

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **28 January 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
*THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM***

Public

**Request on behalf of Mr. Yekatom seeking leave to appeal
“Decision on Disclosure and Related Matters”**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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Further to the Decision on Disclosure and Related Matters issued by the Single Judge on 23 January 2019 (“Impugned Decision”), Counsel representing Mr. Alfred Rombhot Yekatom (“Mr. Yekatom” or “Defence”) hereby submit this:

**Request on behalf of Mr. Yekatom seeking leave to appeal
“Decision on Disclosure and Related Matters”
 (“Defence Leave to Appeal Request”).**

INTRODUCTION

1. The Impugned Decision addresses numerous issues related to the disclosure of evidence and related matters that will govern the conduct of proceedings during the Pre-Trial phase as well as during the trial.

2. The Impugned Decision, *inter alia*: (i) establishes principles governing the disclosure evidence;¹ (ii) denies the Defence’s request that the Single Judge “invite[s]/order[s] the [Prosecutor] to inform the Pre-Trial Chamber and participants in detail of the procedure followed during witness interviews”;² (iii) addresses the disclosure of material pursuant to Article 67(2) of the Rome Statute of the International Criminal Court (“Statute” and “Court”) and Rule 77 of the Rules of Procedure and Evidence (“Rules”) that is protected under Articles 54(3)(e), 72 and 93(8) of the Statute;³ (iv) adopts a far-reaching redaction regime allowing the Prosecution, *proprio motu*, without seeking the authorisation of the Pre-Trial Chamber, to withhold information disclosable pursuant to Rules 81(2) and 81(4), without providing a reasoned opinion;⁴ (v) denies the Defence’s request and decides not to direct the parties to cover the redacted text in black in its entirety or to use the

¹ Decision on Disclosure and Related Matters, 23 January 2019, ICC-01/14-01/18-64-Conf (“Impugned Decision”), paras. 11-18.

² Impugned Decision, para. 19; Observations on behalf of Mr. Yekatom pursuant to “Decision Seeking Observations”, 28 December 2018, ICC-01/14-01/18-45-Conf (“Defence Observations”), para. 42.

³ Impugned Decision, para. 22.

⁴ Impugned Decision, paras. 23-28.

word “redacted” in square brackets (“[REDACTED]”) to depict a redaction;⁵ (vi) denies the Defence’s request and decides not to set up a time schedule for the parties consultations concerning unwarranted or no longer necessary redactions;⁶ (vii) denies the Defence’s request and decides regarding the resolution of disputes concerning unwarranted or no longer necessary redactions, *not* to establish “separately a specific regime for the 30-day period prior to the commencement of the hearing”;⁷ (viii) denies the Defence’s request to make it compulsory for the disclosing party to review redactions applied pursuant to the redaction regime, whenever a change of circumstances occurs in relation to the evidence disclosed⁸ and omits to address Defence’s proposed definition⁹ as to what constitutes a change of circumstances in relation to the validity of *proprio motu* redactions applied evidence.

3. The Defence respectfully takes the view that the Impugned Decision will significantly impact the conduct of proceedings in a manner, which is bound to impede the fair and expeditious conduct of the proceedings.

4. The Defence, nevertheless, acknowledges the restrictive nature of applications for leave to appeal under Article 82(1)(d) of the Statute, as well as the need for the applicant to fulfil the requirements of Article 82(1)(d) and the irrelevance of addressing arguments concerning the merits of the appeal when making such an application. Consequently, the Defence hereby seeks leave from Pre-Trial Chamber II (“Pre-Trial Chamber”) to appeal the Impugned Decision pursuant to Article 82(1)(d) of the Statute solely in respect of one appealable issue, namely:

Whether the Single Judge’s decision to adopt “the redaction regime as it is applied in the case of the *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed*

⁵ Impugned Decision, para. 24; Response to the Prosecution’s Request for a Protocol on Redactions, 7 January 2019, ICC-01/03-01/18-47 (“Defence Response”), para. 64.

⁶ Impugned Decision, para. 30; Defence Response, paras. 65-69, in particular, para. 68.

⁷ Impugned Decision, para. 30; Defence Response, paras. 65-69, in particular, para. 69.

⁸ Impugned Decision, para. 31; Defence Response, paras. 72-75.

⁹ Impugned Decision, para. 31; Defence Response, para. 74.

*Ag Mahmoud*¹⁰ (“Al Hassan Redaction Regime”) – thereby authorising the parties to disclose evidence with redactions of information in standard categories under Rules 81(2) and 81(4), as defined in paragraphs 25 and 26 of the Impugned Decision, without discrete application to the Chamber – without providing a reasoned opinion,¹¹ constitutes an error law.

5. The issue arises from the Impugned Decision; constitutes an appealable issue; would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and an immediate resolution of which by the Appeals Chamber may materially advance the proceedings.

PROCEDURAL BACKGROUND

6. On 14 December 2018, the Pre-Trial Chamber issued a decision seeking observations from parties (“Decision Seeking Observations”).¹²

7. On 21 December 2018, the Prosecution submitted its observations pursuant to the Decision Seeking Observations (“Prosecution Observations”).¹³

8. On 21 December 2018, the Prosecution submitted a request for the adoption of its proposed redaction protocol (“Prosecutor Request”).¹⁴

9. On 28 December 2018, the Defence submitted its observations pursuant to the Decision Seeking Observations (“Defence Observations”).¹⁵

10. On 7 January 2019, the Defence submitted its response to the Prosecution Response and its proposal of the redaction protocol (“Defence Response” and

¹⁰ Impugned Decision, para. 23.

¹¹ The mandate of Judge Rosario Salvatore Aitala as Single Judge ended on 23 January 2019. See Decision designating a Single Judge, 6 December 2018, ICC-01/14-01/18-27, para. 6. The Defence is unaware of whether this mandate was extended or whether another Judge of Pre-Trial Chamber II has been assigned as Single Judge.

¹² Decision Seeking Observations, ICC-01/14-01/18-33, 14 December 2018.

¹³ Prosecution’s Observations pursuant to Decision ICC-01/14-01/18-33, ICC-01/14-01/18-40-Conf, 21 December 2018.

¹⁴ Prosecution’s Request for a Protocol on Redactions, 21 December 2018, ICC-01/14-01/18-39; Annex A, 21 December 2018, ICC-01/14-01/18-39-AnxA.

¹⁵ Defence Observations.

“Defence Proposed Protocol”).¹⁶

11. On 10 January 2019, the Prosecutor requested for leave to reply to the Defence Response,¹⁷ which was rejected on 11 January 2019.¹⁸

12. On 23 January 2019, the Single Judge issued the Decision on Disclosure and Related Matters (“Impugned Decision”).¹⁹

APPLICABLE LAW

13. This Defence Leave to Appeal Request is submitted pursuant to Article 82(1)(d) of the Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court (“RoC”).

14. Pursuant to Article 82(1)(d) of the Statute, either party may appeal a decision, which: (i) involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and for which, in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

15. Regarding the notion of appealable issue, the Appeals Chamber has previously held that:²⁰

[A]n appealable issue must be “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.

¹⁶ Defence Response; Annex A, 7 January 2019, ICC-01/14-01/18-47-AnxA.

¹⁷ Prosecution’s Request for Leave to Reply to the Defence’s Response to the Prosecution’s Request for a Protocol on Redactions, 10 January 2019, ICC-01/14-01/18-53.

¹⁸ Decision on Prosecutor’s Requests to Reply, 10 January 2019, ICC-01/14-01/18-55.

¹⁹ Impugned Decision. Public redacted version filed on the same day: ICC-01/14-01/18-64-Red.

²⁰ *Situation in the Democratic Republic of Congo*, Judgement 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 (“Appeals Decision on the Denial of Leave to Appeal”), para 19.

ARGUMENT

16. The Defence seeks leave to appeal the following issue, which: (i) arises from the Impugned Decision; (ii) constitutes an appealable issue; (iii) would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iv) immediate resolution of which by the Appeals Chamber may materially advance the proceedings.

I. The following issue arises from the Impugned Decision

17. The Single Judge's decision to adopt the Al Hassan Redaction Regime – thereby authorising the parties to disclose evidence with redactions of information in standard categories under Rules 81(2) and 81(4), as defined in paragraphs 25 and 26 of the Impugned Decision,²¹ without discrete application to the Chamber – without providing a reasoned opinion, is an issue that arises from the Impugned Decision.

18. Responding to the Prosecution Request for a Redaction Protocol, the Defence underscored that, *inter alia*: (i) allowing the Prosecution to redact disclosable information pursuant to the Statute and the Rules without seeking prior authorisation from the Pre-Trial Chamber is *per se* contrary to the principle of full disclosure;²² and (ii) the *prima facie* advantages of adopting a protocol allowing *proprio motu* redactions of disclosable information are far outweighed by the disadvantages.²³

19. The Defence also argued that (i) in the fulfilment of its duty to ensure the fair and expeditious conduct of the proceedings and full respect for the rights of Mr. Yekatom, the Pre-Trial Chamber is bound to evaluate the need for the adoption of a protocol allowing *proprio motu* redactions of disclosable information in this case;²⁴

²¹ Impugned Decision, para. 23.

²² Defence Response, para. 67.

²³ Defence Response, para. 21.

²⁴ Defence Response, para. 10.

and (ii) many of the categories of information for which the Prosecutor seeks to be granted authority to redact disclosable information *proprio motu* are not necessary to achieve the objectives of ensuring that ongoing and future investigations are not prejudiced and protecting witnesses, victims, their family members and innocent third parties.²⁵

20. In addition, the Defence provided detailed observations on the proposed redaction protocol – focusing in particular on the standard categories therein – explaining and stressing for each, *inter alia*: (i) the importance of the disclosable information sought to be included in the standard categories to ensure the respect for the rights of Mr. Yekatom;²⁶ (ii) the absence of genuine justification demonstrating how providing ‘A categories’ information to the Defence would impede the Prosecution’s ongoing investigations;²⁷ (iii) the absence of genuine justification demonstrating the necessity to withhold ‘B categories’ information from the Defence in order to protect victims, witnesses, their families and innocent third parties;²⁸ (iv) the impact of allowing *proprio motu* redactions for such information on the fairness of the proceedings;²⁹ and (v) the vague and imprecise nature of certain proposed standard categories.³⁰

21. Adjudicating the Prosecution Request, the Single Judge decided, on the basis that he was following the practice of the pre-trial chambers, to adopt “the redaction regime as it is applied in the case of the *Prosecutor v Al Hassan Ag Abdoul Aziz Ag*

²⁵ Defence Response, paras. 11-12.

²⁶ See, e.g., Defence Response, paras. 22 (Category A.1), 26 (Category A.2), 30 (Category A.3), 33 (Category A.4), 36 (Category A.5), 40-42 (Category A.6), 45-46 (Category A.7), 50 (Category A.8), 54 (Category B.2), 58 (Category B.3).

²⁷ See, e.g., Defence Response, paras. 23 (Category A.1), 27-28 (Category A.2), 31 (Category A.3), 34 (Category A.4), 38 (Category A.5), 47-48 (Category A.7).

²⁸ See, e.g., Defence Response, paras. 51, 55 (Category B.2), 56-57 (Category B.3).

²⁹ See, e.g., Defence Response, paras. 23-24 (Category A.1), 34 (Category A.4), 37-38 (Category A.5), 43 (Category A.6), 47 (Category A.7), 50 (Category A.8), 58 (Category B.3).

³⁰ See, e.g., Defence Response, paras. 25 (Category A.2), 29 (Category A.3), 32 (Category A.4), 35 (Category A.5), 39 and 41 (Category A.6), 44 (Category A.7), 50 (Category A.8), 52 (Categories B.1-B.5), 53 (Category B.1), 54 (Category B.2), 56 (Category B.3), 60 (Category B.5).

Mohamed AG Mahmoud – thereby authorising the Prosecution to disclose information with redactions of information in standard categories under Rule 81(2) and (4) of the Rules without discrete application to the Chamber.³¹ The Single Judge thus incorporated the standard categories set out in the Al Hassan Redaction Regime in the Impugned Decision.³²

22. The Single Judge noted the arguments of the Defence but found that (i) the aforementioned standard categories are well-founded in the case-law and practice of this Court across instances; and (ii) disclosing parties have sufficient guidance in implementing the redactions, if any, before disclosing the evidence.

23. If granted leave to appeal, the Defence would argue, *inter alia*, that the Single Judge neither addressed the arguments of the Defence nor provided a reasoned opinion, including in particular but not limited to, the need for the adoption of a protocol allowing *proprio motu* redactions of disclosable information pursuant to the Statute and the Rules in this case and the impact of the redaction regime adopted on the fairness of the proceedings in this case. The Defence would also argue that: (i) referring to the practice of the pre-trial chambers generally to justify the adoption of a redaction regime in this case does not amount to a reasoned opinion; and that (ii) while the Single Judge referred to the applicable test in the established jurisprudence when assessing Rule 81(2) or (4) requests,³³ he omitted to pronounce on whether the redaction regime adopted in the Impugned Decision – allowing the Prosecution to redact information subject to Rule 81(2) or (4) without judicial control – actually meets this test in this case.

24. This is certainly an issue that arises from the Impugned Decision which now needs to be determined before the Appeals Chamber.

³¹ Impugned Decision, paras. 23-24.

³² Impugned Decision, paras. 25-26.

³³ Impugned Decision, fn. 30.

25. Whether or not the Single Judge takes the view that he did provide a reasoned opinion is not the issue to be determined at this stage. What must be assessed is whether his purported failure to provide a reasoned opinion fulfils the requirements for leave to appeal to be granted pursuant to Article 82(1)(d) of the Statute.

II. The issue arising from the Impugned Decision constitutes an appealable issue

26. The Defence posits that the Single Judge's decision to adopt Al Hassan Redaction Regime – thereby authorising the parties to disclose evidence with redactions of information in standard categories under Rules 81(2) and (4) as defined in paragraphs 25 and 26 of the Impugned Decision,³⁴ without discrete application to the Chamber – without providing a reasoned opinion, constitutes an appealable issue.

27. The Single Judge's decision to adopt the Al Hassan Redaction Regime without providing a reasoned opinion is certainly not merely a question over which there is disagreement or conflicting opinion. It is rather an issue: (i) constituted by an identifiable subject; and (ii) the resolution of which is essential for the purpose of the proceedings and the determination of matters arising in the judicial cause under examination.

28. The issue is constituted by an identifiable subject, namely, whether the Single Judge's decision – without providing a reasoned opinion – to adopt a redaction regime authorizing the parties to disclose evidence with redactions of information subject to disclosure pursuant to the Statute and the Rules, without seeking authorization from the Pre-Trial Chamber, constitutes an error of law.

29. Resolution of this issue is essential for the purposes of the proceedings as it is indeed vital to determine whether the Single Judge's decision constitutes an error of

³⁴ Impugned Decision, para. 24.

law, thereby rendering the redaction regime adopted *ultra vires*.

30. Resolution of this issue is also fundamental for the determination of matters arising in the judicial cause under examination. Indeed, if the redaction regime is *ultra vires*, the redaction of any information by the Prosecution pursuant to the categories set out in paragraphs 25 and 26 of the Impugned Decision would constitute a violation of the Statute and the Rules as well as a violation of the Prosecution's disclosure obligations.

III. The appealable issue arising from the Impugned Decision significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial

31. The Appeals Chamber previously held that "fairness" in the context of Article 82(1)(d) of the Statute "is associated with the norms of the fair trial, the attribute of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and article 21(3)" and that "'expeditiousness', an 'attribute of a fair trial', is closely linked to the concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned".³⁵

32. According to the jurisprudence of the Appeals Chamber, the "'outcome of the trial' is affected 'where the possibility of an error in an interlocutory or intermediate decision may have a bearing thereupon'".³⁶ It follows that "in deciding a request under article 82(1)(d) of the Statute, the Pre-Trial Chamber "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case" and

³⁵ *Ntaganda*, Decision on Defence Request for Leave to Appeal, 14 January 2014, ICC-01/04-02/06-207 ("Ntaganda Decision on Leave to Appeal"), para. 12, citing Appeals Decision on the Denial of Leave to Appeal, para. 11 and *Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, para. 18.

³⁶ *Ntaganda* Decision on Leave to Appeal, para. 13, citing Appeals Decision on the Denial of Leave to Appeal, para. 13.

“[t]he exercise involves a forecast of the consequences of such an occurrence”.³⁷

33. The Single Judge’s adoption of the Al Hassan Redaction Regime without providing a reasoned opinion constitutes an error of law that would inevitably have significant repercussions on the fair and expeditious conduct of the proceedings. Indeed, if the Defence is right – an issue which must now be determined by the Appeals Chamber – the redaction regime adopted by the Single Judge is *ultra vires* resulting in the redaction of any information by the Prosecution pursuant to the categories set out in paragraphs 25 and 26 of the Impugned Decision being a violation of the Statute and the Rules.

34. Moreover, should the Appeals Chamber determine that the redaction regime is indeed *ultra vires*, any redaction of Rule 81(2) and (4) information by the Prosecution would thus require a discrete application to the Pre-Trial Chamber, in accordance with the normal *intra vires* procedure in the Statute and the Rules, which is bound to affect the expeditious conduct of the proceedings.

35. Notably, the Single Judge’s adoption of the Al Hassan Redaction Regime without providing a reasoned opinion also impacts the outcome of the confirmation hearing – as well as the as the security of the trial judgement if the charges are confirmed – if it is later determined that it constituted an error of law. Indeed, the Prosecution would be found to have violated its disclosure obligations; and Mr. Yekatom would have been deprived of: (i) his fundamental right to be informed promptly and in details of the nature, cause and content of the charges;³⁸ and (ii) his right to object to the charges, to challenge the evidence presented by the Prosecution and to present evidence at the confirmation hearing.³⁹

IV. Immediate resolution of the Appealable issue arising from the Impugned

³⁷ Ntaganda Decision on Leave to Appeal, para. 13, citing Appeals Decision on the Denial of Leave to Appeal, para. 13.

³⁸ Article 67(1)(a).

³⁹ Article 61(6).

Decision may materially advance the Proceedings

36. The Appeals Chamber has previously held that to materially advance the proceedings means to move forward by “insuring that the proceedings follow the right course”.⁴⁰ Whether this is the case, involve an assessment by the Pre-Trial Chamber as to whether the authoritative decision by the Appeals Chamber will rid “the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.⁴¹

37. Immediate resolution by the Appeals Chamber of the appealable issue *i.e.* whether the Single Judge’s adoption of the Al Hassan Redaction Regime without providing a reasoned opinion constitutes an error of law may materially advance the proceedings. In fact, the immediate resolution of the appealable issue will move forward the proceedings by ensuring that the disclosure of Rule 81(2) and (4) information by the Prosecution with *proprio motu* redactions pursuant to the redaction regime adopted by the Single Judge – a fundamental aspect of the Pre-Trial proceedings – follows the right course and is *intra vires*.

38. Indeed, the authoritative decision by the Appeals Chamber will rid the Pre-Trial proceedings of a possible mistake that might affect the fairness of the proceedings or impair the outcome of the confirmation hearing and/or trial.

39. In addition, considering that the Prosecution has yet to begin to fulfil its disclosure obligation in this case and that the Prosecution intends to join its case against Mr. Patrice-Edouard Ngaïssona to the present proceedings,⁴² granting the Defence leave to appeal will not unduly delay the proceedings.

⁴⁰ Ntaganda Decision on Leave to Appeal, para. 14, citing Appeals Decision on the Denial of Leave to Appeal, para. 15.

⁴¹ Ntaganda Decision on Leave to Appeal, para. 14, citing Appeals Decision on the Denial of Leave to Appeal, para. 14.

⁴² See, Prosecution’s Observations on the Registry’s French Language Proficiency Assessment of Alfred YEKATOM (ICC-01/14-01/18-42), 7 January 2019, ICC-01/14-01/18-50, para. 3; Order seeking observations on the feasibility of joining the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona, 28 January 2019, ICC-01/14-01/18-67.

CONCLUSION

40. In light of the above submissions and arguments (i) setting out a clearly identifiable legal issue arising from the Impugned Decision; (ii) demonstrating that this identifiable legal issue constitutes an appealable issue, the resolution of which is essential for the determination of matters arising in the present proceedings under examination; (iii) explaining how this appealable issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iv) establishing why immediate resolution of the appealable issue may, in fact will, materially advance the proceedings, the Defence respectfully submits that all criteria are met pursuant to Rule 81(1)(d) to grant the Defence leave to appeal the Impugned Decision in relation to this appealable issue.

RELIEF SOUGHT

41. In light of the above submissions and arguments, the Defence respectfully requests the Pre-Trial Chamber to:

GRANT this Defence Leave to Appeal Request; and

GRANT the Defence leave to appeal the Impugned Decision in relation to the appealable issue identified herein.

RESPECTFULLY SUBMITTED ON THIS 28th DAY OF JANUARY 2019



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