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**International
Criminal
Court**

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Date: **14 July 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

Motion for Finding of Disclosure Violation in Relation to Witness P-1597

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. Defence Counsel representing Mr. Alfred Rombhot Yekatom (“Defence”) hereby requests Trial Chamber V to find that the Prosecution failed to timely disclose a witness statement bearing the ERN CAR-OTP-2050-0513 (“Statement”) containing exculpatory information on a core issue of the Defence case which is potentially exculpatory pursuant to Article 67 (2) of the Rome Statute (“Statute”).
2. In light of the fact that the Statement contains important information on topics that the Defence has addressed repeatedly during its examination of Prosecution witnesses, the Defence requests the Chamber to formally recognize that the Prosecution is in violation of its disclosure obligations. In addition, and as detailed below, the Defence requests as a remedy to this violation that 1) the Prosecution be ordered to review all the material in its possession to ensure, prior to the end of its case, that all documents material to the preparation of the defence and/or exculpatory have been duly disclosed, and that 2) the Prosecution be denied the admission in evidence of a video linked to P-1597 which it seeks to submit through a Bar table motion.

PROCEDURAL BACKGROUND

3. Between 16 March 2017 and 19 March 2017, Prosecution investigators met with P-1597 who signed a statement at the end of his interview.¹
4. On 16 July 2020, the Chamber instructed the Prosecution to “review all the materials in its possession and disclose all materials fulfilling its disclosure obligations” by 9 November 2020; the Chamber further added that “[t]he

¹ CAR-OTP-2050-0513.

Prosecution may – and in some cases, must continue disclosing materials after this date [...]”.²

5. On 26 June 2023, the Prosecution filed its Eight application of Evidence from the Bar Table where it seeks the submission of an Audio/Video Material titled 'CAR crisis Anti-Balaka group vows to defend civil populace.avi' indicating that the source is P-1597.³
6. On 27 June 2023, only following this submission, the Prosecution disclosed a courtesy copy of the Statement.⁴

APPLICABLE LAW

7. Article 67 (2) of the Rome Statute provides that :

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.

8. Rule 77 of the Rules of Procedure and Evidence states that :

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

9. It is well established that the duty of the Prosecution to disclose exculpatory material is necessary to guarantee the right of the accused to a fair trial.⁵ The obligation to disclose exculpatory material, in particular, has consistently

² [ICC-01/14-01/18-589](#), para. 10.

³ CAR-OTP-2050-0648.

⁴ Email from the Prosecution to the Defence sent on 27 June 2023, at 11.58.

⁵ *Prosecutor v. Abdallah Banda*, Decision on Article 54(3)(e) Documents, 23 November 2011, ICC-02/05-03/09-25, para. 14 ; [ICC-01/14-01/18-296](#), para. 12 ; [ICC-01/14-01/18-551-Conf](#), para. 29 ; Public redacted version : [ICC-01/14-01/18-551-Red](#).

benefited from a broad interpretation⁶ and is independent of the existence of other evidence that may undermine it or of the fact “that there are other sources providing similar evidence.”⁷ The counterpart of this obligation is that its violation by the Prosecution may affect the fairness of the proceedings.⁸

SUBMISSIONS

10. This motion follows multiple disclosure violations by the Prosecution either declared by the Chamber or conceded by the Prosecution. Indeed, between 3 September 2019 and 31 May 2023, the Chamber found that the Prosecution violated its disclosure obligations pursuant to Rule 77 on eleven different occasions.⁹
11. On 12 June 2023, the Defence had to file another motion relating to a violation of disclosure in relation to P-1990.¹⁰ In that last motion, the Defence expressed that it was “highly concerned that the lack of organisation of the Prosecution’s archived evidence leads to an incomplete fulfilment of its disclosure obligations, which should be fulfilled on an ongoing basis regardless of any specific request by the Defence identifying items that are material or potentially

⁶ [ICC-01/14-01/18-551-Conf](#), para. 29; Public redacted version: [ICC-01/14-01/18-551-Red](#); *Prosecutor v. Lukic & Lukic*, Decision on Milan Lukic’s Motion for Remedies Arising out of Disclosure Violations by the Prosecution, 12 May.

⁷ [ICC-01/14-01/18-595](#), para. 21; *Prosecutor v. Thomas Lubanga Dyilo*, Decision issuing a confidential and a public redacted version of “Decision on disclosure issues, responsibility for protective measures and other procedural matters”, 24 April 2008, [ICC-01/04-01/06-1311](#), para. 94; *Ndindabahizi v. Prosecutor*, Judgement, 16 January 2007, No. ICTR-01-71-A, para. 72; *Prosecutor v. Kordic & Cerkez*, Judgement, 17 December 2004, No. IT-65-14/2-A, paras. 183, 242.

⁸ See *Prosecutor v. Oric*, [Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules](#), 13 December 2005, No. IT-03-68-T, para. 20; *Prosecutor v. Krstic*, Judgement, 19 April 2004, No. IT-98-33-A, para. 178.

⁹ [ICC-01/14-01/18-315-Conf](#), Public redacted version : [ICC-01/14-01/18-315-Red](#); [ICC-01/14-01/18-342](#) ; [ICC-01/14-01/18-551-Conf](#), Public redacted version: [ICC-01/14-01/18-551-Red](#); [ICC-01/14-01/18-595](#) ; [ICC-01/14-01/18-740-Conf](#) ; Email from the Trial Chamber V to the Parties and Participants on 26 October 2020 at 16:39. See also, ICC-01/14-01/18-783-Anx5; [ICC-01/14-01/18-829](#); [ICC-01/14-01/18-1202](#), Public redacted version : [ICC-01/14-01/18-1202-Red](#); [ICC-01/14-01/18-1309-Conf](#), Public redacted version : [ICC-01/14-01/18-1309-Red](#); [ICC-01/14-01/18-1566-Conf-Corr](#), Public redacted version : [ICC-01/14-01/18-1566-Red-Corr](#); [ICC-01/14-01/18-1896-Conf](#), Public redacted version : [ICC-01/14-01/18-1896-Red](#).

¹⁰ [ICC-01/14-01/18-1918](#).

exculpatory”.¹¹ The late disclosure of the Statement is yet another indication that the concern of the Defence was well founded.

12. The Prosecution had the Statement in its possession since 27 November 2017, *i.e.* the date of the last meeting between P-1597 and Prosecution investigators.¹² This requirement being met, the Defence turns to demonstrating to the Chamber on a *prima facie* basis that this document is potentially exculpatory pursuant to Article 67 (2) of the Statute or, at the very least, material to the Defence pursuant to Rule 77 of the Rules, and that the ensuing disclosure violation is prejudicial to Mr. Yekatom’s rights.¹³

13. The content of the Statement is potentially exculpatory and/or material to the preparation of the Defence (I), therefore the Prosecution has clearly committed a disclosure violation (II) that deserves a remedy (III).

I. The information contained in the Statement are potentially exculpatory and/or material to the preparation of the Defence

14. The Statement disclosed by the Prosecution contains information relating P-1597's personal knowledge of events that occurred in Bangui in 2013 since the arrival of the Seleka armed group. As the son of a *gendarme* who has been imprisoned,¹⁴ he relates in details how civil servants and FACA soldiers were wanted and targeted at the arrival of the Seleka in March 2013.¹⁵ He has also witnessed different crimes committed by the Seleka as murders¹⁶ lootings¹⁷ and attacks against civilians including with heavy weapons¹⁸ and how it has impacted the population in Boy Rabe and other arrondissements of Bangui.

¹¹ [ICC-01/14-01/18-1918](#), para 13.

¹² CAR-OTP-2050-0513.

¹³ *Prosecutor v. Karemera et al*, [Decision on Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion](#), 14 May 2008, No. ICTR-98-44-AR73.13, para. 9.

¹⁴ [CAR-OTP-2050-0513](#) para 44-48

¹⁵ [CAR-OTP-2050-0513](#) para 15, 23, 49

¹⁶ [CAR-OTP-2050-0513](#) para 17-21, 22, 54-66.

¹⁷ [CAR-OTP-2050-0513](#) para 23-25

¹⁸ [CAR-OTP-2050-0513](#), para 29-31, 68-70, 88-93

15. P-1597 also speaks extensively about some high profile Seleka members and particularly of Colonel BICHARA a former salesman who joined the Seleka and “rumoured to have killed many people in 2013”.¹⁹
16. The content of the Statement is therefore highly relevant to the Defence theory against Counts 1, 2 and 3 of the charges, theory which appeared clearly and repeatedly through the Defence examination of many Prosecution witnesses.

II. The Prosecution violated its disclosure obligation while knowing the Defence theory

17. Since 2021, the Defence has consistently examined witnesses testifying about the 5th December attack, the Boeing and Cattin area and the road connecting Cattin to PK5 in relation to the topics that were addressed by P-1597. In particular, questions have been repeatedly asked about a former salesman named BICHAR or BICHARA who became “Colonel” after joining the Seleka. Indeed, no less than seven witnesses were specifically asked by the Yekatom Defence about that Seleka member.²⁰
18. Moreover, the Defence also made clear during its examination of witnesses on Boeing and Cattin events that the issue of armed Muslim merchants and the Seleka military armament was paramount to its case.²¹ Indeed, the presence of armed Muslim merchants and Seleka bases and positions in Boeing, Cattin and surrounding areas implies that these places could be considered legitimate military targets, as opposed to the Prosecution’s theory charging Mr. Yekatom

¹⁹ CAR-OTP-2050-0513, para 36-41.

²⁰ P-0801: T-036-FRA ET WT [15:10:58] to [15:11:19]; P-0291: T-051-CONF-FRA ET [15:59:20] to [15:59:35]; P-0884: T-057-CONF-FRA ET [12:07:57] to [12:06:10]; P-0884: T-057-CONF-FRA ET [12:29:15] to [12:29:42]; P-1521: T-084-CONF-FRA [10:20:13] to [10:22:44]; P-1521: T-084-CONF-FRA [10:26:45] to [10:27:19]; P-2049: T-101-CONF-FRA ET [10:29:47] to [10:30:02]; P-2049: T-101-CONF-FRA ET [12:00:32] to [12:01:18]; P-0888: T-121-FRA ET WT [10:50:17] to [10:56:59] et [11:36:41]; P-1193: T-126-CONF-FRA CT [09:58:54] to [10:01:21]; P-1193: T-126-CONF-FRA CT [10:07:25] to [10:08:05] .

²¹ P-2682: T-018-CONF-FRA ET [12:18:58] to [12:21:37]; P-1528: T-179-CONF-FRA ET [14:14:06] to [14:14:26]; P-1528: T-179-CONF-FRA ET [14:27:10] to [14:27:38]; P-1813: P-1528: T-182-CONF-FRA ET [09:50:07] to [09:55:15]; P-1858: P-1528: T-185-CONF-FRA ET [14:13:51] to [14:15:49]; P-0884: P-1528: T-057-CONF-FRA ET [12:29:15] to [12:29:42]; P-0888: P-1528: T-121-FRA ET WT [11:35:26] to [11:36:41] .

with violently targeting the Muslim civilian population in BANGUI including Cattin and Boeing.²²

19. As an example, P-1597 specifically gives details on the residence of Colonel BICHARA, stating that “[h]is house was approximatively 100 meters from the Kina Mosque in PK5’s Quartier Kina”, and adding that “his home compound was surrounded” by a wall and had a gate at the entrance”, his home being “guarded by his men”.²³ This specific information is potentially exculpatory as it confirms what has been elicited by the Defence during P-1528 testimony about the presence of a Seleka base in Cattin at the football field of SAGBADO at the house of a Seleka Colonel where between 12 and 15 elements were also residing.²⁴
20. Therefore all evidence relating to the presence of Seleka and armed Muslim merchants in this area of Bangui is material to the Defence for Counts 1, 2 and 3 of the Charges as it has the ability to mitigate the guilt of the Accused.²⁵ The Defence made its position quite clear since the first appearance of witnesses on these counts which means the Prosecution was aware of it since at least March 2021.²⁶ In any event, the materiality of BICHARA was made clear to the Prosecution through *inter partes* correspondence as early as January 2022.²⁷
21. The investigators from the Prosecution's Office met with P-1597 in March 2017. There is no dispute that the Statement was in its possession since that date. Because the Prosecution has asserted to have undertaken a thorough review of its evidence collection and commits itself to go through an exhaustive review of

²² [ICC-01/14-01/18-282-Conf-AnxB1](#), para.194, Public redacted version : [ICC-01/14-01/18-282-AnxB1-Red](#); [ICC-01/14-01/18-723-Conf](#), paras 365-367, Public redacted version : [ICC-01/14-01/18-723-Red](#).

²³ CAR-OTP-2050-0513, para 39.

²⁴ T-179-CONF-ENG ET 24-11-2022 1-79 T, p. 41. See also P-1839 who confirms that SAGBADO is in Cattin just at the frontier of Kina : T-172-CONF-FRA ET, p. 23 [10:41:41].

²⁵ [ICC-01/14-01/18-403-Conf-Corr](#), paras 104 and 106, Public redacted version : [ICC-01/14-01/18-403-Red-Corr](#).

²⁶ P-2682: T-018-Conf-FRA ET [12:18:58] to [12:21:37].

²⁷ Email from the Defence to the Prosecution sent on 17 January 2022, at 14.23, with attachment Letter bearing reference number ARY-2022-0199, available upon request.

its material,²⁸ it means it had multiple opportunities to disclose the Statement but failed to do so.²⁹

22. The potential exculpatory nature and/or materiality of the information contained in the Statement for the preparation of the Defence is not disputable and the Prosecution has been aware of the Defence theory for more than two years. Given that this violation occurred after multiple reminders about the necessity to be thorough, and given that the Defence suffered a prejudice by not being able to put the content of the Statement to other Prosecution witnesses to elicit evidence, the Defence respectfully requests the Chamber to find that the Prosecution has once again violated its disclosure obligation by failing to timely disclose the Statement.

III. The renewed disclosure violation merits a remedy

23. The Chamber has recalled the Prosecution's continuing obligation to disclose under Article 67(2) of the Statute and Rule 77 of the Rules.³⁰ Despite the invitation made by the Chamber on 7 December 2021 to the Prosecution, to "review the evidence in its possession and confirm on the record that all documents falling within its disclosure obligations have indeed been disclosed",³¹ it is clear that the Prosecution has not yet done this review properly.
24. The Prosecution might, once again, argue its unfounded concern that violation motions aim at "demonstrating a transparently tactical pattern of practice the

²⁸ [ICC-01/14-01/18-1207-Conf](#), Public redacted version : [ICC-01/14-01/18-1207-Red](#).

²⁹ [ICC-01/14-01/18-315-Conf](#), Public redacted version : [ICC-01/14-01/18-315-Red](#); [ICC-01/14-01/18-342](#) ; [ICC-01/14-01/18-551-Conf](#), Public redacted version: [ICC-01/14-01/18-551-Red](#); [ICC-01/14-01/18-595](#) ; [ICC-01/14-01/18-740-Conf](#) ; Email from the Trial Chamber V to the Parties and Participants on 26 October 2020 at 16:39. *See also*, [ICC-01/14-01/18-783-Anx5](#); [ICC-01/14-01/18-829](#); [ICC-01/14-01/18-1202](#), Public redacted version : [ICC-01/14-01/18-1202-Red](#); [ICC-01/14-01/18-1309-Conf](#), Public redacted version : [ICC-01/14-01/18-1309-Red](#); [ICC-01/14-01/18-1566-Conf-Corr](#), Public redacted version [ICC-01/14-01/18-1566-Red-Corr](#); [ICC-01/14-01/18-1896-Conf](#), Public redacted version : [ICC-01/14-01/18-1896-Red](#).

³⁰ [ICC-01/14-01/18-618](#), paras 12-13.

³¹ [ICC-01/14-01/18-1206](#), para. 14.

Defence” as opposed to raising a concern 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.”³² Again, violation motions are not for the purpose to be counted up but rather to ensure that the Prosecution takes serious measures to address its level of disorganization leading to failures to disclose evidentiary material pursuant to its obligation in a context where the Chamber repeatedly underlined it trusted that “the Prosecution is fulfilling its disclosure obligations, including with regard to any evidence that is exculpatory and/or may affect the credibility of prosecution evidence.”³³

25. The Chamber recently announced the approach of the end of the Prosecution’s presentation of evidence,³⁴ and the midst of meeting the various deadlines fixed by the Chamber, the Defence also mobilizes its resources to proceed with the investigations and prepare the list of its witnesses and evidence. As already stated in the request related to disclosure violation concerning P-1990, “the Defence cannot afford further disclosure oversights on the part of the Prosecution and must ensure one last time that the Prosecution has disclosed all the information in its possession that falls under this obligation”.³⁵ Again, the discovery of another disclosure violation is of great concern to the Defence at this stage of the proceedings.
26. Noting the numerous failures regarding the Prosecution’s disclosure obligation, the Defence requests as a remedy the Chamber 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. The Prosecutor has recently announced publicly “the launch of

³² [ICC-01/14-01/18-1941-Conf](#), para. 19, Public redacted version : [ICC-01/14-01/18-1941-Red](#).

³³ [ICC-01/14-01/18-1862-Conf-Exp](#), para. 7 ; [ICC-01/14-01/18-1202-Conf](#), para. 21, Public redacted version : [ICC-01/14-01/18-1202-Red](#) ; [ICC-01/14-01/18-1831-Conf](#) para. 9, Public redacted version : [ICC-01/14-01/18-1831-Red](#) ; [ICC-01/14-01/18-1753-Conf-Exp](#) para. 7.

³⁴ [ICC-01/14-01/18-1892](#).

³⁵ [ICC-01/14-01/18-1918](#), para. 37.

advanced evidence submission platform”.³⁶ It so appears that the Prosecution lack of thoroughness in their research is not due to technical issues. This review should be therefore conducted promptly, as the Chamber already ordered this to the Prosecution in the past.

27. As a second remedy, the Defence also request the Chamber to reject the submission of the video CAR-OTP-2050-0648 provided by P-1597, a consequence which flows from such disclosure violations by the Prosecution.
28. Consequently, the Defence respectfully requests the Chamber to (i) find that the Prosecution violated its disclosure obligation and (ii) order the Prosecution to review all the material, including internal documents or notes, in its possession to ensure that all documents material to the preparation of the defence or exonerating have been duly disclosed iii) deny the submission of the video CAR-OTP-2050-0648.

RELIEF SOUGHT

29. In light of the above, the Defence respectfully requests Trial Chamber V to:

FIND that the Prosecution has violated its disclosure obligations;

ORDER the Prosecution to review all the material in its possession to ensure, prior to the end of its case, that all documents material to the preparation of the defence or exonerating have been duly disclosed and as a remedy; and,

DENY the submission of video CAR-OTP-2050-0648.

³⁶ Statement, “ICC Prosecutor Karim A.A. Khan KC announces launch of advanced evidence submission platform: OTPLink”, *International Criminal Court*, 24 May 2023, <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-kc-announces-launch-advanced-evidence-submission-platform-otplink>.

RESPECTFULLY SUBMITTED ON THIS 14th DAY OF JUNE 2023



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