

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **11 August 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-  
EDOUARD NGAÏSSONA***

**Public Redacted**

**Public Redacted Version of "Corrigendum of 'Prosecution's Response to the Yekatom Defence's Motion for Disclosure of rule 76 Material', 27 August 2019, ICC-01/14-01/18-295-Conf" 11 September 2019, ICC-01/14-01/18-295-Conf-Corr**

**Source: Office of the Prosecutor**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Kweku Vanderpuye

**Counsel for Alfred Yekatom**

Me Mylène Dimitri  
Mr Peter Robinson

**Counsel for Patrice-Edouard Ngaïssona**

Mr Geert-Jan Alexander Knoops

**Legal Representatives of Victims**

Mr Dmytro Suprun  
Mr Abdou Dangabo Moussa  
Ms Elisabeth Rabesandratana  
Mr Yaré Fall  
Ms Marie-Edith Douzima-Lawson  
Ms Christine Priso Ouamballo  
Ms Paolina Massidda

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Pre-Trial Chamber II (“Chamber”) to dismiss the Yekatom Defence’s Motion for Disclosure of rule 76 Material (“Motion”).<sup>1</sup> The requested relief is not necessary, nor is it required. Nonetheless, the Prosecution is disposed to provide certain requested material, as indicated below.

## II. CONFIDENTIALITY

2. The Response is filed as Confidential, as it responds to a Motion with the same designation.

## III. SUBMISSIONS

3. The Motion requests the disclosure of four categories of evidence in the context of rule 76 of the Rules of Procedure and Evidence (“Rules”): (i) screening notes; (ii) items provided by or shown to the witness; (iii) other information provided by the witness; and (iv) statements to third parties.

### A. Screening Notes

4. As a threshold matter, contrary to the Motion,<sup>2</sup> the Defence is not entitled to *all* notes of every screening the Prosecution has done throughout the course of its investigation. While the Defence is entitled to screenings containing PEXO or rule 77 material, the Prosecution does not, for example, have an obligation to disclose screenings of witnesses providing no information relevant to the investigation.

---

<sup>1</sup> ICC-01/14-01/18-285-Conf.

<sup>2</sup> Motion at paras. 14-19.

5. The Prosecution has already disclosed all Witness statements cited in the Document Containing the Charges (“DCC”) along with any necessary translations, except one Witness for whom it disclosed an anonymous summary instead. There are 96 screening notes associated with these Witnesses.<sup>3</sup> These screenings by their nature are less detailed, and thus largely duplicative and cumulative of the disclosed Witness Statements. While they will be disclosed prior to trial, they are not necessarily of true relevance for the limited purposes of the confirmation proceedings. That said, to encourage as an efficient proceeding as possible, the Prosecution will do its best to accommodate this Defence request, and expects to be able to review, redact, and disclose these 96 screenings within one week.

#### **B. Items Provided by or Shown to Witnesses**

6. The Motion is overbroad in requesting the disclosure of: (i) all materials that witnesses have provided to the Prosecution (irrespective of relevance) and (ii) anything shown to the witness that is referenced in their statement.<sup>4</sup> This request ignores the Court’s prior jurisprudence,<sup>5</sup> upheld by the Appeals Chamber in the *Ntaganda* case — not all items containing information obtained from a witness necessarily constitute a ‘statement’ within the meaning of rule 76.<sup>6</sup> Thus, for instance, information provided by Witnesses solely related to matters other than their knowledge of the case (such as information related to security concerns or purely logistical matters) do not come within rule 76.<sup>7</sup> The Prosecution has abided by this precedent.

---

<sup>3</sup> Included within these 96 screenings are the two screenings the Defence cites at footnotes 28 and 30 in its Motion.

<sup>4</sup> Motion at paras. 20-24.

<sup>5</sup> ICC-01/05-01/13-1227, paras. 9-10; *see also* ICC-01/04-02/06-904, paras. 29-30.

<sup>6</sup> ICC-01/04-02/06-1330, at para. 11 (quoting ICC-01/04-02/06-904 at paras. 29 and 39); *see also* [REDACTED].

<sup>7</sup> ICC-01/04-02/06-1330, at paras. 11 (quoting ICC-01/04-02/06-904 at para. 30) and 39 (confirming the impugned decision); *see also* [REDACTED].

7. In general, the Prosecution discloses materials provided by Witnesses as annexes to their Statements. Specifically, over 2,000 items of evidence were disclosed which are either sources or attachments related to the Witnesses on whom the Prosecution relies for confirmation purposes and cited in the DCC. In accordance with the Chamber's directive to disclose only what is truly relevant at this stage,<sup>8</sup> the Prosecution has endeavoured to avoid overburdening the Defence with irrelevant material; again, in view of the limited purposes of the proceedings. Thus, while not every single piece of evidence related to all Prosecution Witnesses has been disclosed at this stage, nor is required to be,<sup>9</sup> the Prosecution remains mindful of its continuing obligation to review and disclose material, as appropriate through trial.

8. Where items of evidence shown to a Witness have been assessed as relevant to the Statement, they have been disclosed. For example, the Prosecution has repeatedly disclosed videos shown to Witnesses during interviews.<sup>10</sup> If the Defence has any concerns about items shown to a Witness but not disclosed other than the three instances cited in the Motion,<sup>11</sup> the Prosecution invites their specific identification, as this would greatly facilitate any further or necessary review.

9. The Motion's analogising of annexes to Witness Statements and associated exhibits to prior recorded testimony under rule 68<sup>12</sup> is not apt. The comparison obscures the different legal thresholds that apply to admission and to disclosure, respectively. Rather than determining the admissibility of items whose relevance has already been decided (under rule 68), the issue here is whether the item is and *disclosable* in the first place.

---

<sup>8</sup> ICC-01/14-01/18-64-Red, at para. 18 (Single Judge stressing that "only such evidence is disclosed which is of true relevance to the case and apt to support a particular factual allegation underlying the requisite legal elements.")

<sup>9</sup> ICC-01/04-01/06-803, at para. 154; ICC-01/04-01/07-621, para. 8.

<sup>10</sup> See, e.g. P-1819, CAR-OTP-2065-0003-R01, at 0012-0031, paras. 49-164 (describing disclosed video CAR-OTP-2012-0523); P-0289, CAR-OTP-2024-0288, at 0304, paras. 88-94 (describing disclosed videos CAR-OTP-2012-0477 and CAR-OTP-2019-1359); P-1521, CAR-OTP-2046-0603, at 0624-0625, para. 128 (describing disclosed video CAR-OTP-2012-0523).

<sup>11</sup> Motion at para. 21.

<sup>12</sup> Motion at para. 23.

### C. Other Information from the Witnesses

10. The Motion's request for disclosure of other miscellaneous categories of items related to witnesses, including interviewer's notes, draft or unsigned statements, and email correspondence with the witness,<sup>13</sup> is overly broad. Similar to the request for disclosure of any and *all* materials provided by Witnesses, this request ignores the Court's jurisprudence, recently articulated by the Appeals Chamber in the *Ntaganda* case, as noted at paragraph 6 above.

11. The Prosecution has generally disclosed this type of information under rule 77, as PEXO, or as INCRIM. Emails to investigators about organising the date, time, and location of an interview, however, are in general not disclosable. Draft Statements are also not generally disclosable in that they are not final and have not been signed or ratified by the Witness. If the Defence has concerns in respect of the materiality of specific types of notes or email communications, the Prosecution would invite their identification and is more than disposed to review (or re-review) such material.

### D. Statements to Third Parties

12. The Motion's request for the Prosecution to obtain and disclose all prior Statements of Witnesses on whom it intends to rely at the confirmation hearing taken by other entities,<sup>14</sup> is unwarranted and unsupported. Jurisprudence from the ICC<sup>15</sup>, the *ad hoc* tribunals,<sup>16</sup> and the Special Court for Sierra Leone,<sup>17</sup> all indicate that "prior statements" within the meaning of rule 76 (or similar provisions) comprise statements made by witnesses when questioned on their knowledge of the case in the course of its investigation. Statements provided to entities other than the

<sup>13</sup> Motion at paras. 25-27.

<sup>14</sup> Motion at paras. 28-30.

<sup>15</sup> ICC-01/05-01/13/1227, at para. 9; *see also* ICC-01/04-01/06-718, p. 4.

<sup>16</sup> *See Prosecutor v. Blaskic*, IT-95-14-A, at para. 15; *Prosecutor v. Karemera et al.* ICTR-98-44-T, at para. 20; *Niyitegeka v. Prosecutor*, ICTR-96-14-A, at paras. 31-36.

<sup>17</sup> *See Prosecutor v. Brima et al.*, SCSCL-04-16-T, at para. 16.

Prosecution — for example, domestic judicial authorities — only come under rule 76 if they involve questioning witnesses “about their knowledge of the case in the course of its investigation”.<sup>18</sup>

13. The Prosecution is aware of its investigative obligation to make sufficient efforts to obtain rule 76 statements,<sup>19</sup> as well as its burden to disclose any such statement in its possession containing INCRIM, rule 77, or PEXO information. The Defence provides examples of third party organisations to which it suggests Witnesses could have provided statements.<sup>20</sup> The Prosecution is unable, however, to verify the extent to which Prosecution Witnesses have provided statements to third parties such as the United Nations (“UN”) Human Rights Office of the High Commissioner’s International Commission of Inquiry or Human Rights Watch, because these sources redact the identity of these witnesses from they may provide or publish.

14. The Defence cites two examples<sup>21</sup> of alleged interviews of Prosecution Witnesses [REDACTED] by the UN Panel of Experts on the Central African Republic taken in 2014. However, it is the Prosecution’s understanding that the UN Panel of Experts did not take formal statements, but rather, would quote Witnesses in their reports, including the one cited. If the Defence has additional information on Prosecution Witnesses having been questioned by third parties on their knowledge of the case in the course of an investigation relating to this case, it would be helpful to the Prosecution to receive that information to facilitate any further or necessary review.

---

<sup>18</sup> ICC-01/05-01/13/1227, at para. 9.

<sup>19</sup> ICC-01/05-01/13/1227, at para. 9.

<sup>20</sup> Motion at paras. 29-30.

<sup>21</sup> Motion at fn. 45.

#### IV. CONCLUSION

15. For the above reasons, the Prosecution requests the Chamber to dismiss the Defence Motion.



---

**Fatou Bensouda, Prosecutor**

Dated this 11<sup>th</sup> day of August 2020  
At The Hague, The Netherlands