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**International
Criminal
Court**

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Date: **3 May 2023**

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 *Ex Parte* Annex A only available to the Prosecution, the
Ngaïssona Defence and the Yekatom Defence;**

And Confidential Annex B

**Public Redacted Version of the “Motion for Finding of Disclosure
Violation in Relation to Witness P-2018 Material”, ICC-01/14-01/18-1852-
Conf, 1 May 2023**

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. The Defence for Mr. Yekatom (“Defence”) hereby requests the Chamber to find that the Prosecution violated its disclosure obligation by maintaining a redaction to P-2018’s phone number in document CAR-OTP-2071-0298-R01 at page 0301 (the “Document”), and by providing the Defence with a version of a list of alleged child soldiers that was missing important information (CAR-OTP-2115-0369).
2. Indeed, the Defence argues that (i) the redaction applied in the Document is in contravention with the redaction protocol adopted in this case; and (ii) the missing information should have been disclosed to the Defence pursuant to Rule 77 of the Rules of Procedure and Evidence and/or Article 67(2) of the Statute.

PROCEDURAL HISTORY

3. On 13 March 2018, P-2018 provided to the Prosecution the Document which was annexed to his statement.
4. On 13 June 2019, the Prosecution disclosed the Document to the Defence with a redaction applied to the phone number of P-2018.¹
5. On 16 July 2019, P-2018 provided the Prosecution with a list of “names of children that were allegedly recruited by the Anti-Balaka in Bangui and the Lobaye Province during the events of 2013/2014”; this list is named “[REDACTED]” and is registered under ERN CAR-OTP-2115-0369 (the “List”).²

¹ Document CAR-OTP-2071-0298-R01 disclosed as part of the Pre-Confirmation INCRIM package 11.

² See CAR-OTP-2135-4183-R01, para. 7 for details on the provision of the List by P-2018 to Prosecution’s investigators.

6. On 8 April 2020, the Defence in the “Yekatom Defence Submissions for First Status Conference” identified as an important issue the redaction by the Prosecution of phone numbers belonging to witnesses.³ This concern was reiterated in further submissions.⁴
7. On 8 October 2020, the Decision on Protocols at Trial was issued by the Chamber, including the “protocol governing the redaction of evidence at trial”.⁵
8. Between 6 November 2020 and 17 March 2023, the Prosecution disclosed on the e-Court and Nuix platform five different redacted versions of the List provided by witness P-2018.⁶ This List was only disclosed in a PDF format of 13 pages.
9. On 3 April 2023, following a Defence request to obtain the Excel version of the List, the Prosecution responded that such document could not be provided as the redactions applied on it would “not be permanent”.⁷ The Defence consequently requested on 4 April 2023 the Prosecution to lift the redactions applied and disclose an unredacted version of the PDF as well as the excel version.⁸
10. On 5 April 2023, the Defence requested the Prosecution to disclose all phone numbers in their possession attributed to P-2018.⁹
11. On 12 April 2023, the Prosecution provided a courtesy copy of the unredacted List in an excel format;¹⁰ formal disclosure on Nuix of the unredacted List was done on 14 April 2023.¹¹

³ [ICC-01/14-01/18-472](#), paras 70-75.

⁴ ICC-01/14-01/18-587-Red, para. 6.

⁵ [ICC-01/14-01/18-677](#) and [ICC-01/14-01/18-677-Anx3](#).

⁶ The first version (CAR-OTP-2115-0369-R01) was disclosed in Pre-Trial INCRIM package 60 ; the fifth version (CAR-OTP-2115-0369-R05) was disclosed in Trial INCRIM package 147.

⁷ Email from the Prosecution to the Defence dated 3 April 2023 14:08.

⁸ Email from the Defence to the Prosecution dated 4 April 2023 11:05.

⁹ Annex A, page 6.

¹⁰ Annex A, page 5.

¹¹ CAR-OTP-2115-0369 disclosed in Trial INCRIM package 149.

12. On 13 April 2023, the Prosecution declined to provide the information sought on P-2018's phone numbers.¹²
13. On the same day, following a follow-up from the Defence, the Prosecution provided information on contacts between P-2018 and P-2580; this reply did not contain information on other phone numbers that the Prosecution might have in their possession for P-2018.¹³
14. On 17 April 2023, P-2018 was called to testify closely followed by P-1974.

SUBMISSIONS

15. The Defence will first address the disclosure violation regarding P-2018's phone number which remains redacted in document CAR-OTP-2071-0298-R01 (I); and will then address the violation regarding the List CAR-OTP-2115-0369 will be developed (II).

I. On Document CAR-OTP-2071-0298-R01

A. On the materiality of P-2018's phone number to the preparation of the Defence

16. The Defence argues that P-2018's phone number mentioned in the Document should have been disclosed to the Defence pursuant to Rule 77 of the Rules of Procedure and Evidence.
17. Rule 77 provides that, subject to the restrictions on disclosure as provided for in the Statute and in Rules 81 and 82, the Defence is entitled to inspect documents in the possession or control of the Prosecution that are material to its preparation. The Appeal Chamber ruled that the term "material to the preparation of the defence" must be interpreted broadly.¹⁴

¹² Annex A, page 4.

¹³ Annex A, pages 2-3.

¹⁴ Prosecutor v. Lubanga, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, [ICC-01/04-01/06-1433](#), paras. 77-78.

18. As mentioned above, the Prosecution disclosed to the Defence a redacted version of the Document, with a redaction applied to P-2018's phone number. As part of its preparation for P-2018's testimony the Defence conducted open source research on the internet, which led to the discovery on 14 April 2023 of the same document that P-2018 provided to the Prosecution in March 2018, with his phone number visible.¹⁵
19. It should first be noted that P-2018's phone number present in the Document was not previously known to the Defence. Up until the discovery of this number in the open source document, the Defence was thus not in a position to verify, in the call data records ("CDR") disclosed thus far, whether P-2018 had contacts with persons of interest of this case through this new phone number.
20. A preliminary analysis of telecommunication data relevant to the case shows that P-2018, through this previously unknown phone number, was in contact with another witness, [REDACTED].¹⁶ These calls between two key witnesses of Count 29 demonstrates, at the very least, that the phone number redacted in the Document was material to the preparation of the defence.

B. On the unwarranted redaction of P-2018's phone number in the Document

21. The Prosecution redacted P-2018's phone number in the Document using category "B.1"¹⁷ i.e. : recent contact information of witnesses, insofar as necessary to protect the safety of the witness.¹⁸
22. The Defence recalls that the Chamber clarified that "*redaction of identifying information of a witness's family member is only permitted under the Redaction Protocol when the identity is of no relevance to a known issue of the case*"; the Chamber

¹⁵ CAR-D29-0001-0521 at 0525, disclosed on 14 April 2023 in Trial D29 package 64.

¹⁶ See Call Sequence Table CAR-D29-0004-3902, disclosed on 14 April 2023 in Trial D29 package 64.

¹⁷ CAR-OTP-2071-0298-R01 at 0301.

¹⁸ [ICC-01/14-01/18-677-Anx3](#), para. 3.

also quoted Trial Chamber X who ruled that that *“identifying information of individuals [...] who were physically present at the scene of an alleged crime or individuals who have in any other way acquired or established knowledge of the events or circumstances part of a witness’s narrative cannot be redacted pursuant to these two categories [B.2 and B.3] as no standard justification applies”*.¹⁹ The Chamber then expanded this reasoning to redaction category B.1, i.e. that used by the Prosecution on P-2018’s phone number.²⁰

23. In light of the known importance of the various communications between witnesses related to Count 29,²¹ including contemporaneously and after their provision of a statement to Prosecution investigators, it is submitted that the non-disclosure of P-2018’s phone number contained in the Document was both a violation of the disclosure obligations of the Prosecution and a violation of the Chamber’s directions on redactions.
24. Indeed, the redacted information was merely a phone number, information which is less sensitive than a current address for example, especially given that the Defence was already aware of the identity of P-2018. In these circumstances it cannot be argued that the redaction was “necessary to protect the safety of the witness”.
25. Moreover, the fact that P-2018’s phone number is [REDACTED] containing the name of another Prosecution witness, [REDACTED], should also have warranted disclosure of this information to the Defence instead of its redaction.²² Incidentally, the Defence is also of the view that redaction of [REDACTED] was not warranted in order to “protect the safety of the witness” as his identity was already known.

¹⁹ [ICC-01/14-01/18-677](#), para. 71 citing Prosecutor v. Al Hassan, Decision on the evidence disclosure protocol and other related matters, 30 December 2019, [ICC-01/12-01/18-546](#), para. 22 fn. 19.

²⁰ [ICC-01/14-01/18-677](#), para. 72.

²¹ See as an example [ICC-01/14-01/18-1728-Conf-Exp](#), para. 25; Public Redacted Version [ICC-01/14-01/18-1728-Red](#).

²² CAR-D29-0001-0521 at 0525.

26. It is finally submitted that this redaction should have been lifted by the Prosecution as part of its ongoing obligation to “review the redactions applied to ensure that they remain justified”.²³ In concrete terms this obligation means that the Prosecution must keep the redactions under review and amend them if circumstances change, as stated by the Appeals Chamber.²⁴ This obligation was unfortunately not respected in the case of this redaction.
27. In light of the above, the Defence respectfully requests the Chamber to find that the Prosecution violated its disclosure obligation by failing to disclose an unredacted version of the Document CAR-OTP-2071-0298-R01; and to order the Prosecution to disclose an unredacted version of the Document.

II. On the List CAR-OTP-2115-0369

A. On the issues affecting the List

28. The Defence avers that the Prosecution violated its disclosure obligations in relation to the List, as the PDF versions of the List provided between November 2020 and March 2023 were missing crucial information that is exculpatory and/or material to the preparation of the Defence, which is only present in the Excel version of the List provided to the Defence in April 2023.
29. *First*, the Defence notes that the Excel sheet is classified by tabs that are not reflected in the PDF version.
30. It is also argued that by only providing a PDF version, the Prosecution also deprived the Defence to fully review the document by using all the features that an Excel program allows i.e. sort the data applying a specific filter, apply a rule to quickly find all the duplicates in a document, etc.

²³ [ICC-01/14-01/18-677](#), para. 73.

²⁴ Prosecutor v. Gbagbo & Blé Goudé, Public Redacted Version of Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017, [ICC-02/11-01/15-915-Red](#), para. 62

31. *Second*, the Excel version of the List also allowed the discovery of a formula in the tab “[REDACTED]” listing 60 children, which formula appears in column G (“*Annee de naissance*”). This formula shows that the year of birth of all 60 children was not manually typed, but is instead the result of an automatic subtraction of the number in column H (“*Age*”) from the year 2015 (see screenshot below, with formula “=2015-H3” visible). The year of birth for the 60 children bears an additional error depending on the month of birth, or on the date at which the age was entered in the document, as the subtraction is consistently done from the year 2015 (and thus makes not distinction on the basis of this information).²⁵ In any event it is clear that the year of birth was not the result of a specific research or data collection done by the creator of the List.

[REDACTED]

32. *Third*, certain information contained in the Excel version of the List was missing from the PDF version of the List disclosed.²⁶ Two examples of such omissions can be found in the PDF version of the List at page 0369_12 where the column “*Nom du pere / Tuteur*” for lines 3 & 6 indicates respectively the names “[REDACTED]” et “[REDACTED]”; however in the Excel version of the List, in the tab “[REDACTED]” the names are complete, respectively indicated as “[REDACTED]” and “[REDACTED]”.

B. On the exculpatory nature and/or materiality of the missing information

33. The issues mentioned above are particularly grave in light of the importance of the List in relation to Count 29. Indeed, this List was provided by P-2018, one of the main witnesses of this charge and contains hundreds of different names of “*children that were allegedly recruited by the Anti-Balaka in Bangui and the Lobaye*

²⁵ See also ICC-01/14-01/18-T-226-FRA RT at 14:08:05

²⁶ See as an example Annex B, page 3.

*Province during the events of 2013/2014”.*²⁷ The List is also used by the Prosecution in its Trial Brief to aver that “*at least 15 children under the age of 15 years at the time of their demobilization*”,²⁸ which corresponds to one of the criteria necessary for a conviction to be pronounced for the crime of using, conscripting or enlisting children.

34. On its own, this information mitigates the guilt of the accused for several of the alleged child soldiers and affects the credibility of prosecution evidence that was presented through P-2018. The Defence argues that the information missing from the PDF version of the List disclosed is potentially exculpatory or at the very least material to its preparation. By disclosing the PDF version of the list the Prosecution inadvertently edited the original document which was only disclosed a few days before the testimony of the witness.
35. Indeed, the fact that the year of birth of children was the result of an unexplained formula in the Excel document, and consequently not at all verified as implied by the document,²⁹ should be considered as exculpatory pursuant to Article 67(2) of the Statute as it mitigates the guilt and affects the credibility of the testimony of P-2018 and the content of this piece of evidence.
36. Moreover, it is recalled that on 15 June 2020, the Defence filed its Motion for additional details, requesting to be provided with the identity of the alleged victims of Count 29;³⁰ this request was rejected.³¹ In order to ensure that Mr. Yekatom’s trial rights are fully respected the Defence has had to conduct extensive (and ongoing) investigations to demonstrate, as it has done on multiple occasions since the beginning of the trial, that children present on

²⁷ CAR-OTP-2135-4183-R01, para. 7.

²⁸ ICC-01/14-01/18-723-Conf, para. 487, fn. 1237.

²⁹ Columns M and N of the Excel version of the List, in tab « [REDACTED] », indicate respectively « Date verification » and « Lieu de verification ».

³⁰ ICC-01/14-01/18-554-Conf, paras 30-40. Public Redacted Version : [ICC-01/14-01/18-554-Red](#).

³¹ [ICC-01/14-01/18-585](#).

various documents were over 15 years old in 2013-2014 and/or were never part of Mr. Yekatom's group.

37. As these investigations entail finding documents and/or individuals close to the alleged child soldiers, the missing information regarding the names of their parents, as detailed in paragraph 32 above, was necessarily material to the preparation of the Defence. While another document in the possession of the Defence contained the full name of [REDACTED] family member,³² it should be noted that the information regarding the relationship between [REDACTED] and [REDACTED] is only present in the Excel version of the List.
38. While the removal of information appears to result from the conversion of the original Excel List into PDF format, and is certainly not intentional on the part of the Prosecution, the missing information that should have been disclosed nevertheless prejudiced the Defence, as it spent considerable time and resources analyzing the List than it should have, should proper disclosure have occurred.
39. Consequently, as the Excel version of the List was within the control of the Prosecution,³³ the Defence respectfully requests the Chamber to find that the Prosecution violated its disclosure obligation in relation to the List CAR-OTP-2115-0369.
40. Moreover, as a way to cure this violation, the Defence respectfully requests the Chamber to reject the Prosecution's request for formal submission of this item.³⁴
41. This remedy is warranted to ensure the fairness in these proceedings. Indeed, the Defence spent time and resources investigating information contained within this document due to the Prosecution's use of this document in its Trial

³² See CAR-OTP-2071-0279-R01, line 3.

³³ See ICC-01/14-01/18-1566-Conf-Corr, para. 7.

³⁴ Email sent by the Prosecution on 25 April 2023 at 13:36 'Prosecution submission of evidence following the examination of P-2018'.

Brief.³⁵ Yet, and because of this the Prosecution failure to disclose the item in its original form, the Defence was doing so with an incomplete picture as to the reliability and provenance of this document.

CONFIDENTIALITY

42. The present request is filed on a confidential basis due to the presence of screenshot of confidential evidence. Annex A of the present request is classified as confidential *ex parte* as it contains *inter partes* emails between the Prosecution and the Defence. Annex B is classified confidential as it contains personal information on several individuals. A public redacted version of the document will be filed in due time.

RELIEF SOUGHT

43. In light of the above, the Defence respectfully requests Trial Chamber V to:
- FIND** that the Prosecution violated its disclosure obligation in relation to the Document CAR-OTP-2071-0298-R01 and the List CAR-OTP-2115-0369 ;
- ORDER** the Prosecution to disclose an unredacted version of CAR-OTP-2071-0298-R01.
- DENY** the Prosecution formal submission of CAR-OTP-2115-0369.

RESPECTFULLY SUBMITTED ON THIS 3rd DAY OF MAY 2023



Me Mylène Dimitri
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³⁵ See para. 33 above.