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**International
Criminal
Court**

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Date: **24 January 2020**

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 AND PATRICE-EDOUARD NGAISSONA***

Public

Public Redacted Version of “Request on behalf of Mr. Yekatom seeking leave to appeal Decision on the Request for Reconsideration of the Order on Reclassification”, ICC-01/14-01/18-196-Conf, 14 May 2019

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 the Request for Reconsideration of the Order on Reclassification” issued by Pre-Trial Chamber II (“Chamber”) on 8 May 2019¹ (“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
the Request for Reconsideration of the Order on Reclassification
 (“Request for Leave to Appeal”)**

INTRODUCTION

1. The Defence hereby seeks leave to appeal the Impugned Decision pursuant to Article 82(1)(d) of the Rome Statute (“Statute”).
2. This Request for Leave to Appeal raises two appealable issues arising from the Impugned Decision that would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
3. **The first appealable issue** is “whether the Chamber erred in finding that the review of judicial decisions can only be requested on the basis of the mechanism specified in the Statute and the Rules of Procedure and Evidence” (“First Issue”).²
4. **The second appealable issue** is “whether the Chamber erred in refusing to order the disclosure to the Defence of the Prosecutor’s application for a warrant of arrest by considering that the evidence and Document Containing

¹ Decision on the Request for Reconsideration of the Order on Reclassification, 8 May 2019, ICC-01/14-01-18-190-Conf.

² Impugned Decision, para. 11.

the Charges suffice to inform pursuant to Article 67(1)(a) of the Statute” (“Second Issue”).³

PROCEDURAL BACKGROUND

5. On 11 December 2018, the Defence requested the immediate disclosure of the of the Prosecutor’s application for issuance of a warrant of arrest.⁴
6. On 12 December 2018, the Chamber issued its Order on Reclassification where it rejected the Defence request.⁵
7. On 23 April 2018, the Defence submitted its request for reconsideration of the Order on Reclassification.⁶
8. On 8 May 2019, the Chamber issued the Impugned Decision rejecting the reconsideration request and maintaining the classification of Article 58 Application.

APPLICABLE LAW

9. The present Request for Leave to Appeal is submitted pursuant to Article 82(1)(d) of the Statute, Rule 155 of the Rules of Procedure and Evidence (“Rules”), and Regulation 65 of the Regulations of the Court.
10. Pursuant to Article 82(1)(d), a party may appeal a decision which 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

³ Impugned Decision, para. 13.

⁴ Expedited request on behalf of Mr. Yekatom seeking immediate disclosure of the Prosecutor’s application of issuance of a warrant of arrest, 11 December 2018, ICC-01/14-01/18-29-Conf-Exp.

⁵ Order on Reclassification, 12 December 2018, ICC-01/14-01/18-31-Conf.

⁶ Demande de la Défense de M Yekatom en reconsidération de l’Ordonnance portant reclassification rendue le 12 décembre 2018, ICC-01/14-01/18-31-Conf, 23 April 2019, ICC-01/14-01/18-180-Conf.

Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. Regarding the notion of appealable issue, the Appeals Chamber has previously held that:⁷

[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.

12. Article 67(1) of the Statute provides, in its relevant part, that:

In the determination of any charge, the accused shall be entitled [...] to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

ARGUMENT

13. Both Issues arising from the Impugned Decision: (i) constitute appealable issues; (ii) significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) an immediate resolution of which by the Appeals Chamber may materially advance the proceedings.

I. Both issues constitute ‘appealable issues’

14. **Both the First and the Second Issues** constitute ‘appealable issues’ as they (i) are identifiable subjects or topics requiring a decision for their resolution, not merely a question over which there is disagreement or conflicting opinion; and (ii) arise from the Impugned Decision and their resolution is essential for the determination of matters arising in the judicial cause under examination.

⁷ *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, para. 9.

15. Indeed, the First Issue constitutes a precise and significant error of law regarding the right to request a Chamber review of its judicial decisions, which is not merely a question over which there is disagreement or conflicting opinion. The Issue arises from the Impugned Decision where the Chamber stated that⁸:

Pre-Trial Chambers have repeatedly held that the ‘instruments governing the Court’s procedure make no provision for such a broad remedy as an unqualified “motion for reconsideration”’ and that the review of judicial decisions can only be requested on the basis of the mechanisms specified in the Statute and the Rules of Procedure and Evidences”.

16. **As for the Second Issue**, it constitutes a precise and significant error of law regarding the scope of documents that a Suspect has a right to have access to, pursuant to Article 67(1)(a) of the Statute, which is not merely a question over which there is disagreement or conflicting opinion. The Issue arises from the Impugned Decision where the Chamber rejected the Request for Reconsideration on the basis that the evidence and the Document Containing the Charges were sufficient to inform Mr. Yekatom as required by Article 67(1)(a) of the Statute.⁹

II. Both Issues significantly affect the fair and expeditious conduct of the proceedings

17. **The First Issue** affects the fair conduct of the proceedings. The Chamber’s finding as it stands will deprive the parties of the opportunity to seek judicial review of decisions rendered by the Chamber in the form of reconsideration of its previous decisions during the entire pre-trial phase. Notably, the possibility to the party to seek judicial review of a decision rendered by a Trial Chamber, during Trial, has been unequivocally recognised by the Court’s jurisprudence

⁸ Impugned Decision, para. 11.

⁹ Impugned Decision, para. 13.

insofar as certain conditions are fulfilled.¹⁰ Even though it is not explicitly stipulated in the Statute or the Rules, the possibility to seek judicial review of a decision nevertheless exists within the statutory framework through Article 21(2). A deviation from previous, settled jurisprudence would have significant implication on the fairness of the proceedings.

18. An artificial suspension of this right during the entire pre-trial phase would unfairly prejudice Mr. Yekatom. This is further aggravated by the fact that by far, all requests for leave to appeal, which is the only other channel for judicial review, have been denied by the Chamber.
19. The First Issue further affects the expeditious conduct of the proceedings. Without the right to seek reconsideration, any issue previously determined by a Pre-Trial Chamber could not be reviewed even when a clear error of

¹⁰ See, e.g., *Ntaganda*, Decision on the “Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute” (ICC-01/04-02/06-2337) and the “Request for Reconsideration of ‘Decision concerning the “Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki”, the “Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019”” (Filing #2336), and for Additional Disclosure” (ICC-01/04-02/06-2339) and related requests, 14 May 2019, ICC-01/04-02/06-2346; *Banda*, Partly Dissenting Opinion of Judge Eboe-Osuji in the ‘Decision on defence application for leave to appeal the decision on “Warrant of arrest for Abdallah Banda Abakaer Nourain” and, in the alternative, request for reconsideration, 8 January 2015, ICC-02/05-03/09-619-Anx-Red; *Ongwen*, Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements, 11 May 2018, ICC-02/04-01/15-1259, para. 12; *Ntaganda*, Decision on Defence request seeking partial reconsideration of the ‘Decision on Defence request for admission of evidence from the bar table’, 22 February 2018, ICC-01/04-02/06-2241, para. 4; *Bemba et al.*, Decision on Prosecution’s Motion for Reconsideration of the ‘Decision on Outstanding Evidentiary Applications’, 19 May 2016, ICC-01/05-01/13-1896, para. 8; *Ruto and Sang*, Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19; *Bemba*, Public redacted version of “Decision on ‘Defence Request for Reconsideration of the ‘Decision on ‘Defence request for recall of Witness P-178’””, ICC-01/05-01/08-3186-Conf”, 11 December 2014, ICC-01/05-01/08-3204-Red, para. 14; *Lubanga*, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, paras 11-18. Similarly, the right is recognised by *ad hoc* tribunals. See, e.g., *Prlić et al v. Prosecutor*, Case No. IT-04-74-AR73.16, Decision on Jadranko PRLIĆ’S Interlocutory Appeal Against The Decision on PRLIĆ Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 18; *Karadžić v. Prosecutor*, Case No. IT-95-5/18-T, Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, para. 8; *Karadžić v. Prosecutor*, Case No. MICT-13-55-A, Decision on a Motion for Inter Partes Proceedings in Rule 86 Matters, 9 March 2017, para. 5; *Karadžić v. Prosecutor*, Case No. MICT-13-55-A, Decision on a Motion to Reclassify Filings, 3 October 2017, p. 5; *Uwinkindi v. Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on UWINKINDI’S Motion for Review or Reconsideration Of The Decision On Referral To Rwanda And The Related Prosecution Motion, 23 February 2012, para. 11; *Nzabonimana v. Prosecutor*, Case No. ICTR-98-44D-AR7bis, Decision on Callixte NZABONIMANA’S Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and on the Motion for Leave to Appeal the President’s Decision Dated 5 May 2010, 20 September 2010, para. 23.

reasoning, the necessity to prevent an injustice, and/or new facts or a material change of circumstances exist.¹¹ Indeed, if and when the proceedings against Mr. Yekatom reach the appeals phase, this Issue will be raised, as the matter at stake relates to principles and rules of law interpreted in previous decisions of the Court pursuant to Article 21(2) of the Statute. Delaying the final determination of this issue to the appeals phase unnecessarily introduces the risk of the Appeals Chamber finding, at a much later stage, that more than one pre-trial decision warranted reconsideration. The possible remand is self-evidently detrimental to the expeditiousness of the proceedings, if the prejudice could be remedied at all.

20. Therefore, the First Issue, whether the Chamber erred in finding that the review of judicial decisions can only be requested on the basis of the mechanism specified in the Statute and the Rules, affects the fair and expeditious conduct of the proceedings.
21. **The Second Issue** affects the fair conduct of the proceedings as it impacts the fundamental right of Mr. Yekatom to be informed promptly and in detail of the nature, cause, and content of the charges pursuant to the Statute.
22. In the jurisprudence of the Court, Article 58 Applications have consistently been considered as one of the documents to which a suspect has the right to access pursuant to Article 67(1)(a) of the Statute.¹²

¹¹ *Ongwen*, Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements, 11 May 2018, ICC-02/04-01/15-1259, para.12 ; *Ntaganda*, Decision on Defence request seeking partial reconsideration of the ‘Decision on Defence request for admission of evidence from the bar table’, 22 February 2018, ICC-01/04-02/06-2241, para. 4; *Bemba*, Public redacted version of “Decision on ‘Defence Request for Reconsideration of the “Decision on ‘Defence request for recall of Witness P-178’””, ICC-01/05-01/08-3186-Conf”, 11 December 2014, ICC-01/05-01/08-3204-Red, para. 14.

¹² *Al Hassan*, Décision relative à la requête de la défense sollicitant la traduction en arabe de la requête du Procureur aux fins de délivrance d’un mandat d’arrêt, 01 juin 2018, ICC-01/12-01/1842, para. 12; *Bemba*, Decision on the Defence’s Request Related to Language Issues in the Proceedings”, 4 December 2008, ICC-01/05-01/08-307, para. 16; *Ongwen*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 27 February 2015, ICC-02/04-01/15203, para. 32.

23. Thus, without access to Article 58 Application, the fundamental right of Mr. Yekatom to be properly informed is infringed and, consequently, the fair conduct of the proceedings is significantly affected. The disclosure of evidence and access to the Document Containing the Charges cannot remedy this prejudice. Indeed, without the Article 58 Application, Mr. Yekatom is unaware of the reasons leading to the issuance of the arrest warrant which brought him before the Court. Such knowledge is crucial especially at this juncture, namely in the last 30 days prior to the commencement of the confirmation hearing.¹³ It can be replaced neither by the insight of subsequent Prosecution submissions nor by the access to any evidential material disclosed.
24. Furthermore, the Second Issue also affects the expeditious conduct of the proceedings. In light of the fundamental importance of this document, the issue will inevitably arise again as the proceedings advance, the repeated litigation on which will significantly affects the expeditious conduct of the proceedings.
25. In addition, the outcome of the trial is undoubtedly at stake. The Defence could argue against some of the submissions contained in the Article 58 Application to object to the charges pursuant to Article 61(6)(a) of the Statute. The prejudice caused by the unavailability of the Article 58 Application must be remedied immediately to avoid affecting the outcome of the confirmation of charges and, to a greater extend, the outcome of the trial.
26. Therefore, the Second Issue, whether the Chamber erred in refusing to order disclosure to the Defence of the Article 58 Application by considering that the evidence and Document Containing the Charges suffice to be informed within

¹³ See, e.g., Public Redacted Version of “Decision on Disclosure and Related Matters”, 23 January 2019, ICC-01/14-01/18-64-Red, paras. 13 and 16.

the meaning of article 67(1)(a) of the Statute, affects the fair and expeditious conduct of the proceedings and the outcome of the trial.

III. Immediate resolution of the Issues may materially advance the Proceedings

27. **First Issue.** An immediate resolution by the Appeals Chamber of the Issue, *i.e.*, whether the Chamber erred in finding that instruments governing the Court's procedure make no provision for such a broad remedy as an unqualified "motion for reconsideration" and that the review of judicial decisions can only be requested on the basis of the mechanism specified in the Statute and the Rules, will materially advance the proceedings.
28. Taking into consideration the length of the pre-trial phase, there is an urgent need to obtain a ruling by the Appeals Chamber on whether the Chamber erred in finding that there is no provisions at the pre-trial stage to review or reconsider judicial decisions.
29. The mere fact that the Court's jurisprudence consistently acknowledges the power of a chamber to reconsider its own decision on one hand, and the Impugned Decision's contrary finding on the other, warrants an immediate resolution by the Appeals Chamber, which will materially advance this proceeding as well as any proceedings brought before the Court especially at pre-trial stages. On its own, Article 21(2) of the Statute warrants an immediate resolution of this issue by the Appeals Chamber for the purpose of crystalising the principles and rules of law in relation to the mechanism of reconsideration before the Court.
30. Needless to say that it is also in the interest of justice for the Appeals Chamber to resolve immediately, in order to materially advance the proceedings, an issue as fundamental as the applicable law before the Court in relation to the means available to all parties to contest judicial decisions.

31. **The Second Issue.** An immediate resolution by the Appeals Chamber of the Issue, *i.e.*, whether the Chamber erred in refusing to order the disclosure to the Defence of the Article 58 Application by considering that the evidence and Document Containing the Charges suffice to be informed pursuant to Article 67(1)(a) of the Statute, will materially advance the proceedings.
32. As articulated above, an application under Article 58 is a key document that could provide a suspect the unique insight to the allegations which ultimately led to his arrest. It could be used by Mr Yekatom at various stages for various purposes, including, *inter alia*, to object to the charges against him, to [REDACTED], to request for provisional release, and to [REDACTED]. As such, it is crucial that the Appeals Chamber resolve this Issue as a matter of urgency in order to determine whether Mr. Yekatom should be enabled to, for example, meaningfully litigate the matters set out above. This would materially advance the proceedings.
33. For both Issues, an immediate resolution will not unduly delay the proceedings. The advantages of doing so far outweigh the disadvantages. This is necessary to ensure the fairness of the proceedings. It is also in the interest of justice.

CONCLUSION

34. In light of the above submissions and arguments (i) setting out two appealable issues arising from the Impugned Decision; (ii) demonstrating that the two appealable issues raised will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) explaining why immediate resolution of the two issues will materially advance the proceedings, the Defence respectfully submits that all criteria are met

pursuant to Article 82(1)(d) of the Statute to grant the Defence leave to appeal the Impugned Decision in relation to the two appealable issues raised.

CONFIDENTIALITY

35. Pursuant to Regulation 21*bis*(2) of the Regulation of the Court, the present Request for Leave to Appeal is submitted on a confidential basis corresponding to the classification of the Impugned Decision. The Defence does not oppose its reclassification to public.

RELIEF SOUGHT

36. In light of the above, the Defence respectfully requests the Chamber to:

GRANT the Defence the leave to appeal the Impugned Decision in relation to the two Issues set out herein.

RESPECTFULLY SUBMITTED ON THIS 24TH DAY OF JANUARY 2020



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