

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **20 October 2021**

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 with Confidential Annex A

**Public redacted version of “Motion for Finding of Disclosure Violation
and for additional remedies”, 20 October 2021**

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 this instance, the document bearing ERN CAR-OTP-2117-0043¹ corresponding to the screening note of witness P-2580.
2. The Defence sent numerous requests to the Prosecution for disclosure of any evidence tending to show that any of the children enlisted in the [REDACTED] had not been enlisted or conscripted by the Anti-Balaka. All such requests are listed in the procedural history along with a list of several *inter partes* follow up communications made by phone or email correspondence. These follow ups were sent pursuant to the Prosecution’s failures to timely respond to the Defence requests for disclosure. The Defence also sent a disclosure request regarding any evidence that may affect the credibility of witness P-2582 who claims having been the wife of an Anti-Balaka member within Mr Yekatom’s group. This request also remained unanswered for some time. For both requests, the Prosecution finally responded that all evidence concerning the [REDACTED] and P-2582’s request for disclosure had been disclosed. In light of those particular circumstances, the Defence respectfully submits that specific remedial measures are warranted.
3. The Defence respectfully requests the Trial Chamber to grant the following remedial measures for this violation: (i) order that sought exculpatory and/or material information be disclosed (as set out below); and ii) order that the Prosecution submit an evidence search report, taking into account

¹ Courtesy copy was provided on 11 October 2021, Annex A. Please note that as of the date of this filing this item has not been formally disclosed.

all past disclosure requests from the Defence, indicating the method and terms used within their database to search the requested exculpatory evidence and any items material to the Defence, along with a certification to the effect that the Prosecution has no remaining undisclosed exculpatory evidence or evidence material to the Defence.

PROCEDURAL HISTORY

4. On 11 November 2018, Pre-Trial Chamber II (“Pre-Trial Chamber”) issued an arrest warrant against Mr Alfred Yekatom, finding *inter alia* reasonable grounds to believe that he had committed or ordered the commission of the crime of enlistment of children under the age of 15 years and using them to participate actively in hostilities.² Specifically, it found that “at least from December 2013 children were enlisted in [Mr Yekatom’s] [...] group” and that, “[o]n 4 August 2014, Yekatom agreed with [REDACTED] and [...] [UNICEF] to demobilise around 153 children in his group, including at least 14 children under the age of 15” (the “Demobilisation Process”). In reaching these findings, the Pre-Trial Chamber relied on statements of witnesses, including P-2018, and material from [REDACTED], such as the document bearing ERN CAR-OTP-2071-0279 comprising a list containing the identities and ages of 60 children – annexed to P-2018’s statement – who had allegedly been released from Mr Yekatom’s group and participated in the Demobilisation Process (the “List”).³
5. On 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 doing so”, and in advance of the confirmation hearing.⁴

² [ICC-01/14-01/18-1-Conf-Exp](#), p. 18; Public redacted version: [ICC-01/14-01/18-1-Red](#).

³ See [ICC-01/14-01/18-1-Conf-Exp](#), para. 18(g), fn. 107; Public redacted version: [ICC-01/14-01/18-1-Red](#).

⁴ [ICC-01/14-01/18-64-Conf, para. 16](#); Public redacted version: [ICC-01/14-01/18-64-Red](#).

6. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”) which included the charge of enlistment and use of children in hostilities pursuant to Article 8(2)(e)(vii) of the Rome Statute (“Statute”) against Mr Yekatom, under Count 29. The factual allegations supporting the charge included an allegation that [REDACTED].⁵
7. On 20 August 2019, the Defence filed a Motion for Disclosure of Exculpatory Material.⁶
8. On 21 August 2019, the Prosecution responded and indicated that the request was unnecessary as it had performed its disclosure obligation in good faith.⁷
9. On 28 August 2019, the Pre-Trial Chamber issued its Decision on the Defence Motion of 20 August 2019 and directed the Prosecution to verify if “any additional evidence that falls within the scope of article 67(2) of the Statute”.⁸
10. On 12 September 2019, through *inter partes* correspondence the Defence requested the Prosecution to provide it with any information received from the French authorities in relation to Mr Yekatom.⁹
11. On 11 December 2019, the Pre-Trial Chamber issued the Decision on the Confirmation of Charges and committed Mr Yekatom for trial on the charges as confirmed, including the charge of enlistment of children under the age of 15 years.¹⁰ The Pre-Trial Chamber referenced, in its findings concerning count 29, the evidence of witness P-1974. This witness describes

⁵ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 360; Public redacted version: [ICC-01/14-01/18-282-AnxB1-Red](#).

⁶ [ICC-01/14-01/18-284](#).

⁷ [ICC-01/14-01/18-286](#), para. 3.

⁸ [ICC-01/14-01/18-296](#), para. 14.

⁹ Letter Ref. ARY-2019-0072 sent by the Yekatom Defence to the Prosecution, 12 September 2019, available upon request.

¹⁰ [ICC-01/14-01/18-403-Conf-Corr](#), p. 105; Public redacted version: [ICC-01/14-01/18-403-Corr-Red](#).

Mr Yekatom's engagement [REDACTED].¹¹ Specifically, the Pre-Trial Chamber confirmed the war crime charge of conscription, enlistment and use of children under the age of 15 years to participate actively in hostilities pursuant to Article 8(2)(e)(vii) of the Statute, under Count 29 and relied, *inter alia*, on witness statements and media and NGO materials, including the List.¹²

12. On 13 December 2019, through *inter partes* correspondence, the Defence requested the disclosure of *inter alia* all exculpatory material in the Prosecution's possession and any information tending to show that children identified on the List did not take part in the hostilities and/or were not enlisted with the Anti-Balaka.¹³ This correspondence further indicated that the Defence "believe[d] that there are individuals who have information that [REDACTED] listed a number of children who were never enlisted in the armed groups or had taken part in hostilities" and "that any such information also qualifies as potentially exculpatory material that is disclosable pursuant to Article 67(2)."
13. On 21 January 2020, the Defence, through an *inter partes* correspondence inquired as to whether the Prosecution had made any progress regarding some of the issues raised within the 13 December 2019 letter.¹⁴ The Prosecution responded the same day simply indicating that it would look into the matter.¹⁵
14. On 18 February 2020, the Defence made an additional attempt to inquire as to whether the Prosecution was in possession of material identified in the 13

¹¹ [REDACTED].

¹² See [ICC-01/14-01/18-403-Conf-Corr](#), paras. 144-152, fn. 347; Public redacted version: [ICC-01/14-01/18-403-Corr-Red](#).

¹³ Letter Ref. ARY-2019-0093, Annex B.3, sent by the Defence to the Prosecution, 13 December 2019, available upon request.

¹⁴ Email from the Yekatom Defence to the Prosecution on 21 January 2020 at 10:19, available upon request.

¹⁵ Email from the Prosecution to the Yekatom Defence on 21 January 2020 at 11:40, available upon request.

December 2019 disclosure request, notably, items related to the status of children who took part in the [REDACTED]. Specifically, through further *inter partes* correspondence, the Defence reminded the Prosecution that it was yet to receive a response to its disclosure request and that unless a comprehensive response to the said letter was received by 3 March 2020, a disclosure violation motion would be filed.¹⁶

15. On 2 March 2020, the Prosecution proceeded with a disclosure batch.¹⁷
16. On 3 March 2020, after reviewing the items disclosed, the Defence requested the Prosecution through *inter partes* correspondence to respond in writing to the 13 December 2019 correspondence in order to have a clear record of the Prosecution's position and thus resolve the disclosure matters *inter partes*. In addition, the Defence invited the Prosecution to a meeting the following week in order to go through the pending disclosure requests.¹⁸
17. On 9 March 2020, the Defence requested the Prosecution to provide specific missing information that directly relates to, among other counts, count 29.¹⁹ This letter highlighted that according to the Prosecution's own evidence, some children named in the List did not participate in military activity, nor were they conscripted or enlisted, and that further details on the identities of the children relied upon by the Prosecution would assist the Defence.
18. On 12 March 2020, the Prosecution partially responded to the 13 December 2019 disclosure request.²⁰ The Prosecution's *inter partes* correspondence failed to address this specific request of 13 December 2019 which sought disclosure of any item tending to show that not all the children listed by

¹⁶ Email from the Yekatom Defence to the Prosecution on 18 February 2020 at 13:29, available upon request.

¹⁷ [ICC-01/14-01/18-439-Conf-Anx.](#)

¹⁸ Email from the Yekatom Defence to the Prosecution on 3 March 2020 at 14:32, available upon request.

¹⁹ Letter Ref. ARY-2020-0112 sent by the Defence to the Prosecution on 9 March 2020 at 16:52, available upon request.

²⁰ Email from the Prosecution to the Yekatom Defence on 12 March 2020 at 14:12, available upon request.

[REDACTED] were child soldiers. The Prosecution's correspondence nevertheless indicated that it continued to work on the remaining requests.

19. On 27 March 2020, following an invitation by the Defence, the Prosecution attended an *inter partes* meeting during which the pending disclosure requests were discussed. In relation to the Defence request regarding disclosure of any information tending to show that children [REDACTED] did not take part in the hostilities and/or were not enlisted with the Anti-Balaka, the Prosecution indicated during the meeting that it would soon come back and address this subject.²¹
20. On 3 April 2020, the Defence followed up via teleconference on the same request. During the conversation the Prosecution confirmed that it would prioritise the matter during the coming week.²²
21. On 20 April 2020, the Defence sent another reminder to the Prosecution regarding items tending to show that the children [REDACTED] were not child soldiers. The Defence highlighted that its disclosure request sent on 13 December 2019 remained unanswered despite the *inter partes* conference calls held on 27 March 2020, 3 and 10 April 2020.²³
22. On 21 April 2020, the Prosecution responded that it "will attend to it more fully in due course and revert to the Defence".²⁴
23. On 4 May 2020, the Defence sent further *inter partes* correspondence to the Prosecution indicating its concern with the delay in responding to the Defence disclosure requests. The Defence attached a list of the outstanding

²¹ Phone conversation between the Prosecution and the Yekatom Defence dated 27 March 2020 at 14:34.

²² Phone conversation between the Prosecution and the Yekatom Defence dated 3 April 2020 at 14:30.

²³ Letter Ref. ARY-2020-0122 sent by the Yekatom Defence to the Prosecution on 20 April 2020, available upon request.

²⁴ Email from the Prosecution to the Yekatom Defence on 21 April 2020 at 18:13, available upon request.

requests, including the follow-up correspondence and conference calls where the issue of children [REDACTED] were discussed.²⁵

24. On 12 May 2020, the Prosecution responded to the Defence request seeking to obtain any information tending to show that the children [REDACTED] were not child soldiers. The Prosecution responded that: “as you mention in your request, information 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”.²⁶
25. On 15 June 2020, the Defence filed a *Motion for Additional Details*, requesting the names of the alleged child soldiers due to the ambiguities and lack of precision surrounding the List which names 60 alleged demobilised child soldiers from the Anti-Balaka. The Defence argued that:

[REDACTED]. It is therefore unknown and unclear which of the persons on this list the Prosecution contends are the child soldiers referred to in Count 29.²⁷

26. On 13 July 2020, Trial Chamber V rejected the Defence Motion for Additional Details.²⁸
27. On 16 July 2020, Trial Chamber V set the disclosure deadline in the case to 9 November 2020 stating that “[b]y this date, the Prosecution must review all the materials in its possession and disclose all materials falling under its disclosure obligations”.²⁹
28. On 22 July 2020, following the Defence’s request to find that the Prosecution had violated its obligation under Article 67(2),³⁰ the Chamber found a

²⁵ Letter Ref. ARY-2020-0127 sent by the Yekatom Defence to the Prosecution on 4 May 2020, available upon request.

²⁶ Email from the Prosecution to the Yekatom Defence on 12 May 2020 at 09:56, available upon request.

²⁷ [ICC-01/14-01/18-554-Conf](#), para. 31; Public redacted version: [ICC-01/14-01/18-554-Red](#).

²⁸ [ICC-01/14-01/18-585](#), para. 31.

²⁹ [ICC-01/14-01/18-589](#), para. 10.

³⁰ [ICC-01/14-01/18-566-Conf](#); Public redacted version: [ICC-01/14-01/18-566-Red](#).

disclosure violation by the Prosecution; the Chamber underlined that it was nevertheless confident that the Prosecution would abide by its obligations.³¹

29. On 12 October 2020, the Defence filed a motion for a disclosure violation³² following the failure of the Prosecution to disclose the statement of witness P-2428 which contained exculpatory evidence in relation to count 29.³³ The statement of P-2428, obtained in April 2019 but disclosed on 2 October 2020, contradicted the anticipated evidence supporting Count 29. Indeed, P-2428 alleged to have been asked [REDACTED] although he was not a child soldier for the purpose [REDACTED]. On 25 November 2020, the Chamber found that the Prosecution had violated its disclosure obligations pursuant to article 67(2) of the Statute.³⁴
30. On 14 May 2020, the Prosecution attempted to amend the charges against Mr Yekatom *inter alia* on the basis that P-2582 and P-2620 each alleged to have been [REDACTED] of Anti-Balaka members of Mr Yekatom's group.³⁵ The Prosecution alleged that P-2620 was introduced to Mr Yekatom as the [REDACTED]. In addition, both P-2582 and P-2620 statements separately allege that they were respectively [REDACTED].
31. On 1 June 2020, the Pre-Trial Chamber rejected the Prosecution's request.³⁶
32. On 8 June 2020, the Prosecution sought reconsideration of the decision rejecting the amendment of the charges,³⁷ which was denied.³⁸ It then sought

³¹ [ICC-01/14-01/18-595, para. 22.](#)

³² [ICC-01/14-01/18-681-Conf](#); Public redacted version: [ICC-01/14-01/18-681-Red](#).

³³ [CAR-OTP-2105-0970.](#)

³⁴ [ICC-01/14-01/18-740-Conf.](#)

³⁵ [ICC-01/14-01/18-518-Conf](#); Public redacted version: [ICC-01/14-01/18-518-Red](#).

³⁶ [ICC-01/14-01/18-538.](#)

³⁷ [ICC-01/14-01/18-545.](#)

³⁸ [ICC-01/14-01/18-560.](#)

the late disclosure of their identities and redacted statements,³⁹ which was granted.⁴⁰

33. On 22 January 2021, in order to minimise the prejudice resulting from the delayed disclosure of these witnesses, the Defence requested disclosure of any exculpatory information as well as any material that may affect the credibility of the Prosecution's evidence pursuant to Article 67 (2) of the Statute, regarding witnesses P-2620 and P-2582 or the credibility of their expected evidence.⁴¹
34. On 12 February 2021, having received no response by the Prosecution, the Defence sought an update through email on the status of the disclosure request.⁴²
35. On 25 February 2021, the Prosecution responded to the Defence disclosure request specifying that any material related to P-2582 and P-2620's credibility and anticipated evidence had already been disclosed.⁴³
36. On 21 October 2021, the Defence requested a disclosure of "CDR and other documents related to '[REDACTED]'",⁴⁴ who would have been a French military officer part of the Sangaris operation in contact with Mr Yekatom.
37. On 11 October 2021, in response to the Defence's request, the Prosecution disclosed a courtesy copy of the screening note of P-2580⁴⁵ bearing redactions notably on the identity of P-2580.⁴⁶

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³⁹ [ICC-01/14-01/18-628-Conf-Red.](#)

⁴⁰ [ICC-01/14-01/18-648-Conf-Red.](#)

⁴¹ Letter Ref. ARY-2021-0158 sent by the Yekatom Defence to the Prosecution on 22 January 2021, available upon request.

⁴² Email from the Yekatom Defence to the Prosecution on 12 February 2021 at 17:28.

⁴³ Annex to email from the Prosecution to the Yekatom Defence on 25 February 2021 at 15:30.

⁴⁴ Email from the Yekatom Defence to the Prosecution on 01 October 2021 at 10:31.

⁴⁵ Annex A.

⁴⁶ Email from the Prosecution to the Yekatom Defence on 11 October 2021 at 13:53.

38. This motion is being filed on a confidential basis as it refers to confidential information contained by material disclosed by the Prosecution. A public redacted version is being filed simultaneously.

SUBMISSION

39. This motion follows seven disclosure violations by the Prosecution either declared by the Chamber⁴⁷ or conceded by the Prosecution.⁴⁸
40. The Defence is thus highly concerned that the lack of organisation of the Prosecution's archived evidence leads to an incomplete fulfilment of its disclosure obligation regardless of any specific request by the Defence identifying items that are material or potentially exculpatory.
41. It is undisputable that the Prosecution had the requested material in its possession since its collection by its investigators on 26 August 2019. As such, the Defence will restrict itself to demonstrating to the Chamber on a *prima facie* basis that the requested material is potentially exculpatory pursuant to article 67 (2) or at the very least material to the Defence pursuant to Rule 77 and that the ensuing disclosure violation is prejudicial to Mr Yekatom's rights.⁴⁹

A. Prosecution disclosure obligations

42. It is well-established that the duty of the Prosecution to disclose exculpatory material is necessary to guarantee the right of the accused to a fair trial.⁵⁰

⁴⁷ [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, 21; [ICC-01/14-01/18-551-Conf](#), para. 31, Public redacted version: [ICC-01/14-01/18-551-Red](#); [ICC-01/14-01/18-595](#), para. 21; [ICC-01/14-01/18-740-Conf](#), paras. 14-15; [ICC-01/14-01/18-829](#).

⁴⁸ Email from the Trial Chamber V to the Parties and Participants on 26 October 2020 at 16:39. *See also*, [ICC-01/14-01/18-783-Anx5](#).

⁴⁹ *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, para. 9.

⁵⁰ *Prosecutor v. Abdallah Banda*, [Decision on Article 54\(3\)\(e\) Documents](#), 23 November 2011, ICC-02/05-03/09-25, para. 14; [ICC-01/14-01/18-296](#), para. 12; [ICC-01/14-01/18-551-Conf](#), para. 29; Public redacted version: [ICC-01/14-01/18-551-Red](#).

43. The obligation to disclose exculpatory material in particular has consistently benefited from a broad interpretation⁵¹ and is independent of the existence of other evidence that may undermine it, of the fact that the same witness may provide incriminating evidence,⁵² or of the fact “that there are other sources providing similar evidence.”⁵³
44. The counterpart of this obligation is that its violation by the Prosecution may affect the fairness of the proceedings.⁵⁴

B. Exculpatory and/or material nature of document CAR-OTP-2117-0043

45. P-2580’s screening note contains information that is both material to the Defence’s preparation and exculpatory. Indeed, it contains information that may affect the credibility of various evidence relied upon by the Prosecution.⁵⁵
46. Furthermore, it cannot be argued that the fact that this document is a screening note justifies its prior non-disclosure. The Chamber has previously ruled that “screening notes may be disclosable under other⁵⁶ statutory provisions”, specifically recalling the Prosecution’s continuing obligation to disclose Article 67(2) and Rule 77 material.⁵⁷ Notably, in that Decision issued 10 August 2020, the Chamber found that it was “confident

⁵¹ [ICC-01/14-01/18-551-Conf](#), para. 29; Public redacted version: [ICC-01/14-01/18-551-Red](#); *Prosecutor v. Lukic & Lukic*, [Decision on Milan Lukic’s Motion for Remedies Arising out of Disclosure Violations by the Prosecution](#), 12 May 2011, No. IT-98-32/1-A, para. 13; *Prosecutor v. Krstic*, [Judgement](#), 19 April 2004, No. IT-98-33-A, para. 180.

⁵² [ICC-01/14-01/18-64-Conf](#), para. 18; Public redacted version: [ICC-01/14-01/18-64-Red](#).

⁵³ [ICC-01/14-01/18-595](#), para. 21; *Prosecutor v. Thomas Lubanga Dyilo*, [Decision issuing a confidential and a public redacted version of “Decision on disclosure issues, responsibility for protective measures and other procedural matters”](#), 24 April 2008, ICC-01/04-01/06-1311, para. 94; *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.

⁵⁴ See *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, para. 20; *Prosecutor v. Krstic*, [Judgement](#), 19 April 2004, No. IT-98-33-A, para. 178.

⁵⁵ *Prosecutor v. Krstic*, [Judgement](#), 19 April 2004, No. IT-98-33-A, para. 178.

⁵⁶ I.e. other than Rule 76(1) of the Rules.

⁵⁷ [ICC-01/14-01/18-618](#), paras. 12-13.

that the Prosecution [was] discharging its disclosure obligations in good faith”.⁵⁸

i) Child soldiers and Count 29

a. Not all the children [REDACTED] were involved with the Anti-Balaka

47. P-2580 alleges that he was [REDACTED]. [REDACTED]. He alleges that most of the children [REDACTED] were “victims” while only “some had indeed been involved with the Anti Balaka.”
48. The exculpatory nature of such allegations is undeniable. As set out above, through its *inter partes* correspondence the Defence had specifically and repeatedly, over a period of 5 months, requested the disclosure of “any information in the possession of the Prosecution tending to show that any of the children [on the List] had not been enlisted within the Anti-Balaka and/or had not actively taken part in the hostilities.”⁵⁹
49. The information contained in P-2580’s screening note provides further information that tends to show that not all children who took part in the [REDACTED] were involved within the Anti-balaka.⁶⁰
50. In addition to affecting the credibility of the List, P-2580’s allegations contained in the screening note may affect the credibility of the following documentary evidence used by the Prosecution to support the allegation that all children involved [REDACTED] had been enlisted or conscripted in Mr Yekatom’s group to participate actively in hostilities: CAR-OTP-2071-0285; CAR-OTP-2068-0558; CAR-OTP-2071-0308; CAR-OTP-2128-1373; CAR-OTP-2109-0473; CAR-OTP-2071-0279; CAR-OTP-2071-0302; CAR-OTP-2115-0369; CAR-OTP-2066-5307; and CAR-OTP-2073-0871.

⁵⁸ [ICC-01/14-01/18-618](#), para. 13.

⁵⁹ Let Ref. ARY-2019-0093 sent by the Defence to the Prosecution on 13 December 2019, available upon request.

⁶⁰ See for example [CAR-OTP-2115-0216](#), para. 50; [CAR-OTP-2105-0970-R01](#), para. 67.

b. There were no children under the age of 13 years old

51. P-2580 further alleges that [REDACTED], the youngest of all [REDACTED] children [REDACTED] was 13 years old.
52. On its own this allegation by P-2580 affects the credibility of the Prosecution's evidence that the children demobilised by Mr Yekatom were, according to the Trial Brief, between 8 and 18 years old,⁶¹ an allegation supported by the following evidence: CAR-OTP-2068-0222 para. 61 (P-1974);⁶² CAR-OTP-2068-0558 at 0562; CAR-OTP-2109-0473 at 0476,⁶³ CAR-OTP-2071-0308;⁶⁴ CAR-OTP-2109-0452 paras. 45 and 73 (P-2082);⁶⁵ CAR-OTP-2110-0333 para. 36 (P-2083);⁶⁶ CAR-OTP-2068-0222 (P-1974) para. 61;⁶⁷ CAR-OTP-2071-0285 at 0291;⁶⁸ CAR-OTP-2071-0302 at 0303;⁶⁹ CAR-OTP-2115-0369;⁷⁰ CAR-OTP-2094-0968 para. 87 (P-2084);⁷¹ CAR-OTP-2117-0605 (P-2582).⁷²

c. There were no [REDACTED] amongst the alleged child soldiers

53. P-2580 further alleges that among those children that had been involved with the Anti-Balaka and were demobilised, he did not encounter "[REDACTED]".
54. This allegation directly contradicts and affects the credibility of witness P-2582, who is mentioned in the List, and whose anticipated evidence include

⁶¹ [ICC-01/14-01/18-723-Conf](#), para. 487, fn. 1236; Public redacted version: [ICC-01/14-01/18-723-Red](#).

⁶² Age range between 9 to 15 years old.

⁶³ The age varies between 10 to 17 years old.

⁶⁴ Mentions children under 13 years old.

⁶⁵ Age range between 11 and 17 years old.

⁶⁶ Age range between 8 and 17 years old.

⁶⁷ Age range between 9 to 18 years old.

⁶⁸ Age range between 12 to 14 years old.

⁶⁹ Mentions children of 12 years old.

⁷⁰ Age range between 12 to 16 years old.

⁷¹ Mentions children from 10 years upwards.

⁷² Alleged child soldier.

the allegation that [REDACTED]⁷³ as well as an allegation that [REDACTED].⁷⁴

55. Despite a specific request by the Defence to the Prosecution to disclose “any information in the possession of the Prosecution tending to affect the credibility of the allegations by P-2582 [...] [REDACTED]”⁷⁵ as well as a further follow-up to this request as indicated in paragraph 34 above, the Prosecution failed to disclosed the screening note of P-2580 prior to 11 October 2021.

d. Affects the credibility of the Prosecution witnessed related to [REDACTED]

56. In addition, given that P-2580 [REDACTED], his screening note is, on its own, material to the credibility of (i) the four witnesses' who [REDACTED]; as well as to the credibility of (ii) the two local authorities [REDACTED] and to the credibility of the Anti-Balaka representative [REDACTED].

ii) *Sangaris advance to PK9*

57. P-2580 further alleges that the Anti-Balaka “advanced to Mbaiki” after having being told to do so by a member of the Sangaris personnel and for the purpose of talking with “the French.”

58. As a preliminary matter, the Defence recalls that it has previously sought disclosure of information received from the French authorities *inter alia* on the basis of the Defence’s belief that “French military authorities were aware of, and in fact encouraged, many efforts of Mr Yekatom to promote peace and security in CAR during 2013 through 2016”; this included information “on the reconciliation meeting in MBAÏKI organised by SANGARIS and

⁷³ [CAR-OTP-2117-0605-R05](#), paras. 93 and 99.

⁷⁴ [CAR-OTP-2127-3960-R01](#), page 3.

⁷⁵ Letter Ref. ARY-2021-0158 sent by the Yekatom Defence to the Prosecution on 22 January 2021.

attended by Mr Yekatom".⁷⁶ The Prosecution has therefore been on notice of the Defence's case in this regard since 12 September 2019.

59. Further, regardless of any specific request sent by the Defence, evidence tending to show that Mr Yekatom's advance on the PK9-Mbaïki axis was relevant *inter alia* to specific *mens rea* elements of the crimes of displacement and forcible transfer and deportation is at the very least material to the Defence and potentially exculpatory, in that it tended to show the innocence of Mr Yekatom and/or may affect the Prosecution evidence on Mr Yekatom's intent and knowledge pursuant to Article 30 of the Statute.
60. This information is material to the Defence's preparation and was identified as such by the Defence. The Prosecution thus knew that the Defence considered it highly relevant for counts 24 and 25 as it demonstrated cooperation between Mr Yekatom and international forces in charge of security in the Lobaye region. This information is further potentially exculpatory as it affects the credibility of the Prosecution's evidence underpinning the allegation that Mr Yekatom adhered to or otherwise acted in furtherance of an alleged "criminal policy of targeting the Muslim population in western CAR."⁷⁷

C. Violation

61. P-2580's screening note was obtained by the Prosecution on 26 August 2019,⁷⁸ i.e. shortly after the filing by the Prosecution of the DCC, but prior to the hearing for the confirmation of charges.

⁷⁶ Letter Ref. ARY-2019-0072 sent by the Defence to the Prosecution on 12 September 2019, available upon request.

⁷⁷ [ICC-01/14-01/18-723-Conf, para. 170](#); Public redacted version: [ICC-01/14-01/18-723-Red](#).

⁷⁸ [CAR-OTP-2117-0043](#).

62. It remained undisclosed, without justification, despite its clear exculpatory nature and materiality for the Defence on various elements contained in the Prosecution's evidence and used in support of the DCC and the Trial Brief.
63. Thus, the Prosecution's failure to disclose the screening note of P-2580 as soon as practicable and at the very least prior to the confirmation hearing violated its disclosure obligations pursuant to Article 67(2) and Rule 77.
64. Indeed, not only was there no justification provided to explain such a delay in disclosure, but this document was disclosed in response to a request by the Defence that did not relate to count 29 or the allegation of alleged child soldiers enlisted or conscripted in Mr Yekatom's group. Specifically, the request that lead to this disclosure was targeting information regarding the existence of a "[REDACTED]" within the Sangaris personnel.⁷⁹
65. Had the name "[REDACTED]" not been within P-2580's screening note, the Prosecution may never have disclosed this item to the Defence, despite specific requests seeking disclosure of such evidence. This is, to say the least, highly concerning, even more so given that on two occasions the Prosecution indicated that "information of the nature you describe has been disclosed".⁸⁰

D. Prejudice

66. The Trial Chamber in its Decision on the Defence Request Concerning Disclosure Violation and Disclosure of Exculpatory Material 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".⁸¹

⁷⁹ Letter ref. ARY-2021-0187 sent by the Defence to the Prosecution on 1 October 2021.

⁸⁰ See above, paragraphs 24 and 35 respectively.

⁸¹ [ICC-01/14-01/18-595](#), para. 22.

67. While, all previous disclosure violations by the Prosecution in this case arose before the start of the trial, this violation occurs 11 months after the set disclosure deadline in the case⁸² and eight months after the start of the trial.⁸³ It is therefore submitted that this violation is not of the same “minimal”⁸⁴ nature as the previous ones and that it therefore warrants a remedy.
68. The various disclosure requests and the follow-ups identified in the procedural history should have led to the disclosure of P-2580’s screening note. The Prosecution’s failure in this regard can only lead to the conclusion that there is a lack of organisation of the Prosecution’s archived evidence leading to systematic failures of disclosure which need to be addressed urgently.
69. Given the Prosecutor’s commitment during his opening speech on 16 June 2021 to efficiently address the issue of disclosure,⁸⁵ the Defence believes that the remedy requested in the present motion is a pragmatic way for the Prosecution to meet that commitment.
70. The Defence thus requests that the following two remedies be implemented.
71. First, the Defence underlines that P-2580’s screening note contains information of an exculpatory nature relevant to count 29 and more specifically in relation to the children [REDACTED]. The Defence therefore requests that any additional potentially exculpatory and/or material information in the possession of the Prosecution, including information relating to whether individuals on the List were not enlisted or conscripted by the Anti-Balaka, be disclosed immediately.

⁸² [ICC-01/14-01/18-589-Conf](#), para. 10.

⁸³ [ICC-01/14-01/18-589-Conf](#), para. 24.

⁸⁴ [ICC-01/14-01/18-740-Conf](#), para. 20.

⁸⁵ See [Karim Khan’s first speech as ICC Prosecutor 16 June 2021](#), from 8:44 to 9:13.

72. In addition, given that the identity of P-2580 remains redacted, the Defence requests that (i) an unredacted version of the screening note be disclosed; (ii) any statement from P-2580 taken by the Prosecution be disclosed; (iii) any records of meetings, discussions, correspondence, or any other encounter between P-2580 be disclosed, including investigation notes.
73. Given that [REDACTED] is imminently expected to testify *inter alia* on the [REDACTED], and noting the Prosecution's ongoing disclosure duties, the Defence submits that the Prosecution should make every effort to ensure that it meets its obligations in this regard, including while this Motion is pending, prior to the appearance of [REDACTED].
74. Second, noting that circumstances surrounding disclosure of this material, the Defence respectfully requests the Chamber to order the Prosecution to submit an evidence search report indicating the method and terms used within their database to search the requested exculpatory and any items material to the Defence based on key words from all past disclosure requests from the Defence. This remedy would allow the Defence to potentially address without delay any "blind spot" that it would notice in the search conducted by the Prosecution, ensuring in an efficient manner that the rights of Mr Yekatom in relation to the disclosure obligation of the Prosecution are respected.
75. Explanation of how this violation occurred is now necessary to prevent others to come, and an indication of how the Prosecution search within its database for material or exculpatory evidence is now necessary. Following this, the Prosecution should certify that it does not possess undisclosed exculpatory evidence.

RELIEF SOUGHT

76. For all of the above reasons, the Defence respectfully requests Trial Chamber V to:

FIND that the Prosecution has violated its disclosure obligations;

ORDER the Prosecution to disclose, on an expedited basis, the sought information set out above in paragraphs 72-73 of this Motion; and

ORDER the Prosecution to submit an evidentiary search report as set out above, in paragraph 74 of this Motion.

RESPECTFULLY SUBMITTED ON THIS 20th DAY OF OCTOBER 2021



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