

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

Public Redacted Version of Motion for Disclosure of Rule 76 Material

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

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Me Mylène Dimitri

Mr. Peter Robinson

Counsel for Mr. Ngaïssona

Me Geert-Jan Alexander Knoops

Legal Representatives of Victims

Mr. Dmytro Suprun

Mr. Abdou Dangabo Moussa

Mr. Elisabeth Rabesandratana

Mr. Yaré Fall

Ms. Marie-Edith Douzima-Lawson

Ms. Christine Priso Ouamballo

Ms. Paolina Massidda

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**

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully moves for an order directing the Prosecution to disclose all items encompassed by Rule 76 of the Rules of Procedure and Evidence, including (1) screening notes; (2) items provided by or shown to the witness; (3) other information from the witness; (4) and statements in the possession of third parties. By “witness”, Mr. Yekatom refers to all persons whose information is to be relied upon by the Prosecution at the confirmation hearing.¹

RELEVANT PROCEDURAL HISTORY

2. On 11 November 2018, the Pre-Trial Chamber issued a warrant of arrest for Alfred Yekatom, charging him with crimes against humanity and war crimes allegedly committed in the Central African Republic between 5 December 2013 and August 2014.²
3. Mr. Yekatom made his initial appearance on 23 November 2018.³
4. On 14 December 2018, the Single Judge issued a decision seeking observations for the purposes of establishing a disclosure calendar.⁴
5. On 21 December 2018, the Prosecution filed its observations,⁵ and requested the adoption of a redaction protocol.⁶ The Defence filed its observations on 28

¹ *Prosecutor v. Lubanga*, Decision on the Final System of Disclosure and the Establishment of a Timetable, [ICC-01/04-01/06-102](#), 16 May 2006, p. 6.

² [ICC-01/14-01/18-1-Red](#), para. 25.

³ [ICC-01/14-01/18-T-1-ENG](#).

⁴ [ICC-01/14-01/18-33](#).

⁵ [ICC-01/14/01/18-40-Conf](#).

⁶ [ICC-01/14-01/18-39](#).

December 2018,⁷ and responded to the proposed redaction protocol 7 January 2019.⁸

6. On 23 January 2019, the Single Judge issued its *Decision on Disclosure and Related Matters*, which included a redaction protocol.⁹
7. Disclosure commenced on 28 January 2019,¹⁰ and has continued throughout the period leading to the confirmation hearing.¹¹ The Defence has contacted the Prosecution on many occasions in an effort to informally resolve disclosure and redaction issues.¹²
8. On 20 February 2019, the Pre-Trial Chamber joined the case of Mr. Yekatom with that of Patrice-Edouard Ngaïssona, who had been arrested and transferred to the Court in the meantime.¹³
9. On 11 March 2019, Mr. Ngaïssona filed his observation on disclosure issues.¹⁴ The Prosecution responded on 23 March 2019,¹⁵ and on 4 April 2019, the Pre-Trial Chamber issued its *Second Decision on Disclosure and Related Matters*.¹⁶

⁷ [ICC-01/14-01/18-45-Conf.](#)

⁸ [ICC-01/14-01/18-47.](#)

⁹ [ICC-01/14-01/18-64-Red](#), para. 33. Leave to appeal this decision was denied on 8 February 2019 ([ICC-01/14-01/18-79](#)).

¹⁰ [ICC-01/14-01/18-72.](#)

¹¹ [ICC-01/14-01/18-122](#), [ICC-01/14-01/18-159](#), [ICC-01/14-01/18-185](#), [ICC-01/14-01/18-191](#), [ICC-01/14-01/18-202](#), [ICC-01/14-01/18-221](#), [ICC-01/14-01/18-238](#), [ICC-01/14-01/18-251](#), [ICC-01/14-01/18-253](#), [ICC-01/14-01/18-260](#), [ICC-01/14-01/18-268](#), [ICC-01/14-01/18-271](#), [ICC-01/14-01/18-274](#), [ICC-01/14-01/18-278](#).

¹² The first meeting was initiated by the Defence and took place on 30 April 2019 where Senior Trial Attorney Kweku Vanderpuye and then Counsel Stéphane Bourgon discussed the issue of disclosure of items provided by or shown to the witness. The first *inter partes* disclosure request was sent on 1 May 2019 and follow-up telephone conversations were initiated by the Defence on 1 May, 15 May, and 17 May 2019 where disclosure and outstanding responses to Defence *inter partes* request were discussed.

¹³ [ICC-01/14-01/18-87](#). Leave to appeal this decision was denied on 21 March 2019 ([ICC-01/14-01/18-154](#)).

¹⁴ [ICC-01/14-01/18-143-Conf.](#)

¹⁵ [ICC-01/14-01/18-155-Red.](#)

¹⁶ [ICC-01/14-01/18-163](#). Leave to appeal this decision was denied on 24 May 2019 ([ICC-01/14-01/18-206](#)).

10. On 15 May 2019, the Pre-Trial Chamber postponed the confirmation hearing until 19 September 2019 at the request of the Prosecution, and ordered disclosure of Article 67(2) material to be completed by 19 August 2019.¹⁷
11. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”).¹⁸

RELEVANT PROVISION

12. Rule 76 – Pre-Trial disclosure relating to prosecution witnesses:

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.
2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.
3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.
4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

ARGUMENT

13. The Prosecution has voluntarily provided a considerable amount of disclosure, but has generally limited its Rule 76 disclosure to the final signed statement of the witness or the final transcript of the audio recording of the witness’ interview. When the Defence has requested other items, the Prosecution has responded that “all other material [...] will be disclosed in accordance with our

¹⁷ [ICC-01/14-01/18-199](#), para. 39.

¹⁸ [ICC-01/14-01/18-282-Conf-AnxB1](#).

disclosure obligations under the Statute, Rules, and Orders of the Chamber”.¹⁹
This motion highlights items that the Prosecution has not agreed to provide.

I. Screening Notes

14. A “screening note” is a report, notes, or transcript of an interview with a potential witness to determine if the witness has information relevant to the Prosecution’s investigation.²⁰ The Appeals Chamber has held that the ordinary meaning of the term “statement” as used in Rule 76 of the Rules is broad and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded.²¹ Trial Chambers in the *Ruto* and *Ntaganda* cases have held that information from screening of Prosecution witnesses must be disclosed pursuant to Rule 76 when they reflect the witness’ answers to relevant questions about the case.²²
15. Screening notes can contain extensive information about the crimes charged. One screening note that has been disclosed provides an example of the type of substantive information provided during a screening exercise. In this 30-page transcript of a recorded screening interview, the witness provided information about his activities during the 5 December 2013 attack in Bangui,²³ his contact with the Anti-Balaka group in the weeks that followed,²⁴ the structure of the

¹⁹ Email from Senior Trial Attorney Kweku Vanderpuye dated 15 July 2019. Email correspondence can be made available to the Chamber upon request.

²⁰ *Prosecutor v. Ruto & Sang*, Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions, [ICC-01/09-01/11-743-Red](#), 20 May 2013, para. 16.

²¹ *Prosecutor v. Banda & Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, [ICC-02/05-03/09-295](#), 17 February 2012, para. 23.

²² *Prosecutor v. Ruto & Sang*, Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions, [ICC-01/09-01/11-743-Red](#), 20 May 2013, para. 20; *Prosecutor v. Ntaganda*, Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses, [ICC-01/04-02-06-904](#), 16 October 2015, para. 29.

²³ CAR-OTP-2042-4970 at 4991 to 4992.

²⁴ CAR-OTP-2042-4970 at 4992.

Anti-Balaka group and identities of its leaders,²⁵ and his contacts with representatives of former President Bozizé.²⁶

16. On some occasions, screening notes were used by the Prosecution investigators to point out a contradiction or inconsistency between the witness' first account during the screening and his or her second account of events set out in his/her statement.²⁷
17. Whilst disclosing some screening notes, the Prosecution has declined to disclose other screening notes, such as those for Witness P-1839, stating that "this document does not fall within a disclosure obligation and hence will not be disclosed".²⁸ When disclosure was sought after another witness made reference to his "first meeting" with OTP investigators,²⁹ the Prosecution responded that "the item [...] does not fall under a disclosure obligation".³⁰
18. The Prosecution cannot claim that screening notes are internal work product. As recognised by the disclosure principles under international criminal procedural law, a statement remains the product of the witness even when it is transcribed or reported by another person. The form it is recorded in bears no relevance to disclosure obligation. As such, the internal work product exemption does not apply to screening notes.³¹

²⁵ CAR-OTP-2042-4970 at 4993.

²⁶ CAR-OTP-2042-4970 at 4994 to 4997.

²⁷ See, e.g., CAR-OTP-2056-0412-R01, para. 83; CAR-OTP-2064-0036-R01, para. 45.

²⁸ Email from Senior Trial Attorney Kweku Vanderpuye dated 15 July 2019.

²⁹ CAR-OTP-2063-0060, para. 55.

³⁰ Email from Senior Trial Attorney Kweku Vanderpuye dated 15 July 2019.

³¹ *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, [Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230](#), 2 June 2017, para. 12, in particular 12(ii), (iii), and (iv). See also *In the Matter of El Sayed*, Case No. CH/AC/2011/01, [Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011](#), 19 July 2011, paras 83-89, in particular 84; *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, [Decision on Disclosure of Witness Statements and Cross-Examination](#), 16 July 2004, paras 8-10; *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, [Judgement](#), 9 July 2004, paras 33-35; *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, [Order to Prosecution to Disclose Documents Relating to Witness PRH707 to the Defence](#), 29 April 2016, paras 3-5; *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, [Decision on the Production of Discovery Materials](#), 27

19. Therefore, the Chamber should order the Prosecution to disclose all screening notes of its witnesses.

II. Items Provided by or Shown to the Witness

20. On several occasions in this case, a witness has provided written material to the Prosecution during the witness' interview. The Prosecution often annexes such material to the witness' statement. However, while providing some annexes, the Prosecution has declined to provide all such material to the Defence on the basis that the Prosecution does not intend to rely on the material *per se* for the confirmation proceedings.³²
21. Examples of material the Prosecution has declined to disclose include a curriculum-vitae for Witness P-0434,³³ letters provided by Witness P-0487 concerning an event that he is not being truthful about and that was discussed at length during the interview,³⁴ and a letter provided by a third witness as an example of the kind of reporting the witness did during the events.³⁵

January 1997, paras 37-38; *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, [Decision on Joint Defence Motion for Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes pursuant to Rules 66 and/or 68](#), 4 May 2005, p. 6; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, [Order to Redact Certain Portions of Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Respect of Witness 81](#), 2 December 2011, Annex A, paras 32-33. See also *Prosecutor v. Nziroera et al.*, Case No. ICTR-98-44-I, [Decision on the Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures](#), 20 October 2003, para. 5; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, [Decision on Joseph Nziroera's Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures](#), 29 November 2007, para. 20; *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-PT, [Decision on Urgent Defence Motion for Disclosure of Prior Statements](#), 31 January 2011, paras 4-5; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, [Decision on Joseph Nziroera's Motion for Inspection of Report on Interahamwe](#), 28 June 2007, para. 12.

³² Email from Senior Trial Attorney Kweku Vanderpuye dated 15 July 2019.

³³ CAR-OTP-2014-0679, para. 17 (referring to Annex 1).

³⁴ CAR-OTP-2076-0318 at 0185, Ins 170-243 (discussing Annexes A1 to A5) and 240-290 (discussing Annexes B1 to B4).

³⁵ CAR-OTP-2088-0782, para. 145.

22. Mr. Yekatom contends that material provided by, or shown to the witness by the Prosecution, when referenced in the statement of the witness, constitutes an integral part of the statement such as to come within Rule 76.
23. By analogy, material referenced in a statement is routinely admitted pursuant to Rule 68 as associated exhibits. In the *Ongwen* case, the Trial Chamber held that prior recorded testimony under Rule 68 includes any annex to the witness' statement, or document otherwise associated with it, that is used or explained by the witness.³⁶ If such material is admissible as an integral part of the witness' statement, surely it must be disclosable as such.
24. Therefore, the Chamber should order the Prosecution to disclose all material provided by or shown to the witness that is referenced in the witness' statement.

III. Other Information from the Witness

25. Information provided by a witness may also exist in forms other than the witness' final statement or audio-recorded interview. The Trial Chamber in the *Ruto* case has held that the definition of "statement" in Rule 76 is sufficiently broad to include records of information provided by a trial witness during an interview, regardless of the question whether such a record would technically qualify as a "statement" of the witness for purposes of impeachment on the stand or submission under Rule 68.³⁷
26. Information from the witness that does not appear in the statement may be recorded in interviewer's notes, draft or unsigned statements, or e-mail correspondence with the witness. In the *Ruto* case, the Prosecution was found to

³⁶ *Prosecutor v. Ongwen*, Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), [ICC-02/04-01/15-600](#), 22 November 2016, para. 10.

³⁷ *Prosecutor v. Ruto & Sang*, Decision on Defence request to be provided with screening notes and Prosecution's corresponding requests for redactions, [ICC-01/09-01/11-743-Red](#), 20 May 2013, para. 20.

have violated its disclosure obligations by failing to disclose a report containing an e-mail from a Prosecution witness.³⁸ In the *Ayyash et al.* case at the Special Tribunal for Lebanon, the Trial Chamber held that investigator's notes and email correspondence with witnesses must be disclosed if they concern the subject matter of the witness' testimony.³⁹ The Chamber noted that all stages of the preparation of a witness statement can be important, as they enable the Chamber and the opposing Party to know how a witness' version has evolved.⁴⁰

27. Therefore, the Chamber should order the Prosecution to disclose all information received from its witnesses concerning the subject matter of their testimony, as reflected in interviewer's notes, draft or unsigned statements, or email correspondence with the witness.

IV. Statements to Third Parties

28. In the *Lubanga* case, the Trial Chamber held that the Prosecution is under an obligation to make its utmost effort to obtain the prior statements of those witnesses on whom the Prosecution intends to rely at the confirmation hearing which have been taken by other entities.⁴¹ In the *Bemba et al.* case, the Trial Chamber held that statements provided by witnesses to entities other than the Prosecution, such as domestic judicial authorities and certain international organisations, may qualify as Rule 76 statements provided the statements involve questioning witnesses about their knowledge of the case in the course

³⁸ *Prosecutor v. Ruto & Sang*, Public redacted version of the Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January 2015, [ICC-01/09-01/11-1774-Red](#), 16 February 2015, paras 13-14.

³⁹ *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, [Decision on Motion by the Badreddine Defence for the Disclosure of Investigators' Notes](#), 13 April 2016; *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, [Order to Prosecution to Disclose Documents Relating to Witness PRH707 to the Defence](#), 29 April 2016.

⁴⁰ *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, [Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230](#), 2 June 2017, para. 12(ii).

⁴¹ *Prosecutor v. Lubanga*, Decision on Defence Requests for Disclosure of Material, [ICC-01/04-01/06-718](#), 17 November 2006, p. 4.

of its investigation. The Chamber held that the Prosecution had an investigative obligation to make sufficient efforts to obtain and disclose such statements.⁴²

29. Events in the Central African Republic that are the subject of this case have likely been investigated by domestic authorities, such as the Special Criminal Court, as well as international authorities (e.g., MINUSCA, the Panel of Experts on the Central African Republic established pursuant to Security Council Resolution 2127, and UN OHCHR's International Commission of Inquiry-Central African Republic), other national authorities (e.g., French Operation Sangaris), and non-governmental organisations such as the Enough Project⁴³ and Human Rights Watch.⁴⁴
30. Whilst there are indications that certain Prosecution witnesses have been interviewed by such organizations,⁴⁵ Mr. Yekatom is not privy to the details of the investigative activities of those bodies, and cannot be expected, at this stage, to specify the occasions on which such interviews have occurred.⁴⁶ The Chamber should order the Prosecution to obtain and disclose any statements of its witnesses taken by those organisations, or any other organisations that the Prosecution knows have investigated the events that are the subject of this case.

CONCLUSION

31. For any and all of the above reasons, the Chamber is respectfully requested to order the Prosecution to fully comply with Rule 76 by disclosing (1) screening

⁴² *Prosecutor v. Bemba et al.*, Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial authorities and International Organisation, [ICC-01/05-01/13-1227](#), 9 September 2015, para. 9.

⁴³ See, e.g., <https://enoughproject.org/reports/warlord-business-cars-violent-armed-groups-and-their-criminal-operations-profit-and-power>.

⁴⁴ See, e.g., <https://www.hrw.org/news/2013/12/07/dispatches-car-tragedy-imams-house>.

⁴⁵ See, e.g., [REDACTED].

⁴⁶ Cf. *Prosecutor v. Bemba et al.*, Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial authorities and International Organisation, 9 September 2015, [ICC-01/05-01/13-1227](#), para. 10.

notes; (2) items provided by or shown to the witness; (3) other information from the witness; and (4) statements taken by third parties.

RESPECTFULLY SUBMITTED ON THIS 20TH DAY OF AUGUST 2019⁴⁷



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Peter Robinson
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

⁴⁷ The assistance of Legal Consultant Laurence Hortas-Laberge of Canada in the research for this motion is gratefully acknowledged.