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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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

**Corrected public redacted version of the
Decision on the Yekatom Defence Motion for Finding of Disclosure Violation**

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 Article 67(2) of the Rome Statute (the ‘Statute’) and Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Motion for Finding of Disclosure Violation’.

I. Procedural history

1. On 21 March 2022, the Yekatom Defence (the ‘Defence’) filed a motion (the ‘Motion’) requesting that the Chamber (i) find that the Office of the Prosecutor (the ‘Prosecution’) violated its obligation to timely disclose the complete victim application form of P-2620 (the ‘Complete Form’), which contains information that is ‘exculpatory pursuant to article 67(2)’ or, in the alternative, ‘material to the Defence pursuant to Rule 77’; and (ii) deny the Prosecution’s request to introduce the prior recorded testimony of witnesses P-2671 and P-0365 under Rule 68(2)(b) of the Rules (the ‘Rule 68(2)(b) Requests’).¹
2. On 1 April 2022, the Prosecution filed its response to the Motion, in which it acknowledged the disclosure failure and deferred to the Chamber’s discretion.²

II. Analysis

3. At the outset, the Chamber notes that the Prosecution acknowledged the disclosure violation, although it made no submissions as to whether the relevant information contained in the Complete Form falls under Article 67(2) of the Statute or Rule 77 of the Rules, deferring to the Chamber in this regard.³

¹ Motion for Finding of Disclosure Violation, ICC-01/14-01/18-1318-Conf-Corr (with confidential Annex A, ICC-01/14-01/18-1318-Conf-AnxA) (public redacted version notified on 24 March 2022, ICC-01/14-01/18-1318-Red; corrected version and explanatory note notified on 23 August 2022), paras 1, 30, 35, 45-46, 58, p. 14.

² Prosecution’s Response to Yekatom Defence’s Motion for Finding of Disclosure Violation (ICC-01/14-01/18-1318-Conf), ICC-01/14-01/18-1344 (the ‘Response’), paras 1-2, 10.

³ Response, ICC-01/14-01/18-1344, paras 2-7.

4. The Chamber notes that, on 14 December 2020, the Prosecution disclosed a redacted version of P-2620's victim application form to the Defence,⁴ which had been completed on [REDACTED] 2019 (the 'Initial Form').⁵ It further observes that the Prosecution received the Complete Form from the Registry on 15 January 2021,⁶ which includes the content of the Initial Form as well as (i) an unredacted version of the proof of identity information appended to the Initial Form (the 'Proof of Identity'),⁷ and (ii) three pages with supplementary information provided by P-2620 on [REDACTED] 2019 (the 'Supplementary Pages').⁸ The Complete Form, with some redactions to the Supplementary Pages, was then formally disclosed to the Defence on 25 March 2022.⁹
5. The Chamber notes the Defence's submissions concerning the alleged inconsistencies between the information contained in the Proof of Identity and Supplementary Pages, on the one hand, and P-2620's statement of November 2019, on the other hand.¹⁰ In particular, the Defence indicates, *inter alia*, that these inconsistencies concern (i) P-2620's name, date and place of birth, ethnicity, and the identity of both her parents;¹¹ (ii) the identity of the ComZone who allegedly taught P-2620 how to use weapons during her time in the Anti-Balaka and the location of the training, and the fact that P-2620 had allegedly

⁴ Prosecution's Communication of the Disclosure of Evidence on 14 December 2020, ICC-01/14-01/18-772 (with one confidential annex, ICC-01/14-01/18-772-Conf-Anx), para. 3. *See, in particular*, the annex, listing the items disclosed as part of 'Pre-Trial INCRIM Package 73', including CAR-OTP-2123-0072 at p. 3, entry 24.

⁵ CAR-OTP-2123-0072.

⁶ *See* Response, ICC-01/14-01/18-1344, paras 3-5; Motion, ICC-01/14-01/18-1318-Red, paras 19, 28.

⁷ CAR-OTP-2135-2230. The Defence subsequently informed that this ERN is incorrect. It clarified that the correct ERN appears to be CAR-OTP-2135-2241, which was initially disclosed to the Yekatom Defence as a courtesy copy and that the Chamber may therefore not have access to it. The Defence further clarified however that the document in question can also be found at CAR-OTP-2135-2412, at 2416, which was formally disclosed on 25 March 2022 and provided the Chamber with a copy of CAR-OTP-2135-2241 (email from the Defence to the Chamber, 19 August 2022, at 14:11).

⁸ CAR-OTP-2135-2412. *See also* Motion, ICC-01/14-01/18-1318-Conf-Corr, para. 2.

⁹ Prosecution's Communication of the Disclosure of Evidence on 25 March 2022, ICC-01/01-01/18-1338 (with one confidential annex, ICC-01/14-01/18-1338-Conf-Anx), para. 3. *See, in particular*, the annex, listing the items disclosed as part of 'Trial INCRIM Package 123', including CAR-OTP-2135-2412 at p. 2, entry 12. On 25 February and 4 March 2022, respectively, the Prosecution provided the Defence with a courtesy copy of the un-redacted version of the Proof of Identity, and 'a lesser redacted version of P-2620's victim application, which contained the Proof of ID Information and the Supplementary Pages'. *See* Motion, ICC-01/14-01/18-1318-Red, paras 27-28; Response ICC-01/14-01/18-1344, para. 5.

¹⁰ CAR-OTP-2123-0057. The Chamber also notes that P-2620 provided a supplemental statement during an interview with the Prosecution in 2020. *See* CAR-OTP-2121-2567.

¹¹ Motion, ICC-01/14-01/18-1318-Conf-Corr, paras 36-37, 41-43.

been [REDACTED];¹² (iii) the circumstances surrounding P-2620's allegations of rape;¹³ and (iv) the circumstances in which P-2620 left the Anti-Balaka.¹⁴

6. In addition, the Defence argues that there are 'further material discrepancies' as to the information regarding P-2620's date and place of birth¹⁵ and that, in her statement, she denied having been aware that her victim application form had been filled out for her, which in itself 'affects the credibility of her anticipated evidence'.¹⁶
7. Having reviewed the relevant information,¹⁷ the Chamber considers that the Prosecution should have disclosed the Complete Form, at the very least, as being material to the preparation of the defence, pursuant to Rule 77 of the Rules. The Chamber takes note of the explanation provided by the Prosecution concerning the circumstances in which the Complete Form was transmitted and ultimately disclosed.¹⁸ However, as acknowledged by the Prosecution, the Complete Form was 'within its control' since 15 January 2021 and as such fell within its disclosure obligations.¹⁹ Therefore, the Chamber finds that the Prosecution violated its disclosure obligations pursuant to Rule 77 of the Rules.
8. With regard to the extent of the prejudice caused by this violation, the Chamber notes the Defence's submissions that '[it] is yet difficult to determine', but that it nonetheless 'spent a substantial proportion of its limited resources in investigating allegations and/or information relating to witness P-2620', arguing that the disclosed information would have allowed it to conduct a more

¹² Motion, ICC-01/14-01/18-1318-Conf-Corr, paras 38-39, 40.

¹³ Motion, ICC-01/14-01/18-1318-Conf-Corr, para. 44.

¹⁴ Motion, ICC-01/14-01/18-1318-Conf-Corr, para. 39.

¹⁵ Motion, ICC-01/14-01/18-1318-Conf-Corr, para. 42.

¹⁶ Motion, ICC-01/14-01/18-1318-Red, para. 45.

¹⁷ CAR-OTP-2123-0072; CAR-OTP-2135-2412; CAR-OTP-2123-0057, at 0057; at 0059-0060, paras 11, 15-16, 18-19; at 0061-0063, paras 28-32, 38, 42; at 0066-0068, paras 68-70, 72-80; CAR-OTP-2121-2567, at 2567; at 2569, para. 11; at 2570-2571, paras 19-21, 23; at 2573, para. 37; CAR-OTP-2125-0348, at 0348; at 0350, paras 11-22; CAR-OTP-2122-9042, at 9046, paras 21-24; CAR-OTP-2121-2577.

¹⁸ Notably, that it overlooked an email sent by the Victims Participation and Reparations Section on 15 January 2022, which contained the Complete Form, and that the inadvertence was communicated to the Defence on 4 March 2022, in the context of another request from the Defence. *See* Response, ICC-01/14-01/18-1344, paras 2-7.

¹⁹ *See also* Response, ICC-01/14-01/18-1344, para. 7; Motion, ICC-01/14-01/18-1318-Red, paras 47-50, 52.

streamlined investigation.²⁰ In addition, the Defence contends that it was deprived of the opportunity to fully respond to the Rule 68(2)(b) Requests,²¹ given that the discrepancies contained in the Proof of Identity and Supplementary Pages could have been raised as further ‘compelling grounds’ to support its contention that these requests be denied.²²

9. The Chamber observes that P-2620 has not yet testified, and that she is currently listed as witness number 65 in the Prosecution’s order of witnesses.²³ Given the nature and extent of the information provided in the Complete Form, disclosed on 25 March 2022, the Defence will have sufficient time to prepare for the examination of P-2620.²⁴
10. With regard to the Rule 68(2)(b) Requests, the Chamber is unpersuaded by the Defence’s arguments that these should be rejected solely on the basis that it had not been provided with the Complete Form at the time of responding to the requests. Its request is therefore rejected. Nonetheless, the Chamber finds appropriate, in these circumstances and as suggested by the Prosecution,²⁵ to grant the Defence the opportunity to file a supplemental response to the Rule 68(2)(b) Requests. Accordingly, the Chamber directs the Defence to file any such supplemental response within 10 days of notification of the present decision.
11. Therefore, the Chamber considers that while prejudice has been caused, it is limited in nature. Noting that the Defence will be given an opportunity to provide a supplemental response in relation to the Rule 68(2)(b) Requests and that the

²⁰ Motion, ICC-01/14-01/18-1318-Red, para. 54.

²¹ See Corrigendum to the “Prosecution’s Sixth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)” (ICC-01/14-01/18-802-Conf), 11 January 2021, ICC-01/14-01/18-802-Conf-Corr (with confidential Annexes A and B, ICC-01/14-01/18-802-Conf-AnxA, ICC-01/14-01/18-802-Conf-AnxB) (corrigendum notified on 12 January 2021; public redacted version notified on 26 March 2021, ICC-01/14-01/18-802-Corr-Red), paras 1, 13-19.

²² Motion, ICC-01/14-01/18-1318-Conf-Corr, paras 55-56. See also Corrigendum to “Yekatom Defence Response to ‘Prosecution’s Sixth, Seventh and Eighth Formal Submissions of Rule 68(2) Applications’ (ICC-01/14-01/18-802-Conf, ICC-01/14-01/18-808-Conf and ICC-01/14-01/18-812-Conf)” (ICC-01/14-01/18-845-Conf), 21 January 2021, ICC-01/14-01/18-845-Conf-Corr (with confidential Annex A, ICC-01/14-01/18-845-Conf-AnxA) (corrigendum notified on 2 March 2021; public redacted version notified on 6 April 2021, ICC-01/14-01/18-845-Corr-Red), paras 5, 21-29, 57-59.

²³ Email from the Prosecution, 1 September 2022, at 10:23.

²⁴ See also Response, ICC-01/14-01/18-1344, para. 8.

²⁵ See Response, ICC-01/14-01/18-1344, para. 9.

Chamber has found that a violation under Rule 77 of the Rules occurred, no further remedies are warranted at this stage.

12. The Chamber reiterates its concern regarding the Prosecution's numerous and repeated disclosure violations, as previously emphasised.²⁶ The Chamber also expects the Prosecution to take measures to ensure that similar oversights do not occur again.

FOR THESE REASONS, THE CHAMBER HEREBY

FINDS that the Prosecution violated its disclosure obligations pursuant to Rule 77 of the Rules;




PARTLY GRANTS the Motion, as set out in paragraphs 7 and 10 above;

REJECTS the remainder of the Motion;

DIRECTS the Defence to file a supplementary response to the Rule 68(2)(b) Requests, if any, within 10 days of notification of this decision; and

DIRECTS the Defence to file a public redacted version of ICC-01/14-01/18-1318-Conf-Corr within one week of notification of this decision.

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

 <hr style="width: 25%; margin: 0 auto;"/> <p>Judge Péter Kovács</p>	 <hr style="width: 25%; margin: 0 auto;"/> <p>Judge Bertram Schmitt Presiding Judge</p>	 <hr style="width: 25%; margin: 0 auto;"/> <p>Judge Chang-ho Chung</p>
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Dated 3 October 2022

At The Hague, The Netherlands

²⁶ See 9 March 2022 Disclosure Violation Decision, ICC-01/14-01/18-1309-Red, para. 9.