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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 the Yekatom Defence's
"Motion for Finding of Disclosure Violation of Exculpatory Material" (ICC-01/14-
01/18-753-Conf), 18 December 2020, ICC-01/14-01/18-786-Conf**

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Yekatom Defence’s “Motion for Finding of Disclosure Violation of Exculpatory Material” (“Motion”).¹ Although various reasons explain the timing of the disclosure of P-1504’s evidence, the Prosecution acknowledges and accepts that it contains both incriminating evidence and article 67(2) information, and should have been disclosed as soon as practicable. Nevertheless, the Motion should be dismissed.

2. *First*, the timing of disclosure has caused no prejudice, since the Defence was already in possession of other evidence containing the potentially exonerating information, specifically, allegations that (i) some of the Boeing Market traders were armed or engaged in combat, and (ii) the Boeing Mosque was destroyed by the local population rather than the Anti-Balaka. The Defence was already in possession of similar information prior to the September 2019 confirmation hearing.

3. *Second*, the Motion inappropriately seeks remedies and/or sanctions that are without legal authority.

II. CONFIDENTIALITY

4. This Response is classified as “Confidential” as it refers to filings with the same classification. The Prosecution will file a public redacted version of this submission as soon as practicable.

¹ ICC-01/14-01/18-753-Conf.

III. SUBMISSIONS

5. As noted, P-1504's evidence should have been disclosed sooner. However, its disclosure on 3 November 2020 is months prior to the scheduled start of evidence² in a case likely to last several years.

6. The pre-trial process of reviewing and disclosing a large volume of evidence while balancing article 68 obligations to ensure the protection of victims and witnesses in this case is complex, as was foreshadowed from its inception.³ Since the arrest and transfer of YEKATOM into ICC custody in late November 2018, the Prosecution has reviewed over 375,000 pages of documents, over 1,000 hours of audio-visual material, and disclosed over 22,000 exhibits. The Prosecution has effectively managed these significant disclosure obligations, in addition to fulfilling its duty to investigate incriminating and exonerating circumstances, while preparing for pre-trial (and now trial) proceedings. Given the mixed nature of incriminating and article 67(2) information in P-1504's statement, the Prosecution acknowledges that it should have strived to disclose it sooner than 3 November 2020.⁴ Nevertheless, the timing of its disclosure is not prejudicial, given that substantially the same information was already in the hands of the Defence, and P-1504's evidence was disclosed well before trial.

A. No prejudice to the Accused's rights

7. Contrary to the Motion, there is no prejudice to the rights of the Defence caused by the timing of the disclosure of P-1504's evidence. The Motion cites several cases from the ad hoc tribunals⁵ to argue that it has been prejudiced by the timing of this

² ICC-01/14-01/18-589, para. 10.

³ ICC-01/14-01/18-186-Conf-Red.

⁴ See ICC-01/14-01/18-595, para. 21.

⁵ Motion, fn. 34-41.

disclosure.⁶ However, these cases undermine, rather than support, the notion that there can be prejudice by a *pre-trial* disclosure containing potentially exculpatory material.

8. Unlike the ICTY cases cited in the Motion, P-1504's evidence has been disclosed to the Defence before the start of trial started. In the *Orić* decision cited in the Motion, the potentially exculpatory statements were disclosed only after the Prosecution had rested and during the Defence case on the eve of the testimony of a witness who allegedly had evidence materially different than that adduced during the Prosecution case.⁷ Similarly, in the three *Karadžić* decisions cited in the Motion, the Prosecution disclosed potentially exculpatory statements either during the Defence case,⁸ or before closing arguments.⁹ In all of these cases the Defence was deprived of an opportunity to cross-examine Prosecution witnesses on the potentially exculpatory material, and yet, in none of the cases was the Accused actually deemed to have been prejudiced. It can hardly be the case then, that YEKATOM is prejudiced by the disclosure of the information here, well before the start of the trial. The Accused will have an opportunity to use this evidence to question Prosecution witnesses and in its subsequent submissions.

9. Further, the ICTR case cited in the Motion¹⁰ explicitly supports the proposition that there is no disclosure violation (let alone any prejudice) to the Defence where the disclosure of potentially exonerating material happens before trial. That Trial Chamber held that because some the documents were disclosed in the pre-trial phase,

⁶ Motion, para. 66.

⁷ Motion, fn. 39 (citing *Prosecutor v. Orić*, Case No. IT-03-68-T [Decision on Alleged Prosecution Non-Compliance With Disclosure Obligations Under Rule 66\(B\) and 68\(i\)](#), 29 September 2005)

⁸ Motion, fn. 38 (citing *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T [Decision on Accused's Eighty-Seventh Disclosure Violation Motion](#), 10 March 2014, paras. 13-14); Motion, fn. 40 (citing *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, [Decision on Accused's Eighty-Fourth Disclosure Violation Motion](#), 16 January 2014, para. 10).

⁹ Motion, fn. 39 (citing *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, [Decision on Accused's Ninety-Fourth Disclosure Violation Motion](#), 13 October 2014, para. 14).

¹⁰ Motion fn. 41 (citing *Prosecutor v. Ndindiliyimana et al*, Case No. ICTR-00-56-T [Decision on Defence Motions Alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68](#), 22 September 2008).

the Prosecution has not violated its disclosure obligations regarding that potentially exculpatory material.¹¹ The present case requires the same result.¹² The prejudice found in that ICTR case was for different potentially exculpatory material disclosed to the Defence several (up to nine) years late and *in the middle of the Defence case*, thereby depriving the Defence of the opportunity to cross-examine witnesses.¹³ Even so, the Trial Chamber's remedy was not to draw negative inferences about the evidence, but to allow the re-calling of Prosecution witnesses or of additional Defence witnesses.¹⁴ That Trial Chamber rightfully clarified: "[h]owever, not every violation of the duty to disclose exculpatory material warrants a remedy."¹⁵

- i. The Defence already had substantially similar allegations about the BOEING Market attack in other disclosed statements*

10. Because the Defence has had substantially similar information about the BOEING Market attack since before the Confirmation Hearing, no credible claim of prejudice arises either in relation to that phase of the proceedings, or of the prospective trial. The Motion focuses its arguments about the BOEING Market on the fact that P-1504 provides evidence alleging that (i) the Muslim traders were actually Seleka fighters, armed with AK47s, (ii) some of them were wearing military attire, and (iii) that some engaged in combat by starting to shoot at the Anti-Balaka.¹⁶ This information provided by P-1504 is neither new nor accurate. Similar information

¹¹ *Prosecutor v. Ndindiliyimana et al*, Case 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. 19.

¹² While the Prosecution recognises this Chamber has found the Prosecution in violation of its disclosure obligations before trial has started, it is also mindful of the Chamber's ruling that it is not its role to pronounce itself on whether a disclosure violation has caused any prejudice to the accused during the pre-trial proceedings. ICC-01/14-01/18-740-Conf, para. 15 (citing Decision on the Yekatom Defence Request Concerning Disclosure Violation and Disclosure of Exculpatory Material, 22 July 2020, ICC-01/14-01/18-595, para. 18).

¹³ See, e.g., *Prosecutor v. Ndindiliyimana et al*, Case No. ICTR-00-56-T, [Decision on Defence Motions Alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68](#), 22 September 2008, paras. 33, 40, 49.

¹⁴ *Prosecutor v. Ndindiliyimana et al*, Case 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. 63.

¹⁵ *Prosecutor v. Ndindiliyimana et al*, Case 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. 14.

¹⁶ Motion, paras. 45-47 (citing CAR-OTP-2104-0718-R01 at 0753-0755, CAR-OTP-2104-0789-R01 at 0799, 0808, 0809, 0813, CAR-OTP-2104-0816-R01 at 0822, 0826 and 0828 to 0830).

regarding the traders being armed and their alleged links to the Seleka was made available to the Defence from several other sources in advance of the confirmation hearing, including in the statements of Prosecution witnesses P-2125, P-1339, P-1416, P-1437, and P-1528.

11. Like P-1504, evidence from P-2125, P-1339, and P-1416 suggests that the traders were armed. Moreover, P-1416, and P-1437 also described rumours that [REDACTED] was linked to the Seleka. P-1528 mentioned that the Seleka sometimes visited the market and talked to the traders.

12. P-2125, a Muslim crime base witness, claimed that he saw [REDACTED] buying firearms from Seleka on 2 December 2013.¹⁷ During the attack on the morning of 5 December 2013, P-2125 claimed to have seen [REDACTED] shooting at the Anti-Balaka near his shop at the BOEING market, wearing a battle vest containing three magazines of ammunition. P-2125 reported that the Anti-Balaka then killed [REDACTED] by [REDACTED] when he ran out of ammunition.¹⁸

13. A member of YEKATOM's Group, P-1339, who participated in the attack on the BOEING Market, also claimed the Muslim traders were armed, but clarified that the traders did not use weapons until fired upon:

*"[o]ne of the Muslim shop owners named [REDACTED] was in his shop when the shooting started. Once we started shooting, he started shooting at us with a machine gun. [REDACTED], also shot at us. The other unarmed Muslims [sic] shop owners fled from the market in the direction of PK5... Six Muslims were killed that I saw. Two were Seleka and the other four were not."*¹⁹

¹⁷ CAR-OTP-2082-0299, at 0307, paras. 44-45.

¹⁸ CAR-OTP-2082-0299, at 0308-0309, paras. 54-55.

¹⁹ CAR-OTP-2041-0741-R01, at 0751-0752, para. 72 (emphasis added).

14. P-1416, a crime base witness, indicated that the “Muslim merchants were armed before the Seleka arrival in Bangui. We used to see them with their weapons at the market.”²⁰ P-1416 heard gunshots in the early morning of 5 December 2013, and a few hours later heard people speaking about the deaths of seven Muslim merchants at the market, including [REDACTED]. Later that day, P-1416 went to the market and saw several bodies of merchants he knew, and saw armed Anti-Balaka from YEKATOM’s Group stealing the Muslim merchants’ money and putting it in a plastic bag.²¹ According to P-1416, [REDACTED] was rumoured to give Seleka information, which was [REDACTED] and even before the Seleka, [REDACTED] was considered [REDACTED]²²

15. P-1437, a female relative of [REDACTED] the trader, [REDACTED] were also killed by the Anti-Balaka in the attack on BOEING,²³ indicated that [REDACTED] was armed before the Seleka arrived,²⁴ and was a [REDACTED] and had lots of young Muslim friends, some of whom were Seleka members. She even recalls the allegation that he was a Seleka accomplice being [REDACTED].²⁵

16. P-1528, the [REDACTED], who heard the gunshots during the attack on the market, knew the Muslim traders there and indicated that the Seleka would sometimes visit the market and talk to the traders.²⁶

17. These five statements were provided to the Defence before the Confirmation Hearing: P-1437’s statement was provided on 13 June 2019,²⁷ P-1416’s and P-2125’s statements were provided on 30 July 2019,²⁸ and P-1528’s statement was provided on

²⁰ CAR-OTP-2045-0150-R02, at 0160, para. 80.

²¹ CAR-OTP-2045-0150-R02, at 0159-0160, paras. 76-86.

²² CAR-OTP-2045-0150-R02, at 0160, para. 79.

²³ CAR-OTP-2047-0257-R02, at 0266, paras. 67-68.

²⁴ CAR-OTP-2047-0257-R02, at 0266, para. 70.

²⁵ CAR-OTP-2047-0257-R02, at 0266, paras. 71-72.

²⁶ CAR-OTP-2048-0757-R03, at 0762, paras. 27-29.

²⁷ Pre-Confirmation INCRIM package 11.

²⁸ Pre-Confirmation INCRIM package 14; Pre-Confirmation INCRIM package 15.

1 October 2019.²⁹ Thus, in short, the Defence was in possession of similar information from P-1504's evidence *prior* to the commencement of the confirmation hearing. This information – allegations that the traders had and/or used weapons and their links with the Seleka – were fully available for the Defence to plead and investigate.

ii. The Defence already had substantially similar information about the destruction of the BOEING Mosque in other disclosed statements

18. Because the Defence has had substantially similar information about the BOEING Mosque attack since before the Confirmation Hearing, there is no credible claim of prejudice that can arise in relation to that phase of the proceedings or the trial. The Motion focuses its arguments about the BOEING Mosque on P-1504's evidence that it was destroyed on 5 December 2013 by members of the local population, and not the Anti-Balaka.³⁰ This information provided by P-1504 is neither new nor accurate. Moreover, similar information was disclosed in P-2034's statement before the confirmation hearing, and afterwards in P-2682's statement.

19. A member of YEKATOM's Group, P-2034, specified that the BOEING Mosque was not destroyed by the Anti-Balaka during the 5 December attack, but by the local population later in 2014, when the Anti-Balaka under Coeur de Lion were based in SEKIA.³¹

20. A Muslim crime base witness from BOEING, P-2682, indicated that she heard that the Anti-Balaka began to dismantle the BOEING Mosque on 5 December by removing its roof and doors.³² She also says that by the time she had fled in a protected

²⁹ Pre-Confirmation INCRIM package 28.

³⁰ Motion, paras. 50, 52 (citing CAR-OTP-2104-0842-R01, at 0855 and 0856).

³¹ CAR-OTP-2073-0824 at 0832, para. 73.

³² CAR-OTP-2126-0205-R01, at 0215, para. 56.

convoy to [REDACTED] in early January 2014, she was told that the population had removed the bricks and walls of the BOEING Mosque to use for their own homes.³³

21. The Defence has been in possession of P-2034's statement comprising similar article 67(2) information as P-1504's since 14 August 2019,³⁴ before the Confirmation Hearing. P-2682's statement was provided on 26 June 2020.³⁵

iii. The exculpatory value of the information is marginal

22. The 'exculpatory' value of the information provided by P-1504 is marginal at best.

23. *First*, P-1504 was not selected as a witness for trial because, on the whole, his evidence was not credible. During his initial screening with the Prosecution, which is being disclosed under rule 77 simultaneously with the filing of this motion, P-1504 admitted to being part of YEKATOM's Group but specified that he never fought for the Anti-Balaka.³⁶ After this screening, investigators approached their first interview with P-1504 under article 55(1), having no reason to think P-1504 was implicated in crimes, however, his materially different version of events in that interview in which he described participating in the 5 December 2013 attack caused Prosecution investigators to consider P-1504 a suspect and to interview him under article 55(2) in the presence of counsel.³⁷ This material inconsistency casts doubt on the reliability of his evidence with regard to the 5 December attack on Bangui.

24. *Second*, evidence from a variety of reliable sources establishes that the traders at BOEING market were not combatants. Multiple trial witnesses, including members of YEKATOM's Group who participated in the 5 December 2013 attack on the BOEING

³³ CAR-OTP-2126-0205-R01, at 0215, paras. 56-58.

³⁴ Pre-Confirmation INCRIM package 19.

³⁵ Pre-Trial INCRIM package 36.

³⁶ CAR-OTP-2042-5559-R01, at 5563-556.

³⁷ CAR-OTP-2118-6570-R01, at 6573, 1.85-93, and 6675, 1.153-164.

market (P-2475 and P-1339), a family member of the murder victims (P-2682), and a [REDACTED] (P-1528), provide direct evidence on the civilian nature of the victims.

25. P-2475, [REDACTED] in YEKATOM's Group, describes YEKATOM's plan to attack Muslims at the BOEING market,³⁸ and the civilian nature of the victims there:

"[a]s we entered the market we began to attack the Arabs who were outside their shops. They were washing before their morning prayers and I did not see them with any guns. There were many in our group and the Arabs were shot where they were standing. I saw six Arabs shot down and killed. They did not die straight away but they were still struggling on the ground, [REDACTED]".³⁹

26. P-1339 recalled YEKATOM's orders and leadership that day:

"ROMBHOT told us we would attack the Muslims *and* Seleka at BOEING Market.... At around 4am we deployed around the perimeter of the BOEING market and at around 5:30 am we attacked the Muslims in the BOEING area. We used guns, grenades, and machetes.... We targeted specific places in the market. We knew the shops that were owned by the Muslims.... We knew the Christians were not there at the time we attacked. The remaining shops were all owned by Muslims and we knew they use[d] to also sleep in their shops. Around the time of the attack the Muslims were opening their shops and our group started shooting at them. ROMBHOT told the elements to 'shoot at the Muslims'. ROMBHOT, Freddy and HABIB were in the front and were all shooting with their AK47 rifles."⁴⁰

27. Other crime base witnesses such as P-2682 and P-1528 differentiate these Muslim trader victims who lived at the market from the Seleka. For example, P-2682 who was

³⁸ CAR-OTP-2110-0556-R04, at 0571, paras. 99-100, 102.

³⁹ CAR-OTP-2110-0556-R04, at 0572, para.106.

⁴⁰ CAR-OTP-2041-0741-R01, at 0751, paras. 68-71 (emphasis added).

[REDACTED] [REDACTED], was clear that [REDACTED] was a civilian and not part of the Seleka.⁴¹ She confirmed the other traders who were killed were shop owners or employees, and also indicated she did not see the Seleka when she visited [REDACTED] at the market on the day before the attack.⁴² P-1528 heard the gunshots during the attack on the market, knew the Muslim traders there and that the Seleka would sometimes visit the market and talk to them, but did not know of any direct link, other than their alleged Chadian origin.⁴³

28. P-1442, [REDACTED], further describes how [REDACTED] was not armed and was asleep when the Anti-Balaka killed him, and that merchants in the area often slept in their stores to protect their goods.⁴⁴ P-1442 is clear that there were no Seleka in the BOEING Market when the Anti-Balaka attacked it on 5 December 2013.⁴⁵ In response to the question of whether the Muslims in BOEING were armed, P-1442 said that Muslims there grouped together for self-defence against the aggressions of the Anti-Balaka, and that before the Anti-Balaka, there were no self-defence groups in BOEING.⁴⁶

29. Another member of YEKATOM's Group, P-2233, was not present during the attack, but claims that *other Group members* described how YEKATOM was present for the attack, and that his Group encircled the BOEING market that morning and killed men, women, and children, pregnant women, and elderly people, pillaged the shops, and destroyed the BOEING mosque, including the removal of its rug.⁴⁷

⁴¹ CAR-OTP-2126-0205-R01, at 0211 paras. 33-34.

⁴² CAR-OTP-2126-0205-R01, at 0212, 0214, paras. 43, 54.

⁴³ CAR-OTP-2048-0757-R03, at 0762, paras. 27-29.

⁴⁴ CAR-OTP-2077-0520-R01, at 0526, para. 38.

⁴⁵ CAR-OTP-2077-0520-R01, at 0530, paras. 62-63.

⁴⁶ CAR-OTP-2077-0520-R01, at 0530, paras. 64-65.

⁴⁷ CAR-OTP-2118-6014-R01, at 6020-6029, l.172-508.

30. *Third*, evidence from a variety of reliable sources establishes that the Anti-Balaka destroyed the BOEING Mosque between 5 and 20 December 2013.

31. P-1339 described how on or about the morning of 20 December 2013, YEKATOM ordered the destruction of the BOEING Mosque — and that members of YEKATOM's Group carried out his order, using rockets and grenades to destroy the structure's walls, and then burned it down.⁴⁸

32. The [REDACTED], P-1528 heard gunshots on the morning of 5 December 2013, fled his home with his family in fear of his life because of the attack, and never moved back.⁴⁹ Within two weeks, he was told that the BOEING Mosque had been pillaged and destroyed.⁵⁰ This account is corroborated by recent video and photographic evidence from [REDACTED] who obtained video and photographic evidence of the concrete slab where the Mosque once stood.⁵¹

33. P-1721, [REDACTED] saw the destroyed BOEING Mosque, and described how its roof and walls were destroyed, the iron bars of the building's foundation were looted, and the Korans were burned and thrown to the ground. Although P-1721 does not give a precise date of the destruction of the Mosque or the date he saw what remained of it, he estimated that YEKATOM and his men destroyed the BOEING Mosque about a month after the Anti-Balaka arrived in BANGUI.⁵²

34. P-1437, [REDACTED] because of the attack, heard that the Anti-Balaka destroyed the BOEING Mosque on 5 December 2013, including using pages from the Korans *"pour les utiliser comme du papier pour fumer"* and removing the doors and windows from the Mosque. Over the next three or four days, P-1437 says she was told

⁴⁸ CAR-OTP-2041-0741-R01, at 0749-0750, paras. 53-54, 63.

⁴⁹ CAR-OTP-2048-0757-R03, at 0764-0768, paras. 39, 49, 55-64.

⁵⁰ CAR-OTP-2048-0757-R03, at 0765, para. 47; CAR-OTP-2121-2831-R01, at 2833, para. 14.

⁵¹ CAR-OTP-2121-2831-R01, at 2835, paras. 27-28; CAR-OTP-2121-2859 from [00:00:00] to [00:00:18]; CAR-OTP-2121-2858; CAR-OTP-2121-2839-R01, at 2840.

⁵² CAR-OTP-2061-0044-R01, at 0051, paras. 45-46.

the Anti-Balaka completely destroyed the mosque, including the foundations.⁵³ On or about the 18 or 19 of December, some youth who were sheltering [REDACTED] at the ALI BABOLO Mosque in PK5 went to go see what happened to the BOEING Mosque, and the Anti-Balaka killed them.⁵⁴

35. While the Motion claims that satellite imagery shows the BOEING Mosque was destroyed by 8 December 2013,⁵⁵ the expert's report actually says that "five structures were *damaged or destroyed* close to the Mosque GPS location by 8 December 2013."⁵⁶ This finding is corroborated by the satellite imagery in the report's annex, which shows the Mosque and surrounding buildings intact on 27 November 2013, with considerable damage (including a removed roof) by 8 December 2013, and even more damage to surrounding buildings by 30 December 2013.⁵⁷

36. Understood in light of the volume and quality of the evidence described above, and his materially inconsistent versions of these events, P-1504's evidence is not credible and his narrative's value as exculpatory information, while disclosable under article 67(2), is largely insignificant.

37. All three reasons above demonstrate that the timing of the disclosure of P-1504's evidence is not prejudicial. The Defence was in possession of substantially similar information before the commencement of the confirmation hearing and were not deprived of using it to pursue their own investigations, or challenge the Prosecution's evidence. On this basis, the relief sought should be denied. Further, evidence from variety of sources establish that P-1504's version of events is not credible.

⁵³ CAR-OTP-2047-0257-R02, at 0267, paras. 73-74.

⁵⁴ CAR-OTP-2047-0257-R02, at 0267, para. 75.

⁵⁵ Motion, para. 69.

⁵⁶ CAR-OTP-2127-6617, at 6620 (emphasis added). This report was disclosed 06 November 2020.

⁵⁷ CAR-OTP-2127-6626, at 6627 (inset 1).

B. The remedy requested has no legal basis

38. The remedies and sanctions sought in the Motion, particularly the drawing of an adverse inference, are not appropriate or authorised in the Statute. Notably, in one of the decisions cited in the Motion, the ICTY Trial Chamber warned the Accused: “[t]he Chamber reminds the Accused that the filing of disclosure violation motions should not be a numerical exercise directed towards documenting every disclosure violation, and should focus on examples where there is demonstrable prejudice.”⁵⁸ Where, as here, there is no prejudice, the requested relief must be denied.

39. The Motion’s suggestion that Pre-Trial Chamber II could have dismissed the relevant counts at the Confirmation Hearing stage if P-1504’s evidence had been disclosed beforehand, is misguided.⁵⁹ The Pre-Trial Chamber could just as easily have disregarded P-1504’s evidence as wholly incredible in confirming the charges as they have been. And, even if credited — although highly doubtful — the Pre-Trial Chamber could also have remedied the matter in a manner which would otherwise still have resulted in the confirmation of the charges; such as by adjourning the hearing and for the Prosecutor provide further evidence, or to amend a charge.⁶⁰ In sum, that the Defence’s position is wholly speculative and should be rejected.

i. The sanctions sought are inappropriate

40. With respect to the propriety of the Defence request for declaratory relief, the Prosecution hereby incorporates by reference its objections from its previous submissions.⁶¹

⁵⁸ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, [Decision on Accused’s Eighty-Seventh Disclosure Violation Motion](#), 10 March 2014, para. 14 (cited in Motion, fn. 38).

⁵⁹ Motion, paras. 3, 67.

⁶⁰ See article 61(7).

⁶¹ ICC-01/14-01/18-698-Conf, paras. 24-32; ICC-01/14-01/18-581, para. 20.

41. As concerns the request for the Chamber to “draw 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”,⁶² the Prosecution considers that drawing an adverse evidentiary presumption before trial and before the submission of any evidence is improper. The Prosecution understands the request to comprise a form of sanction and, as such, has no legal basis. Further, it would contravene the statutory framework.

42. *First*, the Defence fails to point to any authority or statutory provision allowing a Chamber to draw a negative inference or presumption regarding an item of evidence before the start of trial and before the presentation of any evidence has begun. This remedy may have been authorized in the *Orić* case, but only where the potentially exculpatory material occurred at such a late stage in the proceedings (during the Defence case) that it would have been impossible or impractical to recall prosecution witnesses without effectively re-opening the case in its entirety.⁶³ Where, as in the present case, the trial has not started and the evidence in question was disclosed months before trial, there can be no such remedy.

43. Similarly, in the “Military II” case at the ICTR, the Trial Chamber found that the:

“...dismissal of charges, exclusion of evidence, a stay of proceedings, and drawing necessary inferences from the evidence are severe forms of remedy that should be invoked only in exceptional circumstances where less severe measures reasonably capable of remedying the Prosecution’s violation are unavailable.

⁶² Motion, paras. 3, 69.

⁶³ *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, paras. 5, 7, 35; *Prosecutor v. Ndindiliyimana et al*, Case 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. 14.

The Chamber finds that none of these remedies are warranted at this stage of the proceedings.”⁶⁴

That Trial Chamber’s remedy for a pattern of disclosure violations where the Prosecution disclosed potentially exculpatory material *during the Defence case*, was not to draw a negative inference, but to allow the Defence to re-call Prosecution witnesses or call additional witnesses of its own.⁶⁵ Given that the trial in the present case has not even started, the Defence request to draw a negative inference or presumption is clearly unwarranted and inappropriate.

44. *Second*, although the Motion cites, but does not challenge the admissibility or relevance of, other witnesses who gave evidence about the BOEING Market attack or the destruction of the BOEING Mosque, drawing a *conclusive* presumption as requested would run contrary to rule 64(1) of the Rules of Evidence and Procedure (“Rules”). Rule 64(1) mandates the Parties and Participants to raise issues “relating to the relevance or admissibility” of evidence “at the time when the evidence is submitted to a Chamber”. The Defence may not do so in advance.

45. As previously confirmed by this Chamber, rule 64(1):

“does not provide [...] for objections to be raised *prior* to the submission of evidence. It is therefore clear that the parties and participants cannot raise any such objections before the time of submission”.⁶⁶

⁶⁴ *Prosecutor v. Ndindiliyimana 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. 62.

⁶⁵ *Prosecutor v. Ndindiliyimana 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. 63.

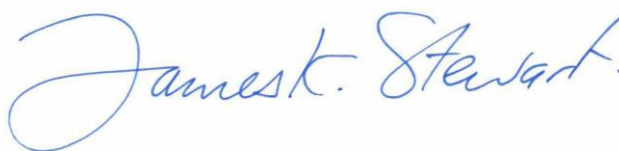
⁶⁶ ICC-01/14-01/18-602, paras. 15-16 (citing ICC-01/05-01/08-1386, paras. 48-49).

The reliability and probative value of any evidence to be relied on by the Parties is a matter to be adjudicated pursuant to the relevant statutory provisions. The requested sanction would effectively and improperly circumvent rule 64(1).

46. *Third*, the sanction sought is contrary to the statutory framework, and neither appropriate nor proportional to the violation. The late disclosure of P-1504's evidence was not deliberate, as the timely disclosure of the substantially similar evidence of Prosecution witnesses clearly demonstrates. In addition, even if not disclosed as soon as practicable, the relevant information has nevertheless been provided to the Defence well before the start of trial, and no valid claim of prejudice lies. As noted, the Defence has had the relevant information in their possession for over a year, and the exculpatory value of the information is, in any event, at best marginal.

IV. CONCLUSION

47. For the above reasons, the Prosecution the Chamber should reject the Motion.



James Stewart, Deputy Prosecutor

Dated this 24th day of December 2020

At The Hague, The Netherlands