

Public Redacted Version

Annex B

Email chain entitled "Request on behalf of Me Stéphane Bourgon Ad.E.  
to the Honourable Judges of Pre-Trial Chamber II"

**Yuqing Liu**

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**From:** [REDACTED]  
**Sent:** 17 June 2019 11:46  
**To:** Bourgon, Stephane  
**Cc:** Mindua, Antoine; Akane, Tomoko; Aitala, Rosario; [REDACTED]; Knoops, Geert-Jan; Vanderpuye, Kweku; Mylene Dimitri; Yuqing Liu; Carrin, Marion; Vandeler, Lauriane; Sara Pedroso; [REDACTED]; [REDACTED]  
**Subject:** Re: Request on behalf of Me Stéphane Bourgon Ad.E. to the Honourable Judges of Pre Trial Chamber II

Dear Mr Bourgon,

Please be informed that the Judges of Pre-Trial Chamber II have, by majority, Judge Mindua dissenting, decided to reject your request and to, consequently, maintain the classification of the transcript of the hearing conducted on 29 May 2019 as confidential, *ex parte*, only available to the Prosecutor and the Victims and Witnesses Unit.

The Chamber, Judge Mindua dissenting, is of the view that, mindful of its duty to ensure a fair trial, the purpose of the aforementioned hearing was to protect the rights of Messrs Yekatom and Ngaïssona and to ensure that the variation of the time limit to submit applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence is strictly required to protect witnesses. Furthermore, considering the sensitive and confidential nature of the protection of witnesses, any redactions required would be so extensive that it would be meaningless to provide the Defence with a redacted transcript of this hearing.

Judge Mindua disagrees with the majority and considers that the transcript should be reclassified as *ex parte*, only available to the Prosecutor, the Defence for Messrs Yekatom and Ngaïssona, and the Victims and Witnesses Unit. Accordingly, upon review of the transcript, he holds the view that a redacted version of the transcript should be made available to the Defence so as to balance the rights of the Defence and the protection of witnesses.

Best regards,

[REDACTED], on behalf of Pre-Trial Chamber II

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**From:** Bourgon, Stephane [REDACTED]  
**Sent:** 10 June 2019 13:20  
**To:** Vanderpuye, Kweku; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]  
**Cc:** Iverson, Eric; Struyven, Olivia; Verrill, Nigel; Knoops, Geert-Jan; Carrin, Marion; Sara Pedroso; Mylene Dimitri; Yuqing Liu; [REDACTED]; [REDACTED]  
**Subject:** RE : Request on behalf of Me Stéphane Bourgon Ad.E. to the Honourable Judges of Pre Trial Chamber II

To: Pre-Trial Chamber II  
Info: ICC Prosecutor  
Defence of Mr. Ngaïssona  
Registry, Victims and Witnesses Unit

Subject: Re:Request on behalf of Me Stéphane Bourgon Ad.E. to the Honourable Judges of Pre-Trial Chamber II

Message: Please convey the enclosed request to the Honourable Judges of Pre-Trial Chamber II

10 June 2019

**To the Honourable Judges of Pre-Trial Chamber II**

I hereby refer to the Prosecution's views submitted to Pre-Trial Chamber II (« Chamber ») in relation to the Yekatom Defence (« Defence »)'s message addressed to the Chamber on 6<sup>th</sup> June 2019 by way of electronic correspondence.

In light of the views expressed by the Prosecution, the Defence deems necessary and appropriate to offer the following observations:

It is significant that the Prosecution's views omit to address the core of the Defence's message addressed to the Chamber, namely (i) the legal basis and/or the necessity to hold an *ex parte* status conference during which the issues discussed directly impact the fairness of the proceedings and the rights of Mr. Yekatom; and (ii) the rationale for not providing the Defence with an opportunity to be heard contrary to what happened following the Chamber's 29<sup>th</sup> March 2019, further to the Decision setting a deadline for the submission of applications prior to the confirmation hearing (ICC-01/14-01/18-148-Conf).

Indeed, although there might be exceptions, the fact that the other party has to be informed of the fact that an application for *ex parte* proceedings has been filed and the legal basis for the application is, in principle, unobjectionable.

Merely stating that « the 29 May 2019 *ex parte* closed session Status Conference was properly held on an *ex parte* basis and that the classification should be maintained » is simply not sufficient. The Chamber's responsibility to conduct pre-trial proceedings efficiently and the Chamber's duty to be informed about witness security issues are not matters addressed in the Defence's message.

The Prosecution's reference to Article 68(1) is also incomplete as it ignores the fact that measures taken pursuant to Article 68(1) « shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial ».

In this context, reclassification of the transcript of the 29 May 2019 *ex parte* Status Conference – with the application of the minimum redactions required – certainly appears to be a fair and responsible approach consistent with the rights of Mr. Yekatom and the Court's legal framework.

RESPECTFULLY SUBMITTED ON THIS 10<sup>th</sup> DAY OF JUNE 2019,

Stéphane Bourgon,  
Lead Counsel for Mr. Yekatom

**De :** Vanderpuye, Kweku [REDACTED]  
**Date d'envoi :** 8 juin 2019 19:39  
**À :** [REDACTED]; Bourgon, Stephane; [REDACTED]; [REDACTED]; [REDACTED]  
**Cc :** Iverson, Eric; Struyven, Olivia; Verrill, Nigel; Knoops, Geert-Jan; Carrin, Marion; Sara Pedroso; Mylene Dimitri; Yuqing Liu  
**Objet :** RE: Request on behalf of Me Stéphane Bourgon Ad.E. to the Honourable Judges of Pre Trial Chamber II

Dear Pre-Trial Chamber,

Dear All,

Thank you for the opportunity to provide the Prosecution's views. The 29 May 2019 *ex parte* closed session Status Conference was properly held on an *ex parte* basis and the classification should be maintained, at least through the Confirmation Hearing. The Defence's request to reclassify the transcript of the proceeding is unfounded.

*First*, the Chamber is responsible to conduct pre-trial proceedings efficiently and consistent with its statutory obligations, particularly regarding the conditions of disclosure and attendant witness security issues.

*Second*, the Chamber has a duty to be informed about witness security matters given the potential impact on the integrity of prospective proceedings if managed ineffectively.

*Third*, the Court's regulatory framework vests the Chamber with the power and broad discretion to balance the procedural interests of the Defence and the Court's competing obligation to take "*appropriate measures*" to ensure the protection of "the safety, physical, psychological well-being, dignity and privacy of [...] witnesses" under article 68(1). How best to balance these interests is firmly within the Chamber's broad discretion in overseeing the disclosure and confirmation processes, whether through its consideration of *ex parte* filings or calling for similarly designated conferences.

*Fourth*, barring a charge of 'abuse of discretion' – which it does not appear the Defence asserts here – no procedural infringement or unfair prejudice arises from the Chamber having designated the Status Conference or its transcript as *ex parte*. Consequently, no claim lies for modifying the current classification in any respect, particularly in advance of the Confirmation Hearing.

If the Defence intends to further litigate the matter, the Prosecution would suggest that it file a motion to which it will respond. That said, the Prosecution remains at the Chamber's disposal should it require any further explanation. Thank you.

Kind regards,

Kweku Vanderpuye



**Kweku Vanderpuye**

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**From:** [REDACTED]  
**Sent:** 07 June 2019 15:44  
**To:** 'Bourgon, Stephane'; [REDACTED]; [REDACTED]; [REDACTED]  
**Cc:** Vanderpuye, Kweku; Iverson, Eric; Struyven, Olivia; Verrill, Nigel; Knoops, Geert-Jan; Carrin, Marion; Sara Pedroso; Mylene Dimitri; Yuqing Liu  
**Subject:** RE: Request on behalf of Me Stéphane Bourgon Ad.E. to the Honourable Judges of Pre Trial Chamber II

Dear Stéphane Bourgon,  
 Dear Kweku Vanderpuye,

The Judges of Pre-Trial Chamber II would like to have the views of the Office of the Prosecutor on the request presented below by the counsel for the defence.

Kind regards,

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**From:** Bourgon, Stephane [REDACTED]  
**Sent:** 06 June 2019 20:13  
**To:** [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]  
**Cc:** Vanderpuye, Kweku; Iverson, Eric; Struyven, Olivia; Verrill, Nigel; Knoops, Geert-Jan; Carrin, Marion; Sara Pedroso; Mylene Dimitri; Yuqing Liu  
**Subject:** Request on behalf of Me Stéphane Bourgon Ad.E. to the Honourable Judges of Pre Trial Chamber II

**To:** Pre-Trial Chamber II  
**Info:** ICC Prosecutor,  
 Defence of Mr. Ngaißsona  
 Registry, Victims and Witnesses Unit

**Subject:** Request on behalf of Me Stéphane Bourgon Ad.E. to the Honourable Judges of Pre Trial Chamber II

**Message:** Please convey the enclosed request to the Honourable Judges of Pre-Trial Chamber II

6 June 2019

### **To the Honourable Judges of Pre-Trial Chamber II**

I hereby refer to Pre-Trial Chamber II ("Chamber")'s message transmitted to the Defence of Mr. Yekatom and the Defence of Mr. Ngaißsona by electronic correspondence on 29 May 2019 (14h58), bearing the subject: "Notification of variation of time limit".

The Defence notes the Chamber's Decision to vary the time limit for the submission by the Prosecutor of any and all applications for authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence [...]

In this regard, the Defence deems necessary and appropriate to recall that:

- On 29 March 2019, further to the "Decision setting a deadline for the submission of applications prior to the confirmation hearing (ICC-01/14-01/18-148-Conf)", the Prosecutor submitted *ex parte* a Request seeking authorisation to : (i) withhold the identities of certain Prosecution witnesses; (ii) apply non-standard redactions to the statements of certain

witnesses; and (iii) an additional three weeks to apply for the non-disclosure of identities for other witnesses (“ Prosecution Request”);

- On 1 April 2019, noting that the Prosecution filing was submitted *ex parte*, the Chamber directed the Prosecutor to file a confidential, redacted version of the Prosecution Request by Wednesday, 3 April 2019 and directed the Yekatom Defence and the Ngaïssona Defence to file any responses thereto by Monday, 8 April 2019;
- On 8 April 2019, the Defence for Mr. Yekatom and Mr. Ngaïssona jointly responded to the Prosecution Request; and
- On 10 April 2019, the Chamber granted the extension of time sought by the Prosecution while the other two issues in the Prosecution Request remain pending to this day.

In light of the foregoing, the Defence for Mr. Yekatom expresses concern as to why the Chamber proceeded on a different basis and why the Defence was not provided with an opportunity to be heard before the Chamber issued its Decision to vary the time limit for the submission by the Prosecutor of any and all applications for authorisation of the non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence from 7 June to 5 July 2019.

The Defence for Mr. Yekatom also expresses concern regarding the holding of a confidential *ex parte* status conference involving the Prosecution and VWU, which does not appear to be a procedure provided for in the International Criminal Court’s legal framework.

Indeed, the issues which appear to have been discussed during the 29 May 2019 *ex parte* status conference including *inter alia*, submissions by the Prosecution of applications for authorisation of the non-disclosure of witnesses’ identities or the non-disclosure of entire items of evidence, directly impact on the fairness of the proceedings and the rights of Mr. Yekatom.

Consequently, the Defence respectfully requests reclassification of the transcript of the *ex parte* hearing held on the 29 May 2019 from *ex parte* to confidential, with redaction if necessary.

RESPECTFULLY SUBMITTED ON THIS 6<sup>TH</sup> DAY OF JUNE 2019

Stéphane Bourgon,  
Lead Counsel for Mr. Yekatom