

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **20 August 2019**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Motion for Review and Reclassification of *Ex Parte* Filings

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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Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

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REGISTRY

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Victims and Witnesses Unit

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**Victims Participation and Reparations
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully request that the Pre-Trial Chamber, prior to the confirmation hearing, review all *ex parte* filings in this case, seek submissions from the party making the *ex parte* filings as to the continuing need for keeping the filing, or parts thereof, secret from the Defence, and reclassify those that can now be shared with the Defence and/or the public.

RELEVANT PROCEDURAL HISTORY

2. On 30 October 2018, the Prosecution applied, *ex parte*, for warrants of arrest for Alfred Yekatom¹ and Patrice-Edouard Ngaïssona.²
3. Mr. Yekatom was arrested in the Central African Republic on 29 October 2018 and arrived at the Detention Centre on 18 November 2018.³ Mr. Ngaïssona was arrested in France on 12 December 2018 and arrived at the Detention Centre on 23 January 2019.⁴
4. On 11 December 2018, Mr. Yekatom requested disclosure of the application for his arrest warrant.⁵ The Pre-Trial Chamber denied the request the next day.⁶
5. On 23 April 2019, Mr. Yekatom requested reconsideration.⁷ The Prosecution objected,⁸ and on 8 May 2019, the Pre-Trial Chamber denied the request.⁹

¹ [ICC-01/14-01/18-1-Red](#), para. 2.

² [ICC-01/14-02/18-2-Red](#), para. 2.

³ [ICC-01/14-01/18-15](#), para. 4.

⁴ [ICC-01/14-02/18-99-Corr](#), para. 4.

⁵ [ICC-01/14-01/18-29-Conf-Exp](#).

⁶ [ICC-01/14-01/18-31-Conf](#).

⁷ [ICC-01/14-01/18-180-Conf](#).

⁸ [ICC-01/14-01/18-188-Conf-Red](#).

⁹ [ICC-01/14-01/18-190](#). Leave to appeal this decision was denied on 27 May 2019 ([ICC-01/14-01/18-211](#)).

6. Other *ex parte* filings have been made in the case in addition to the Application for Arrest Warrant. A review of the docket indicates that the following filings have not been made available to Mr. Yekatom:

- (1) ICC-01/14-01/18-2
- (2) ICC-01/14-01/18-3
- (3) ICC-01/14-01/18-4
- (4) ICC-01/14-01/18-5-US-Exp-AnxA
- (5) ICC-01/14-01/18-6
- (6) ICC-01/14-01/18-7-US-Exp-AnxA
- (7) ICC-01/14-01/18-14
- (8) ICC-01/14-01/18-17-US-Exp-AnxV
- (9) ICC-01/14-01/18-17-US-Exp-AnxIX
- (10) ICC-01/14-01/18-17-US-Exp-AnxX
- (11) ICC-01/14-01/18-17-US-Exp-AnxXI
- (12) ICC-01/14-01/18-22
- (13) ICC-01/14-01/18-26
- (14) ICC-01/14-01/18-28
- (15) ICC-01/14-01/18-28-Conf-Exp-AnxA
- (16) ICC-01/14-01/18-30
- (17) ICC-01/14-01/18-38
- (18) ICC-01/14-01/18-69-Conf-Exp-AnxA
- (19) ICC-01/14-01/18-78-Conf-Exp-AnxA
- (20) ICC-01/14-01/18-88
- (21) ICC-01/14-01/18-92
- (22) ICC-01/14-01/18-93
- (23) ICC-01/14-01/18-94
- (24) ICC-01/14-01/18-95
- (25) ICC-01/14-01/18-96
- (26) ICC-01/14-01/18-97
- (27) ICC-01/14-01/18-100-Conf-Exp-AnxIII
- (28) ICC-01/14-01/18-101
- (29) ICC-01/14-01/18-107
- (30) ICC-01/14-01/18-108
- (31) ICC-01/14-01/18-114
- (32) ICC-01/14-01/18-115
- (33) ICC-01/14-01/18-119
- (34) ICC-01/14-01/18-125
- (35) ICC-01/14-01/18-133-Conf-Exp-AnxII
- (36) ICC-01/14-01/18-133-Conf-Exp-AnxIII
- (37) ICC-01/14-01/18-134
- (38) ICC-01/14-01/18-135

- (39) ICC-01/14-01/18-136
- (40) ICC-01/14-01/18-138
- (41) ICC-01/14-01/18-140-Conf-Exp-AnxIII
- (42) ICC-01/14-01/18-142
- (43) ICC-01/14-01/18-146
- (44) ICC-01/14-01/18-164
- (45) ICC-01/14-01/18-166
- (46) ICC-01/14-01/18-170-Conf-Exp-AnxA
- (47) ICC-01/14-01/18-170-Conf-Exp-AnxB
- (48) ICC-01/14-01/18-173
- (49) ICC-01/14-01/18-174
- (50) ICC-01/14-01/18-178-Conf-Exp-AnxII
- (51) ICC-01/14-01/18-178-Conf-Exp-AnxIII
- (52) ICC-01/14-01/18-179-Conf-Exp-AnxA
- (53) ICC-01/14-01/18-179-Conf-Exp-AnxB
- (54) ICC-01/14-01/18-186-Conf-Anx
- (55) ICC-01/14-01/18-207
- (56) ICC-01/14-01/18-209
- (57) ICC-01/14-01/18-209-Conf-Exp-AnxA to J
- (58) ICC-01/14-01/18-216-Conf-Exp-Anx
- (59) ICC-01/14-01/18-217
- (60) ICC-01/14-01/18-218-Conf-Exp-AnxI
- (61) ICC-01/14-01/18-222-Conf-Exp-Anx1 to 74
- (62) ICC-01/14-01/18-225
- (63) ICC-01/14-01/18-228
- (64) ICC-01/14-01/18-234
- (65) ICC-01/14-01/18-237-Conf-Exp-AnxA
- (66) ICC-01/14-01/18-237-Conf-Exp-AnxB
- (67) ICC-01/14-01/18-240
- (68) ICC-01/14-01/18-242
- (69) ICC-01/14-01/18-244
- (70) ICC-01/14-01/18-245-Conf-Exp-Anx1 to 161
- (71) ICC-01/14-01/18-246
- (72) ICC-01/14-01/18-258-Conf-Exp-Anx1 to 150
- (73) ICC-01/14-01/18-267-Conf-Exp-AnxA to O
- (74) ICC-01/14-01/18-273
- (75) ICC-01/14-01/18-276
- (76) ICC-01/14-01/18-279

7. Mr. Yekatom has also not had access to transcripts of *ex parte* hearings.

RELEVANT PROVISION

8. Regulation 23 *bis* – filing of confidential documents:

1. Any document filed by the Registrar or a participant and marked “*ex parte*”, “under seal” or “confidential”, shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.
2. Unless otherwise ordered by a Chamber, any response, reply or other document referring to a document, decision or order marked “*ex parte*”, “under seal” or “confidential” shall be filed with the same classification. If there are additional reasons why a response, reply or any other document filed by the Registrar or a participant should be classified “*ex parte*”, “under seal”, or “confidential”, or reasons why the original document or other related documents should not be so classified, they shall be provided in the same document.
3. Where the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to reclassify the document. **A Chamber may also re-classify a document upon request by any other participant** or on its own motion. In the case of an application to vary a protective measure, regulation 42 shall apply.
4. This regulation shall apply *mutatis mutandis* to proceedings before the Presidency. (emphasis added)

ARGUMENT

9. The *Chambers Practice Manual* provides in pertinent part:

At the latest from the moment of the first appearance, the Defence acquires all procedural rights and becomes a party to proceedings that have thus far been conducted *ex parte*. For this reason, the Pre-Trial Chamber should conduct a review of the record of the case and make available to the Defence as many documents as possible, and, at a minimum, and without prejudice to the necessary protective measures, the Prosecutor’s application under article 58 of the Statute and any accompanying documents.¹⁰

10. The Trial Chamber in the *Ntaganda* case reviewed all the filings in the case record that had not been provided to the Defence. It also affirmed that “it is

¹⁰ [Chambers Practice Manual](#) (16 February 2016), p. 8, adopted by [Chambers Practice Manual](#) (May 2017), p. 8.

usual practice to consider *proprio motu* whether redactions or *ex parte* or confidential classifications of any transcript remain necessary”.¹¹ The Pre-Trial Chamber should engage in this same exercise prior to the confirmation hearing to ensure that the Defence is not placed at a disadvantage vis-à-vis the Prosecution at the hearing. This is required by the principle of equality of arms.¹²

11. When conducting the review, it is respectfully requested that the Chamber keep in mind that *ex parte* proceedings should be exceptional, only used when truly necessary and when no alternative procedures are available, and be proportionate given the potential prejudice to the accused.¹³ The Chamber should not be provided with any information on an *ex parte* basis purely for its information.¹⁴
12. It appears that many of the *ex parte* filings relate to the execution of the arrest warrant, or searches conducted incident thereto, and information that might reveal the identity of others, suspects in the case or cooperating with the Prosecution. The Chamber should reassess, in light of the passage of time, the lack of interference with witnesses, and the additional information now provided in the Document Containing the Charges, whether the reasons for the *ex parte* status of the filing remain viable.¹⁵

¹¹ *Prosecutor v. Ntaganda*, Decision on Defence request for access to *ex parte* material, [ICC-01/04-02/06-1826](#), 16 March 2017, paras 7, 10.

¹² *Prosecutor v. Katanga*, Judgment pursuant to Article 74 of the Statute, [ICC-01/04-01/07-3436-tENG](#), 7 March 2014, para. 1572.

¹³ *Prosecutor v. Bemba*, Decision on the Defence’s Request for Access to Filings in case ICC-01/05-01/08, [ICC-01/05-01/08-3630](#), 7 May 2018, para. 12; *Prosecutor v. Lubanga*, Decision on the procedures to be adopted for *ex parte* proceedings, [ICC-01/04-01/06-1058](#), 6 December 2007, para. 12; *Prosecutor v. Ntaganda*, Decision on expedited Defence request for reclassification of *ex parte* documents, [ICC-01/04-02/06-2230](#), 15 February 2018, para. 8.

¹⁴ *Prosecutor v. Lubanga*, Decision on the procedures to be adopted for *ex parte* proceedings, [ICC-01/04-01/06-1058](#), 6 December 2007, para. 13.

¹⁵ The continued maintenance under seal of the reasons for the effort to disqualify Mr. Yekatom’s counsel also appears to be unnecessary (ICC-01/14-01/18-14-Conf-Exp, not available to Defence). The Prosecution could not have had a reasonable expectation that its effort to point out a potential conflict of interest of defence counsel will forever remain confidential.

13. Mr. Yekatom specifically requests that the Chamber reassess whether it remains necessary to retain under seal the warrants of arrest for other suspects included in the 30 October 2018 application for arrest warrants. After the passage of almost one year, those suspects are likely well aware of the existence of the warrants of arrest, and no further purpose remains for maintaining those warrants under seal. In fact, public knowledge of the arrest warrants may generate international pressure on the State where the suspects are found to transfer them to the Court.
14. On the other hand, the Defence is prejudiced by maintaining the identities of the co-suspects under seal because persons who the Defence have sought to interview in preparation of the confirmation hearing have been reluctant to cooperate, speculating that they are the ones named in the arrest warrant. These persons do not want to prejudice their own "case" by providing an interview to the Defence.
15. The Pre-Trial Chamber is respectfully requested to conduct a fresh review of the record of the case, and now make available to the Defence as many documents and transcripts, or portions thereof, as possible.

RESPECTFULLY SUBMITTED ON THIS 20TH DAY OF AUGUST 2019



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