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**International
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Date: **26 January 2022**

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 “Motion for Finding of Disclosure Violation”,
13 January 2022, ICC-01/14-01/18-1246-Conf**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Mr. Karim Asad Ahmad Khan
Mr. James Stewart
Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Me Mylène Dimitri
Mr. Thomas Hannis
Me Anta Guissé
Ms. Sabine Bayssat

Counsel for Mr. Ngaïssona

Mr. Geert-Jan Alexander Knoops
Me Richard Omissé-Namkeamaï
Me 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)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**
Me Xavier-Jean Keïta

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**

INTRODUCTION

1. Counsel representing Mr Alfred Rombhot Yekatom (“Defence” and “Mr Yekatom”, respectively) respectfully move for a finding that the Prosecution has violated its obligation to timely disclose material relevant to the Defence. It is referring to the screening note of witness P-1436 bearing the ERN CAR-OTP-2047-0243-R01 disclosed to the Defence on 3 December 2021 (“Screening Note”).¹

PROCEDURAL HISTORY

2. On 11 November 2018, Pre-Trial Chamber II (“Pre-Trial Chamber”) issued an arrest warrant against Mr. Alfred Yekatom.
3. On 23 January 2019, the Single Judge of the Pre-Trial Chamber ordered the Prosecutor to disclose exculpatory evidence “*immediately* after having identified any such evidence, unless some justifiable reasons prevent her from doing so”, and in advance of the confirmation hearing.²
4. On 2 August 2019, the Defence sent a redaction lift request regarding the statement of witness P-1437 inviting the Prosecution to lift pseudonym B.2 – 0490. In the request the Defence specified that the individual, who seemed to be [REDACTED] was present in the Boeing area on the 5th of December 2013 and at the Ali Babolo Mosque and therefore could provide information about the alleged attack in Boeing.³
5. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”).⁴

¹ [ICC-01/14-01/18-1200-Conf-Anx](#), Trial Rule 77 Package 66.

² [ICC-01/14-01/18-64-Conf](#); Public redacted version: [ICC-01/14-01/18-64-Red](#).

³ Letter Ref. ARY-2019-0044 sent by the Defence to the Prosecution on 2 August 2019, available upon request.

⁴ [ICC-01/14-01/18-282-Conf-AnxB1](#); Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

6. On 20 August 2019, the Defence filed a motion requesting the Chamber to order the Prosecution to immediately disclose all exculpatory material.⁵ The Prosecution responded indicating that the request was unnecessary as it had performed its disclosure obligation in good faith.⁶
7. On 28 August 2019, the Pre-Trial Chamber issued its Decision on the Defence Motion and directed the Prosecution to verify if it had “any additional evidence that falls within the scope of article 67(2) of the Statute”.⁷
8. On 11 December 2019, Pre-Trial Chamber II issued the Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (‘Confirmation Decision’) finding *inter alia* that:

Between five and thirteen Muslim shop owners were shot and then stabbed by Anti-Balaka elements, including Hassan Mahamat.

And that: [...]

The evidence also reveals that, following the 5 December 2013 Attack, nearly all the Muslim residents of Boeing and Cattin fled to PK5, a predominantly Muslim neighbourhood in Bangui, other parts of the CAR or neighbouring countries. (...) ⁸

9. Pre-Trial Chamber II based its findings *inter alia* on P-1437's statement, specifically quoting her words to support the finding concerning the number of deaths during the alleged attack of the Boeing Market including the death of Hassan MAHAMAT.⁹

⁵ [ICC-01/14-01/18-284](#).

⁶ [ICC-01/14-01/18-286](#), para. 3.

⁷ [ICC-01/14-01/18-296](#), para. 14.

⁸ [ICC-01/14-01/18-403-Conf-Corr](#), paras 87 and 92; Public redacted version: [ICC-01/14-01/18-403-Red-Corr](#).

⁹ [ICC-01/14-01/18-403-Conf-Corr](#), fn 214: “P-1437: [CAR-OTP-2047-0257-R01](#), at 0263, para. 46 (‘Le 05 decembre 2013 jour de l’attaque je pense qu’il y a eu treize(13) personnes tuées à Boeing’)” and fn.215.

10. On 13 December 2019, the Defence requested inspection of items material to the preparation of its defence. The Defence particularly requested the disclosure of any material related to Hassan MAHAMAT.¹⁰
11. On 21 January 2020, the Prosecution responded to the redaction lift request of 2 August 2019¹¹ and agreed to lift the pseudonym B.2 – 0490 in P-1437's statement. The name of [REDACTED] was disclosed to the Defence in CAR-OTP-2047-0257-R02.¹²
12. On 12 March 2020, the Prosecution responded to the Defence's request dated 13 December 2019 indicating that "materials responsive to this description have been disclosed. Any further materials identified will be disclosed prior to trial".¹³
13. On 16 March 2020, the Defence reiterated its request for inspection of items material to the preparation of its defence.¹⁴
14. On 16 July 2020, Trial Chamber V set the disclosure deadline in the case to 9 November 2020 stating that "[b]y this date, the Prosecution must review all the materials in its possession and disclose all materials falling under its disclosure obligations".¹⁵
15. On 22 July 2020, following the Defence's request to find that the Prosecution had violated its obligation under Article 67(2),¹⁶ the Chamber found a disclosure violation by the Prosecution; the Chamber underlined that it was nevertheless confident that the Prosecution would abide by its obligations.¹⁷

¹⁰ Letter Ref. ARY-2020-0093 sent by the Defence to the Prosecution on 13 December 2019, available upon request.

¹¹ See above para. 4.

¹² [ICC-01/14-01/18-594-Conf-Anx.](#)

¹³ Attachment to the email sent by the Prosecution to the Defence on 12 March 2020 at 14:12, available upon request.

¹⁴ Letter Ref. ARY-2020-0114, sent by the Defence to the Prosecution on 16 March 2020 at 11:38.

¹⁵ [ICC-01/14-01/18-589](#), para. 10.

¹⁶ [ICC-01/14-01/18-566-Conf](#); Public redacted version: [ICC-01/14-01/18-566-Red](#).

¹⁷ [ICC-01/14-01/18-595](#), para. 22.

16. On 12 October 2020, the Defence filed a motion for a disclosure violation¹⁸ following the failure of the Prosecution to disclose a statement containing exculpatory evidence in relation to Count 29.¹⁹ On 25 November 2020, the Chamber found that the Prosecution had violated its disclosure obligations pursuant to article 67(2) of the Statute.²⁰
17. On 4 December 2020, the Defence filed a motion for a disclosure violation that the Prosecution violated its obligation to disclose exculpatory material contained in Witness P-1504's statement relating to Counts 1, 2, 3 and 6.²¹ On 18 January 2021, the Chamber found that the Prosecution violated its statutory obligation as well as the Trial Chamber's and the Pre-Trial Chamber's orders.²²
18. On 8 October 2021, the Defence requested the Prosecution to disclose information in relation to the evacuation of people from Bangui to the Chad²³ to which the Prosecution responded that, aside from one audio-video item, it found no further exhibits that would contain additional material information.²⁴
19. On 7 December 2021, following another Motion for finding a disclosure violation filed by the Defence,²⁵ the Chamber found that the Prosecution violated its disclosure obligations pursuant to Rule 77. The Chamber ordered the Prosecution to review the evidence in its possession and file a report confirming that all documents falling within its disclosure obligation have been disclosed or, should it not be the case, to disclose the remaining

¹⁸ [ICC-01/14-01/18-681-Conf](#); Public redacted version: [ICC-01/14-01/18-681-Red](#).

¹⁹ [CAR-OTP-2105-0970-R01](#).

²⁰ [ICC-01/14-01/18-740-Conf](#).

²¹ [ICC-01/14-01/18-753-Conf](#); Public redacted version: [ICC-01/14-01/18-753-Red](#).

²² [ICC-01/14-01/18-829](#), para. 15.

²³ Letter Ref. ARY-2021-0189 sent by the Defence to the Prosecution on 8 October 2021.

²⁴ Email sent by the Prosecution to the Defence on 15 October 2021 at 18:02.

²⁵ [ICC-01/14-01/18-1142-Conf](#); Public redacted version : [ICC-01/14-01/18-1142-Red](#).

items immediately.²⁶ The Chamber further expressed its concern regarding the numerous breaches by the Prosecution of its disclosure obligation and its expectation that the Prosecution will tackle its statutory obligation with more diligence in the future.²⁷

SUBMISSION

20. The Defence will demonstrate that the Screening note, in the possession of the Prosecution since 30 January 2017, is potentially exculpatory pursuant to article 67 (2) or, at the very least, is material to the Defence pursuant to Rule 77 and that the ensuing disclosure violation is prejudicial to Mr Yekatom's rights.²⁸

A. Prosecution disclosure obligations

21. It is well established that the duty of the Prosecution to disclose exculpatory material is necessary to guarantee the right of the accused to a fair trial.²⁹
22. The obligation to disclose exculpatory material in particular has consistently benefited from a broad interpretation³⁰ and is independent of the existence of other evidence that may undermine it or of the fact "that there are other sources providing similar evidence."³¹

²⁶ [ICC-01/14-01/18-1202-Conf](#), para. 22, Public redacted version : [ICC-01/14-01/18-1202-Red](#).

²⁷ [ICC-01/14-01/18-1202-Conf](#), para. 23.

²⁸ *Prosecutor v. Karemera et al*, [Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion](#), 14 May 2008, No. ICTR-98-44-AR73.13, para. 9.

²⁹ *Prosecutor v. Abdallah Banda*, [Decision on Article 54\(3\)\(e\) Documents](#), 23 November 2011, ICC-02/05-03/09-25, para. 14; [ICC-01/14-01/18-296](#), para. 12; [ICC-01/14-01/18-551-Conf](#), para. 29; Public redacted version: [ICC-01/14-01/18-551-Red](#).

³⁰ [ICC-01/14-01/18-551-Conf](#), para. 29; Public redacted version: [ICC-01/14-01/18-551-Red](#); *Prosecutor v. Lukic & Lukic*, [Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution](#), 12 May 2011, No. IT-98-32/1-A, para. 13; *Prosecutor v. Krstic*, [Judgement](#), 19 April 2004, No. IT-98-33-A, para. 180.

³¹ [ICC-01/14-01/18-595](#), para. 21; *Prosecutor v. Thomas Lubanga Dyilo*, [Decision issuing a confidential and a public redacted version of "Decision on disclosure issues, responsibility for protective measures and other procedural matters"](#), 24 April 2008, ICC-01/04-01/06-1311, para. 94; *Ndindabahizi v. Prosecutor*, [Judgement](#), 16 January 2007, No. ICTR-01-71-A, para. 72; *Prosecutor v. Kordic & Cerkez*, [Judgement](#), 17 December 2004, No. IT-65-14/2-A, paras. 183, 242.

23. In this regard, the Chamber recently reminded the Prosecution of its obligation recalling *inter alia* that “the fact that a document contains incriminatory information is not a reason to disregard any potentially exculpatory factor(s) contained therein, including those that may affect the credibility of prosecution evidence”.³²
24. The counterpart of this obligation is that its violation by the Prosecution may affect the fairness of the proceedings.³³
25. In addition, the Chamber has previously ruled that “screening notes may be disclosable under other³⁴ statutory provisions”, specifically recalling the Prosecution’s continuing obligation to disclose Article 67(2) and Rule 77 material.³⁵

B. Retention of the Screening Note by the Prosecution

26. The investigators of the Office of the Prosecutor met with P-1436 [REDACTED] on 30 January 2017.³⁶ It is therefore undisputable that the Prosecution had the requested material in its possession since and well in advance of the disclosure deadline and the beginning of the Trial.
27. The Defence notes that according to the information mentioned in the Screening note of P-1436 [REDACTED] and the Statement of P-1437 [REDACTED], the investigators met with both witnesses on the same day [REDACTED] as P-1436 [REDACTED] has been interviewed there and as P-1437 [REDACTED].

³² [ICC-01/14-01/18-1202-Conf](#), para. 13; Public redacted version : [ICC-01/14-01/18-1202-Red](#).

³³ See *Prosecutor v. Oric*, [Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules](#), 13 December 2005, No. IT-03-68-T, para. 20; *Prosecutor v. Krstic*, [Judgement](#), 19 April 2004, No. IT-98-33-A, para. 178.

³⁴ i.e. other than Rule 76(1) of the Rules.

³⁵ [ICC-01/14-01/18-618](#), paras 12-13.

³⁶ [CAR-OTP-2047-0243-R01](#).

28. While P-1437's [REDACTED] statement was disclosed to the Defence on 13 June 2019,³⁷ the screening note of P-1436 [REDACTED] was not part of the same disclosure package and remained undisclosed until two and a half years later.
29. The various requests sent by the Defence to the Prosecution should have led to the disclosure of P-1436's [REDACTED] screening note especially since the Defence requested the Prosecution to disclose any material in relation to the person named Hassan MAHAMAT³⁸ whose name appears twice in the Screening note.
30. The Defence also notes that when responding to motions for finding a disclosure violation, the Prosecution asserts undertaking a thorough review of its evidence collection and commits itself to go through an exhaustive review of its material. In addition to the various disclosure requests sent by the Defence, the Prosecution had therefore eight times the opportunity to disclose the relevant Screening note but failed to do so.³⁹

C. Exculpatory and/or material nature of document CAR-OTP-2047-0243

31. Not only is the screening note of P-1436 [REDACTED] dedicated to the alleged Boeing Market attack of the 5th December 2013 which is on its own material to the preparation of the Defence but it also provides exculpatory information and affects the credibility of Prosecution witnesses. In any event, disclosure of the screening note under Rule 77⁴⁰ is on its own, a

³⁷ [ICC-01/14-01/18-221-Conf-Anx](#), page 4, row 56.

³⁸ See above para. 10.

³⁹ [ICC-01/14-01/18-315-Conf](#), para. 78, Public redacted version : [ICC-01/14-01/18-315-Red](#); [ICC-01/14-01/18-342](#), paras. 18, 21; [ICC-01/14-01/18-551-Conf](#), para. 31, Public redacted version: [ICC-01/14-01/18-551-Red](#); [ICC-01/14-01/18-595](#), para. 21; [ICC-01/14-01/18-740-Conf](#), paras. 14-15; Email from the Trial Chamber V to the Parties and Participants on 26 October 2020 at 16:39. See also, [ICC-01/14-01/18-783-Anx5](#); [ICC-01/14-01/18-829](#); [ICC-01/14-01/18-1202](#).

⁴⁰ [ICC-01/14-01/18-1200-Conf-Anx](#), Trial Rule 77 Package 66.

concession by the Prosecution that it was at the very least material to the Defence.

a. P-1436's screening note is exculpatory

i. *Exculpatory information regarding the alleged Boeing market attack*

32. P-1436 claims that [REDACTED] told her brothers on 5 December 2013 that the Boy Rabe people were coming to take revenge on the Muslims living in Boeing.

33. This assertion is exculpatory, as it tends to mitigate the guilt of the Mr Yekatom, or may affect the credibility of prosecution evidence regarding the alleged attack on Boeing by Mr Yekatom's group on 5 December, the displacement of Muslims and thus affects Counts 1, 2, 3, 4, 5 and 8.

34. This allegation corroborates other Prosecution witnesses who also provide information about groups, other than Mr Yekatom's elements, attacking the Boeing area. For instance P-1442, Prosecution witness who is expected to testify about the alleged attack on the Boeing market,⁴¹ states that on 5 December the Anti-Balaka gathered in Boy Rabe from where they infiltrated different areas of Bangui, including Boeing.⁴²

ii. *P-1436's Screening note affects the credibility of other Prosecution witnesses*

35. Given that P-1436 [REDACTED], her screening note is material to the credibility of witness P-1437 [REDACTED], and witness P-2682 [REDACTED].

⁴¹ [ICC-01/14-01/18-724-Conf-AnxA](#), page 28, number 38.

⁴² [CAR-OTP-2077-0520-R02](#), para.35.

1. Deceased persons in Boeing on 5 December 2013

36. P-1436 [REDACTED] describes her family members coming out from the house [REDACTED] and discovering the bodies of [REDACTED], [REDACTED] and [REDACTED]. Neither P-1437 [REDACTED] nor P-2682 [REDACTED] mention those names nor do they mention [REDACTED] being killed during the alleged attack.
37. P-1437 [REDACTED] is also expected to testify that [REDACTED] was killed in the early morning of the 5th of December and gave specific information about the circumstances of [REDACTED]'s murder, including the name of the alleged perpetrator, and how she saw her dead body at the Ali Babolo Mosque later on the same day.⁴³ It is on that basis that the Prosecution's DCC contained an allegation that YEKATOM's elements killed at least six Muslim civilians including Hassan MAHAMAT and his family members.⁴⁴ While P-1436 [REDACTED] does not mention that P-1437's [REDACTED] [REDACTED] was killed, she claims that her [REDACTED] disappeared and was never found.⁴⁵ This allegation contradicts P-1437 [REDACTED] who said that [REDACTED] was paralysed after seeing the body of [REDACTED] at Ali Babolo Mosque.⁴⁶ This is also contradicted by P-2682 [REDACTED] who declared in her statement that the parents of [REDACTED] passed away a long time before she met him and testified before the Chamber that she does not know a person named [REDACTED].⁴⁷
38. In addition, whereas P-1436 [REDACTED] claims that her husband, [REDACTED] disappeared and was never found,⁴⁸ P-1437 [REDACTED] specifies that "the husband [REDACTED], was helping with burying the

⁴³ [CAR-OTP-2047-0257-R03](#), paras 52-64.

⁴⁴ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 250; Public redacted version : [ICC-01/14-01/18-282-AnxB1-Red](#).

⁴⁵ [CAR-OTP-2047-0243-R01](#) at 0245.

⁴⁶ [CAR-OTP-2047-0257-R03](#) at para. 82.

⁴⁷ [CAR-OTP-2126-0205-R02](#), para.67; [REDACTED].

⁴⁸ [CAR-OTP-2047-0243-R01](#) at 0245.

corpse after the 5th December” and explains that he is still living in Bangui where he works as a tailor.⁴⁹

39. P-1437 [REDACTED] also precisely describes the death of [REDACTED], [REDACTED], claiming that he was killed at the Boeing Market and that she saw his body on the same day of the attack.⁵⁰ However, while P-1436 [REDACTED] lists the names of her relatives who died, she does not cite her brother, [REDACTED], among the four men of her family killed on the 5th December.
40. Furthermore, while P-1436 [REDACTED] explains that after the attack her family members, including [REDACTED], came out from the house and saw the bodies of their relatives including [REDACTED],⁵¹ P-2682 [REDACTED] testified that [REDACTED] found the dead body of [REDACTED] at the Ali Babolo Mosque.⁵²

2. Wife of [REDACTED]

41. P-2682 [REDACTED], [REDACTED] who already came to testify before the Chamber, declared in her statement that [REDACTED] is the wife of a person named [REDACTED]. As she specified to the OTP investigators during her interview, P-2682 also confirmed during her examination by the Prosecution that her name is [REDACTED] and that she used to be named [REDACTED].⁵³
42. P-2682 [REDACTED] also says that her husband, [REDACTED]⁵⁴ and that he is also the only one nicknamed named [REDACTED].⁵⁵

⁴⁹ [CAR-OTP-2047-0257-R03](#), para. 108.

⁵⁰ [CAR-OTP-2047-0257-R03](#), paras 65-68.

⁵¹ [CAR-OTP-2047-0243-R01](#) at 0245.

⁵² [ICC-01/14-01/18-T-017-CONF-ENG](#), page 28, lns 1-3.

⁵³ [CAR-OTP-2126-0205-R02](#) at 0205 ; [ICC-01/14-01/18-T-017-CONF-FRA](#), lns.6-8.

⁵⁴ [CAR-OTP-2126-0205-R02](#), para. 23.

⁵⁵ [ICC-01/14-01/18-T-018-CONF-FRA](#), page 19, ln 5-10.

43. P-1437 [REDACTED] declares that her brother, [REDACTED] was [REDACTED].⁵⁶

44. However, in her screening note recently disclosed P-1436 [REDACTED] clearly describes [REDACTED] as the wife of [REDACTED]. This evidence corroborates P-1437's [REDACTED] statement which also explains that [REDACTED] the wife of [REDACTED], is Christian but converted to Islam and that her Muslim name is [REDACTED].⁵⁷

3. Other inconsistencies

45. The Defence also notes that while P-1436 [REDACTED] stated to the investigators that "she instinctively took the direction of Ali Babolo mosque, therefore she was not in BOEING when the combat took place",⁵⁸ P-1437 [REDACTED] recalls that [REDACTED] stayed in the house during the attack with [REDACTED] and [REDACTED].⁵⁹

46. Finally, during her screening, P-1436 [REDACTED] specifies that the Seleka and the Red Cross arrived in the Boeing area around 3 p.m. while P-1437 recalls that they both arrived in the neighborhood at 7a.m.

b. P-1636's screening note is material to the preparation of the Defence

47. The Defence submits that the Prosecution conceded that information in relation to Hassan Mahamat is material to the preparation of the Defence through its response to the disclosure request concerning this individual as described above.⁶⁰

⁵⁶ [CAR-OTP-2047-0257-R03](#), para. 71.

⁵⁷ [CAR-OTP-2047-0257-R03](#), para. 63.

⁵⁸ [CAR-OTP-2047-0243-R01](#) at 0245.

⁵⁹ [CAR-OTP-2047-0257-R03](#), para. 52.

⁶⁰ See para. 13 above.

48. P-1436's Screening note relates mainly to the Boeing market attack, one of the very specific incident for which Mr Yekatom is charged with.
49. P-1436 [REDACTED] was [REDACTED] next to the Boeing market during the night between 4 and 5 December 2013. She depicts the day of 5 December 2013 through her own experience and with the information that she collected from her relatives.
50. P-1436 [REDACTED] is [REDACTED] of P-1437 [REDACTED], another witness on the List of Witnesses (LoW) that the Prosecution intends to call at Trial,⁶¹ and of [REDACTED], allegedly killed at the Boeing market during the attack of 5 December 2013 by Mr. Yekatom's group.
51. On a total of three pages that compose her Screening note, P-1436 mentions twice the name of Hassan Mahamat, including information on how his body was found on the 5 December 2013.
52. P-1436 also specifies the names of the persons allegedly killed during the Boeing market attack, as well as the names of her relatives present (alive) during the attack.
53. The information provided by P-1436 is clearly material to the preparation of the Defence regarding Counts 2 and 3.

D. Prejudice

54. The Defence acknowledged the Chamber's conclusion that it will not decide on whether a disclosure violation caused any prejudice to the accused during the pre-trial phase.⁶² However, given that this violation occurred after the Chamber reminded several times the Prosecution of its disclosure obligation and given that the prejudice suffered by the Defence occurred

⁶¹ [ICC-01/14-01/18-724-Conf-AnxB](#), page 4, number 60.

⁶² [ICC-01/14-01/18-1202](#), para.16; Public redacted version : [ICC-01/14-01/18-1202-Red.](#)

during the Trial phase, the Defence respectfully submits that the prejudice and violation underlined in this motion can be fully assessed by the Trial Chamber. In addition, the Prosecution relies on P-1437's [REDACTED] statement in its Trial Brief and is calling her to testify before the Chamber, the Defence deems it therefore important to raise a concise remark.

55. The Defence submits that the retention of the information contained in the Screening note did not allow the Defence to challenge through P-2682 the evidence contained in P-1437's statement with the inconsistencies arising from P-1436's evidence concerning the killing of civilians at the Boeing Market on 5 December 2013 while the Prosecution relied on it in the DCC as did the Pre-Trial Chamber in the Confirmation Decision.⁶³
56. The Defence also contends that information provided by P-1436 is particularly relevant to P-1437's evidence since [REDACTED] and [REDACTED] therefore should have provided similar information, at the very least concerning [REDACTED].
57. Inconsistencies between P-1436 and P-1437 are further relevant as regards witness P-1442's evidence that the Prosecution intends to introduce under Rule 68(2) concerning the alleged attack of 5 December 2013 as he provides information that he directly received from an individual named [REDACTED].⁶⁴ Since P-1436 contradicts P-1437, P-1436 also impacts P-1442's statement.
58. The contradictions listed between P-2682 and P-1437, corroborated by P-1436,⁶⁵ underline some confusion about [REDACTED] Hassan *Délégué*, one of the rare alleged victims clearly identified by the Prosecution in its DCC

⁶³ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 250; See above para. 9 for the Confirmation Decision.

⁶⁴ [CAR-OTP-2077-0520-R02](#), paras 37-41.

⁶⁵ See above paras 32 to 46.

and Trial Brief and by the Pre-Trial Chamber in the Confirmation Decision. The Defence had already alerted of the uncertainty regarding [REDACTED] of Hassan Mahamat and the circumstances of his death when it opposed the 68 (2) b) application of P-1442.⁶⁶

59. The Defence emphasizes also that this violation occurred while P-2682 already came to testify before the Chamber on 15 and 16 March 2021 and that the Defence did not have the opportunity to examine the witness with the entirety of the information with regards the alleged Boeing market attack. Had the Prosecution timely disclosed the screening note of P-1436, the Defence could have questioned P-2682 to obtain additional clarification about [REDACTED] of Hassan *Délégué*.
60. In addition, the prejudice suffered also affects time and facilities spent on Defence investigation budget as the Defence used considerable time and resources investigating not only the Boeing market allegation but mainly [REDACTED] Hassan *Délégué* [REDACTED].
61. As regards the information provided in the screening note concerning the arrival of a group from Boy Rabe to attack the Boeing area on the 5 December, this violation leaves the Defence with doubts concerning the Prosecution's compliance with its obligation to investigate incriminating and exonerating circumstances equally pursuant to Article 54 of the Statute.

E. Remedy

62. The Defence takes note of the recent *Decision on the Yekatom Defence Motion for Finding of Disclosure Violation and Additional Remedies* in which the Chamber directed the Prosecution to 'review the evidence in its possession and confirm on the record that all documents falling within its disclosure

⁶⁶ [ICC-01/14-01/18-845-Conf-Corr](#), para. 38 ; Public redacted version : [ICC-01/14-01/18-845-Corr-Red](#).

obligations have indeed been disclosed'⁶⁷ and trusts that the Prosecution thoroughly complied with the Chamber's order.

63. The Defence however remains concerned that once again the Prosecution failed to identify exculpatory information among its evidence collection, especially since the Prosecution disclosed the Screening note in a Rule 77 package without providing any explanation concerning its disclosure violation.
64. The Defence therefore respectfully requests the Chamber to find that the Prosecution has once again violated its disclosure obligation by failing to timely disclose the Screening note of P-1436.
65. Further, as demonstrated above, the Defence has been deprived of the opportunity to cross examine P-2682 with full knowledge of the evidence in relation to the alleged Boeing market attack and therefore considers the possibility to recall P-2682 when all the Prosecution's witnesses called to testify about the alleged Boeing market attack will have appeared before the Chamber.
66. As an additional remedy the Defence respectfully requests that the Prosecution's application to introduce the prior recorded testimony of witness P-1442 under Rule 68(2)(b) be denied.⁶⁸ The Defence already raised the lack of clarity regarding [REDACTED] Hassan *Délagué* and the circumstances surrounding his death when responding to the Prosecution request for the formal submissions of Rule 68(2) applications.⁶⁹

⁶⁷ [ICC-01/14-01/18-1202-Conf](#), para. 22 ; Public redacted version : [ICC-01/14-01/18-1202-Red](#).

⁶⁸ [ICC-01/14-01/18-802-Conf-Corr](#); Public redacted version: [ICC-01/14-01/18-802-Corr-Red](#).

⁶⁹ [ICC-01/14-01/18-845-Conf-Corr](#), para. 38; Public redacted version : [ICC-01/14-01/18-845-Corr-Red](#).

CONFIDENTIALITY

67. This motion is being filed on a confidential basis as it refers to confidential information contained in material disclosed by the Prosecution. A public redacted version will be filed in due course.

RELIEF SOUGHT

For all of the above reasons, the Defence respectfully requests Trial Chamber V to:

FIND that the Prosecution has violated its disclosure obligations;

DENY the introduction of the prior recorded testimony of P-1442 under Rule 68(2)(b).

RESPECTFULLY SUBMITTED ON THIS 26th DAY OF JANUARY 2022



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands