



Original: English

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

Date: 21 January 2022

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 Defence’s Motion for Finding of Disclosure Violation (ICC-01/14-01/18-1246-Conf)”, 21 January 2022

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan QC

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri

Mr Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops

Mr Richard Landry Omissé-Namkeamaï

Ms Marie-Hélène Proulx

Legal Representatives of Victims

Mr Dmytro Suprun

Mr Abdou Dangabo Moussa

Ms Elisabeth Rabesandratana

Mr Yaré Fall

Ms Marie-Edith Douzima-Lawson

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) acknowledges the disclosure error and consequent failure alleged in the Yekatom Defence’s Motion for Finding of Disclosure Violation,¹ and defers to Trial Chamber V’s (“Chamber”) discretion in the disposition of the Request, taking into account the following submissions.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this Request and its annexes are filed as “Confidential”, as they contain information concerning witnesses and their evidence which should not be made public. A “Public Redacted” version of the Request will be filed as soon as practicable.

III. SUBMISSIONS

3. The Prosecution accepts the Defence’s recitation of the procedural history concerning the screening note of P-1436 (CAR-OTP-2047-0243, “Screening Note”).² The Prosecution does not have a clear record as to how the relevant disclosure requests were processed internally among the dozens of *inter partes* requests it has received during the course of the proceedings, as it should. Regrettably, it appears that the matter fell through the cracks.

4. The Screening Note was however disclosed pursuant to the Prosecution’s normal and continuing disclosure review process, and in advance of its 24 December 2021 submission in respect of the Chamber’s 7 December 2021 direction.³ Notably, the 24 December submission was filed following the Prosecution’s targeted review of

¹ ICC-01/04-01/18-1246-Conf (“Request”).

² Request, paras. 2-19.

³ ICC-01/14-01/18-1202-Red.

witness-related material,⁴ which would also have independently identified the inadvertence.

Article 67(2) was not violated

5. The Screening Note does not fall within the ambit of article 67(2).

6. While P-1436's account in the Screening Note differs in some aspects from the accounts of trial witnesses P-2682 and P-1437, this does not *per se* render it exculpatory or affect the credibility of these trial witnesses, as the Defence suggests.⁵ In some instances, it is merely a case of certain information appearing in one account, while being absent in another or others.⁶ The omissions identified in the Request neither amount to contradictions or inconsistencies, and even less so to the extent they occur as between the evidence of different witnesses. Importantly, the Request does not identify any *new* differences between the accounts of P-1436 and P-2682 beyond those already apparent in the accounts of P-1437 and P-2682.⁷

The Screening Note falls under rule 77

7. As noted, the Prosecution acknowledges, consistent with the disclosure classification given, that the differing narratives of the same or similar event brings the Screening Note within the ambit of rule 77 of the Rules of Procedure and Evidence ("Rules"). For this reason, it was identified – as noted – independently of the Defence requests and disclosed by the Prosecution relative to P-1437's prospective testimony. Admittedly, this should have occurred much earlier in the proceedings, and at the latest identified during preparation for P-2682. However, in view of other disclosed

⁴ ICC-01/14-01/18-1230.

⁵ See Request, para. 35.

⁶ For *e.g.*, see Request, para. 36, 37, 39, 40. The Defence's submissions in para. 37 appear premised on the mistaken understanding that [REDACTED]. This is not the case: see CAR-OTP-2122-8968, at 8968, para. 3.

⁷ See Request, para. 41-44, 58. The statement of P-1437 was disclosed on 13 June 2019, and the statement of P-2682 on 26 June 2020.

information, the absence of the information contained in the Screening Note has not seriously prejudiced or impeded the Defence.

Any resultant prejudice is mitigated by the availability of similar and better evidence

8. The evidence described in the Request as ‘corroborative’ of information contained in the Screening Note⁸ underscores that, even without the Screening Note (i.e. an unattested preliminary investigative device amounting to “‘a personal record’ by the investigator of what the witness said”⁹), the Defence was in possession of the statement of P-1437, an *attested* witness statement that was timely disclosed providing similar information. Therefore, at a minimum, the Defence was timely provided with evidence of a *better quality* than the Screening Note, which remained at its disposal to prepare in terms of addressing the evidentiary issue cited in the Request. Nevertheless, the Prosecution concedes that the unavailability of the Screening Note, particularly as concerns the examination of P-2682 (whose testimony was completed prior to its disclosure), could have had an impact.

Deference to the Chamber on the requested relief

9. The Prosecution defers to the Chamber’s discretion regarding the requested relief, but notes the logistical difficulty in recalling P-2682 in view of her location, circumstances and prevailing COVID-19 restrictions.

10. Importantly, recalling the witness to provide further evidence on what was clearly an emotionally challenging subject matter¹⁰ runs a serious risk of re-

⁸ See Request, para. 44, 58.

⁹ ICC-01/14-01/18-539, para. 13, internal citation to ICC-01/04-01/06-T-104 ENG, p. 24, l. 19-p. 25, l. 2.

¹⁰ ICC-01/14-01/18-T-018-Red2-ENG CT, p. 31, l. 3-17.

traumatisation and may not appropriately balance the statutory interests expressed in articles 68(1), 67, and 64.

11. Alternatively, the Prosecution considers that the prospective conversion of P-1442's mode of testimony from rule 68(2)(b) to 68(3) of the Rules may sufficiently accommodate the Defence's stated interest in making use of the Screening Note, should the Chamber deem this necessary after the examination of the related witness P-1437.

IV. CONCLUSION

12. The Prosecution defers to the Chamber's discretion in the disposition of the Request, taking into account its submissions herein.

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 21st day of January 2022
At The Hague, The Netherlands