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

Date: **6 January 2021**

**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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-  
EDOUARD NGAÏSSONA***

**Public**

**Public redacted version of “Prosecution’s Response to the Yekatom Defence’s  
“Motion for Finding of Disclosure Violation of Exculpatory Material”,  
26 October 2020, (ICC-01/14-01/18-681-Conf)**

**Source:** Office of the Prosecutor

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

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## I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Yekatom Defence’s “Motion for Finding of Disclosure Violation of Exculpatory Material” (“Motion”).<sup>1</sup> Although there are various reasons which explain the timing of the disclosure of P-2428’s statement in part, the Prosecution acknowledges and accepts that the statement, which contains both incriminating evidence and article 67(2) information, should have been disclosed as soon as practicable. Nevertheless, the Motion should be dismissed.

2. *First*, the timing of disclosure has caused no prejudice, since the Defence was already in possession of the same information provided by P-2428 in relation to the child soldiers [REDACTED] from YEKATOM’s Anti-Balaka group prior to the September 2019 confirmation hearing. Moreover, YEKATOM has actual knowledge of the children that were [REDACTED] from his group because [REDACTED].

3. *Second*, the Motion seeks declaratory relief, and requests the Chamber to draw an adverse inference or presumption regarding the reliability and probative value of evidence in advance of its submission, and before the trial has even commenced, without any legal authority for such a remedy or sanction.

## II. CONFIDENTIALITY

4. This Response is classified as “Confidential” as it refers to filings with the same classification. The Prosecution will file a public redacted version of this submission as soon as practicable.

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<sup>1</sup> ICC-01/14-01/18-681-Conf.

### III. SUBMISSIONS

#### A. Timing of the disclosure of P-2428's statement

5. As noted, P-2428's statement should have been disclosed sooner. However, its disclosure on 2 October 2020<sup>2</sup> precedes the final deadline by one month, and some five months prior to the scheduled start of evidence<sup>3</sup> in a case likely to last several years.

6. The pre-trial process of reviewing and disclosing a large volume of evidence while balancing article 68 obligations to ensure the protection of victims and witnesses in this case is complex. The implementation of more stringent security measures is often required before disclosing material related to witnesses on which the Prosecution intends to rely — as was its original intention regarding P-2428. Unfortunately, budgetary constraints and COVID-19 measures affecting operational capabilities of the Court, impacted the process, and the Prosecution was not able to [REDACTED] satisfy these requirements prior to the confirmation hearing. Thereafter, the Prosecution faced considerable difficulties in contacting P-2428 and, having elected not to rely on the witness, was unable to reach P-2428 until mid-September 2020, despite multiple earlier attempts.

7. Given the mixed nature of incriminating and article 67(2) information contained in P-2428's statement, the Prosecution acknowledges that it should have strived to disclose it sooner.<sup>4</sup> Nevertheless, given that substantially the same information was already in the hands of the Defence, the timing of the statement's ultimate disclosure is not prejudicial, as is further elaborated below.

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<sup>2</sup> ICC-01/14-01/18-671-Conf-Anx.

<sup>3</sup> ICC-01/14-01/18-589, para. 10.

<sup>4</sup> See ICC-01/14-01/18-595, para. 21.

## **B. No prejudice to the Accused's rights**

8. Contrary to the Motion, there is no prejudice to the rights of the Defence caused by the timing of the disclosure of P-2428's statement.

*i. The Defence already had substantially similar information in other disclosed statements*

9. In his statement, P-2428 provides his personal opinion on the ages of six<sup>5</sup> out of 60 individuals [REDACTED],<sup>6</sup> estimating that at least one of them was in fact below the age of 15.<sup>7</sup> He also describes his own involvement [REDACTED].<sup>8</sup> This information provided by P-2428 is not new. Similar information was made available to the Defence from several other sources well in advance of the commencement of the confirmation hearing, including in the statements of Prosecution witnesses P-1792, P-2442, and P-2475.

### P-1792's and P-2442's statements

10. Like P-2428, P-1792's and P-2442's statements provide evidence that some [REDACTED] children were supposedly not Anti-Balaka members, or under the age of 15 at the relevant time. P-2442 stated that some of the children [REDACTED] were 15 and older.<sup>9</sup> P-1792 stated that not all children selected for the [REDACTED] process were in, or associated with, the Anti-Balaka. [REDACTED].<sup>10</sup> Thus, P-1792's statement also suggests that YEKATOM has actual knowledge of the information he now claims

<sup>5</sup> CAR-OTP-2105-0970-R01, paras. 67-72.

<sup>6</sup> CAR-OTP-2071-0279-R01.

<sup>7</sup> CAR-OTP-2105-0970-R01, para. 69.

<sup>8</sup> CAR-OTP-2105-0970-R01, paras. 51-53, 60; *but see* para. 57.

<sup>9</sup> CAR-OTP-2105-0940-R01, paras. 109, 122.

<sup>10</sup> CAR-OTP-2115-0216, para. 50.

was withheld – namely that certain children [REDACTED] were not in his Anti-Balaka group.

11. A summary of P-1792's statements containing this information<sup>11</sup> was disclosed to the Defence on 9 August 2019.<sup>12</sup> Similarly, the statement of P-2442 was also provided to the Defence, with relevant portions unredacted,<sup>13</sup> on 14 August 2019.<sup>14</sup>

P-2475's statement

12. P-2475's statement also disclosed substantially similar information. In particular, P-2475 commented on certain photographs of purportedly [REDACTED] children, stating that several were not members of the Anti-Balaka.<sup>15</sup>

13. Although the version of P-2475's statement<sup>16</sup> disclosed on 14 August 2019<sup>17</sup> was heavily redacted in accordance with the "Prosecution's Urgent Request for the Non-Disclosure of Witness Identities",<sup>18</sup> the Defence incorrectly contends that it did not have timely access to this information because of the applied redactions.<sup>19</sup> However, the Motion overlooks the lesser redacted version,<sup>20</sup> which reveals the paragraphs that the Defence cites as relevant.<sup>21</sup> That version was disclosed on 16 September 2019<sup>22</sup> after necessary security measures were implemented. In short, the Defence was in possession of the relevant information from P-2475's statement *prior* to the commencement of the confirmation hearing.

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<sup>11</sup> CAR-OTP-2115-0216, para. 50.

<sup>12</sup> ICC-01/14-01/18-271-Conf-Anx.

<sup>13</sup> CAR-OTP-2105-0940-R01, paras. 109-125.

<sup>14</sup> ICC-01/14-01/18-274-Conf-Anx.

<sup>15</sup> CAR-OTP-2110-0556, paras. 200-202, 205.

<sup>16</sup> CAR-OTP-2110-0556-R01.

<sup>17</sup> ICC-01/14-01/18-274-Conf-Anx.

<sup>18</sup> ICC-01/14-01/18-267-Conf.

<sup>19</sup> ICC-01/14-01/18-681-Conf, para. 35.

<sup>20</sup> CAR-OTP-2110-0556-R02.

<sup>21</sup> ICC-01/14-01/18-681-Conf, para. 35, citing to paras. 200-202 and 205 of P-2475's statement at CAR-OTP-2110-0556.

<sup>22</sup> ICC-01/14-01/18-353-Conf-Anx.

14. For over a year, the Defence has been in possession of evidence provided by P-1792, P-2442, and P-2475 comprising substantially the same article 67(2) information as P-2428.

*ii. The exculpatory value of the information is marginal*

15. The ‘exculpatory’ value of the information provided by P-2428 is marginal at best.

16. *First*, P-2428 merely provides his personal opinion on the ages of just six out of 60 children [REDACTED]. This is neither inconsistent with, nor negates the presence of children under the age of 15 in YEKATOM’s group. Notably, even P-2428 estimates that at least one child [REDACTED] in YEKATOM’s group was in fact below the age of 15.<sup>23</sup> He also does not exclude that other children who took part in the [REDACTED] were members of YEKATOM’s group.

17. P-2428 is not alone in his observations. Indeed, evidence from a variety of reliable sources establishes that children under age 15 were indeed recruited in YEKATOM’s group. Multiple witnesses, including child soldiers,<sup>24</sup> insider witnesses,<sup>25</sup> and [REDACTED],<sup>26</sup> provide direct evidence of the presence and use of children under the age of 15 in YEKATOM’s group. Several of these witnesses specifically explain that some children [REDACTED] from YEKATOM’s group [REDACTED] were as young as 11<sup>27</sup> and 12<sup>28</sup> years old.

<sup>23</sup> CAR-OTP-2105-0970-R01, para. 69.

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].

<sup>27</sup> P-2082: CAR-OTP-2109-0452-R01, paras. 45, 73;

<sup>28</sup> P-2442: CAR-OTP-2105-0940-R01, para. 125; P-2018: CAR-OTP-2071-0259-R01, paras. 95-96.

18. Understood in light of the volume and quality of the evidence described above, P-2428's perception of the events is marginal at best and his narrative's value as exculpatory information, while disclosable under article 67(2), is largely insignificant.

*iii. YEKATOM has direct knowledge of the children that were demobilised*

19. YEKATOM has actual knowledge of the children in his Anti-Balaka group, [REDACTED].

20. YEKATOM was directly involved in the process leading up to the [REDACTED] of the children from his group, as were several of his subordinates, and he personally met with UNICEF [REDACTED].<sup>29</sup> During one meeting YEKATOM stated that [REDACTED].<sup>30</sup>

21. YEKATOM also attended the [REDACTED] held in [REDACTED].<sup>31</sup> [REDACTED].<sup>32</sup> [REDACTED].<sup>33</sup> YEKATOM also spoke to the children [REDACTED].<sup>34</sup>

22. [REDACTED].<sup>35</sup> [REDACTED].<sup>36</sup>

23. All three reasons above demonstrate that the timing of the disclosure of P-2428's statement is not prejudicial. The Defence was in possession of substantially similar information before the commencement of the confirmation hearing and were not deprived of using it to pursue their own investigations, or challenge the Prosecution's

<sup>29</sup> P-1974: CAR-OTP-2068-0222-R02, paras. 37-40; P-2018: CAR-OTP-2071-0259-R01, para. 53; P-1792: CAR-OTP-2075-1743-R01, paras. 21-23.

<sup>30</sup> P-1974: CAR-OTP-2068-0222-R02, para. 39.

<sup>31</sup> [REDACTED]. *See also* ICC-01/14-01/18-403-Conf-Corr, para. 152 and ICC-01/14-01/18-282-Conf-AnxB1, para. 360.

<sup>32</sup> *See* P-1974: CAR-OTP-2068-0222-R02, at 0229, paras. 42-46 and P-2018: CAR-OTP-2071-0259-R, at 0267-0269, paras. 56, 58-61, 63-66.

<sup>33</sup> *See* CAR-OTP-2068-0586 (video footage).

<sup>34</sup> P-1974: CAR-OTP-2068-0222-R02, at 0229, para. 45.

<sup>35</sup> P-2082: CAR-OTP-2109-0452-R01, paras. 37, 42.

<sup>36</sup> P-0808: CAR-OTP-2093-0010-R01, paras. 130, 136; P-2082: CAR-OTP-2109-0452-R01, para. 40.



evidence. Moreover, YEKATOM had direct knowledge of the children [REDACTED]. He personally saw these children at the time of their formal [REDACTED]. On this basis the relief sought should be denied.

### **C. The remedy requested has no legal basis**

#### *i. Declaratory relief*

24. The Defence requests declaratory relief in the form of a symbolic declaration formally finding a “disclosure violation”. As stated in the Prosecution’s previous submission, incorporated by reference, declaratory relief is not a remedy found in the statutory framework, and has no legal effect, definition, or consequence.<sup>37</sup>

25. An application for a disclosure violation should be one that is raised in furtherance of advancing a genuine interest in the case, and not one made for the purpose of trying to score technical violations to be counted up. The Trial Chamber in the *Karadžić* case noted with some disapproval, a similar strategy in its Decision on Accused’s 107<sup>th</sup> Disclosure Violation Motion:

“It is clear however, that the Accused is pursuing this issue as a litigation tactic through frivolous motions, and is not genuinely interested in furthering his case.”<sup>38</sup>

Although the Motion may not be frivolous here, the Defence seems to be following a similar tactic.

#### *ii. The sanction of an adverse inference or presumption is inappropriate*

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<sup>37</sup> ICC-01/14-01/18-581, para. 20.

<sup>38</sup> *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s 107<sup>th</sup> Disclosure Violation Motion, 14 March 2016, para. 15 <https://www.icty.org/x/cases/karadzic/tdec/en/160314.pdf>

26. The Defence requests the Chamber to “draw a presumption that the children listed [REDACTED], which was shown to Witness P-2428, were not enlisted in Mr. Yekatom’s group and/or were not under the age of 15 years old at the relevant time covered by the charges”.<sup>39</sup>

27. The Prosecution understands the request to comprise a form of sanction and, as such, has no legal basis. Further, it would contravene the statutory framework.

28. *First*, the Defence fails to point to any authority or statutory provision allowing a Chamber to draw a negative inference or presumption regarding an item of evidence before the start of trial and before the presentation of any evidence by the Parties has even begun.

29. *Second*, although the Motion does not challenge the admissibility or relevance of the [REDACTED], drawing a *conclusive* presumption as requested would run contrary to rule 64(1) of the Rules of Evidence and Procedure (“Rules”). This is because a conclusive presumption would operate to preclude the introduction of *other evidence* which would demonstrate the accuracy and validity of the [REDACTED].

30. Rule 64(1) mandates the Parties and Participants to raise issues “relating to the relevance or admissibility” of evidence “at the time when the evidence is submitted to a Chamber”. The Defence may not do so in advance.

31. As previously confirmed by this Chamber, rule 64(1):

“does not provide [...] for objections to be raised *prior* to the submission of evidence. It is therefore clear that the parties and participants cannot raise any such objections before the time of submission”.<sup>40</sup>

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<sup>39</sup> ICC-01/14-01/18-681-Conf, para. 36.

<sup>40</sup> ICC-01/14-01/18-602, paras. 15-16 (citing ICC-01/05-01/08-1386, paras. 48-49).

The reliability and probative value of any evidence to be relied on by the Parties is a matter to be adjudicated pursuant to the relevant statutory provisions. The requested sanction would effectively and improperly circumvent rule 64(1).

32. *Third*, the sanction sought is contrary to the statutory framework, and neither appropriate nor proportional to the violation. The late disclosure of P-2428's statement was not deliberate, as the timely disclosure of the substantially similar evidence of Prosecution witnesses clearly demonstrates. In addition, even if not disclosed as soon as practicable, the relevant information has nevertheless been provided to the Defence well before the start of trial, and no valid claim of prejudice lies. As noted, the Defence has had the relevant information in their possession for over a year; YEKATOM further has actual and constructive knowledge of such information; and the exculpatory value of the information is, in any event, at best marginal.

#### IV. RELIEF SOUGHT

33. For the above reasons, the Prosecution requests the Chamber to reject the Motion.



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**James Stewart, Deputy Prosecutor**

Dated this 6<sup>th</sup> day of January 2021  
At The Hague, The Netherlands