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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-1597 (ICC-01/14-01/18-1982)”,
ICC-01/14-01/18-2000-Conf, 21 July 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-1597.”¹ The Motion is without merit and should be dismissed. Regrettably, it is yet another example of the Defence’s persistent litigation tactics in this case.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(1) of the Regulations of the Court (“RoC”), this Response is filed as “Confidential”, as it contains information concerning witnesses and documents 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

i. The Motion is a trial tactic

3. The Defence’s contention that P-1597’s November 2017 Statement² contains certain information material to the preparation of the Defence and/or is potentially exculpatory is unavailing.

4. The information in the Statement to which the Motion refers, namely: (a) that Seleka bases were present in BANGUI and its surrounds during the 5 December 2013 coordinated Anti-Balaka attack; and (b) that a certain Colonel BISHARA commanded Seleka elements in and around KINA and CATTIN,³ are in fact neither ‘material’ nor potentially exculpatory.

¹ ICC-01/14-01/18-1982 (“Motion”).

² CAR-OTP-2050-0513 (“Statement”).

³ ICC-01/14-01/18-1982, paras. 15, 17, 19.

5. There is a fundamental difference between information which is *relevant* to the Defence's preparation, and that which is *necessary*.⁴ The 'materiality' requirement of rule 77 of the Rules of Procedure and Evidence ("Rules") and the Court's interpretive jurisprudence embodies the latter.⁵ As the Appeals Chamber has explained "the right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will depend upon the *specific circumstances* of the case."⁶ Trial Chamber III, for instance, has noted that there is no Prosecution obligation "to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance. The prosecution does not have the obligation of 'handing the defence the keys to the warehouse' in this way."⁷ The notion of 'materiality' is neither abstract nor automatic, and the Defence's challenge of the Court's interpretive jurisprudence does not make its position so.

6. In view of that jurisprudence and the circumstances of this case, the YEKATOM Defence's strategy — begun with previous Associate Counsel (who unsuccessfully pursued the identical tactic in the ICTY's *Karadžić* case) — is as transparent here as it was there. The *Karadžić* Trial Chamber's observation that, "[i]t 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",⁸ is equally apt regarding present Motion and YEKATOM's previous one.⁹

7. The Defence's conduct contradicts the suggestion that its motions "are not for the purpose to be counted up but rather to ensure that the Prosecution takes serious

⁴ See e.g., Règle 77 du Règlement de procédure et de preuve (providing for the disclosure of items « *qui sont nécessaires à la préparation de la défense de l'accusé* ») (emphasis added).

⁵ See ICC-02/04-01/15-1734, para. 22; ICC-01/12-01/18-859-Red, paras. 9-10; ICC-01/04-01/06-2147, 23-24; see also for example, ICC-01/14-01/18-64-Red, para. 18, ICC02/05-01/20-169, para. 21. ICC-01/12-01/18-31-tENG, para. 25; ICC-02/04-01/15-203, para. 20 (describing the notion of "true relevance").

⁶ ICC-01/05-01/13-2275-Red, para. 55 (internal citations omitted) (emphasis added).

⁷ See ICC-01/05-01/08-632, para. 26.

⁸ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's 107th Disclosure Violation Motion, 14 March 2016, para. 15.

⁹ See ICC-01/14-01/18-1918, (filed 12 June 2023).

measures to address its level of disorganization leading to failures to disclose evidentiary material.”¹⁰ The Defence’s practice to date makes clear that the impetus for the Motion (and others) is not genuine, but contrived. This is confirmed by the fact that, to date, none of the so-called “numerous failures regarding the Prosecution’s disclosure obligations”¹¹ has caused any material prejudice affecting the fairness of the proceedings. The Motion is no different.

i. The presence of active Seleka personnel in BANGUI

8. *First*, the presence of Seleka personnel and their bases in BANGUI and its surroundings, including during the 5 December 2013 coordinated Anti-Balaka attack, is practically a fact of common knowledge. It is moreover, a part of the Prosecution’s case.

9. As the Parties and Participants are aware, the Prosecution’s September 2018 Document Containing the Charges provides:

“the Seleka continued to operate under a military framework, with prominent Seleka commanders controlling groups of foot-soldiers (“elements”), within their respective bases in BANGUI and geographic areas of responsibility”¹²

The Prosecution’s 2021 Trial Brief contains the identical assertion.¹³

10. Further to this, the Prosecution’s position has consistently been that, in the course of the Anti-Balaka’s 5 December 2013 coordinated attack on BANGUI, “Seleka positions were targeted first”¹⁴ — which of course, does not preclude the group’s subsequent attack of civilians, as charged.¹⁵

¹⁰ ICC-01/14-01/18-1982, para. 24.

¹¹ ICC-01/14-01/18-1982, para. 26.

¹² ICC-01/14-01/18-282-AnxB1-Red, para. 619.

¹³ ICC-01/14-01/18-723-Red, para. 211.

¹⁴ ICC-01/14-01/18-723-Red, para. 55;

¹⁵ *Contra* ICC-01/14-01/18-1982, para. 17-19 (arguing that presence of the Seleka is exculpatory, at para. 18 that “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”).

11. *Second*, the presence of Seleka elements in and around BANGUI, and even allegations concerning armed Muslim merchants, is nothing new. And, as the Defence is well aware, the disclosed evidence in this case is replete with such information.

12. Significantly, the Court's statutory framework has long held that when the disclosure of additional information would have no "material effect" on the Defence's preparation (such as where sufficient information is already available), its provision is neither necessary, nor falls within the Prosecution's statutory obligations.¹⁶ It is not incidental that the Motion does not assert that P-1597's Statement provides material information which is new to the Defence, or not at its disposal. In this respect, the Motion fails to establish a key element for disclosure in the sense of demonstrating a 'material effect' on its preparation.

13. *Third*, in addition to the express assertions contained in core Prosecution filings regarding the presence of Seleka commanders, personnel, and bases in and around BANGUI during the 5 December 2013 coordinated Anti-Balaka attack — in which YEKATOM and his Group allegedly participated — the Prosecution presented a series of pertinent proposed agreed facts. The YEKATOM Defence's express rejection of

¹⁶ See ICC-01/04-01/06-2147, paras. 23-24 (noting, "where the defence has been supplied with a more than sufficient body of information" and "further material will not provide additional assistance to the defence under Rule 77"... providing material "above and beyond that already disclosed, is *unnecessary* for the preparation of the defence (*viz.* it would have no material effect). It does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules") (emphasis added)

these proposed agreed facts contradicts the claimed materiality of the information referenced in P-1597's Statement.

14. In its 29 July 2020 Second Proposal of Agreements as to Evidence, the Prosecution put forward, *inter alia*, the following proposed stipulations:

[REDACTED].

[REDACTED].

[REDACTED].¹⁷

15. Although the presence of prominent Seleka commanders in control of foot-soldiers situated in bases in and around BANGUI would obviously advance, if not subsume, the claimed materiality of the information referenced in P-1597's Statement — the YEKATOM Defence declined any such agreement,¹⁸ nor did it propose any contrary or related facts at any other time. Again, this belies the Motion's claim that the referenced information in P-1597's Statement is material and/or potentially exculpatory.

ii. Seleka Commander Colonel BISHARA

16. The Defence's contentions regarding the materiality of information concerning the Seleka commander named BICHARA is no more availing.¹⁹ That the said Colonel BICHARA controlled elements in the area of CATTIN and/or KINA is established by several disclosed items, whether directly or inferentially.

17. The Defence's position that P-1597's assertions to the effect that "some high profile Seleka members and particularly of Colonel BICHARA a former salesman who joined the Seleka and is "*rumoured* to have killed many people in 2013""²⁰ is material

¹⁷ ICC-01/14-01/18-811-Conf-AnxB-Corr, at pp. 4-5, 7 of the Second Proposal of Agreements as to Evidence.

¹⁸ ICC-01/14-01/18-811-Conf-AnxB-Corr, p. 18 [REDACTED].

¹⁹ See ICC-01/14-01/18-1982, paras. 15, 17, 19-20.

²⁰ ICC-01/14-01/18-1982, paras. 15.

is unconvincing. Not only is this information disclosed in several documents at least equally probative, that have been in the Defence's hands for over four years,²¹ some of the referenced information is also readily publicly available.²²

18. Again, given the previous disclosures, the information referenced in P-1597's Statement would have had no 'material effect' on the Defence's preparation. The Defence's concession that several witnesses were examined on the related topic(s) only underscores that information already disclosed was adequate, and that its preparation was not impeded.²³

²¹ See for example, CAR-OTP-2046-0599 (« le général Ali **Bichara**, accusé par des habitants du quartier Cattin de commander une sanglante opération de ratissage ») (disclosed on 25 January 2019); CAR-OTP-2001-2707, 2733 (“[a]ccording to several testimonies including by eye-witnesses collected by Amnesty International during a mission in Bangui in December 2013, Séléka commanders including Colonel **Bishara** and Colonel Aba Tom led several attacks in which crimes under international law and serious human rights violations were committed. These included killings of civilians, mostly Christians that took place in the 3rd arrondissement of Bangui between 5 and 6 December 2013”) (disclosed on 12 July 2019) — see also footnote 112 (noting, the alleged killing of persons by Seleka and “armed Muslims” led by Colonel AbaTom and/or Colonel **Bishara** between 5 and 7 December 2013”) (disclosed on 25 January 2019); see CAR-OTP-2001-6762 (“[e]ye-witness testimonies documented by Amnesty international reveal the role of Séléka commanders, including Colonel **Bishara**, Colonel Aba Tom and Colonel Yussuf Hamad, in leading attacks in Bangui”) (disclosed on 25 January 2019); see CAR-OTP-2001-2769, 2801 (“[i]n the Kina neighbourhood of the 3rd district - “during the night of December 5th after the anti-balaka and the Seleka attack. Colonel Bichard[sic] and three other Seleka entered our neighbourhood”), 2837 (“...Ali **Bichara**, a colonel who has become a general. Ali **Bichara**, 46-years old, used to be a shoe salesman and was a Nouredine Adam man who fought in the final attack in March 2013. Besides the torture and pillage reported by many victims, Adam carried out violent searches especially in the Cattin district of Bangui during the anti-balaka attack on Bangui on 5 December 2013”) (disclosed on 25 January 2019); see CAR-OTP-2099-0165, 0219 (« [e]n dehors de ces grand chefs, il y avait des individus se proclamant colonels ici et là, disposant de quelques hommes qui pouvaient faire régner la terreur dans les quartiers. C'est le cas d'un colonel appelé **BICHARA** qui était au quartier FATIMA. **BICHARA** est un ancien commerçant au marché central de BANGUI. **BICHARA** serait "impliqué dans de nombreux incidents criminels tels que les assassinats, vols de véhicules et de groupes électrogènes appartenant à l'Etat. Cela est de notoriété publique à BANGUI ») (disclosed on 17 May 2019); see CAR-OTP-2105-0195, 0209 (identifying **Bishara**'s men on CAR-OTP-2012-0523) (disclosed on 18 June 2020).

²² See e.g., FIDH - International Federation for Human Rights, Central African Republic: A country in the hands of Seleka war criminals, September 2013, at p. 16 (noting the organisation of Seleka forces by zone or district, with control over limited territory and confirming Col **Bichara** as “one of Nouredine Adam's men”) <<https://www.fidh.org/IMG/pdf/rca616a2013basdef.pdf>> last visited on 17 July 2023.

²³ See ICC-01/14-01/18-1982, paras. 17, 18. Cf the *Lubanga* ‘material effect’ doctrine cited above.

ii. The referenced information is not legally or factually significant

19. The suggestion that YEKATOM and his Group attacked Seleka bases during the course of the Anti-Balaka's 5 December 2013 attack on BANGUI and its surroundings has no material impact on the charges, nor does it mitigate his responsibility.

20. As the Defence is aware, the presence of Seleka fighters in BANGUI does not alter the nature of the article 7(1) attack against the Muslim civilian population perpetrated by the Anti-Balaka.²⁴ The *context* of the crimes ascribed to YEKATOM and his Group are not determined by the discrete neighbourhoods in which they allegedly occurred, but instead by the circumstances attendant to the broader Anti-Balaka attack in which he and his elements took part — which included, *inter alia*, BANGUI and its surroundings.

21. Thus, the Defence's suggestion that the presence of Seleka elements in areas of BANGUI wherein YEKATOM and his Group allegedly participated in the broader Anti-Balaka attack is exculpatory or mitigates his criminal responsibility is incorrect.

22. It is well settled that "the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character."²⁵ Moreover, it is not an element of 'crimes against humanity' that the victims of the underlying crimes need be civilians, as they may properly include other protected classes of individuals.²⁶

23. In any case, the presence of Seleka elements and/or Col BISHARA in the neighbourhoods of BOEING and CATTIN, cannot change the manifestly civilian

²⁴ See ICC-01/14-01/18-403-Corr-Red, para. 64 (defining the scope of the article 7(1) "as a form of retributive violence throughout Bangui, including Boeing and Bimbo, and across western CAR Prefectures, including Ouham (Bossangoa), Mambere-Kadei (Berbérati, Carnot, Guen), Lobaye (Boda), Ouham-Pende (Bossemptélé) and Ombella-M'Poko (Yaloké, Gaga, Zawa, Boali)" beginning in September 2013, and involving multiple crimes).

²⁵ See ICC-01/04-02/06-2359, para.668; ICC-01/05-01/08-3343, para.153; ICC-01/04-01/07-3436-tENG, para.1105; see also Additional Protocol I, Article 50(3). Note also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010, para. 754 (internal citation omitted); see also *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgement, 24 March 2016, paras. 474-476.

²⁶ ICC-01/04-02/06-2359, para. 669; ICC-01/05-01/08-3343, para.156; see *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeal Judgement, 30 January 2015, para. 569; see *Prosecutor v. Mrkšić and Šljivančanin*, Case

character of the population of BANGUI — the capital of the Central African Republic — and its surroundings. Moreover, YEKATOM is not charged with targeting the Seleka unlawfully, but the Muslim *civilian* population. The attack on civilians in these neighbourhoods is not mitigated by the presence of Seleka elements or so-called “armed Muslim merchants.”²⁷ The Defence’s attempt to parse the context of the Anti-Balaka attack according to discrete neighbourhoods in and around BANGUI to substantiate the Motion is as artificial as it is flawed.

iii. The burden is on the Defence to establish materiality

24. Where information is not otherwise assessed as ‘material’ by the Prosecution in the exercise of its responsibility,²⁸ the Defence bears the burden to demonstrate the materiality of the information sought.²⁹ Several cases speak to this issue, including *Ongwen*, *Al Hassan*, and *Lubanga*.³⁰

25. The Defence’s argument that the Prosecution should have been aware of the its “theory” is at best an assumption. *First*, the Defence never expressly communicated any such theory to the Prosecution in respect of its prior disclosure demands or requests.³¹ *Second*, it is well-settled jurisprudence in any case that the Prosecution does not have an obligation to anticipate every idea the Defence may intend to advance. This is especially true, where it has no clear evidentiary or legal impact on

No. IT-95-13/1-A, Appeal Judgement, 5 May 2009, paras. 29, 32; *see also Prosecutor v. Martić*, IT-95-11-A, Appeal Judgement, 8 October 2008, para. 307; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgement, 24 March 2016, para. 476; *Prosecutor v. Kaing Guek Eav*, Judgment, ECCC 001/18-07-2007, 2 August 2010, para.311; *Prosecutor v. Sesay et al.*, Judgement, Case No. SCSL-04-15- T, 2 March 2009, para. 82.

²⁷ ICC-01/14-01/18-1982, paras. 18-20.

²⁸ *See* ICC-01/05-01/08- 3336, para. 34 (“[...] Generally, the Prosecution holds responsibility for making such determinations.”). Similarly, *see* ICC-01/05-01/08-632, paras. 20-22.

²⁹ *See* ICC-01/11-01/11- 392-Red-Corr, para. 40 .(requiring disclosure requests to be “specific enough both in terms of what is sought by the Defence and the reasons why disclosure of the [...] material appears necessary”).

³⁰ *See* ICC-02/04-01/15-1734; ICC-01/12-01/18-859-Red; ICC-01/04-01/06-2147; *see also* ICC-01/05-01/13-2275-Red, para.55, paras. 39, 42.

³¹ *Contra* ICC-01/14-01/18-1982, para. 20 and fn. 27 (referring to correspondence requesting redaction lifts in respect of *disclosed items*).

the charges or the case as a whole — such as altering the context or character of the charged crimes, as the Motion seems to suggest.

26. As noted, the position that “the presence of Seleka and armed Muslim merchants in this area of Bangui is material ... [and] has the ability to mitigate the guilt of the Accused”³² is flawed, in respect of the crimes against humanity with which YEKATOM is charged.³³

B. The Defence has suffered no prejudice

27. Even assuming *arguendo* that P-1597’s Statement contains ‘material’ information — which it does not in regard to all of the attendant circumstances — the timing of its disclosure has caused no material prejudice.

28. In its preparation, the Defence has been able to avail itself of several documents and other information affirmatively disclosed (years ago), elicited during the course of testimony, and available publicly. The contention that the Defence has “suffered a prejudice by not being able to put the content of the Statement to other Prosecution witnesses to elicit evidence” is not persuasive. For instance, the Motion does not allege that the Defence was unable to put any unique material fact contained in P-1597’s Statement to Prosecution witnesses during the course of trial.

C. The requested remedies are disproportionate and unnecessary

29. Insofar as there has been no breach of the Prosecution’s disclosure obligations, the additional remedies sought by the Defence should be dismissed. Even if the Chamber determines that the Prosecution did not *timely* disclose P-1597’s Statement,³⁴

³² ICC-01/14-01/18-1982, para. 20.

³³ See *e.g. Prosecutor v. Popović et al*, Case No. IT-05-88-T, Judgement, 10 June 2010, para. 761 (“[w]hile the Trial Chamber has found members of the ABiH [Bosnian Army] were present in the enclaves prior to and during the attack, this does not in any way affect the fundamental civilian status of the enclaves”) — see also para. 246 (noting that thousands of men comprised the 28th Division within the Srebrenica enclave); see also *Prosecutor v. Perišić*, “Judgement”, Case No. IT-04-81-T, 6 September 2011, para. 84.

³⁴ ICC-01/14-01/18-1982, para. 22.

the relief requested is disproportionate given the absence of any appreciable prejudice to the Defence, much less an impact on the fairness of the proceedings.

30. The Prosecution has previously addressed the Defence's requests for 'declaratory relief' and maintains its position that the statutory framework does not provide for the same.³⁵ The request that the Prosecution "review all the material, including internal documents or notes, in its possession", is not only disproportionate, but impractical – given an evidence collection of more than 140,000 documents of which well over 32,000 have been duly disclosed.³⁶ Finally, as concerns the exclusion of the video CAR-OTP-2050-0648 provided by P-1597,³⁷ the Prosecution notes two things: (1) the video is and has been publicly available for years;³⁸ (2) its exclusion would unreasonably impede the Chamber's statutory duty to determine the truth in these proceedings.

IV. CONCLUSION

31. For the reasons above, the Chamber should reject the Motion in all respects.



Karim A. A. Khan KC, Prosecutor

Dated this 1st day of September 2023

At The Hague, The Netherlands

³⁵ See e.g. ICC-01/14-01/18-1941-Red, p. 12, ICC-01/14-01/18-698-Red, p.12, ICC-01/14-01/18-581-Red, p. 11 (incorporated herein by reference).

³⁶ The Prosecution asserts that this represents among the largest disclosure collections at the Court to date.

³⁷ Disclosed on 28 August 2020.

³⁸ See TVC Communications, TVC Digital, CAR crisis: Anti-Balaka group vows to defend civil populace, uploaded Dec 20, 2013, <<https://www.youtube.com/watch?v=n43POmH94Cw>> last visited on 21 July 2013.