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No.: **ICC-01/14-01/18**
Date: **4 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-*
EDOUARD NGAÏSSONA

Public

**Prosecution's Response to the Yekatom Defence's "Motion for Finding of
Disclosure Violation and to Exclude the Evidence of Ten Witnesses",
ICC-01/14-01/18-313-Conf**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Pre-Trial Chamber II (“Chamber”) to dismiss the YEKATOM Defence’s Motion for Finding of Disclosure Violation and to Exclude the Evidence of Ten Witnesses (“Motion”).¹ The remedy sought by the YEKATOM Defence is unwarranted and should be rejected.

2. The Prosecution concedes its inadvertent failure to timely disclose 54 transcribed portions of 10 witness interviews (“54 Transcripts”). However, given that the Prosecution does not rely upon this material (which is incriminating) for the confirmation hearing and that it is now disclosed, any potential prejudice to the Defence is marginal and the requested relief manifestly disproportionate.

II. SUBMISSIONS

A. The inadvertent delay in disclosure has been rectified

3. On 20 August 2019, the YEKATOM Defence notified the Prosecution that at least one transcribed portion of a witness’ interview, another portion of which the Prosecution intended to rely on at the confirmation hearing, had not been disclosed. This led the Prosecution promptly to review its prior disclosures to determine what if anything had gone wrong, and whether the issue could have affected other relevant transcripts. As a result of its comprehensive review, the Prosecution identified 54 such transcript portions, and began immediately preparing their disclosure. The results of the Prosecution’s review are consistent with the YEKATOM Defence’s follow up letter of 21 August 2019.

4. The Prosecution disclosed the 54 Transcripts on 29 August 2019 – within 10 days of the Chamber’s disclosure deadline. Having looked into all queries raised by

¹ ICC-01/04-01-/18-313-Conf.

the YEKATOM Defence² and having conducted its own searches, the Prosecution acted promptly and diligently to address the matter.

B. The potential prejudice caused to the Defence is minimal

5. Any potential prejudice caused to the Defence by the late disclosure of the 54 Transcripts is minimal.

6. *First*, as set out in the Prosecution's 29 August 2019 Disclosure Communication,³ the Prosecution does not rely on the 54 Transcripts for confirmation. The Prosecution does not contest its obligation to have disclosed the 54 Transcripts under Rule 76 of the Rules of Procedure and Evidence ("Rules"). However, they do not contain material most relevant to the Prosecution's case.⁴ The transcript portions on which the Prosecution relies were duly disclosed by the 19 August 2019 disclosure deadline and included in the Prosecution's List of Evidence in compliance with the Chamber's decision of 15 May 2019.⁵

7. *Second*, the 54 Transcripts represent only a small proportion of the total amount of witness evidence disclosed in this case. To date, a total of 442 transcript portions from recorded witness interviews, and 152 written witness statements have been disclosed without error or fault. Similarly, the 10 affected witnesses represent a small proportion of the more than 140 witnesses relied upon in the Prosecution's Document Containing the Charges.

8. *Third* the oversight was inadvertent, swiftly rectified and the resultant delay was not excessive. As noted in previous filings, the disclosure that has taken place in this case pre-confirmation is voluminous and, in many ways unprecedented before

² Including those raised in paragraph 9 of the Motion.

³ ICC-01/04-01/18-306, para. 4.

⁴ See the Single Judge's direction in ICC-01/14-01/18-64-Red, para. 18

⁵ ICC-01/04-01/18-199, p. 18 (ordering the Prosecution to "submit the DCC, together with a list of evidence she intends to present at the confirmation hearing, and to disclose all evidence within the meaning of article 67(2) of the Rome Statute and all material referred to in rule 77 of the Rules by 19 August 2019 at the latest.")

the Court at this stage of the proceedings. Regrettably, given its complexity and scope, inadvertences have occurred, despite the Prosecutions diligent and good faith efforts to discharge its disclosure obligations.

9. Importantly, the Prosecution acted swiftly to rectify the oversight to minimise the delay in disclosure and thus the Defence will still have had three weeks before the 19 September 2019 confirmation hearing to review the 54 Transcripts.

The remedy sought is unwarranted and excessive

10. In light of the minimal potential prejudice caused by the 10-day delay in disclosure, no remedial measure is warranted at this stage. But even if the Chamber were minded to grant relief, fully excluding the witnesses' evidence would be disproportionate. This is a drastic remedy which, apart from being manifestly excessive, would also hamper the Chamber's truth finding function by depriving it of extremely relevant and cogent evidence upon which the Prosecution will undoubtedly rely in any future trial.

11. The more appropriate relief would be for the Chamber to consider any particularised and substantiated Defence request for additional time to prepare. In particular, the Prosecution would not oppose the Defence being given an opportunity to submit additional observations regarding any issues arising directly from the contents of the 54 transcripts within a similar period after the confirmation hearing.

III. CONCLUSION

12. For the above reasons, the Prosecution requests the Chamber to reject the Motion, and particularly the remedy sought by the YEKATOM Defence to exclude the evidence of ten Prosecution Witnesses.



Fatou Bensouda, Prosecutor

Dated this 4th day of September 2019
At The Hague, The Netherlands