

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **27 March 2020**

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 redacted version of "Response to Prosecution Notification
Refusing to Disclose Exculpatory Material", 17 September 2019, ICC-01/14-
01/18-349-Conf**

Source: Defence for Mr. Alfred Rombhot Yekatom

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Me Mylène Dimitri

Mr. Peter Robinson

Counsel for Mr. Ngaïssona

Me Geert-Jan Alexander Knoops

Legal Representatives of Victims

Mr. Abdou Dangabo Moussa

Mr. Elisabeth Rabesandratana

Mr. Yaré Fall

Ms. Marie-Edith Douzima-Lawson

Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

Mr. Dmytro Suprun

**The Office of Public Counsel for the
Defence**

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully responds to the *Prosecution’s Notification Regarding the Order of Pre-Trial Chamber II in the Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions* (10 September 2019) (“Notification”).¹

CONFIDENTIALITY

2. This response is classified as confidential because the *Notification* was filed confidentially and [REDACTED].

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.²

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 2019.³
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 2019.⁴
6. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”).⁵

¹ [ICC-01/14-01/18-330-Conf](#), [REDACTED].

² [ICC-01/14-01/18-64-Red](#), para. 16.

³ [ICC-01/14-01/18-163](#).

⁴ [ICC-01/14-01/18-199](#).

⁵ [ICC-01/14-01/18-282-Conf-AnxB1](#).

7. On 20 August 2019, the Defence filed a motion for disclosure of exculpatory material.⁶ The Prosecution responded the next day, stating that the motion was unnecessary since it had fully complied with its duty to disclose 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 a Prosecution witness had been 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, 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
10. On 29 August 2019, the Defence filed a *Motion for Finding of Disclosure Violation and for Remedial Measures* contending that the Prosecution had violated its obligation to disclose exculpatory evidence with respect to Witness P-[REDACTED].¹⁰
11. The Prosecution responded on 2 September 2019.¹¹
12. On 3 September 2019, the Chamber found that the Prosecutor has failed to fully discharge her obligation to disclose information relevant to the witness.

⁶ [ICC-01/14-01/18-284](#).

⁷ [ICC-01/14-01/18-286](#).

⁸ [ICC-01/14-01/18-301-Conf-AnxA](#).

⁹ [ICC-01/14-01/18-301-Conf-AnxB](#).

¹⁰ [ICC-01/14-01/18-301-Red](#).

¹¹ [ICC-01/14-01/18-311-Conf](#).

13. With respect to the material available publicly, the Chamber held that the public nature of some of the information pertaining to Witness P-[REDACTED] did not affect the Prosecutor's obligation to disclose it.¹²
14. As to the non-public material, the Chamber directed the Prosecutor to disclose by 9 September 2019 any information pertaining to the witness and falling under Article 67(2) of the Statute, while respecting the protective measures ordered in relation to this witness in other proceedings before the Court.¹³
15. The Prosecution has never disclosed any of the public material related to this witness. On 10 September 2019, the Prosecution notified the Chamber that it was not in a position to disclose the non-public material.¹⁴
16. Relevant provisions
17. 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 case of doubt as to the application of this paragraph, the Court shall decide.

18. Regulation 42 provides:

1. Protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court and shall continue after proceedings have been concluded, subject to revision by a Chamber.
2. When the Prosecutor discharges disclosure obligations in subsequent proceedings, he or she shall respect the protective measures as previously

¹² [ICC-01/14-01/18-315-Conf](#), [REDACTED].

¹³ [ICC-01/14-01/18-315-Conf](#), [REDACTED].

¹⁴ [ICC-01/14-01/18-330-Conf](#), [REDACTED].

ordered by a Chamber and shall inform the defence to whom the disclosure is being made of the nature of these protective measures.

3. Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.

4. Before making a determination under sub-regulation 3, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

ARGUMENT

19. The right to disclosure of potentially exculpatory material is a fundamental component of a fair trial.¹⁵ The obligation to disclose exculpatory material is of paramount importance to ensure the fairness of proceedings,¹⁶ and is as important as the obligation to prosecute.¹⁷
20. The Prosecution has still not disclosed any of the public material concerning Witness P-[REDACTED] despite the Chamber's clear indication that it had a duty to do so.
21. With respect to the non-public material, the Chamber has already rejected the Prosecution's claim that it was unable to disclose the material without an order from other Trial Chambers. Regulation 42(2) does not require such an order. It simply requires that the Prosecution respect the protective measures in place and notify the defence of those protective measures when disclosing the material in a subsequent case.

¹⁵ *Prosecutor v. Banda & Jerbo*, [Decision on Article 54\(3\)\(e\) Documents](#), ICC-02/05-03/09-259, 23 November 2011, para. 14.

¹⁶ *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.

¹⁷ *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.

22. The Prosecution's refusal to disclose the non-public material by repeating its arguments that the defence must first apply to the other Chambers is in violation of this Chamber's decision and contrary to Regulation 42(2).
23. In any event, Regulation 42(3) provides that if the Chamber that authorised the protective measures for witnesses is no longer seized of the proceedings, the Chamber before which a variation of the protective measure is being requested can order the variation.
24. [REDACTED] Therefore, this Chamber is authorised to vary the protective measures and order disclosure all of the material that the Prosecution is withholding.
25. The Prosecution violated its duty under Article 67(2) and the Chamber's 3 September decision by not disclosing any public material, and by not disclosing the non-public material pursuant to Regulation 42(2) or, at a minimum, seeking to vary the protective measures pursuant to Regulation 42(3) before this Chamber. Instead, it waited until 10 September and then repeated to the Chamber the argument the Chamber had already rejected.
26. The Chamber is respectfully requested to find that by this course of action, the Prosecution has violated its obligations under Article 67(2). As a remedial measure, the Chamber is respectfully requested to order the Prosecutor to immediately disclose the material.

CONCLUSION

27. The Defence appreciates the hard work and considerable energy that the Chamber and its staff have devoted to keeping the confirmation hearing on

track.¹⁸ The Defence does not seek a postponement of that hearing. But the Prosecution should not be allowed to profit from its strategy of “running out the clock” to avoid disclosing exculpatory material. Disclosure can be ordered before the hearing concludes. Alternatively, the Chamber should exclude the evidence of Witness P-[REDACTED] from the confirmation hearing.

28. RESPECTFULLY SUBMITTED ON THIS 27th DAY OF MARCH 2020



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Peter Robinson
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

¹⁸ The Defence takes note of the Chamber’s order that “no further motions for disclosure shall be considered at this time”, [ICC-01/14-01/18-341-Conf](#), [REDACTED], but considers this issue to be “grandfathered” to the *Motion for Finding of Disclosure Violation and for Remedial Measures* filed on 29 August 2019 and important enough to warrant a decision by the Chamber.