regard, *see* CLRV1 Response, ICC-01/14-01/18-2314-Red, para. 14.

³¹ In relation to P-1974, the Chamber notes that the witness testified pursuant to Rule 68(3) of the Rules. The present finding thus only applies to his live testimony, not to his prior recorded testimony introduced under this provision.

³² *See* Annex C to the Request, ICC-01/14-01/18-2240-Conf-AnxC.

these omissions resulted in procuring the Allegedly Fabricated Evidence. One can only speculate as to what impact, if any, an investigation into the Alleged Conspiracy by the Prosecution would have had on the evidence adduced. In the Chamber's view, it can certainly not be argued definitively that the Allegedly Fabricated Evidence would not have been obtained at all, or with a different content.

25. Fourth, the Chamber finds the Defence's submissions that the 'investigative failures emboldened the [Alleged] Conspirators'³³ speculative and irrelevant to the present assessment.
26. Fifth, the Chamber is not persuaded by the Defence's submissions that the Prosecution continued to violate Article 54(1)(a) of the Statute beyond the investigation stage, notably by virtue of how it has prosecuted Mr Yekatom up until today.³⁴
27. Although the Prosecution's disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules continue to apply throughout the trial, the same cannot be said for its duty to investigate incriminating and exonerating circumstances – which is limited to the investigation stage.³⁵ In this respect, it should also be borne in mind that the Prosecution cannot investigate endlessly. Long-standing practice of this Court makes clear that while the Prosecution is not barred from investigating beyond the confirmation stage,³⁶ it is expected to be trial ready at that point and conclude its investigations speedily thereafter.³⁷
28. Furthermore, the Chamber recalls that the Court's legal framework combines adversarial and inquisitorial elements, including with regard to the role of the

³³ Request, ICC-01/14-01/18-2240-Red, para. 124.

³⁴ Request, ICC-01/14-01/18-2240-Red, para. 54.

³⁵ Ambos, 'Article 54(1)' in K. Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article Commentary* (2022), paras 3530-3531.

³⁶ See e.g. Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, paras 2, 52.

³⁷ See Chambers Practice Manual, 7th edition (2023), para. 14; Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Prosecution's applications to add witnesses and items to its List of Witnesses and List of Evidence and to rely on recently collected evidence, 11 April 2022, ICC-02/05-01/20-668-Conf (public redacted version notified on 5 May 2022), para. 19.

Prosecution. While Article 54(1)(a) of the Statute makes it clear that the Prosecution is conceived of as an ‘objective truth seeker and not as a partisan lawyer’ during the investigation phase,³⁸ it cannot be denied that thereafter it is expected to focus on *proving* the confirmed charges. Considering this, the Prosecution has no obligation to ask questions to aid the Defence’s case and cannot be reprimanded for limiting its witness examinations³⁹ to questions in support of its own case theory.

29. Similarly, the Chamber notes that nothing in the Court’s legal framework precludes the Prosecution from relying on evidence for which the probative value is disputed – so long as the evidence is not *known* to be false or forged.⁴⁰ At present, the Chamber has no reason to believe that the Prosecution knowingly presented false or forged evidence.

b. Article 54(1)(b)

30. The Chamber considers that the Defence also fails to demonstrate a violation under Article 54(1)(b) of the Statute.
31. First, the Chamber considers that the mere fact the Prosecution did not discover the Alleged Conspiracy during its investigation does not render the entire investigation in relation to Count 29 ineffective.
32. Second, and contrary to the Defence’s allegations,⁴¹ the Chamber notes that the Prosecution [REDACTED] engaged [REDACTED] intermediary – [REDACTED].⁴² It did not engage [REDACTED] in such role.⁴³
33. Third, the Chamber cannot discern any violation in the Prosecution’s use and supervision of intermediary [REDACTED]. In reaching this conclusion, the

³⁸ See Pre-Trial Chamber II, *The Prosecutor vs. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Dissenting Opinion Judge Kaul to the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, para. 45 (3). See also Ambos, ‘Article 54(1)’ in K. Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article Commentary* (2022), para. 3531, n. 17.

³⁹ See e.g. Request, ICC-01/14-01/18-2240-Red, paras 54, 82.

⁴⁰ The Chamber notes Article 70 of the Statute in this regard.

⁴¹ See e.g. Request, ICC-01/14-01/18-2240-Red, para. 60.

⁴² See Prosecution Response, ICC-01/14-01/18-2313-Conf, para. 14.

⁴³ See Prosecution Response, ICC-01/14-01/18-2313-Conf, para. 14, n. 18, where it clarifies that ‘[REDACTED] was not a Prosecution intermediary, *de jure* or *de facto*’ and that [REDACTED]’.

Chamber has given due consideration to the ‘Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries’ (the ‘Intermediary Guidelines’)⁴⁴ as well as the Intermediary Code.

34. According to the Intermediary Guidelines, the ‘effectiveness of the Court’s activities also depends to a large extent on the cooperation it receives from [...] individuals operating in the country where the Court functions’. Additionally, the guidelines state that in order ‘[t]o accomplish the objectives of the Rome Statute and to carry out their functions effectively, the different organs and units of the court [...] work together with [...] intermediaries’. While intermediaries should not be called upon to ‘undertake core functions of the Court’,⁴⁵ the Chamber notes that one recognised purpose is to ‘[a]ssist a party or participant to conduct investigations by identifying evidentiary leads and/or witnesses and facilitating contact with potential witnesses’.⁴⁶ This includes assisting in the preservation of evidence, assisting the Prosecution in locating and contacting witnesses and other investigative leads and/or maintaining contacts between the Prosecution and witnesses.⁴⁷
35. Bearing the above and the Prosecution’s logistical limitations on the ground in the CAR⁴⁸ in mind, the Chamber considers that the use of intermediary [REDACTED] appears to be an appropriate measure in the context of the present case. In this respect, it notes that the Prosecution engaged [REDACTED] only for the limited purpose of [REDACTED]. Moreover, it notes the Prosecution’s submission that these [REDACTED].⁴⁹ The Chamber recalls that the CAR is an active conflict area, with 80% of the country being outside of the government’s control at the time that the Prosecution conducted its investigations.⁵⁰ It must also

⁴⁴ Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the court and Counsel working with intermediaries’ (March 2014) on [icc-cpi.int](https://www.icc-cpi.int/sites/default/files/GRCI-Eng.pdf) (23 April 2024), <https://www.icc-cpi.int/sites/default/files/GRCI-Eng.pdf>.

⁴⁵ Intermediary Guidelines, p. 2.

⁴⁶ Intermediary Guidelines, p. 6.

⁴⁷ Annex I to the Intermediary Guidelines, p. 1, b.

⁴⁸ See Prosecution Response, ICC-01/14-01/18-2313-Red, para. 10.

⁴⁹ See Prosecution Response, ICC-01/14-01/18-2313-Conf, para. 14; CAR-OTP-2128-1203.

⁵⁰ See for instance, Pre-Trial Chamber II, Decision Pursuant to Regulation 101 of the Regulations of the Court, 1 March 2019, ICC-01/14-01/18-137, para. 18; Decision on the Yekatom Defence Application for

be noted that both accused maintained support networks in the CAR and continued to exert influence during the investigation phase.⁵¹

36. In light of the above, it cannot be said that the Prosecution ‘funnelled’ its investigations with regard to Count 29 through intermediaries, or went beyond the limits of the envisaged scope of intermediary work, as alleged by the Defence.⁵²
37. Moreover, the Prosecution briefed [REDACTED] about his obligations as an intermediary.⁵³ Finally, when [REDACTED] alleged improper conduct became known to it, the Prosecution [REDACTED]⁵⁴ and [REDACTED] against him.⁵⁵ In any event, the Chamber notes that the Prosecution does not intend to rely on [REDACTED], ‘[t]o the extent that the provenance of [REDACTED] later appeared questionable during the proceedings’.⁵⁶
38. In light of the above, the Chamber fails to see any violation in the Prosecution’s supervision of [REDACTED], nor does it consider that it ‘rewarded’ any alleged breaches by this individual of the Intermediary Code. On the contrary, the Chamber considers that the Prosecution has taken ‘appropriate measures’ to address potential breaches of the Intermediary Code.⁵⁷
39. The Chamber further notes that the Prosecution [REDACTED] ⁵⁸).⁵⁹ Even if it had supervised [REDACTED] more closely, or investigated and cautioned the

Interim Release, 28 April 2020, ICC-01/14-01/18-495-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Yekatom Defence (public redacted version notified on 24 July 2020), para. 25 with further references.

⁵¹ See for instance, Pre-Trial Chamber II, Warrant of Arrest for Alfred Yekatom, 11 November 2018, ICC-01/14-01/18-1-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Yekatom Defence (public redacted version notified on 17 November 2018), para. 22; Warrant of Arrest for Patrice-Edouard Ngaïssona, 7 December 2018, ICC-01/14-01/18-89-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Ngaïssona Defence (public redacted version notified on 13 December 2018), para. 22. See also Prosecution Response, ICC-01/14-01/18-2313-Red, para. 10.

⁵² See e.g. Request, ICC-01/14-01/18-2240-Red, para. 60.

⁵³ See Intermediary Briefing Speaking Notes, CAR-OTP-2128-1191; Declaration, CAR-OTP-2128-1195. Both documents are dated 25 September 2020 and signed by [REDACTED].

⁵⁴ See Investigation Report, CAR-OTP-00001992, dated 14 October 2023, [REDACTED].

⁵⁵ See email from the Prosecution, 17 November 2023, at 15:10, in which it indicated the following: [REDACTED]

⁵⁶ Prosecution Response, ICC-01/14-01/18-2313-Conf, para. 14.

⁵⁷ Intermediary Code, Section 8.

⁵⁸ Request, ICC-01/14-01/18-2240-Red, para. 52.

⁵⁹ See also Prosecution Response, ICC-01/14-01/18-2313-Conf, para. 11.

Alleged Conspirators, it would not necessarily have been able to [REDACTED], or ultimately on the collection of the Allegedly Fabricated Evidence. Consequently, a causal link to the obtaining of this evidence is, in any event, missing.

c. Article 54(1)(c)

40. The Chamber notes that the Defence's submissions regarding Article 54(1)(c) of the Statute consist simply of its allegations regarding subrule (a) and (b) of this provision, and Article 67(2) of the Statute.
41. Accordingly, the Chamber makes reference to its findings above⁶⁰ and below.⁶¹

ii. Article 67 of the Statute

42. In the Defence's submission, the 'investigative failures and collusive conduct of the [Alleged] Conspirators have resulted in violations of article 67(1)(e) and 67(2)'.⁶²

a. Article 67(1)(e)

43. The Defence submits that Article 67(1)(e) of the Statute has been violated because [REDACTED] interfered with the Defence's investigations by approaching potential witnesses 'with the aim of preventing [them] from meeting with and/or testifying on behalf of the Defence'. It argues that this 'has stymied Mr Yekatom's right to call witnesses on his behalf'.⁶³
44. Article 67(1)(e) of the Statute stipulates that the accused has the right to, *inter alia*, 'obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. [...]'.⁶³
45. The Chamber considers that the Defence has been able to call and examine witnesses in exactly the same conditions as the Prosecution. Notably, it was able to schedule, call and examine each witness on its witness list in relation to

⁶⁰ See section II.B.1.i.a. and b.

⁶¹ See section II.B.1.ii.b.

⁶² Request, ICC-01/14-01/18-2240-Red, paras 114-128.

⁶³ Request, ICC-01/14-01/18-2240-Red, paras 117-122.

Count 29. Moreover, it collected a significant amount of witness statements of individuals who – despite having been allegedly interfered with – have clearly not been deterred from providing information to the Defence. Even assuming that the Defence witnesses were interfered with, the Chamber is not persuaded by the argument that the accused’s rights under Article 67(1)(e) of the Statute have been infringed upon by virtue of these actions, particularly noting that this allegation concerns [REDACTED]⁶⁴ [REDACTED].⁶⁵

46. Accordingly, the Chamber does not consider that Article 67(1)(e) of the Statute has been violated. Further, even in the event that such a violation had occurred, the Chamber considers there to be no causal link to the collection of the Allegedly Fabricated Evidence.

b. Article 67(2)

47. The Defence argues that the Prosecution violated Article 67(2) of the Statute by virtue of (i) its ‘persistent failure to either effectively investigate exonerating circumstances’ and/or (ii) ‘mischaracteris[ing] exculpatory material as non-disclosable’.⁶⁶
48. The Chamber recalls the applicable law set out in relation to Article 67(2) of the Statute in its previous decisions.⁶⁷
49. With regard to allegation (i), the Chamber already found that the Prosecution did not fail to effectively investigate exonerating circumstances within the meaning of Article 54(1) of the Statute. Accordingly, it will not address this point further.
50. As regards allegation (ii), the Chamber notes that the Defence specifically makes reference to a substantive disclosure request sent to the Prosecution on 3 July

⁶⁴ See paragraph 39 above.

⁶⁵ [REDACTED] the Chamber notes the following jurisprudence in the context of Article 69(7) of the Statute from the *Lubanga* case: [REDACTED], see Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admission of material from the “bar table”, 24 June 2009, ICC-01/04-01/06-1981, para. [REDACTED].

⁶⁶ Request, ICC-01/14-01/18-2240-Red, para. 115.

⁶⁷ Decision on the Yekatom Defence Motion for Disclosure of Prior Statement of Witness P-0801, 15 June 2020, ICC-01/14-01/18-551-Conf (public redacted version notified the same day, ICC-01/14-01/18-551-Red), para. 25.

2023, towards the end of the Prosecution's presentation of evidence.⁶⁸ It also observes that the Prosecution in its response from 14 July 2023 provided further details and reasons for not disclosing certain requested information.⁶⁹ Having reviewed these two communications, it is evident that the Defence's allegation is a mere disagreement with the Prosecution's assessment of its disclosure obligations, which could have been raised with the Chamber at the time.

51. Beyond that, the Chamber generally notes that within the wealth of material collected during an investigation in a case of this scale, evidence may not seem relevant at first, but become relevant only at a later stage of the proceedings.⁷⁰ As has been stated above, the Chamber does not consider that the potentially exonerating themes raised by the Defence were 'blindingly obvious'.
52. In view of the above, the Chamber cannot discern a deliberate mischaracterisation of exculpatory material by the Prosecution throughout the proceedings.
53. In any event, the Defence fails to demonstrate a causal link between the alleged violations under Article 67(2) of the Statute and the collection of the Allegedly Fabricated Evidence.

C. Conclusion

54. In conclusion, the Chamber has not found any violation of the Statute or internationally recognised human rights. Having determined that the requirements of the first limb of Article 69(7) of the Statute are not fulfilled, the Chamber will not address the remaining requirements under this provision. Accordingly, the Request is rejected.
55. For the sake of clarity, the Chamber stresses that the present assessment on admissibility is distinct from the probative value that the Allegedly Fabricated

⁶⁸ Email from the Defence, 3 July 2023, at 18:05, *see* Annex B to the Request, ICC-01/14-01/18-2240-Conf-AnxB, pp. 20-36.

⁶⁹ Email from the Prosecution, 14 July 2023, at 16:21, *see* Annex B to the Request, ICC-01/14-01/18-2240-Conf-AnxB, pp. 20-36.

⁷⁰ In this context, the Chamber notes that the Request itself quotes an OTP investigator from the *Katanga and Ngudjolo* case who stated that exonerating themes 'evolve over time', *see* Request, ICC-01/14-01/18-2240-Red, para. 40.

Evidence will eventually be awarded in the judgment.⁷¹ This evidence will be subject to the same scrutiny during the Chamber's deliberation as every other piece of evidence at the end of the trial. In this regard, the Chamber assures the Defence that it has taken due notice of the submissions in the present Request and during its opening statements, which all touch upon the standard evidentiary criteria⁷² of this evidence, and will duly examine them. This decision is by no means an indication whether, and to what extent, the Chamber will ultimately rely on the Allegedly Fabricated Evidence in its judgment.

56. In the same vein, and in order to have the entirety of relevant information on intermediary [REDACTED] before it, the Chamber considers it prudent to submit the items documenting his role and interactions with the Prosecution⁷³ into evidence. Accordingly, it recognises items CAR-OTP-2128-1191, CAR-OTP-2128-1195 and CAR-OTP-00001992 as formally submitted.
57. Lastly, the Chamber emphasises that this decision should not be interpreted as endorsement of any conduct which may be characterised as criminal offences under Article 70 of the Statute. On the contrary, the Chamber fiercely condemns any such behaviour. It encourages the Prosecution to assess and, where relevant, investigate the allegations raised by the Defence.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

RECOGNISES items CAR-OTP-2128-1191, CAR-OTP-2128-1195 and CAR-OTP-00001992 as formally submitted.

⁷¹ *Al Hassan* 69(7) Decision, ICC-01/12-01/18-1475-Red, para. 29 with further references. *See also* International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, *The Prosecutor v. Milan Martić*, Decision adopting Guidelines on the Standards Governing the Admission of Evidence, Annex A, 19 January 2006, Case No. IT-95-11-T, para. 2; International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, *The Prosecutor v. Radoslav Brđjanin*, Decision on the Defence 'Objection to Intercept Evidence', 3 October 2003, Case No. IT-99-36-T, para. 68.

⁷² *See also* Prosecution Response, ICC-01/14-01/18-2313-Red, para. 75; CLR V1 Response, ICC-01/14-01/18-2314-Red, para. 15.

⁷³ *See* footnotes 53 and 54 above.

Done in both English and French, the English version being authoritative.



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 23 April 2024

At The Hague, The Netherlands