

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/14-01/18**

Date: **21 January 2019**

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 ROMBHOT YEKATOM***

Public

Request on behalf of Alfred Rombhot Yekatom seeking either leave to present additional submissions following the “Prosecution’s Reply to the Defence’s Response to the Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses” or the scheduling of *inter partes* consultations chaired by a representative of Pre-Trial Chamber II

Source: Defence for 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

Mrs. 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 Prosecution's Submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses filed on 17 December 2018 ("Prosecution Submission"); the Response to the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses submitted on 7 January 2019 ("Defence Response"); and the Prosecution's Reply to the Defence's Response to the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses submitted on 16 January 2019 ("Prosecution Reply"), Counsel representing Mr. Alfred Rombhot Yekatom ("Defence" or "Mr. Yekatom") hereby submit:

Request on behalf of Alfred Rombhot Yekatom seeking either leave to present additional submissions following the "Prosecution's Reply to the Defence's Response to the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses" or the scheduling of *inter partes* consultations chaired by a representative of Pre-Trial Chamber II

("Defence Request for Additional Submissions or Consultations").

INTRODUCTION

1. The adoption of a protocol on the handling of confidential information and contact with witnesses that will govern the proceedings for the duration of the pre-trial phase and possibly for the ensuing trial phase constitutes an important and delicate exercise, which requires a thorough and careful assessment of its repercussions on the fair and expeditious conduct of the proceedings.

2. It is thus in the interests of justice that in designing such a protocol, Pre-Trial Chamber II ("Pre-Trial Chamber") be assisted by the parties and provided with detailed submissions from both the Prosecution and the Defence, going beyond plain litigation rhetoric.

3. Accordingly, with a view to assisting the Pre-Trial Chamber in adopting the best possible protocol that will achieve its aims and ensure full respect for the rights of Mr. Yekatom while hopefully avoiding time consuming litigation, the Defence respectfully requests either leave to present additional submissions or the scheduling of *inter partes* consultations chaired by a representative of the Pre-Trial Chamber.

4. At this early stage of the proceedings, considering that the Prosecution has not yet begun fulfilling its disclosure obligations as well as the Prosecution's intent to join its case against Ngaïssona to the present proceedings, the Defence underscores that scheduling *inter partes* consultations chaired by a representative of the Pre-Trial Chamber will not unduly delay the proceedings and is therefore the preferred option.

5. In the alternative, the Defence posits that the Prosecution Reply mischaracterizes the Defence Response and that additional submissions are required to clarify the Prosecution's arguments in reply.

6. The fact that the Prosecution Reply does not address certain submissions in the Defence Response despite their obvious difference with the contents of the Prosecution Submission also justifies the scheduling of *inter partes* consultations or granting the Defence leave to present additional submissions.

ARUGUMENT

7. The Prosecution Reply mischaracterises the Defence Response in many ways. It also misunderstands responsible submissions put forward by the Defence with a view to ensuring that the protocol's aim can be achieved without impeding the rights of Mr. Yekatom. More importantly, rather than clarifying the issues raised, the Prosecution Reply further complicates the matter, thereby displaying the need for further submissions or, even better, *inter partes* consultations.

8. The following examples, *inter alia*, illustrate the above:

- a. The Prosecution's submission that the Defence suggestions are predicated on the assumption that the object of the protocol is to regulate who, within the context of proceedings before the Court, may gain access to confidential information in the first instance, is plainly incorrect and unsubstantiated;¹
- b. The Prosecution's submissions that the Defence's restrictive construction of the terms "Party", "Participant", "Confidential information", and "Witness" unreasonably limit the scope and purpose of the Protocol, thereby impeding the Court's obligation to protect the safety of witnesses and victims in accordance with article 68, attempt to minimize the importance of these definitions, are confusing and do not assist the Pre-Trial Chamber in designing the protocol sought;²
- c. The Prosecution's argument that the Defence aims to limit the parties' and participants' obligation to report all breaches of confidentiality under the Proposed Protocol³ misunderstands the issue and misses the point. The Prosecution Reply also ignores that the Defence proposition is in line with "Section IV. Inadvertent Disclosure", paragraphs 19-22 of the Defence Proposed Protocol.⁴
- d. The Prosecution's submission that "[t]he fewer people that are bound by the terms of the protocol, the greater the risks",⁵ confuses the issue of protection with the handling of confidential information and contacts with

¹ Prosecution's Reply to the Defence's Response to the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses (ICC-01/14-01/18-51), ICC-01/14-01/18-58, 16 January 2019 ("Prosecution Reply"), para 7.

² Prosecution Reply, para 8.

³ Prosecution Reply, paras 16-19.

⁴ Chambers Practice Manual, May 2017, pp. 32-38 ("Chamber's Protocol"), para 18; Annex A to Response to the Prosecution's submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses, ICC-01/14-01/18-51-AnxA, 7 January 2019 ("Defence Proposed Protocol"), para 19; Annex A to Prosecution's Submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses, ICC-01/14-01/18-35-AnxA, 17 December 2018 ("Prosecution Proposed Protocol"), para 19.

⁵ Prosecution Reply, para 7.

witnesses. It also ignores the basic principle that access to confidential information should be limited to persons who need the information; to the minimum number of persons; and to known persons;

- e. The Prosecution's submission that new confidential information gained during a conversation with a witness would not fall under the definition of "confidential information" unless its suggested modification is adopted⁶ is simply wrong. It would also open the door to disclosure violations the opposing party would not even become aware of;
- f. The Prosecution's argument that the definition of witness proposed by the Defence is unworkable and undermines the purpose of the proposed protocol⁷ is incorrect. It fails to take into account the applicable procedure suggested by the Defence when meeting with potential witnesses and omits the impact of its own proposed definition, which impedes the ability of the Defence to investigate;
- g. The Prosecution submission that it is unclear how the Prosecution could implement its obligations under the Protocol in respect of individuals whose names would have been "communicated *ex parte* to the VWU" and whose identities "have not yet been disclosed to the Prosecution"⁸ is inapposite in the light of the applicable procedure suggested by the Defence when meeting with potential witnesses.⁹ It also fails to take into account that the proposed definition will ensure respect for the rights of Mr. Yekatom as well as for the equality of arms principle; and
- h. It is also incorrect that any Prosecution witness could be interviewed without consent before a formal decision to call them is made, i.e., by

⁶ Prosecution Reply, para 9.

⁷ Prosecution Reply, para 10.

⁸ Prosecution Reply, para 13.

⁹ Defence Proposed Protocol, paras 28-29.

definition before the confirmation decision is issued.¹⁰ The Prosecution fails to draw the distinction between the pre-trial phase and the trial phase. The Prosecution also omits the extent to which this definition would ensure full respect for the rights of Mr. Yekatom.

9. The above non-exhaustive examples shed light on the significant misunderstandings and differences of view between the Prosecution and the Defence regarding the adoption of the proposed protocol.

10. Taking into consideration the significant consequences of the adoption of the proposed protocol on the fair and expeditious conduct of the proceedings, additional submissions are required for the purpose of better assisting the Pre-Trial Chamber and ensuring that all issues are clarified before adoption of the protocol.

11. The preferred option in this regard would be for the Pre-Trial Chamber to order and schedule further *inter partes* consultations. Such consultations could take place in the course of a regular hearing before the Pre-Trial Chamber or take place in the form of out of court consultations with the Pre-Trial Chamber being apprised of the result thereof within a short and fixed period of time thereafter. To ensure the success of such out of court consultations and considering the importance of the matter, the Defence posits that a representative of the Pre-Trial Chamber should chair and guide the work of the parties, thereby ensuring an objective process and the best possible output addressing all contentious issues. Such consultations could also involve the Victims and Witnesses Unit representatives who are specifically referred to in the proposed protocol.

12. As an alternative, the Defence seeks leave to present additional submissions to address and clarify the erroneous arguments and mischaracterisation of the Defence Response in the Prosecution Reply.

¹⁰ Prosecution Reply, para 12.

13. Lastly, the fact that the Prosecution opted not to address certain Defence submissions – in particular, the procedure applicable when meeting any potential witness¹¹ – further illustrates the need for additional submissions or consultations before the protocol sought is adopted.

14. At this early stage of the proceedings, considering that the Prosecution has not yet begun fulfilling its disclosure obligations and bearing in mind that the Prosecution's intent to join its case against Ngaïssona to the present proceedings, the Defence respectfully submit that holding further *inter partes* consultations at this time would neither prejudice the parties nor the expeditious conduct of the proceedings. Furthermore, it is in the interest of justice as well as in line with the principle of judicial economy that such consultations take place before the protocol sought is adopted.

CONCLUSION AND RELIEF SOUGHT

15. The Prosecution Reply in conjunction with the above submissions illustrate the need for additional submissions to the Pre-Trial Chamber before the intended protocol on the handling of confidential information and contact with witnesses can be adopted. Accordingly, the Defence proposes the scheduling of additional *inter partes* consultations or, in the alternative, leave to submit additional submissions to address the defects in the Prosecution Reply.

16. Consequently, the Defence respectfully requests the Single Judge to:

CONSIDER the present Defence Request for Additional Submissions or Consultations; and

ORDER the scheduling of further *inter partes* consultations chaired by a representative of the Trial Chamber; or, in the alternative,

¹¹ Defence Proposed Protocol, paras 28-29.

GRANT the Defence leave to submit additional submissions following the filing of the Prosecution Reply.

RESPECTFULLY SUBMITTED ON THIS 21st DAY OF JANUARY 2019

A handwritten signature in black ink, appearing to read 'StB' with a small flourish at the end.

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

The Hague, the Netherlands