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

Date: **19 July 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

Prosecution's Response to "Joint Defence Request for leave to appeal 'First Decision on the Prosecutor's Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-standard Redactions,'" ICC-01/14-01/18-232-Conf-Red

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Joint Defence Request seeking leave to appeal¹ the “First Decision on the Prosecutor’s Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-standard Redactions” (“Decision”)² should be rejected.

2. The First Issue³ comprises a question of law arising from the Decision which the Appeals Chamber has already settled. The Second, Third and Fourth Issues⁴ identify no appealable issue whatsoever, because they either misread the Decision, or are mere disagreements on how the Chamber exercised its discretion in reaching the Decision.⁵ In any event, none of the four largely interrelated issues affects the fair and expeditious conduct of the proceedings, nor would immediate appellate intervention under article 82(1)(d) advance them.

II. CONFIDENTIALITY

3. This response is filed as CONFIDENTIAL pursuant to regulation 23bis(2) of the Regulations of the Court as it responds to a filing with the same classification.⁶

III. SUBMISSIONS

A. The First Issue concerns a legal question already determined by the Appeals Chamber and does not merit immediate appellate intervention

4. The First Issue is framed as follows: “Whether the Pre-Trial Chamber erred when determining that the notion “further and ongoing investigations” pursuant to

¹ ICC-01/14-01/18-248-Conf (“Request”).

² ICC-01/14-01/18-232-Conf-Red.

³ Request, para. 7.

⁴ Request, para. 7.

⁵ See ICC-01/04-01/10-487, paras. 32-33; ICC-01/05-01/13-1278, para. 9.

⁶ ICC-01/14-01/18-248-Conf.

Rule 81(2) includes the Prosecution's investigations other than the investigations directed at Mr Ngaïssona and Mr Yekatom."⁷

5. This legal question has already been decided by the Appeals Chamber, although in a different context. It does not merit appellate intervention. In an appeal against Lubanga's conviction, the Appeals Chamber granted redactions to the Prosecution's Request for Assistance (RFA) concerning pending investigative matters unrelated to the *Lubanga* case under article 81(2) – namely - domestic procedures on obtaining election cards and whether such cards are official identity documents.⁸ Like the Pre-Trial Chamber has done here,⁹ the Appeals Chamber did not restrict the authorisation of redactions based on further or ongoing investigations to those concerning Lubanga.¹⁰

6. In any case, as shown below, like the rest of the Issues, the First Issue does not affect the fair and expeditious conduct of the proceedings or their outcome, to justify immediate appellate intervention.

B. The Second, Third and Fourth Issues misread the Decision or are mere disagreements with the Chamber's exercise of discretion

7. The Second, Third and Fourth Issues either misread the Decision, or merely disagree with the Chamber's exercise of its discretion. They identify no appealable issue.

⁷ Request, para. 7. See also paras. 10.

⁸ ICC-01/04-01/06-3017 A5 A6, paras. 5, 12.

⁹ Decision, para. 28.

¹⁰ ICC-01/04-01/06-3017 A5 A6, para. 12 (“[T]he Appeals Chamber notes that, according to the Prosecutor, parts of the RFA relate to pending investigative matters that are unrelated to the Letter, and that those parts should therefore be redacted. The Appeals Chamber recalls that, pursuant to rule 81(2) of the Rules of Procedure and Evidence, the Prosecutor may apply for non-disclosure of material if such disclosure may prejudice further or ongoing investigations; therefore, in the present case, the Appeals Chamber treats the Prosecution's submissions with respect to redactions as an application under rule 81(2) of the Rules of Procedure and Evidence. Further, the Appeals Chamber considers that, in the circumstances, it is most expedient to disclose document “OTP/DRC/COD-190/JCCD-pt” to Mr Lubanga with any redactions that she considers necessary (...”).

8. The Second Issue is framed as follows: “Whether the Pre-Trial Chamber erred when determining that it is permissible under rule 81(2) to disclose mere extracts of documents.”¹¹

9. The Second Issue misreads the Decision. Contrary to the Request,¹² the Decision did not construe disclosure of excerpts and the application of redactions as equivalent. Rather, “they are *different ways* of implementing what is one and the same measure – the non-disclosure of information.”¹³

10. Indeed, rather than construing either measure as applying open-endedly across every situation, the Decision properly considers the particular facts in the case.¹⁴ Moreover, while granting discretion to the Prosecution to “opt for one measure or the other”,¹⁵ this was made subject “to the Chamber’s authorisation”,¹⁶ as detailed in the subsequent parts of the Decision. The Request, without substantiation, alleges “substantial differences” between the two options,¹⁷ and merely disagrees with the Chamber’s exercise of discretion permitting the disclosure of excerpts.¹⁸

11. The Third Issue is framed as follows: Whether the Pre-Trial Chamber erred in its application of the “objectively justifiable risk of prejudice” criterion of Rule 81(2) test when it determined that there was a risk of prejudice to the on-going Seleka investigations due to the possibility of the disclosed material being leaked by either the suspects or Defence sources on the ground.”¹⁹

12. The Request’s claim that the Chamber failed to consider that the Defence is bound by article 8 of the Professional Code of Conduct, and that both Suspects are

¹¹ Request, para. 7. See also para. 11.

¹² Request, para. 11.

¹³ Decision, para. 37 (emphasis added).

¹⁴ Decision, para. 37.

¹⁵ Decision, para. 37.

¹⁶ Decision, para. 37.

¹⁷ Request, para. 11.

¹⁸ Request, paras. 11, 17.

¹⁹ Request, para. 7; *see also*, para. 12.

currently under restrictive measures under Regulation 101, misconstrues the Decision.²⁰

13. The Chamber did not find that the Defence would violate its ethical obligations, as the Request appears to assume. To the contrary, the Chamber correctly considered both intentional and inadvertent disclosures of information. Indeed, “information disclosed to the Defence may be passed on by the suspects in this case or by Defence sources on the ground, whether intentionally or inadvertently. While the Defence may not desire or intend to affect such an outcome, the risk of prejudice to the ongoing investigations persists given the possibility of leaks or inadvertent disclosure.”²¹

14. The Fourth Issue is framed as follows: “Whether the Pre-Trial Chamber exceeded the scope of its discretion under Article 81(2) when deciding *proprio motu* not to allow the Prosecution to disclose certain paragraphs of witness statements, which the Prosecution had determined to be disclosable.”²²

15. The Request misreads the Decision or merely disagrees with the Chamber’s exercise of discretion. Having determined that the Prosecution’s request fell within article 81(2), the Chamber merely interpreted what material fell within the scope of the Prosecution’s request to protect further or ongoing investigations. The Chamber thus simply applied article 81(2) to all material or information, including that not expressly referred to in the Prosecution request, for the sake of consistency, or to correct what it considered Prosecution oversight, and to ensure the effectiveness of

²⁰ Request, para. 12.

²¹ Decision, para. 40.

²² Request, para. 7; *see also*, para. 14.

the protections sought.²³ This does not mean that the Chamber exceeded or abused its discretion.

C. All Issues do not meet article 82(1)(d)'s remaining requirements

16. Even assuming *arguendo* that all four Issues are appealable issues, the Request fails to demonstrate that they significantly affect the outcome or fairness of the proceedings, or that their immediate resolution would materially advance them.²⁴

17. The Decision fails by ignoring or misreading the Chamber's holistic assessment of all information before it in authorising non-disclosure under article 81(2) vis-à-vis other competing interests, including the rights of the Defence.

18. In reaching the Decision, the Chamber carefully considered the possible prejudice to the Defence as a result of the redactions, by assessing each discrete request²⁵ "bearing in mind its principal responsibility to balance the different interests at stake."²⁶

19. Moreover, "in order to ensure that non-disclosure is not inconsistent with the rights of the Defence, the Chamber has made sure that the Defence will have disclosed all portions of the statements which are potentially exculpatory or material to its preparation."²⁷ Therefore, the Request cannot show any prejudice. As such, it cannot demonstrate that the Decision affects the fair or expeditious conduct of the proceedings or their outcome.

²³ See *e.g.*, Decision, para. 44 ("[T]he Chamber observes that the Prosecutor has not requested the non-disclosure of paragraphs 258-259 and annex 5 to the statement. The Chamber considers this to be an oversight as the paragraphs and annexes contain information which the Prosecution seeks to withhold in other parts of the statement (..."); and para. 49 ("[T]he Chamber notes that the Prosecution ... requests the non-disclosure of part of the table ... The Chamber considers that for the sake of consistency, non-disclosure of the entirety of the table is justified as it refers to the annexes to the statement, which the Prosecutor seeks to withhold from the Defence (...").

²⁴ *Contra* Request, paras. 15-26.

²⁵ Decision, para. 27.

²⁶ Decision, para. 27. See also paras. 38-68.

²⁷ Decision, para. 27.

20. Noting that “information withheld from the Defence must remain under review and, should circumstances change, may be subsequently disclosed,”²⁸ the Chamber ordered the Prosecution “to continually assess the risk of prejudice to further or ongoing investigations and immediately inform the Chamber of any changes which may warrant a variation of the present ruling.”²⁹ In the circumstances, appellate intervention would merely delay rather than advance the proceedings.

IV. RELIEF SOUGHT

21. For the reasons set out above, the Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 19th day of July 2019
At The Hague, The Netherlands

²⁸ Decision, para. 23.

²⁹ Decision, p. 25