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Date: **15 December 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

**Public redacted version of “Motion for Finding of Disclosure Violation of
Exculpatory Material”, 4 December 2020, ICC-01/14-01/18-753-Conf**

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. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully move for a finding that the Prosecution has violated its obligation to timely disclose exculpatory material in relation to Witness P-1504.

2. Witness P-1504’s statement concerns events related to:

Count 1 - attack against the civilian population in Bangui, including Cattin and the Boeing market;

Counts 2 and 3 - the killing of between five and thirteen persons, including [REDACTED], at the Boeing market, four Muslim persons in Cattin, and [REDACTED] at the Boeing market on 5 December 2013; and

Count 6 - the attack against the Boeing Mosque.

Although Article 67(2) of the Statute requires disclosure of material that mitigates the guilt of the accused, or which may affect the credibility of prosecutorial evidence as soon as practicable, the Prosecution withheld the exonerating transcripts until a late stage of the proceedings even though it had earlier disclosed incriminating ones related to these counts.

3. As a remedial measure for this violation, the Defence respectfully requests that the Trial Chamber draws a presumption that the Boeing Mosque was destroyed by no later than 8 December 2013 by members of the local population and that the Boeing Market traders were combatants and engaged in combat. The prejudice to the Defence is significant and continuous, as it has spent significant time and resources into investigations to properly defend Mr. Yekatom on counts that are still carried on to date and that could have been dismissed by the Pre-Trial Chamber II if the exculpatory information had been disclosed on time by the Prosecution.

PROCEDURAL BACKGROUND

4. On 11 November 2018, Pre-Trial Chamber II issued an arrest warrant against Mr. Yekatom, finding reasonable grounds to believe that he had committed or ordered, *inter alia*, murder as war crime and as crime against humanity, an intentional attack against the civilian population and an attack against buildings dedicated to religion as war crimes.¹
5. The arrest warrant refers to the statements of Prosecution Witnesses P-1339, P-1437, and P-1528 to support the findings concerning murder as a war crime and crime against humanity and the intentional attack against the civilian population as a war crime.²
6. The arrest warrant also relies on Witnesses P-1437 and P-1339's statements to support the charge of the intentional attack against buildings dedicated to religion as a war crime.³
7. On 19 August 2019, the Prosecution filed its Document Containing the Charges ("DCC").⁴ It included the charges aforementioned under counts 1, 2, 3 and 6⁵ as well as the following allegations concerning an attack directed against the civilian population as a war crime:

YEKATOM, [REDACTED], moved his troops from KALANGOI via PROJET to attack BOEING. [...] There was no indication that any of the victims were Seleka, armed, or otherwise engaged in combat.⁶

¹ [ICC-01/14-01/18-1-Conf-Exp](#), pp. 22-23; Public redacted version: [ICC-01/14-01/18-1-Red](#).

² [ICC-01/14-01/18-1-Conf-Exp](#), para 18(a), fn. 74 referencing [CAR-OTP-2041-0741-R01](#) at 0751-0752, paras 69-73; [CAR-OTP-2047-0257-R02](#) at 0263, para. 46; [CAR-OTP-2048-0757-R03](#) at 0762, para. 27.

³ [ICC-01/14-01/18-1-Conf-Exp](#), para. 18(b), fns. 81-82 referencing [CAR-OTP-2047-0257-R02](#), at 0267, para. 73; [CAR-OTP-2041-0741-R01](#), at 0749, paras 53-54, 63.

⁴ [ICC-01/14-01/18-282-Conf-AnxB1](#); Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

⁵ [ICC-01/14-01/18-282-Conf-AnxB1](#), paras. 246-251, 254; Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

⁶ [ICC-01/14-01/18-282-Conf-AnxB1](#), paras 247-248; Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

8. The DCC references, *inter alia*, the statements of Prosecution Witnesses P-2125, P-1819, P-1339, P-2475, P-2328, and P-1528 to support this allegation.⁷

9. In addition, the DCC includes the following allegation concerning the charge of murder under Article 7(1)(a) and Article 8(2)(c)(i) of the Statute:

During the attack on BOEING, YEKATOM's elements killed at least six Muslim civilians (including traders at the BOEING Market). Among the victims were [REDACTED], and [REDACTED] and his family members.⁸

10. The DCC references the statements of Prosecution Witnesses P-1416, P-1452, P-2125, P-1588, P-2475, P-1437, P-1339, and P-1528 to support this allegation.⁹

11. Moreover, the DCC includes the allegation concerning the intentional attack against buildings dedicated to religion as a war crime:

By 20 December 2013 at the latest, YEKATOM ordered the destruction of the BOEING mosque — members of YEKATOM's Group carried out the order, using rockets and grenades to destroy the Mosque's walls and then burned it down. [REDACTED].¹⁰

12. The DCC references the statements of Prosecution Witnesses P-1339, P-1437, and P-2125 to support this allegation.¹¹

13. From 19 to 25 September 2019 and on 11 October 2019, Pre-Trial Chamber II held the hearing on the confirmation of the charges against Mr. Yekatom and Mr. Ngaïssona. The Defence challenged Count 6 notably on the inconsistency of the Prosecution's evidence.¹²

⁷ [ICC-01/14-01/18-282-Conf-AnxB1](#), fns. 558-562; Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

⁸ [ICC-01/14-01/18-282-Conf-AnxB1](#), paras. 250-251; Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

⁹ [ICC-01/14-01/18-282-Conf-AnxB1](#), fns. 563-564; Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

¹⁰ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 254; Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

¹¹ [ICC-01/14-01/18-282-Conf-AnxB1](#), fns. 571-572; Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

¹² [ICC-01/14-01/18-T-008-CONF-ENG](#), p. 62, line 8 – p. 63, line 9; Public redacted version: [ICC-01/14-01/18-T-008-Red2-ENG](#); [ICC-01/14-01/18-376-Conf-Corr](#), para.123; Public redacted version: [ICC-01/14-01/18-376-Corr-Red](#); [ICC-01/14-01/18-383-Conf-Corr](#), paras. 73-75; Public redacted version: [ICC-01/14-01/18-383-Red](#).

14. On 11 December 2019, the Pre-Trial Chamber issued its Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (“Confirmation Decision”) finding that:

Yekatom told the elements that they would attack ‘the Muslims and Seleka’ at Boeing Market. Witness P-1339 and Witness P-2475 state that, in the early morning hours of 5 December 2013, Yekatom’s group attacked the Boeing market, specifically targeting the shops owned by Muslims. Yekatom told the Anti-Balaka elements that the ‘Arabs had many guns’ and instructed them to ‘shoot at the Muslims’. Yekatom, Freddy Ouandjio and Habib Beina were in the front of the group and were shooting their AK-47 rifles. Between five and thirteen Muslim shop owners were shot and then stabbed by Anti-Balaka elements, [REDACTED].¹³

15. The Pre-Trial Chamber based its findings on the statements of Prosecution Witnesses P-1339, P-2475, P-1528, P-1416, P-2125, and P-1437.¹⁴

16. In addition, the Confirmation Decision includes findings concerning the intentional attack against buildings dedicated to religion:

Witness P-1339 also describes the destruction of the Boeing mosque, which occurred by 20 December 2013 at the latest. Yekatom ‘personally ordered [Anti-Balaka elements] to attack the Mosque at BOEING’. The walls of the mosque were destroyed with rockets and grenades and the roof was burned using gasoline and matches. Yekatom was present during the destruction.¹⁵

17. The Pre-Trial Chamber based its findings on the statements of Prosecution Witnesses P-1339, P-2125, and P-1437.¹⁶

18. On 6 September 2019 (“First Request”), the Defence requested, pursuant to Rule 77, the Prosecution to disclose information in its possession tending to show that the traders at the Boeing Market were affiliated with the Seleka, armed, and/or participated in combat between September and December 2013.¹⁷ The materiality of this information lies in its relevance to the civilian status of the victims of

¹³ [ICC-01/14-01/18-403-Conf-Corr](#), para. 87; Public redacted version: [ICC-01/14-01/18-403-Red-Corr](#).

¹⁴ [ICC-01/14-01/18-403-Conf-Corr](#), fns. 211-215; Public redacted version: [ICC-01/14-01/18-403-Red-Corr](#).

¹⁵ [ICC-01/14-01/18-403-Conf-Corr](#), para. 91; Public redacted version: [ICC-01/14-01/18-403-Red-Corr](#).

¹⁶ [ICC-01/14-01/18-403-Conf-Corr](#), fns. 223-226; Public redacted version: [ICC-01/14-01/18-403-Red-Corr](#).

¹⁷ ARY-2019-0066 dated 6 September 2019 can be provided upon request.

Counts 1, 2 and 3 and the presence of legitimate military targets within the market.

19. On 13 December 2019, the Defence reiterated its demand specifying that it requested in particular, the disclosure of any material related to [REDACTED] who appears to have been a weapon-seller affiliated with the Seleka and armed during the 5 December 2013 attack.¹⁸
20. In addition, concerning the allegation related to the attack against the Boeing Mosque, the Defence requested “any information in the possession of the Prosecution tending to show that the Boeing Mosque was destroyed by the Anti-Balaka from Boy-Rabe, young people from Boeing, and/or any other person(s) not from Mr. Yekatom’s group” (“Second Request”).¹⁹
21. The materiality of this information lies in its relevance to the purported liability of Mr. Yekatom regarding Count 6 and the potential responsibility of other persons for this attack.
22. During the months of January to March 2020, the Defence followed up with the Prosecution on the First and Second Requests multiple times. Although the Prosecution mentioned that they would look into it and revert to the Defence, no further response was provided.²⁰
23. On 27 March 2020 and 3 April 2020 *inter partes* communications by phone were conducted between the Prosecution and the Defence during which Defence Counsel requested that an answer to the First and the Second Requests be obtained.

¹⁸ ARY-2019-0093 dated 13 December 2019 can be provided upon request.

¹⁹ ARY-2019-0093 dated 13 December 2019 can be provided upon request.

²⁰ Correspondence dated 21 January 2020, 18 February 2020 and 03 March 2020, the emails can be provided to the Chamber upon request.

24. On 20 April 2020, the Defence reiterated that the First and the Second Requests remained unanswered.²¹
25. On 12 May 2020, the Prosecution finally informed the Defence that:
- [I]nformation of the nature you describe has been disclosed. Should the Prosecution review any further similar information it will disclose the exhibit(s) containing the information.²²
26. On 15 June 2020, the Defence filed a *Motion for Additional Details*, putting on record that its investigation into the Boeing Mosque and the Boeing Market had led to the discovery of more than one location bearing the same name and recent disclosure by the Prosecution appeared to have pinpointed both locations with GPS coordinates. The Defence was proceeding with Mr. Yekatom's defence on the basis of those locations.²³
27. At no time during the pre-confirmation stage did the Prosecution inform the Defence that it had additional exculpatory evidence concerning the status of civilians regarding the Boeing Market traders and the fact that the Boeing Mosque was not attacked on 20 December 2013 following Yekatom's order but was rather destroyed by locals unrelated to Mr. Yekatom which did not occur during the alleged 20 December 2013 attack.
28. The Defence heard for the first time of Witness P-1504 last month even though the Prosecution met him more than two and a half years earlier, in April 2018.²⁴
29. As far back as 23 January 2019, the Single Judge of the Pre-Trial Chamber ordered the Prosecutor to disclose exculpatory evidence "*immediately* after having identified any such evidence, unless some justifiable reasons prevent her from

²¹ Correspondence dated 20 April 2020 can be provided upon request.

²² Correspondence dated 12 May 2020 can be provided upon request.

²³ [ICC-01/14-01/18-554-Conf](#); Public redacted version: [ICC-01/14-01/18-554-Red](#).

²⁴ [ICC-01/14-01/18-711-Conf-Anx](#); [CAR-OTP-2104-0708-R01](#).

doing so”, and in advance of the confirmation hearing.²⁵ On 20 August 2019, the Defence had filed a motion for disclosure of exculpatory material for a category of discrete material not related to the Boeing Mosque or the Boeing Market attack.²⁶ That same motion nevertheless requested disclosure of “[i]nformation tending to show that someone other than the suspect or co-perpetrators or subordinates were responsible for the crimes” and/or “[i]nformation 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 group”.²⁷ The Prosecution responded the next day without containing its response to the material listed in the Defence motion. The Prosecution stated that the motion was unnecessary because “throughout the pre-confirmation process, the Prosecution has abided by the Chamber’s Order and directions regarding disclosure as well as its statutory obligations in good faith, including with respect to potentially exculpatory material”.²⁸

30. On 28 August 2019, the Pre-Trial Chamber nevertheless directed the Prosecutor to verify whether she has in her possession any additional evidence that falls within the scope of article 67(2) of the Statute.²⁹ The Prosecution never disclosed Witness P-1504’s exculpatory transcripts throughout the confirmation phase.
31. On 15 June 2020, 22 July 2020 and on 25 November 2020, the Trial Chamber found that the Prosecution violated its disclosure obligation pursuant to Article 67(2) of the Statute as it has failed to fully disclose exculpatory information.³⁰

²⁵ [ICC-01/14-01/18-64-Conf](#), para. 16; Public redacted version: [ICC-01/14-01/18-64-Red](#).

²⁶ [ICC-01/14-01/18-284](#).

²⁷ [ICC-01/14-01/18-284](#), para. 22 (A) and (B).

²⁸ [ICC-01/14-01/18-286](#), para. 3.

²⁹ [ICC-01/14-01/18-296](#), para. 14.

³⁰ [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](#).

32. In its latest decision, the Chamber further noted “with concern that, in May 2020, the Prosecution informed the Defence upon its specific request, that it had disclosed all the information”.³¹ In this instance, not only did the Prosecution inform the Defence that it had disclosed the requested information, but this was done after several requests and reminders by the Defence.
33. From 20 October 2020 until today the Prosecution has disclosed more than 55 000 pages of documents including several hours of video/audio materials.³² During its review of the disclosed evidence, the Defence recently discovered that the transcripts of P-1504 mitigate the guilt of Mr. Yekatom and contradict the Prosecution’s evidence. It was only on 3 November 2020, more than a year after the confirmation hearing, that the Prosecution disclosed the transcripts of P-1504.³³

RELEVANT PROVISIONS

Article 61 (11)

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Article 64 (6)(a)

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

Article 67(2) – Rights of the accused

³¹ [ICC-01/14-01/18-740-Conf](#), para. 14.

³² [ICC-01/14-01/18-691](#); [ICC-01/14-01/18-691-Conf-Anx](#); [ICC-01/14-01/18-699](#); [ICC-01/14-01/18-699-Conf-Anx](#); [ICC-01/14-01/18-711](#); [ICC-01/14-01/18-711-Conf-Anx](#); [ICC-01/14-01/18-722](#); [ICC-01/14-01/18-722-Conf-Anx](#); [ICC-01/14-01/18-736](#); [ICC-01/14-01/18-736-Conf-Anx](#).

³³ [ICC-01/14-01/18-711-Conf](#); [ICC-01/14-01/18-711-Conf-Anx](#).

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

34. The Prosecution collected statements concerning the attack against the Boeing Mosque on or about 20 December 2013 and the killings of the Muslim civilians (including traders at the Boeing Market) on 5 December 2013. The Prosecution withheld the exonerating statement subject of this Motion.
35. The Prosecution's duty to disclose exculpatory material is as important as its obligation to prosecute.³⁴ The fairness of the proceedings relies on respect by the Prosecution of its obligation to disclose exculpatory material to the Defence.³⁵
36. When claiming a violation of the Prosecution's duty to disclose exculpatory material, the party is expected to: (i) identify the materials in dispute; (ii) satisfy the Chamber on a *prima facie* basis of the Prosecutor's custody or control of the materials requested; and (iii) satisfy the Chamber on a *prima facie* basis of the exculpatory or potentially exculpatory character of the materials requested.³⁶
37. The first page of P-1504's transcript indicates that the Prosecution's interview took place in April 2018.³⁷ This shows that the Prosecution had the statement in its possession since then but never disclosed it to the Defence until more than two and a half years later. No reason was provided by the Prosecution for failing to disclose the statement, let alone a sound justification. It is no excuse for the failure

³⁴ *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.

³⁵ *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 at para. 20.

³⁶ *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, at para. 9.

³⁷ [CAR-OTP-2104-0708-R01](#).

to disclose an exculpatory document that the accused had the same information in other documents. Thus, whether or not the Defence was already in possession of other witness statements claiming that some of the Boeing Market traders were armed or engaged in combat or that the Boeing Mosque was attacked by the local population is not a justification for the Prosecution's failure to disclose P-1504's statement.³⁸

38. Article 67(2) clearly includes material "which may affect the credibility of prosecution evidence". This includes information that contradicts the evidence of Prosecution witnesses it intends to rely upon and/or documentary evidence the Prosecution intends to submit.
39. Trial Chambers at the ICTY have found that a statement of a person that contradicted testimony of Prosecution witnesses was exculpatory in nature and should have been disclosed.³⁹
40. 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.⁴⁰
41. At the ICTR, Trial Chamber II stated that a statement of a person who contradicted a Prosecution witness as to the presence of the accused at a meeting was held to be exculpatory in nature.⁴¹

³⁸ *Prosecutor v. Karadzic*, [Decision on Accused's Eighty-Seventh Disclosure Violation Motion](#), 10 March 2014, No. IT-95-5/18-T, at paras. 13-14.

³⁹ *Prosecutor v. Oric*, [Decision on Alleged Prosecution Non-Compliance With Disclosure Obligations Under Rule 66\(B\) and 68\(i\)](#), 29 September 2005, No. 03-68-T; *Prosecutor v. Karadzic*, [Decision on Accused's Ninety-Fourth Disclosure Violation Motion](#), 13 October 2014, No. IT-95-5/18-T, at para. 14.

⁴⁰ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, [Decision on Accused's Eighty-Fourth Disclosure Violation Motion](#), 16 January 2014, para. 10.

⁴¹ *Prosecutor v. Ndindiyimana et al.*, [Decision on Defence Motions Alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68](#), 22 September 2008, No. ICTR-00-56-T, at para. 33.

42. For the two events described hereafter, the transcribed statement of P-1504 contradicts the evidence of Prosecution witnesses and includes exculpatory information.

The 5 December 2013 Attack

43. While Witness P-2125 claims that at 11:00 AM on 5 December 2013 Mr. Yekatom was at the Boeing Market and responsible for the killings therein,⁴² P-1504 asserts that Mr. Yekatom was not present as he was fighting the Seleka in Cattin.⁴³
44. P-1504's evidence equally contradicts P-1339's evidence who claims that Mr. Yekatom was present telling the elements to shoot at the Muslims while he was himself shooting with his AK47.⁴⁴ P-1504 recalls that Mr. Yekatom ordered not to rob and kill innocent people, but to 'combat the Seleka coalitions'.⁴⁵
45. In addition, on the one hand, P-2475 claims that the traders were not armed,⁴⁶ whereas on the other hand, P-1504 claims that the traders were Seleka, armed with AK47s and some of them were wearing military attire.⁴⁷ P-1504 also indicates that the Boeing Market traders engaged in combat by starting to shoot at them.⁴⁸
46. P-1504 also describes in detail how [REDACTED] – the same [REDACTED] subject to Counts 2 and 3⁴⁹ - was a Seleka. P-1504 further specifies that

⁴² [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 250, fn. 564; [CAR-OTP-2082-0299-R03](#), at 0321-0322, paras. 127-129.

⁴³ [CAR-OTP-2104-0718-R01](#) at 0756; [CAR-OTP-2104-0789-R01](#) at 0805.

⁴⁴ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 225; [CAR-OTP-2041-0741-R01](#), at 0751, para.71.

⁴⁵ [CAR-OTP-2104-0789-R01](#) at 0805, ln. 515-520.

⁴⁶ [CAR-OTP-2110-0556-R04](#) at 0572, para.106.

⁴⁷ [CAR-OTP-2104-0718-R01](#) at 0754-0755, [CAR-OTP-2104-0789-R01](#) at 0808, 0809, 0813, [CAR-OTP-2104-0816-R01](#) at 0822, 0826 and 0828 to 0830.

⁴⁸ [CAR-OTP-2104-0718-R01](#) at 0753 and 0754; [CAR-OTP-2104-0789-R01](#) at 0799.

⁴⁹ The Defence notes that in its Confirmation Decision, the Pre-Trial Chamber retained the charge of murder for the 5th December 2013 attack regarding the death of between five and thirteen Muslim persons, including [REDACTED]. To support its findings, Pre-Trial Chamber II refers to P-2125's statement who gave information about the death of [REDACTED] on the 5th December 2013 at the Boeing Market. P-1504 specifies in his statement that [REDACTED]. See [CAR-OTP-2104-0789-R01](#) at 0809, ln. 676 and at 0815, ln. 867.

[REDACTED] was wearing a military uniform during the Boeing Market attack and took part in the combat at the market.⁵⁰

47. Considering that P-1504 indicates that five alleged victims at the Boeing Market were Seleka, armed and engaged in combat,⁵¹ this assertion contradicts the Prosecution's allegation developed in the DCC that states:

There was no indication that any of the victims were Seleka, armed, or otherwise engaged in combat.⁵²

48. Such information is evidently of an exculpatory nature and falls into the scope of the First and Second Requests addressed to the Prosecution. It was not timely released for the Defence to be able to make use of it during the confirmation hearing. In the Confirmation Decision, the Pre-Trial Chamber specifically indicated that:

In addition, Witness P-2125 indicates that [REDACTED] shot and killed a number of Anti-Balaka members [...] However, the Chamber also observes that Witness P-1339 and Witness P-2125 indicate that the Muslims shop-owners were first shot at by the Anti-Balaka and then stabbed. *See* P-2475 [...] Similarly, Witness P-2125 indicates that [REDACTED]. [...] In light of the foregoing, the Chamber considers that a full presentation of the evidence before the Trial Chamber is required.⁵³

49. The retention of that exculpatory information did not allow the Defence to fully challenge the evidence presented by the Prosecution and to meaningfully object to the charges held against Mr. Yekatom regarding the killings of the Muslim civilians (including traders at the Boeing Market). The Defence considers that if the Pre-Trial Chamber had had knowledge of the exculpatory information contained in P-1504's statement, its assessment on Counts 1, 2 and 3 could have been different.

⁵⁰ [CAR-OTP-2104-0789-R01](#), at 0808, lns. 629 to 632, at 0812, lns. 753 to 760, and at 0813, ln. 782.

⁵¹ [CAR-OTP-2104-0718-R01](#) at 0754 to 0755; [CAR-OTP-2104-0789-R01](#) at 0808.

⁵² [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 248.

⁵³ [ICC-01/14-01/18-403-Conf-Corr](#), para. 97, fn. 237.

Boeing Mosque Destruction

50. As for the Boeing Mosque, whereas P-1339 claims that the Boeing Mosque was attacked at 10 AM on 20 December 2013 following an order by Mr. Yekatom,⁵⁴ who was present during the destruction,⁵⁵ P-1504 contradicts this evidence by stating that the Mosque was destroyed on 5 December 2013 by “les gens du quartier” who were not part of Mr. Yekatom’s group.⁵⁶
51. P-1504 also specifies that Mr. Yekatom’s group was the subject of an attack by the Seleka on 20 December 2013 and they retaliated the same day with the sole objective to attack the Seleka.⁵⁷ No mention of an order by Mr. Yekatom to attack against the Muslim homes or the Boeing Mosque was ever made by P-1504.
52. More specifically, P-1504 saw for himself on 5 December 2013 that the Mosque was no longer there⁵⁸ and therefore could not have been destroyed on 20 December 2013 as described by P-1339.
53. In any events, P-1504 states that the aim was the Seleka and not to attack the houses or the mosques.⁵⁹
54. The Confirmation Decision describes, relying on Witness statements of P-1339, the attack against the Boeing Mosque, ‘which occurred by 20 December 2013 at the latest’.⁶⁰
55. It was already known that the statement of P-1339 was irreconcilable with the statements of P-1437 and P-2125.⁶¹ However, the direct participation and the ‘detailed account of this destruction’ by P-1339 were considered decisive to

⁵⁴ [CAR-OTP-2041-0741-R01](#), at 0749, paras. 53-54; [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 254.

⁵⁵ [CAR-OTP-2041-0741-R01](#), at 0749, para. 53.

⁵⁶ [CAR-OTP-2104-0842-R01](#) at 0855 and 0856.

⁵⁷ [CAR-OTP-2104-0842-R01](#) at 0862 to 0866.

⁵⁸ [CAR-OTP-2104-0842-R01](#) at 0855 and 0856.

⁵⁹ [CAR-OTP-2104-0842-R01](#) at 0855 and 0856.

⁶⁰ [ICC-01/14-01/18-403-Conf-Corr](#), para. 91, fn. 223.

⁶¹ [ICC-01/14-01/18-403-Conf-Corr](#), fn. 223: The Chamber notes that all three witnesses agree that the Boeing mosque was destroyed by the Anti-Balaka either around 8 December 2013 or around 20 December 2013.

bypass the divergences of witnesses' accounts. This sidestepping of these divergences of witnesses' accounts did, according to the Chamber, not warrant the conclusion that this charge should not be confirmed:

In view of the current stage of the proceedings, the Chamber considers that the divergences between the witnesses' accounts are not of such a degree as to warrant the conclusion that this charge should not be confirmed.⁶²

56. This conclusion of the Chamber was based on (i) the fact that P-1339 directly participated in the destruction of the Mosque and gave a detailed account of Mr. Yekatom's involvement as opposed to (ii) P-1437 who was not an eye witness to the destruction of the Mosque and (iii) P-2125 who observed the destruction of the Mosque but did not know Mr. Yekatom personally and did not take part in its destruction.⁶³

57. Witness P-1504 directly knew Mr. Yekatom, he participated in the combat of 5 December 2013 and provided a detailed eyewitness account of what happened to the Mosque on 5 December 2013. His evidence is more in line with the testimony provided for by Witness P-1437 and the eyewitness P-2125.⁶⁴

58. It is undeniable that if the Pre-Trial Chamber had been aware of P-1504's transcripts before issuing its Confirmation Decision, the weight it attributed to the allegations of P-1339 would have been considerably reduced and could have tipped the balance on the side of the exculpatory information provided by P-1504 and corroborated by P-1435 and P-2125. It could have led to the non-confirmation of Count 6 charging Mr. Yekatom for intentional attack against buildings dedicated to religion.

59. The Defence is now facing a prejudice carried on since the confirmation stage.

⁶² [ICC-01/14-01/18-403-Conf-Corr](#), fn. 223.

⁶³ [ICC-01/14-01/18-403-Conf-Corr](#), para. 91, fn. 223.

⁶⁴ [ICC-01/14-01/18-T-008-CONF-ENG](#), p. 62, line 8 to p. 63, line 9; Public redacted version: [ICC-01/14-01/18-T-008-Red2-ENG](#);

The significant prejudice against the Defence by carrying charges that were lacking substantiation

60. The Chamber has authority to exercise any Pre-Trial Chamber functions, including prejudice to partaking parties in the proceeding. Such an endeavor is based, next to Article 61 (11) of the Statute, on Article 64 (6)(a) which stipulates the powers of the Trial Chamber to ‘exercise any functions of the Pre-Trial Chamber referred to in Article 61, paragraph 11’.
61. When charges are carried through and they lead to high costs in time and resources, based on evidence provided during the pre-trial proceedings that led to the confirmation of certain counts, the prejudice is compounded during Trial proceedings. The Defence has had to investigate, invest time and resources and prepare its defence against the counts affected by the disclosure violation. The issue came to light during the period when the Chamber was responsible for the conduct of the proceedings and the Defence respectfully submits that the Chamber is fully competent to resolve it, including assessing the further accumulating prejudice.
62. When considering an appropriate remedy for this violation of the Prosecution’s disclosure obligation, the Trial Chamber could take into account that the Prosecution has already been found to have violated its disclosure obligations on seven separate occasions in this case.⁶⁵ In addition, it is the second time now that exculpatory information specifically requested by the Defence was not released as soon as practicable. This was the case despite several reminders from the Defence.⁶⁶

⁶⁵ [ICC-01/14-01/18-315-Conf](#), para. 78; Public redacted version: [ICC-01/14-01/18-315-Red](#); [ICC-01/14-01/18-342](#), paras. 18 and 21; [ICC-01/14-01/18-551-Conf](#); Public redacted version: [ICC-01/14-01/18-551-Red](#), para. 31; [ICC-01/14-01/18-595](#), para. 21; Emails exchanged between the parties and participants between 22 October 2020 and 26 October 2020 concerning the Yekatom’s Motion for Violation of Decision on the Prosecution Request for Non-Standard Redaction, [ICC-01/14-01/18-692-Conf](#), in which the Prosecution concedes having violated his obligation; [ICC-01/14-01/18-740-Conf](#), paras 14-15.

⁶⁶ *Supra* fns. 17 to 22.

63. The Defence in this instance relied on the First and Second Requests for the release of the material related to the Boeing Market and Boeing Mosque. Given the Prosecution's answers that there was no other material to be provided and relying on the confirmation of charges by the Chamber, the Defence engaged in scrutinizing the charges through the search of satellite imagery, video material, field investigations, witness interrogations, and experts analysis. It invested a huge amount of time and resources in this endeavor. The Defence Motion for Additional Details⁶⁷ was an attempt to focus its investigations on the exact locations related to those charges as the Defence was and is investing significant time and resources into locating witnesses that can confirm: (1) that the Boeing Mosque was destroyed well before 20 December 2013 and by individuals unrelated to Mr. Yekatom; and (2) that the Boeing Market traders were armed, combatants, Seleka, and/or engaged in combat on 5 December 2013.
64. The Chamber's Decision on the Defence Request Concerning Disclosure Violation and Disclosure of Exculpatory Material affirmed that a violation of Article 67(2) can be found if the Prosecution does not disclose a statement containing both exculpatory and incriminatory information.⁶⁸ For the purpose of this Motion, it should be duly noted that P-1504 provides exculpatory information only. The Prosecution even included his statement and annexes in disclosure batches classified as PEXO conceding that they were well aware of the exculpatory nature of the evidence provided by this witness.⁶⁹
65. The Chamber in its previous Decision concerning disclosure violation stated that it was "confident that the Prosecution will abide by its obligations and sees no need for sanctions to be envisioned for any potential violations of this nature in the future".⁷⁰ In its Decision on the Yekatom Defence Motion for Finding of

⁶⁷ [ICC-01/14-01/18-554-Conf](#), Public redacted version: [ICC-01/14-01/18-554-Red](#).

⁶⁸ [ICC-01/14-01/18-595](#), para. 21.

⁶⁹ [ICC-01/14-01/18-711-Conf](#); [ICC-01/14-01/18-711-Conf-Anx](#).

⁷⁰ [ICC-01/14-01/18-595](#), para. 22.

Disclosure Violation of Exculpatory Material, the Chamber considered the “prejudice resulting from the late disclosure [...] is, at the present stage of the proceedings, minimal”.⁷¹

66. However, the Prosecution’s failure to disclose the statement of Witness P-1504 as soon as practicable and at the very least prior to the confirmation hearing violates its disclosure obligations pursuant to Article 67(2) and has resulted in a prejudice that is significant, not minimal, and compounded to the trial phase.
67. The Defence emphasized the fact that compared to the previous violations, it should be noted that the prejudice of the present violation is more salient in light of its continuous nature due to the fact that to this day the Defence has had to prepare and investigate on these charges that could have been dismissed at the Confirmation stage.

CONCLUSION

68. The Defence respectfully requests that the remedy for this disclosure violation should include an express finding that the Prosecution has once again violated its disclosure obligation.
69. The Trial Chamber is also requested to draw a presumption that the Boeing Mosque was destroyed at the latest on 8 December 2013 by members of the local population unrelated to Mr. Yekatom and that the Boeing Market traders, including [REDACTED], were combatants and engaged in combat. In light of this eighth violation, the Prosecution bears the burden of rebutting these presumptions. In addition the suggested sanction is reasonable. It is in line with the search for the truth as satellite imagery disclosed by the Prosecution, and

⁷¹ [ICC-01/14-01/18-740-Conf](#), para. 20.

relied upon by its own expert, now shows that on the 8th of December 2013, the Boeing Mosque was already destroyed.⁷²

CONFIDENTIALITY

70. This motion is being filed on a confidential basis as it refers to confidential portions of filings and decisions. A public redacted version will be filed shortly.

RESPECTFULLY SUBMITTED ON THIS 15TH DAY OF DECEMBER 2020⁷³



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⁷² CAR-OTP-2127-6624, p. 2.

⁷³ The assistance of Mr. Alexander Wolffenbüttel and Ms Audrey Gagné Breton, to the research of this motion is gratefully acknowledged.