



Original: English

No.: ICC-01/14-01/18
Date: 10 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

**Prosecution's Notification Regarding the Order of Pre-Trial Chamber II in the
Decision on the Defence Motion for an Extension of Time to File List of Evidence
and Related Motions (ICC-01/14-01/18-315-Conf)**

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. NOTIFICATION

1. The Prosecution provides this Notification pursuant to the Order of Pre-Trial Chamber II (“Chamber”) set out in its 3 September 2019 “Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions.”¹

Rule 76 ‘statements’

2. As concerns material falling under rule 76 of the Rules of Procedure and Evidence (“Rules”),² the Prosecution has disclosed all screening notes concerning Witnesses on whom it relies for confirmation purposes.

3. In addition, the Prosecution has verified that it does not have any further undisclosed evidence that falls under rule 76, with the exception of evidence relating to Prosecution Witnesses P-1402, P-1719, P-1792, and P-2475.

4. The Chamber has authorised the non-disclosure of the identities of P-1719, P-1792, and P-2475.³ In particular, the Chamber authorised an anonymised summary of P-1792’s rule 76 Statement.⁴ As previously noted,⁵ the Prosecution inadvertently omitted to translate and disclose P-1402’s rule 76 Statement in French, but is working to rectify the error and will disclose it as soon as possible. P-1719’s identity will also be disclosed promptly and in any case no later than 13 September 2019. Similarly, the Prosecution anticipates disclosing P-2475’s identity by the same date, but is awaiting final confirmation, which is expected soon.

5. Except the above, there is no further rule 76 material disclosable at this stage.

¹ ICC-01/14-01/18-315-Conf, para. 86.

² ICC-01/14-01/18-315-Conf, para. 86(a).

³ ICC-01/14-01/18-261-Conf-Red ; ICC-01/14-01/18-261-Conf-Red.

⁴ ICC-01/14-01/18-261-Conf-Red

⁵ ICC-01/14-01/18-324.

Article 67(2) information regarding P-0801

6. As concerns information relating to Prosecution Witness P-0801 under article 67(2),⁶ the Prosecution has reviewed the information within its possession going to the culpable involvement of P-0801 in the offences against the administration of justice charged in the *Bemba et al* case. However, the Prosecution is not in a position to disclose this material.

7. The information concerned is included in the statements and testimony of Prosecution Witnesses in the *Bemba* case and in the *Bemba et al* case, which remain subject to a number of protective orders issued by Trial Chamber III and Trial Chamber VII. To the extent that certain statements tend to identify P-0801 as having been involved in the charged offences, the circumstances and details of the witnesses' respective interactions with P-0801 and others involved in that case would tend to identify *them*.

8. Absent the authorisation of a Chamber appropriately seized of a variance request, disclosure of this information cannot be achieved reasonably or fairly in a manner which respects the existing protective orders of Trial Chamber VII. The reasons for this, which also comprise notice to the Defence pursuant to regulation 42(2) of the Regulations of the Court ("RoC"), are set out below.

9. The direct evidence establishing P-0801's culpable conduct regarding the offences charged in *Bemba et al*. comprise the evidence of P-0245, P-0260, and P-0261 in that case, as well as allegations provided by an anonymous informant. Absent a variation of the existing protections imposed by Trial Chambers III and VII bearing on this material, the Prosecution is unable to disclose this information.

⁶ ICC-01/14-01/18-315-Conf, para. 86(c).

10. As concerns the testimonies of P-0245, P-0260, and P-0261, the transcripts of evidence as well as the exhibits used with them during the course of their testimonies (including their prior statements to the Prosecution) are protected from disclosure insofar as they may incriminate the Witnesses or identify them. Such material is not within the ‘possession or control’ of the Prosecution as such, but of the Registry. In any event, they are subject to confidentiality on the above bases, as directed by Trial Chamber VII.⁷

11. The Prosecution’s concurrent possession or control of P-0245, P-0260, and P-0261’s statements does not diminish their protected status. Rather, the protections accorded the circumstances of their testimonies and the formal submission of their statements in the case record attach to the material in the Prosecution’s possession—particularly insofar as it may identify or could be used to incriminate them. In any case, the Witnesses’ statements are subject to the Protocol on the Handling of Confidential Information adopted by Trial Chamber VII (“Confidentiality Protocol”), which applies to all disclosed or acquired material or through Parties in the case.⁸ Trial Chamber III also acknowledged similar protection in respect of the Witnesses’

⁷ See ICC-01/05-01/13-T-22-CONF-ENG ET, p.22, l.2-15, (rule 74 Decision regarding P-0245) ; ICC-01/05-01/13-T-18-CONF-ENG ET et, p. 29, l.20 –p. 30, l. 10 (rule 74 Decision regarding P-0260) ; ICC-01/05-01/13-T-13-CONF-ENG ET, p. 8, l. 16-p.10, l. 9 (rule 74 Decision regarding P-0261). See ICC-01/05-01/13-1209 (Directions on the conduct of proceedings, referencing the application of rule 74) and ICC-01/05-01/13-T-19-CONF-ENG ET p.2, ln21- p. 3, ln. 18 (clarifying the scope of rule 74 assurances and noting that “rule 74 also requires that if assurances under the provision are given, then, first, evidence which is self-incriminating to the witness must be kept confidential and not be disclosed to the public or any State .. the record of the proceedings must be *sealed* to give effect to the assurances given”). See ICC-01/05-01/13-1010-Conf-red (regarding the Prosecution’s application for rule 74 protections). See also ICC-01/05-01/13-1353 and ICC-01/05-01/13-1379 (appointing rule 74 Counsel for the three witnesses).

⁸ ICC-01/05-01/13-1093-Anx, para. 6 (providing that “Confidential information disclosed to a party by the other party/ies may only be disclosed to any members of the public where such disclosure is directly and specifically necessary for the preparation and presentation of their case”); see also ICC-01/05-01/13-1093, para. 26 (Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties, noting, particularly in requiring prior VWU consultation prior to any disclosure that the “[u]se of the identity of a witness in the context of investigations *may lead to inferences about that witness’s relevance to the investigation, and thus to their identity as a witness*”) para. 26.

evidence in the Bemba Main Case, particularly as concerns any divulgence of their identities.⁹

12. The Defence request for any statement made to the Prosecution in respect of P-0801 presents exactly the same issue. The circumstances of P-0801's interactions with the witnesses who provided evidence of his culpability regarding the offences charged in *Bemba et al.*, would also tend to identify *them*, contravening the protections provided by the respective Trial Chambers. Likewise, P-0801's statement is subject to the Confidentiality Protocol.

13. In these circumstances, disclosing the witness statements of P-0245, P-0260, P-0261, and the correspondence of the anonymous informant regarding P-0801's culpable involvement in the context of the *Bemba et al* case as well as the prior statement of P-0801 "while respecting the protective measures ordered in relation to this witness "¹⁰ (and also *other* witnesses in that case), is untenable absent a judicial order.

14. The Prosecution notes the existence of ample information regarding P-0801's conduct in relation to the *Bemba et al.* case in the public record of the proceedings, including the Trial Judgement¹¹ and the Appeal Judgement.¹² This has been duly notified and communicated to the Defence both in prior filings and in correspondence.

15. The Prosecution considers that this information can be effectively used for the limited purposes of the Confirmation Hearing and, consistent with its public representations and submissions regarding P-0801's involvement and role in the

⁹ ICC-01/05-01/08-2663-Conf; ICC-01/05-01/08-2694-Conf; ICC-01/05-01/08-2746-Conf. *See also*, ICC-01/05-01/08-813 and ICC-01/05-01/08-2293 (referencing the protocol and conditions concerning the handling of confidential information). The Protocol applies equally to the information provided by the anonymous informant disclosed in *Bemba et al.*

¹⁰ ICC-01/14-01/18-315-Conf, para. 86(c).

¹¹ ICC-01/05-01/13-1989-Red.

¹² ICC-01/05-01/13-2275-Red.

article 70 offences, proposes that the Parties stipulate to Trial Chamber VII's findings regarding P-0801's conduct as set out in the Trial Judgement and confirmed on appeal.

16. Doing so would enhance judicial economy and avoid unnecessarily burdening the Chamber as regards final judicial determinations of *facts* that are collateral in any event, and which are not in dispute in this case.

II. CONFIDENTIALITY

17. This Notification is classified as "Confidential" as it contains information which cannot be released to the public at this time. A public redacted version will be filed as soon as practicable.



Fatou Bensouda, Prosecutor

Dated this 10th day of September 2019
At The Hague, The Netherlands