

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **2 September 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 with Confidential Annexes A and B

**Public redacted version of “Motion for Finding of Disclosure Violation and
to Exclude the Evidence of Ten Witnesses”**

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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1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully move for a finding that the Prosecution has violated its obligation under Rule 76 and the Chamber’s orders to disclose, by 19 August 2019, statements of the witnesses it will rely on at the confirmation hearing. The Defence further requests that as a remedial measure, the Chamber exclude the evidence of the ten affected witnesses at the confirmation hearing.

RELEVANT PROCEDURAL HISTORY

2. On 4 April 2019, the Pre-Trial Chamber issued its *Second Decision on Disclosure and Related Matters*. The Chamber ordered the Prosecutor to disclose a list of evidence she intends to present at the confirmation of charges hearing within the meaning of Rule 121(3) of the Rules of Procedural and Evidence, all evidence within the meaning of Article 67(2) of the Statute in her possession or control, and all material referred to in Rule 77 of the Rules in her possession or control by 17 May 2019 at the latest.¹
3. On 15 May 2019, the Chamber postponed the confirmation hearing until 19 September 2019 at the request of the Prosecution, and postponed the deadline for disclosure of this material to 19 August 2019.²
4. On 14 August 2019, in its *Decision on the Prosecution Urgent Request for the Non-Disclosure of Witness Identities*, the Chamber stated that:

[REDACTED].³
5. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”).⁴ Among the Prosecution Witnesses relied upon in the DCC are

¹ [ICC-01/14-01/18-163](#), para. 40(a).

² [ICC-01/14-01/18-199](#), para. 39.

³ [ICC-01/14-01/18-273-Conf-Red](#), para. 31.

⁴ [ICC-01/14-01/18-282-Conf-AnxB1](#).

Witnesses P-0627, P-0884, P-0952, P-0965, P-1040, P-1042, P-1402, P-1947, P-1949, and P-2173.

6. On 21 August 2019, the Defence informed the Prosecution that the disclosure of the transcripts of interviews of these witnesses was incomplete and that many portions of the transcripts had not been disclosed. The Defence provided a chart listing the missing transcripts.⁵
7. On 23 August 2019, the Prosecution responded that it would look into the matter.⁶
8. On 29 August 2019, ten days after the deadline and only three weeks before the confirmation hearing, the Prosecution disclosed 54 of the missing transcripts.⁷ The number of previously undisclosed transcripts for the Prosecution Witnesses that were lately disclosed on 29 August, compared to the total number of transcripts for each witness, are as follows: P-0627 (1/16), P-0884 (1/22), P-0952 (9/14), P-0965 (12/17), P-1040 (2/19), P-1042 (3/16), P-1402 (6/7), P-1947 (5/18), P-1949 (4/15), and P-2173 (9/15).
9. Nonetheless, an analysis of the transcripts of witness P-1402 reveals that some transcripts may still be missing. First, in the transcripts disclosed to the Defence, it seems that a transcript of 17 pages is missing.⁸ Second, the context in transcript CAR-OTP-2070-0518-R01 suggests that another meeting was scheduled between the investigators and the witness.⁹

⁵ A copy of this letter is Confidential Annex A.

⁶ A copy of this e-mail is Confidential Annex B.

⁷ [ICC-01/04-01/18-306](#).

⁸ The ERN between transcripts "Transcript of Interview / CAR-OTP-P-1402 / Rule 68 Interview Recordings / Day 1/1" and "Transcript of Interview / CAR-OTP-P-1402 / Interview Recordings / Day 1/3 / CAR-OTP-2064-0030 - Track 1" jumps from CAR-OTP-2070-0378 to CAR-OTP-2070-0396.

⁹ CAR-OTP-2070-0518-R01, lns. 227-235.

10. Also on 29 August 2019, the Defence filed its *Motion for Finding of Disclosure Violation and for Remedial Measures* alleging that the Prosecution had failed to disclose exculpatory evidence relating to the fabrication of evidence by one of its witnesses.¹⁰
11. On 30 August 2019, the Defence filed its *Motion for Finding of Disclosure Violation and to Exclude the Evidence of Thirteen Witnesses* alleging that the Prosecution had failed to disclose the French translation of the statements of thirteen witnesses.¹¹ The latter included a finding in relation to witness P-1402. Not only was his transcript never translated in French, it was also largely incomplete as specified in this motion.

RELEVANT PROVISIONS

12. Rule 76(1) provides that:

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.

13. Rule 121(3) provides that:

The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.

14. Regulation 35(2) provides that:

The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.

¹⁰ [ICC-01/04-01/18-301-Red.](#)

¹¹ [ICC-01/04-01/18-305.](#)

ARGUMENT

15. The Prosecution failed to disclose on time the complete transcripts of its interviews with ten Prosecution witnesses upon whom it purports to rely at the Confirmation Hearing: P-0446, P-0627, P-0884, P-0952, P-0965, P-1019, P-1040, P-1042, P-1402, P-1947, P-1949, and P-2173.
16. A transcript of a witness interview clearly falls under the definition of statement for the purpose of Rule 76. As stated by the Appeals Chamber:

[T]he ordinary meaning of the term “statement” as used in rule 76 is broad and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded.¹²
17. In *Katanga*, the Trial Chamber held that audio recording of witness interviews are statements within the meaning of Rule 76.¹³
18. The Prosecution does not comply with Rule 76 by only disclosing the excerpts from an interview that it relies upon in the DCC. It is the entire statement of the Prosecution witness that is required to be disclosed by Rule 76. The belated disclosure of 54 missing transcripts of the witnesses that the Prosecution intends to rely upon at the Confirmation Hearing is a violation of Rule 76(1), which requires disclosure of copies of any prior statements made by a witness who the Prosecutor intends to call to testify.
19. Rule 76 applies not only to witnesses who the prosecution intends to call at the confirmation hearing, but also to those witnesses upon whose statements or

¹² *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.

¹³ *Prosecutor v. Katanga*, [Decision on Prosecution requests ICC-01/04-01/07-1726-Conf-Exp and ICC-01/04-01/07-1738-Conf-Exp made pursuant to regulation 35 of the Regulations](#), ICC-01/04-01/07-1869, 15 February 2010, para. 15.

summaries it intends to rely.¹⁴ This was in any event clearly understood by the Prosecution back in December 2018.¹⁵

20. [REDACTED].¹⁶ The evidence of the ten witnesses was *de facto* redacted as a result of the missing transcripts.
21. In a similar situation, the Trial Chamber in *Katanga* found that “when one is missing, the evidence is not complete”.¹⁷ Therefore, the Prosecution should not be able to rely on the evidence of these witnesses at the confirmation hearing.¹⁸ As noted by the Appeals Chamber :

The tenor of the disclosure regime established by the Statute and The Rules of Procedure and Evidence is that the Prosecutor is ordinarily obliged to make *full disclosure*, save for where specific provision is made for restrictions on disclosure to be permitted.¹⁹

22. The Defence has been prejudiced by this disclosure violation because it has been unable to understand the scope of the witnesses’ evidence and adequately prepare to address the substance and reliability of the witnesses’ evidence in time for the confirmation of charges hearing.
23. For example, the portions of the transcript of the interviews of Witnesses P-0952, P-0965, P-1402, and P-2173 disclosed for the first time ten days after the deadline constitute the majority of the entire interviews. For Witness P-1402,

¹⁴ *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, Annex I, para. 94.

¹⁵ [REDACTED].

¹⁶ [ICC-01/14-01/18-273-Conf-Red](#), para. 31.

¹⁷ *Prosecutor v. Katanga*, [Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)”](#), ICC-01/04-01/07-1336, 27 July 2009, para. 13.

¹⁸ The complete transcripts are also material to the preparation of the Defence, pursuant to Rule 77, as they constitute statements from the very witnesses relied upon by the Prosecution at the confirmation hearing.

¹⁹ *Prosecutor v. Lubanga*, [Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008](#), ICC-01/04-01/06-1433, 11 July 2008, para. 45.

only one transcript of nine pages was disclosed on time, whilst six transcripts amounting to a total of approximately 150 pages were disclosed late.

24. For other witnesses with fewer missing transcripts, the gaps in the middle of the interviews made the remainder of the interviews unintelligible or extremely hard to follow. In addition, the burden on the Defence of having to now read 54 new transcripts on the eve of the confirmation hearing in the midst of all of the other preparation that needs to be done strains the resources of the Defence team to the breaking point.
25. It should also be noted that the Prosecution has not complied with Regulation 35(2) by making an application for an extension of time to produce these transcripts, nor has it shown that the failure to produce the transcripts on time was for reasons outside of its control.

CONFIDENTIALITY

26. This motion is filed on a confidential basis pursuant to Regulation 23*bis* (2) of the Regulation of the Court due to references to the content of filings bearing the same classification. A public redacted version is filed simultaneously.

CONCLUSION

27. The Chamber is requested to make an explicit finding that the Prosecution has violated its disclosure obligation by failing to timely disclose the complete statements of the ten witnesses. Such a finding is necessary to fully document this violation and to deter future violations. The Chamber is further requested to enter an order that the Prosecution may not rely on the evidence of these ten witnesses at the confirmation hearing.

RESPECTFULLY SUBMITTED ON THIS 2ND DAY OF SEPTEMBER 2019



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