

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/14-01/18
Date: 24 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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public Redacted Version of “Expedited request on behalf of Mr. Yekatom seeking immediate disclosure of the Prosecutor’s application for issuance of a warrant of arrest”, ICC-01/14-01/18-29-Conf-Exp, 11 December 2018

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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Further to the, *inter alia*: (i) arrest warrant issued by Pre-Trial Chamber II (“Pre-Trial Chamber”) against Mr. Alfred Rombhot Yekatom on 11 November 2018 (“Warrant of Arrest”); (ii) transfer of Mr. Alfred Rombhot Yekatom in the custody of the International Criminal Court (“Court”) on 17 November 2018; (iii) initial appearance of Mr. Alfred Rombhot Yekatom before the Pre-Trial Chamber on 23 November 2018; and (iv) [REDACTED] ([REDACTED]), Counsel representing Mr. Alfred Rombhot Yekatom (« Defence » or « Mr. Yekatom ») hereby submits this Expedited request on behalf of Mr. Yekatom seeking immediate disclosure of the Prosecutor’s application for the issuance of a warrant of arrest (« Defence Expedited Request »).

INTRODUCTION

1. The aim of this Defence Expedited Request is to respectfully seek the Pre-Trial Chamber to order the Prosecutor to immediately disclose the Prosecutor’s application for the issuance of a warrant against Mr. Alfred Yekatom (« Prosecutor’s Application »)
2. Mr. Yekatom has the right to immediate disclosure of the Prosecutor’s Application, which is material to the preparation of his defence. More particularly, disclosure of the Prosecutor’s Application is required and necessary to, *inter alia*: (i) ensure Mr. Yekatom is informed promptly and in detail of the nature, cause and content of the charges against him; (ii) [REDACTED]; (iii) ensure he is effectively able to seek provisional release without delay; and (iv) ensure he is able to challenge the admissibility of the Prosecutor’s case against him at the earliest possibility.

PROCEDURAL BACKGROUND

3. On 30 May 2014, the Government of the Central African Republic (“CAR”) referred the situation in the CAR since 1 August 2012 to the Court.¹
4. On 18 June 2014, this situation was assigned to Pre-Trial Chamber II.²
5. On 30 October 2018, the Prosecutor filed an application for the issuance of a warrant of arrest against Alfred Rombhot Yekatom.³ At the latest on 05 November 2018, Mr. Alfred Rombhot Yekatom was arrested in the CAR.⁴
6. On 11 November 2018, the Pre-Trial Chamber issued a warrant of arrest pursuant article 58 of the Rome Statute (“Statute”) against Mr. Yekatom,⁵ who was surrendered to the Court on 17 November 2018 (“Warrant of Arrest”).
7. On 17 November 2018, the Single Judge, acting on behalf of the Pre-Trial Chamber, issued [REDACTED].⁶ The Single Judge based her decision on the Prosecutor’s Application.⁷
8. On 18 November 2018, Mr. Yekatom was transferred to the Detention Centre of the Court. Following his arrival at the Detention Center, Mr Yekatom received a non-redacted version of the Warrant of Arrest.
9. On 20 November 2018, Judge Tomoko Akane, acting as Single Judge on behalf of the Pre-Trial Chamber, issued a Decision setting the date for the initial appearance of Alfred Rombhot Yekatom.⁸

¹ Presidency, Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, 18 June 2014, ICC-01/14-1-Anx1.

² Presidency, Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, 18 June 2014, ICC-01/14-1.

³ Prosecution’s Application for the Issuance of a Warrant of Arrest for Alfred Yekatom, 30 October 2018, ICC-01/14-01/18-US-Exp.

⁴ Warrant of Arrest for Alfred Yekatom, 11 November 2018, ICC-01/14-01/18-1-US-Exp, para. 3.

⁵ ICC-01/14-01/18-1-US-Exp (“Warrant of Arrest”). A public redacted version is also available, *see* ICC-01/14-01/18-1-Red.

⁶ [REDACTED], ICC-01/14-01/18-11-Conf-Exp.

⁷ [REDACTED], ICC-01/14-01/18-11-Conf-Exp, para. 1, fn 2.

10. On 23 November 2018, Mr. Yekatom, made his first appearance before the Pre-Trial Chamber. During this first hearing, the Pre-Trial Chamber endeavoured to ascertain whether the person who is the subject of the arrest warrant had been informed of the crimes, which he or she is alleged to have committed.⁹ On this occasion, Mr. Yekatom was represented by the Office of the Public Counsel for the Defence (“OPCD”) and had already expressed his desire to have Me Stéphane Bourgon appointed to represent him.¹⁰
11. On 29 November 2018, the Pre-Trial Chamber issued a Decision on withdrawal of Counsel whereby it terminated the appointment of the OPCD and confirmed the representation of Mr. Yekatom by Me Stéphane Bourgon.¹¹
12. On 30 November 2018, a meeting took place between the OPCD’s Principal Counsel and Me Bourgon to handover the responsibility to represent Mr. Yekatom to Me Bourgon, pursuant the latter’s appointment.
13. On 04 December 2018, the Pre-Trial Chamber issued its confidential *ex parte*, only available to the Prosecutor and the Defence for Alfred Rombhot Yekatom, [REDACTED] in which the Pre-trial Chamber, *inter alia*, ordered the Defence to submit its views on the Prosecutor’s request to [REDACTED], no later than Thursday, 20 December 2018.¹²
14. To this day, despite specific consultations to that effect between Counsel representing the Prosecutor (“Prosecution”) and the Defence, the Prosecutor’s Application has yet to be disclosed.

⁸ Decision setting the date for the initial appearance of Alfred Yekatom, 20 November 2018, ICC-01/14-01/18-15.

⁹ ICC-01/14-01/18-T-1-ENG, p.4 l.11-13.

¹⁰ ICC-01/14-01/18-T-1-ENG, p.2 l.11 to 3 l.1.

¹¹ Decision on Withdrawal of Counsel, 29 November 2018, ICC-01/14-01/18-21.

¹² [REDACTED], ICC-01/14-01/18-25-Conf-Exp (“[REDACTED]”).

15. Indeed, on 04 December 2018, the Defence specifically requested disclosure of the Prosecutor's Application.¹³ On 06 December 2018, the Defence reiterated its request.¹⁴ On 07 December 2018, the Prosecution responded that: "we do not intend to disclose the filing at this time";¹⁵ the Prosecution position was further reiterated on the 10 December 2018: "I do not agree that your client's entitlement to it at this early stage of the proceedings is either absolute or necessary [...] Presently, a Defence application may be unavoidable."¹⁶

APPLICABLE LAW

16. Article 19(2)(4) of the Statute, provides (in relevant part) that:

"2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

- a) An Accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; [...]

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. [...] Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1(c)".

17. Pursuant to Article 60(2) of the Rome Statute of the International Criminal Court (the "Statute"):

¹³ Email available upon request.

¹⁴ Email available upon request.

¹⁵ Email available upon request.

¹⁶ Email available upon request.

“A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions”

18. Article 67(1) of the Statute provides that a suspect has the right:

“(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which [he] fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence;

[...]

(f) To have, free of any cost, [...] such translations as are necessary to meet the requirements of fairness, if any of [...] the documents presented to the Court are not in a language which [he] fully understands and speaks.”

19. Rule 118 of the Rules of Procedure and Evidence (the “Rules”) provides (in part) that:

“[...] [A] request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing at the request of the Prosecutor or the

detained person or on its own initiative. A hearing must be held at least once every year”.

20. [REDACTED]:

“[REDACTED]

[REDACTED]”

SUBMISSIONS

21. Immediate disclosure of the Prosecutor’s Application is requested to ensure and safeguard notably four specific rights, such as (i) Mr. Yekatom’s right to be informed promptly and in detail of the nature, cause and content of the charges against him, (ii) Mr. Yekatom’s right to effectively be heard and to be in a position to present [REDACTED] (iii) Mr. Yekatom’s right to seek, without further delay, provisional release and finally (iv) Mr. Yekatom’s right to challenge the admissibility of the case before the Court.

I. Mr. Yekatom’s right to be informed promptly and in detail of the nature, cause and content of the charges against him

22. Article 67 (1) of the Statute provides that any suspect has the fundamental right “to be informed promptly and in detail of the nature, cause and content of the charge, in a language which [he] fully understands and speaks”.

23. There is no dispute that the Prosecutor’s Application contains the details, nature, cause and content of the charges against the Mr. Yekatom. The Prosecutor’s Application is the document that triggered the issuance of the Warrant of Arrest, the transfer of Mr. Yekatom in the custody of the Court as well as [REDACTED].

24. Indeed, the Pre-Trial Chamber held in the Warrant of Arrest, that it “is satisfied that the incidents described in the Application amount to crimes

against humanity and war crimes that have taken place after 1 August 2012 on the territory of the CAR [...] and were associated with the conflict underlying the referral of the CAR Government.”¹⁷

25. It follows that in order to ensure that Mr. Yekatom is informed promptly and in detail of the nature, cause and content of the charge against him, the Prosecutor’s Application must be disclosed forthwith, both in a language Mr. Yekatom reads and understands, *i.e.* in Sango as well as in one of the working language of the Court.
26. This was very recently reaffirmed by Pre-Trial Chamber I which recalled the jurisprudence of Pre-Trial Chamber II on the very same subject: *“Le juge unique rappelle également la jurisprudence de la Chambre préliminaire II selon laquelle, bien qu’un suspect n’ait pas un droit absolu à obtenir la traduction de l’intégralité des documents versés au dossier, une requête du Procureur aux fins de délivrance d’un mandat d’arrêt fait partie des documents qui informent un suspect de la nature, de la cause et de la teneur des charges portées contre lui, et qui à ce titre, doivent lui être communiqués dans une langue qu’il comprend et parle parfaitement.”*¹⁸
27. The importance for the suspect to receive disclosure of the Prosecutor’s Application was underlined by the Court as early as 2008 in the *Bemba* case and reiterated in the *Ongwen* case: “in accordance with article 67(l)(a) and (f) of the Statute, [the suspect] should enjoy the right to interpretation throughout the whole proceedings but is only entitled to receive the [...] translation of *such* documents that inform him in detail of the nature, cause and content of the charges brought against him. Accordingly, [the suspect] should be

¹⁷ Warrant of Arrest, para. 4 (emphasis added).

¹⁸ *Le Procureur c. Al Hassan*, Décision relative à la requête de la défense sollicitant la traduction en arabe de la requête du Procureur aux fins de délivrance d’un mandat d’arrêt, 01 juin 2018, ICC-01/12-01/18-42, para. 12 (emphasis added).

provided with a [translation] of the following documents: (i) **the Prosecutor's application for a warrant of arrest** and the Pre-Trial Chamber's decision thereon; (ii) the Document Containing the Charges and the List of Evidence as well as any amendment thereto; and (iii) the statements of prosecution witnesses."¹⁹

28. The issue of contention between the parties in the cases cited above addresses the right of the accused or suspect to receive the translation of the Application for Warrant of Arrest rather than the disclosure of the said Application, which appears to have taken place without the need for the Defence to file an application seeking such disclosure. Unfortunately, in the present case, the Prosecution's refusal to disclose the Prosecutor's Application at this time renders the Pre-Trial Chamber's intervention unavoidable and delays unduly the accused's right to be informed promptly and in detail of the nature, cause and content of the charge against him.
29. Despite the Prosecution's acknowledgement of Mr. Yekatom's right to receive the Prosecutor's Application, it nevertheless invites the Defence to seek the Pre-Trial Chamber's intervention.
30. Although the Prosecution intends to discuss a redaction Protocol in respect of disclosure, such a Protocol is in not and should not be a justification to delay the disclosure of a document as essential as the Prosecutor's Application. The Prosecution offers no valid reason or justification to delay any further the requested disclosure.

¹⁹ *Prosecutor v. Bemba*, Decision on the Defence's Request Related to Language Issues in the Proceedings", 4 December 2008, ICC-01/05-01/08-307, para. 16; *Prosecutor v. Ongwen*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015, ICC-02/04-01/15-203, para. 32 (emphasis added).

31. Furthermore, the Defence recalls that the date chosen for the beginning of the confirmation of charges hearing shall be 30 April 2019.²⁰ The Defence underlines that during the hearing for confirmation of charges it can either (i) object to the charges; (ii) challenge the evidence presented by the Prosecutor; and (iii) present evidence.²¹ In order to fully challenge, object or present evidence during the hearing, the Defence must be given adequate time and facilities, which includes, disclosure of the Prosecutor's Application.
32. The Prosecutor's Application undoubtedly contains information on the alleged events, witnesses and evidence that concern Mr Yekatom. This type of information constitutes an integral part of the "nature" and "cause" of the charges against Mr. Yekatom including the crimes he is purportedly suspected of having committed. Therefore, any document containing details on the material facts of the case, or that require Mr Yekatom's comprehension, advice or approval, must be provided in Sango as well as in a working language of the Court.
33. In addition, the Defence recalls that Mr Yekatom has an inherent right to adequately prepare his defence before this Court. This includes being able to provide his version of events and challenge allegations made against him. Needless to say that the core of the allegations made against him is contained in the Prosecutor's Application.
34. For the purpose of enjoying his fundamental right to be informed promptly and in detail of the nature, cause and content of the charges against him, the Defence respectfully requests the Pre-Trial Chamber to order the immediate disclosure by the Prosecutor of the Application for Warrant of Arrest and its annexes, in Sango as well as in one of the working language of the Court.

²⁰ ICC-01/14-01/18-T-1-ENG, p. 81.20-21.

²¹ Article 61(6) of the Rome Statute of the International Criminal Court.

II. [REDACTED]

35. In the Prosecutor's Application, the Prosecutor also "requested the Chamber to order the Registry to [REDACTED]"²²
36. The Pre-Trial Chamber noted, however, that "[REDACTED]".²³
37. Considering that the reasons and justifications provided by the Prosecutor to support its request to [REDACTED]. [REDACTED].
38. Additionally, for the Pre-Trial Chamber to fully assess whether or not there [REDACTED]. Any defence argument or challenge would be pointless and unsubstantiated without the possibility to assess the content of the Prosecutor's arguments, which are contained in the Prosecutor's Application.
39. In other words, the Pre-Trial Chamber's decision underlining that it "[REDACTED]"²⁴ becomes purposeless if the Defence is not given an effective opportunity to presents its views.
40. The Defence respectfully submits that in order to give full effect to the Pre-Trial Chamber's clear intention to receive the views of the Defence, the Prosecutor's Application must be disclosed without further delay.
41. Thus, in order to assess whether [REDACTED]. [REDACTED].²⁵ Without immediate disclosure the Defence is not in a position to present any observations or arguments to counter the Prosecutor's arguments that led her to persuade the Pre-Trial Chamber that [REDACTED].

²² [REDACTED], para. 1.

²³ [REDACTED], para. 9.

²⁴ [REDACTED], para. 9

²⁵ [REDACTED], ICC-01/14-01/18-25-Conf-Exp, par. 6.

42. Given that the Pre-Trial Chamber issued a Decision whereby it “[REDACTED]”, the Defence respectfully requests that the disclosure of the Prosecutor’s Application be made as a matter of urgency.

III. Mr. Yekatom has the right to apply for provisional release without delay

43. Pursuant Article 60 (2) of the Statute “[a] person subject to a warrant of arrest may apply for interim release pending trial [...]” Mr. Yekatom may indeed apply for interim release and in order to explore that possibility and receive proper advice from Counsel, he must receive the application that led to his arrest and detention.
44. Any further delay in disclosing the Prosecutor’s Application impedes on Mr. Yekatom’s right to seek provisional release and challenge his continuous detention. The Prosecution’s position that although its Application is subject to disclosure but “not at this time” defeats the purpose of Mr. Yekatom’s right to apply for provisional release. Without the Prosecutor’s Application the Defence is not in a position to make any substantial submissions on provisional release.
45. The Prosecutor’s Application is, as stated by the Court, among the documents that are essential for the purposes of applying for interim release.²⁶ In order to seek interim release or challenge the validity of the Warrant of Arrest or the arrest itself the Defence needs, at the very least, the Application that led to the issuance of the Warrant of Arrest and the continued detention.²⁷
46. The Appeals Chamber in the case against Jean-Pierre Bemba Gombo confirmed the existence of a right to such disclosure for the purposes of

²⁶ Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’, 16 December 2008, ICC-01/05-01/08-323, para. 32; *See also Prosecution v. Mbarushimana*, Decision on the Defence Request for Disclosure, 27 January 2011, ICC-01/04-01/10-47, para. 10.

²⁷ *Prosecution v. Mbarushimana*, Decision on the Defence Request for Disclosure, 27 January 2011, ICC-01/04-01/10-47, para. 11.

applications for interim release where it held that: “[...] in order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case.”²⁸

IV. The Defence has the right to challenge the admissibility of the case

47. In addition to his right to apply for provisional release, Mr. Yekatom has the right to challenge the admissibility of the case before the Court. For this purpose Mr. Yekatom must have access to the Prosecutor’s Application as one of the core documents triggering Mr. Yekatom’s transfer to the Court forthwith.
48. Mr. Yekatom is entitled to disclosure of documents enabling him to challenge the admissibility of evidence submitted to the Pre-Trial Chamber in support of the Prosecutor’s Application.²⁹
49. In the *Mbarushimana* case, the Chamber indeed recognized that in order to effectively challenge the admissibility of the case, essential documents must be disclosed to the Defence: “The Chamber is also of the view that an effective exercise of the right to make a challenge to the admissibility of the case or the jurisdiction of the Court, a right which is expressly provided for in the Statute, requires access to relevant documents. For these reasons, the Chamber acknowledges that the Defence must have access to documents that are

²⁸ Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release', 16 December 2008, ICC-01/05-01/08-323, para. 32; *See also* Prosecution v. Mbarushimana, Decision on the Defence Request for Disclosure, 27 January 2011, ICC-01/04-01/10-47, para. 10.

²⁹ Prosecutor v. Joseph Kony et al, "Decision on Defence Counsel's "Request for conditional stay of proceedings", ICC-02/04-01/05-328, 31 October 2008.

essential in order effectively to challenge the admissibility of the case or the jurisdiction of the Court.”³⁰

50. In view of the fact that the Prosecutor’s Application should contain the background of the investigation and information in relation to the situation as well as information in relation to the arrest, the Defence should be entitled to receive, in all fairness and to ensure equality of arms, the said Application.

CONFIDENTIALITY

51. This request has been classified as confidential ex parte as it refers to the content of a document classified as such.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Pre-Trial Chamber to:

ORDER the Prosecution to immediately disclose the Prosecutor’s Application for Warrant of Arrest and its annexes;

ORDER translation in Sango of the Prosecutor’s Application for Warrant of Arrest and its annexes;

RESPECTFULLY SUBMITTED ON THIS 24TH DAY OF JANUARY 2020



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³⁰ Prosecution v. Mbarushimana, Decision on the Defence Request for Disclosure, 27 January 2011, ICC-01/04-01/10-47, par. 13