

**Cour
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**International
Criminal
Court**



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Date: **23 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***

Corrected Version of “Public Redacted Version of ‘Defence’s Observations on the Registry French language proficiency assessment of Mr Yekatom (ICC-01/14-01/18-42-Conf-Anx) and response to the Prosecution’s 17 December 2018 Request for an Order on YEKATOM’s French Proficiency Level (ICC-01/14-01/18-34)’, 7 January 2019” (ICC-01/14-01/18-48-Red), 14 January 2019

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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Further to the Prosecution's Request for an Order on Yekatom's French Proficiency Level on 17 December 2018, the Order to Conduct a French Language Proficiency Assessment of Alfred Yekatom issued by the Single Judge on 18 December 2018 ("Order"), and the Registry Transmission of French Language Proficiency Assessment of Alfred Yekatom filed on 24 December 2018 ("Language Assessment Report"), Counsel representing Mr. Alfred Rombhot Yekatom ("Defence" or "Mr. Yekatom",) hereby submit this:

**Defence's Observations on the Registry French Language Proficiency Assessment
of Alfred YEKATOM (ICC-01/14-01/18-42) and Response to Prosecution 17
December 2018 Request for an Order on Yekatom's French Proficiency Level.
("Observations")**

INTRODUCTION

1. The Defence respectfully submits that in light of the Language Assessment Report, the Chamber should find Mr. Yekatom not proficient in French for the purpose of the Statute, Rules of Procedure and Evidence ("Rules"), and Regulations of the Court ("Regulations"). The Registry's Language Assessment Report assessment conclusions have direct implications on the fairness of the proceedings. Mr. Yekatom's inability to fully understand and speak the language has inevitable repercussions on the fairness and expeditiousness of the proceedings, the judicial economy and the disclosure of information, evidence and documents. Those interests are intertwined and underpin Mr. Yekatom's fundamental rights. In order to safeguard his rights to a fair and expeditious trial, as well as in the interest of judicial economy, the Chamber should craft a framework providing – and facilitating the provision of – translation and interpretation assistance that can, in view of the peculiarities of Mr. Yekatom's language ability, sufficiently accommodate his needs to effectively prepare his defence.

PROCEDURAL BACKGROUND

2. On 17 November 2018, Mr. Yekatom was surrendered to the International Criminal Court (“Court”) pursuant to the arrest warrant issued by the Pre-Trial Chamber (“Chamber”) on 11 November 2018.¹

3. On 23 November 2018 during his initial appearance, Mr. Yekatom stated that his French proficiency is limited and that he prefers Sango.²

4. On 17 December 2018, the Prosecution requested the Single Judge to find Mr. Yekatom fully proficient in French for all statutory purposes, and to order, if necessary, a language proficiency assessment to facilitate the determination.³ Alternatively, the Prosecution requested that should the Pre-Trial Chamber determine that Mr. Yekatom “does not ‘fully’ understand or speak French”, he should be provided with translation and/or interpretation services commensurate with his demonstrated needs, rather than receiving “written translation of *all* filings and witness statements into Sango”.⁴

5. On 18 December 2018, the Single Judge directs the Registry to conduct such an assessment, and invites the parties to submit observations on the outcome. The Single Judge also orders the Defence to include in the same observations its response to the Prosecution Request.⁵

6. On 24 December 2018, the Registry transmitted the Language Assessment

¹ Warrant of Arrest for Alfred Yekatom, ICC-01/14-01/18-1-US-Exp, 11 November 2018.

² ICC-01/14-01/18-T-1-ENG, p. 6. See also, Expedited Request on Behalf of Mr. Yekatom Seeking Immediate Disclosure of the Prosecutor’s Application for Issuance of a Warrant of Arrest, ICC-01/14-01/18-29-Conf-Exp, 11 December 2018, paras 25, 32, 34

³ Prosecution’s Request for an Order on YEKATOM’s French Proficiency Level, ICC-01/14-01/18-34, 17 December 2018 (“Prosecution Request”).

⁴ Prosecution Request, para. 10.

⁵ Order to Conduct a French Language Proficiency Assessment of Alfred Yekatom, ICC-01/14-01/18-36, 18 December 2018, corrected as Corrigendum of “Order to Conduct a French Language Proficiency Assessment of Alfred Yekatom”, ICC-01/14-01/18-36-Corr, 19 December 2018 (“Order”).

Report, which encompasses Mr. Yekatom's proficiency in [REDACTED].⁶

7. On 4 January 2019, the Prosecution and the Defence conferred and agreed that in light of the assessment, disclosure could be done in the French subject to and Mr. Yekatom being provided with the permanent assistance of a French and Sango interpreter within the meaning of Article 67(1)(f).

SUBMISSIONS

A. Observations of the Assessment Report

8. In accordance with the Order, the Language Services Section of the Registry of the Court appointed a Panel to conduct a language assessment of Mr. Yekatom. The Panel assessed Mr. Yekatom's speaking, listening and reading proficiency levels in French. [REDACTED].⁷

i) Mr. Yekatom's speaking comprehension in French

9. The tests conducted by the Panel demonstrate that Mr. Yekatom can have a normal day-to-day conversation in French. The Panel assessed his oral communication and comprehension skills at [REDACTED] Level when having a "light" conversation, *i.e.*, transport and photograph description.⁸ However, the Panel noted that Mr. Yekatom [REDACTED].⁹

ii) Mr. Yekatom's listening comprehension in French

10. When assessing Mr. Yekatom's listening comprehension in French through a video clip on a random and simple subject, the Panel came to similar conclusions, whereby placing his oral comprehension skill at B2 level.

⁶ Registry Transmission of French Language Proficiency Assessment of Alfred Yekatom, ICC-01/14-01/18-42, 24 December 2018; Annex to Registry Transmission of French Language Proficiency Assessment of Alfred Yekatom, ICC-01/14-01/18-42-Conf-Anx, 24 December 2018 ("Language Assessment Report").

⁷ Language Assessment Report, p. 1.

⁸ Language Assessment Report, p. 3.

⁹ Language Assessment Report, p. 3.

iii) Mr. Yekatom's reading comprehension in French

11. When given a text in French to read aloud, Mr. Yekatom was observed to have occasionally made some pronunciation errors, however, his reading was fluid and clear. Notably, however, the Panel noticed that [REDACTED].¹⁰ The Panel placed Mr. Yekatom at [REDACTED] when assessing his reading comprehension in French.¹¹

12. The Panel concluded that:

Mr Yekatom is able to read and generally understand written French. However, [REDACTED].¹²

iv) [REDACTED]

13. [REDACTED].[REDACTED].¹³[REDACTED].¹⁴

v) Mr. Yekatom's oral and listening comprehension in Sango

14. Mr. Yekatom fully speaks Sango and fully understands spoken Sango. Unfortunately, the Panel did not assess his oral communication and comprehension skills. Had it done so, Mr. Yekatom's oral communication and comprehension would have likely been rated at C1 or C2 level.

15. Sango is the language normally spoken by Mr. Yekatom in everyday life in the CAR unless he is interacting with a French Speaker.

B. The Pre-Trial Chamber should find Mr. Yekatom lacks language proficiency for statutory purposes

16. As demonstrated through the Panel's various tests and the Registry's Language Assessment Report, Mr. Yekatom's reading and understanding capacity in French, albeit on familiar topic, is not proficient. Mr. Yekatom[REDACTED].

¹⁰ Language Assessment Report, p. 2.

¹¹ Language Assessment Report, p. 3.

¹² Language Assessment Report, p. 3 (emphasis added).

¹³ Language Assessment Report, p. 2.

¹⁴ Language Assessment Report, p. 3.

17. Thus, Mr. Yekatom's overall command of French suggests that he is not "fully" proficient for the 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.

18. Indeed, Mr. Yekatom can engage in discussions in French in "familiar context".¹⁵ His oral communication and comprehension skills in this context are placed at [REDACTED] level while his reading comprehension of written French is at [REDACTED].¹⁶ Nevertheless, speaking fluent "colloquial French", understanding "journalists' French" and being at ease "in French in a familiar context"¹⁷ only indicates Mr. Yekatom's general language abilities. It is self-evident that international criminal proceedings where one's liberty and life are at stake can by no means be qualified as a "familiar context".

19. Within the statutory framework of the Court,¹⁸ the language proficiency is not merely Mr. Yekatom's general language abilities but specifically his ability to undertake tasks required in the context of a complex criminal trial, such as the ability to inform himself in detail of the nature, cause and content of the charges against him, to respond to questions regarding allegations of war crimes and crimes against humanity, to critically evaluate the evidential materials placed before him, and to review, comment and approve or reject submissions prepared by his Defence team.¹⁹

¹⁵ Language Assessment Report, p. 3.

¹⁶ Language Assessment Report, p. 3.

¹⁷ Language Assessment Report, p. 3.

¹⁸ Article 67(1); Rules 42 and 76(3); Regulation 40(2), 40(6), 93(1) and 93(2).

¹⁹ *Bemba*, Decision on the Defence's Request Related to Language Issues in the Proceedings, ICC-01/05-01/08-307, 4 December 2008 ("Bemba Decision"), para 16; *Karadžić*, IT-95-5/18-AR73.3, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Prosecution Motion Seeking Determination that the Accused Understands English, 4 June 2009, para 13; *Katanga & Ngudjolo*, Decision on the Defence for Mathieu Ngudjolo Chui's Request Concerning Translation of Documents, ICC-01/04-01/07-477, 15 May 2008 ("Katanga & Ngudjolo Pre-Trial Decision"), para 3, citing ECtHR, *Hermi v. Italy*, App No. 18114/02, Judgment, 18 October 2006, para 71; *Tolimir*, IT-05-88/2-AR73.1, Decision on Interlocutory Appeal Against Oral Decision of the Pre-Trial Judge of 11 December 2007, 28 March 2008, para 15.

20. While the Appeals Chamber held that it suffices if an accused has a level of fluency “in ordinary, non-technical conversations”,²⁰ the term “conversations” in this context shall not be narrowly construed as oral exchanges of observations, opinions or ideas; rather, one’s capacity to comprehend observations, opinions and ideas in written form is equally vital. Therefore, the Prosecution’s emphasis on Mr. Yekatom’s command of spoken French is superfluous and misplaced.²¹

21. Indeed, the Language Assessment Report identifies discrepancies between [REDACTED].²² In particular, the Assessment Report observes that Mr. Yekatom “[REDACTED]” and that he [REDACTED].²³ Whereas one of the hallmarks of a “full” understanding is to comprehend “without deficiency”, the level of fluency exhibited by Mr. Yekatom clearly falls short of the “very high” standard set out in Article 67(1)(a).²⁴

22. Mr. Yekatom’s day-to-day language is Sango. Whereas Sango is a working language of the Special Criminal Court in the CAR, the facilities and assistance necessary to meet the requirements of fairness would be considerably more accessible to Mr. Yekatom.

C. Mr. Yekatom should receive translation and interpretation assistance

23. In light of his lack of language proficiency for statutory purposes, Mr. Yekatom is entitled to receive translation and interpretation assistance that are necessary for the realisation of his fair trial rights.²⁵ It is important to determine what

²⁰ *Katanga and Ngudjolo*, Judgment on the Appeal of Mr. Germain Katanga Against the Decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, ICC-01/04-01/07-522, 27 May 2008 (“Katanga Appeal Decision”), para 3, cited by Prosecution Request, paras 3 and 6.

²¹ Prosecution Request, paras 3-5, citing videos listed in Annex A to Prosecution Request. These clips were indeed evaluated by the Panel. See Language Assessment Report, pp. 2-3.

²² Language Assessment Report, pp. 1-2.

²³ Language Assessment Report, pp. 2 and 3.

²⁴ Katanga Appeal Decision, para 40, referencing the definition of “fully” in the online Oxford English Dictionary (“[i]n a full manner or degree; to the full, without deficiency; completely, entirely; thoroughly, exactly, quite”).

²⁵ Article 67(1)(f).

translation and/or interpretation services he should obtain to meet the requirement of fairness.

24. Considering [REDACTED],²⁶ the Defence accepts, in the interest of an expeditious trial and the judicial economy, not to receive the written translation of all filings and witness statements into Sango. The Defence is ready to accept receiving disclosure in the original with at least a version in French. This is, however, subject to the following caveats.

i) Permanent French-Sango interpreter

25. In its respectful submission, the Defence considers the permanent assistance of an interpreter is a remedy that better suits Mr. Yekatom's needs. This is echoed by the Prosecution's suggestion throughout its Request that oral interpretation, for example, through an interpreter available to Mr. Yekatom, could greatly facilitate the satisfaction of the requirements of fairness.²⁷

26. This proposal was therefore the subject of a consultation between the Defence and the Prosecution, where the latter agreed that in view of the Registry's Language Assessment Report, the permanent assistance of an interpreter was warranted and necessary.²⁸

27. The necessity and utility of the permanent assistant of an interpreter was recognised by both parties and is consistent with the practice of other cases before the Court.

28. In *Bemba*, the Single Judge held that the requirements of fairness means the suspect should enjoy the right to interpretation into a language he fully understands and speaks throughout the whole proceedings:

²⁶ Language Assessment Report, pp. 2-3.

²⁷ Prosecution Request, paras 11, 17, 20.

²⁸ Email available upon request.

[T]he use of the phrase “as are necessary to meet the requirements of fairness” in article 67(l)(f) of the Statute shall not be read as granting [the suspect] the right to have all evidentiary material disclosed by the Prosecutor and all documents in the proceedings translated into the language he fully understands and speaks. Rather, in accordance with article 67(l)(a) and (f) of the Statute, [the suspect] should enjoy the right to interpretation throughout the whole proceedings but is only entitled to receive the [...] translation of such documents that inform him in detail of the nature, cause and content of the charges brought against him.²⁹

29. In *Lubanga*, the Single Judge found that Mr. Lubanga “would greatly benefit from the permanent assistance of a French interpreter in order to facilitate his adequate knowledge of the evidentiary materials and procedural documents filed by the Prosecution, as well as his proper understanding of the decisions and orders of the Chamber pending their official written translations”.³⁰ The Single Judge consequently ordered “the Registrar to have permanently available and free of any cost, a French interpreter to assist Thomas Lubanga Dyilo and the Defence team for the purpose of the confirmation hearing with documents of the case which are available only in English”.³¹

30. Recalling the *Lubanga* reasoning, Pre-Trial Chamber I granted the same arrangement for the permanent assistance of an interpreter in the cases of *Katanga*³² and *Ngudjolo*.³³ In *Ngudjolo*, Pre-Trial Chamber I additionally allowed Mr. Ngudjolo to have the assistance of an interpreter available sooner than the initially envisaged 24-hour notice.³⁴

²⁹ Bemba Decision, para 16 (emphasis added).

³⁰ *Lubanga*, Decision on the Requests of the Defence of 3 and 4 July 2006, ICC-01/04-01/06-268, 5 August 2006 (“*Lubanga Decision*”), pp. 5–7, canvassing ICTY and ECtHR jurisprudence.

³¹ *Lubanga Decision*, p. 8.

³² *Katanga*, Decision on the Defence Request Concerning Languages, ICC-01/04-01/07-127, 21 December 2007, para 43.

³³ *Ngudjolo*, Decision on the Defence Request Concerning Time Limits, ICC-01/04-01/07-304, 27 February 2008, pp. 4 and 7.

³⁴ *Katanga & Ngudjolo Pre-Trial Decision*, p. 6.

31. The Defence therefore respectfully requests the Pre-Trial Chamber to declare that Mr. Yekatom is entitled to have at his disposal the permanent available and free of any cost French-Sango interpreter to assist Mr. Yekatom as well as his Defence team.

32. Given the nature of the interpreter's work as well as the foreseeably high frequency and long duration of his/her meeting with Mr. Yekatom, the Defence respectfully requests the interpreter to be allowed unsupervised visit in the Detention Centre on a par with an assistant appointed pursuant to Rule 22; that is, unsupervised visit regardless if the Counsel is also present.³⁵

ii) Expedited translation of court records

33. The Defence specifically requests the Registry's timely provision of French translations of filings in the present case. This will make it easier for the Counsel to familiarise Mr. Yekatom with the content of material issues and decisions. The requested accommodation is reasonable and is well within the capacity of the Registry's Language Service Section. It would contribute to the expeditious conduct of the proceedings.

34. The Prosecution also agreed to this accommodation during the consultationS.

iii) Additional translation of discrete material

35. Mr. Yekatom reserves his right to request for additional translation in Sango of certain material or a discrete portion thereof in the event that Mr. Yekatom finds the regular framework of assistance, including that from an interpreter, still proves insufficient for his understanding of the material for the purpose of preparing for his defence.

³⁵ Regulation 97(2): "All communication between a detained person and his or her defence counsel or assistants to his or her defence counsel [...] shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre." (emphasis added).

36. As the Appeals Chamber noted in *Katanga*, it is the accused who best determines his level of understanding therefore credence should be given to his claim that cannot fully understand and speak the language of the Court.³⁶ By the same token, the Defence submits the Chamber should give credence to any claim by Mr. Yekatom of his inability to understand specific material due to linguistic reasons. Unless it is established beyond a reasonable doubt that the claim is fraudulent and an abuse of Article 67(1), the request for additional translation should be granted in principle.³⁷

37. Since its purpose is to facilitate the understanding of discrete material or a portion thereof, the translation request would be intrinsically confined. The requested accommodation is, again, reasonable and well within the capacity of the Registry's Language Service Section. This would be subject to detailed submissions when the occasion arises.

D. Additional remedies warranted by the prejudicial effect

38. There is a limitation to interpretation and translation inherent in the intricacy of any language: second-hand interpretation and translation could turn out to be mistaken ergo misleading when the interpreter is not privy to the context or to the exact words used in the original speech. Consequently, Mr. Yekatom is still seriously prejudiced notwithstanding the arrangements proposed above.

39. During the consultation with the Prosecution on 4 January 2019, the Defence was informed that the prospective witnesses are Sango- and/or French-speaking but their signed statements are and will only be in either English or French. The Prosecution further specified that in the event the signed statement is in English, it would be disclosed in English together with a French translation. On the other hand, when the signed statement is in French, disclosure will be limited to the French

³⁶ Katanga Appeal Decision, para 59.

³⁷ *Katanga*, Decision on a Number of Procedural Issues Raised by the Registry, ICC-01/04-01/07-1134, 14 May 2009, para 43.

version. It is not a standard Prosecution practice to prepare statements in the original language used by the witness.

40. The information available concerning the language used during witness interviews conducted by the Prosecution – all be it limited – and not directly related to the issue at hand – raises serious issues concerning the examination and cross-examination of witnesses at trial, which, in turn have the potential to impact the fairness of the proceedings. The Defence intends to address these issues in subsequent filings, following additional consultations with the Prosecution. In this regard, any Decision or Order issued by the Pre-Trial Chamber in relation to the Prosecution Request should be without prejudice to future Defence applications or requests.

CONFIDENTIALITY

41. The Observations is filed on a confidential basis due to the references to the findings in the confidential Language Assessment Report. Public redacted versions will be filed forthwith.

RELIEF SOUGHT

42. In light of the above, the Defence respectfully requests the Single Judge to exercise its discretion and:

DECLARE that Mr. Yekatom is not proficient in French for purposes of the Article 67(1)(a) and (f) of the Statute and Rule 76 (3);

ORDER the Registry to appoint a French-Sango interpreter to assist Mr. Yekatom and the Defence team, on a permanent basis for the duration of the proceedings;

DIRECT the Registry to take measures in order to provide expedited French translation in this case.

RESPECTFULLY SUBMITTED ON THIS 7TH 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