

ANNEX 22
Public Redacted
Version

From: Trial Chamber V Communications
Sent: 05 September 2023 11:34
To: OTP CAR IIB; D29 Yekatom Defence Team; D30 Ngaissona Defence Team; 'V44 LRV Team'; V44 LRV Team OPCV; V45 LRV Team
Cc: Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber V Communications
Subject: Decision on Yekatom Defence Request regarding Disclosure of Photographs from CLRV1

[ICC] RESTRICTED

Dear Counsel,

The Single Judge takes note of the request below.

In particular, he notes the Yekatom Defence's submissions that it is 'unable to accurately confirm the identity of either victim [the 'Witnesses'] in light of the various contradictory identifying information provided by the CLR1 in its disclosure thus far'.

While the Single Judge is mindful of the CLRV1's concerns regarding the security and well-being of the Witnesses, as well as the fact that the request for protective measures is still pending, he does not consider that the disclosure of the photographs to the defence teams is barred.

First, the Single Judge notes that the Yekatom Defence is already in possession of identifying information of the Witnesses, and finds the CLRV1's submissions on a heightened risk to the safety of the Witnesses from the Yekatom Defence to be speculative.

Second, the Single Judge observes that the provisions of the Protocol on the Handling of Confidential Information are sufficient to safeguard the interests of the participants in this instance. In particular, the Single Judge notes that the Yekatom Defence intends to show the photographs 'amongst a catalogue of several other photographs' and stresses that, in any event, the Yekatom Defence is not be allowed to 'reveal to third parties that the [Witnesses are] involved with the activities of the Court or the nature of such involvement' (see ICC-01/14-01/18-677-Anx5, paras 12-13). The Single Judge reiterates that the Yekatom Defence is, in any event, bound by the provisions of this protocol.

In light of the above and at this stage, the Single Judge does not consider observations by the VWU necessary on this matter.

Therefore, the Single Judge grants the request, and orders the CLRV1 to disclose the photographs as soon as possible, and no later than 6 September 2023, COB.

Kind regards,

TC V

From: Suprun, Dmytro <[REDACTED]>
Sent: 01 September 2023 10:09
To: Trial Chamber V Communications [REDACTED]
Cc: Associate Legal Officer-Court Officer [REDACTED]; D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team [REDACTED]; OTP CAR IIB [REDACTED]; V44 LRV Team OPCV [REDACTED]

[REDACTED] V45 LRV Team [REDACTED]; V44 LRV Team
[REDACTED]

Subject: RE: Request for an order of disclosure of photographs from CLR1

Dear Trial Chamber V,
Dear All,

The CLR1 herewith submits in two Attachments a Confidential Redacted Version of his Response to the Yekatom Defence Request for disclosure of a/65991/19 and a/20722/21 photos, together with a Confidential Redacted Version of Annex to his Response.

Kind regards,
Dmytro Suprun

From: [REDACTED]
Sent: 31 August 2023 11:41
To: Trial Chamber V Communications [REDACTED] >
Cc: Associate Legal Officer-Court Officer [REDACTED] >; D29 Yekatom Defence Team [REDACTED] D30 Ngaissona Defence Team [REDACTED] OTP CAR IIB [REDACTED] V44 LRV Team OPCV [REDACTED]; V45 LRV Team [REDACTED] V44 LRV Team [REDACTED]
Subject: Request for an order of disclosure of photographs from CLR1

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Dear Trial Chamber V,
Dear all,

Pursuant to articles 64(2), 64(6), 67(1)(b), 68(3) and 69(3) of the Rome Statute, and in accordance with ICC-01/14-01/18-631 (paras. 75-78), the Yekatom Defence respectfully requests an order for disclosure of photographs of a/65991/19 and a/20722/21 from the CLR1 (“Requested Photographs”).

This request is filed on an urgent basis via email as it directly concerns the facilitation of defence investigations ahead of the forthcoming testimony of a/65991/19 and a/20722/21.

As detailed in the attached correspondence, the Yekatom Defence had requested provision of the photographs of a/65991/19 and a/20722/21 from CLR1 in order to allow the Defence to accurately ascertain the identities of a/65991/19 and a/20722/21 in its investigations. Currently the Defence is unable to accurately confirm the identity of either victim in light of the various contradictory identifying information provided by the CLR1 in its disclosure thus far. This includes for example, diverging information with respect to the parent names and date of births which are a contentious issue in these proceedings.

Provision of the Requested Photographs will therefore ensure efficient and meaningful investigations so that the Defence will not needlessly follow investigative leads concerning persons not involved in these proceedings. Relatedly, accurate identifying information will undoubtedly protect a/65991/19 and a/20722/21 as the Defence will be able to conduct better targeted and focused investigations with full respect for their security. This fully accords with the Trial Chamber’s email decision of 9 August 2023 (10:35) in which the Trial Chamber recognised the need for prompt disclosure of the victims’ identities to the defence teams in order to “ensure that the defence teams will have sufficient time to prepare”. This decision necessarily requires disclosure of accurate identifying information.

Unfortunately, however, the CLR1 has declined to provide the Requested Photographs to the Defence on the basis that there is “no general obligation [on the legal representatives for victims] to disclose to the accused

all evidence in their possession, whether incriminating or exculpatory” (see email dated 25 August 2023 (11:25) as attached). The CLR1 does not aver that it is not in possession of the Requested Photographs.

In doing so, the CLR1 relies on the *Katanga* Appeals Judgment (ICC-01/04-01/07-2288 OA11) in support of its position that there is no general obligation for legal representatives of victims to disclose to the accused all evidence in their possession. However, this particular finding is inapposite in these circumstances. The findings of the Appeals Chamber in *Katanga* only concerned the lack of general disclosure obligation prior to the commencement of trial (ICC-01/04-01/07-2288 OA11, paras. 43-45). This was determined on the basis that “the Trial Chamber may not know in advance of the trial which evidence will be necessary for the determination of the truth and as far as evidence submitted by victims is concerned, whether the victims’ personal interests are affected” (ICC-01/04-01/07-2288, para. 44).

More pertinently, the Appeals Chamber determined that where the requirements of article 68(3) are met, the Trial Chamber must “order disclosure of the evidence to the accused sufficiently in advance of its presentation at the trial, and take any other measures necessary to ensure the accused's right to a fair trial, in particular the right to “have adequate time and facilities for the preparation of the defence”” (ICC-01/04-01/07-2288, paras 1 and 55). The Trial Chamber clearly has the power to order the production of evidence from legal representatives of victims (see e.g. ICC-01/14-01/18-1892 para. 28 and footnotes therein).

It is evident in these circumstances that the requirements of article 68(3) are met. The Trial Chamber has already granted leave to the CLR1 to present evidence during these proceedings in its determination of the truth and that the personal interests of a/659991/19 and a/20722/21 are affected (ICC-01/14-01/18-2016-Conf). Accordingly, the Trial Chamber possesses the power to order the production of the Requested Photographs from the CLR1 in order to ensure that the Defence has adequate time and facilities for its preparation of the defence.

Furthermore, the Defence recalls paragraph 13 of the Contact Protocol (ICC-01/14-01/18-156-AnxA) which identifies the use of photographs with third parties as a legitimate investigative tool where no satisfactory alternative investigative avenue is available. It is respectfully submitted that such conditions are met in this instance in that the Defence is unable to accurately identify a/659991/19 and a/20722/21 without disclosure of their photographs and in light of the diverging identifying information currently provided by CLR1.

The Defence intends to utilise the Requested Photographs on a limited basis in relation to activities essential to the work of the defence based at the Court headquarters.

In doing so, the Defence proposes a number of measures in order to safeguard the security of a/659991/19 and a/20722/21 and to alleviate the concerns raised by the CLR1. These measures include:

- Only one member of the defence team in the field is to have an electronic version of the Requested Photographs which will not be transferred to any other third party
- Requested Photographs shall not be printed in the field nor communicated in any other physical form
- Requested Photographs are to be shown to no more than approximately six individuals for the strict purpose of identifying a/659991/19 and a/20722/21
- Requested Photographs are to be shown amongst a catalogue of several other photographs

The Defence of course remains open to any other additional measures to protect the security of a/659991/19 and a/20722/21 as proposed by the CLR1, or the Trial Chamber.

The provision of the Requested Photographs within the conditions proposed would not defeat the in-court protective measures as requested by the CLR1. The Requested Photographs are merely necessary to provide accurate identifying information, and in this regard, the use of such visual aids is no different to any other identifying information provided by the CLR1.

Moreover, the Defence reiterates its adherence to the Contact Protocol in that the Requested Photographs will not be utilised to identify the status of a/659991/19 and a/20722/21 in these proceedings. The disclosure of

the Requested Photographs will not therefore increase the risk of a/659991/19 and a/20722/21 being located or targeted by former Anti-Balaka elements and nor is there any grounded justification for the CLR1's assertion that the "safety, security and well-being of victims a/659991/19 and a/20722/21 are already put at significant risk by the fact that their identities have been disclosed to the Defence despite CLR1's request to postpone such a disclosure until relevant protective measures were put in place" (see CLR1 email dated 28 August 2023 (16:03) as attached).

This position contradicts the Trial Chamber's decision of 9 August 2023 (10:35) and undermines prior practice in these proceedings. The Defence notes in this regard the provision of photographs by the Prosecution in relation to three protected witnesses (P-2476, P-2511 and P-2620) which did not result in any reported security incidents following disclosure of the photographs.

Finally, the Defence addresses the fact that the provision of the Requested Photographs does not impinge on the counsel-client privilege given that the victims are to be called in this case, with similar photographs being taken by the Registry, and have agreed to their disclosure of their identities to the Defence.

Accordingly, and noting the close of the Prosecution's evidence in chief on 29 August 2023, the Defence requests an order for disclosure of the Requested Photographs of a/659991/19 and a/20722/21 on an urgent basis to allow adequate time for defence investigations to be conducted ahead of the forthcoming presentation of evidence by CLR1 starting on 18 September.

Kind regards



Associate Counsel
Yekatom Defence

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