

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **4 May 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 with Confidential Annex

**Public redacted version of "Motion for Disclosure of Prior Statement of
Witness [REDACTED]" 4 May 2020, ICC-01/14-01/18-506-Conf**

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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Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) hereby moves, pursuant to Article 67(2) for an order requiring the Prosecution to disclose the statement given by Witness [REDACTED] in [REDACTED] in connection with the [REDACTED] case, and to make a finding that the failure to disclose the statement violated the Prosecution’s disclosure obligations.¹
2. The Defence contends that the statement is exculpatory because it either confirms the witness’ involvement in the fabrication of evidence or it contains his denial [REDACTED]. Under either scenario, the statement is relevant to Witness [REDACTED] credibility.

RELEVANT PROCEDURAL HISTORY

3. On 29 August 2019, the Defence filed a motion with the Pre-Trial Chamber alleging that the Prosecution had violated its obligations under Article 67(2) by failing to disclose that Witness [REDACTED] had been involved in the fabrication of evidence and seeking an order disclosing the withheld material.²
4. On 2 September 2019, the Prosecution responded, acknowledging that evidence that witness [REDACTED] engaged in the fabrication of evidence was exculpatory, but contending that the information was already available to the Defence from public filings and from the fact that [REDACTED]case.³
5. On 3 September 2019, the Trial Chamber found that the Prosecutor has failed to fully discharge her obligation to disclose information relevant to Witness [REDACTED]and directed the Prosecutor to disclose any information pertaining to [REDACTED]and falling under article 67(2) of the Statute that

¹ The Defence uses the term “statement” to denote the product of the Prosecution’s interview with Witness [REDACTED]. If the interview was recorded, the statement will be reflected in a transcript.

² [REDACTED], Public redacted version: [ICC-01/14-01/18-301-Red.](#)

³ [REDACTED].

has not been disclosed to the Defence, while respecting the protective measures ordered in relation to this witness in other proceedings.⁴

6. On 10 September 2019, instead of disclosing the exculpatory material as required, the Prosecution filed a “notice” indicating it was unable to do so absent an order from the [REDACTED] Chamber. It said that:

In these circumstances, disclosing the witness statements of [REDACTED] and the correspondence of the anonymous informant regarding [REDACTED] culpable involvement in the context of the [REDACTED] case as **well as the prior statement of [REDACTED]** “while respecting the protective measures ordered in relation to this witness” (and also *other* witnesses in that case), is untenable absent a judicial order.⁵

7. On 17 September 2019, the Defence responded, requesting that the Prosecution be immediately ordered to disclose the material.⁶
8. The Confirmation of Charges hearing commenced on 19 September 2019 without the Chamber having resolved this issue.
9. On 11 December 2019, in its Decision on the Confirmation of Charges against Alfred Yekatom and Patrice Edouard Ngaïssona, the Chamber reiterated its finding that the Office of the Prosecutor had failed to fully discharge its obligation to disclose information relevant to Witness [REDACTED], refrained from entering findings based entirely on [REDACTED], and only referred to this Witness’ evidence for the purpose of corroborating findings otherwise established to the relevant standards.⁷
10. On 13 December 2019 the Defence sent an *inter partes* disclosure request whereby it pointed out that witness [REDACTED] referred in his statement to a previous interview held in [REDACTED] with the Office of the Prosecution.

⁴ [REDACTED], Public redacted version: [ICC-01/14-01/18-315-Red.](#)

⁵ [REDACTED].

⁶ [REDACTED], Public redacted version: [ICC-01/14-01/18-349-Red.](#)

⁷ [REDACTED], Public redacted version: [ICC-01/14-01/18-403-Red.](#)

The Defence requested disclosure of all interview products from the said meeting.⁸

11. On 17 December 2019, the Defence applied to the Pre-Trial Chamber to vary the protective measures from the [REDACTED] case to facilitate the disclosure of the exculpatory material. It specified that among the material requested was the prior statement of Witness [REDACTED] concerning the fabrication of evidence, noting that:

[REDACTED]. The witness also confirmed to the Defence that he had been interviewed by the Prosecution on this subject. This prior statement, in which [REDACTED] either acknowledges his participation in the [REDACTED], or falsely denies it, or both, is the highest degree of exculpatory evidence and is the most probative piece of exculpatory material concerning his reliability for purposes of the confirmation hearing. Therefore all statements, transcripts, recordings, investigator's notes and e-mails of [REDACTED] concerning the [REDACTED] in the [REDACTED] case should be disclosed.⁹

12. The Defence added that:

To the extent that the information would reveal the identities of protected witnesses [REDACTED] in the [REDACTED] case, the names can be redacted and pseudonyms substituted in their place.¹⁰

13. On 24 December 2019, the Prosecution responded, indicating it had no objection to the Chamber's granting access to the prior statements and confidential transcripts of four witnesses who provided information concerning [REDACTED] involvement in the fabrication of evidence, as well as the unredacted judgement in the [REDACTED] case. It made no mention of Witness [REDACTED] prior statement,¹¹ nor did it list it in the annex to its response containing what it considered being the relevant material.¹²

⁸ A copy of this *inter partes* correspondence can be furnished to the Chamber upon request.

⁹ [REDACTED].

¹⁰ *Id.*, para. 21.

¹¹ [REDACTED], Public redacted version: [ICC-01/14-01/18-415-Red](#).

¹² [REDACTED].

14. On 22 January 2020, the Pre-Trial Chamber declined to decide the motion to vary the protective measures and suggested that it be considered by the Trial Chamber.¹³
15. On 3 March 2020, the Prosecution responded to the Defence disclosure request of 19 December 2019 by indicating that all responsive documents registered under the relevant interview have been disclosed.¹⁴

RELEVANT PROVISION

16. Article 67—rights of the accused

2. 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 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

17. For purposes of this motion, Mr. Yekatom must demonstrate that the material he seeks—the statement of Witness [REDACTED] in [REDACTED] (1) is within the Prosecutor's possession or control; and (2) tends to affect the credibility of prosecution evidence.

(1) Possession of the Prosecutor

18. Witness [REDACTED] and the Prosecution both refer to a previous meeting and interview held in [REDACTED].¹⁵ The Prosecution has confirmed being in possession of a prior statement of Witness [REDACTED] in connection with

¹³ [REDACTED], Public redacted version: [ICC-01/14-01/18-422-Red](#).

¹⁴ A copy of this *inter partes* correspondence can be furnished to the Chamber upon request.

¹⁵ CAR-OTP-2074-1965-R01, pages 1972-1973, 1979.

the [REDACTED] case.¹⁶ In addition, on 9 November 2019, Witness [REDACTED] confirmed to a member of the Defence team that he had been interviewed in [REDACTED] by the Office of the Prosecutor concerning the issue of the fabrication of evidence in the [REDACTED] case and the interview had been recorded.¹⁷

(2) Exculpatory Nature

19. The Prosecution has conceded that the involvement of Witness [REDACTED] in the fabrication of evidence is relevant to his credibility and therefore comes within Article 67(2)'s definition of exculpatory material.¹⁸ Therefore, if Witness [REDACTED] statement confirms his involvement in the fabrication of evidence in the [REDACTED] case, that statement is relevant to his credibility.
20. On the other hand, if Witness [REDACTED] statement denies his involvement in the fabrication of evidence, such statements would contradict the findings in the [REDACTED] that Witness [REDACTED] recruited Witnesses [REDACTED] to falsely testify at the trial of [REDACTED] and offered to pay them money and relocate them to Europe if they did so.¹⁹ This too would be exculpatory as it would tend to show that Witness [REDACTED] lied to the Prosecution about his involvement in the fabrication of evidence and therefore be relevant to his credibility.
21. Therefore, the exculpatory nature of Witness [REDACTED] statement is established.

¹⁶ [REDACTED].

¹⁷ An English translation of the relevant excerpt of the recording of the Defence interview is attached as Confidential Annex A.

¹⁸ [REDACTED].

¹⁹ [REDACTED].

(3) Violation of Article 67(2)

22. The Prosecution has gone to great lengths to avoid disclosure of this statement, which has been in its possession for many years. First, it claimed that an order modifying protective measures in the [REDACTED] case would be required for it to disclose it.²⁰ When the defence sought to modify the protective measures, the Prosecution did not include the statement in the items that would be disclosed if the protective measures were modified.²¹ Finally, when the Defence sought disclosure of the [REDACTED] interview, the Prosecution claimed to have disclosed all previous interviews or statements.²²
23. The Defence now seeks an order from the Trial Chamber requiring the Prosecution to disclose Witness [REDACTED] statement. As it suggested during the proceedings before the Pre-Trial Chamber,²³ any reference to protected witnesses can be redacted and the witnesses referred to by their pseudonyms. The statement of Witness [REDACTED] can thus be disclosed without the necessity of modifying any of the witness protective measures in the [REDACTED] case, or infringing upon any Rule 74 assurances that were given to witnesses in that case.

(4) In Camera Inspection

24. Should the Prosecution claim that the statement is not of an exculpatory nature, the Single Judge is requested to review the statement *in camera* and decide if it should be disclosed to the Defence.

²⁰ [REDACTED].

²¹ [REDACTED].

²² A copy of this *inter partes* correspondence can be furnished to the Chamber upon request.

²³ [REDACTED].

(5) Finding of Violation

25. There has never been a *bona fide* justification for failing to disclose [REDACTED] statement. In addition to ordering the disclosure of the transcript or statement, the Trial Chamber is requested to make an express finding that the Prosecution has violated its obligation to disclose exculpatory material as soon as practicable. Such a finding will serve as a deterrent to future violations in this case.

CONFIDENTIALITY

26. This motion is filed confidentially because its contents may reveal the identity of a Prosecution witness. A public redacted version is being filed simultaneously.

CONCLUSION

27. The Prosecution's failure to disclose the prior statement of Witness [REDACTED] relating to the fabrication of evidence in the [REDACTED] case was in violation of its obligation under Article 67(2). The Chamber should so find, and order the immediate disclosure of the statement.

RESPECTFULLY SUBMITTED ON THIS 4th DAY OF MAY 2020



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