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**No. ICC-01/14-01/18
Date: 13 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 YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Public

Decision on the Defence for Mr Yekatom's 'Motion for Finding of Disclosure Violation and to Exclude the Evidence of Thirteen Witnesses' (ICC-01/14-01/18-305) and 'Motion for Finding of Disclosure Violation and to Exclude the Evidence of Ten Witnesses' (ICC-01/14-01/18-313-Conf)

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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REGISTRY

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Victims and Witnesses Unit

Detention Section

**Victims Participation
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Other

PRE-TRIAL CHAMBER II of the International Criminal Court hereby issues this decision on the defence for Mr Yekatom's (the 'Defence') 'Motion for Finding of Disclosure Violation and to Exclude the Evidence of Thirteen Witnesses'¹ (the 'Motion on Thirteen Witnesses') and 'Motion for Finding of Disclosure Violation and to Exclude the Evidence of Ten Witnesses'² (the 'Motion on Ten Witnesses').

I. Procedural History

1. On 11 November 2018, the Chamber issued the 'Warrant of Arrest for Alfred Yekatom'.³ On 17 November 2018, Yekatom was surrendered to the Court by the authorities of the Central African Republic.⁴
2. On 7 December 2018, the Chamber issued the 'Warrant of Arrest for Patrice-Edouard Ngaïssona'.⁵ On 23 January 2019, Ngaïssona was surrendered to the Court by the authorities of the French Republic.⁶
3. On 11 January 2019, the Single Judge found that Yekatom 'is proficient in French for the purposes of these proceedings' and that he 'has the right to have, on an *ad hoc* basis, the assistance of a French-Sango interpreter when reading the witness statements [...]'.⁷
4. On 23 January 2019, the Single Judge issued the first 'Decision on Disclosure and Related Matters'.⁸
5. 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.⁹
6. On 4 April 2019, the Chamber issued the 'Second Decision on Disclosure and Related Matters', thereby ordering, *inter alia*, that the Prosecutor disclose all evidence

¹ [ICC-01/14-01/18-305](#), together with confidential annexes A to C.

² ICC-01/14-01/18-313-Conf, together with confidential annexes A and B. A public redacted version is also available, *see* [ICC-01/14-01/18-313-Red](#).

³ ICC-01/14-01/18-1-US-Exp. A public redacted version of the warrant of arrest is also available; *see* [ICC-01/14-01/18-1-Red](#).

⁴ 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.

⁵ ICC-01/14-01/18-89-Conf-Exp. A public redacted version of the warrant of arrest is also available; *see* [ICC-01/14-01/18-89-Red](#).

⁶ Registry, Rapport du Greffe sur la Remise de Patrice-Edouard Ngaïssona, ICC-01/14-01/18-101-US-Exp, paras 5-14.

⁷ ICC-01/14-01/18-56-Conf. A public redacted version is also available, *see* [ICC-01/14-01/18-56-Red](#).

⁸ ICC-01/14-01/18-64-Conf. A public redacted version is also available, *see* [ICC-01/14-01/18-64-Red](#).

⁹ [ICC-01/14-01/18-87](#); [ICC-01/14-01/18-121](#).

within the meaning of article 67(2) of the Rome Statute ('Statute') and all material referred to in rule 77 of the Rules of Procedure and Evidence ('Rules') by 17 May 2019 at the latest.¹⁰

7. On 15 May 2019, the Chamber decided that the confirmation hearing in the case against Yekatom and Ngaïssona shall commence on 19 September 2019, and postponed the deadline for disclosure of the abovementioned material to 19 August 2019.¹¹

8. On 19 August 2019, the Chamber received the 'Prosecution's Notification of Filing of the Document Containing the Charges and List of Evidence' (the 'DCC').¹²

9. On 30 August 2019, the Defence submitted the Motion on Thirteen Witnesses.

10. On the same day, the Prosecutor filed the 'Prosecution's Communication of the Disclosure of Evidence', reporting that on 29 August 2019 the Prosecution disclosed to the Defence teams, *inter alia*, '54 transcribed portions of witness interviews'.¹³

11. On 2 September 2019, the Defence filed the Motion on Ten Witnesses.

12. On 3 September 2019, the Prosecutor filed the 'Prosecution's Communication of the Disclosure of Evidence on 2 September 2019', notifying that on 2 September 2019 the Prosecution disclosed to the Defence teams 'a total of 12 French translations of Statements previously disclosed to the Defence in English'.¹⁴

13. On 4 and 6 September 2019, the Prosecutor submitted the responses to the Motion on Ten Witnesses and the Motion on Thirteen Witnesses respectively.¹⁵

II. Submissions of the Parties

A. The Defence

14. In the Motion on Thirteen Witnesses, the Defence alleges that the Prosecutor failed to disclose French translations of thirteen witness statements, relied upon in the DCC and intended to be used during the confirmation hearing, before the 19 August 2019 deadline. The Defence considers that this amounts to a violation of the Prosecution's disclosure obligations, in particular pursuant to article 67(1)(a) of the

¹⁰ [ICC-01/14-01/18-163](#).

¹¹ [ICC-01/14-01/18-199](#).

¹² [ICC-01/14-01/18-282](#), together with confidential annexes A to J.

¹³ [ICC-01/14-01/18-306](#).

¹⁴ [ICC-01/14-01/18-317](#).

¹⁵ [ICC-01/14-01/18-318](#); [ICC-01/14-01/18-324](#).

Statute and rule 76(3) of the Rules, requiring the Prosecutor to provide translations of the statements of its witnesses in a language which the accused fully understands and speaks. The Defence thus requests the Chamber to (i) ‘make an explicit finding that the Prosecution has violated its disclosure obligations under Rule 76(3) by failing to timely disclose the witness statements of thirteen witnesses in a language that Mr. Yekatom understands’; and (ii) ‘enter an order that the Prosecution may not rely on the evidence of these thirteen witnesses at the confirmation hearing’.

15. In the Motion on Ten Witnesses, the Defence alleges that the Prosecutor has failed to disclose the complete transcripts of the interviews of ten Prosecution witnesses, upon whom it intends to rely at the confirmation hearing, before the 19 August 2019 deadline. The Defence considers that this amounts to a violation of the Prosecution’s disclosure obligations, in particular pursuant to rule 76 of the Rules requiring the disclosure of ‘the entire statement of the Prosecution witness’, and not only of those specific excerpts from those statements on which the Prosecutor relies in the DCC. Thus, the Defence requests the Chamber to (i) find ‘that the Prosecution has violated its disclosure obligation by failing to timely disclose the complete statements of the ten witnesses’; and (ii) ‘enter an order that the Prosecution may not rely on the evidence of these ten witnesses at the confirmation hearing’.

B. The Prosecutor

16. The Prosecutor responded to the Motion on Thirteen Witnesses stating that the omission to disclose thirteen French translations of witness statements was inadvertent. The Prosecutor asserts that (i) the omission has been addressed through the disclosure of as many as twelve French translations of witness statements on 2 September 2019; (ii) the thirteenth missing translation will be disclosed ‘as soon as possible’; and (iii) the potential prejudice suffered by the defendant is minimal since ‘the Prosecution’s disclosure has not undermined either the safety or fairness of the on-going proceedings in any appreciable way’. Hence, the Prosecutor requests that the Chamber reject the motion.

17. The Prosecutor responded to the Motion on Ten Witnesses attributing the late disclosure of 54 transcript portions to an oversight. The Prosecutor affirms that (i) the inadvertent delay in disclosure has been rectified through the 29 August 2019 disclosure of evidence; and (ii) the potential prejudice caused to the Defence is

minimal as the Prosecutor won't rely on those transcript portions for the purposes of the confirmation hearing. The Prosecutor concludes that, 'given that the Prosecution does not rely upon this material [...] for the confirmation hearing and that it is now disclosed, any potential prejudice to the Defence is marginal and the requested relief manifestly disproportionate', and the Defence's motion should be rejected.

III. Determinations by the Chamber

A. Motion on Thirteen Witnesses

18. The Chamber notes that rule 76(3) of the Rules reads as follows: '[t]he statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks'. Additionally, rule 76(3) of the Rules must be complied with in accordance with the deadlines imposed by the Chamber. In the case at hand, the 'language which the accused fully understands and speaks' is French, as found by the Chamber on 11 January 2019; furthermore, according to the Chamber's 15 May 2019 decision postponing the confirmation of the charges hearing, the relevant deadline in the present case was set to 19 August 2019. Having omitted to disclose the French translations of thirteen witness statements before that deadline, the Prosecutor has violated the disclosure obligations enshrined in rule 76(3) of the Rules and imposed through the Chamber's 15 May 2019 decision.

19. However, the Chamber notes that the Prosecutor has partially remedied such violation by disclosing twelve out of the thirteen missing French translations on 2 September 2019; this makes the Motion on Thirteen Witnesses to a large extent moot. Furthermore, in light of the accidental nature of the Prosecutor's omission, as well as of the remedy promptly implemented by the latter, the Chamber finds that the Defence has not suffered such a prejudice that would warrant an order to exclude the lately disclosed evidence relating to the thirteen witnesses.

20. As far as the French translation of CAR-OTP-2070-0518-R01, relating to witness P-1402, is concerned, the Chamber notes that the Prosecutor has undertaken to make it available as soon as feasible. The Chamber takes note of this undertaking and orders the Prosecutor to proceed without undue delay.

B. Motion on Ten Witnesses

21. The Chamber notes rule 76(1) of the Rules according to which ‘[t]he Prosecutor shall provide the defence with the names of the 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’. Additionally, rule 76(1) of the Rules must be complied with in accordance with the deadlines imposed by the Chamber; in the present case, the deadline was set on 19 August 2019. Having omitted to disclose 54 transcript portions before that deadline, the Prosecutor has violated the disclosure obligations enshrined in rule 76(1) of the Rules, to the extent that the Prosecutor did not provide the Defence with ‘any prior statements made by’ the ten witnesses, as ordered by the Chamber by its 15 May 2019 decision.

22. The Chamber notes that the Prosecutor has since remedied this inadvertent violation by disclosing the 54 missing transcript portions on 29 August 2019; this makes the Motion on Ten Witnesses to a large extent moot. Furthermore, the Chamber finds this time to be sufficiently in advance to allow the Defence to adequately prepare. Additionally, the Chamber notes the Prosecutor’s statement to the effect that she will not rely on these lately disclosed transcript portions for the purposes of the confirmation hearing. In light of these reasons, the Chamber finds that the Defence has not suffered such a prejudice that would warrant an order to exclude the lately disclosed evidence related to the ten witnesses.

23. The Chamber notes that the Prosecutor has not responded to the Defence’s allegation to the effect that ‘some transcripts may still be missing’, in particular one or more transcript portions relating to the interview of witness P-1402. To the extent that such transcripts exist, consist of items subject to disclosure and have not been yet disclosed by virtue of an oversight, the Chamber orders the Prosecutor to remedy such omission by disclosing them without undue delay.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **REJECTS** the Defence's Motion on Thirteen Witnesses and Motion on Ten Witnesses;
- b) **ORDERS** the Prosecutor to disclose the French translation of CAR-OTP-2070-0518-R01 and any additional existing transcript portions of witnesses' interviews in accordance with paragraphs 20 and 23 above.

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 Friday, 13 September 2019

At The Hague, The Netherlands