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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***

Public

**Decision on the Yekatom Defence Request Concerning Disclosure Violation and
Disclosure of Exculpatory Material**

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 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 Request Concerning Disclosure Violation and Disclosure of Exculpatory Material’.

I. Procedural history and submissions

1. On 11 November 2018, Pre-Trial Chamber II (the ‘PTC II’) issued an arrest warrant against Mr Yekatom (the ‘Arrest Warrant’).¹ In the Arrest Warrant, PTC II relied on two statements – ‘CAR-OTP-2053-0086’ and ‘CAR-OTP-2054-1136’ provided by two witnesses – in respect of an incident at Yamwara School (the ‘Incident’),² finding them ‘sufficient to establish reasonable grounds to believe’ that crimes were committed. These crimes included imprisonment or other severe deprivation of physical liberty, torture, persecution, enforced disappearance and other inhumane acts as crimes against humanity and torture and cruel treatment, and mutilation as war crimes.³
2. On 19 August 2019, the Office of the Prosecutor (the ‘Prosecution’) filed its document containing the charges against Mr Yekatom⁴ and its list of evidence⁵ (the ‘Document Containing the Charges’ and the ‘List of Evidence’, respectively). In the Document Containing the Charges, the Prosecution relied, *inter alia*, on the two statements in support of the occurrence of the Incident,⁶ as well as to allege Mr Yekatom’s role and intent in respect of the crimes that took place during the Incident.⁷ In addition to the two statements, the Prosecution

¹ Warrant of Arrest for Alfred Yekatom, ICC-01/14-01/18-1-Conf-Exp, confidential *ex parte*, only available to the Yekatom Defence and the Prosecution (public redacted version notified on 17 November 2018, ICC-01/14-01/18-1-Red).

² See Warrant of Arrest, ICC-01/14-01/18-1-Red, para. 18, nn. 86-93.

³ Warrant of Arrest, ICC-01/14-01/18-1-Red, para. 18, pp. 15-16.

⁴ Annex B1 to the Prosecution’s Notification of Filing of the Document Containing the Charges and List of Evidence, ICC-01/14-01/18-282-Conf-AnxB1 (public redacted version notified on 18 September 2019, ICC-01/14-01/18-282-AnxB1-Red).

⁵ Annex H to the Prosecution’s Notification of Filing of the Document Containing the Charges and List of Evidence, ICC-01/14-01/18-282-Conf-AnxH.

⁶ Document Containing the Charges, ICC-01/14-01/18-282-AnxB1-Red, paras 296-300.

⁷ Document Containing the Charges, ICC-01/14-01/18-282-AnxB1-Red, paras 304-306 (direct perpetration), para. 307 (knowledge and intent).

referenced two other statements ('CAR-OTP-2053-0112-R01' and 'CAR-OTP-2058-0003-R01') (collectively, the 'Four Statements').⁸ The Four Statements appear in the List of Evidence.⁹

3. On 1 May 2019, the Prosecution requested a postponement of the hearing on the confirmation of the charges (the 'Confirmation Hearing') and the related disclosure deadlines.¹⁰ PTC II granted the postponement until 19 September 2019.¹¹
4. By 5 August 2019, the Four Statements were disclosed to the Yekatom Defence (the 'Defence').¹²
5. On 28 August 2019, upon request by the Defence for disclosure of 'discrete categories of material on which parties may differ as to their exculpatory nature',¹³ PTC II directed the Prosecution to verify whether it had 'any additional evidence that falls within the scope of article 67(2) of the Statute'.¹⁴

⁸ See Document Containing the Charges, ICC-01/14-01/18-282-Conf-AnxB1, paras 296-300, nn. 642-643, 646-647, 649.

⁹ See List of Evidence, ICC-01/14-01/18-282-Conf-AnxH, p. 1, entry 9 (CAR-OTP-2053-0086-R01); p. 2, entry 77 (CAR-OTP-2058-0003-R01) and 90 (CAR-OTP-2054-1136-R01); p. 3, entry 105 (CAR-OTP-2053-0112-R01).

¹⁰ Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines, 2 May 2019, ICC-01/14-01/18-186-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Registry (with confidential *ex parte* Annex 1, only available to the Prosecution and the Registry) (public redacted version notified on 8 May 2019, ICC-01/14-01/18-186-Red2).

¹¹ Decision on the 'Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines', 15 May 2019, ICC-01/14-01/18-199 (the 'Decision on the Postponement Request').

¹² See Pre-Confirmation INCRIM package 17 05 August 2019 (for documents CAR-OTP-2053-0086-R01 and CAR-OTP-2054-1136-R01); Pre-Confirmation INCRIM package 15 30 July 2019 (for document CAR-OTP-2053-0112-R01); Pre-Confirmation INCRIM package 10 17 May 2019 (for document CAR-OTP-2058-0003-R01). It is noted that lesser redacted versions of these statements were disclosed subsequently as part of the Pre-Confirmation INCRIM package 24 11 September 2019 disclosed statements (for documents CAR-OTP-2054-1136-R02, CAR-OTP-2053-0086-R02 and CAR-OTP-2058-0003-R02), the Pre-Confirmation INCRIM package 25 16 September 2019 (for document CAR-OTP-2053-0112-R02). The Pre-Trial INCRIM package 30 21 January 2020 (for documents CAR-OTP-2053-0086-R03 and CAR-OTP-2054-1136-R03).

¹³ Motion for Disclosure of Exculpatory Material, 20 August 2019, ICC-01/14-01/18-284, para. 15.

¹⁴ Decision on the Yekatom Defence Motion for Disclosure of Exculpatory Material, ICC-01/14-01/18-296, para. 14, p. 6.

6. The Confirmation Hearing took place from 19 to 25 September 2019 and 11 October 2019.¹⁵
7. On 11 December 2019, PTC II issued its decision on the confirmation of charges and committed Mr Yekatom for trial on the charges as confirmed (the ‘Confirmation Decision’).¹⁶ PTC II referenced all Four Statements in its findings concerning the Incident.¹⁷ In particular, PTC II cited ‘CAR-OTP-2054-1136-R01’ and ‘CAR-OTP-2053-0086-R01’ in respect of the Incident.¹⁸
8. On 16 March 2020, the Presidency constituted this Chamber.¹⁹ On the same day, the Chamber elected the Presiding and Single Judge.²⁰
9. On 22 May 2020, the Single Judge (i) ordered the Prosecution to file a list of witnesses that it is certain to call to testify (the ‘Preliminary Witness List’) as well as to identify those witnesses that it is certain not to call, no later than 15 June 2020; and (ii) directed that the disclosure relating to witnesses on the Preliminary Witness List must be affected immediately.²¹
10. On 4 June 2020, the Chamber issued an order scheduling the first status conference on 9 July 2020 (the ‘First Status Conference’), wherein it requested oral submissions on, *inter alia*, ‘[o]ngoing disclosure obligations pursuant to

¹⁵ See transcript of hearing, 19 September 2019, ICC-01/14-01/18-T-004-Red2-ENG; transcript of hearing, 20 September 2019, ICC-01/14-01/18-T-005-Red-ENG; transcript of hearing, 20 September 2019, ICC-01/14-01/18-T-007-Red-ENG; transcript of hearing, 23 September 2019, ICC-01/14-01/18-T-008-Red2-ENG; transcript of hearing, 24 September 2019, ICC-01/14-01/18-T-009-Red-ENG; transcript of hearing, 25 September 2019, ICC-01/14-01/18-T-010-ENG; transcript of hearing, 11 October 2019, ICC-01/14-01/18-T-011-Red-ENG.

¹⁶ Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 14 May 2020, ICC-01/14-01/18-403-Conf-Corr (original version dated 11 December 2019) (corrected public redacted version notified the same day, ICC-01/14-01/18-403-Red-Corr).

¹⁷ Confirmation Decision, ICC-01/14-01/18-403-Conf, paras 114-116, nn. 278-288.

¹⁸ Confirmation Decision, ICC-01/14-01/18-403-Conf, para 115, nn. 280-281.

¹⁹ Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-451. See further Decision on the Prosecutor’s request for reconsideration or, in the alternative, leave to appeal the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 11 March 2020, ICC-01/14-01/18-447, paras 34-37; Transmission to the Presidency of the record of the proceedings, including the Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-449.

²⁰ Decision notifying the election of a Presiding Judge and Single Judge, 17 March 2020, ICC-01/14-01/18-454.

²¹ Order to provide a Preliminary Witness List, 22 May 2020, ICC-01/14-01/18-528, paras 4-5, p. 4.

Article 67(2) of the Statute and Rules 76 and 77 of the Rules, in particular timing and volume of outstanding disclosure'.²²

11. On 15 June 2020, the Prosecution submitted its Preliminary Witness List,²³ which included the four witnesses who gave the Four Statements,²⁴ as well as another witness, P-1716.²⁵
12. The Prosecution disclosed P-1716's statement (the 'Statement' or the 'Statement of P-1716'), which was taken in 2017, on 18 June 2020.²⁶
13. On 24 June 2020, the Defence requested the Chamber to find that the Prosecution had violated its obligation under Article 67(2) of the Statute by not disclosing the Statement of P-1716, which contains exculpatory material, as soon as practicable (the 'Request').²⁷ As a remedy, the Defence requests the Chamber to set a deadline for disclosure of 'all remaining exculpatory material and make it clear that sanctions may be imposed for any further violations'.²⁸ In support of its argument that the Prosecution violated its disclosure obligations, the Defence avers that (i) throughout the confirmation proceedings, the Prosecution did not disclose that P-1716 was a witness;²⁹ (ii) it was only on 3 April 2020, after the Defence attempted to interview the witness, that the Prosecution advised that this person was a Prosecution witness;³⁰ and (iii) the Defence requested a copy of the Statement on 4 April 2020 but it was only disclosed on 18 June 2020.³¹ The Defence further points to an order by PTC II

²² Second Order Scheduling First Status Conference, ICC-01/14-01/18-543, para. 8.

²³ Annex A to the Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528, ICC-01/14-01/18-553-Conf-AnxA, pp. 2-6.

²⁴ Preliminary Witness List, ICC-01/14-01/18-553-Conf-AnxA, p. 2, entries 30, 31, 45, 51.

²⁵ Preliminary Witness List, ICC-01/14-01/18-553-Conf-AnxA, p. 4, entry 31.

²⁶ See Pre-Trial INCRIM package 35.

²⁷ Motion for Finding of Disclosure Violation and for Deadline for Disclosure of Exculpatory Material, ICC-01/14-01/18-566-Conf (public redacted version notified the same day, ICC-01/14-01/18-566-Red), paras 1, 32.

²⁸ Request, ICC-01/14-01/18-566-Red, paras 2, 30, 32.

²⁹ Request, ICC-01/14-01/18-566-Red, para. 12.

³⁰ Request, ICC-01/14-01/18-566-Red, para. 12.

³¹ Request, ICC-01/14-01/18-566-Red, para. 13.

to disclose exculpatory evidence in advance of the Confirmation Hearing that, it claims, was not respected by the Prosecution.³²

14. In support of its claim that the Statement of P-1716 is exculpatory, the Defence argues that it contradicts evidence provided by the witnesses who provided the Four Statements in respect of the Incident.³³ The Defence further submits that Mr Yekatom was prejudiced by the late disclosure because it was prevented from using the Statement during the Confirmation Hearing to contest his responsibility for the crimes charged in respect of the Incident.³⁴
15. On 6 July 2020, the Prosecution responded to the Request (the ‘Response’),³⁵ arguing that (i) the Defence’s claim that the Prosecution ‘failed to timely disclose the “exculpatory” [Statement] is incorrect’ because the Statement is incriminating;³⁶ (ii) the Prosecution’s review of disclosure of evidence is ongoing and must take place in accordance with Article 68 of the Statute, and as this process is ongoing and no disclosure deadline has been set, the Request is premature;³⁷ and (iii) the declaratory relief sought is not ‘legally cognisable’ and has no legal effect, and the request to set a disclosure deadline prior to trial is unnecessary.³⁸

II. Analysis

16. The Request, *inter alia*, seeks a declaration from the Chamber that the non-disclosure of the Statement of P-1716 prior to the Confirmation Hearing constitutes a disclosure violation under Article 67(2) of the Statute. The

³² Request, ICC-01/14-01/18-566-Red, para. 17, *referring to* Decision on the Yekatom Defence Motion for Disclosure of Exculpatory Material, 28 August 2019, ICC-01/14-01/18-296.

³³ Request, ICC-01/14-01/18-566-Red, paras 26-27; *see also* paras 22-25.

³⁴ Request, ICC-01/14-01/18-566-Red, para. 28.

³⁵ Prosecution’s Response to the Yekatom Defence’s “Motion for Finding of Disclosure Violation and for Deadline for Disclosure of Exculpatory Material” (ICC-01/14-01/18-566-Conf), ICC-01/14-01/18-581-Conf (public redacted version notified on 8 July 2020, ICC-01/14-01/18-581-Red).

³⁶ Response, ICC-01/14-01/18-581-Red, paras 2, 6-16.

³⁷ Response, ICC-01/14-01/18-581-Red, paras 3, 17-19.

³⁸ Response, ICC-01/14-01/18-581-Red, paras 4, 20-23.

Chamber takes note that the parties disagree as to the exculpatory nature of information contained in the Statement.³⁹

17. At the outset, the Chamber notes that the witnesses who gave the Four Statements provided their respective accounts of the Incident and attributed words and actions to Mr Yekatom for various parts of the Incident.⁴⁰ P-1716 does not mention Mr Yekatom by name, indicating nonetheless that ‘Anti-Balaka elements’ were involved.⁴¹ The Chamber further notes that the Statement of P-1716 contains indications as to why the witness could not provide the names of all the concerned Anti-Balaka elements.⁴²
18. In light of the above, the Chamber considers that the Prosecution should have disclosed the Statement of P-1716, at the very least, as being material to the preparation of the defence, pursuant to Rule 77 of the Rules. This is especially since the Prosecution was in a position to do so, having regard to the fact that the Statement was taken as early as 2017.⁴³ However, it is not the role of the Chamber to pronounce itself on the question whether this violation has caused any prejudice to the accused during the pre-trial proceedings. In the following, the Chamber therefore limits its assessment to the question whether this violation caused any prejudice to the accused’s rights at trial, warranting remedies.
19. The Chamber finds that Mr Yekatom has suffered no prejudice at trial on account of the aforementioned disclosure violation. The Chamber notes that the Statement has been disclosed well before the start of trial and that the presentation of evidence has yet to begin. The Chamber recalls that the Prosecution intends to call the witnesses who provided the Four Statements and P-1716 to testify before the Chamber.⁴⁴ Both the Defence and the Prosecution

³⁹ Request, ICC-01/14-01/18-566-Red, paras 14, 18, 26; Response, ICC-01/14-01/18-581-Red, paras 13-16.

⁴⁰ See for example CAR-OTP-2054-1136-R03, paras 35-38, 52; CAR-OTP-2053-0086-R03, paras 29-31, 34, 40-41; CAR-OTP-2053-0112-R02, paras 30-32, CAR-OTP-2058-0003-R02, paras 38-40.

⁴¹ CAR-OTP-2053-0062-R01, paras 45-46.

⁴² See Statement, CAR-OTP-2053-0062-R01, paras 49, 56-57.

⁴³ See Statement, CAR-OTP-2053-0062-R01, p. 12.

⁴⁴ Preliminary Witness List, ICC-01/14-01/18-553-Conf-AnxA, p. 2, entries 30, 31, 45 and 51; p. 4, entry 31.

can explore the disputed issues live during the witnesses' testimony and in their subsequent submissions.

20. With regard to the Defence request to set a disclosure deadline for all remaining exculpatory material, the Chamber considers it moot in light of its recent decision setting 31 August 2020 as the deadline for disclosing evidence related to the witnesses listed on the Preliminary Witness List,⁴⁵ and setting 9 November 2020 as the final disclosure deadline.⁴⁶
21. Lastly, the Chamber reminds the Prosecution that it continues to remain bound by its obligation to disclose potentially exculpatory materials falling under Article 67(2) of the Statute 'as soon as practicable'.⁴⁷ In this respect, the Chamber recalls that a statement may contain both exculpatory and incriminatory information. The fact that a statement 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. In case of doubt as to the applicability of this provision, and following unsuccessful *inter partes* consultations, the Chamber will decide.
22. At this stage, the Chamber is confident that the Prosecution will abide by its obligations and sees no need for sanctions to be envisioned for any potential violations of this nature in the future.

FOR THESE REASONS, THE CHAMBER HEREBY

FINDS that the Prosecution violated its obligations at least pursuant to Rule 77 of the Rules; and



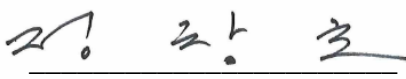
REJECTS the remainder of the Request.

⁴⁵ Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589 (the 'Decision on Date of Trial'), para. 11.

⁴⁶ Decision on Date of Trial, ICC-01/14-01/18-589, para. 10.

⁴⁷ See also Decision on Date of Trial, ICC-01/14-01/18-589, para. 10.

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

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Judge Péter Kovács	Judge Bertram Schmitt	
	Presiding Judge	
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		Judge Chang-ho Chung

Dated 22 July 2020

At The Hague, The Netherlands