



**Original: English**

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

**Date: 29 May 2023**

**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 Finding of Disclosure Violation in  
Relation to P-2018**

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 64(2) and (6)(c) and (e), 67(2) and 68 of the Rome Statute, and Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Request for Finding of Disclosure Violation in Relation to P-2018’.

## **I. Procedural history**

1. On 28 April 2023, the Yekatom Defence filed a ‘Motion for Finding of Disclosure Violation in Relation to Witness P-2018 Material’ (the ‘Request’).<sup>1</sup> The Yekatom Defence submits that the Office of the Prosecutor (the ‘Prosecution’) violated its disclosure obligations in respect of information contained in two items [REDACTED] to the Prosecution, namely: (i) Annex 7, CAR-OTP-2071-0298-R01 (the ‘Item A’);<sup>2</sup> and (ii) [REDACTED], CAR-OTP-2115-0369 (the ‘Item B’).
2. The Yekatom Defence requests the Chamber to (i) find that the Prosecution violated its disclosure obligation by failing to disclose an unredacted version of Item A; and (ii) order the Prosecution to disclose it (the ‘First Request’).<sup>3</sup> It further requests the Chamber to (i) find that the Prosecution violated its disclosure obligation in relation to Item B by providing it with a version of this list that was missing important information; and (ii) not recognise Item B as formally submitted (the ‘Second Request’).<sup>4</sup>
3. On 9 May 2023, the Prosecution responded to the Request (the ‘Response’)<sup>5</sup> stating that neither the redacted information in Item A nor the information missing in Item B contains information that is exculpatory, or otherwise material to the preparation of the defence.<sup>6</sup> In addition, the Prosecution requests that, in the event

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<sup>1</sup> ICC-01/14-01/18-1852-Conf (notified on 1 May 2023, with confidential *ex parte* Annex A and confidential Annex B) (public redacted version of the Request registered on 3 May 2023, ICC-01/14-01/18-1852-Red).

<sup>2</sup> Annexed to P-2018’s statement CAR-OTP-2071-0259.

<sup>3</sup> Request, ICC-01/14-01/18-1852-Red, paras 27, 43.

<sup>4</sup> Request, ICC-01/14-01/18-1852-Red, paras 39-41, 43.

<sup>5</sup> Prosecution’s Response to “Motion for Finding of Disclosure Violation in Relation to Witness P-2018 Material (ICC-01/14-01/18-1852-Conf)”, ICC-01/14-01/18-1861-Conf (public redacted version notified the same day, ICC-01/14-01/18-1861-Red).

<sup>6</sup> Response, ICC-01/14-01/18-1861-Red, paras 2, 6, 11-14.

that the Chamber rejects the formal submission of Item B in its original format, it should authorise the submission of its redacted PDF version in the alternative.<sup>7</sup>

4. On 12 May 2023, Ngaïssona Defence informed the Chamber that it does not intend to file a response to the Request.<sup>8</sup>

## II. Analysis

5. The Chamber recalls the Court's jurisprudence on the Prosecution's disclosure obligations, as previously set out by this Chamber.<sup>9</sup>

### A. First Request

6. In respect of Item A, the Yekatom Defence submits that the Prosecution maintained a redaction to P-2018's phone number therein, which was material to its preparation, in contravention of the Redaction Protocol<sup>10</sup> and therefore, should have been disclosed pursuant to Rule 77 of the Rules.<sup>11</sup>
7. Having regard to the nature of the information sought to be disclosed, the Chamber finds that it is, at the very least, material to the preparation of the defence. The Chamber finds that P-2018's contacts with other related Prosecution witnesses in the present case are relevant to the factual allegations concerning Count 29. Further, given P-2018's particular role in the present case, the nature and extent of contact between P-2018 and other related Prosecution witnesses, and therefore involving the use of his phone number, is material to the preparation of the defence. The availability of P-2018's phone number would have enabled the Yekatom Defence to fully prepare the examination concerning his contacts with other Prosecution witnesses in advance of his testimony.

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<sup>7</sup> Response, ICC-01/14-01/18-1861-Red, para. 16.

<sup>8</sup> Email from Ngaïssona Defence, 12 May 2023, at 10:10.

<sup>9</sup> See e.g. 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.

<sup>10</sup> Request, ICC-01/14-01/18-1852-Red, paras 1-2, 16-26. For the Redaction Protocol, see Annex 3 to the Decision on Protocols at Trial, ICC-01/14-01/18-677-Anx3.

<sup>11</sup> Request, ICC-01/14-01/18-1852-Red, para. 16.

8. The Chamber will now assess whether any redactions to P-2018's phone number in Item A continued to be justified in accordance with the standard redaction categories.
9. The Chamber notes that the Prosecution redacted P-2018's phone number in Item A using category B.1, which concerns 'recent contact information of witnesses, insofar as necessary to protect the safety of the witness'.<sup>12</sup> The Yekatom Defence submits that the redaction of this phone number should have been lifted by the Prosecution as part of its ongoing obligations to review redactions; and that this should have happened after the Chamber's clarification concerning redactions under category B.1.<sup>13</sup>
10. The Chamber recalls that identifying information of individuals who have acquired, or established knowledge of the events or circumstances part of a witness's narrative cannot be redacted pursuant to, *inter alia*, category B.1 and B.2 of the Redaction Protocol.<sup>14</sup> This identifying information includes phone numbers, 'recent' or otherwise.
11. In these circumstances, the Chamber is not persuaded by the Prosecution's suggestion that the Yekatom Defence needed to make a specific request to lift the redaction in Item A and/or needed to demonstrate how contacts between P-2018 and other Prosecution witnesses would have a bearing on the validity of the [REDACTED] or the witnesses' credibility.<sup>15</sup>
12. The Chamber is similarly not persuaded by the Prosecution's submission that redaction to another one of P-2018's phone numbers was warranted to protect his safety.<sup>16</sup> The Chamber further recalls, in this context, that P-2018 testified with in-court protective measures which remain in place towards the public.<sup>17</sup> The

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<sup>12</sup> See Request, ICC-01/14-01/18-1852-Red, para. 21.

<sup>13</sup> Request, ICC-01/14-01/18-1852-Red, para. 22 referring to Decision on Protocols at Trial, 8 October 2020, ICC-01/14-01/18-677 (the 'Decision on Protocols'), para. 72.

<sup>14</sup> Decision on Protocols, ICC-01/14-01/18-677, paras 71-72.

<sup>15</sup> See Response, ICC-01/14-01/18-1861-Conf, para. 6.

<sup>16</sup> Response, ICC-01/14-01/18-1861-Red, para. 4.

<sup>17</sup> Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses, 9 March 2021, ICC-01/14-01/18-906-Conf-Exp, paras 68-73, pp. 45-46.

Chamber notes that, in its Response, the Prosecution pointed, *inter alia*, to information received by it in 2019 that [REDACTED].<sup>18</sup>

13. In the Chamber's view, the Prosecution does not substantiate how the risk to P-2018's security could arise from disclosure of one of his phone numbers to the Yekatom Defence, as opposed to the public. In this regard, the Chamber notes that a redaction on another one of P-2018's phone numbers contained in his statement, also a category B.1 redaction, was lifted, albeit only in April 2023.<sup>19</sup> The Chamber also notes that Item A could be found publicly on the internet without any redactions.<sup>20</sup>
14. For these reasons, the Chamber finds that the Prosecution should have disclosed Item A without redactions, or otherwise lifted the redaction therein upon review. Accordingly, the Chamber finds that the Prosecution violated its disclosure obligations. Noting the Prosecution's submissions concerning re-disclosing Item A,<sup>21</sup> the Chamber clarifies that it expects the Prosecution to re-disclose Item A.
15. Furthermore, the Chamber emphasises that the disclosing party's obligation to ensure that the standard redactions have been carried out in line with the redaction protocol requires that all redactions be reviewed on an ongoing basis in light of the Chamber's decisions, and not only the specific redactions subject to each request. The Chamber expects that the Prosecution will review the standard redactions applied to P-2018's phone number(s) in line with the present decision in respect of other material on the record.
16. As regards the prejudice caused by the failure to disclose, the Yekatom Defence submits that, until this phone number was discovered by it, it was not in a position

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<sup>18</sup> Response, ICC-01/14-01/18-1861-Red, para. 4 *referring to* ICC Investigation notes / report / correspondence, CAR-OTP-2135-4183-R01, at 4183 (emphasis added).

<sup>19</sup> See P-1974 Statement, CAR-OTP-2068-0222-R05, at 0226, para. 22 disclosed as part of Trial INCRIM package 149, 14 April 2023.

<sup>20</sup> See Request, ICC-01/14-01/18-1852-Red, para. 18.

<sup>21</sup> Response, ICC-01/14-01/18-1861-Red, para. 8.

to verify ‘whether P-2018 had contacts with persons of interest in this case through this new phone number’.<sup>22</sup>

17. The Chamber notes that the Yekatom Defence had the opportunity to examine P-2018 fully live, including on his contacts with other Prosecution witnesses and persons of interest in the case. Should it wish to do so, the Yekatom Defence may make further submissions in the future on P-2018’s contacts.
18. In these circumstances, the Chamber considers that the prejudice resulting from late disclosure of the redacted information in Item A is minimal. The Chamber is of the view that its express finding of a disclosure violation suffices to remedy the prejudice caused and that no further remedies are warranted.

### ***B. Second Request***

19. The Yekatom Defence submits that the Prosecution violated its disclosure obligations in relation to Item B by not disclosing its fully unredacted version in the original Microsoft Excel format, sooner.
20. The Yekatom submits that the Prosecution provided variously redacted PDF versions of Item B between November 2020 and March 2023 that were missing ‘crucial information that is exculpatory and/or material to the preparation of the Defence’, while fully unredacted Item B in its original (.xlsx) format was provided only in April 2023.<sup>23</sup> The Yekatom Defence submits that crucial information was lost during the conversion of the original version to PDF and that this only became known when the original format of Item B was eventually disclosed in April 2023.<sup>24</sup>
21. The Yekatom Defence explains what information was missing in the PDF versions: (i) the categorisation of the Excel sheets by tabs that are not reflected in the PDF versions;<sup>25</sup> (ii) existence of a formula in column G concerning ‘*Anne de naissance*’ that shows that the year of birth was not manually typed but ‘instead

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<sup>22</sup> Request, ICC-01/14-01/18-1852-Red, para. 19.

<sup>23</sup> Request, ICC-01/14-01/18-1852-Red, paras 1-2, 28-38.

<sup>24</sup> Request, ICC-01/14-01/18-1852-Red, paras 28-32. *See also* Response, ICC-01/14-01/18-1861-Red, para. 9.

<sup>25</sup> Request, ICC-01/14-01/18-1852-Red, para. 29.

the result of an automatic subtraction of the number in column H' listing 'Age';<sup>26</sup> (iii) other information in column Q that is not visible in the PDF version i.e. the first names of certain individuals (collectively, the 'Missing Information').<sup>27</sup> The Yekatom Defence adds that by only providing the PDF version, the Prosecution also deprived it from fully reviewing the document by using all the features that a Microsoft Excel program would allow.<sup>28</sup> The Yekatom Defence submits that the Missing Information is exculpatory, or at the very least, material to the preparation of the defence.<sup>29</sup>

22. The Prosecution acknowledges that conversion of Item B into a redacted PDF version led to the inadvertent omission of certain information.<sup>30</sup> It adds that the Missing Information was not exculpatory; and this omission did not affect the contents of Item B, nor the credibility of P-2018's testimony.<sup>31</sup> In particular, the Prosecution argues, *inter alia*, that (i) the Yekatom Defence did not address the materiality of the Excel sheet tabs; and the information contained in them was already available to the Yekatom Defence 'though other information contained in the tables of the PDF version and other documents';<sup>32</sup> (ii) the existence of the formula bolsters the reliability of the original Item B;<sup>33</sup> and (iii) the missing information in Column Q concerned two children, aged 17 and 16, and 'despite them not being directly material for Count 29, their families could have alternatively been reached through the children's mothers and uncles, whose full names are provided in the PDF version'.<sup>34</sup>
23. In assessing the Second Request, the Chamber will first assess whether the Missing Information was material to the preparation of the defence. Second, it will consider whether it was possible to disclose the original version of Item B earlier than April 2023.

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<sup>26</sup> Request, ICC-01/14-01/18-1852-Red, para. 31.

<sup>27</sup> Request, ICC-01/14-01/18-1852-Red, para. 32.

<sup>28</sup> Request, ICC-01/14-01/18-1852-Red, para. 30.

<sup>29</sup> Request, ICC-01/14-01/18-1852-Red, paras 33-37.

<sup>30</sup> Response, ICC-01/14-01/18-1861-Red, para. 10.

<sup>31</sup> Response, ICC-01/14-01/18-1861-Red, paras 10-11; *see also* para. 12.

<sup>32</sup> Response, ICC-01/14-01/18-1861-Red, para. 14.

<sup>33</sup> Response, ICC-01/14-01/18-1861-Red, para. 12.

<sup>34</sup> Response, ICC-01/14-01/18-1861-Red, para. 13.



24. Before turning to this assessment, at the outset, the Chamber notes that the Prosecution disclosed redacted PDF versions of Item B to the Yekatom Defence between November 2020 and March 2023.<sup>35</sup> The Chamber further notes that the Prosecution submits that on 12 April 2023, ‘all remaining redactions [to the PDF version of Item B] were lifted’.<sup>36</sup> However, this does not appear in JEM yet.
25. Having examined Item B in its original format compared with its redacted PDF versions in light of the arguments by the parties, the Chamber finds that part of the Missing Information was material to the preparation of defence within the meaning of Rule 77 of the Rules. In particular, the Chamber considers that the Excel sheet tabs assist in understanding the nature and purpose of the various lists contained in the document; this information does not appear in the PDF version as title, heading, or otherwise in the text. The Chamber is not persuaded that this information can be gleaned from reading the contents of the table together with other documents on the record. Second, the Chamber notes that the existence of the formula explains how age-related columns were populated in the table. This is not apparent from only studying the PDF version of Item B.
26. However, in relation to the missing information in column Q, the Chamber notes that this concerns individuals whose age, as per this document, is over 15 years.<sup>37</sup> The Chamber further notes that, despite the first names being excluded, the Yekatom Defence had access to the information concerning the last names and the nature of familial relationship between the individuals concerned. Therefore, this part of the Missing Information, specifically their first names, was not material to the defence.
27. The Chamber acknowledges the Prosecution’s explanation as to why Item B could not have been disclosed to the Yekatom Defence in its original format. It submits that the original format of Item B needed to be converted to PDF in order

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<sup>35</sup> These are contained in CAR-OTP-2115-0369-R01 (date filed 6 November 2020), CAR-OTP-2115-0369-R02 (date filed 8 December 2020), CAR-OTP-2115-0369-R03 (date filed 20 October 2021), CAR-OTP-2115-0369-R04 (date filed 11 March 2022), and CAR-OTP-2115-0369-R05 (date filed 17 March 2023).

<sup>36</sup> See Response, ICC-01/14-01/18-1861-Red, para. 9 referring to *inter partes* communication that the Chamber does not have access to.

<sup>37</sup> CAR-OTP-2115-0369-R05, at 0369\_12, rows 3 and 6.

to effectively apply redactions to this document, as the necessary redactions could not be permanently applied to the electronic data file.<sup>38</sup>

28. Therefore, in determining whether the Prosecution could have disclosed the original version of Item B earlier, the Chamber will first assess whether any redactions to the original version of Item B were justified in accordance with the standard redaction categories.
29. The Chamber assessed the redactions contained in the lesser redacted PDF version of Item B, namely, CAR-OTP-2115-0369-R05. It finds that, for the following reasons, all redactions contained therein were not justified, at least as of 17 March 2023, the date when this lesser redacted version was disclosed to the parties.
30. In particular, B.2 redactions applied in relation to P-2475 and P-2476, witnesses who have testified, are not in line with the Chamber's direction, as clarified above.<sup>39</sup> Further, in relation to the B.2 or B.3 redaction applied in relation to P-2582,<sup>40</sup> the Chamber notes that the Prosecution had informed the Chamber that it did not intend to call this witness as of November 2022;<sup>41</sup> and therefore, at least, as of this date, this redaction could have been lifted. Similarly, in relation to the redaction concerning P-2511, the Chamber notes that the Prosecution informed the Chamber that it will withdraw this witness on 10 March 2023 and requested the Chamber to consider calling him as a Chamber's witness.<sup>42</sup>
31. From the Response and the *inter partes* communication annexed to the Request, it is not clear what prompted the Prosecution to provide the original Item B on 12 April 2023 and/or whether these redactions had continued to being applied in March 2023 because of any security concerns arising from disclosure to the Yekatom Defence.

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<sup>38</sup> Response, ICC-01/14-01/18-1861-Red, para. 9.

<sup>39</sup> *See above* para. 10 in relation to standard redaction categories B.1 and B.2.

<sup>40</sup> The Chamber notes that it is not visible whether the redaction category is B.2 or B.3.

<sup>41</sup> Email from the Prosecution, 15 November 2022, at 13:38.

<sup>42</sup> *See* Prosecution's Observations pursuant to the Chamber's "Order regarding the Remainder of the Prosecution's Presentation of Evidence and Order pursuant to Article 64(6)(d) of the Statute", ICC-01/14-01/18-1739-Conf, 31 January 2023, 10 March 2023, ICC-01/14-01/18-1791-Conf, paras 6-7.

32. For these reasons, the Chamber considers that no redactions were justified in the Item B in its PDF versions, and therefore, in its original format, at least as of 17 March 2023. Therefore, its original format could have been disclosed earlier.
33. In light of the above, the Chamber finds that the Prosecution violated its disclosure obligations in respect of Item B.
34. As regards prejudice, the Prosecution submits that there was no prejudice resulting from the non-disclosure of the Missing Information because, *inter alia*, this information was already at the Yekatom Defence's disposal; and it was able to use the original version of Item B when questioning P-2018 [REDACTED], including by reference to the various tabs and the formula.<sup>43</sup>
35. The Chamber notes that Item B was eventually disclosed to the parties, albeit only three days earlier prior to P-2018's testimony. P-2018, [REDACTED], was indeed examined by the Yekatom Defence extensively on the contents of the original version (.xlsx) of Item B.
36. Therefore, the Chamber considers that the prejudice caused to the Yekatom Defence was limited. In light of this, the Chamber is of the view that its express finding of a disclosure violation suffices to remedy the limited prejudice caused and that no further remedies are warranted.
37. Accordingly, the Chamber rejects, without prejudice, the Yekatom Defence's request to deny the formal submission of this item. In light of this, the Chamber need not address, at this stage, the Prosecution's alternative request to recognise the formal submission of the PDF versions of Item B.

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<sup>43</sup> Response, ICC-01/14-01/18-1861-Red, para. 15.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**FINDS** that the Prosecution violated its disclosure obligations pursuant to Rule 77 of the Rules in respect of Item A, CAR-OTP-2071-0298-R01;

**GRANTS** the First Request, as set out in paragraph 14 above;

**FINDS** that the Prosecution violated its disclosure obligations pursuant to Rule 77 of the Rules in respect of Item B, CAR-OTP-2115-0369;

**PARTLY GRANTS** the Second Request, as set out in paragraph 33 above; and

**REJECTS**, without prejudice, the request to deny the formal submission of Item B, CAR-OTP-2115-0369.

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

**Judge Péter Kovács**

**Judge Bertram Schmitt**

**Presiding Judge**

**Judge Chang-ho Chung**

Dated 29 May 2023

At The Hague, The Netherlands