

**Cour
Pénale
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**International
Criminal
Court**

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Date: **20 August 2019**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Motion for Disclosure of Exculpatory Material

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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1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully moves that the Chamber order the Prosecution to disclose all items encompassed by Article 67(2) of the Statute, including (1) information that may tend to show that Mr. Yekatom cannot be held responsible for the crimes as a superior; (2) information about activities of Seleka or other armed groups; and (3) information tending to effect the credibility of prosecution evidence such as evidence of criminality of Prosecution witnesses and information about promises or benefits requested by or provided to Prosecution witnesses.

RELEVANT PROCEDURAL HISTORY

2. On 11 November 2018, the Pre-Trial Chamber issued a warrant of arrest for Mr. Yekatom, charging him with crimes against humanity and war crimes allegedly committed in the Central African Republic between 5 December 2013 and August 2014.¹
3. Mr. Yekatom made his initial appearance on 23 November 2018.²
4. On 14 December 2018, the Single Judge issued a decision seeking observations for the purposes of establishing a disclosure calendar.³
5. On 21 December 2018, the Prosecution filed its observations,⁴ and requested the adoption of a redaction protocol.⁵ The Defence filed its observations on 28 December 2018,⁶ and responded to the proposed redaction protocol 7 January 2019.⁷

¹ [ICC-01/14-01/18-1 Red](#), para. 25.

² [ICC-01/14-01/18-T-1](#).

³ [ICC-01/14-01/18-33](#).

⁴ [ICC-01/14/01/18-40-Conf](#).

⁵ [ICC-01/14-01/18-39](#).

⁶ [ICC-01/14-01/18-45-Conf](#).

⁷ [ICC-01/14-01/18-47](#).

6. On 23 January 2019, the Single Judge issued its *Decision on Disclosure and Related Matters*. In the decision, he emphasised that:

The Prosecutor shall disclose [exculpatory] evidence immediately after having identified any such evidence, unless some justifiable reasons prevent her from doing so.⁸

7. Disclosure commenced on 28 January 2019,⁹ and has continued throughout the period leading to the confirmation hearing.¹⁰ Exculpatory material has been included in these disclosures. The Defence has contacted the Prosecution on many occasions in an effort to informally resolve disclosure and redaction issues.
8. On 20 February 2019, the Pre-Trial Chamber joined the case of Mr. Yekatom with that of Patrice-Edouard Ngaïssona, who had been arrested and transferred to the Court in the meantime.¹¹
9. On 11 March 2019, Mr. Ngaïssona filed his observation on disclosure issues.¹² The Prosecution responded on 23 March 2019,¹³ and on 4 April 2019, the Pre-Trial Chamber issued its *Second Decision on Disclosure and Related Matters*. The Chamber ordered that the Prosecutor disclose all evidence within the meaning of Article 67(2) of the Statute by 17 May 2019.¹⁴

⁸ [ICC-01/14-01/18-64-Red](#), para. 16. Leave to appeal this decision was denied on 8 February 2019 ([ICC-01/14-01/18-79](#)).

⁹ [ICC-01/14-01/18-72](#).

¹⁰ [ICC-01/14-01/18-122](#), [ICC-01/14-01/18-159](#), [ICC-01/14-01/18-185](#), [ICC-01/14-01/18-191](#), [ICC-01/14-01/18-202](#), [ICC-01/14-01/18-221](#), [ICC-01/14-01/18-238](#), [ICC-01/14-01/18-251](#), [ICC-01/14-01/18-253](#), [ICC-01/14-01/18-260](#), [ICC-01/14-01/18-268](#), [ICC-01/14-01/18-271](#), [ICC-01/14-01/18-274](#), [ICC-01/14-01/18-278](#).

¹¹ [ICC-01/14-01/18-87](#). Leave to appeal this decision was denied on 21 March 2019 ([ICC-01/14-01/18-154](#)).

¹² [ICC-01/14-01/18-143-Conf](#).

¹³ [ICC-01/14-01/18-155-Red](#).

¹⁴ [ICC-01/14-01/18-163](#). Leave to appeal this decision was denied on 24 May 2019 ([ICC-01/14-01/18-206](#)).

10. On 15 May 2019, the Pre-Trial Chamber postponed the confirmation hearing until 19 September 2019 at the request of the Prosecution, and ordered disclosure of Article 67(2) material to be completed by 19 August 2019.¹⁵
11. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”).¹⁶

RELEVANT PROVISION

12. Article 67—rights of the accused:

2. 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.

ARGUMENT

13. A fundamental component of the right of an accused to a fair trial includes the right to disclosure of potentially exculpatory material.¹⁷ The Prosecution's duty to disclose exculpatory material is as important as the obligation to prosecute.¹⁸ The Chamber has already ordered the Prosecution to disclose exculpatory information **immediately** after having identified it.¹⁹
14. While material relating to issues of witness credibility and mitigation of punishment may not be immediately usable by the Defence during the

¹⁵ [ICC-01/14-01/18-199](#), para. 39.

¹⁶ [ICC-01/14-01/18-282-Conf-AnxB1](#).

¹⁷ *Prosecutor v. Banda & Jerbo*, Decision on Article 54(3)(e) documents, [ICC-02/05-03/09-259](#), 23 November 2011, para. 14.

¹⁸ *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, [Judgement](#), 16 January 2007, para. 72; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, [Judgement](#), 17 December 2004, paras 183, 242.

¹⁹ [ICC-01/14-01/18-64-Red](#), para. 16.

confirmation proceedings, the Prosecution is not allowed to delay its disclosure of exculpatory material depending on the stage of the procedure. Development of a defence strategy for the case requires disclosure of all exculpatory information at the earliest possible stage. Therefore, the Chamber should not entertain any argument from the Prosecution that it is conducting “rolling disclosure” dependent on the perceived utility of the information to the Defence.²⁰

15. This motion pertains to discrete categories of material on which the parties may differ as to their exculpatory nature, and seeks a decision from the Chamber resolving those differences. The standard for assessing whether material is considered to be exculpatory is whether there is any possibility, in light of the submissions of the parties, that the given information could be relevant to the defence of the suspect.²¹ The material needs only to be potentially exculpatory.²²

I. Superior Responsibility material

16. Article 28 of the Statute provides in pertinent part:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

²⁰ See *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, [Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision](#), 10 December 2010, para. 11: “The Prosecution can[not] delay the disclosure of [exculpatory] material already in its possession, or identify and disclose potentially exculpatory material on a ‘rolling basis’.”

²¹ *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-A, [Decision on Milan Lukić’s Motion for Remedies Arising out of Disclosure Violations by the Prosecution](#), 12 May 2011, para. 14.

²² *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, [Judgement](#), 20 October 2010, para. 20.

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

17. Mr. Yekatom contends that the following material should be disclosed to him pursuant to Article 67(2) as tending to show his lack of superior responsibility for the crimes charged:

- (A) Information tending to show that Mr. Yekatom lacked effective control over the perpetrators, including the existence of a parallel chain of command;
- (B) Information tending to show that the crimes did not result from Mr. Yekatom's failure to exercise control;
- (C) Information tending to show that Mr. Yekatom lacked knowledge or reason to know of the crimes;
- (D) Information tending to show that Mr. Yekatom made efforts to prevent or punish crimes or to refer them for investigation.

18. In the *Lubanga* case, the Prosecution conceded that evidence that the suspect had insufficient command over people who committed the crimes with which he was charged would fall within Article 67(2).²³ Evidence of the accused's lack of effective control over those committing the charged crimes has also been recognised as exculpatory by a Trial Chamber of the ICTY.²⁴

19. But effective control is only one element of what the Prosecution must establish for superior responsibility. It must also establish that the suspect either knew or, should have known that his forces were committing or about to commit

²³ *Prosecutor v. Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, [ICC-01/04-01/06-1401](#), 13 June 2008, para. 22.

²⁴ *Prosecutor v. Orić*, Case No. IT-03-68-T, [Judgement](#), 30 June 2006, para. 74.

such crimes; that the suspect failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes; and that the crimes committed by the forces resulted from the failure of the suspect to exercise control properly over them.²⁵

20. Information about efforts of an accused to prevent crimes by a group considered to be his subordinates was found to be exculpatory material in the *Karemera* case at the ICTR,²⁶ and information about efforts to punish crimes was found to be exculpatory in the *Karadžić* case at the ICTY.²⁷
21. Therefore, all information in possession of the Prosecution that indicates any possibility that Mr. Yekatom may not have known of the crimes of his subordinates, may have made some effort, in the past or on that occasion, to prevent or punish crimes, or that the crimes may not have resulted from his failure to exercise control, must be disclosed pursuant to Article 67(2).

II. Activities of Seleka and Other Armed Groups

22. Mr. Yekatom does not defend himself by claiming that anti-Balaka in CAR were simply behaving like Seleka and other armed groups. *Tu quoque* is not a defence. However, information about the conduct of the other side can be exculpatory for other reasons. Therefore, Mr. Yekatom requests the Chamber to order the Prosecution to disclose under Article 67(2):

- (A) Information tending to show that someone other than the suspect or co-perpetrators or subordinates were responsible for the crimes charged;

²⁵ *Prosecutor v. Bemba*, Judgment pursuant to Article 74 of the Statute, [ICC-01/05-01/08-3343](#), 21 March 2016, para. 170.

²⁶ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, [Oral Decision on Disclosure of Material from Joseph Serugendo](#), 30 May 2006, p. 64, lines 1-14.

²⁷ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, [Decision on Accused's Forty-Seventh Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings](#), 10 May 2011, para. 15; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, [Decision on Accused's Ninety-Sixth Disclosure Violation Motion](#), 21 January 2015, para. 8.

- (B) Information tending to show that persons in the areas attacked by the suspect or his co-perpetrators or subordinates were not civilians, but could possibly be classified as combatants, such as armed traders and members of other armed groups;
- (C) Information tending to show that perpetrators were acting out of personal revenge and thus less likely to be able to be effectively controlled (i.e. evidence of crimes committed against their family members, neighbours, or friends);
- (D) Information about crimes by other armed groups that preceded the attacks charged (being relevant to the suspect's and his co-perpetrators and subordinates' *mens rea* as well as potential defences of reasonable force and necessity);
- (E) Information concerning the organisation of other armed groups known to be present in the areas attacked by the suspect or his co-perpetrators or subordinates and the existence of any orders or plans to conduct combat in those areas around the time of the attacks.

23. In the *Lubanga* case, the Appeals Chamber recognised that the use of child soldiers by other armed groups in DRC was material to the preparation of the Defence and should be disclosed. It recognised that such information could be relevant to mitigation of punishment as well as to "setting a defence line".²⁸ Similarly, evidence of the activities of other armed groups in CAR, for the reasons specified in paragraph 22(A)-(E) above, can possibly be relevant to defences offered by Mr. Yekatom that could exculpate him from the crimes charged or mitigate his sentence if convicted.

24. For example, in material that has been disclosed, Prosecution Witness P-0291 said that in a very strong and violent retaliation, the Seleka killed 1,000 suspected Anti-Balaka supporters within two days of the December 2013 attack, including people who were in hospitals for medical care.²⁹

²⁸ *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, [ICC-01/04-01/06-1433](#), 11 July 2018, para. 82. To the extent that the Pre-Trial Chamber believes that any of the material should be ordered disclosed pursuant to Rule 77, rather than Article 67(2), it is respectfully requested to treat the instant motion as having been brought under Rule 77 in the alternative.

²⁹ CAR-OTP-2034-0104, para. 111.

25. Another Prosecution witness who was present in Mbaïki throughout 2013 and 2014 has indicated that the Seleka pillaged houses in Mbaïki without distinction between who was Muslim and who was not, they raped women in Mbaïki, attacked innocent citizens, and distributed arms to traders who later used them to resist the Anti-Balaka.³⁰ The witness also indicated that the Seleka bore some responsibility for the decision of Muslims to flee Mbaïki³¹ – information which may tend to exculpate Mr. Yekatom for the charge of forced displacement of Muslims from there.
26. Information that has not yet been disclosed that would shed further light on the activities of the Seleka in Bangui, Mbaïki, and other areas where Mr. Yekatom is accused of committing crimes, is likewise relevant and exculpatory.
27. Decisions of ICTY and ICTR Trial Chambers illustrate the relevance of information about crimes committed by the other side beyond the impermissible *tu quoque* purpose.
28. In the *Prlić* case, the ICTY Trial Chamber held that it may be legitimate to prove the other side's attacks upon the civilian population of an accused's camp if they go to refute, for example, allegations of a widespread or systematic attacks perpetrated upon a civilian population, allegations of the existence of a plan of concerted attacks upon several villages or perhaps to explain the behaviour of the accused, or provide information on the organisation and activities of the armed forces of the other side.³²

³⁰ CAR-OTP-2100-0252, paras 21-25, 30-35.

³¹ CAR-OTP-2100-0252, paras 36-37.

³² *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, [Decision on Praljak Defence Motion for Admission of Documentary Evidence](#), 1 April 2010, para. 80.

29. In the *Karadžić* case, the ICTY Trial Chamber held that information that Bosnian Muslim snipers were firing into Serb areas was exculpatory and should have been disclosed.³³
30. In the *Gotovina* case, the ICTY Trial Chamber held that evidence of Serb crimes against Croat civilians could aid in showing an alternative explanation to the prosecution allegation of a joint criminal enterprise by the Croatian forces and was therefore exculpatory.³⁴
31. In the *Bralo* case, the ICTY Appeals Chamber held that evidence of an attack on his home was not improper *tu quoque* evidence, but was properly relevant to mitigation of his sentence.³⁵
32. ICTR Trial Chambers in the *Military I*, *Military II*, and *Government I* cases held that information about crimes by the Rwandan Patriotic Front (“RPF”) constituted exculpatory material in the trials of leaders of the Rwandan Armed Forces and their political leaders.³⁶
33. Therefore, the Chamber should order the Prosecution to disclose, pursuant to Article 67(2), evidence of activities of the Seleka and other armed groups, within the parameters set forth in paragraph 22(A)-(E), above.³⁷

³³ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, [Decision on Accused’s Eighty-Fourth Disclosure Violation Motion](#), 16 January 2014, para. 10.

³⁴ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, [Decision on Ivan Cermak’s Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence](#), 7 August 2009, para. 11.

³⁵ *Prosecutor v. Bralo*, Case No. IT-95-17-A, [Judgement on Sentencing Appeal](#), 2 April 2007, para. 16.

³⁶ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, [Decision on Ntabakuze Motion for Disclosure of Prosecution Files](#), 6 October 2006, paras 4-5; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, [Decision on Ntabakuze Defence Motions Concerning Disclosure of Exculpatory Evidence](#), 22 October 2008, para. 4; *Prosecutor v. Ndindiliyimana et al.*, No. ICTR-00-56-T, [Decision on Defence Motions Alleging Violations of the Prosecution’s Disclosure Obligations Pursuant to Rule 68](#), 22 September 2008, para. 27; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, [Decision on Prosecutor’s Rule 68\(D\) Application and Joseph Nzirorera’s 12th Notice of Rule 68 Violation](#), 26 March 2009, para. 16.

³⁷ The issue of whether the Prosecution should be allowed to redact information as a result of its ongoing investigation of Seleka crimes is addressed in a separate *Motion to Lift Redactions*.

III. Material Related to Credibility

34. As part of its duty to disclose material relevant to the credibility of prosecution evidence pursuant to Article 67(2), the Prosecution must disclose the criminal records of all of the witnesses it intends to rely on at the confirmation stage, material supporting the Prosecution's position that these witnesses are suspects, as well as all benefits requested or provided to those witnesses.³⁸ While these propositions appear to be uncontroversial, the Defence has barely received disclosure of any such material under Article 67 (2).³⁹
35. The Prosecution interviewed many Prosecution witnesses as "suspects" during its investigation. The material that led the Prosecution to believe that the witness may have committed crimes, like records of a criminal conviction, evidence of their *de facto* or *de jure* authority over armed groups, or evidence of their involvement in crimes tends to affect the credibility of the Prosecution evidence from that witness. Likewise, the fact that the witness sought or received money or any other benefit from the Prosecution may reveal a motive for the witness' giving evidence and tends to affect the credibility of the witness.

³⁸ *Prosecutor v. Lubanga*, Decision on the Defence Request for Order to Disclose Exculpatory Materials, [ICC-01/04-01/06-649](#), 3 November 2006, p. 3; *Prosecutor v. Bemba*, Public Redacted Version of "Decision on the 'Defence request for modification of redactions'", ICC-01/05-01/08-1857 of 21 October 2011, [ICC-01/05-01/08-1857-Red](#), 28 June 2016, para. 13; *Prosecutor v. Ntaganda*, Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses, [ICC-01/04-02/06-904](#), 16 October 2015, para. 32.

³⁹ For example, in material that has been disclosed, one Prosecution witness states that Witness P-0801 had a criminal record (CAR-OTP-2094-0228-R01, para. 157). The disclosure of this criminal record is required if in the possession of the Prosecution.

CONCLUSION

36. For any and all of the above reasons, the Chamber is respectfully requested to order the Prosecution to immediately disclose all exculpatory material, including the categories of material sought by this motion.⁴⁰

RESPECTFULLY SUBMITTED ON THIS 20TH DAY OF AUGUST 2019



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⁴⁰ The assistance of Legal Intern Eva Daniel of France in the research for this motion is gratefully acknowledged.