



Original: English

**No. ICC-01/14-01/18
Date: 9 March 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

Decision on the Yekatom Defence Motion for Finding of Disclosure Violation

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

The Office of the Prosecutor

Karim A. A. Khan
James Stewart
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis
Anta Guissé

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops
Richard Omissé-Namkeamai
Marie-Hélène Proulx

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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 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’.

I. Procedural history

1. On 13 January 2022, the Yekatom Defence (the ‘Defence’) filed a motion (the ‘Motion’) requesting that the Chamber (i) find that the Office of the Prosecutor (the ‘Prosecution’) violated its obligation to timely disclose the screening note of witness P-1436 (the ‘Screening Note’), which ‘is potentially exculpatory pursuant to article 67(2) or, at the very least, is material to the Defence pursuant to Rule 77’; and (ii) deny the Prosecution’s request to introduce the prior recorded testimony of witness P-1442 under Rule 68(2)(b) of the Rules (the ‘Rule 68(2)(b) Request for P-1442’).¹
2. On 21 January 2022, the Prosecution responded to the Motion, in which it (i) ‘acknowledges the disclosure error and consequent failure alleged in the [Motion]’, and (ii) defers to the Chamber’s discretion as regards the relief sought by the Defence.² Alternatively, the Prosecution suggests the conversion of P-1442’s mode of testimony from Rule 68(2)(b) to 68(3) of the Rules to ‘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’ (the ‘Alternative Remedy’).³

II. Analysis

3. The Chamber observes that the Screening Note, dated 30 January 2017, contains an account of the alleged Anti-Balaka attack on the Boeing market on 5 December

¹ Motion for Finding of Disclosure Violation, ICC-01/14-01/18-1246-Conf (public redacted version notified on 26 January 2022, ICC-01/14-01/18-1246-Red), paras 1, 20, 64, 66, p. 16.

² Prosecution’s Response to Yekatom Defence’s Motion for Finding of Disclosure Violation (ICC-01/14-01/18-1246-Conf), ICC-01/14-01/18-1255-Conf (public redacted version notified on 24 January 2022, ICC-01/14-01/18-1255-Red) (the ‘Response’), paras 1, 12.

³ Response, ICC-01/14-01/18-1255-Red, para. 11.

2013 (the ‘Boeing Market Attack’) provided by P-1436, [REDACTED] witness P-1437 and Hassan Mahamat. Specifically, P-1436 told the Prosecution investigators that on 5 December 2013, [REDACTED] next to the Boeing market when [REDACTED]; after which [REDACTED] while [REDACTED], described by P-1436 as [REDACTED]. P-1436 also provided details about (i) [REDACTED] the dead bodies of [REDACTED] after the Boeing Market Attack; (ii) [REDACTED]; (iii) [REDACTED]; and (iv) her evacuation [REDACTED].⁴

4. In light of this information, 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. It further notes that, despite multiple opportunities to do so,⁵ the Prosecution only disclosed the Screening Note on 3 December 2021,⁶ that is, almost five years after P-1436’s screening took place and over a year after the final disclosure deadline. In this respect, it further notes that the Prosecution itself acknowledges that the Screening Note contains information falling under Rule 77 of the Rules and that, accordingly, its disclosure ‘should have occurred much earlier in the proceedings’.⁷ The Chamber thus finds that the Prosecution violated its disclosure obligations pursuant to Rule 77 of the Rules.
5. Turning to the Defence’s allegations of prejudice caused to Mr Yekatom by this violation, the Chamber notes that the Defence submits that the late disclosure of the Screening Note prevented it from examining P-2682, who testified [REDACTED],⁸ ‘with the entirety of the information’ regarding the Boeing Market Attack, and, specifically, challeng[ing] through P-2682 the evidence

⁴ CAR-OTP-2047-0243, at 0244-0246.

⁵ See e.g. Motion, ICC-01/14-01/18-1246-Red, paras 3-19, 26-30. See also Response, ICC-01/14-01/18-1255-Red, para. 7, where the Prosecution acknowledges that it could have disclosed the Screening Note ‘at the latest [...] during preparation for P-2682’, who testified on 15 and 16 March 2021 (see transcripts of hearing, ICC-01/14-01/18-T-017-Red2-ENG and ICC-01/14-01/18-T-018-Red2-ENG, respectively).

⁶ Prosecution’s Communication of the Disclosure of Evidence on 3 December 2021, 6 December 2021, ICC-01/14-01/18-1200 (with one confidential annex, ICC-01/14-01/18-1200-Conf-Anx). See, in particular, the annex, listing the items disclosed on 3 December 2021 as part of ‘Trial RULE 77 Package 66’, including item CAR-OTP-2047-0243.

⁷ Response, ICC-01/14-01/18-1255-Red, para. 7.

⁸ See transcripts of hearing, 15 March 2021, ICC-01/14-01/18-T-017-CONF-ENG, p. 12, lines 2 to 18, p. 13, lines 10 to 19, p. 14, lines 9 to 11, p. 17, lines 5 to 16; 16 March 2021, ICC-01/14-01/18-T-018-CONF-ENG, p. 19, line 17 to p. 20, line 9.

contained in P-1437's statement with the inconsistencies arising from P-1436's evidence'. It further submits that the late disclosure of the Screening Note prevented it from obtaining additional clarifications about Hassan *Délégué*.⁹ In this respect, the Chamber notes the Defence's submissions that '[t]he contradictions listed between P-2682 and P-1437, corroborated by P-1436, underline some confusion about [REDACTED] Hassan *Délégué*'.¹⁰ Moreover, the Chamber notes that the Defence submits having already used 'considerable time and resources' investigating the Boeing Market Attack and [REDACTED] Hassan *Délégué*.¹¹

6. The Chamber is mindful that the late disclosure of the Screening Note prevented the Defence from confronting P-2682, the first witness to testify in this case, with the information contained in the Screening Note in relation to the Boeing Market Attack. In this regard, the Chamber further notes that the Prosecution itself 'concedes that the unavailability of the Screening Note, particularly as concerns the examination of P-2682 [...], could have had an impact'.¹² Nonetheless, the Chamber notes that the statement of P-1437, who also discusses the Boeing Market Attack, has been in the Defence's possession since 13 June 2019,¹³ and that the issues in question can be further clarified with this witness, who is yet to testify.¹⁴ Moreover, the Chamber notes that the Defence will have the opportunity to examine further Prosecution witnesses whose testimonies relate to the Boeing Market Attack and individuals allegedly killed during this attack,¹⁵ as well as to call its own witnesses.
7. In these circumstances, the Chamber considers that while prejudice has been caused, it is limited in nature. Accordingly, no further remedies, other than the

⁹ Motion, ICC-01/14-01/18-1246-Red, paras 55, 59.

¹⁰ Motion, ICC-01/14-01/18-1246-Conf, para. 58 *referring to* paras 32-46.

¹¹ Motion, ICC-01/14-01/18-1246-Conf, para. 60.

¹² Response, ICC-01/14-01/18-1255-Red, para. 8.

¹³ Prosecution's Communication of the Disclosure of Evidence, 14 June 2019, ICC-01/14-01/18-221 (with one confidential annex, ICC-01/14-01/18-221-Conf-Anx). *See, in particular*, the annex, listing the items disclosed on 13 June 2019 as part of 'INCRIM package 11', including item CAR-OTP-2047-0257.

¹⁴ The Chamber notes that, according to the Prosecution's anticipated order of upcoming witnesses, P-1437 is scheduled to testify as witness number 61 (*see* email from the Prosecution, 1 March 2022, at 18:13).

¹⁵ *See e.g.* **P-1416**: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, p. 30, entry 44; **P-2475**: Final Witness List, ICC-01/14-01/18-724-Conf-AnxA, pp. 34-35, entry 57.

Chamber's finding of a violation of the Prosecution's statutory obligations under Rule 77 of the Rules, are warranted at this stage.

8. With regard to the Defence's request that the Chamber deny the Rule 68(2)(b) Request for P-1442 on the basis that P-1442 'provides information that he directly received from an individual named [REDACTED],¹⁶ the Chamber takes notes of the Defence's repeated objections to the Rule 68(2)(b) Request for P-1442,¹⁷ which will be addressed in its decision on this request in due course. The Chamber will also consider therein the Alternative Remedy proposed by the Prosecution.
9. The Chamber is troubled by the Prosecution's numerous and repeated disclosure violations, as emphasised on previous occasions.¹⁸ In this particular instance, the Chamber finds it particularly concerning that the Prosecution only indicated that '[r]egrettably, it appears that the matter fell through the cracks', which seems to indicate a certain level of disorganisation.¹⁹ The Chamber expects the Prosecution to do better and, more importantly, that no further violations of this nature are reported.

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 4 above; and

DEFERS its decision on the remainder of the Motion, as set out in paragraph 8 above.

¹⁶ Motion, ICC-01/14-01/18-1246-Conf, para. 57.

¹⁷ Corrigendum to "Yekatom Defence Response to 'Prosecution's Sixth, Seventh and Eighth Formal Submissions of Rule 68(2) Applications' (ICC-01/14-01/18-802-Conf, ICC-01/14-01/18-808-Conf and ICC-01/14-01/18-812-Conf)" (ICC-01/14-01/18-845-Conf), 21 January 2021, ICC-01/14-01/18-845-Conf-Corr (with confidential Annex A, ICC-01/14-01/18-845-Conf-AnxA) (corrigendum notified on 2 March 2021; public redacted version notified on 6 April 2021, ICC-01/14-01/18-845-Corr-Red), paras 30-39.

¹⁸ See e.g. Decision on the Yekatom Defence Motion for Finding of Disclosure Violation and Additional Remedies, 7 December 2021, ICC-01/14-01/18-1202-Conf (public redacted version notified the same day, ICC-01/14-01/18-1202-Red), para. 23.

¹⁹ Response, ICC-01/14-01/18-1255-Red, para. 3.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
---	--	--

Dated 9 March 2022

At The Hague, The Netherlands