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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 YEKATOM’s Motion for
Finding of Disclosure Violation and for additional remedies,
ICC-01/14-01/18-1142-Conf”,
ICC-01/14-01/18-1149, 27 October 2021**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber V (“Chamber”) to deny in all respects, the YEKATOM Defence’s Motion for Finding of Disclosure Violation (“Motion”)¹ regarding P-2580’s screening note (“Screening Note”).² The Screening Note does not tend to show the innocence of the Accused or mitigate YEKATOM’s guilt, as charged. Rather, it principally contains *incriminating* evidence. Although various reasons explain the timing of disclosure, the Prosecution accepts that the Screening Note should have been identified and disclosed earlier. Nevertheless, the Motion should be dismissed.

2. *First*, the timing of the disclosure of the Screening Note has caused no prejudice because the information contained therein with respect to a certain member of the French SANGARIS forces named [REDACTED], and other evidence concerning the presence of child soldiers in YEKATOM’s Group is actually incriminating, and reinforces the Prosecution’s case theory presented during the hearing on the confirmation of charges over two years ago (“Confirmation Hearing”).

3. *Second*, the Defence was already in possession of the same information in relation to child soldiers prior to the Confirmation Hearing. Moreover, YEKATOM has actual knowledge of the children that were demobilised from his group because he personally negotiated and authorised this process and took part in the demobilisation ceremony himself.

4. *Third*, the Motion inappropriately seeks remedies and/or sanctions that are without legal authority and, in any event, grossly disproportionate and unwarranted.

¹ ICC-01/04-01-/18-1142-Conf.

² CAR-OTP-2117-0043.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), this Response is filed as “Confidential”, as it responds to a Motion with the same designation. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

6. Article 67(2) obligates the Prosecution to disclose as soon as practicable evidence which it believes: i) tends to show the innocence of the accused; ii) mitigates the guilt of the accused; or iii) may affect the credibility of Prosecution evidence.³ This is not a speculative standard. Rather, there must be a founded basis for the evidence to be considered *meaningful*. Exculpatory evidence does not exist in a vacuum, but its assessment always relates to the quality of the underlying information, as well as *what* is charged and *how* it is charged.

7. Nothing in the Screening Note objectively indicates or suggests the innocence of either Accused, nor does it mitigate guilt. Indeed, this is how it was initially assessed. In fact, much of the Screening Note is largely incriminatory, and consistent with the Prosecution’s case theory presented at the Confirmation Hearing. While concededly the Screening Note relates to the subject matter of the expected testimony of certain Prosecution witnesses (*e.g.* former child soldiers or [REDACTED]), that it could adversely affect the credibility of their expected testimony, though possible, is speculative.

³ Article 67(2).

8. As demonstrated below, the only new evidence in the Screening Note is about an alleged SANGARIS element named [REDACTED], which was provided to the Defence in response to its 1 October 2021 request about this individual.⁴

9. The Screening Note was not disclosed earlier because at the time of the Prosecution's review, [REDACTED] name or his work with the French forces (*i.e.*, Operation Sangaris ("SANGARIS")) was not assessed as material to the preparation of the Defence. As noted, in its reasonable assessment the Prosecution considered the Screening Note, when taken as a whole, to be incriminating. However, in view of its decision not to rely on the note given that by its nature P-2580 never had it read back, and adopted or acknowledged it,⁵ the Prosecution (in retrospect) should have disclosed it sooner, albeit for a reason other than those advanced in the Motion.

10. That said, there is no unfair prejudice from the delay since the key information in the Screening Note is largely incriminatory and, for the most part, cumulative to information in the possession of the Defence for over two years in one form or another. The Defence is further free to inquire among any relevant Prosecution witness about the nature and context of this "reconciliation" meeting in MBAIKI, or the [REDACTED] demobilisation process in which YEKATOM personally took part in the presence of children who appear [REDACTED].

A. The Screening Note is Largely Incriminatory

11. The Motion concerns one document: a six-page Screening Note of a non-trial witness. Only three pages contain any substantive information. By their nature, screening notes serve a very limited purpose in the course of an investigation. Unlike a 'witness statement', attested to for its truth and accuracy, 'screening notes' are merely a step in the process of evidence collection. They are not adopted, signed or

⁴ ARY-2021-0187

⁵ ICC-01/14-01/18-539, paras. 16, 18, *see also* paras. 10, 14.

reviewed by a witness for accuracy, and by design, are meant only to skim key issues about which the witness may have information to be subsequently obtained in a formalised process.⁶

12. Here, the Screening Note's information about child soldiers and a SANGARIS element named [REDACTED] is largely inculpatory and assessed as such, as it supports the Prosecution's case.

a. The evidence about child soldiers is actually inculpatory and reinforces the Prosecution case presented at the Confirmation Hearing

13. The nature of the prohibited conduct under the Statute (using, conscripting or enlisting child soldiers) is not dependent upon the *number* of children in YEKATOM's Group, but the presence of *any* child among the group's ranks under the age of 15.⁷ The Screening Note is not only consistent with the presence of such children in YEKATOM's Group, but affirmatively establishes this by confirming: YEKATOM was an Anti-Balaka leader and signed an undertaking with [REDACTED] to demobilise children in his group [REDACTED].⁸

14. Importantly, the Screening Note provides that [REDACTED] took children from the Anti-Balaka and gave them [REDACTED], and there was a ceremony [REDACTED].⁹ Moreover, P-2580 claims that for the eight to nine months that he was involved with [REDACTED], about 85 to 87 children went through the [REDACTED] program and that most of them were victims (having seen their parents killed or

⁶ ICC-01/14-01/18-618, para. 10 (noting that screening notes "provide 'a personal record' by the investigator of what the witness said"); *see also* ICC-01/09-01/11-743, para. 16.

⁷ *See, e.g.* Elements of Crimes, Article 8(2)(e)(vii).

⁸ CAR-OTP-2117-0043 at 0045-0046.

⁹ CAR-OTP-2117-0043 at 0045-0046.

houses burned), that some of them had been involved with the Anti-Balaka, and that the youngest child that he had in his [REDACTED] program was 13 years old.¹⁰

15. The Screening Note's description of YEKATOM's role as an Anti-Balaka leader, his participation in the demobilisation process, and [REDACTED] children from the Anti-Balaka to provide them training, is clearly incriminating. It is also consistent with evidence from a variety of reliable sources which establish that children under age 15 were recruited in YEKATOM's Group. Multiple witnesses, including child soldiers,¹¹ insider witnesses,¹² and individuals who took part in organising the demobilisation process,¹³ provide direct evidence of the presence and use of children under the age of 15 in YEKATOM's Group. Several of these witnesses specifically explain that some children released from YEKATOM's Group through [REDACTED] were as young as 11¹⁴ and 12¹⁵ years old.

16. Taken as a whole, the Screening Note is also consistent with YEKATOM's assertive conduct and admissions in the demobilisation of the listed children. His express and signed undertaking not to "re-recruit" them thereafter underscores this. YEKATOM was directly involved in the process leading up to his release of the children from his group, as were several of his subordinates, and he personally met with UNICEF [REDACTED] representatives regarding their demobilisation.¹⁶ During one meeting YEKATOM stated that [REDACTED].¹⁷

¹⁰ CAR-OTP-2117-0043 at 0046-0047.

¹¹ P-2475: CAR-OTP-2110-0556-R03, paras. 43, 69; P-2511: CAR-OTP-2114-0178-R01, paras. 11, 29; P-2476: CAR-OTP-2114-0149-R01, paras. 11, 36; P-2582: CAR-OTP-2117-0605-R02, para. 12.

¹² P-2233: CAR-OTP-2118-5902-R01, at 5903-5904, 5914, 1.16-42, 399-406; P-1792: CAR-OTP-2075-1743-R01, paras. 11, 13.

¹³ P-1974: CAR-OTP-2068-0222-R02, para. 61; P-2018: CAR-OTP-2071-0259-R01, paras. 89-90, 95-96; P-2082: CAR-OTP-2109-0452-R01, paras. 45, 73.

¹⁴ P-2082: CAR-OTP-2109-0452-R01, paras. 45, 73;

¹⁵ P-2442: CAR-OTP-2105-0940-R01, para. 125; P-2018: CAR-OTP-2071-0259-R01, paras. 95-96.

¹⁶ P-1974: CAR-OTP-2068-0222-R02, paras. 37-40; P-2018: CAR-OTP-2071-0259-R01, para. 53; P-1792: CAR-OTP-2075-1743-R01, paras. 21-23.

¹⁷ P-1974: CAR-OTP-2068-0222-R02, para. 39.

17. YEKATOM also attended the demobilisation ceremony held [REDACTED] on 4 August 2014, where he formally recognised his conduct was in violation of UN Security Council Resolution 1612 on the rights of children in armed conflict, and agreed in a signed document to demobilise and refrain from re-recruiting children in his Anti-Balaka group:

«[REDACTED]...»¹⁸

Moreover, he did this in the presence of children whose names appear on the [REDACTED] list of demobilised child soldiers (“[REDACTED]”).¹⁹ The event was [REDACTED].²⁰ YEKATOM also spoke to the children just before signing the agreement on the day of the ceremony, explaining that “the [REDACTED] project was an opportunity for them to find something better than what the Anti-Balaka could offer them”.²¹

18. Prior to the ceremony, YEKATOM met [REDACTED] representatives and local authorities [REDACTED], who explained the purpose of the demobilisation project. They noted the difficulty of convincing him to sign an agreement, which was important so they would have “on record that he has given us the children who were *under his control*”.²² YEKATOM, who was in the presence of the children when signing the undertaking as noted, was in the best position to know whether they were in fact in his group or not. His assent speaks for itself.

19. YEKATOM’s own conduct at the time belies the significance of the Screening Note he now asserts. To sustain the Motion, it appears that the YEKATOM Defence

¹⁸ CAR-OTP-2128-1373; P-1974: CAR-OTP-2068-0222-R02, paras. 42-46; P-2082: CAR-OTP-2109-0452-R01, paras. 37, 64, 66-67; P-2018: CAR-OTP-2071-0259-R01, paras. 54-56; P-2475: CAR-OTP-2110-0556-R02, paras. 177-180, 184 and 195-198. *See also* ICC-01/14-01/18-403-Conf-Corr, para. 152 and ICC-01/14-01/18-282-Conf-AnxB1, para. 360.

¹⁹ CAR-OTP-2071-0279-R01; *See* P-1974: CAR-OTP-2068-0222-R02, at 0229, paras. 42-46 and P-2018: CAR-OTP-2071-0259-R, at 0267-0269, paras. 56, 58-61, 63-66.

²⁰ *See* [REDACTED].

²¹ P-1974: CAR-OTP-2068-0222-R02, at 0229, para. 45.

²² P-2082: CAR-OTP-2109-0452-R01, paras. 37, 42 (emphasis added).

asserts that the Accused deliberately deceived and defrauded UNICEF/[REDACTED] in his negotiations to demobilise children attributed to his group liberated in [REDACTED] and MBAIKI, by providing false information about them in exchange for the benefit of being perceived to be doing something about the widespread problem of child soldiers. However, a Defence position that is itself incriminating – that is, one which undermines the Accused’s character, integrity, and establishes his dishonesty, so as to damage his ability to testify credibly in his own Defence, cannot be the basis on which the Prosecution can be expected to assess such evidence as ‘potentially exonerating’.²³

b. The evidence about [REDACTED] is actually incriminating and reinforces the Prosecution case presented at the Confirmation Hearing

20. As noted, the Screening Note was disclosed on 20 October 2021 in response to a 1 October 2021 Defence request for documents related to [REDACTED].²⁴ It indicates that P-2580 was in contact with a SANGARIS Warrant Officer named [REDACTED] when the SELEKA wanted to commit exactions, and that [REDACTED] would deploy a helicopter to calm the situation.²⁵ Although the source of information is unclear, P-2580 learned that [REDACTED] “told the Anti-Balaka to advance to Mbaiki so that they can have a discussion with the French.”²⁶

21. The Motion argues that it is potentially exonerating that YEKATOM advanced to MBAIKI for a SANGARIS-sponsored reconciliation meeting,²⁷ despite that this has consistently been the Prosecution’s case theory during the Confirmation Hearing²⁸ and the position set out in its Trial Brief.²⁹ The Prosecution has consistently put

²³ *Contra*. Motion, para. 71.

²⁴ ARY-2021-0187

²⁵ CAR-OTP-2117-0043 at 0045.

²⁶ CAR-OTP-2117-0043 at 0046.

²⁷ Motion at paras. 58-59.

²⁸ ICC-01/14-01/18-T-005-CONF-ENG ET, p. 31, l.7- p. 32, l. 9.

²⁹ ICC-01/14-01/18-723-Red, para. 468.

forward that YEKATOM participated in the MBAIKI meeting with SANGARIS in the broader context of the actions of his own elements, indicating that his participation in the “reconciliation” meeting was not with the genuine aim of peace.³⁰ In any event, YEKATOM’s motive does not mitigate his intentional and unlawful orders to attack Muslims, or his elements’ continued violence directed at the Muslim civilian population in MBAIKI after the meeting.³¹ In this sense, the Screening Note reinforces the Prosecution’s case theory that YEKATOM’s participation in this “reconciliation” meeting was in bad faith and illusory, thus *incriminating*.

22. Other than the Screening Note, the Prosecution has little evidence about the role of [REDACTED] in SANGARIS – it is indeed unclear whether these are even the same individual. The first source is P-0954, who named [REDACTED] and his alleged phone number.³² P-0954 indicates that YEKATOM had given the French P-0954’s phone number, that a French man named [REDACTED] called him from the above number some time before 27 December 2013, and that [REDACTED] then drove [REDACTED] to meet P-0954 at their base in [REDACTED], and asked P-0954 why they did not attack PK9.³³ The second source is P-1598, whose statement briefly refers to a phone call with “*Adjudant [REDACTED] des Sangaris au niveau de BANGUI*”, in which [REDACTED] told P-1598 that he would refer his concerns about the scope of SANGARIS operations in GADZI and GUEN up the hierarchy.³⁴

23. Additional queries with the relevant French authorities on the identity or role of [REDACTED] in SANGARIS did not yield any results. The information from P-0954 formed the basis of the Prosecution’s RFA to the French authorities on 5 June 2017, seeking, *inter alia*, more information about a French soldier in SANGARIS named

³⁰ ICC-01/14-01/18-723-Red, para. 468 (citing P-1839: [CAR-OTP-2072-0946-R03](#), at 0967, l. 745-753 and [CAR-OTP-2072-1039-R01](#), at 1059, l.681-683. See also P-1838: [CAR-OTP-2100-0252-R02](#), at 0265, para. 72; P-1813: [CAR-OTP-2069-0035-R01](#), at 0043-0044, paras. 55-56).

³¹ ICC-01/14-01/18-723-Red, paras. 467-470; ICC-01/14-01/18-T-005-CONF-ENG ET, p. 31, l. 7- p. 32, l. 9.

³² CAR-OTP-2048-0171, at 0179, para. 49.

³³ CAR-OTP-2048-0171, at 0179, para. 49.

³⁴ CAR-OTP-2057-0892, at 0906, para. 65.

[REDACTED] who was in telephone contact with YEKATOM and other Anti-Balaka members from the above number, and who had at least one meeting with Anti-Balaka close to BIMBO.³⁵ Notably, the French authorities' response indicated their searches for such a person named [REDACTED] or who used the above telephone number were not successful.³⁶

24. Thus, the disclosure of this minimal unacknowledged and unsigned mention of a [REDACTED] that works for SANGARIS, especially in light of its consistency with the Prosecution's case theory since the Confirmation Hearing, does not substantially change the nature or quality of the Prosecution case, nor does it tend to show the innocence of the accused, mitigate his guilt, or appreciably affect the credibility of Prosecution evidence – if anything, it tends to substantiate it.

B. No Prejudice to Accused's rights

25. Contrary to the Motion, there is no unfair prejudice to the rights of the Defence caused by the timing of the disclosure of P-2580's Screening Note. As noted, the Defence already has similar information about child soldiers in other disclosed statements. As detailed below, the Defence either misinterprets the Screening Note or has substantially similar information in its possession about children who participated in [REDACTED] programs, their age, their gender, and whether they belonged to the Anti-Balaka.

Not all children in [REDACTED] programs were involved with the Anti-Balaka

26. The Defence argues that it is prejudiced by the inference arising from the Screening Note that not all the children who participated in [REDACTED] programs were involved with the Anti-Balaka.³⁷ But, the contrary inference also arises — that is,

³⁵ CAR-OTP-2127-9942 at 9945.

³⁶ CAR-OTP-2084-0291 at 0291; *see also* CAR-OTP-2090-0373 at 0374.

³⁷ Motion, paras. 47-50.

some were. In any event, the information which underpins the arguments in the Motion has been in the possession of the Defence since well before the Confirmation Hearing.

27. P-2428, P-1792, and P-2442's statements provide evidence that some 'demobilised' children were supposedly not Anti-Balaka members or under the age of 15 at the relevant time. P-2428 provides his personal opinion on the ages of six³⁸ out of 60 individuals who appear on the [REDACTED],³⁹ estimating that at least one of them was in fact below the age of 15.⁴⁰ He also describes his own involvement in the demobilisation process despite claiming not to have been a member of the "real" Anti-Balaka.⁴¹

28. Like P-2428, P-1792's and P-2442's statements provide evidence that some 'demobilised' children were supposedly not Anti-Balaka members or under the age of 15 at the relevant time. P-2442 states that some of the children on the [REDACTED] were 15 and older.⁴² P-1792 states that not all children selected for the demobilisation process were in, or associated with, the Anti-Balaka. He explains that "[s]ome of the children were from the community" as "[s]ome parents took advantage of the initiative and asked YEKATOM to include their children on the list so that they could benefit from the training".⁴³ Thus, P-1792's statement also suggests that YEKATOM has actual knowledge of the information he now claims was withheld – namely, that certain demobilised children were not in his Anti-Balaka group.

³⁸ CAR-OTP-2105-0970-R01, paras. 67-72.

³⁹ CAR-OTP-2071-0279-R01.

⁴⁰ CAR-OTP-2105-0970-R01, para. 69.

⁴¹ CAR-OTP-2105-0970-R01, paras. 51-53, 60; *but see*. para. 57.

⁴² CAR-OTP-2105-0940-R01, paras. 109, 122.

⁴³ CAR-OTP-2115-0216, para. 50.

29. Moreover, P-2475, a child soldier in YEKATOM's Group, commented on certain photographs of purportedly demobilised children, stating that to his knowledge several were not members of the Anti-Balaka.⁴⁴

30. Thus, for over two years,⁴⁵ the Defence has been in possession of signed and acknowledged witness statements provided by P-2428, P-1792, P-2442, and P-2475 comprising substantially the same evidence as P-2580's unacknowledged or unattested screening in this regard.

Children under the age of 13

31. The Motion further argues unfair prejudice given P-2580's assertion that the youngest child he worked with during his time at [REDACTED] was 13 years old.⁴⁶ This argument fails, as it presumes that P-2580 worked with *every* child under [REDACTED] care. However, there is no such claim in the Screening Note, nor in any other evidence. The Screening Note asserts that P-2580 only worked for [REDACTED] for eight or nine months.⁴⁷ Necessarily, he did not have personal knowledge of the age of every child involved in the program. Furthermore, this argument does not recognise that this portion of the Screening Note is *prima facie* incriminatory in that it identifies children in the [REDACTED] program that were under the age of 15.

Wives among Anti-Balaka child soldiers

32. The Defence's claimed unfair prejudice concerning the information in the Screening Note that there were no 'wives' among the [REDACTED] child soldiers⁴⁸ is misleading. It leaves out the remainder of the sentence, which provides: "P-2580 did not see any girls who were in Anti-Balaka as wives, *however he met girls who were with*

⁴⁴ CAR-OTP-2110-0556, paras. 200-202, 205.

⁴⁵ See e.g. ICC-01/14-01/18-271-Conf-Anx; ICC-01/14-01/18-274-Conf-Anx.

⁴⁶ Motion, paras. 51-52.

⁴⁷ CAR-OTP-2117-0043 at 0046-0047.

⁴⁸ Motion, paras. 53-55.

*Anti Balaka and were used as spies and also to collect food.”*⁴⁹ This omission is glaring because it conveniently excises the incriminatory part of the sentence: that the Anti Balaka used girls as spies and to collect food. Moreover, it comprises P-2580’s personal experience and does not reflect the experience of all [REDACTED] workers, or all girls participating in the [REDACTED] programs, nor does it disprove statements to the contrary.

C. The remedy sought by the YEKATOM Defence is unwarranted and should be rejected

33. Although imperfect, there are no serious or systemic deficiencies in the Prosecution’s disclosure assessments or processes. The Motion ignores the significant scale of the Prosecution’s reviews, disclosures, and re-disclosures to date. For context, the Prosecution has disclosed 32,279 items comprising around 188,384 pages. It has further re-disclosed over 500 of these items, usually with fewer redactions. The figures above do not include hundreds of hours of audio and video materials also disclosed, which, of course, do not figure among the page count in this case.

34. The Prosecution has previously noted the inordinately expansive evidence collection in this Situation.⁵⁰ As the Chamber is aware, the disclosure exercise in this case has been vast and complex. Despite the Motion’s allegations to the contrary, the Prosecution has been reasonably responsive to the YEKATOM Defence’s continuous stream of disclosure inquiries and requests.

35. As to the Defence’s requests for additional information,⁵¹ P-2580’s name is provided unredacted on the *first page* of the screening, contrary to the Defence

⁴⁹ CAR-OTP-2117-0043 at 0047 (emphasis added).

⁵⁰ See ICC-01/14-01/18-474-Conf, para. 23 (noting in April 2020 an evidence collection of around 122,000 items, and “one of the largest of any Situation at the Court.” It is larger still.

⁵¹ Motion, paras. 72-73.

allegation.⁵² There is no further statement from this witness; this six-page screening reflects the totality of P-2580's evidence. Furthermore, P-2580's status [REDACTED] has been disclosed to the Defence since at least 9 November 2020.⁵³

36. Given the Prosecution's extensive disclosures and re-disclosures to date, its prompt reply to the Defence request in question, and that it has largely complied with the Motion's requests, the additional demand for the Prosecution to submit an evidence search report indicating its method and terms used within its database to search for exculpatory items⁵⁴ should be denied as moot. It would, in any case, be wholly disproportionate and unwarranted in view of the discrete matter before the Chamber.

37. As detailed previously, the Prosecution has undertaken a thorough review of its vast evidence collection. It has dutifully and in good faith conducted disclosure and complied with its obligations to the best of its ability in this sprawling case. In the very few instances where there has been inappropriate delay, as will happen in circumstances involving exceedingly large evidence collections – absolutely no unfair prejudice has been found. Given the circumstances as set out above, this situation is no different.

⁵² Motion, para. 72.

⁵³ CAR-OTP-2128-1203 at 1204.

⁵⁴ Motion, para. 74.

IV. CONCLUSION

38. For the above reasons, the Prosecution requests the Chamber deny the YEKATOM Defence Motion in all respects.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan QC, Prosecutor

Dated this 9th day of November 2021

At The Hague, The Netherlands