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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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Decision on Yekatom Defence's Requests concerning Disclosure Violations

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
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis
Anta Guissé
Sarah Bafadhel

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops
Richard Omissé-Namkeamaï
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

Oswaldo Zavala Giler

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 Articles 67(2) of the Rome Statute (the ‘Statute’) and Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’) issues this ‘Decision on Yekatom Defence’s Requests concerning Disclosure Violations’.

I. Procedural history

1. On 12 June 2023, the Yekatom Defence (the ‘Defence’) filed its ‘Motion for Finding of Disclosure Violation in Relation to Witness P-1990’ (the ‘P-1990 Request’).¹ It submits that the Prosecution violated its disclosure obligation by late disclosure of an investigation report concerning the Prosecution’s interactions with P-1990 (the ‘P-1990 Investigation Report’).²
2. On 22 June 2023, the Office of the Prosecutor (the ‘Prosecution’) responded to the P-1990 Request.³
3. On 14 July 2023, the Defence filed its ‘Motion for Finding of Disclosure Violation in Relation to Witness P-1597’ (the ‘P-1597 Request’).⁴ It submits that the Prosecution violated its disclosure obligation by late disclosure of P-1597’s witness statement (the ‘P-1597 Statement’).⁵ The Defence requests the Chamber to reject the submission of video CAR-OTP-2050-0648 provided by P-1597 to the Prosecution as an additional remedy for the alleged disclosure violation (the ‘Additional Remedy’).⁶
4. On 21 July 2023, the Prosecution responded to the P-1597 Request (the ‘Prosecution’s Response to the P-1597 Request’).⁷

¹ ICC-01/14-01/18-1918 (with confidential Annex 1, ICC-01/14-01/18-1918-Conf-Anx1).

² ICC Investigation notes / report / correspondence, CAR-OTP-00001499.

³ Prosecution’s Response to “Motion for Finding of Disclosure Violation in Relation to Witness P-1990 (ICC-01/14-01/18-1918)”, ICC-01/14-01/18-1941-Conf (public redacted version notified the same day, ICC-01/14-01/18-1941-Red) (the ‘Prosecution’s Response to the P-1990 Request’).

⁴ ICC-01/14-01/18-1982.

⁵ CAR-OTP-2050-0513-R01.

⁶ P-1597 Request, ICC-01/14-01/18-1982, paras 27, 29.

⁷ Prosecution’s Response to “Motion for Finding of Disclosure Violation in Relation to Witness P-1597 (ICC-01/14-01/18-1982)”, ICC-01/14-01/18-2000-Conf.

5. In both motions, the Defence, *inter alia*, requests the Chamber to order the Prosecution to review all the material, including internal documents or notes, in its possession to ensure that all documents material to the preparation of the defence or exonerating have been duly disclosed (the ‘Request for an Order to Review’).⁸ In response to both motions, the Prosecution submits that the Request for an Order to Review should be rejected as being unnecessary and disproportionate.⁹

II. Analysis

6. The Chamber recalls the Court’s jurisprudence on the Prosecution’s disclosure obligations, as previously set out by this Chamber.¹⁰

A. P-1990 Request

7. The P-1990 Request concerns the disclosure of the P-1990 Investigation Report dated 10 May 2023 that contains information about the Prosecution’s interaction with the witness dated 27 November 2017. The P-1990 Investigation Report states, *inter alia*, that P-1990 said that ‘three bodies were exhumed’ at Yamwara School (the ‘P-1990 Information’).¹¹
8. The Yekatom Defence submits that the P-1990 Investigation Report affects the credibility of P-1990’s statement because the P-1990 Information is ‘materially inconsistent’ with the account he provided in his statement dated January 2020.¹² It submits that the P-1990 Investigation Report therefore contains potentially exculpatory information, falling under Article 67(2) of the Statute, that should have been disclosed earlier.¹³ It argues, relying on previous jurisprudence of the

⁸ P-1990 Request, ICC-01/14-01/18-1918, paras 2, 41, 43; P-1597 Request, ICC-01/14-01/18-1982, paras 2, 22, 26, 28-29.

⁹ Prosecution’s Response to the P-1990 Request, ICC-01/14-01/18-1941-Red, paras 18-24. Prosecution’s Response to the P-1597 Request, ICC-01/14-01/18-2000-Conf, paras 29-30.

¹⁰ *See for example* 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. 25.

¹¹ P-1990 Investigation Report, CAR-OTP-00001499 at 000001.

¹² P-1990 Request, ICC-01/14-01/18-1918, paras 1, 22-26.

¹³ P-1990 Request, ICC-01/14-01/18-1918, paras 26-31.

Chamber, that, similar to screening notes, such investigation reports should also require disclosure, even if they are not signed by the witness.¹⁴

9. The Prosecution submits that the P-1990 Information is neither potentially exculpatory nor material to the preparation of the Defence.¹⁵ It submits that the information contained in the P-1990 Investigation Report was obtained informally and merely reflects the personal recollection of the Prosecution investigators about this interaction; it does not amount to a statement acknowledged and accepted by the witness.¹⁶ It further submits that, for the same reasons, there appeared to be no contradiction or inconsistency between the accounts provided by the witness warranting disclosure.¹⁷ Regarding the question of materiality, it submits that the P-1990 Information does not relate to the core issue in this case.¹⁸
10. The Chamber will first assess whether the P-1990 Information was material to the preparation of the defence. Second, it will consider whether it was possible to disclose it earlier than May 2023.
11. The Chamber notes the Prosecution's submission that the meeting with P-1990 dated 27 November 2017 was its first interaction with the witness and was thus informal; and that, at the time, the witness was not prepared to meet the Prosecution and could not remember certain details concerning the exhumation at the Yamwara School.¹⁹ The P-1990 Investigation Report is not signed or otherwise acknowledged by the witness himself. In that sense, the Chamber is persuaded that the P-1990 Investigation Report does not contain P-1990's account about the exhumation at Yamwara School and was never intended for it to do so. The Chamber considers that it does not amount to a statement by the witness and, of itself, is not indicative of the witness's credibility.

¹⁴ P-1990 Request, ICC-01/14-01/18-1918, paras 16-20 *referring to* Decision on the Yekatom Defence Motion for Disclosure of Screening Notes, 10 August 2020, ICC-01/14-01/18-618, paras 11-13.

¹⁵ Prosecution's Response to the P-1990 Request, ICC-01/14-01/18-1941-Red, para. 6.

¹⁶ Prosecution's Response to the P-1990 Request, ICC-01/14-01/18-1941-Red, paras 7-8.

¹⁷ Prosecution's Response to the P-1990 Request, ICC-01/14-01/18-1941-Red, paras 9-10.

¹⁸ Prosecution's Response to the P-1990 Request, ICC-01/14-01/18-1941-Red, paras 12-13.

¹⁹ Prosecution's Response to the P-1990 Request, ICC-01/14-01/18-1941-Red, para. 7.

12. However, the Chamber considers that the P-1990 Investigation Report is a document that provides a personal record by a Prosecution investigator of what the witness had said during this interaction. This personal record is, as such, disclosable, if the information therein falls under Article 67(2) of the Statute and/or Rule 77 of the Rules.²⁰
13. Having assessed the P-1990 Information, the Chamber further finds that it is, at the very least, material to the preparation of the Defence within the meaning of Rule 77 of the Rules. In view of the Chamber, regardless of whether the P-1990 Information was acknowledged or accepted by P-1990 himself, it would have assisted the Defence in assessing potential contradictions and/or inconsistencies in the statement and/or the testimony provided by him.
14. As regards whether it could have been made available to the Defence earlier, the Chamber notes that the P-1990 Investigation Report is dated 10 May 2023. It appears to have been prepared following *inter partes* communication between the Defence and the Prosecution upon the former's request to disclose 'any undisclosed document in [the Prosecution's] possession regarding the 27 November 2017 [meeting] at Yamwara, especially regarding contacts between P-1990 and [the Prosecution]'.²¹ It is based on the 'internal notes' of the Prosecution investigators,²² the actual date(s) of which is not known to the Chamber.
15. While the P-1990 Investigation Report was only prepared on 10 May 2023, the Chamber concludes that the Prosecution must have been in possession of the P-1990 Information prior to this date in the form of internal notes. The Chamber recalls that it decided to introduce P-1990's prior recorded testimony pursuant to Rule 68(3) of the Rules on 6 April 2023.²³ At the very least, the P-1990

²⁰ Decision on the Yekatom Defence Motion for Disclosure of Draft Witness Statements, 1 June 2020, ICC-01/14-01/18-539, para. 13 *and further jurisprudence referenced therein*.

²¹ Annex to the P-1990 Request, ICC-01/14-01/18-1918-Conf-Anx1, pp. 7-8 *referring to* the email from the Prosecution, 10 May 2023, at 15:26 and the email from the Defence, 5 May 2023, at 17:51.

²² Annex to the P-1990 Request, ICC-01/14-01/18-1918-Conf-Anx1, p. 7 *referring to* the email from the Prosecution, 10 May 2023, at 15:26.

²³ *See* Corrected version of First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules, 6 April 2023, ICC-01/14-01/18-1833-Conf-Corr (corrected version notified on 17 April 2023) (public redacted version notified the same day, ICC-01/14-01/18-1833-Corr-Red), para. 327, p. 105.

Information should have been disclosed following the scheduling on 28 April 2023 of P-1990's expected testimony.²⁴ Accordingly, the Chamber finds that the Prosecution did not disclose the P-1990 Information in a timely manner and violated its disclosure obligations.

16. As regards prejudice, the Chamber notes the Prosecution's submission that the Defence was in possession of similar disclosed information for years, which it effectively used during P-1990's testimony when questioning him.²⁵ It adds that, for this reason, the Defence had ample opportunity to investigate this issue and challenge P-1990's evidence in court and in written submissions prior to his testimony.²⁶
17. For the same reasons, the Chamber finds that the prejudice to the accused on account of late disclosure of the P-1990 Investigation Report is minimal. In particular, although the similarly disclosed information is coming from other items on the record originating from different witnesses, the Defence was not hindered in investigating the number of bodies exhumed at Yamwara School. The Defence also had the opportunity to question P-1990 on the same issue. The Chamber further emphasises that the P-1990 Information is limited in scope.
18. Having regard to the above, the Chamber partly grants the P-1990 Request.

B. P-1597 Request

19. The P-1597 Request concerns the disclosure of the P-1597 Statement, which according to the Defence contained information that was exculpatory in nature and/or material to the preparation of the Defence.
20. The Yekatom Defence submits, *inter alia*, that the following information contained in the P-1597 Statement is potentially exculpatory and/or material to the preparation of the Defence: (i) P-1597's personal knowledge concerning targeting of 'civil servants and FACA soldiers' 'at the arrival of the Seleka in March 2013'; (ii) his observations on the impact of the Seleka exactions on the

²⁴ Email from the Prosecution, 28 April 2023, at 16:03.

²⁵ Prosecution's Response to the P-1990 Request, ICC-01/14-01/18-1941-Red, paras 14-15 *with further references*.

²⁶ Prosecution's Response to the P-1990 Request, ICC-01/14-01/18-1941-Red, paras 16-17.

population in Boy Rabe and other arrondissements in Bangui; and (iii) his knowledge about ‘some high profile Seleka members and particularly of Colonel BICHARA a former salesman who joined the Seleka and “rumoured to have killed many people in 2013”’.²⁷

21. It further argues that ‘all evidence relating to the presence of Seleka and armed Muslim merchants in [Cattin] area of Bangui is material to the Defence as it has the ability to mitigate the guilt of the accused’.²⁸
22. The Yekatom Defence submits that the Prosecution interviewed P-1597 in March 2017 and failed to disclose his statement despite multiple opportunities to do so and reminders about the necessity to be thorough.²⁹
23. The Prosecution submits, *inter alia*, that it did not violate its disclosure obligations because the concerned information is not exculpatory.³⁰ It further submits that, even assuming that the P-1597 Statement contains information material to the preparation of the Defence, the timing of its disclosure has caused no prejudice to the accused.³¹
24. Having assessed the P-1597 Statement in light of the information identified by the Yekatom Defence mentioned above,³² the Chamber is of the view that it contains, at the very least, information material to the preparation of the Defence. As regards timeliness of the disclosure, the Chamber notes that P-1597 was interviewed in March 2017.³³ The P-1597 Statement was disclosed to the Defence in July 2023.³⁴ Therefore, the Chamber finds that the Prosecution did not disclose the P-1597 Statement in a timely manner.
25. Nonetheless, the Chamber is persuaded by the Prosecution’s submission that the information provided by P-1597 in his statement was already available to the

²⁷ P-1597 Request, ICC-01/14-01/18-1982, paras 14-15.

²⁸ P-1597 Request, ICC-01/14-01/18-1982, para. 20; *see also* paras 17-19.

²⁹ P-1597 Request, ICC-01/14-01/18-1982, paras 21-22.

³⁰ Prosecution’s Response to the P-1597 Request, ICC-01/14-01/18-2000-Conf, para. 21.

³¹ Prosecution’s Response to the P-1597 Request, ICC-01/14-01/18-2000-Conf, paras 27-28.

³² *See above* para. 20.

³³ P-1597 Statement, CAR-OTP-2050-0513-R01, at 0531.

³⁴ *See Annex to the Prosecution’s Communication of the Disclosure of Evidence on 7 July 2023*, ICC-01/14-01/18-1970-Conf-Anx, p. 4.

Defence in previously disclosed evidence. In particular, the Chamber notes that the Prosecution's submission that the presence of Seleka elements in and around Bangui and allegations concerning armed Muslim merchants is 'nothing new' and that the 'disclosed evidence in this case is replete with such information'.³⁵ The Chamber further notes the Prosecution's submission that information concerning 'Colonel BICHARA' has been available to the Defence as being disclosed prior in several documents and that some of the referenced information is also readily available publicly.³⁶

26. In these circumstances, the Chamber considers that there was no prejudice to the Defence from the late disclosure of the P-1597 Statement. Therefore, the Chamber sees no need to address the Additional Remedy.
27. In conclusion, having regard to its determinations of both requests, the Chamber finds that no further remedies are warranted at this stage. Accordingly, it rejects the Request for an Order to Review.

³⁵ Prosecution's Response to the P-1597 Request, ICC-01/14-01/18-2000-Conf, para. 11.

³⁶ Prosecution's Response to the P-1597 Request, ICC-01/14-01/18-2000-Conf, para. 17 *with further references*.

FOR THESE REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the P-1990 Request;

PARTIALLY GRANTS the P-1597 Request;

REJECTS the Request for an Order to Review; and

ORDERS the Prosecution to file a public redacted version of the Prosecution's Response to the P-1597 Request, ICC-01/14-01/18-2000-Conf within one week of notification of the present decision.

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

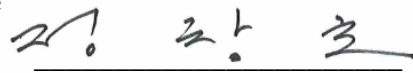


Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 30 August 2023

At The Hague, The Netherlands