

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/14-01/18**

Date: **29 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 with Confidential Annexes A and B

**Public Redacted Version of Motion for
Finding of Disclosure Violation and for Remedial Measures**

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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REGISTRY

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**Victims Participation and Reparations
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully move for a finding that the Prosecution has violated its obligation to disclose exculpatory material by failing to timely disclose material in its possession indicating that one of its witnesses was involved in the fabrication of evidence. The Defence further requests that as a remedial measure, the Chamber orders the Prosecution to take immediate steps to disclose the material and require the evidence of the witness to be heard *viva voce* at the confirmation hearing.

CONFIDENTIALITY

2. The present motion and its annexes are filed on a confidential basis as disclosure may identify the witness. A public redacted version is being filed contemporaneously.

RELEVANT PROCEDURAL HISTORY

3. 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.¹
4. 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 exculpatory evidence by 17 May 2019.²
5. 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 exculpatory material to be completed by 19 August 2019.³

¹ [ICC-01/14-01/18-64-Red](#), para. 16.

² [ICC-01/14-01/18-163](#).

6. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”).⁴
7. On 20 August 2019, the Defence filed a motion for disclosure of exculpatory material.⁵ The Prosecution responded the next day, stating that the motion was unnecessary since it had fully complied with its duty to disclose exculpatory material.⁶ On 28 August 2019, the Chamber once again directed the Prosecution to disclose all exculpatory material.⁷
8. On 23 August 2019, the Defence sent a letter to the Prosecution asking why it had not disclosed information in its possession that Prosecution Witness P-[REDACTED] had engaged in the fabrication of evidence and requesting disclosure of all such information in the Prosecution’s possession.⁸
9. On 26 August 2019, the Prosecution recognised that the witness’ involvement in the fabrication of evidence was “relevant to his credibility as a prior act involving dishonesty”, but declined to disclose any of the material in its possession, suggesting that the Defence had to apply to the court before whom the fabrication occurred to obtain the exculpatory evidence.⁹

RELEVANT PROVISION

10. Article 67(2) provides:

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

³ [ICC-01/14-01/18-199](#).

⁴ [ICC-01/14-01/18-282-Conf-AnxB1](#).

⁵ [ICC-01/04-01/18-284](#).

⁶ [ICC-01/04-01/18-286](#).

⁷ [ICC-01/04-01/18-296](#).

⁸ This letter is attached as Confidential Annex A.

⁹ The email is attached as Confidential Annex B.

case of doubt as to the application of this paragraph, the Court shall decide.

ARGUMENT

11. The right to disclosure of potentially exculpatory material has been held to be a fundamental component of the right of an accused to a fair trial.¹⁰ It has been said that the obligation to disclose exculpatory material is as important as the obligation to prosecute.¹¹ In pursuit of justice, the disclosure of exculpatory material to the defence is of paramount importance to ensure the fairness of proceedings.¹² The Prosecution's obligation to disclose exculpatory material has always been interpreted broadly.¹³
12. A fundamental component of the right of an accused to a fair trial includes the right to disclosure of potentially exculpatory material.¹⁴ The Chamber has already ordered the Prosecution to disclose exculpatory information immediately after having identified it.¹⁵
13. The Prosecution's DCC relies upon Prosecution Witness P-[REDACTED]'s evidence on 44 separate occasions.¹⁶ What appears nowhere in the DCC, or in the material disclosed to the defence, is that Witness P-[REDACTED] was heavily involved in the fabrication of false evidence.

¹⁰ *Prosecutor v. Banda & Jerbo*, [Decision on Article 54\(3\)\(e\) Documents](#), ICC-02/05-03/09-259, 23 November 2011, para. 14.

¹¹ *Prosecutor v. Kordić & Čerkez*, Case No. IT-65-14/2-A, [Judgement](#), 17 December 2004, paras 183, 242; *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, [Judgement](#), 16 January 2007, para. 72.

¹² *Prosecutor v. Orić*, Case No. IT-03-68-T, [Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules](#), 13 December 2005, para. 20.

¹³ *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. 13.

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

¹⁵ [ICC-01/14-01/18-64-Red](#), para. 16.

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

14. [REDACTED]¹⁷
15. [REDCATED].
16. [REDACTED].
17. The Prosecution has conceded that this information is exculpatory within the meaning of Article 67(2) and that they had not disclosed it to the Defence.¹⁸ Its excuses for doing so are untenable.
18. *First*, the Prosecution claims that much of the information is already public. But the Appeals Chamber has squarely held that the Prosecution has an obligation to disclose items to the defence even if they are publicly available.¹⁹ At the ICTR, a Trial Chamber held:

The Chamber disagrees with, and finds absolutely lacking in merit, the prosecution's contention that it does not have to abide by established Rule 68 obligations [to disclose exculpatory or impeaching evidence] when it feels that the accused might be able to find the information on his own.²⁰
19. *Second*, [REDACTED].²¹ [REDACTED].
20. [REDACTED]. By remaining silent the Prosecution has made this information unreachable by the Defence in time for the confirmation hearing.
21. The Prosecution's second excuse is that [REDACTED]. It claims that [REDACTED]. But the Prosecution never even notified the Defence of the existence of this material. This failure and the belated claim on the eve of the

¹⁷ [REDACTED].

¹⁸ Confidential Annex B.

¹⁹ *Prosecutor v. Banda & Jerbo*, [Judgement on the Appeal of Mr. Abdallah Banda Abakaer Nourain and Mr. Salah Mohamed Jerbo Jamus against the Decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor"](#), ICC-02/05-03/09-501, 28 August 2013, para. 34.

²⁰ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, [Decision on Joseph Nziirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho](#), 18 February 2009, para. 21.

²¹ [REDACTED].

confirmation hearing that [REDACTED] significantly jeopardises the Defence's ability to complete any necessary proceedings to access the material soon enough for an effective use at the confirmation hearing.

22. In his *Decision on Disclosure and Related Matters*, the Single Judge stated:

[T]he Defence must receive such evidence sufficiently in advance prior to the commencement of the confirmation hearing in order to make *effective* use of the right provided in article 61(6) of the Statute. In the light of the foregoing, the Single Judge expects the Prosecutor to fulfill diligently her duties under article 67(2) of the Statute.²²

23. The Prosecution's failure to disclose material related to Witness P-[REDACTED]'s fabrication of evidence by the 19 August 2019 deadline is a breach of its duty under Article 67(2) and the Single Judge's order. The Chamber is requested to make an explicit finding to this effect so as to fully document this violation and to deter future violations.
24. Because the Defence has been prejudiced by this violation, the Chamber is requested to provide the following remedies: (A) direct the Prosecution to disclose all information in its possession concerning the fabrication of evidence by Witness P-[REDACTED], [REDACTED], and to take whatever steps necessary to obtain modification of any protective measures to effect such disclosure; and (B) require Witness P-[REDACTED] to testify *viva voce* at the confirmation hearing where he can be fully cross examined about the fabrication of evidence and the Chamber can determine whether his evidence in this case is reliable.

CONCLUSION

25. It is respectfully requested that the Chamber make a finding that the Prosecution has violated its duty to disclose exculpatory material pursuant to

²² [ICC-01/14-01/18-64-Red](#), para. 16.

Article 67(2), and as remedial measures, order the immediate disclosure of the material and require the evidence of the witness at the confirmation hearing to be heard *viva voce*.

RESPECTFULLY SUBMITTED ON THIS 29TH DAY OF AUGUST 2019



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