



Original: English

**No. ICC-01/14-01/18
Date: 22 January 2020**

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 YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Public Redacted

Decision on the Yekatom Defence Application to vary protective measures (ICC-01/14-01/18-407-Conf)

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for Alfred Yekatom

Mylène Dimitri
Peter Robinson

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this decision on the ‘Application to Vary Protective Measures [REDACTED]’ submitted by the Defence for Yekatom on 17 December 2019 (‘Application’).¹

1. In the Application, the Defence for Yekatom (i) refers to the evidence of Prosecutor’s Witness [REDACTED]; (ii) recalls that this evidence has not been yet disclosed in its entirety; (iii) states that, ‘as Witness [REDACTED] will be a witness at trial, [it] continues to need access’ to such evidence to the extent that it constitutes potentially exculpatory material within the meaning of article 67(2) of the Statute’ and (iv) refers to the Prosecutor’s argument that it is unable to disclose the material due to protective measures [REDACTED]. Accordingly, the Defence requests the Chamber to modify those protective measures so as to make it possible for the Prosecutor to fully honour the disclosure obligations in respect of ‘(1) redacted versions of all prior statements, transcripts, recordings, investigator’s notes and emails of Witness [REDACTED]; (2) redacted versions of the information from the informant; and (3) redacted versions of the transcripts of the testimony and prior statements of Witnesses [REDACTED]’.

2. In the response dated 24 December 2019,² the Prosecutor confirms that all this material relates to Witness [REDACTED], because it emanates either from [REDACTED] or from [REDACTED]. It indicates having identified, following a review of the [REDACTED] record and of the Office’s own records, as many as three categories of ‘material which may affect the credibility of Witness [REDACTED], in that it tends to show [REDACTED] and provides, in the confidential annex A, a detailed list of items, as included in each of those categories. In addition, the Prosecutor clarifies that the material at stake consists of transcripts of testimony or interviews pertaining to witnesses having been granted assurances against self-incrimination pursuant to rule 74 of the Rules of Procedure and Evidence (the ‘Rules’) at the outset of their testimonies in the courtroom, as well as in portions of the [REDACTED] referring to them. Whilst disagreeing with the Defence for

¹ Defence for Yekatom, Application to Vary Protective Measures [REDACTED], 17 December 2019, ICC-01/04-01/18-407-Conf.

² Prosecutor, Prosecution’s response to the Yekatom Defence’s Application to Vary Protective Measures [REDACTED] (ICC-01/14-01/18-407-Conf), 24 December 2019, ICC-01/04-01/18-415-Conf (public redacted version notified on the same day, ICC-01/14-01/18-415-Red) with Annex A.

Yekatom as to whether regulation 42(3) of the Regulations of the Court (the ‘Regulations’) may also apply to scenarios where a protective measure is adopted as a result of assurances under rule 74 of the Rules, the Prosecutor agrees that the parties and participants should be provided access to the materials and defers to the Chamber as to the correct legal basis to address the matter.

Determinations by the Chamber

3. The Chamber notes article 67(2) of the Statute, rules 74 and 87 of the Rules and regulation 42(3) of the Regulations.

4. The Chamber recalls that the Prosecutor’s disclosure (or not) of material relating to Witness [REDACTED] has been a matter for contention throughout the pre-trial proceedings and that, in the context of the confirmation decision, it decided only to refer to this Witness’ evidence for the purpose of corroborating findings otherwise established, while rejecting the Defence’s request to entirely exclude [REDACTED] evidence.³ This approach, for which the Defence for Yekatom expresses its appreciation, was adopted not only in light of the complexity of the matter, but also of the non-advisability to delve into such complexity in light of the limited scope and purpose of the confirmation proceedings.

5. As a matter of principle, there should be no doubt that this Chamber can address the matter, whether pursuant to regulation 42(3) of the Regulations (as submitted by the Defence for Yekatom) or otherwise (as held by the Prosecutor). By the same token, one should be mindful that factors guiding a Chamber in deciding whether to grant the assurances under rule 74 of the Rules (and to adopt the relevant measures, in this case confidentiality, in the form of in camera sessions), and whether a witness should or should not be required to answer a potentially self-incriminating question, include ‘the importance of the anticipated evidence’ and a determination as to ‘whether the witness would be providing unique evidence’. The Chamber believes that those very factors cannot be ignored when deciding whether those measures should be maintained, revoked, restricted or otherwise amended in their scope.

³ Pre-Trial Chamber II, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, 11 December 2019, ICC-01/14-01/18-403-Conf (public redacted version notified on 20 December 2019, ICC-01/14-01/18-403-Red), paras 31-34.

6. The Chamber observes that the considerations which led it not to delve into the matter when deciding on the confirmation are not only still valid, but also strongly militate against addressing the matter at this stage. The fact that the confirmation proceedings have now been concluded in their essential function, barring only the need to wait for the translation of the decision for the purposes of the possible filing of an application for leave to appeal (where no consideration or role should be given to the merits of the case), means that this Chamber has now fulfilled its first and foremost function in respect of this case. When stating that ‘Witness [REDACTED] will be a witness at trial’, the Defence for Yekatom confirms that this matter essentially revolves around the relevance of the evidence at stake; as such, it is now best left to the consideration of the Trial Chamber.

7. Furthermore, as noted by the Prosecutor, the beneficiary of an assurance ex rule 74 of the Rules is likely to develop a legitimate expectation that no disclosure of the relevant material will ever happen, at least not without him or her being heard. In matters relating to the variation of protective measures, regulation 42(4) of the Regulations indeed establishes that, ‘whenever possible’, the consent of the person in respect of whom the application is made should be obtained before proceeding with any variation. One may consider that this provision is the expression of a general principle, as such also appropriately followed in a matter as sensitive as self-incrimination and that, accordingly, no variation of the relevant measures could or should be ordered without having at least heard from the relevant witnesses. Such consultation would be by its very nature time-consuming and thus incompatible with the limited remaining time-frame and scope of this Chamber’s involvement in these proceedings. Furthermore, while the Defence for Yekatom seems indeed persuaded at this stage that this witness will be part of the evidence relied upon at trial, there is no indication as to the type, extent and purpose of the reliance of either party on this evidence, or even any certainty that either party will indeed rely on it: this makes it even more appropriate to refrain from intervening in a matter the relevance of which for the future stages of the proceedings is yet to materialise in its specific details.

8. Accordingly, the Application is dismissed *in limine* and there is no need for the Chamber to resolve the issue as to whether the power to amend the existing protective measures would be based on regulation 42 of the Regulations or elsewhere.

FOR THESE REASONS, THE CHAMBER HEREBY

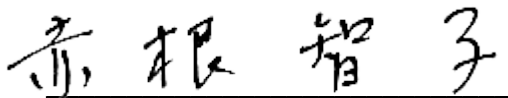
DECIDES that the Application should be addressed and adjudicated by the Trial Chamber and, accordingly, **DISMISSES** it *in limine*;

ORDERS the Defence for Yekatom to file a public redacted version of the Application by Friday 24 January 2019.

Done in both English and French, the English version being authoritative.



**Judge Antoine Kesia-Mbe Mindua,
Presiding Judge**



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Wednesday, 22 January 2020

At The Hague, The Netherlands