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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA**

Public

**Decision on the Yekatom Defence Request for Leave to Appeal the
‘Decision on the Yekatom Defence Request for the Exclusion of Allegedly
Fabricated Evidence’**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Yekatom Defence Request for Leave to Appeal the “Decision on the Yekatom Defence Request for the Exclusion of Allegedly Fabricated Evidence”’.

I. Procedural history

1. On 23 April 2024, the Chamber issued its ‘Decision on the Yekatom Defence Request for the Exclusion of Allegedly Fabricated Evidence’ (the ‘Impugned Decision’),¹ in which it rejected the Yekatom Defence’s request to exclude certain evidence pursuant to Article 69(7) of the Statute (the ‘Defence’, the ‘Allegedly Fabricated Evidence’ and the ‘Exclusion Request’, respectively).²
2. On 29 April 2024, the Defence requested leave to appeal the Impugned Decision (the ‘Request’). It raises the following three issues:
 - (i) ‘whether the Chamber erred in fact and law in its assessment of the evidence and argumentation regarding the Prosecution’s violation of article 54(1), due to an improperly narrow application of its powers and responsibilities vis-à-vis review of the Prosecution’s compliance with its duties’ (the ‘First Issue’);
 - (ii) ‘whether the Chamber erred in law in finding that the Prosecution’s obligation to investigate exonerating circumstances was “limited to the investigation stage”’ (the ‘Second Issue’); and,
 - (iii) ‘whether the Chamber erred in fact and law in finding that there was no causal link between the Prosecution’s violation of article 54(1) and the obtaining of the impugned fabricated evidence’ (the ‘Third Issue’).³

¹ ICC-01/14-01/18-2460-Conf (public redacted version notified the same day, ICC-01/14-01/18-2460-Red).

² Request for the Exclusion of Fabricated Evidence, 5 December 2023, ICC-01/14-01/18-2240-Conf (public redacted version notified on 9 February 2024).

³ Yekatom Defence Request for leave to appeal the ‘Decision on Yekatom Defence Request for the Exclusion of Allegedly Fabricated Evidence’ (ICC-01/14-01/18-2460-Conf), ICC-01/14-01/18-2468-Conf (public redacted version notified on 6 May 2024, ICC-01/14-01/18-2468-Red).

3. On 3 May 2024, the Office of the Prosecutor (the ‘Prosecution’) responded to the Request, asking the Chamber to reject it (the ‘Response’).⁴

II. Analysis

4. The Chamber recalls the applicable law governing requests for leave to appeal under Article 82(1)(d) of the Statute, as previously set out by the Chamber.⁵

A. First Issue

5. The Defence argues that the Chamber erred in finding that it has ‘only a very limited role in reviewing whether the Prosecution complied with its duties under Article 54(1) of the Statute’. In the Defence’s submission, this ‘self-imposed constraint is at odds with the statutory framework and jurisprudence of the Court’.⁶ It further alleges that the Chamber did not conduct a review of whether the Prosecution violated Article 54(1) of the Statute ‘in accordance with its statutory powers and duties’ and criticises the Chamber for ‘limit[ing] its engagement with the evidence and argumentation cited’.⁷
6. The Prosecution submits that the First Issue ‘does not arise from the Impugned Decision’ and constitutes a ‘disagreement with the Chamber’s factual determinations’. It further submits that the Defence ‘misapprehends the Impugned Decision’ by taking the ‘Chamber’s assessment of its “limited role” out of context’. Furthermore, it avers that ‘[n]owhere in the Impugned Decision did the Chamber suggest that it would not properly assess the Defence’s allegations or review the Defence’s evidence’.⁸
7. The Chamber considers that the Defence indeed misreads the Impugned Decision. While the Chamber held that its role in reviewing whether the Prosecution

⁴ Prosecution’s Response to the Yekatom Defence Request for leave to appeal the ‘Decision on Yekatom Defence Request for the Exclusion of Allegedly Fabricated Evidence’ (ICC-01/14-01/18-2460-Conf) - ICC-01/14-01/18-2468-Conf, ICC-01/14-01/18-2480-Conf.

⁵ See Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, paras 15-21.

⁶ Request, ICC-01/14-01/18-2468-Red, paras 4-6 *referring to* jurisprudence in the *Ruto and Sang, Banda, Katanga* and *Lubanga* cases, as well the Chamber’s Decision on the Ngaïssona Defence Motion to Strike P-2843 from the Final Witness List, 11 February 2021, ICC-01/14-01/18-883-Conf-Exp, confidential *ex parte*, only available to the Prosecution (public redacted version notified the same day).

⁷ Request, ICC-01/14-01/18-2468-Red, paras 7-13.

⁸ Response, ICC-01/14-01/18-2480-Conf, paras 6-8.

complied with its duties under Article 54(1) of the Statute was limited, it did not foreclose or limit the possibility of conducting such a review. On the contrary, and cognisant of its powers under Article 64 of the Statute, the Chamber proceeded to review the arguments and supporting material brought forward by the Defence in order to determine whether a violation of, *inter alia*, Article 54(1) of the Statute had occurred.⁹

8. In doing so, and contrary to the Defence's submissions,¹⁰ the Chamber did not 'selectively rely on a fragment of [the] evidence' or limit itself to 'publicly available information'. It took note of *all* arguments and supporting material submitted by the Defence,¹¹ including the chronology annexed to the Exclusion Request,¹² despite of the latter having been filed in contradiction of the page limit imposed by the Chamber.¹³ The Chamber recalls in this context that, according to the established Appeals Chamber jurisprudence, it is not obliged to justify its findings in relation to every submission made and that its reasoning 'will not necessarily require reciting each and every factor that was before [it]'.¹⁴
9. Consequently, the Chamber cannot discern a contradiction between its approach and the jurisprudence cited by the Defence in relation to Article 54(1) of the Statute.¹⁵ Similarly, it can also not identify an error in relying on jurisprudence made in the context of Article 15 proceedings and a request to appear as *amicus curiae*, respectively,¹⁶ in order to support its discrete findings regarding the

⁹ Impugned Decision, ICC-01/14-01/18-2460-Red, paras 17-41.

¹⁰ See Request, ICC-01/14-01/18-2468-Red, paras 9-11.

¹¹ Impugned Decision, ICC-01/14-01/18-2460-Red, paras 2-4 and their corresponding footnotes. See also para. 55.

¹² Annex A to the Exclusion Request, ICC-01/14-01/18-2240-Conf-AnxA.

¹³ Decision on Yekatom Defence Request for Extension of Page Limits, email from the Chamber, 15 November 2023, at 14:51. See also Prosecution Response to the Yekatom Defence 'Request for the Exclusion of Fabricated Evidence' (ICC-01/14-01/18-2240-Conf), 18 January 2024, ICC-01/14-01/18-2313-Conf (public redacted version notified on 18 February 2024), para. 4, n. 3.

¹⁴ See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, para. 20; Appeals Chamber, *The Prosecutor v. Mahamat Said Abdel Kani*, Judgment on the appeal of Mr. Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled "Decision on the "Prosecution's Request for Extension of Contact Restrictions"", 29 June 2021, ICC-01/14-01/21-111-Conf (public redacted version notified on 17 May 2022), paras 44-45 with further references.

¹⁵ See Request, ICC-01/14-01/18-2468-Red, paras 4-6 and particularly footnotes 5-10.

¹⁶ See Request, ICC-01/14-01/18-2468-Red, para. 4, n. 4.

Prosecution's independence, responsibility for conducting investigations and discretion therein.¹⁷

10. Having reviewed the entire information before it, the Impugned Decision concluded that no violation of Article 54(1) of the Statute had occurred.¹⁸ The Defence seems to merely disagree with this outcome. This becomes particularly clear from paragraph 10 of the Request, in which the Defence plainly re-summarises factual allegations which were already mentioned in its Exclusion Request¹⁹ and considered in the Impugned Decision.²⁰ In this respect, the Chamber recalls that the Appeals Chamber has repeatedly held that a mere disagreement does not constitute an appealable issue.²¹
11. In light of the above, the Chamber rejects the Request with regard to the First Issue.

B. Second Issue

12. The Second Issue concerns the Chamber's finding that the Prosecution's duty to investigate incriminating and exonerating circumstances is limited to the *investigation stage*.²² The Defence argues that this finding is based on an erroneous reading of the Court's statutory framework and jurisprudence, and is at odds with the Prosecution's own understanding of its investigative duties.²³ It further argues that while the Prosecution 'may indeed primarily focus to proving its case [post-confirmation], it does not follow that this can occur – or that this

¹⁷ See Impugned Decision, ICC-01/14-01/18-2460-Red, para. 16, n. 24-25 with reference to Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, para. 63; Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, Decision regarding applications related to the Prosecution's 'Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request', 3 September 2021, ICC-02/17-156, para. 22; Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the "Request by Ms. Moraa Gesicho to Appear as Amicus Curiae", 12 April 2011, ICC-01/09-02/11-54, para. 13.

¹⁸ Impugned Decision, ICC-01/14-01/18-2460-Red, paras 17-18, 23-24, 30, 38-39, 41.

¹⁹ Request, ICC-01/14-01/18-2468-Red, para. 10.

²⁰ See footnote 11 above.

²¹ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

²² Impugned Decision, ICC-01/14-01/18-2460-Red, para. 27.

²³ Request, ICC-01/14-01/18-2468-Red, paras 15-20.

can be permitted to occur – at the expense of the Prosecution’s due and full compliance with article 54(1)(a).²⁴ Moreover, it submits that the ‘Chamber could not have correctly determined whether the post-confirmation conduct of the Prosecution was contrary to its article 54(1) duties, given its finding that these duties did not apply post-confirmation in the first place’.²⁵

13. The Prosecution avers that the Second Issue is ‘premised on a mischaracterisation of the Chamber’s legal findings’. Specifically, it submits that the Impugned Decision (i) ‘does not hold that the Prosecution’s obligation to investigate exonerating circumstances is limited to the investigation phase *before* the commencement of the trial’ and (ii) ‘neither states nor implies that article 54 does not apply in the conduct of further investigations *during* a trial’.²⁶
14. The Chamber is of the view that the Defence again misinterprets the Impugned Decision. As is commonly done, the Chamber used the term ‘investigation stage’ to refer to the *initial* investigations into a case. This stage of gathering evidence indisputably should be completed speedily after the confirmation of charges²⁷ and before the trial commences.
15. Conversely, the Impugned Decision did not assume that the Prosecution is entirely precluded from investigating ‘post-confirmation’. On the contrary, it explicitly recalled the Appeals Chamber’s jurisprudence in the *Lubanga* case that investigations may go beyond the confirmation of charges.²⁸ If the Prosecution becomes aware of *specific* exonerating evidence, it cannot ignore it,²⁹ irrespective of the stage of the proceedings. The Impugned Decision said as much by virtue of entertaining the core question of the Exclusion Request, namely whether the

²⁴ Request, ICC-01/14-01/18-2468-Red, para. 21. *See further* paras 22-24.

²⁵ Request, ICC-01/14-01/18-2468-Red, paras 25-27.

²⁶ Response, ICC-01/14-01/18-2480-Conf, paras 9-11.

²⁷ Impugned Decision, ICC-01/14-01/18-2460-Red, para. 27, n. 37 *with further references*.

²⁸ Impugned Decision, ICC-01/14-01/18-2460-Red, para. 27.

²⁹ *See, similarly*, Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Joint Defence Application for Further Prosecution Investigation Concerning the Asylum Application Records of Certain Prosecution Witnesses, 17 November 2014, ICC-01/09-01/11-1655-Conf (lesser public redacted version notified on 11 December 2017), para. 32: ‘should it be determined that there are reasonable grounds to believe that information not in the Prosecution’s possession may be potentially exculpatory, Article 54(1)(a) of the Statute obligates the Prosecution to make reasonable efforts to obtain that information’, in the context of specific items of potentially exonerating evidence.

Prosecution's alleged awareness of the alleged conspiracy triggered specific investigative obligations under Article 54(1) of the Statute.³⁰

16. The Chamber fails to see how this approach conflicts with the jurisprudence of the Court, as alleged by the Defence.³¹ The Defence seems to merely disagree with the outcome of the Impugned Decision that, in the specific circumstances at hand, the Chamber was not persuaded that the Prosecution violated its obligations under Article 54(1) of the Statute.
17. In view of the above, the Chamber does not consider the Second Issue to be an appealable issue.

C. Third Issue

18. The Defence argues that the Chamber erred in fact and law by finding that a causal link between the alleged violations and the obtaining of the Allegedly Fabricated Evidence was missing. It criticises, *inter alia*, that the Chamber 'made no specific reference to [the] specific arguments in the Exclusion [Request]' and further submits that the fact that the Allegedly Fabricated Evidence was obtained directly by the Chamber does not 'negat[e] or otherwise [break] the causal chain of events linking [it] to the violation of article 54(1)'.³²
19. The Prosecution submits, *inter alia*, that the Third Issue 'merely advances the Defence's disagreement with the Impugned Decision in respect of the Chamber's determination that there is not causal link between any alleged article 54 violation and the evidence adduced at trial'.³³
20. In the Chamber's opinion, the Defence fails to show any factual or legal errors in relation to the Third Issue. The Chamber considers that, while alleging that the Impugned Decision is based on a 'flawed understanding of legal causation' and 'flawed reasoning', and is not responsive to specific arguments contained in the

³⁰ Impugned Decision, ICC-01/14-01/18-2460-Red, paras 17-41.

³¹ Request, ICC-01/14-01/18-2468-Red, paras 17-18 *with reference to* the jurisprudence in the *Lubanga*, *Ruto and Sang*, and *Katanga* cases.

³² Request, ICC-01/14-01/18-2468-Red, paras 28-32.

³³ Response, ICC-01/14-01/18-2480-Conf, para. 12.

Exclusion Request, the Defence simply misrepresents the decision and disagrees with its findings.

21. Contrary to the Defence's submissions, the Chamber recalls that it did consider the entirety of arguments and material brought forward in the Exclusion Request, including regarding the required causal link, albeit not justifying its findings in relation to each and every submission made.³⁴
22. Taking into account that the burden of proving a violation under Article 69(7) of the Statute lies with the Defence,³⁵ the Chamber was simply not persuaded by the Defence's arguments regarding the required causal link between the alleged violations and the obtaining of the Allegedly Fabricated Evidence.³⁶ The Chamber further notes that its findings regarding a missing causal link were in any event not determinative for the outcome of the Impugned Decision, as they were made in the alternative, based on the hypothetical assumption that a violation had occurred.
23. Recalling that a mere disagreement does not constitute an appealable issue, the Chamber dismisses the Request with regard to the Third Issue.
24. Having found that neither of the three issues constitute appealable issues, it is not necessary to address the remainder of the cumulative criteria of Article 82(1)(d) of the Statute. Accordingly, the Chamber rejects the Request in its entirety.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

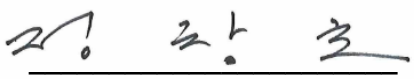
ORDERS the Prosecution to file a public redacted version of the Response, ICC-01/14-01/18-2480-Conf, within one week of notification of the present decision.

³⁴ See also paragraph 8 above.

³⁵ See Impugned Decision, ICC-01/14-01/18-2460-Red, para. 12.

³⁶ See Impugned Decision, ICC-01/14-01/18-2460-Red, paras 22, 39, 41.

Done in both English and French, the English version being authoritative.

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 4 June 2024

At The Hague, The Netherlands