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

Public

**Public redacted version of “Prosecution's Response to “Motion for Finding of
Disclosure Violation in Relation to Witness P-2018 Material
(ICC-01/14-01/18-1852-Conf)””**

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the YEKATOM Defence’s “Motion for Finding of Disclosure Violation in Relation to Witness P-2018 Material” (“Motion”),¹ regarding the alleged disclosure violation in relation to CAR-OTP-2071-0298-R01, a [REDACTED] document (“[REDACTED] form”), and CAR-OTP-2114-0369 (“Excel File”), and allow the formal submission of the Excel File, or in the alternative, its PDF version.

2. The information redacted from the [REDACTED] form or otherwise missing from the PDF version of the Excel File is not exculpatory in nature or material to the preparation of the Defence, nor does it affect P-2018’s credibility, as elaborated below. Moreover, it caused no undue prejudice, as the information was largely available to the Defence and effectively used during the cross-examination of P-2018.

II. CONFIDENTIALITY

3. Pursuant to regulation 23bis(2) of the Regulations of the Court (“RoC”), this Response is filed as “Confidential”, as it responds to a filing of the same classification and contains information concerning witnesses that may not be made public. A public redacted version will be submitted as soon as practicable.

III. SUBMISSIONS

a) The [REDACTED] form

4. *First*, contrary to the Defence’s arguments, the redaction of P-2018’s phone number in 2019² under category B.1 (“*recent contact information of witnesses, insofar as necessary to protect the safety of the witness*”) was warranted. The redaction was applied

¹ ICC-01/14-01/18-1852-Conf.

² As indicated in the Motion, para. 4, the document was disclosed to the Defence on 13 June 2019, as part of Pre-Confirmation INCRIM package 11.

to protect the safety of the witness, in particular in view of, *inter alia* (i) [REDACTED]³, and (ii) information received by the Prosecution in 2019 that [REDACTED].⁴

5. *Second*, since the redaction was applied to the [REDACTED] form in 2019, the YEKATOM Defence did not request its lifting through the *inter partes* mechanism to address disputed redactions,⁵ used extensively on other occasions. Only on 5 April 2023, did the YEKATOM Defence formulate its overbroad and generic request to disclose: (i) any and all phone numbers attributed to P-2018 [REDACTED]; (ii) the source of attribution for these phone numbers; and (iii) all CDRs targeting and/or containing the phone numbers for P-2018 and [REDACTED].⁶ On 13 April 2023 (within four working days),⁷ the Prosecution responded that it did not consider the requested information to be disclosable as framed, and invited the Defence to provide the names and phone numbers of the contacts they deemed material so that they could be specifically searched in the records.⁸ The same day, the Defence requested that contacts between P-2018/[REDACTED] and a series of individuals be checked.⁹ The Prosecution responded to the Defence's query, as formulated, the same day.¹⁰

6. *Third*, without a specific request to lift the redaction on P-2018's phone number in the SCPE form and contrary to the Defence's arguments, the materiality of contacts between P-2018 [REDACTED] is neither demonstrated, nor readily apparent.¹¹ Clearly contacts between them, [REDACTED], are to be expected – if not, presumed. The

³ CAR-OTP-2135-1589, at 1590.

⁴ CAR-OTP-2135-4183, para. 4.

⁵ ICC-01/14-01/18-64, paras. 28, 30 (“the receiving party may challenge any specific redaction, in accordance with the regime established in this decision” and further provides that “[s]hould the receiving party consider that a particular redaction is unwarranted or should be lifted as a result of changed circumstances, it shall approach the disclosing party directly. The disputing parties shall consult in good faith with a view to resolving the matter [...]. If they are unable to agree, the receiving party may apply to the Chamber for a ruling”); see also Redaction Protocol, ICC-01/14-01/18-677-Anx3, para. 6.

⁶ See ICC-01/14-01/18-1852-Conf-Exp-AnxA, p. 5 (Email YEKATOM Defence, 5 April 2023, at 10:50).

⁷ Note that 7 and 10 April 2023 were official Court holidays.

⁸ See ICC-01/14-01/18-1852-Conf-Exp-AnxA, p. 3 (Email Prosecution, 13 April 2023, at 10:53).

⁹ See ICC-01/14-01/18-1852-Conf-Exp-AnxA, p. 2 (Email YEKATOM Defence, 13 April 2023, at 12:58).

¹⁰ See ICC-01/14-01/18-1852-Conf-Exp-AnxA, p. 1 (Email Prosecution, 13 April 2023, at 16:40).

¹¹ ICC-01/14-01/18-1852-Conf, para. 20.

Defence did not demonstrate how such contacts bear on either the validity of [REDACTED] or the witnesses' credibility.

7. *Fourth*, there is no prejudice to the Defence resulting from the redaction of this particular phone number of P-2018. As it happened, the disputed phone number was publicly available and thus accessible to the Defence. It was obtained by the Defence prior to the start of P-2018's testimony and incorporated in the call sequence table of contacts between P-2018 and [REDACTED] included in the Defence list of material ([REDACTED]¹²). However, the Defence elected not to use it during the cross-examination of P-2018.¹³ Furthermore, P-2018 testified that he was in contact with [REDACTED].¹⁴ The witness was also available to the YEKATOM Defence to answer any questions related to any such contacts.

8. *Finally*, given the Defence's possession of CAR-D29-0001-0521 – an unredacted version of the [REDACTED] form¹⁵ – the request to redisclose the latter is inapposite. Doing so could have no material effect on the Defence's preparation – since it has already acquired the underlying information.¹⁶ Nevertheless, the Prosecution defers to the Chamber as regards any need for redisclosure.

b) The Excel File

9. In July 2019, [REDACTED] transmitted to the Prosecution a Microsoft Excel data file containing information related to [REDACTED]. This Excel File contained, *inter alia*, certain identifying and contact information related to witnesses, their family members, and to innocent third parties. However, as necessary redactions could not be permanently applied to the electronic data file, the Prosecution's Evidence Unit

¹² [REDACTED], see Email YEKATOM Defence, 14 April 2024, at 14:22.

¹³ See NUIX entry "EVD- Date Used" which is empty for document CAR-D29-0004-3902 (as of the date of this filing).

¹⁴ T-222-Conf-Eng ET, at p. 8, l. 24-p. 10, l. 5.

¹⁵ Note that CAR-OTP-2071-0298 is a duplicate of pages 0522-0525 of CAR-D29-0001-0521, except for the [REDACTED] to the OTP's version, which was provided [REDACTED].

¹⁶ See ICC-01/04-01/06-2147, para. 24 (where the disclosure of an item, "would have *no material effect* ... [i]t *does not*, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules") (emphasis added).

transformed the Excel File into a 13 page PDF document¹⁷ to allow for their effective application. This PDF document was initially disclosed on 6 November 2020, and re-disclosed subsequently on various occasions with lesser redactions until, on 12 April 2023, all remaining redactions were lifted.¹⁸ On the same day, the Excel File was also provided as a courtesy copy¹⁹ and formally disclosed on 14 April 2023, three days before the start of P-2018's testimony.²⁰

10. Information contained in the Excel File was substantively known to the YEKATOM Defence since November 2020 through the PDF version. The Prosecution regrets the fact that the transformation of the Excel sheet into a PDF document led to the inadvertent omission of certain information, comprising of (i) the existence of a formula to calculate the birth year of the children based on their stated ages; (ii) two cells where the tutors' first names were incomplete, and (iii) tab names ("the three noted differences").²¹

11. However, contrary to the Defence allegations, the three noted differences do not objectively indicate or suggest the innocence of YEKATOM, mitigate his guilt, or affect the credibility of P-2018's testimony or the content of this piece of evidence. In fact, the data contained therein is consistent with the Prosecution's case theory regarding Count 29.

12. *First*, the Defence's allegation that the "unexplained formula in the Excel document (...) mitigates the guilt of YEKATOM, affects the credibility of P-2018's testimony and the content of this piece of evidence"²² is unavailing. Rather, its existence bolsters the reliability of the Excel File, as it explains potential discrepancies between the age provided by a given child and presented in the corresponding

¹⁷ CAR-OTP-2115-0369_01 to CAR-OTP-2115-0369_13.

¹⁸ See email Prosecution, 12 April 2023, at 11:15.

¹⁹ See email Prosecution, 12 April 2023, at 17:45.

²⁰ T-222-Conf-Eng ET.

²¹ ICC-01/14-01/18-1852-Conf, paras. 29, 31, 32.

²² ICC-01/14-01/18-1852-Conf, para. 35.

Identification forms provided by commanders in YEKATOM's Anti-Balaka group, the year of verification (2014), and the child's birth year. Further, it does not affect P-2018's credibility, who explained that (i) the Excel File was [REDACTED];²³ (ii) the children associated with the armed groups [REDACTED]²⁴ [REDACTED]; (iii) the EAFGA children (*enfants associés aux forces et aux groupes armés*) [REDACTED] were not able to produce any meaningful documentation with regards to their birth dates.²⁵

13. *Second*, the Defence concedes that the missing first name for [REDACTED] (family member of [REDACTED]), was at its disposal in CAR-OTP-2071-0279, at 0279, line 3. However, contrary to what the Defence puts forward,²⁶ this was also the case for the first name of [REDACTED] (family member of [REDACTED]), which was also at its disposal in CAR-OTP-2071-0279, at 0281, line 57.²⁷ Further, this information concerns two children listed as aged 17 and 16, and despite them not being directly material for Count 29, their families could have alternatively been reached through the children's mothers and uncles, whose full names are provided in the PDF version of the Excel File.²⁸

14. *Third*, although the Defence did not address the materiality of the missing tabs, the information contained in the six tab names was already at its disposal through other information contained in the tables of the PDF version and other documents. From the PDF document alone, it was apparent that the first list (tab 1: "[REDACTED]") is an initial list of [REDACTED] children, of which only some were [REDACTED]; that the second list (tab 2: "[REDACTED]") only contained the children

²³ T-223-Conf-Fra ET, at p. 20, l. 15-p. 21, l. 6; T-224-Conf-Fra ET, at p. 71, l. 17-p. 73, l. 1, at p. 74, l. 2-22; T-225-Conf-Fra ET, at p. 59, l. 21-p. 61, l. 6.

²⁴ See "[REDACTED]" at CAR-OTP-2071-0277, containing the column "[REDACTED]"; see also T-222-Conf-Fra ET, at p. 28, l. 24-p. 29, l. 1; see also T-224-Conf-Fra ET, at p. 5, l. 24-p. 6, l. 11; T-225-Conf-Fra ET, p. 8, l. 17-24.

²⁵ T-224-Conf-Fra ET, at p. 70, l. 12-27.

²⁶ ICC-01/14-01/18-1852-Conf, para. 37.

²⁷ Both names were provided when CAR-OTP-2071-0279 was initially disclosed to the Defence on 13 June 2019, as part of Pre-Confirmation INCRIM package 11.

²⁸ See CAR-OTP-2116-0369_01, at CAR-OTP-2116-0369_12, lines 3 and 6, and columns "*nom de la mère*", "*tuteur/tutrice: noms et prénoms; degré de relation avec l'enfant*".

who were [REDACTED]²⁹ in the previous tab; that the third, fourth, and fifth lists (tab 3: “[REDACTED]”; tab 4: “[REDACTED]”; tab 5: “[REDACTED]”), only contained the children who were [REDACTED]³⁰, [REDACTED]³¹ and [REDACTED]³² respectively; and that the sixth list (tab 6: “[REDACTED]”) is the list of children that matched the list of 60 “[REDACTED]” (“list of 60 children”) provided at CAR-OTP-2071-0279.³³

15. *Finally*, there is no prejudice. The Defence claim of prejudice in having spent “considerable time and resources analysing the List than it should have, should proper disclosure have occurred”³⁴ is vacuous. The three noted discrepancies were either already at the Defence’s disposal³⁵ or were of a magnitude that allowed their assimilation into the cross-examination. The Defence used the Excel File when cross-examining P-2018³⁶ and was able to make reference to the relevant tabs,³⁷ to request clarifications from the witness regarding a formula apparently used in calculating the birth year of the children,³⁸ as well as to meaningfully compare the Excel File to the list of 60 children, and to put its position to P-2018.³⁹ The witness was further questioned about the Excel File by the Presiding Judge.⁴⁰

IV CONCLUSION

16. For the reasons above, the Chamber should reject the Motion and allow the formal submission of the Excel File. Should the Chamber nevertheless reject the formal

²⁹ See CAR-OTP-2116-0369_01, at CAR-OTP-2116-0369_07 to _08, the column “[REDACTED]” which indicates that all the children were [REDACTED].

³⁰ See CAR-OTP-2116-0369_01, at CAR-OTP-2116-0369_09, the column “[REDACTED]” which indicates that all the children were [REDACTED].

³¹ See CAR-OTP-2116-0369_01, at CAR-OTP-2116-0369_10, the column “[REDACTED]” which indicates that all the children were [REDACTED].

³² See CAR-OTP-2116-0369_01, at CAR-OTP-2116-0369_11, the column “[REDACTED]” which indicates that all the children were [REDACTED].

³³ Which the Defence also compared in document CAR-D29-0014-0088.

³⁴ ICC-01/14-01/18-1852-Conf, para. 38.

³⁵ As mentioned in para. 13 of this filing, regarding the first names of the family members of two children.

³⁶ T-225-Conf-Fra ET, at p. 16, l. 1-14, p. 30, l. 8-p. 31, l. 18; T-226-Conf-Fra ET, at p. 24, l. 14-p. 27, l. 18; p. 59, l. 3-20, p. 62, l. 4-p. 64, l. 23.

³⁷ T-226-Conf-Fra ET, at p. 62, l. 27-p. 63, l. 5.

³⁸ T-226-Conf-Fra ET, at p. 62, l. 7-p. 64, l. 23.

³⁹ Comparison between the “Excel File” and the list of the 60 children, CAR-D29-0014-0088, used with P-2018 in cross-examination at T-224-Conf-Fra ET, at p. 76, l. 11-p. 82, l. 27.

⁴⁰ T-223-Conf-Fra ET, at p. 20, l. 4-23.

submission of the Excel File, it should, in the alternative, authorise the submission of its PDF version.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 8th day of May 2023
At The Hague, The Netherlands