



Original: English

**No. ICC-01/14-01/18
Date: 18 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Decision on the Yekatom Defence Request Concerning 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 Ngaïssona*, having regard to Article 67(2) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Yekatom Defence Request Concerning Disclosure Violation’.

I. Procedural history and submissions

1. On 19 August 2019, the Office of the Prosecutor (the ‘Prosecution’) filed its document containing the charges against Mr Yekatom (the ‘DCC’)¹ and its pre-trial list of evidence.²
2. On 11 December 2019, Pre-Trial Chamber II (hereinafter ‘PTC II’) issued its decision on the confirmation of charges and committed Mr Yekatom for trial on the charges as confirmed (the ‘Confirmation Decision’).³ These charges include, *inter alia*:

directing attacks against the civilian population, pursuant to and prohibited by article 8(2)(e)(i) of the Statute, in Bangui, including Cattin and the Boeing market, starting on 5 December 2013, on the basis of the conduct pertaining to Counts 2 to 6 and 8, as set out in paragraphs 246-256 of the DCC and paragraphs 86-92 of the [Confirmation Decision] (Count 1);⁴

murder, pursuant to and prohibited by article 7(1)(a) of the Statute, for the killing of between five and 13 persons, including [Victim A], at the Boeing market, four Muslim persons in Cattin, and [Victim B] at the Boeing market, in the context of the attack on Bangui, including Cattin and Boeing, on 5 December 2013, as set out in paragraphs 250-251 of the DCC and paragraphs 87-89 of the [Confirmation Decision] (Count 2);⁵

murder, pursuant to and prohibited by article 8(2)(c)(i) of the Statute, for the killing of between five and 13 persons, including [Victim A], at the Boeing market, four Muslim persons in Cattin, and [Victim B] at the Boeing market, in the context of the attack on Bangui, including Cattin and Boeing,

¹ 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).

² 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.

³ 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 (corrected public redacted version notified the same day, ICC-01/14-01/18-403-Red-Corr).

⁴ Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, p. 100, (i).

⁵ Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, pp. 101-102, (i)(a).

on 5 December 2013, as set out in paragraphs 250-251 of the DCC and paragraphs 87-89 of the [Confirmation Decision] (Count 3);⁶

directing an attack against a building dedicated to religion, pursuant to and prohibited by article 8(2)(e)(iv) of the Statute, for the destruction of the Boeing mosque by 20 December 2013 at the latest, as set out in paragraph 254 of the DCC and paragraph 91 of the [Confirmation Decision] (Count 6).⁷

3. On 16 July 2020, the Chamber set the final disclosure deadline for 9 November 2020, directing the Prosecution to ‘review all the materials in its possession and disclose all materials falling under its disclosure obligations’.⁸
4. On 3 November 2020, the Prosecution disclosed P-1504’s transcribed statements (the ‘Statements’) as part of a disclosure package containing exculpatory information.⁹ The interview with the witness was carried out in February 2017 and April 2018.¹⁰
5. On 7 December 2020, the Chamber received the Yekatom Defence’s ‘Motion for Finding of Disclosure Violation of Exculpatory Material’ (the ‘Defence’ and the ‘Motion’ respectively).¹¹ It requests the Chamber to find that the Prosecution has violated its disclosure obligations by not disclosing the Statements that contain exonerating information concerning the allegations of (i) the destruction of the Boeing Mosque on or about 20 December 2013 and (ii) the killing of Muslim civilians on 5 December 2013 at the Boeing Market.¹² It adds that the Statements contradict evidence provided by other witnesses relied upon in the Confirmation

⁶ Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, p. 100, (ii)(a).

⁷ Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, p. 101, (iv).

⁸ Decision Setting the Commencement Date of the Trial, ICC-01/14-01/18-589, para. 10.

⁹ See Annex to the Prosecution’s Communication of the Disclosure of Evidence on 3 November 2020, ICC-01/14-01/18-711-Conf-Anx, pp. 49-52, entries 15 (CAR-OTP-2104-0708), 16 (CAR-OTP-2104-0718), 17 (CAR-OTP-2104-0758), 18 (CAR-OTP-2104-0767), 19 (CAR-OTP-2104-0774), 20 (CAR-OTP-2104-0789), 21 (CAR-OTP-2104-0816), 22 (CAR-OTP-2104-0833), 23 (CAR-OTP-2104-0842), 24 (CAR-OTP-2104-0880), 25 (CAR-OTP-2104-0890), 41 (CAR-OTP-2118-6570).

¹⁰ See CAR-OTP-2104-0708, CAR-OTP-2104-0718, CAR-OTP-2104-0758, CAR-OTP-2104-0767 and CAR-OTP-2104-0774, dated 7 April 2018; CAR-OTP-2104-0789, CAR-OTP-2104-0816, CAR-OTP-2104-0833, CAR-OTP-2104-0842 and CAR-OTP-2104-0880, dated 9 April 2018; CAR-OTP-2104-0890, dated 12 April 2018; CAR-OTP-2118-6570, dated 7 February 2017.

¹¹ Motion, ICC-01/14-01/18-753-Conf (public redacted version notified on 15 December 2020, ICC-01/14-01/18-753-Red).

¹² Motion, ICC-01/14-01/18-753-Red, para. 34; see further paras 43-49 (the killing of Muslim civilians on 5 December 2013), paras 50-59 (destruction of the Boeing Mosque).

Decision.¹³ The Defence argues that, had PTC II been aware of the exculpatory information contained in the Statements before issuing the Confirmation Decision, its assessment of the evidence underlying Counts 1, 2, 3 and 6 would have been different.¹⁴

6. The Defence further submits that the Statements were taken in April 2018 and no justification was provided why they were disclosed only in November 2020. It argues that ‘[i]t is no excuse for the failure to disclose an exculpatory document that the accused had the same information in other documents’.¹⁵
7. On the basis of the aforementioned, the Defence submits that it has been continually prejudiced by the non-disclosure of the Statements since the confirmation stage.¹⁶ It therefore requests the Chamber to draw a presumption that (i) the Boeing Mosque was destroyed at the latest on 8 December 2013 by members of the local population unrelated to Mr Yekatom’s group; and that (ii) the Boeing Market traders were combatants who were engaged in combat.¹⁷
8. On 9 December 2020, the Ngaïssona Defence informed the Chamber that it concurs with the arguments presented and the relief sought in the Motion.¹⁸
9. On 18 December 2020, the Prosecution responded to the Motion, acknowledging that the Statements contain both incriminatory evidence and information falling under Article 67(2) of the Statute and ‘should have been disclosed sooner’.¹⁹ It submits, however, that the value of the exculpatory information contained in the Statements is ‘marginal’ since the witness’s evidence is not credible and other evidence from reliable sources exists in support of the confirmed allegations.²⁰ It adds that the Defence was already in possession of other evidence containing

¹³ Motion, ICC-01/14-01/18-753-Red, paras 43-45, 48, 50, 55-57.

¹⁴ Motion, ICC-01/14-01/18-753-Red, paras 49, 58.

¹⁵ Motion, ICC-01/14-01/18-753-Red, para. 37.

¹⁶ Motion, ICC-01/14-01/18-753-Red, paras 3, 59, 61, 66-67.

¹⁷ Motion, ICC-01/14-01/18-753-Red, paras 3, 69.

¹⁸ Email from the Ngaïssona Defence, 9 December 2020, at 14:22.

¹⁹ Prosecution’s Response to the Yekatom Defence’s “Motion for Finding of Disclosure Violation of Exculpatory Material” (ICC-01/14-01/18-753-Conf), ICC-01/14-01/18-786-Conf (confidential redacted version and public redacted version notified on 24 December 2020, ICC-01/14-01/18-786-Conf-Red and ICC-01/14-01/18-786-Red2, respectively) (the ‘Prosecution Response’), paras 1, 5-6.

²⁰ Prosecution Response, ICC-01/14-01/18-786-Red2, paras 22-36.

exonerating information concerning the allegations of crimes at the Boeing Market and the destruction of the Boeing Mosque.²¹ On this basis, it argues that the timing of the disclosure has caused no prejudice to the Defence.²² It further submits that the Motion should be dismissed because it seeks remedies and/or sanctions that are without legal basis.²³

10. On the same day, the Common Legal Representatives of the Victims of Other Crimes (the ‘CLR V’) filed their response to the Motion.²⁴ The CLR V do not respond to the issue of the disclosure violation which, they submit, must be litigated between the parties.²⁵ However, they provide their views in respect of the Defence’s request to draw a presumption on account of the disclosure violation, arguing that it would have a ‘clear impact on the interests of the Victims they represent’.²⁶ The CLR V submit that the Motion should be dismissed *in limine* for lack of legal basis.²⁷

II. Analysis

11. At the outset, the Chamber notes that the Prosecution acknowledges that the Statements contain information falling under Article 67(2) of the Statute and that, accordingly, they should have been disclosed at an earlier stage.²⁸
12. The Chamber notes that the witness provides information of an exculpatory nature.²⁹ Therefore, the Statements should have been disclosed ‘as soon as practicable’ pursuant to Article 67(2) of the Statute.

²¹ Prosecution Response, ICC-01/14-01/18-786-Red2, paras 2, 10-17 (Boeing Market), 18-21 (Boeing Mosque), 37.

²² Prosecution Response, ICC-01/14-01/18-786-Red2, paras 2, 7-8, 10, 18, 37.

²³ Prosecution Response, ICC-01/14-01/18-786-Red2, paras 3, 38-46.

²⁴ Response by the Common Legal Representatives of the Victims of the Other Crimes to the “Motion for Finding of Disclosure Violation of Exculpatory Material”, ICC-01/14-01/18-784-Conf (the ‘CLR V Response’).

²⁵ CLR V Response, ICC-01/14-01/18-784-Conf, paras 2, 5.

²⁶ CLR V Response, ICC-01/14-01/18-784-Conf, paras 2, 7.

²⁷ CLR V Response, ICC-01/14-01/18-784-Conf, paras 2, 7-8. *See further* paras 9-14.

²⁸ Prosecution Response, ICC-01/14-01/18-786-Red2, paras 1, 5-6.

²⁹ CAR-OTP-2104-0718-R01, at 0748, 0754-0755; CAR-OTP-2104-0789-R01, at 0805-0806, 0808-0809, 0812-0813, 0815; CAR-OTP-2104-0816-R01, at 0822-0825, 0828-0830; CAR-OTP-2104-0842, at 0855-0856, 0862-0864.

13. The Chamber further notes that the Statements contain information concerning the protected status of the victims of the crimes under Counts 2 and 3, which should have been disclosed in line with the Chamber’s direction of 13 July 2020.³⁰ The Chamber also recalls that, as early as January 2019, PTC II ordered the Prosecution to disclose all exculpatory evidence ‘*immediately* after having identified any such evidence, unless some justifiable reasons prevent [it] from doing so’.³¹ Further, in August 2019, it directed the Prosecution to verify whether it had in its possession ‘any additional evidence that falls within the scope of article 67(2) of the Statute’.³²
14. The Chamber notes that the Prosecution took the Statements in February 2017 and April 2018.³³ Despite being in its possession since then, the Prosecution did not disclose them to the Defence until November 2020. The Chamber further notes that the Prosecution has failed to provide any specific reasons justifying late disclosure, besides general submissions related to the volume of material under review and the mixed nature of the Statements.³⁴
15. For these reasons, the Chamber finds that the Statements were not disclosed ‘as soon as practicable’ as required under Article 67(2) of the Statute. Accordingly, the Prosecution violated its statutory disclosure obligations as well as the Chamber’s and PTC II’s orders mentioned above. The Chamber is concerned that, since the referral of the case to the Chamber, the Prosecution has violated its disclosure obligations on several occasions.³⁵
16. The Chamber will now turn to the prejudice, if any, caused to the Defence. The Chamber recalls that it is not its role to pronounce itself on whether this violation

³⁰ See Decision on the Yekatom Defence Motion for Additional Details, ICC-01/14-01/18-585, para. 28.

³¹ Decision on Disclosure and Related Matters, 23 January 2019, ICC-01/14-01/18-64-Conf (with one public annex) (public redacted version notified the same day, ICC-01/14-01/18-64-Red), para. 16.

³² Decision on the Yekatom Defence Motion for Disclosure of Exculpatory Material, 28 August 2019, ICC-01/14-01/18-296, para. 14, p. 6.

³³ See *above* paragraph 4.

³⁴ Prosecution Response, ICC-01/14-01/18-786-Red2, para. 6.

³⁵ See *e.g.* Decision on the Yekatom Defence Motion for Finding of Disclosure Violation of Exculpatory Material, 25 November 2020, ICC-01/14-01/18-740-Conf (the ‘Decision on Disclosure Violation (P-2428)’); Decision on the Yekatom Defence Request Concerning Disclosure Violation and Disclosure of Exculpatory Material, 22 July 2020, ICC-01/14-01/18-595 (the ‘Decision on Disclosure Violation (P-1716)’); Decision on the Yekatom Defence Motion for Disclosure of Prior Statement of Witness P-REDACTED, 15 June 2020, ICC-01/14-01/18-551-Red.

has caused any prejudice to the accused during the pre-trial proceedings.³⁶ Therefore, the Chamber will limit its assessment to the question whether this violation has caused any prejudice to the accused's rights at trial, warranting remedies.

17. First, the Chamber notes that the Statements were disclosed to the Defence on 3 November 2020, prior to the final disclosure deadline of 9 November 2020 and more than three months before the scheduled commencement of the presentation of evidence.³⁷ Second, the Chamber notes that by mid-October 2019, the Defence had access to other witness statements providing substantially similar information to that contained in the Statements.³⁸
18. Finally, while the Prosecution is not calling P-1504 to testify at trial, the Chamber notes that several other witnesses will testify in relation to Counts 2, 3 and 6. The Chamber thus considers that the parties will be able to explore any issues relevant to, *inter alia*, Counts 2, 3 and 6 during the testimony of witnesses who will testify on these counts and in the parties' subsequent submissions.
19. In these circumstances, the Chamber considers that the prejudice resulting from delayed disclosure of the Statements is 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 to the Defence and that no further remedies are warranted.

³⁶ See also Decision on Disclosure Violation (P-1716), ICC-01/14-01/18-595, para. 18; Decision on Disclosure Violation (P-2428), ICC-01/14-01/18-740-Conf, para. 15.

³⁷ Order Setting the Commencement Date of the Prosecution's Presentation of Evidence, 13 January 2021, ICC-01/14-01/18-817.

³⁸ See e.g. P-2125, CAR-OTP-2082-0299-R03, at 0308-0309, paras 54-55 (R01 version disclosed on 15 October 2019); P-1339, CAR-OTP-2041-0741-R01, at 0751-0752, paras 72-73 (disclosed on 15 October 2019); P-1437, CAR-OTP-2047-0257-R02, at 0266, para. 72 (R01 version disclosed on 13 June 2019); P-2034, CAR-OTP-2073-0824-R01, at 0832, para. 73 (disclosed on 14 August 2019). See further transcript of hearing, 23 September 2019, ICC-01/14-01/18-T-008-Red2-ENG, pp. 62-63.


FOR THESE REASONS, THE CHAMBER HEREBY

FINDS that the Prosecution violated its disclosure obligations pursuant to Article 67(2) of the Statute;


REJECTS the remainder of the Motion; and

ORDERS the CLRV to file a public redacted version of their response within one week of notification of the present decision.

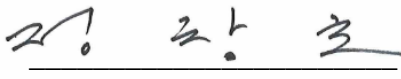
Done in both English and French, the English version being authoritative.



Judge Péter Kovács



Judge Bertram Schmitt
Presiding Judge



Judge Chang-ho Chung

Dated 18 January 2021

At The Hague, The Netherlands