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PRE-TRIAL CHAMBER II

Before: Judge Tomoko Akane, Single Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM***

**Public
with Public Annex A**

Prosecution's Request for an Order on YEKATOM's French Proficiency Level

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests that Pre-Trial Chamber II (“Chamber”) find that YEKATOM fully understands and speaks French within the meaning of the Statute, Rules of Evidence and Procedure (“Rules”), and Regulations of the Court (“Regulations”). In determining the issue, the Chamber should, if necessary, direct the Court’s Language Services Section (“LSS”) to formally assess YEKATOM’s French proficiency level.

2. Alternatively, should the Chamber conclude that YEKATOM’s French proficiency comprises less than a full understanding of the language, the Chamber should only require such interpretation and translation as necessary to inform him of the case and to defend himself.

II. SUBMISSIONS

A. The Chamber should find YEKATOM proficient in French and direct an assessment of his proficiency if necessary

a. YEKATOM fully understands and speaks French

3. YEKATOM is “fully” fluent in French, at the least “in ordinary, non-technical conversation”,¹ and should be treated as such. While YEKATOM has previously asserted that his French is “not very good” and that he prefers Sango,² videos containing YEKATOM’s speeches, interviews, and conversations show him speaking and understanding French on a wide-range of matters. These include political and military topics, the Anti-Balaka’s objectives and operations, his personal

¹ ICC-01/04-01/07-522, para. 61.

² ICC-01/14-01/18-T-1-ENG ET, p. 6, l. 20-21. *See also* ICC-01/14-01/18-T-1-FRA ET, p. 6, l. 26-27; ICC-01/14-01/18-29-Conf-Exp, para. 25, 32, 34.

motivations, and living conditions in the bush. The corresponding videos are listed in Annex A and include:

- CAR-OTP-2012-0523, from [00:09:00] to [00:10:00]; from [00:49:36] to [00:50:20]: Canal Plus documentary containing several excerpts showing YEKATOM discussing the Seleka and the coordination of operations with, purportedly, members of the French army.
- CAR-OTP-2084-1307, from [00:02:15] to [00:02:52]: footage of a meeting during which YEKATOM introduces himself to the group.
- CAR-OTP-2055-2610, from [00:07:29] to [00:08:41]: France24 report containing an interview with YEKATOM, during which he describes the number of Anti-Balaka elements under his command, why he has a strategic advantage in future negotiations, and his motivations for fighting.
- CAR-OTP-2005-0129, from [00:22:00] to [00:22:46]: Vice News report containing interview with YEKATOM at his base at the Yamwara School, during which he discusses his political motivations for wanting to remove Djotodia and continuing the attack on Bangui until that objective is achieved.
- CAR-OTP-2080-1493, from [00:00:25] to [00:00:38]: trailer of a documentary entitled "Central African Republic: a bursting society" in which YEKATOM introduces himself and describes his role in the Anti-Balaka and his objectives.

4. These videos further reflect YEKATOM's capacity fully to express himself in French to a diverse audience, including members of the French and international

press,³ the French army,⁴ and other Anti-Balaka members.⁵ They reflect his wide vocabulary, grammatical precision, and fluidity. The videos also show YEKATOM's understanding of and appropriate and direct responses to complex questions.⁶

5. Other information similarly suggests that YEKATOM fully speaks and understands French. YEKATOM signed documents and communications written in French,⁷ he communicates in French over the phone while in detention,⁸ and he retained his current counsel by executing a letter in French.⁹ As a Member of the Central African Republic ("CAR") *Assemblée nationale* and law-maker, YEKATOM's proficiency in French would have been necessary to review and evaluate proposed laws, decrees, appointments, etc., given that French is one of CAR's official languages¹⁰ and the language used in legal and administrative matters.¹¹

6. YEKATOM's use and understanding of French demonstrates that he is "fully" proficient for purposes of article 67(1)(a) and (f) of the Statute, rule 76(3) of the Rules, and regulations 40(2)(b) and (6), and 93(1) and (2) of the Regulations. As noted by the Appeals Chamber, "it is not required that [the accused] has an understanding as

³ See e.g. CAR-OTP-2005-0129, from [00:22:00] to [00:22:46]; CAR-OTP-2012-0523, from [00:09:00] to [00:10:00]; from [00:49:36] to [00:50:20]; CAR-OTP-2055-2610, from [00:07:29] to [00:08:41]; CAR-OTP-2065-0396; CAR-OTP-2065-0400; CAR-OTP-2065-0516, from [00:55:00] to [01:51:00]; CAR-OTP-2065-0560; CAR-OTP-2065-0716; CAR-OTP-2065-0718; CAR-OTP-2065-0730; CAR-OTP-2065-0983; CAR-OTP-2065-3180; CAR-OTP-2065-3476; CAR-OTP-2065-5324; CAR-OTP-2073-1301, from [01:15:00] to [01:20:00].

⁴ See e.g. CAR-OTP-2012-0523, from [00:46:36] to [00:46:55].

⁵ See e.g. CAR-OTP-2084-1307, from [00:02:15] to [00:02:52].

⁶ See e.g. CAR-OTP-2065-0516, from [00:55:00] to [01:51:00]; CAR-OTP-2065-0560; CAR-OTP-2065-0716; CAR-OTP-2065-0718; CAR-OTP-2065-0730; CAR-OTP-2065-0983; CAR-OTP-2065-3180; CAR-OTP-2065-3476.

⁷ See e.g. CAR-OTP-2039-0072; CAR-OTP-2039-0050; CAR-OTP-2032-0074; CAR-OTP-2032-0059; CAR-OTP-2075-0763.

⁸ ICC-01/14-01/18-23-Conf-Red, para. 13; ICC-01/14-01/18-32-Conf-Red, para. 8.

⁹ ICC-01/14-01/18-18-Conf-Anx.

¹⁰ CAR-OTP-2053-0822, at 0828, art. 18 (« Ses langues officielles sont le sango et le français »).

¹¹ See Jean Daloba, *De Quelques Particularismes Lexicaux du Français de Centrafrique*, Le français en Afrique 22: 309-317 (2007), at 309 (« Sur le plan officiel, le français continue de s'affirmer comme la principale langue de l'administration, de l'éducation, de l'ouverture au monde, de la presse écrite, et de la promotion sociale : c'est la principale langue officielle de référence. ») [Last accessed : 17/12/2018]; International Legal Assistance Consortium, *ILAC Rapport d'évaluation de l'état de droit: République Centrafricaine 2017*, fn. 10 (« Les langues utilisées dans le pays sont le sango et le français. La langue du droit est le français. ») [Last accessed : 17/12/2018]. See also CAR-OTP-2006-0778, at 0780, art. 5 (« Les correspondances et requêtes adressées à l'Administration doivent être rédigées en langue française. »).

if he or she were trained as a lawyer or judicial officer”¹²; rather, only that the accused be “completely fluent in the language in ordinary, non-technical conversation”.¹³

7. The meaning of “fully understands and speaks” must also be understood in its context. The Statute requires that an accused receive interpretation and translation in a language they fully understand and speak to understand the charges and effectively exercise their statutory rights.¹⁴ The Statute does not require that YEKATOM speak and understand French on or at particularly advanced level. Rather, it is sufficient that YEKATOM’s French proficiency enables him to understand the case against him and to defend himself without language assistance.¹⁵ The above-mentioned examples demonstrate that he is sufficiently proficient in French for that purpose.

b. The Registry should formally assess YEKATOM’s French proficiency level if necessary

8. If the Chamber cannot conclude that YEKATOM’s understanding of French satisfies the Court’s regulatory framework on the basis of the evidence and information referenced above, it should direct the Registry to formally assess YEKATOM’s French proficiency in determining the issue.

9. Other Chambers have previously relied upon LSS’s assessments in determining whether an accused is proficient in a language for statutory purposes.¹⁶ In the *Ruto and Sang* case, Pre-Trial Chamber II determined that “staff members of [LSS] are highly qualified professionals who satisfy the strict requirements for providing the

¹² ICC-01/14-01/07-522, para. 61.

¹³ ICC-01/14-01/07-522, para. 61.

¹⁴ See *Prosecutor v. Tolimir*, [Decision on Interlocutory Appeal against Oral Decision of the Pre-Trial Judge of 11 December 2007](#), Case No. IT-05-88/2-AR 73.1, 28 March 2008, para. 15. See also ICC-01/05-01/08-307, para. 16. [last accessed 17/12/2018].

¹⁵ See ICC-01/05-01/08-307, para. 16 (quoting ECtHR, *Kamasinski v. Austria*, [Judgment of 19 December 1989](#), para. 74). [Last accessed : 17/12/2018].

¹⁶ See e.g. ICC-01/04-02/06-50; ICC-01/09-01/11-42; ICC-01/04-01/07-45.

language services of the Court, in accordance with article 44(2) of the Statute and rule 6(2) of the Rules.”¹⁷ LSS is thus well-placed to ascertain YEKATOM’s level of French proficiency and the degree to which he may require Sango translation or interpretation services if found not to be fully proficient. The list of videos contained in Annex A can assist LSS’s evaluation for this purpose.

B. YEKATOM should only receive translation or interpretation relative to his French proficiency level

10. Should the Chamber determine that YEKATOM does not “fully” understand or speak French, the Chamber should provide YEKATOM with translation and/or interpretation services commensurate with his demonstrated needs, and not require the written translation of *all* filings and witness statements into Sango.

11. The statutory framework, particularly article 67 and rule 76(3), provide the Chamber broad discretion and flexibility to balance several competing (but not mutually exclusive) interests, including the accused’s right to a fair trial, an expeditious process, and judicial economy (i.e., the Chamber’s efficient management of Court resources and the relative burdens on the Parties). In fashioning a remedy that best attends to balancing these interests in the specific circumstance of this case, the Chamber has the flexibility to determine: (1) *which* filings and witness statements require language assistance – in view of YEKATOM’s French proficiency and the nature of the filing or witness statement; and (2) what *form* of language assistance is required, namely whether oral interpretation, written translation, or some combination thereof.

¹⁷ ICC-01/09-01/11-42, para. 10.

a. *Article 67 grants the Chamber flexibility in identifying which filings and proceedings, or parts thereof, require language assistance and in what form*

12. Article 67 affords the Chamber flexibility in deciding *which* filings require language assistance depending on YEKATOM's French proficiency. Article 67(1)(f) provides YEKATOM the right to have "such translations *as are necessary* to meet the requirements of fairness."¹⁸ Article 67(1)(a) grants YEKATOM the right to be "*informed* [...] *of the nature, cause and content of the charges*" against him.¹⁹ By its plain terms, the Statute does not require that all court documents be interpreted or translated into Sango.²⁰ Indeed, a proposal to provide the accused with the right to choose the language in which they wished to be informed of the charges and have translations and interpretations provided was defeated during negotiations over article 67.²¹

13. Thus, article 67 only requires the provision of interpretation or translation when and to the degree necessary to ensure an accused understands the charges and the case against them. The logic underpinning this flexibility is self-evident — an individual who is nearly fluent in a language of the Court requires less assistance to exercise their statutory rights than someone without any knowledge of that language. Similarly, a filing or decision which is entirely tangential to the accused's charges has less significance to the accused's fair trial rights than a document which is core to those charges. Where an accused cannot understand or speak the language used in court proceedings, lacks counsel who is fluent in that language and his/her own, and where the material is core to the nature, cause, and content of the charges,

¹⁸ Emphasis added.

¹⁹ Emphasis added.

²⁰ See ICC-02/11-01/11-489, para. 12 (noting that the requested translations are "necessary to meet the requirements of fairness"); ICC-01/05-01/08-307, para. 12 ("In the Single Judge's opinion, this suggests that the accused shall not be served with all documents in a language he fully understands and speak"); ICC-01/04-01/06-268, pp. 4-5 (noting that the Statute does not grant "a general right to receive all documents from the Prosecution in a language [the accused] fully understands and speaks").

²¹ See Proposal submitted by the Delegations of Egypt, Oman and the Syrian Arab Republic, A/CONF 183/C.1/WGPM/L.36, 29 June 1998. See also ICC-01/04-01/07-522, paras. 53, 56.

the scope and extent of the language assistance necessary to exercise the accused's statutory rights will necessarily be great. YEKATOM's circumstances, however, are virtually the opposite, and his high proficiency in French clear.

14. Others Chambers of the Court have similarly fashioned remedies that were filing-specific, and dependent on the accused's specific proficiency level and the character of the document for which translations and interpretations were sought. In the *Bemba* case, Pre-Trial Chamber III provided Bemba and his Defence with a French-English interpreter for the entirety of the proceedings and only required written translations into French of a limited sub-set of documents.²² In *Gbagbo*, the Appeals Chamber similarly confirmed that Gbagbo's right to translations was limited to those filings which related to the "nature, cause and content of the charges against him" or were "necessary to meet the requirements of fairness"; determining that the Prosecution's document in support of an appeal regarding the adjournment of the confirmation hearing did not meet either of those tests.²³

15. Article 67(1)(a) is silent as to the form by which YEKATOM must be "informed" as to the nature, cause, and content of his charges. It does not require the provision of *written* translations, and thereby permits the satisfaction of article 67 rights through the provision of *oral* interpretation, including by providing an interpreter to an accused.²⁴ The European Court of Human Rights ("ECtHR") has similarly assessed article 6(3)(a) of the European Convention on Human Rights, which parallels article 67(1)(a) of the Statute.²⁵

²² ICC-01/05-01/08-307, paras. 16, 18.

²³ ICC-02/11-01/11-489, para. 12. *See also* ICC-01/04-01/06-268, p. 6 ("by using the words 'as are necessary to meet the requirements of fairness', article 67 (1) (f) of the Statute does not grant Thomas Lubanga Dyilo the right to have all procedural documents and all evidentiary materials disclosed by the Prosecution translated into a language that Thomas Lubanga Dyilo fully understands and speaks").

²⁴ *See e.g.* ICC-01/05-01/08-307, para. 16.

²⁵ [European Convention on Human Rights](#), art. 6(3)(a) ("Everyone charged with a criminal offence has the following minimum rights [...] to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him"). [Last accessed : 17/12/2018]

16. In *Kamasinski v. Austria*, the ECtHR determined that article 6(3)(a) does not require written translations, and is satisfied by the provision of sufficient oral explanations of the content of an indictment or charging document.²⁶ This conclusion was confirmed by the ECtHR's Grand Chamber in *Hermi v. Italy*, which found that "oral linguistic assistance may satisfy the requirements of the Convention".²⁷

17. Article 67(1)(f) of Statute functions the same way and requires translations only to the extent they "are necessary". By these plain terms, if oral interpretations are sufficient to satisfy the requirements of fairness, for example by making an interpreter available to YEKATOM, then written translations are no longer "necessary".

18. In addition to being supported by the Statute's text and legislative history, the flexibility article 67 confers also tends toward ensuring the right to be tried without undue delay and the Court's corresponding obligations, under articles 67(1)(c) and 64(2), respectively. The translation or interpretation of every document or hearing into Sango beyond what is actually necessary to guarantee YEKATOM's right to be informed of the nature, cause, and content of the charges may seriously jeopardise the expeditiousness of the proceedings, given the substantial time required.²⁸ In the *Ntaganda* case, LSS reported that 1,051 pages of translation required an estimate of 210.2 working days to complete.²⁹ Despite its very early stages, YEKATOM's case file already exceeds 600 pages.³⁰ Separately, over 1,000 pages reside in the CAR II Situation case file.³¹ Based on LSS's calculations in the *Ntaganda* case, to translate only the filings in the *Yekatom* case file to-date would require a minimum of 120

²⁶ ECtHR, *Kamasinski v. Austria*, [Judgment of 19 December 1989](#), para. 74; [Last accessed : 17/12/2018].

²⁷ ECtHR, *Hermi v. Italy*, [Judgment of 18 October 2006](#), para. 70 (citing ECtHR, *Husain v. Italy*, Judgment of 24 February 2005). [Last accessed : 17/12/2018].

²⁸ ICC-01/05-01/08-307, para. 15.

²⁹ ICC-01/04-02/06-115, para. 10. In the same filing, the Registry also noted that this work amounts to approximately 42 weeks of five working days, or 35 weeks of six working days.

³⁰ This calculation is based on a review of those filings and decisions available to the Prosecution in the case file of *Prosecutor v. Alfred Yekatom*, ICC-01/14-01/18.

³¹ This calculation is based on a review of those filings and decisions available to the Prosecution in the case file of *Situation in the Central African Republic II*, ICC-01/14.

working days. Excluding weekends, the *Yekatom* case-file as it currently stands would not be translated until 31 May 2019, without accounting for the likelihood that the case file will grow in the interim. In the long run, particularly given NGAISSONA's arrest, translating every court filing and transcript in the case would undoubtedly cause considerable delay to the proceedings.

19. Moreover, doing so would waste valuable Court resources. Translations cost money. In the *Ntaganda* case, LSS calculated the estimated cost of translating 1,051 pages at €47,295, if done normally, or €70,942, if done urgently.³² This amounts to approximately €45 per page and €67 per page, respectively. Applied across the several hundreds of thousands of pages of evidence, filings, and transcripts likely to incur in this case, the projected translation costs will be exorbitant. According to information from the Prosecution's Language Services Unit, these costs would be significantly reduced through the provision of oral interpretations by a Registry appointed interpreter.

20. Given the totality of these considerations, and to the extent the Chamber may determine that YEKATOM does not fully understand and speak French, the Chamber should adopt a case-by-case approach. In particular, the Chamber should consider which filings require Sango language assistance on a rolling basis – in view of YEKATOM's assessed French proficiency and the nature of specific filings –, and whether such assistance requires written translation or can be satisfied through interpretation; for example by making available to YEKATOM a French-Sango interpreter.

³² ICC-01/04-02/06-115, para. 10. These figures are consistent with the Registry's 2008 [Report of the Court on options for outsourcing translation work](#), ICC-ASP/7/5, 26 May 2008, para. 3. [Last accessed : 17/12/2018]. There the Registry reported that the cost of translations when outsourced amounted to 0.15 euro per word for regular translations, and 0.22 euro per word for urgent translations.

b. Rule 76(3) grants the Chamber flexibility to identify which written statements, or parts thereof, should be translated and in what form

21. Rule 76(3), like article 67, affords the Chamber flexibility to determine which Prosecution witness statements require language assistance and whether oral interpretation suffices. Rule 76(3) does not require the provision of *written* translations of all Prosecution witness statements. Rather, the rule requires the Prosecution to “ma[k]e available” those statements in a language the accused fully understands and speaks. Nothing in the rule countermands providing such statements to a suspect or accused in their original language and providing, in this case, a qualified Sango interpreter to YEKATOM to translate those passages which he identifies in good faith that he has difficulty understanding. This should be a rarity, given that the vast majority of Prosecution witness statements are in plain, ordinary language, reflecting the witness’ words. A case by case approach is the most cost effective and time-efficient means to address the language considerations arising from YEKATOM’s assessed level of French proficiency.

22. Rule 76 also permits the Chamber to require written translations for parts of certain witness statements, as may be necessary, rather than the whole. In the *Ntaganda* case, citing the same practical considerations noted above³³ and the impact such considerations would have on the accused’s right to a speedy trial, Pre-Trial Chamber II followed a flexible approach whereby only “those relevant parts [of prior witness statements] which are essential or core for the preparation of [Ntaganda’s defence]” would be translated into Kinyarwanda.³⁴ That Chamber found that full translations “would have a direct and substantial impact on the expeditiousness of the proceedings including the right of the suspect to be tried without undue delay”.³⁵ Similarly, in the *Ongwen* case, Pre-Trial Chamber II,

³³ See above, paras. 18-19.

³⁴ ICC-01/04-02/06-115, para. 12. See also ICC-01/04-02/06-64, paras. 21-22.

³⁵ ICC-01/04-02/06-115, para. 12.

referring “to the established practice of this Chamber”, required the Defence “to review the witness statements disclosed with a view to identifying portions which require to be translated and to ‘request, to the extent necessary, the translation of evidence which is core to the preparation of the defence’”.³⁶ A similar approach may be appropriate here.

23. The Court’s legal framework and practice provide the Chamber considerable latitude in determining how best to balance the competing interests of conducting efficient proceedings, deploying valuable Court resources responsibly and sparingly, and YEKATOM’s right to fair and expeditious trial. The proposed approaches would also help the Chamber avoid repeating mistakes made in prior cases.

24. In the *Katanga* case, the accused notably requested to receive all court proceedings in Lingala on the basis that his French was imperfect.³⁷ That request was unconditionally granted³⁸ despite the Registry’s conclusion that Katanga “would have been able to follow all trial related proceedings in French”.³⁹ Katanga then testified entirely in French over the course of three weeks,⁴⁰ showing, as noted by the Registry, a “manifest command of the French language”.⁴¹ Trial Chamber II immediately ceased all future Lingala interpretations for Katanga.⁴² That situation, which came “as a total surprise” to the Registry given Katanga’s consistent submissions until then that he was not in a position to fully defend himself in French,⁴³ amounted to a loss of €758,000 to the Court and, consequently, to the

³⁶ ICC-02/04-01/15-203, para. 35 (*citing* ICC-01/04-02/06-64, paras. 21-22; ICC-01/04-02/06-115, para. 12). The Chamber’s approach was also adopted at trial: ICC-02/04-01/15-457, para. 11.

³⁷ ICC-01/04-01/07-1161-Corr, para. 16.

³⁸ ICC-01/04-01/07-1473.

³⁹ ICC-01/04-01/07-3173, para. 2.

⁴⁰ ICC-01/04-01/07-3173, para. 11 (the Registry calculated that the costs of providing Lingala interpretation amounted to €482,000 and the cost of completing the Lingala booth amounted to €276,000). Katanga testified, in French, from 27 September 2011 until 19 October 2011: ICC-01/04-01/07-T-314-FRA to ICC-01/04-01/07-T-325-FRA.

⁴¹ ICC-01/04-01/07-3173, para. 12.

⁴² ICC-01/04-01/07-T-315-ENG, p. 10, l. 23-25.

⁴³ *See* ICC-01/04-01/07-3173, para. 4.

international community.⁴⁴ The approaches described above help prevent a similar occurrence from happening here.

III. RELIEF SOUGHT

25. For the above reasons, the Prosecution requests that the Chamber find YEKATOM fluent in French for purposes of the Statute, Rules, and Regulations; if the Chamber is unable to make such determination on the evidence and information referenced in this Request, direct the Registry to assess YEKATOM's level of French proficiency; and alternatively, should the Chamber find that YEKATOM does not fully speak or understand French within the meaning of the statutory framework, direct that only such translation and/or interpretation be provided to YEKATOM as necessary for him to understand the case or charges against him, in view of his assessed level of French proficiency.



Fatou Bensouda, Prosecutor

Dated this 17th day of December 2018
At The Hague, The Netherlands

⁴⁴ ICC-01/04-01/07-3173, para. 11.