

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **3 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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public with Confidential Annexes A to C

**Public redacted version of “Motion for Inspection of Information on the
Organisation of the Seleka”, 28 August 2019, ICC-01/14-01/18-297-Conf**

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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**Victims Participation and Reparations
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully move, pursuant to Rule 77, that the Chamber order the Prosecution to allow the Defence to inspect all information about the organisation of the Seleka and ex-Seleka received by the Office of the Prosecutor from any of the 31 individuals listed in Annex A. These items are material to the preparation of the defence because they will provide information to challenge Prosecution evidence on a *chapeau* element of the war crimes charges at the confirmation hearing.

RELEVANT PROCEDURAL HISTORY

2. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”).¹ The Prosecution recognised that one of the *chapeau* elements for its war crimes charges requires that it prove that, in a non-international armed conflict, the existence of armed groups of sufficient organisation. It alleged that Seleka forces, as a party to the conflict with the Anti-Balaka, had the requisite degree of organisation.²
3. On 22 August 2019, the Defence requested inspection of “all information in the possession of the Prosecution relating to the structure of the Seleka and ex-Seleka as of September 2013”, pursuant to Rule 77. It explained that the information sought was material to its potential challenge to the “sufficiently organised” *chapeau* element of the war crimes charges.³
4. On 24 August 2019, the Prosecution declined to provide the requested material on the ground that the request was overbroad and that the requested information was cumulative to material already available to the Defence.⁴

¹ [ICC-01/14-01/18-282-Conf-AnxB1](#).

² [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 618.

³ A copy of the letter is attached as Annex B.

⁴ A copy of the Prosecution’s e-mail is attached as Annex C.

5. In formulating this motion, the Defence has taken on board the Prosecution's position that the request was overbroad and now limits its request to information about the organisation of the Seleka and ex-Seleka obtained by the Prosecution from any of 31 "insiders".

RELEVANT PROVISION

6. Rule 77 provides that:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

ARGUMENT

7. The Defence contends that information about the organisation of the Seleka and ex-Seleka forces is needed to contest at the confirmation hearing the *chapeau* element of war crimes in a non-international armed conflict that the parties to the conflict were sufficiently organised.
8. The DCC cites to a FIDH report that provides information about the Seleka before September 2013,⁵ a footnote in an Amnesty International report that says that the dismantling of the Seleka in September 2013 had no impact on their activities,⁶ a Human Rights Watch report that says that many ex-Seleka fighters continued to commit violence in much of the country, terrorising the local populations,⁷ and estimates from a UN Secretary General report that the

⁵ [ICC-01/14-01/18-282-Conf-AnxB1](#), [REDACTED].

⁶ [ICC-01/14-01/18-282-Conf-AnxB1](#), [REDACTED].

⁷ [ICC-01/14-01/18-282-Conf-AnxB1](#), [REDACTED].

number of Seleka had grown to between 15,000 and 20,000 fighters by November 2013.⁸

9. It is material to the preparation of the defence to obtain more concrete information about the organisation of the Seleka and ex-Seleka as of the time of the armed conflict with the Anti-Balaka to challenge the “sufficient organisation” element at the confirmation hearing. Through NGO reports, the Defence has identified 21 “insiders” who are likely to have information about the organisation of the Seleka and ex-Seleka. Its request is for the Chamber to order the Prosecution to allow the Defence to inspect any information in its possession that any of these insiders have provided about the organisation of the Seleka and ex-Seleka.
10. In addition, the following SELEKA elements referred to in the material in possession of the Prosecution is material to the preparation of the defence: [REDACTED].
11. This information is specific enough for the Prosecution to readily identify (1) if it has obtained information from any of these 31 individuals and; (2) to determine whether any of that information relates to the organisation of the Seleka and ex-Seleka at the time of the armed conflict with the Anti-Balaka.
12. The Prosecution’s objection that this information is “cumulative” to information provided by NGOs is unfounded. The NGO information is vague hearsay, while the information sought by the Defence is from insiders with first-hand knowledge of the organisation.
13. The Appeals Chamber confronted a similar situation in the *Banda & Jerbo* case. There, the Defence sought material relevant to the existence of a campaign of violence in Darfur by its adversary as part of its challenge to the Prosecution’s

⁸ [ICC-01/14-01/18-282-Conf-AnxB1](#), [REDACTED].

allegation that it had carried out an unlawful attack. The Appeals Chamber held that what is material to the preparation of the defence pursuant to Rule 77 should be made on a *prima facie* basis. The Chamber explained:

This places a low burden on the defence. It is emphasised that Rule 77 concerns material that the defence is entitled to have disclosed to it in order to prepare its defence. It may be that information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a *prima facie* assessment.⁹

14. Since it is an element of war crimes in a non-international armed conflict that the forces were sufficiently organised, the items sought by the Defence in our case are *prima facie* material to the preparation of the Defence to challenge that element at the confirmation hearing.
15. In the *Lubanga* case, the Appeals Chamber held that the Trial Chamber had erred in refusing to order the prosecution to allow inspection of reports on general use of child soldiers in DRC since such reports could be material to the preparation of the defence by assisting in the understanding of the general situation.¹⁰ By contrast, the information sought in our case is specifically related to an element of the offence. If the items sought to be inspected in *Lubanga* fell within the “materiality” criteria of Rule 77, surely the items sought to be inspected in our case fall squarely within that Rule.
16. With respect to the cumulative nature of the material, the Appeals Chamber expressly stated in the *Banda & Jerbo* case that caution should be exercised when denying inspection on the grounds that other material on the same issue was already available to the Defence to ensure that the paramount right of the

⁹ *Prosecutor v. Banda & Jerbo*, Judgement on the Appeal of Mr. Abdallah Banda Abakaer Nourain and Mr. Salah Mohamed Jerbo Jamus against the Decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, [ICC-02/05-03/09-501](#), 28 August 2013, para. 42.

¹⁰ *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I on 18 January 2008, [ICC-01/04-01/06-1433](#), 11 July 2008, para. 82.

defence to disclosure of all information material to the preparation of the defence not be undermined.¹¹

17. This was also the conclusion of the Trial Chamber in the *Bemba* case, which held that:

An assessment of what is cumulative and what is not will almost inevitably require an exercise of judgment, and there is an unacceptable risk that the defence may be deprived of materials to which it is entitled as a result of incorrect judgment calls. This risk is heightened due to the fact that the prosecution will seldom know the precise contours of the defence strategy.¹²

18. In the *Lubanga* case, the Trial Chamber also came to the conclusion that the “cumulative” nature of the material provided no justification for the Prosecution to refuse inspection under Rule 77. The Chamber held that:

[T]he Chamber has grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence: the right of the accused is to both items. [...] The fact that [...] there are other sources providing similar evidence are all irrelevant for these purposes. If the real possibility exists that this evidence may contribute to a resolution of material factual issues in the case in favour of the accused, he is to be provided with it [...]¹³

19. Therefore, even if the information from any of the 31 insiders dealt with the same subjects as the NGO reports available to the Defence, this provides no reason to deny inspection of that information.

¹¹ *Prosecutor v Banda & Jerbo*, Judgement on the Appeal of Mr. Abdallah Banda Abakaer Nourain and Mr. Salah Mohamed Jerbo Jamus against the Decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, [ICC-02/05-03/09-501](#), 28 August 2013, para. 40.

¹² *Prosecutor v. Bemba*, Redacted Version of Decision on the “Defence Motion for Disclosure pursuant to Rule 77”, [ICC-01/05-01/08-1594-Red](#), 29 July 2011, para. 23.

¹³ *Prosecutor v. Lubanga*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference of 10 June 2008, [ICC-01/04-01/06-1401](#), 13 June 2008, para. 60.

20. Finally, although not raised by the Prosecution in its response to the Rule 77 request, the existence of an ongoing investigation into Seleka crimes cannot be used to deny inspection of the information. Unlike disclosure of actual events that the Prosecutor may be investigating, disclosure of information about the organisation of the Seleka in general does not impede or interfere with the Prosecution's ongoing investigations. Given that the organisation of the Seleka is an element of the war crimes charges in this case, the Prosecution must have foreseen that it would have to disclose this information when it decided on the timing of Mr. Yekatom's arrest. It cannot now be heard to complain that it might interfere with its 5-year old Seleka investigation.

CONCLUSION

21. The Chamber is respectfully requested to order the Prosecution to allow the Defence to inspect all information about the organisation of the Seleka and ex-Seleka received by the Office of the Prosecutor from any of the 31 individuals listed in Annex A.

RESPECTFULLY SUBMITTED ON THIS 3RD DAY OF SEPTEMBER 2019



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