

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/14-01/18
Date: 28 December 2018

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR V. ALFRED YEKATOM***

Confidential

**Observations on behalf of Mr. Yekatom pursuant to
“Decision Seeking Observations”**

Source: Defence Team of Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr. James Stewart
Mr. Kweku Vanderpuye

Counsel for the Defence
Me Stéphane Bourgon *Ad.E.*
Me Mylène Dimitri

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants
(Participation / Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States’ Representatives

Amicus Curiae

REGISTRY

Registrar
Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Further to the "Decision Seeking Observations" issued by the Single Judge on behalf of Pre-Trial Chamber II ("Pre-Trial Chamber") of the International Criminal Court ("Court") on 14 December 2018 ("Decision") and the "Prosecution's Observations pursuant to Decision ICC-01/14-01/18-33" filed on 21 December 2018 ("Prosecution Observations"), Counsel representing Alfred Rombhot Yekatom ("Mr. Yekatom" or "Defence") hereby submit these:

**Observations on behalf of Mr. Yekatom pursuant to
"Decision Seeking Observations"
("Defence Observations")**

INTRODUCTION

1. The Defence hereby provides its observations pursuant to the Decision.
2. Despite the paucity of information available at this stage due to *inter alia* : (i) the very early stage of the proceedings; (ii) information withheld from the Defence in numerous Prosecution submissions filed *ex parte* and/or confidential and redacted; and (iii) the absence to this day of any disclosure by the Prosecution pursuant to any article in the Rome Statute ("Statute") or rule in the Rules of Procedure and Evidence ("Rules" or "RPE"), the Defence has attempted to provide herein as much information as possible.
3. That being said, the Defence deems necessary to underscore that its ability to prepare for the confirmation hearing as well as for trial and to efficiently fulfil its duty towards Mr. Yekatom rests to a significant extent on the Prosecution's: (i) timely and thorough disclosure of evidence pursuant to its statutory obligations; (ii) disclosure without delay of the identity of all witnesses the Prosecution's intends to rely upon; and (iii) *bona fide* effort in keeping to a

minimum, and only for legitimate reasons, the redaction of information from the evidence disclosed, thereby making it possible for the Defence to conduct timely and meaningful investigations.

4. In this regard, the Defence notes that in its observations, the Prosecution places significant emphasis on the security situation in the Central African Republic ("CAR") which, in its assessment: "[...] necessitates extensive witness protection measures which will necessarily affect the timing of Prosecution disclosure and the scheduling of proceedings [...]". While the Defence acknowledges the importance of ensuring the protection of witnesses where necessary, it is imperative to recall that the implementation of witness protection measures must neither impede the fairness of the proceedings nor the full respect of the rights of Mr. Yekatom, in particular before confirmation of the charges.
5. The Defence also deems necessary and appropriate to recall that: (i) the Prosecution investigation regarding Mr. Yekatom began more than four years ago; (ii) the Prosecution submitted its application for the issuance of a warrant of arrest against Mr. Yekatom almost two months ago; and (iii) Mr. Yekatom was arrested in the CAR on 29 October 2018 and has been detained despite the fact that he has yet to be formally charged. Still, to this day, the Prosecution has not disclosed any document.

PROCEDURAL BACKGROUND

6. On 11 November 2018, the Pre-Trial Chamber issued a warrant of arrest pursuant to Article 58 against Mr. Yekatom,¹ who was surrendered to the Court on 17 November 2018 ("Warrant of Arrest").²
7. On 18 November 2018, Mr. Yekatom was transferred to the Detention Center ("ICC DC"). Following his arrival, Mr. Yekatom received a non-redacted version of the Warrant of Arrest.
8. On 23 November 2018, Mr. Yekatom, made his first appearance before the Pre-Trial Chamber.
9. On 11 December 2018, the Defence submitted a confidential, *ex parte* "Expedited request on behalf of Mr. Yekatom seeking immediate disclosure of the Prosecutor's Application for issuance of a warrant of arrest" ("Defence Request").³
10. On 12 December 2018, Pre-Trial Chamber issued an Order on Reclassification ("Order on Reclassification")⁴ in which, *inter alia*, it denied the Defence Request holding that the classification of the Prosecution Application must be maintained.⁵

¹ ICC-01/14-01/18-1-US-Exp ("Warrant of Arrest"). A public redacted version is also available, *see* ICC-01/14-01/18-1-Red.

² Decision pursuant to Regulation 101 of the Regulations of the Court, 17 November 2018, ICC-01/14-01/18-11-Conf-Exp ("First Decision on Restrictions").

³ Expedited Request on behalf of Mr. Yekatom seeking immediate disclosure of the Prosecutor's application for issuance of a warrant of arrest, 11 December 2018, ICC-01/14-01/18-29-Conf-Exp.

⁴ Order on Reclassification, 12 December 2018, ICC-01/14-01/18-31-Conf ("Order on Reclassification").

⁵ Order on Reclassification, para. 6.

11. On 14 December 2018, the Pre-Trial Chamber issued its Decision whereby it ordered the Prosecutor and the VWU to provide, no later than 21 December 2018, the information requested in paragraph 5 or the Decision.⁶
12. On 21 December 2018, the Prosecutor submitted its Prosecution Observations pursuant to the Decision.⁷

SUBMISSIONS

13. In its Decision the Single Judge ordered the Defence to provide: (i) observations on the information to be provided by the Prosecutor as well as (ii) information on a series of additional questions.⁸

Observations on the information provided by the Prosecution

14. Paragraph 4(a) - *The Prosecution intends to rely on approximately 800 exhibits at the confirmation hearing. The number of pages amounts to approximately 14,500.*
15. The number of exhibits and the corresponding number of pages the Prosecution intends to rely on are determining figures in relation to the resources available to the Defence to adequately prepare for the confirmation hearing. Already at this stage, a serious inequality exists between the resources available to the Prosecution and that available to the Defence. As the Defence will be relying on the figures provided by the Prosecution to request additional resources, it is paramount for these figures to be as precise as

⁶ Decision Seeking Observation, 14 December 2018, ICC-01/14-01/18-33.

⁷ Prosecutor's Observations pursuant to Decision ICC-01/14-01/18-33, 21 December 2018, ICC-01/14-01/18-40-Conf.

⁸ Decision Seeking Observation, 14 December 2018, ICC-01/14-01/18-33, para. 6

possible and for the Defence to be informed without delay regarding any increase in the figures provided.

16. Paragraph 4(b) - *The Prosecution estimates that around 300 exhibits can be disclosed immediately to the Defence without redactions. The number of pages is approximately 5,000.*
17. Any exhibit that does not require redactions should be disclosed without delay. It appears surprising that only 300 out of 800 exhibits the Prosecution intends to rely on can be disclosed without redactions.
18. The Prosecution should be invited / ordered to rapidly submit requests for the approval of any redaction sought other than those covered by the redaction protocol that will be adopted.
19. Paragraph 4(c) - *The Prosecution expects to be in a position to provide an accurate assessment in terms of the numbers of exhibits exculpatory evidence under article 67(2) of the Statute by the end of January to mid-February 2019.*
20. It is of the utmost importance for the Prosecution to disclose all exculpatory evidence in its possession as soon as it is identified.
21. Article 54 of the Statute provides that the Prosecution shall "[...] investigate incriminating and exonerating circumstances equally". It follows, more than four years after the beginning of its CAR II investigation, that the Prosecution must have already identified exculpatory evidence in its possession and should be in a position to disclose the same without delay. Accordingly, the Prosecution should be invited / ordered to immediately disclose identified exculpatory evidence in its possession on a rolling basis. There is no

justification for the Prosecution waiting until end of January to mid-February for this purpose.

22. Time is also of the essence considering that the Defence depends on the figures that will be provided by the Prosecution to request additional resources to prepare for the confirmation hearing.
23. Paragraph 4(d) - *The Prosecution does not intend to call witnesses to testify at the confirmation hearing.*
24. The Defence acknowledges that pursuant to Article 61(5) of the Statute, the Prosecution need not call the witnesses expected to testify at trial. Nonetheless, it cannot be ignored that the Prosecution's strategy not to call *any* witness to testify at the confirmation hearing deprives not only the Defence but also the Pre-Trial Chamber of the opportunity to test the evidence and assess whether any probative value can be attributed to the testimony of key witnesses the Prosecution intends to rely on. As such, the Prosecution's strategy defeats to a certain extent the aim and purpose of the confirmation hearing.
25. Accordingly, the Defence respectfully submits that the Prosecution should be strongly encouraged to call key witnesses to testify at the confirmation hearing, which is certainly in the interests of justice.
26. Paragraph 4(e) - *The Prosecution intends to rely on around 50 witness statements for the purposes of the confirmation hearing and on around eight summaries of witness statements.*

27. It is too early in the absence of any Prosecution disclosure, despite Mr. Yekatom's detention on remand for more than one month, to provide observations on the number of witness statements the Prosecution intends to rely on for the purposes of the confirmation hearing.
28. Nonetheless, the Defence takes issue with the Prosecution's intention to rely on some eight summaries of witness statements. While the Prosecution "may rely on documentary or *summary* evidence",⁹ recourse to summaries of witness statements prepared by the Prosecution – which (i) precludes any assessment of the reliability of the person who provided the information; (ii) deprives the Defence of the information required to conduct meaningful investigations; and (iii) deprives the Defence of the opportunity to test the information in the summary – must be limited to instances where it is squarely *not* possible to provide a witness statements.
29. Accordingly, the Defence respectfully submits that the Prosecution should be strongly encouraged / ordered to limit the number summaries of witness statements it intends to rely on for the purposes of the confirmation hearing to an absolute minimum. Recourse to eight summaries out of a total of 58 witnesses certainly does not meet this objective.
30. Paragraph 4(f) - *The Prosecution's best estimate presently is that it will request to withhold the identities of up to 10 witnesses for purposes of the confirmation hearing. Additionally, the Prosecution anticipates that the numbers (sic) of witnesses for whom it will request identity redactions will change pending the putative joinder of the Prosecution's case against Patrice Edouard NGAISSONA.*

⁹ Article 61(5) of the Statute.

31. The Prosecution's assessment of the security situation in the CAR as being "unpredictable, dangerous and evolving"¹⁰ is not sufficient in and of itself to justify withholding the identity nearly 20% of the witnesses the Prosecution intends to rely on. The same applies to the fact that the 10 witnesses for whom the Prosecution estimates that it will request to withhold the identity are key to the Mr. Yekatom warrant of arrest.¹¹
32. For the above-mentioned reasons,¹² withholding the identity of witnesses must be a measure of last resort when there is no other option.
33. The Prosecution's undertaking to disclose the identity of all Prosecution witnesses prior to confirmation must be subject to an order. In fact, the identity of all Prosecution witnesses must be disclosed a minimum of 30 days prior to the confirmation hearing with a view to ensuring that Mr. Yekatom is able to effectively conduct the necessary preliminary investigations to prepare for the confirmation hearing.
34. Regarding the possible joinder of the Prosecution's case against Patrice Edouard NGAISSONA to its case against Mr. Yekatom, the Defence was informed during informal consultations with the Prosecution on 21 December 2018 that this would impact the proceedings against Mr. Yekatom and likely delay the conformation hearing presently scheduled on 30 April 2019.
35. At this juncture, the Defence is not in a position to state whether it will oppose the intended joinder. However, taking into consideration the purported nexus between the two cases and the fact that Mr. Yekatom has already been detained for almost two months, the Defence posits that if the cases were to be

¹⁰ Prosecution Observations para. 4(f)(i).

¹¹ Prosecution Observations para. 4(f)(i).

¹² *Supra* para. 30.

joined, it would be imperative for the Prosecution to be ready to proceed in both cases – including the fulfillment of its disclosure obligations in both cases - without delay.

36. This necessarily implies the Prosecution being able, without delay, to: (i) withhold the identity of witnesses only as a measure of last resort; and (ii) disclosing the identity of all Prosecution witnesses no later than 30 days before the confirmation hearing.
37. Paragraph 4(g) - *The Prosecution has not translated into Sango the statements upon which the Prosecution intends to rely with regard to YEKATOM.*
38. The Prosecution has already been informed during informal consultations held on 21 December that as long as witness statements are disclosed in French, Mr. Yekatom will not, as a general rule, request the translation of witness statements in Sango even though the latter is the language he fully understands and speaks. The reason for this will be explained in detail in the Defense submission due on 7 January 2019.
39. Notwithstanding this major development - which will generate significant savings and favour the expeditious conduct of the proceedings – the Defence reserves the right to request the translation of certain witness statements in Sango when this will be necessary to prepare for their testimony with Mr. Yekatom.
40. More importantly, the Defence deems necessary at this stage, to seek clarification and information from the Prosecution on the procedure followed when obtaining statements from witnesses, when the language they fully understand and speak is Sango.

41. It is indeed necessary – with a view to being able to verify / determine whether a witness actually said what is included in his or her statement that is not available in his or her own language – to know and/or establish what language(s) were spoken during witness interviews conducted by Prosecution representatives with potential witnesses who speak and understand Sango.
42. The Defence thus respectfully requests the Single Judge to invite / order the Prosecution to inform the Pre-Trial Chamber, Parties and Participants in detail of the procedure followed during witness interviews, including *inter alia*: (i) the number and role of interpreters during the interviews; and (ii) whether any record of the interviews - other than the signed statement whether in hard copy or electronic format – is kept or exists.
43. Paragraph 4(h) - *The Prosecution estimates that it will be able to provide updated IRA's for all witnesses by the end of January 2019.*
44. Taking into consideration that (i) the Prosecution has been investigating the situation in the CAR for more than four years; (ii) draft IRAs are available for all witnesses; and (iii) the Prosecution submitted its application for the issuance of the arrest warrant against Mr. Yekatom almost two months ago, the Prosecution's estimate that it will require until the end of January 2019 to provide IRAs for all witnesses is not justified.
45. Notably, the situation in the CAR, more particularly in Bangui, has not deteriorated since Mr. Yekatom's arrest, detention and transfer to the ICC DC. In these circumstances, the purported need to review existing IRAs based on the evolving situation should be assessed with care.

46. In this regard, the Defence underscores the necessity for the Prosecution to disclose witnesses IRAs along with their statements, after the application of the necessary redactions.
47. Paragraph 4(i) - *Yes, the Prosecution intends to request redactions to information contained in documents, including witness statements. The approximate number of exhibits for which redactions will be requested is around 500. This estimate includes the anticipated need for redactions to meta-data.*
48. As previously mentioned,¹³ the Prosecution's intention to apply redactions to 500 documents, more than half of the documents to be disclosed, certainly appears excessive. The same observation applies to the Prosecution's anticipated need to apply redactions to *meta data*, which are often the only available lead allowing the Defence to investigate the reliability of documents.
49. Although the adoption of a protocol on redactions will indeed facilitate the application of redactions by the Prosecution and subsequent disclosure of documents, there is no justification for the Prosecution waiting until the adoption of a protocol on redaction to begin the disclosure process.
50. That being said, the Defence intends to take a responsible approach towards the adoption of a protocol on redactions with a view to facilitating the disclosure of evidence while ensuring Mr. Yekatom is not prejudiced by the implementation of a time consuming mechanism to justify the lifting of redactions as opposed to the Prosecution having to justify the application of redactions.

¹³ *Supra* para. 20.

51. Paragraph 4 (j) - *The Prosecution may refer up to 10 witnesses to VWU for protection advice, pending the outcome of the IRA's.*
52. The Defence takes issue with the Prosecution's observation that the security measures required for witnesses depend on "(...) the nature of the evidence they provide".¹⁴ To consider the nature of the evidence provided by a witness for the purpose of determining what security measures will be implemented either amounts to, or, at a minimum, can be perceived as an incentive to bolster one's narrative in the hope of benefiting from stronger protective measures such as relocation.
53. In any event, the Defence reiterates that referring up to 10 potential witnesses to VWU for protection advice - possibly leading to the witnesses being admitted in the Court's protection program ("ICC PP") - from a total of 58 potential witnesses, certainly appears excessive.
54. Furthermore, the fact that the Prosecution has not yet referred these witnesses to VWU, four years after the beginning of its investigation in the CAR and almost two months after requesting the issuance of an arrest warrant against Mr. Yekatom is certainly questionable.
55. Paragraph 4 (k) - *Yes, PSU has been in contact with the VWU and cooperation is ongoing. At the date of this filing, three witnesses have been referred to the VWU for protection purposes. Presently, pending updated information from the witnesses, the Prosecution could refer up to 10 witnesses to the VWU for protection advice. All things remaining equal, the Prosecution will be in a position to provide a final number by the end of January 2019.*

¹⁴ Prosecution Observations para. 4(j)(i).

56. As previously mentioned, the fact that as of 21 December 2018, the Prosecution has only referred three witnesses to VWU for protection advice, whereas it intends to refer up to 10 witnesses, is questionable to say the least.
57. Furthermore, any delays in referring witnesses to VWU for protection advice is very likely to generate significant delays in the disclosure of witnesses' statements and more importantly the identity of witnesses.
58. Paragraph 4 (l) - *At present, the Prosecution has not identified potentially exculpatory evidence or evidence material to the preparation of the defence affected by articles 54(3)(e), 72, or 93 of the Statute.*
59. It is well known that obtaining the consent of information providers, in particular with respect to Article 54(3)(e) of the Statute, is a significant time consuming endeavour.
60. In this regard, it is very surprising considering *inter alia*, the duration of the Prosecution's investigation in the CAR situation and the presence in Bangui of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic ("MINUSCA"), that the Prosecution has not yet identified evidence material to the preparation of the defence (Rule 77), affected by Article 54(3)(e).
61. Accordingly, the Defence respectfully submits that the Prosecution should be strongly encouraged / ordered to immediately review all Rule 77 and Article 67(2) material in its possession with a view to requesting, if necessary, consent from the information provider pursuant to Rule 54(3)(e).

62. Paragraph 4(m) - *As noted, the Prosecution is currently in the process of reviewing and assessing evidence subject to inspection under rule 77. As such evidence is identified it will be disclosed as soon as practicable. The Prosecution expects to be in a position to provide an accurate assessment in terms of the numbers of exhibits by the end of January to mid-February 2019.*
63. For the reasons mentioned above, the Prosecution must be in a position to immediately begin the disclosure of Rule 77 material in its possession. More than an assessment in terms the number of exhibits – albeit useful and required to request additional resources – the Defence respectfully submits that the Prosecution should be strongly encouraged / ordered to immediately begin the disclosure of Rule 77 material.
64. Needless to say, in reviewing the Rule 77 and Article 67(2) material in its possession, the Prosecution should, with a view to avoiding unwarranted delays, consider at this stage the Rule 77 material that would have to be disclosed to Mr. Ngaïssona.
65. Paragraph 4(n) - *The Prosecution does not presently intend to submit further requests under article 56 of the Statute.*
66. No observation from the Defence at this stage.
67. Paragraph 4(o) – The Prosecution is continuing its investigation concerning Mr. Yekatom and there may be additional evidence uncovered during the ongoing investigation.
68. Four years after the beginning of its investigation in the CAR and almost two months since the arrest of Mr. Yekatom in Bangui and the submission of its

application for the issuance of a warrant of arrest against Mr Yekatom, the Prosecution's investigation regarding Mr. Yekatom should, for all intent and purposes, be completed.

69. In these circumstances, the Defence takes the view that the Prosecution's ongoing investigation regarding Mr. Yekatom based on events that allegedly took place four to five years ago, while delaying the disclosure of evidence impedes the fairness of the proceedings.
70. At a minimum, the Defence should be allocated the necessary resources to conduct investigations on an equal footing with the Prosecution. If required, the Defence will address the Pre-Trial Chamber on this issue.
71. More importantly, there must be an end to the Prosecution investigation leading up to the confirmation hearing with the aim of allowing Mr Yekatom to effectively know the case he has to meet.

Observations in relation to the Pre-Trial Chamber's queries in paragraph 6 of the Decision

72. Paragraph 6(a) - *Does the Defence anticipate presenting evidence at the confirmation hearing? If in the affirmative, what is the envisaged amount of non-oral evidence?*
73. In the absence of any disclosure by the Prosecution almost two months following the arrest, detention and transfer of Mr. Yekatom to the ICC DC, the Defence is not in a position at this time to confirm whether it anticipates presenting evidence at the confirmation hearing.

74. That being said, provided with the necessary disclosure, resources and time to investigate, the Defence could present evidence at the confirmation hearing.
75. Paragraph 6(b) - *Does the Defence anticipate calling witness to testify at the confirmation hearing?*
76. See paragraph 75, the Defence is not in a position at this time to confirm whether it anticipates calling witnesses to testify at the confirmation hearing.
77. That being said, the Defence could call witnesses to testify at the confirmation hearing.
78. Paragraph 6(c) - *Does the Defence intend to rely on witness statements at the confirmation hearing? If yes, does the Defence intend to submit full witness statements or summaries thereof, as provided in rule 81(6) of the Rules?*
79. See paragraph 75, the Defence is not in a position at this time to confirm whether it intends to rely on witness statements or summaries thereof at the confirmation hearing.
80. That being said, the Defence could rely on witness statements or summaries thereof at the confirmation hearing.
81. Paragraph 6(d) - *Does the Defence anticipate requests for redactions? If in the affirmative, how many pieces of evidence would that affect? How many pages does this evidence amount to?*
82. See paragraph 75, the Defence is not in a position at this time to confirm whether it anticipates requests for redaction.

83. That being said, the Defence could be requesting the application of redactions to material before the confirmation hearing
84. Paragraph 6(e) - *Are there any documents, books, photographs or other tangible items in the possession or control of the Defence that are intended for use by the Defence as evidence, as provided in rule 78 of the Rules? If in the affirmative, how many pieces of evidence are subject to inspection under rule 78 of the Rules? Are they likely to be affected by redaction requests, pursuant to rule 81(6) of the Rules?*
85. At this stage, the Defence does not have documents, books, photographs or other tangible items in the possession or control of the Defence that are intended for use by the Defence as evidence
86. Paragraph 6(f) - *Does the Defence intend to request protective measures for witnesses, including relocation, to be put in place prior to the commencement of the confirmation hearing? Does the Defence anticipating (sic) requesting redactions? Is the Defence in contact with the VWU in this regard?*
87. See paragraph 75, the Defence is not in a position at this time to confirm whether it intends to request protective measures for witnesses or whether it anticipates requesting redactions. The Defence is not in contact with the VWU at this time.

CONCLUSION

88. In light of the above observations and submissions – bearing in mind the inability of the Defence to provide more detailed information at this time as set out above – the Defence welcomes the Single Judge’s approach “with a

view to ensuring that disclosure commences as soon as possible and 'takes place under satisfactory conditions'".

89. The Defence is committed to taking the necessary steps to ensure that it will be ready for the confirmation hearing scheduled on 30 April 2019 as planned.
90. To this end, the Defence respectfully requests the Single Judge to strongly encourage / order the Prosecution to fulfil its disclosure obligations without delay, as suggested herein.

CONFIDENTIALITY

91. This request is classified as confidential as it refers to the Prosecution Observations, which bears the same classification.

RESPECTFULLY SUBMITTED ON THIS 28TH DAY OF DECEMBER 2018



Me Stéphane Bourgon *Ad.E.*, Counsel for Alfred Rombhot Yekatom

The Hague, The Netherlands