

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **24 June 2020**

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 and
for Deadline for Disclosure of Exculpatory Material”, 24 June 2020**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully move for a finding that the Prosecution has once again violated its obligation to timely disclose exculpatory material, in this instance, the statement of Witness P-1716.
2. As a remedial measure for this violation, the Defence requests that the Trial Chamber set a deadline for the disclosure of all remaining exculpatory material and make it clear that sanctions may be imposed for any further violations.

RELEVANT PROCEDURAL HISTORY

3. On 11 November 2018, Pre-Trial Chamber II issued an arrest warrant for Alfred Yekatom, finding reasonable grounds to believe that Mr. Yekatom committed murder, torture, and a number of other offences based on a finding of, *inter alia*, the following facts:

[REDACTED].¹

4. The arrest warrant referenced the statements of Prosecution Witnesses P-1704 and P-1705 to support those findings.²
5. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”).³ It included the following allegations:

[REDACTED].⁴

6. The DCC referenced the statements of Prosecution Witnesses P-1654, P-1704 and P-1705 to support these allegations.⁵ The statements of those three

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ [REDACTED].

witnesses were disclosed to the Defence in advance of the confirmation hearing.

7. The confirmation hearing was held between 19 September and 11 October 2019. On 11 December 2019, the Pre-Trial Chamber issued its confirmation decision.⁶ It included the following findings:

[REDACTED].⁷

8. The Pre-Trial Chamber based its findings on the statements of Prosecution Witnesses P-1654, P-1704, and P-1705.⁸
9. Prosecution Witness P-1704 claimed [REDACTED].⁹
10. Prosecution Witness P-1705 claimed [REDACTED].¹⁰
11. Prosecution Witness P-1654 claimed [REDACTED].¹¹
12. Throughout the confirmation process, the Prosecution never disclosed that the individual referred to herein as P-1716 was a witness. It was only on 3 April 2020, after the Defence had attempted to interview the individual that the Prosecution advised that he was a Prosecution witness.
13. On 4 April 2020, the Defence requested a copy of Witness P-1716's statement.¹² The Prosecution never provided the statement until 18 June 2020 after the Trial Chamber ordered it to disclose all statements of witnesses it intended to call at trial.¹³ The statement was taken in 2017.¹⁴

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ CAR-OTP-2054-1136-R03, paras. 32-44.

¹⁰ CAR-OTP-2053-0086-R02, paras. 27-39.

¹¹ CAR-OTP-2053-0112-R02, paras. 32-39.

¹² The *inter partes* correspondence can be provided upon request.

¹³ [ICC-01/14-01/18-528](#).

¹⁴ CAR-OTP-2053-0062.

14. The statement of Witness P-1716 contradicts the evidence of Witnesses P-1704 and P-1705 [REDACTED].¹⁵ Witness P-1716 also contradicts the evidence of Witness P-1654, [REDACTED].¹⁶
15. As far back as 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.¹⁷
16. On 20 August 2019, when the Defence had filed a motion for disclosure of exculpatory material,¹⁸ the Prosecution responded the next day, saying that the motion was unnecessary because “throughout the pre-confirmation process, the Prosecution has abided by the Chamber’s Order and directions regarding disclosure as well as its statutory obligations in good faith, including with respect to potentially exculpatory material”.¹⁹
17. On 28 August 2019, the Pre-Trial Chamber nevertheless directed the Prosecutor to verify whether she has in her possession any additional evidence that falls within the scope of article 67(2) of the Statute.²⁰ The Prosecution never disclosed Witness P-1716’s exculpatory statement throughout the confirmation process.

RELEVANT PROVISIONS

Article 67(2) provides:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to

¹⁵ *Id.*, paras. 40-43.

¹⁶ *Id.*, para. 50.

¹⁷ [ICC-01/14-01/18-64-Conf](#), para. 16; Public redacted version: [ICC-01/14-01/18-64-Red](#).

¹⁸ [ICC-01/14-01/18-284](#).

¹⁹ [ICC-01/14-01/18-286](#), para. 3.

²⁰ [ICC-01/14-01/18-296](#), para. 14.

show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

ARGUMENT

18. The Prosecution had three statements from victims of the same event. Two of the victims claimed that Mr. Yekatom participated in the crimes, one did not. The Prosecution disclosed the two incriminating statements and withheld the exonerating one. This is a classic violation of Article 67(2)'s requirement that mandates disclosure of material that may affect the credibility of Prosecution evidence as soon as practicable.
19. A fundamental component of the right of an accused to a fair trial includes the right to disclosure of potentially exculpatory material.²¹ The Prosecution's duty to disclose exculpatory material is as important as the obligation to prosecute.²² In pursuit of justice, the disclosure of exculpatory material to the defence is of paramount importance to ensure the fairness of proceedings.²³ The Prosecution's obligation to disclose exculpatory material has always been interpreted broadly.²⁴
20. A party claiming a breach of the Prosecution's duty to disclose exculpatory material is expected to: (i) identify the materials in dispute; (ii) satisfy the Chamber on a prima facie basis of the Prosecutor's custody or control of the

²¹ [ICC-01/14-01/18-551-Conf](#), para. 25; Public redacted version: [ICC-01/14-01/18-551-Red](#). *Prosecutor v. Banda and Jerbo*, Decision on Article 54(3)(e) Documents, 23 November 2011, [ICC-02/05-03/09-259](#), para. 14; *Prosecutor v. Lubanga*, [Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54\(3\)\(e\) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008](#), 13 June 2008, ICC-01/04-01/06-1401, para. 77.

²² *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 *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 at para. 20.

²⁴ *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, at para. 13

materials requested; and (iii) satisfy the Chamber on a prima facie basis of the exculpatory or potentially exculpatory character of the materials requested.²⁵

21. Here, the material in dispute is the statement of Witness P-1716.²⁶ On the first page of the statement, it indicates that it was taken in May 2017 by the Prosecution and has therefore been in its possession since that time.
22. As to its exculpatory nature, Article 67(2) explicitly includes material “which may affect the credibility of prosecution evidence.” The ICTY Appeals Chamber has held that material will affect the credibility of the Prosecution’s evidence if it undermines the Prosecution’s case.²⁷ This includes information that contradicts the evidence of Prosecution witnesses.
23. For example, at the ICTR, a statement of a person who contradicted a Prosecution witness as to the presence of the accused at a meeting was held to be exculpatory in nature.²⁸
24. At the ICTY, Trial Chambers have held that a statement of a person that contradicted testimony of Prosecution witnesses, or facts that were judicially noticed at the request of the Prosecution, was exculpatory in nature and should have been disclosed.²⁹
25. The fact that that the witness may also provide incriminating evidence is irrelevant to the issue of whether the statement must be disclosed pursuant to Article 67(2).³⁰

²⁵ *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, at para. 9.

²⁶ CAR-OTP-2053-0062.

²⁷ *Prosecutor v. Krstic*, [Judgement](#), 19 April 2004, No. IT-98-33-A, at para. 178.

²⁸ *Prosecutor v. Ndindiliyimana et al*, [Decision on Defence Motions Alleging Violations of the Prosecution’s Disclosure Obligations Pursuant to Rule 68](#), 22 September 2008, No. ICTR-00-56-T, at para. 33.

²⁹ *Prosecutor v. Oric*, [Decision on Alleged Prosecution Non-Compliance With Disclosure Obligations Under Rule 66\(B\) and 68\(i\)](#), 29 September 2005, No. 03-68-T; *Prosecutor v. Karadzic*, [Decision on Accused’s Ninety-Fourth Disclosure Violation Motion](#), 13 October 2014, No. IT-95-5/18-T, at para. 14.

³⁰ *Prosecutor v. Lubanga*, [Decision on Disclosure Issues, Responsibility for Protective Measures and other Procedural Matters](#), 24 April 2008, ICC-01/04-01/06-1311-Anx2, para. 94.

26. The statement of Witness P-1716 directly contradicts the evidence of Prosecution Witnesses P-1704 and P-1705 that Alfred Yekatom was present at the Yanwara School when [REDACTED]. It also contradicts the evidence of Witness P-1654, who claimed that [REDACTED].
27. Therefore, the Trial Chamber should conclude that the Prosecution's failure to disclose the statement of Witness P-1716 as soon as practicable violated its disclosure obligations pursuant to Article 67(2).
28. The Defence was prejudiced by this late disclosure because it was prevented from using it at the confirmation hearing to contest Mr. Yekatom's responsibility for the murder, torture, and other charges arising from the beatings [REDACTED], and the late disclosure has delayed its investigation and preparation to defend this incident at trial.
29. When considering an appropriate remedy for this violation of the Prosecution's disclosure obligations, the Trial Chamber should take into account that the Prosecution has already been found to have violated its disclosure obligations on four separate occasions in this case.³¹
30. The Defence suggests that the remedy for this disclosure violation should include an express finding that the Prosecution has once again violated its disclosure obligations. The Trial Chamber is also requested to set a deadline for the disclosure of all remaining exculpatory material. It is requested to make it clear to the Prosecution and its individual counsel that sanctions may be imposed for any further violations.

³¹ [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 and 21; [ICC-01/14-01/18-551-Conf](#); Public redacted version: [ICC-01/14-01/18-551-Red](#), para. 31.

CONFIDENTIALITY

31. This motion is being filed on a confidential basis as it refers to confidential portions of filings and decisions. A public redacted version is being filed simultaneously.

CONCLUSION

32. For all of the above reasons, the Trial Chamber is respectfully requested to find that the Prosecution violated its obligations to disclose exculpatory evidence pursuant to Article 67(2) of the Statute by failing to disclose the statement of Witness P-1716 as soon as practicable. The Chamber is further requested to set a deadline for the disclosure of all remaining exculpatory material and to make it clear to the Prosecution and its individual counsel that sanctions may be imposed for any further violations.

RESPECTFULLY SUBMITTED ON THIS 24th DAY OF JUNE 2020



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