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Date: **22 June 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 *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-1990 (ICC-01/14-01/18-1918)”,
22 June 2023**

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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 in Relation to Witness P-1990”¹ alleging that Office of the Prosecutor’s (“Prosecution”) failure to timely disclose material information contained in a May 2023 investigation report² (“Investigation Report”). For the reasons set out below, the Motion is without merit and should be dismissed.

2. *First*, the information at issue — the number of bodies exhumed at YEKATOM’s former Anti-Balaka base at the Yamwara School (“Contested Information”) — is not material, let alone potentially exonerating. Rather, the number of corpses exhumed from YEKATOM’s former base is only marginally relevant to the charges. Insofar as one murder is charged at that location, the number of bodies recovered beyond that is insignificant. In addition, the timing of disclosure has caused no prejudice. Since 2020, the Defence has been in possession of substantially the same information on the number of corpses recovered from the Yamwara School as that attributed to P-1990 in the notes of a Prosecution investigator (*i.e.*, the Contested Information). Moreover, the Defence used this information, *inter alia*, during P-1990’s cross-examination.

3. *Second*, given the informal nature of the 27 November 2017 meeting resulting in the investigator’s notation of the Contested Information, and considering that the only formal statement accepted by the witness prior to his testimony was his Rule 111 Statement of January 2020 (“2020 Statement”) which elaborated and clarified the information contained in the investigator’s notes, the Prosecution had no reason to believe that any discrepancy attributable to the witness warranted a disclosure under article 67(2) or even rule 77 of the Rules.

¹ ICC-01/14-01/18-1918 (“Motion”).

² CAR-OTP-00001499.

4. *Finally*, the Defence's request for declaratory relief and for an order requiring the Prosecution's review of its evidence collection anew is without legal authority and, in the circumstances, wholly unwarranted.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC"), this Response is filed as "Confidential", as it 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 Prosecution did not violate its disclosure obligations

6. At the outset, the Prosecution does not contest the disclosability of investigation reports when they contain information falling under article 67(2) or rule 77 of the Rules. However, this is not the case here. Rather, the information noted by investigators in 2017 regarding the number of bodies exhumed at Yekatom's former Anti-Balaka base at the Yamwara School is neither potentially exculpatory, nor is it material to the preparation of the Defence.

i. The Contested Information was obtained informally

7. The circumstances of the collection of the Contested Information is important to understanding the Prosecution's disclosure assessment. Contrary to the Defence's assertion that P-1990 was "interviewed" on 27 November 2017 during a meeting at the Yamwara School,³ this first interaction with the witness was initiated by Prosecution investigators [REDACTED].⁴ It was thus informal. As the Investigation Report attests,

³ ICC-01/14-01/18-1918, para. 27.

⁴ CAR-OTP-00001499, at 000001, para. 1; CAR-OTP-2124-0247, at 0258, para. 49.

at the time the witness was not prepared to meet the investigator and could not even remember the name of the local Non-Governmental Organisation (“NGO”) in charge of the exhumation.⁵

8. Here, the Contested Information merely reflects the personal recollection of Prosecution investigators regarding their November 2017 interaction with P-1990 concerning, *inter alia*, the number of graves and bodies exhumed at the Yamwara School. As explained below, the notes which underpin the Investigation Report are not tantamount to an acknowledged and accepted statement of the witness. This is necessary in order to identify whether a subsequent statement of the witness is in any way inconsistent. As explained below, such is not the case.

ii. The Contested Information is not potentially exonerating

9. In assessing whether a statement presents a discrepancy or contradiction *vis-a-vis* a witness’s subsequent account of the events, the former purported utterance must at least be acknowledged, accepted, or adopted.⁶ Without this, the utterance cannot fairly be ascribed to the witness.

10. The Contested Information thus does not amount to a contradiction or inconsistency warranting a disclosure pursuant to article 67(2) because it was not accepted by P-1990 at any point prior to his cross-examination, including in the context of providing his 2020 Statement. In his 2020 Statement, P-1990 confirmed and described the locations of three exhumed graves at the Yamwara School.⁷ However, he never adopted or accepted that, as noted by the OTP investigators, only three bodies were recovered. Rather, his 2020 Statement specifically details that 10 bodies

⁵ CAR-OTP-00001499, at 000001, para. 2.

⁶ See ICC-01/14-01/18-539, para. 17 (absent some indication of adoption “it is impossible (and *certainly unfair* to the witness) to assume that the content of a statement has been accepted by the witness as being true, accurate and, most importantly, as his or her own”).

⁷ CAR-OTP-2124-0247, at 0256-0258, paras. 38-43, 46, 50; See also Annex A to P-1990’s statement at CAR-OTP-2124-0261.

were exhumed from the three graves: two from the first grave, five from the second, and three from the third.⁸ That clarification provided by the witness in January 2020 neutralises any claim that the unacknowledged information contained in the Investigation Report regarding the number of bodies, is at all an inconsistent statement *of the witness* – or that it is independently a statement of fact, affecting his credibility.

11. As noted, any attributable discrepancy regarding P-1990's account of the number of bodies only became apparent during his cross-examination. Prior to this, the Prosecution had no basis to consider that the witness had provided different accounts of the same event, as opposed to a mere clarification of the circumstances. *First* the 2020 Statement contains very specific details on the number of victims, as provided and acknowledged by the witness. *Second*, during the familiarisation process preceding his testimony, P-1990 had an interpreter read back his statement and had no observations or corrections to make, which he confirmed under oath.⁹ *Finally*, P-1990 testified that the "entire statement is truthful",¹⁰ as regards his 2020 Statement.

iii. The Contested Information was not material to the preparation of the Defence

12. The Contested Information was not material to the preparation of the Defence as it does not relate to a core issue in this case. Contrary to the Defence's claim that "the Prosecution has repeatedly shown that the question of the number of buried and exhumed bodies at the Yamwara School was a matter of particular importance (...) and one of the major points of P-1990's testimony (...)", the importance of P-1990's evidence goes to YEKATOM's leadership of the Anti-Balaka and use of the Yamwara School as a base, where he additionally set up checkpoints, and as concerns their targeting of the Muslim population leading to their forced displacement from

⁸ CAR-OTP-2124-0247, at 0256-0257, paras. 42, 46.

⁹ ICC-01/14-01/18-T-236-CONF-ENG ET, p. 6, l. 3-6.

¹⁰ ICC-01/14-01/18-T-236-CONF-ENG ET, p. 6, l. 20-22.

CATTIN and BOEING to PK5.¹¹ These aspects of P-1990's evidence were confirmed by the witness during his testimony.¹² As noted, the significance of P-1990's testimony as to the corpses recovered from the Yamwara School is not how many there were, but merely that at least *one* was.

13. Significantly, the Prosecution has never alleged that Saint-Cyr LAPO N'GOMAT, the sole victim of the murder charges involving the Yamwara School under counts 15 and 16 – was also buried there, although the presence of at least one corpse at the school may support such an inference. In any event, if there was any adverse evidence demonstrating YEKATOM's awareness that members of his group were engaged in burying individuals on school grounds (including in a grave identified by P-1990), such evidence of knowledge and/or inquiry notice was brought out by the Defence on cross-examination.¹³

B. The Defence has suffered no prejudice

14. Even assuming *arguendo* the Contested Information was material to the preparation of the Defence – which it was not – the timing of the disclosure of the Investigation Report was not prejudicial. As noted, the Defence was in possession of similar disclosed information for years, which it effectively used during P-1990's cross-examination.

15. The fact that there may have been less than 10 bodies exhumed at the Yamwara School in 2015 was disclosed under rule 77 of the Rules on 26 October 2020 through the statement of P-2705, [REDACTED] called "*Initiatives et Recherches des Actions concrètes du Développement*", known as IRAD.¹⁴ Similarly, three documents annexed to

¹¹ See Prosecution's Trial brief: ICC-01/14-01/18-723-Conf, paras. 361, 368, and 401.

¹² ICC-01/14-01/18-T-236-CONF-ENG ET, p. 33, l.15- p. 35, l.19; ICC-01/14-01/18-T-237-CONF-ENG ET, p. 40, l.17-23; CAR-OTP-2124-0247, at 0252-0255, paras. 24, 28-32, 34-35.

¹³ ICC-01/14-01/18-T-237-CONF-ENG ET, p. 57, l. 62-p. 62, l. 11.

¹⁴ CAR-OTP-2126-0274, at 0282, para. 39.

P-2675's statement containing IRAD's database covering the exhumation and reburial process in BANGUI and other locations in the Central African Republic between 2015 and 2017 were available to the Defence since 26 June 2020.¹⁵

16. The Defence has had ample opportunity to investigate this issue and indeed, challenged P-1990's evidence on the number of bodies exhumed at the Yamwara School base prior to and during P-1990's testimony. For example, in its 15 January 2021 "Consolidated Response to Prosecution's Fourth and Fifth Submissions of Rule 68(2) Applications", the Defence objected to the introduction of P-1990's prior recorded testimony citing an apparent contradiction regarding *inter alia* "the number of the bodies in the graves".¹⁶ Subsequently the Defence was able to confront P-1990 with this information when cross-examining the witness.¹⁷

17. Moreover, the prejudice claimed by the Defence in relation to the presumed negative outcome of the Prosecution's rule 68(2)(b) application for P-1990¹⁸ is not valid, considering the Chamber's findings regarding the relevance of P-1990's evidence. It is not apparent from the Chamber's "First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules" that the number of bodies was a significant factor in reaching its *proprio motu* decision to introduce P-1990's prior recorded testimony pursuant to rule 68(3) of the Rules. Rather, the determinative factor was clearly that certain aspects of P-1990's evidence went to the acts and conduct of the Accused; namely the witness's evidence on YEKATOM's leadership within the Anti-Balaka, the crimes committed by his elements at the Yamwara School, and P-1990's presence during the exhumation.¹⁹ The Chamber further considered that P-1990's evidence, particularly (i) paragraph 32

¹⁵ See CAR-OTP-2126-0231, at 0237-0239, paras. 26-34. See also Annexes D, E, and F to P-2675's statement: CAR-OTP-2126-0292, CAR-OTP-2126-0293, and CAR-OTP-2126-0294.

¹⁶ ICC-01/14-01/18-823-Conf, para. 67, footnote 109 referring to the evidence of witnesses P-2968, P-2475, and 2675.

¹⁷ ICC-01/14-01/18-T-237-CONF-ENG ET, p. 62, l. 12-p. 64, l. 18.

¹⁸ ICC-01/14-01/18-1918, para. 35.

¹⁹ ICC-01/14-01/18-1833-Conf, para. 325.

related to the Anti-Balaka's targeting of the Muslim population at checkpoints, and (ii) paragraphs 38 to 44 related to the graves sites and exhumation in the Yamwara School premises; could assist its determination of the truth.²⁰

C. The remedy requested is disproportionate and has no legal basis

i. The declaratory relief is unwarranted

18. The Defence requests declaratory relief in the form of a symbolic declaration formally finding a "disclosure violation." As stated in the Prosecution's previous submissions, incorporated by reference, declaratory relief is not a remedy found in the statutory framework and has no legal effect, definition, or consequence.²¹

19. The Prosecution is concerned that the Motion is one among others demonstrating a transparently tactical pattern of practice the Defence has engaged in since the beginning of this case. As stated in the Prosecution's previous submissions, incorporated by reference, 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.²²

20. Contrary to the Defence's assertions, the issue of the number of bodies exhumed at the Yamwara School is simply not a "core issue to P-1990's testimony", nor is it a core issue to the charges against the Accused in this case. The Defence's attempt to paint it as such in order to substantiate the Motion is strained at best, and unavailing.

21. Moreover, it would appear that the witness's cross-examination was also conducted with this straw man fallacy in mind, rather than directed at challenging the

²⁰ ICC-01/14-01/18-1833-Conf, para. 327.

²¹ ICC-01/14-01/18-581, para. 20.

²² ICC-01/14-01/18-698-Conf, para. 25, which refers to a finding by the Trial Chamber in the *Karadžić* case's disapproval of a similar Defence strategy resulting in the filing of over 107 Disclosure Violation Motions.

salient issues of consequence in his evidence — such as YEKATOM’s control over the Yamwara School Base, his elements, their checkpoints, and the crimes committed by the group during the relevant period. It is telling, that in pursuit of establishing a discrepancy regarding the number of corpses exhumed from YEKATOM’s former base, the Defence avoided displaying or reading back the witness’s 2020 Statement, or confronting him with any specific discrepancy in the explanation that he provided of the circumstances, or the facts to which he swore in his direct examination.

22. Once again, the Motion displays the same tactics frowned on by the ICTY Trial Chamber *Karadzic* case, which noted:

“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.”²³

ii. *The requested order for the Prosecution to review its evidence anew is unnecessary and disproportionate*

23. Even assuming *arguendo* that there was a disclosure violation – which there was not – the request “to order the Prosecution to review again the evidence in its possession and confirm on the record that all documents falling within its disclosure obligation on all the charges have been disclosed”²⁴ is unnecessary and disproportionate.

24. The Contested Information relates to a marginal issue in the case, and indeed, a minor aspect of P-1990’s evidence on the whole. The timing of the disclosure of the Contested Information was not the product of a deliberate action, but one predicated on a reasonable assessment and analysis of the Court’s disclosure paradigm. The

²³ See *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s 107th Disclosure Violation Motion, 14 March 2016, para. 15, <https://www.icty.org/x/cases/karadzic/tdec/en/160314.pdf>. It bears mentioning that Karadžić’s Legal Advisor was also assigned as Counsel during the pre-trial phase of this case, where the same tactic began.

²⁴ ICC-01/14-01/18-1918, para. 40.

disclosure of the substantially similar evidence properly attributed to witnesses as *their* acknowledged and accepted statements or documents clearly demonstrates this. In addition, even if not provided timely, the relevant information was still provided to the Defence sufficiently in time for it to effectively conduct the witness's cross-examination, and no valid claim of prejudice lies. As noted, the Defence has had similar information in their possession for over two and a half years.

IV. CONCLUSION

25. For the reasons above, the Chamber should reject the Motion.

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 22nd day of June 2023
At The Hague, The Netherlands