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**No. ICC-01/14-01/18
Date: 7 December 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Yekatom Defence Motion for Finding of Disclosure Violation and
Additional Remedies**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 67(2) of the Rome Statute (the ‘Statute’) and Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Motion for Finding of Disclosure Violation and Additional Remedies’.

I. Procedural history and submissions

1. On 11 December 2019, Pre-Trial Chamber II (hereinafter: ‘PTC II’) issued the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, confirming the charges against Mr Yekatom for, *inter alia*, the war crimes of displacement (Count 25); conscription, enlistment, and use of children under the age of 15 years to participate actively in hostilities (Count 29); and for the crime against humanity of forcible transfer and deportation (Count 24), pursuant to Articles 8(2)(e)(viii), (vii), and 7(1)(d) of the Statute, respectively.¹
2. On 16 July 2020, the Chamber set the final disclosure deadline for 9 November 2020, directing the Office of the Prosecutor (the ‘Prosecution’) to ‘review all the materials in its possession and disclose all materials falling under its disclosure obligations’.²
3. On 20 October 2021, the Yekatom Defence (the ‘Defence’) filed a motion requesting the Chamber to find that the Prosecution violated its obligation to timely disclose exculpatory material, namely the Screening Note, under Article 67(2) of the Statute and Rule 77 of the Rules (the ‘Motion’).³ The Defence indicates that it sent numerous requests to the Prosecution for disclosure of any evidence tending to show that any of the children enlisted in the [REDACTED]

¹ Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-403-Conf (corrected version and corrected public redacted version notified on 14 May 2020; public redacted version of the corrected version notified on 29 June 2021), pp.105-106.

² Decision Setting the Commencement Date of the Trial, ICC-01/14-01/18-589, para. 10.

³ Motion, ICC-01/14-01/18-1142-Conf (with confidential Annex A, ICC-01/14-01/18-1142-Conf-AnxA) (public redacted version notified on 21 October 2021, ICC-01/14-01/18-1142-Red), paras 1, 63, 76. The Chamber notes that Annex A to the Motion contains the Screening Note in the redacted version available to the Defence at the time of filing the Motion.

had not been enlisted or conscripted by the Anti-Balaka, as well as 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. According to the Defence, the Prosecution responded that all such evidence had been disclosed.⁴

4. Therefore, the Defence also requests the Chamber to order the Prosecution to (i) disclose an unredacted version of the Screening Note, any statement from P-2580, as well as 'any records of meetings, discussions, correspondence, or any other encounter [...], including investigation notes'; and (ii) submit an 'evidence search report [...] indicating the method and terms used within [its] database to search [said information], along with a certification to the effect that the Prosecution has no remaining undisclosed exculpatory evidence or evidence material to the Defence'.⁵
5. The Defence argues that the Screening Note contains information that is both material to the defence preparation and exculpatory, and that it affects the credibility of various items of evidence relied upon by the Prosecution.⁶ It submits that the information tends to show that not all children who took part in the [REDACTED] were involved in the Anti-Balaka, that there were no children under the age of 13 years old, and that there were no wives amongst the alleged child soldiers.⁷ In addition, the Defence contends that the Screening Note is material and potentially exculpatory in relation to Mr Yekatom's advance on the PK9-Mbaïki axis, as it is relevant to, *inter alia*, specific *mens rea* elements of the crimes of displacement and forcible transfer and deportation.⁸
6. The Defence submits that the Prosecution failed to disclose the Screening Note 'as soon as practicable and at the very least prior to the confirmation hearing', and that given the time elapsed since the final disclosure deadline and the start of the trial, the violation is not of the same 'minimal' nature as in previous

⁴ Motion, ICC-01/14-01/18-1142-Conf, para. 2.

⁵ Motion, ICC-01/14-01/18-1142-Red, paras 3, 72, 74, 76.

⁶ Motion, ICC-01/14-01/18-1142-Red, paras 41, 45, 56.

⁷ Motion, ICC-01/14-01/18-1142-Conf, paras 47-55.

⁸ Motion, ICC-01/14-01/18-1142-Red, paras 57-60.

instances.⁹ It also indicates that the fact that the Screening Note was disclosed in response to a request unrelated to Count 29, despite numerous requests sent in that regard, is ‘highly concerning’.¹⁰

7. On the same day, the Prosecution disclosed P-2580’s screening note¹¹ (the ‘Screening Note’) under Rule 77 of the Rules.¹²
8. On 28 October 2021, the Prosecution responded to the Motion. It acknowledges that the Screening Note should have been disclosed earlier, but nonetheless requests that the Motion be denied (the ‘Response’).¹³ The Prosecution submits, *inter alia*, that (i) the timing of the disclosure of the Screening Note caused no prejudice because the information contained therein is incriminating; (ii) the Defence was already in possession of the same information in relation to child soldiers for over two years, and ‘Mr Yekatom has actual knowledge of the children that were demobilised from his group’; and (iii) the Motion seeks remedies and/or sanctions without legal authority and, in any event, they are ‘grossly disproportionate and unwarranted’.¹⁴
9. On 29 October 2021, the Chamber received the Defence’s application for leave to reply to the Response, seeking to address (i) the Prosecution’s ‘misconception of its obligations under Article 67(2) of the Statute’, claiming that the Screening Note is not subject to disclosure; and (ii) the timing and manner in which the Screening Note was disclosed.¹⁵

⁹ Motion, ICC-01/14-01/18-1142-Red, paras 41, 61-67.

¹⁰ Motion, ICC-01/14-01/18-1142-Red, paras 2, 4-36, 64-65, 68-69.

¹¹ CAR-OTP-2117-0043.

¹² Prosecution Trial Rule 77 Package 62, entry 3. *See also* Prosecution’s Communication of the Disclosure of Evidence on 20 October 2021, 21 October 2021, ICC-01/14-01/18-1143 (the ‘Disclosure Communication’) (with one confidential annex, ICC-01/14-01/18-1143-Conf-Anx), para. 3; annex to the Disclosure Communication, ICC-01/14-01/18-1143-Conf-Anx, p. 3.

¹³ 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-Conf (public redacted version notified 10 November 2021, ICC-01/14-01/18-1149-Red), paras 1, 7, 9, 38.

¹⁴ Response, ICC-01/14-01/18-1149-Red, paras 1-4, 10, 21, 25, 30, 33-37.

¹⁵ Yekatom Defence Request for Leave to Reply to ‘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-Conf, ICC-01/14-01/18-1152, paras 3-4, 6-7, 9-10.

10. On 5 November 2021, the Single Judge partly granted the Defence's application for leave to reply to the Response, considering that 'out of fairness to the Defence and to set the record straight publically', the Chamber would be assisted by the Defence's submissions regarding the timing and manner in which the Screening Note had been disclosed.¹⁶
11. On 9 November 2021, the Defence filed its reply to the Response (the 'Reply'). It indicates that while in the courtesy copy of the Screening Note provided on 11 October 2021 redactions were applied to, *inter alia*, identifying information on P-2580, the Prosecution disclosed the lesser redacted version of the document, revealing this information, only on 20 October 2021 *after* the Defence filed its Motion. In this regard, the Defence submits that the Prosecution mischaracterised the disclosure history of the Screening Note and 'impugn[ed] the professionalism of the Defence' by submitting that the sought information already appeared in the document in question.¹⁷

II. Analysis

12. The Chamber observes that the Motion seeks, *inter alia*, a declaration that the delayed disclosure of the Screening Note constitutes a violation under Article 67(2) of the Statute and Rule 77 of the Rules.¹⁸ In this regard, it takes note that the parties disagree as to the exculpatory nature of the information contained in the Screening Note.
13. At the outset, the Chamber recalls that, under Article 67(2) of the Statute, the Prosecution is bound to disclose potentially exculpatory material 'as soon as practicable', and that a document may contain both exculpatory and incriminatory information. The fact that a document contains incriminatory information is not a reason to disregard any potentially exculpatory factor(s) contained therein, including those that may affect the credibility of prosecution evidence. In case of

¹⁶ Decision on the Yekatom Defence Request for Leave to Reply to the Prosecution Response to the Motion for Finding of Disclosure Violation, ICC-01/14-01/18-1168, paras 4, 6-7, p. 4.

¹⁷ Yekatom Defence Reply to 'Prosecution's Response to Yekatom's Motion for Finding of Disclosure Violation and for additional remedies, ICC-01/14-01/18-1142-Conf', ICC-01/14-01/18-1171, paras 2-8.

¹⁸ See Motion, ICC-01/14-01/18-1142-Red, paras 1, 63, 76.

doubt as to the applicability of this provision, and following unsuccessful *inter partes* consultations, the Chamber will decide.¹⁹

14. The Chamber observes that the information contained in the Screening Note refers to, *inter alia*, the alleged acts and conducts of Mr Yekatom as the Anti-Balaka leader [REDACTED], where he met P-2580, [REDACTED]. The Screening Note also mentions the signing of a document between Mr Yekatom and [REDACTED], and two ceremonies, during which '[c]hildren were taken from Anti-Balaka [REDACTED]. It also indicates that some children had been involved with the Anti-Balaka – the youngest that P-2580 met being 13 years old –, and that while the witness did not see any girls who were in the Anti-Balaka as wives, he met others who were used as spies and to collect food. Lastly, the Screening Note indicates that P-2580 learnt that it was a French warrant officer called '[REDACTED] [...] who told the Anti-Balaka to advance to Mbaïki so that they can have a discussion with the French'.
15. In light of the above, the Chamber considers that the Prosecution should have disclosed the Screening Note, at the very least, as being material to the preparation of the defence, pursuant to Rule 77 of the Rules. This is especially the case since the Prosecution was in a position to do so, having regard to the fact that the screening took place in August 2019 and noting its own acknowledgement that the Screening Note should have been disclosed sooner.²⁰ In this regard, the Chamber is concerned that, since the transmission of the case record to the Chamber, the Prosecution has violated its disclosure obligations on several occasions.²¹ This concern is further heightened by the fact that the Prosecution had previously stated that it did not oppose the disclosure of

¹⁹ See, *inter alia*, Decision on the Yekatom Defence Request Concerning Disclosure Violation and Disclosure of Exculpatory Material, 22 July 2020, ICC-01/14-01/18-595 (the '22 July 2020 Disclosure Violation Decision'), para. 21.

²⁰ See Response, ICC-01/14-01/18-1149-Red, paras 1, 9.

²¹ See *e.g.* Decision on the Yekatom Defence Motion for Disclosure of Prior Statement of Witness P-0801, 15 June 2020, ICC-01/14-01/18-551-Conf (public redacted version notified the same day, ICC-01/14-01/18-551-Red), para. 31; 22 July 2020 Disclosure Violation Decision, ICC-01/14-01/18-595, para. 18; Decision on the Yekatom Defence Motion for Finding of Disclosure Violation of Exculpatory Material, 25 November 2020, ICC-01/14-01/18-740-Conf (the '25 November 2020 Disclosure Violation Decision'), para. 12; Decision on the Yekatom Defence Request Concerning Disclosure Violation, 18 January 2021, ICC-01/14-01/18-829 (the '18 January 2021 Disclosure Violation Decision'), para. 15.

screening notes, and assured that it had disclosed ‘the vast majority [...], *inter alia*, under rule 77’ and that it continued to review and disclose materials in its possession under Rules 76 and 77 of the Rules and Article 67(2) of the Statute.²²

16. Having found a disclosure violation, the Chamber will now assess whether any prejudice was caused. First of all, the Chamber recalls that it is not its role to pronounce itself on the question of whether this violation has caused any prejudice to the accused during the pre-trial proceedings.²³ The Chamber therefore limits its following assessment to the question of whether this violation causes any prejudice to the accused’s rights at trial, warranting remedies.
17. At the outset, the Chamber notes with regard to the Defence’s request to be provided with an unredacted version of the Screening Note that the Defence is meanwhile in possession of such version. Accordingly, the Request is moot in this regard. Nonetheless, the Chamber notes, with concern, the information flagged by the Defence concerning the disclosure history of the Screening Note.²⁴ The Chamber considers that, out of fairness to the Defence, the Prosecution should have explained the circumstances in which the filing of the Motion overlapped with the disclosure of the lesser redacted version of the Screening Note. This would have, in turn, also prevented the parties and the Chamber from dedicating time and resources to this matter.
18. The Chamber further notes with concern that, contrary to previous disclosure violations,²⁵ the Screening Note was disclosed to the Defence on 20 October 2021, that is eight months after the start of the trial and in the midst of the Prosecution’s presentation of evidence.

²² See Prosecution’s Response to Yekatom Defence’s Motion for Disclosure of Screening Notes (ICC-01/14-01/18-583), 15 July 2020, ICC-01/14-01/18-588, paras 1, 16-18, 21. See also Decision on the Yekatom Defence Motion for Disclosure of Screening Notes, 10 August 2020, ICC-01/14-01/18-618, paras 11-13.

²³ See, *inter alia*, Disclosure Violation Decision, ICC-01/14-01/18-595, para. 18.

²⁴ See Response, ICC-01/14-01/18-1149-Red, para. 35

²⁵ See, e.g., 22 July 2020 Disclosure Violation Decision, ICC-01/14-01/18-595, para. 19; 25 November 2020 Disclosure Violation Decision, ICC-01/14-01/18-740-Conf, para. 16; 18 January 2021 Disclosure Violation Decision, ICC-01/14-01/18-829, para. 17.

19. However, it observes with regard to Count 29 that the witnesses whose credibility might be affected by the Screening Note according to the Defence, except for P-0808, have not yet testified.²⁶ In relation to Counts 24 and 25, the Chamber notes that the Defence will also have the opportunity to examine witnesses whose testimonies relate to these counts, including as regards the identity of the person known as [REDACTED].²⁷ Additionally, the Chamber notes that the Defence has been in possession of evidence comprising similar information to that contained in the Screening Note.²⁸ Finally, while the Prosecution is not calling P-2580 to testify at trial, the Chamber considers that the parties will be able to explore the abovementioned issues during the testimony of witnesses who will testify on these counts and address them in subsequent submissions.
20. In these circumstances, the Chamber considers that while prejudice has been caused, it is limited in nature.
21. Having determined the extent of the prejudice caused, the Chamber will assess whether any remedies are warranted. In this regard, the Chamber takes note of the Prosecution's submissions that there are no further materials related to P-2580 and that the Screening Note reflects the totality of his evidence in the Prosecution's possession.²⁹ Therefore, the Chamber trusts that the Prosecution has fulfilled its disclosure obligations towards the Defence with regard to this witness. However, the Chamber notes that while the Prosecution submits that having been responsive to the Defence's disclosure inquiries and requests, there is no clear indication from the Prosecution that it has discharged its disclosure obligations entirely, in particular in relation to other material relevant to Count 29.

²⁶ See Motion, ICC-01/14-01/18-1142-Red, paras 50, 52, 54, 56.

²⁷ See, *inter alia*, P-0954: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, p. 17, entry 10; P-1595: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, p. 36, entry 61; P-2041: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, p. 36, entry 62; P-2419: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, pp. 36-37, entry 63.

²⁸ See, *for instance*, P-2428: CAR-OTP-2105-0970, at 0978-0980, paras 51, 53, 57, 60 (disclosed on 2 October 2020); P-1792: CAR-OTP-2115-0216, at 0224, para. 50 (disclosed on 9 August 2019); P-2475: CAR-OTP-2110-0556, at 0585-0586, paras 200-202, 205 (disclosed on 27 November 2020); P-2442: CAR-OTP-2105-0940, at 0957, 0959, paras 109, 122 (disclosed on 13 January 2021).

²⁹ See Response, ICC-01/14-01/18-1149-Red, para. 35.

22. In view of the findings above, the Chamber directs the Prosecution to review the evidence in its possession, and confirm on the record that all documents falling within its disclosure obligations have indeed been disclosed, within one week of notification of the present decision. Should items falling within its disclosure obligations not have been disclosed, the Prosecution is instructed to disclose them immediately, and latest by the same deadline. In light of this direction, the Chamber does not consider it necessary or appropriate to order the Prosecution to disclose an internal ‘evidence search report, indicating the method and terms used within [the Prosecution’s] database to search’, as requested by the Defence.³⁰
23. That said, the Chamber is troubled by the number of times the Prosecution has so far breached its disclosure obligations. It expects the Prosecution to tackle its statutory obligations more diligently in the future.

FOR THESE REASONS, THE CHAMBER HEREBY

FINDS that the Prosecution violated its disclosure obligations pursuant to Rule 77 of the Rules;

PARTLY GRANTS the Motion, as set out in paragraph 22 above;

ORDERS the Prosecution to file a report as set out in paragraph 22 above, and disclose any relevant material, within one week of notification of the present decision; and

REJECTS the remainder of the Motion.

Done in both English and French, the English version being authoritative.

³⁰ See Motion, ICC-01/14-01/18-1142-Red, paras 3, 74, 76.



Judge Bertram Schmitt

Presiding Judge



Judge Péter Kovács



Judge Chang-ho Chung

Dated 7 December 2021

At The Hague, The Netherlands