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Original: **English** No.**: ICC-01/14-01/18**
Date: **7 July 2020**

**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 Redacted**

**Public Redacted Version of "Prosecution's Response to the Yekatom Defence's 'Motion for Finding of Disclosure Violation and for Deadline for Disclosure of Exculpatory Material' (ICC-01/14-01/18-566-Conf)"**
**6 July 2020, ICC-01/14-01/18-581-Conf**

**Source:** **Office of the Prosecutor**

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## I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the Yekatom Defence's *Motion for Finding of Disclosure Violation and for Deadline for Disclosure of Exculpatory Material* ("Motion").[1] The Motion is meritless.

2. *First*, the Defence's bold claim that the Prosecution has failed to timely disclose the "exculpatory" statement of Prosecution Witness P-1716 is incorrect. Rather, P-1716's statement *incriminates* YEKATOM and NGAÏSSONA. The Defence's characterisation of the statement as exculpatory in claiming that it "contradicts" other evidence[2] is unfounded. The statement is *consistent* with other incriminating evidence, particularly given the nature of the Accused's alleged criminal responsibility in the Document Containing the Charges, and has emerged following the Confirmation Decision.

3. *Second*, the Defence misapprehends that the posture of the case is *pre-trial*, and the Prosecution continues the complex process of reviewing, and disclosing evidence, which must be undertaken with regard to its obligations to ensure the welfare and security of victims and witnesses in accordance with article 68. The feasibility of disclosure, as is well known, must account for these statutory obligations, which are also shared by the Chambers of the Court. To the extent that this process is ongoing, the Motion is in any case premature.

4. *Third*, the relief sought in the Motion is not legally cognisable. Rather YEKATOM seeks declaratory relief – *i.e.* a formal and symbolic declaration from the Chamber of a "disclosure violation". However, this is a concept that is not found in Statute, and has no legal effect, definition, or

[1] ICC-01/14-01/18-566-Conf (The NGAÏSSONA Defence joined the motion in an email sent on Wednesday, 1 July 2020 at 10:23).
[2] ICC-01/14-01/18-566-Conf, para. 26.

consequence. Further, the Defence request that the Chamber to set a deadline for disclosure prior to trial is unnecessary. The Statute confers this obligation on the Chamber in any case. Thus, this relief is superfluous.

## II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this Response is classified as Confidential because it contains classified information. A public redacted version will be filed in due course.

## III. SUBMISSIONS

### A. The Defence Motion is meritless since P-1716's statement incriminates the Accused

6. Contrary to the Motion, P-1716's statement is *inculpatory*. Indeed, the Prosecution intended since the beginning of the proceedings to rely on P-1716's evidence to establish the criminal responsibility of the Accused, but could not do so until the completion of the implementation of security measures under article 68. Specifically, the Prosecution [REDACTED] P-1716 prior to the Confirmation Hearing due to [REDACTED] and thus, despite considerable efforts [REDACTED] in advance of disclosing his materials, was unable to do so.

7. The Defence's claim that since P-1716 statement does not mention YEKATOM it "contradicts" other witness statements and is therefore exculpatory[3] is unpersuasive. The fact that P-1716 does not mention YEKATOM in his statement does not "contradict" other witnesses. The Defence's reasoning is strained, at best, and effectively amounts to arguing a contradiction by omission, when the distinction does not even give rise to an *inconsistency.* Clearly, P-1716's statement is not an exact

[3] ICC-01/14-01/18-566-Conf, para. 26.

copy of other witness statements, nor should it be. But that fact does not mean that it contradicts other evidence, particularly on any material matter. Here, it indeed substantiates the basis of YEKATOM's criminal responsibility as alleged in the DCC and survives in the Confirmation Decision and significantly, in a manner that is *consistent* with the Statement the Defence claims it contradicts. What the Defence portrays as a material contradiction in the factual narrative of the charged incident in no way diminishes the *legal theory* and the evidence substantiating YEKATOM's criminal responsibility in the charging instruments.

8. The variances in P-1716's statement illustrate a natural occurrence among witnesses to any given event, and especially in a highly traumatic situation. Facts and circumstances recounted by one witness are hardly ever told in the exact same manner by others, and often witness' narratives do not mention exactly the same facts. A variance of witness accounts is a natural and well-known phenomenon.

9. As noted, P-1716 statement does not exclude YEKATOM's presence at the scene of the crimes charged. For this reason alone it is not *inconsistent* with a statement that places him there. Similarly, P-1716's statement does not discredit other evidence of YEKATOM's presence at the [REDACTED]. Given that no two witnesses ever view events from the same vantage point or with the same knowledge, it can hardly be argued that by not mentioning a given fact which other witnesses may have, without more, is "exculpatory". To hold otherwise would logically make every variance in any witness's account automatically disclosable under article 67(2) without any regard to the nature of the variance itself.

10. To be disclosable under article 67(2) the Prosecution must believe that the evidence: i) tends to show the innocence of the accused; or ii)

mitigates the guilt of the accused; or iii) may affect the credibility of Prosecution evidence.

11. What is necessarily subsumed in all of the above is founded basis for the evidence to be considered *meaningful*. Exculpatory evidence does not exist in a vacuum, but is always relational to what is charged and how it is charged. Thus, to assess what if any "exculpatory" value P-1716's statement may have in this case, it is first necessary to understand what the factual allegations in the DCC were, and further, what they are following the Confirmation Decision

12. The following facts were alleged in the DCC:[4]

a. [REDACTED].

b. [REDACTED]

c. [REDACTED].

d. [REDACTED].

13. P-1716 directly witnessed some of the above factual allegations, but not all of them.[5] Accordingly, his statement partially confirms the above allegations; but, does not contradict any of them. P-1716 knew some of the people he was with and identified some of the perpetrators, but not all of them. For instance, P-1716 states that "[u]pon arriving at [REDACTED] I did not know the names of anybody [REDACTED]."[6] P-1716's lack of knowledge of the identities of perpetrators should not be confused with a contradiction of their identities. The Defence's attempt to argue this is transparently self-serving and unconvincing.

[4] ICC-01/14-01/18-282-Conf-AnxB1, paras. 296-300 (citations omitted).
[5] CAR-OTP-2053-0062.
[6] CAR-OTP-2053-0062, para. 35.

14. As noted, in the Defence's view, a variance of *any* kind among witnesses' evidence whether or not meaningful in view of the factual or legal basis of the charges, is "exculpatory". However, this definition would manifestly lead to absurdity — since no two witness statements are ever identical. Necessarily, an evaluation of the meaningfulness of any inconsistency, omission, or even contradiction, plays a role in any evaluation of alleged article 67(2) material.

15. Although, not confirmed, the Prosecution charged YEKATOM as being criminally responsible as a commander under article 28(a), in addition to various alternative modes of liability regarding the [REDACTED] incident. These cannot be overlooked in determining the nature of P-1716's statement. Notably, P-1716 names [REDACTED] as among the perpetrators of the charged crimes. In this context, P-1716's statement is anything but exculpatory. Nothing in his statement objectively indicates or suggests to the Prosecution the innocence of either Accused, mitigates their guilt, or affects the credibility of Prosecution evidence.

16. Lastly, even if P-1716's statement could somehow be characterized as "exculpatory" — which it is not — the Prosecution's determination to rely on the statement as incriminatory evidence, and thus to disclose it *after* [REDACTED], was reasonable. Good faith disagreements about the fair labelling of evidence occur between the parties as part of the ordinary course of adversarial proceedings. Those disagreements should not result in "violations" as the Defence seems to eagerly posit. It would be a bizarre outcome if, reasonably acting in good faith, the side that was ruled against were said to "violate" its obligations each time a court decided against them.

## B. The Motion is premature as it comes before disclosure deadlines

17. The Prosecution continues the complex pre-trial process of reviewing, and disclosing a large volume of evidence while balancing the need for witness security under article 68. Declaring a *violation* for the disclosure of evidence during the pre-trial period designated precisely for pre-trial preparation, including the disclosure of evidence, makes no logical sense. Indeed, the Motion implicitly acknowledges that a remedy is manifestly available, if necessary at all — here, indeed there is no alleged prejudice.

18. The Accused have in fact received the contested material, and in ample time to prepare their respective trial defences, to the extent there are any. As noted, no date has been for set for a trial and no disclosure deadline has been set. Thus, the Defence cannot reasonably claim any prejudice, even if the Chamber were to consider that the material falls within the ambit of article 67(2), which it does not.

19. Trial Chambers have recognised the need to allow the Prosecution to review and disclose evidence prior to trial, even when the Defence needs for disclosure are "immediate". Nothing either alleged in the Motion or in fact detracts from the Prosecution's having proceeded appropriately in this exercise. In the *Ongwen* case, the Defence requested immediate disclosure of certain materials.[7] The Single Judge of Trial Chamber IX dismissed the request *in limine*, determining that no judicial action was required on Defence disclosure requests pertaining to "a collection being actively reviewed for disclosure." Such is the case here.

[7] ICC-02/04-01/15-457, para. 7.

## C. The Defence fails to request legally cognisable relief

20. The Defence requests declaratory relief in the form of a symbolic declaration formally finding a "disclosure violation" rather than any substantive relief, such as for additional time, resources, or any procedural remedy.[8] As noted, this is plainly because, even if the Chamber were to determine that the alleged inconsistency between P-1716's statement and other evidence should have been disclosed earlier, there has been absolutely no prejudice suffered. The Chamber should reject the Motion as the declaratory relief sought is not a concept expressly found in statutory framework, and has no legal effect, definition, or consequence.

21. The Defence claim of prejudice in not being able to use P-1716's statement at the Confirmation Hearing[9] is vacuous. As noted above, the Prosecution itself sought to rely on the statement for incriminatory purposes, which are readily apparent from even a cursory reading it. In any case, the Motion belies the prejudice claimed. Were the facts as suggested, one might have expected a motion to re-open the confirmation hearing.

22. Instead, the Motion requests relief that achieves nothing in substance but only in form. The lack of any request for a *real* remedy underscores the Motion's weakness. Granting the request encourages litigation having no substantive bearing or legal effect in the case, but instead patently undertaken to serve tactical interests in litigation.[10] The Defence asks that the Chamber be engaged in a process of finding fault for the sake of finding fault, rather than granting substantive relief. Instead, the Chamber

[8] ICC-01/14-01/18-566-Conf, para. 32.
[9] ICC-01/14-01/18-566-Conf, 28 (adding that it is prejudiced by delaying its investigation and preparation for trial).
[10] *See e.g.* Prosecutor v. Karadzic, IT-95-5/18-T, Decision on Accused's 107tz Disclosure Violation Motion, 14 March 2016, para. 15 (finding in the 108th Motion for a disclosure violation "*that the Accused is pursuing this issue as a litigation tactic through frivolous motions, and is not genuinely interested in furthering his case*.").

should involve itself as appropriate in addressing and remedying actual prejudice suffered by the Parties and Participants, and granting cognisable relief as and when justified in the circumstances. The Motion fails in this respect.

23. Finally, the Chamber should dispense with the Defence request to set a deadline for disclosure prior to trial. The request is redundant to what the Chamber must, in any case, do per its statutory obligation. Thus, in line with other Trial Chambers of the Court, this Chamber will in inevitably set a disclosure deadline prior to the start of trial, obviating any need for the requested relief.

## IV. RELIEF SOUGHT

24. For the above reasons, the Prosecution requests the Chamber to reject the Motion.

**Fatou Bensouda, Prosecutor**

Dated this 7th day of July 2020
At The Hague, The Netherlands