



**Original: English**

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

**Date: 13 September 2019**

**Date of public redacted version: 4 February 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 Second Motion for Disclosure of Rule 76 Material**

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

**The Office of the Prosecutor**

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**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel  
for Victims**

Dmytro Suprun

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section**

**Victims Participation  
and Reparations Section**

**Other**

**PRE-TRIAL CHAMBER II** of the International Criminal Court issues this Decision on the Yekatom Defence Second Motion for Disclosure of Rule 76 Material.

## **I. Procedural History**

1. On 11 November 2018, the Chamber issued the ‘Warrant of Arrest for Alfred Yekatom’.<sup>1</sup> On 17 November 2018, Yekatom was surrendered to the Court by the authorities of the Central African Republic (the ‘CAR’).<sup>2</sup>

2. On 7 December 2018, the Chamber issued the ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’.<sup>3</sup> On 23 January 2019, Ngaïssona was surrendered to the Court by the authorities of the French Republic.<sup>4</sup>

3. On 23 January 2019, the Chamber issued the ‘Decision on Disclosure and Related Matters’ (the ‘Disclosure Decision’).<sup>5</sup>

4. On 20 February 2019, the Chamber issued the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’, thereby joining the cases against Yekatom and Ngaïssona.<sup>6</sup>

5. On 4 April 2019, the Chamber issued the ‘Second Decision on Disclosure and Related Matters’ (the ‘Second Disclosure Decision’), thereby deciding, *inter alia*, that the Disclosure Decision was applicable to the joint case, as modified by the Second Disclosure Decision.<sup>7</sup>

6. On 15 May 2019, the Chamber issued the ‘Decision on the “Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines”’, thereby deciding that the confirmation hearing in the case against Yekatom and Ngaïssona shall commence on 19 September 2019.<sup>8</sup>

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<sup>1</sup> ICC-01/14-01/18-1-US-Exp. A public redacted version is also available; see [ICC-01/14-01/18-1-Red](#).

<sup>2</sup> Registry, Rapport du Greffe sur l’Arrestation et la Remise de M. Alfred Yekatom, ICC-01/14-01/18-17-US-Exp, paras 19-24.

<sup>3</sup> ICC-01/14-01/18-89-Conf-Exp. A public redacted version is also available; see [ICC-01/14-01/18-89-Red](#).

<sup>4</sup> Registry, Rapport du Greffe sur la Remise de Patrice-Edouard Ngaïssona, ICC-01/14-01/18-101-US-Exp, paras 5-14.

<sup>5</sup> ICC-01/14-01/18-64-Conf. A public redacted version is also available, see [ICC-01/14-01/18-64-Red](#).

<sup>6</sup> [ICC-01/14-01/18-87](#); [ICC-01/14-01/18-121](#).

<sup>7</sup> [ICC-01/14-01/18-163](#).

<sup>8</sup> [ICC-01/14-01/18-199](#).

7. On 20 August 2019, the Chamber received the Yekatom Defence's 'Motion for Disclosure of Rule 76 Material' (the 'First Rule 76 Motion').<sup>9</sup>

8. On 27 August 2019, the Chamber received the 'Prosecution's Response to the Yekatom Defence's Motion for Disclosure of rule 76 Material'.<sup>10</sup>

9. On 3 September 2019, the Chamber issued the Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions (the '3 September 2019 Decision'), in which it, *inter alia*, directed the Prosecutor to: (i) disclose the 108 screening notes for witnesses upon whom she will rely at the confirmation hearing by no later than 9 September 2019; (ii) verify whether she has any additional screening notes in her possession that fall within the scope of rule 76 of the Rules, and if so, to disclose these to the Defence by 9 September 2019; (iii) verify whether she has in her possession any additional material that may fall within rule 76 of the Rules, and if so, to disclose it to the Defence by 9 September 2019. The Chamber also encouraged the Prosecutor and the Defence to engage in *inter partes* discussions as necessary to facilitate any additional disclosure of rule 76 material.<sup>11</sup>

10. On 11 September 2019, the Yekatom Defence submitted the 'Second Motion for Disclosure of Rule 76 Material' (the 'Motion').<sup>12</sup>

11. On 12 September 2019, the Prosecutor submitted the 'Prosecution's Response to the Yekatom Defence's 'Second Motion for Disclosure of rule 76 Material', 11 September 2019, ICC-01/14-01/18-331-Conf'.<sup>13</sup>

## II. Submissions

### A. The Defence

12. The Defence submits that following the 3 September 2019 Decision, the Prosecutor disclosed several of the items in dispute, but declined to disclose others. On 10-11 September 2019, the parties discussed the remaining issues and reduced the remaining number of issues in dispute. The Defence contends that 'material provided

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<sup>9</sup> ICC-01/14-01/18-285-Conf.

<sup>10</sup> ICC-01/14-01/18-295-Conf.

<sup>11</sup> ICC-01/14-01/18-315-Conf, paras 40-41.

<sup>12</sup> ICC-01/14-01/18-331-Conf.

<sup>13</sup> ICC-01/14-01/18-333-Conf.

by, or shown to the witness by the Prosecution, when referenced in the statement of the witness, constitute[s] an integral part of the statement such as to come within Rule 76'. However, the Defence asserts that the Prosecutor is of the view 'that its obligation was limited to disclosing items discussed in the witness' statement that it deemed "relevant"'.

13. The Defence requests the disclosure of certain specific information, as set out below (the 'First Request'), as well as a broader order for disclosure of 'other items shown to or provided by any Prosecution witness that is an integral part of the witness' statement regardless of relevance' (the 'Second Request').

14. In the First Request, the Defence refers to photos referenced in the witness statements of P-0646 and P-2125. The Defence submits that P-0646 is cited four times in the DCC, was shown twelve photos of individuals, and provided comments on the four photos in which he recognised someone. The Defence contends that these 12 photos form an integral part of the witness statement and must be disclosed.

15. The Defence indicates that P-2125 is cited six times in the DCC, [REDACTED], and provided a photo to investigators [REDACTED], which is contained at Annex C to his statement. In addition, in his statement, the witness refers to 6 photos shown to him by investigators, and indicates that he recognises two of the individuals [REDACTED]. The Defence considers that the aforementioned photos referenced at Annex C and Annex S to the respective witness statements are integral to the statements, regardless of their relevance.

16. The Defence refers to the *Ongwen* case in arguing that, by analogy, 'material in a statement is routinely admitted pursuant to Rule 68 as associated exhibits', and submits that while '[e]verything that is disclosable is not admissible, everything that is admissible must be disclosed'.

17. The Defence requests that the Chamber 'find that Rule 76 covers the items obtained from or shown to Prosecution Witnesses P-0646 and P-2125 and to order their disclosure', and, per the Second Request, that 'the Prosecution apply this principle to any other items shown to or provided by any Prosecution witness that is an integral part of the witness' statement regardless of relevance'.

## **B. The Prosecutor**

18. The Prosecutor opposes the Motion, and argues that, in regard to the photos referenced therein, they are ‘not logically connected to any matter in the case or helpful to understanding other evidence - and are therefore irrelevant’. Furthermore, the Prosecutor submits that she has complied with her rule 76 disclosure obligations to disclose ‘items of “true relevance” to the case’, noting that ‘[m]any, if not most, items obtained during the investigation tend to be relevant to the case’. The Prosecutor argues, however, that not every item shown to, or received from, a witness is relevant. As regards the specific photos referenced in the Request, the Prosecutor submits that none of the photos fall under the plain terms of rule 76, ‘which requires the pre-trial disclosure of names, Statements, and Statement translations of Witnesses’.

19. The Prosecutor indicates that she has disclosed items provided by witnesses as annexes to their statements where such items are ‘relevant to an issue in the case’, and submits that her investigations in the CAR II situation go beyond this case, and as such, not every item shown to a witness during an investigation should be automatically disclosable.

20. The Prosecutor further asserts that ‘the issue at stake is more far-reaching’ than the specific photos referenced in the Motion. ‘The Defence invites the Chamber to apply a blanket order on the disclosure of otherwise irrelevant items merely because they were shown to a Witness or provided by a Witness, by attempting to shoehorn the items into rule 76’. Further, the Prosecutor submits that if the Chamber grants the Request, this would then ‘require the wholesale disclosure of irrelevant items’, and that the Court ‘would be inundated with a raft of irrelevant exhibits unnecessarily burdening the record, prolonging the proceedings, and causing inefficiency – counter to the requirement of expedition’.

21. The Prosecutor submits that there should be no ‘bright line’ rule that requires ‘automatic disclosure of any item mentioned or provided during the course of a Witness interview without regard to the relevance, let along the *materiality* of that item either to the Statement or to the case’.

### III. Analysis

22. The Chamber recalls rules 76 of the Rules, which states, in the relevant part, that '[t]he 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'.

23. The Chamber notes that in those instances where P-2125 recognised individuals in the photos, the individuals identified were said to [REDACTED]. Similarly, for one of the photos identified by P-0646,<sup>14</sup> the individual in the photo was said to [REDACTED]. The remaining individuals identified by P-0646 were said to [REDACTED],<sup>15</sup> [REDACTED],<sup>16</sup> [REDACTED].

24. The Chamber notes that based on the information available, it appears that certain photos may relate to the Seleka investigation. However, the Prosecutor has not provided detailed information to demonstrate to the Chamber that these photos do not need to be disclosed to the Defence. The Chamber considers that, for the purposes of the First Request, it suffices to order the Prosecutor to disclose the photos specified in the Motion for which the witnesses have provided detailed information,<sup>17</sup> by no later than 12.00 on 16 September 2019. The Chamber finds that this is appropriate given that the photos were shown to, or provided by, the witnesses during their interviews, and that the witnesses have provided information regarding these witnesses. As such, these photos may be necessary in order for the Defence to understand the line of questioning surrounding them. The Chamber specifies that it does not require disclosure of those photos for which the witnesses indicated that they do not know the

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<sup>14</sup> CAR-OTP-2013-0377.

<sup>15</sup> CAR-OTP-2013-0385.

<sup>16</sup> CAR-OTP-2013-0344.

<sup>17</sup> See paras 14 to 20 of the Motion: In relation to Witness P-0646, the Chamber orders disclosure of the following: CAR-OTP-2013-0344; CAR-OTP-2013-0364; CAR-OTP-2013-0385; and CAR-OTP-2013-0377. In relation to Witness P-2125, the Chamber orders disclosure of the following: The photo at Annex C to the witness statement, which the witness indicates at para. 40 of the witness statement is [REDACTED]; photos 5 and 6 shown to the witness, and referred to in the witness statement, which are contained at Annex S to the witness statement.

person in the photo.<sup>18</sup> Furthermore, noting that there may be concerns relating to the protection of witnesses or the ongoing investigation, the Chamber authorises the Prosecutor to apply any such redactions, as necessary, to the photos that are ordered for disclosure.

25. The Chamber notes that it is an established principle that the disclosure regime relies upon the Prosecutor implementing her obligations in good faith. The Chamber also takes note of the fact that the disclosure deadlines provided for in the statutory framework for the pre-trial stage of proceedings, notably rule 121 of the Rules, have passed and that the confirmation of charges hearing is imminent.

26. The Chamber further observes that: (i) the Prosecutor has disclosed the names and statements of witnesses upon whom she intends to rely at the confirmation of charges hearing, subject to protection concerns; (ii) the Chamber's 3 September 2019 Decision ordered the Prosecutor to verify whether she had in her possession any additional material falling within the scope of rule 76 of the Rules, and if so, to disclose it by 9 September 2019; (iii) the Prosecutor has provided additional disclosure provided pursuant to the aforementioned decision and the *inter partes* discussions of the parties; and (iv) the Prosecutor submits that she has fulfilled her disclosure obligations.

27. In addition, the Chamber notes the limited purpose of the confirmation of charges hearing, and finds that the information already available to the Defence, along with the additional disclosure already ordered and provided, including the disclosure ordered in the present decision, will sufficiently enable the Defence to exercise their rights in relation to the charges. Furthermore, given the fact that the confirmation of charges hearing is now only days away, potential large-scale bulk disclosure at this stage is not only unrealistic, but would not result in meaningful disclosure to the Defence, as it would not allow adequate time for review of the material prior to the 16 September 2019 deadline for the submission of an amended List of Evidence.

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<sup>18</sup> See paras 14 to 20 of the Motion: In relation to Witness P-0646, the Chamber does not require disclosure of the following: CAR-OTP-2013-0358; CAR-OTP-2013-0388; CAR-OTP-2013-0351; CAR-OTP-2013-0382; CAR-OTP-2013-0346; CAR-OTP-2013-0356; CAR-OTP-2013-0376; CAR-OTP-2013-0369. In relation to Witness P-2125, the Chamber does not require disclosure of the following: Photos 1, 2, 3, and 4 as reflected in the witness statement, and attached at Annex S.



The Chamber further notes that, in the event that the case proceeds to trial, the Defence would have further opportunity to seek disclosure at that stage.

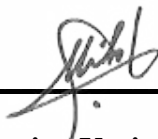
28. Finally, the Chamber considers that the subject matter of the Motion and First Rule 76 Motion should appropriately have been raised at an earlier stage following the 19 August 2019 disclosure deadline, rather than in the immediate lead up to the confirmation of charges hearing.

29. In light of the above, the Chamber finds that a broad order for bulk disclosure is not warranted and, accordingly, rejects the Second Request. The Chamber further considers that, in light of the current stage of proceedings, no further motions on disclosure shall be considered at this time.

**FOR THESE REASONS, THE CHAMBER HEREBY**

- a) **GRANTS** the Defence request for disclosure of certain photos referenced in the Motion, as set out in the present decision at paragraph 24 and footnotes 17 and 18, by no later than 12:00 on 16 September 2019;
- b) **AUTHORISES** the Prosecutor to apply redactions to the photos ordered for disclosure in the present decision, if necessary for protective purposes;
- c) **REJECTS** the Defence request to order the Prosecutor to disclose any remaining items shown to, or provided by, any of the Prosecutor's witnesses; and
- d) **DETERMINES** that, in light of the current stage of proceedings, no further motions on disclosure shall be considered at this time.

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




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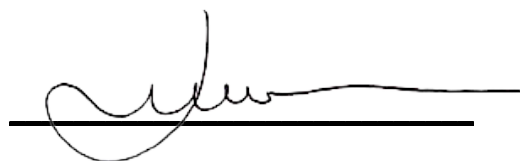
**Judge Antoine Kesia-Mbe Mindua**

**Presiding Judge**




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**Judge Tomoko Akane**




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**Judge Rosario Salvatore Aitala**

Dated this Tuesday, 4 February 2020

At The Hague, The Netherlands