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**International
Criminal
Court**

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Date: **27 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA

Public

**Public Redacted Version of “Joint Defence Request for Leave to Appeal
the ‘First Decision on the Prosecutor’s Request for Authorisation
to Withhold the Identities of Witnesses and Apply Non-standard Redactions,’
ICC-01/14-01/18-232-Conf-Red”, ICC-01/14-01/18-248-Conf, 15 July 2019**

Source: Defence of Patrice-Edouard Ngaïssona and Defence of Alfred
Rombhot Yekatom

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

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I. Introduction

1. On 28 June 2019, Pre-Trial Chamber II (“the Chamber”) issued *ex parte* its “First Decision on the Prosecutor’s Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-Standard Redactions” (“the Impugned Decision”).¹ The Defence of Mr Ngaïssona and Mr Yekatom (“the Defence”) were notified of the Impugned Decision one week later by way of a confidential redacted version filed on 5 July 2019. The Chamber granted almost in its entirety the Prosecution’s request to: (1) withhold the identities of five witnesses whose evidence the Prosecution will not rely on for the Confirmation of Charges, and to (2) to disclose only mere excerpts of their statements despite the express finding that they contained information that was potentially exculpatory or material to the preparation of the defence.² Further, with respect to the witnesses on whose evidence the Prosecution intends to rely, the Chamber again granted almost the totality of the Prosecution’s request to apply significant redactions to their statements. The Chamber’s basis for limiting disclosure of this material was primarily related to the protection of the investigation of the crimes committed by the Seleka (“Seleka investigation”).³
2. The Defence seek leave to appeal the Impugned Decision on four fundamental issues each of which go to the interpretation and application of Rule 81 of the Rules of Procedure and Evidence (“the Rules”). The significance of the Chamber’s interpretation and application of the Rule cannot be understated as it may substantially limit Defence rights enshrined under Articles 61(3)(b), 61(6) and 67(2) and impact the Chamber’s role in protecting Prosecution investigations under Rule 81(2).

II. Confidentiality

3. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Defence requests that this filing be received by the Chamber as “confidential” as it contains information that is subject to the same classification. A public redacted version will be filed in due time.

¹ ICC-01/14-01/18-232-Conf-Red.

² Ibid.

³ Ibid, at paras 20-21.

III. Applicable law

4. Article 82(1)(d) of the Rome Statute provides that either party may appeal “a decision that 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.”
5. Pursuant to rule 155(1) of the Rules the party wishing to appeal under Article 82(1)(d) must make a written application to the Chamber that rendered the decision and set out the reasons for the request for leave to appeal.
6. Regulation 65 of the Regulations of the Court further provides that such request for leave to appeal must “specify the legal and or factual reasons in support thereof... and shall specify why immediate resolution by the Appeals Chamber of the issue(s) is warranted.”

IV. Submissions

7. Pursuant to Article 82(1)(d) of the Statute, the Defence hereby seek leave to appeal the Impugned Decision on the following four issues:

First Issue: Whether the Pre-Trial Chamber erred when determining that the notion of “further and ongoing investigations” pursuant to Rule 81(2) includes the Prosecution’s investigations other than the investigations directed at Mr Ngaïssona and Mr Yekatom;

Second Issue: Whether the Pre-Trial Chamber erred when determining that it is permissible under Rule 81(2) to disclose mere extracts of documents;

Third Issue: Whether the Pre-Trial Chamber erred in its application of the “objectively justifiable risk of prejudice” criterion of the Rule 81(2) test when it determined that there was a risk of prejudice to the ongoing Seleka investigations due to the possibility of the disclosed material being leaked by either the suspects or Defence sources on the ground;

Fourth Issue: Whether the Pre-Trial Chamber exceeded the scope of its discretion under Article 81(2) when deciding *proprio motu* not to allow the Prosecution to disclose certain paragraphs of witness statements, which the Prosecution had determined to be disclosable.

8. The four issues are interrelated as they concern the scope and the application of Rule 81(2) of the Rules. Each issue meets the cumulative criteria of Article 81(2)(d), namely: (1) the issues raised constitute “appealable issues,” (2) they could significantly affect either the fair and expeditious conduct of the proceedings, or the outcome of the trial, and (3) the immediate resolution of the matter by the Appeals Chamber could materially advance the proceedings. Therefore, the Defence’s request for leave to appeal should be granted.

a. The four issues raised by the Defence constitute “appealable issues” under Article 81(2)(d)

9. The Appeals Chamber of the Court has ruled that an “issue” is “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is a disagreement or conflicting opinion”.⁴ An “issue” must arise from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.⁵
10. The four issues arise from the decision and do not merely consist of a disagreement or a conflicting opinion. Rather, they raise fundamental questions of law and fact with respect to the Defence’s right to disclosure under Article 67(2), Rules 76 and 77. With respect to the Defence’s first issue, it is evident that it arises from the Impugned Decision since the Chamber directly addressed the legal question of whether “further and ongoing investigations” under Rule 81(2) may include investigations other than those directed against the suspects.⁶ In coming to its determination, the Chamber expressly engaged in statutory interpretation when it rejected the Defence’s arguments by referring to the plain reading of the text of Rule 81(2) and by applying the rule against surplusage.⁷ The Chamber’s interpretation was essential to the determination

⁴ ICC-01/04-01/06-168, para. 9.

⁵ ICC-02/11-01/11-464, para. 8; ICC-01/04-02/06-322.

⁶ The Impugned Decision, para 28.

⁷ Ibid, para. 28.

of whether the Defence should be disclosed information relevant to the Prosecution investigation of Seleka crimes. Had the Chamber given credence to the Defence's arguments, the Prosecution's request would have been rejected.⁸ Accordingly, the First Issue emanates from the Impugned Decision.

11. It is evident that the Second Issue arises from the Impugned Decision seeing as its wording is taken directly from paragraph 37 in which the Chamber held that "that is not to say that the disclosure of excerpts is not *per se* permissible."⁹ In its reasoning, the Chamber recalled "the Appeals Chamber's pronouncement that once it is established that a document must be disclosed to the Defence pursuant to article 67(2) of the Statute or Rule 77 of the Rules, 'the disclosure obligation extends to *the entire document* and not only to the relevant portions of information'"¹⁰ Despite this precedent, the Chamber determined that excerpts could be disclosed since in its view "the disclosure of excerpts and the application of redactions are but different ways of implementing what is one and the same measure-the non-disclosure of information."¹¹ By interpreting the application of discrete redactions to be the same measure as removing large segments of a given text, the Chamber held that it is permissible for the Prosecution to disclose only the partial content of the witness statements.¹² Had it found that the two measures are fundamentally different and thus cannot be equated, the Chamber would have rejected the Prosecution's request. Therefore, the Second Issue arises from the Impugned Decision.

12. The Third Issue stems from the Chamber's application of the Rule 81(2). In paragraph 21 of the Impugned Decision, the Chamber referred to the "objectively justifiable risk of prejudice" criterion as one it must consider under Rule 81(2). However, in paragraphs 40, 47, 48, 52, 53 and 57 the Chamber did not consider whether the risk of prejudice to further and ongoing investigations "could be overcome by ruling that the information should be kept confidential between the parties."¹³ The Chamber found in paragraph 40 that "information disclosed to the Defence may be passed on by the

⁸ For every witness in the Impugned Decision, the Chamber granted the Prosecution's request to not disclose certain information pertaining to the Seleka crimes. See *ibid*.

⁹ *Ibid*, para. 37.

¹⁰ *Ibid*, para. 36.

¹¹ *Ibid*, para. 37.

¹² *Ibid*, paras 36-37

¹³ *Ibid*, para. 21(a).

suspects in this case or by Defence sources on the ground, whether intentionally or inadvertently, [REDACTED].”¹⁴ The Chamber reasoned that there is a risk of potential disclosure stemming from the volatile situation on the ground in which there are shifting alliances between different groups.¹⁵ *Assuming arguendo* the truth of this statement, it does not respond to the Defence’s arguments made in response to the Prosecution request. The Defence submitted that they are bound by Article 8 of the Professional Code of Conduct, and that both Mr Ngaïssona and Mr Yekatom are [REDACTED].¹⁶ Nowhere in the Impugned Decision did the Chamber consider that the two suspects [REDACTED].¹⁷

13. Further, with respect to the Defence or Defence sources leaking information intentionally, the Chamber did not provide the Defence with concrete information that would indicate there was a possibility that the Defence would intentionally leak information. As stated before in its submissions, the Defence are bound by Article 8 of the Code of Professional Conduct for Counsel and their domestic professional ethics rules, which impose a duty on counsel to ensure the confidentiality of information. Regarding the risk of inadvertent disclosure, the Chamber did not consider the “Protocol on the Handling of Confidential Information and Contacts with Witnesses,”¹⁸ which also limits any prejudicial effect of inadvertent disclosure. Accordingly, the Third Issue arises from the Impugned Decision.

14. The Fourth Issue emanates from the Chamber’s decision to make its legal findings under Rule 81(2) instead of Rule 81(4), which was the rule the Prosecution invoked in its submissions made pursuant to the Chamber’s *ex parte* order for additional information regarding the Prosecution’s request.¹⁹ While Rule 81(4) expressly mentions the Chamber’s power to ensure confidentiality of information in accordance with Articles 54, 57, 64, 72 and 93, such a provision is absent from Rule 81(2). Indeed, Rule 81(2) only refers to the Prosecution’s discretion to make such a motion to the Chamber so that the determination can be made as to whether the information must be disclosed to the Defence. The Defence note several instances in which the

¹⁴ Ibid, para. 40.

¹⁵ Ibid, para. 40 . The Chamber has redacted part of the reasoning in this section, and therefore the Defence have been placed in a position where they are not able to make submissions in their regard.

¹⁶ ICC-01/14-01/18-165-Conf, paras 29-31.

¹⁷ ICC-01/14-02/18-11-Conf-Exp; ICC-01/14-01/18-98-Conf-Exp.

¹⁸ ICC-01/14-01/18-156-AnxA, Section IV, Inadvertent Disclosure, paras 19-22

¹⁹ Ibid, para. 34.

Chamber played an active role in protecting the Prosecution's Seleka investigation by authorising the non-disclosure of certain paragraphs which were never requested by the Prosecution to be withheld from the Defence.²⁰ While the Chamber found that the Prosecution must have not included some of the paragraphs in its request due to an oversight, for other paragraphs the Chamber determined *proprio motu* that they should not be disclosed in order to protect the Prosecution's Seleka investigation.²¹ In both instances, the Chamber failed to articulate the legal basis for withholding portions of statements that were deemed by the Prosecution to be disclosable. Thus, the Fourth Issue arises from the Impugned Decision.

b. The four issues raised by the Defence could significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial

15. All four issues could significantly affect the fair and expeditious conduct of the proceedings since their resolution goes to the heart of Defence rights enshrined under Articles 61(3)(b), 61(6), and Article 67(2). This Court has held that fairness is preserved when “a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”.²² In other words, one of the fundamental aspects of the right to fair trial is that proceedings should be adversarial in nature and that there should be equality of arms, in the sense of a fair balance between the parties.²³

16. With respect to the First Issue, the Chamber's broad interpretation of the term “further and ongoing investigations” has the effect of depriving both Mr Ngaïssona and Mr Yekatom of essential information in order to effectively challenge the evidence presented by the Prosecutor under Article 61. The Seleka crimes are of course relevant to the alleged crimes with which Mr Ngaïssona and Mr Yekatom are charged as the Seleka groups are one of the protagonists to the alleged armed conflict which

²⁰ See Impugned Decision, paras 44, 49, 54, 59, 64, and 68 with respect to [REDACTED].

²¹ Ibid, paras 49, 54, 59, 64.

²² ICC-01/05-01/08-75, para. 14.

²³ ICC-01/05-01/08-75, para. 14.

took hold of the Central African Republic (CAR) in 2012 and onwards.²⁴ Disclosure pertaining to their activities and their general structure is potentially exonerating under Article 67(2) since the Seleka groups were on the opposite side of the alleged conflict. The Chamber acknowledged the exculpatory nature of this potential evidence and its materiality when it determined that the Defence should have access to information concerning Seleka crimes allegedly committed within the temporal and territorial scope of the case at hand, and to information concerning the structure and the capabilities of the Seleka.²⁵

17. Similarly, the Chamber's determination of the second issue has a significant impact on the Defence's rights under Articles 61(6) and 67(2). Despite the clear jurisprudence indicating that once it is determined that a document is potentially exculpatory under Article 67(2) and Rule 77, the Chamber found in the instant case that only excerpts can be disclosed. Whether applying a redaction is equivalent to disclosing excerpts is an essential question since it pertains to the Defence's ability to be apprised of the content of potentially exonerating evidence under Article 67(2). Extracting entire portions of a potentially exonerating statement affects the ability of the Defence to make use of such a statement as is their right under Article 61(6). The prejudicial effect is particularly salient in the instant case since the Chamber on several occasions in the Impugned Decision held that non-disclosure of information relating to the Seleka investigation was not prejudicial to the Defence.²⁶ However, the Chamber failed to consider that exculpatory evidence is not always dependent on the temporal or geographic scope of the alleged crimes charged.

18. The Third Issue which pertains to a misapplication of Rule 81(2) affects the fairness of the proceedings. The Chamber's reason for not authorizing disclosure to the Defence was in part redacted, which is fundamentally unfair seeing as the Defence should be given the opportunity to fully respond to an allegation concerning its inability to keep information confidential. The redactions also impede the Defence's right to seek leave to appeal since they have not been apprised of the entirety of the Chamber's reasoning. With respect to the unredacted reasons, the Defence submit that the situation on the ground will most likely be volatile for the duration of the

²⁴ ICC-01/14-02/18-2-Red, paras 6-15; ICC-01/14-01/18-1-Red, paras 6-17.

²⁵ The Impugned Decision, paras 58, 67 and 68.

²⁶ See *e.g.* The Impugned Decision, paras 48 and 53.

proceedings against Mr Yekatom and Mr Ngaïssona since the country is likely to remain unstable due to the recent nature of the conflict. Therefore, the Chamber may apply this reasoning to every future determination under this criterion and thus find that disclosure on a confidential basis to the Defence cannot be made.

19. At the core of the first three aforementioned issues is the fundamental question of whether the statutory limits on disclosure under Rule 81(2) should be construed narrowly as to ensure Defence rights under Article 61 or should more weight be accorded to the Prosecution's investigations because of the lower evidentiary threshold that is applied at the confirmation stage of the proceedings.
20. The fourth aforementioned issue raises a different question of fairness, which pertains to the role the Chamber may play in protecting Prosecution investigations. Article 67(2) and Rule 77 make clear that the Prosecution is the entity which determines which material is potentially exculpatory or material to the Defence. As an interested party in the proceedings, the Prosecution may clearly try to limit disclosure to the Defence. Therefore, Article 67(2) provides for the necessary safeguard of making the Chamber the ultimate arbiter of what material must be disclosed. This ensures the fairness of the proceedings. However, if the Chamber under Rule 81(2) may authorise the non-disclosure of information upon its own motion in order to further serve the Prosecution's interest, then the Defence are deprived of this fundamental safeguard, which significantly affects the fairness of the proceedings.
21. Due to the aforementioned consequences of the Impugned Decision, the expeditiousness of the proceedings could also be significantly affected. The concept of "expeditiousness" must be read as "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".²⁷ If these issues are resolved now, it will avoid the extensive litigation of future Prosecution requests to withhold witness identities and apply non-standard redactions to witness statements. The possibility of extensive future litigation is not mere speculation on behalf of the Defence. The Defence note that the deadline for the Prosecution to make such requests has

²⁷ ICC-01/05-01/08-75, para. 17.

elapsed,²⁸ but it assumes it will be notified of any confidential redacted version of such requests at a later time.

22. In addition to the litigation of future non-disclosure requests, the Defence foresee re-litigation of previous non-disclosure decisions. In the Impugned Decision, the Chamber rejected the Prosecution's request for non-disclosure with respect to information relating to the Seleka crimes allegedly committed within the temporal and territorial scope of the present case.²⁹ However, the Defence respectfully recall that the Chamber has previously held that "although indicative, the Warrants of Arrest are by no means determinative as to the scope of the confirmation hearing or any trial that could possibly be conducted before a Trial Chamber."³⁰ Given that the temporal and geographic scope of the present case is yet to be determined, information which currently may not be relevant to the Defence under the Impugned Decision, may become relevant in the future. The parties will have to re-litigate certain Prosecution requests for non-disclosure on the basis of the Prosecution's evolving case against Mr Ngaïssona and Mr Yekatom, which will unnecessarily delay the proceedings. The Appeals Chamber's resolution of the four issues would prevent such re-litigation by making clear the exact scope and proper application of Rule 81(2) of the Rules.

23. Further, if the issues are not resolved now, they could affect the outcome of a potential trial against Mr Ngaïssona and Mr Yekatom. The Chamber's Decision significantly limits the disclosure of information to the Defence, which will impact their ability to challenge the evidence of the Prosecution. This could affect not only the outcome of the Confirmation of Charges proceedings, but also the trial if the charges are confirmed. If the Defence continues to have limited access to information pertaining to the Prosecution's investigation of Seleka crimes during the trial stage, the Defence will continue to be hampered in its challenging of the Prosecution evidence. Therefore, the resolution of the four issues could affect the outcome of the trial.

c. The immediate resolution of the four issues by the Appeals Chamber could materially advance the proceedings

²⁸ ICC-01/14-01/18-199, para. 39.

²⁹ The Impugned Decision, para. 58.

³⁰ ICC-01/14-01/18-227-Red, para. 23.

24. The Appeals Chamber has held that for leave to appeal to be granted, the issue must be such “that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.³¹ “Advancing” the proceedings has been identified by the Appeals Chamber as “removing doubts about the correctness of a decision or mapping a course of action along the right lines” and the term “immediate” has been defined as “underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal”.³²

25. The Impugned Decision constitutes the first decision the Chamber has rendered with respect to withholding witness identities and applying non-standard redactions to witness statements and the first Court’s decision on the interpretation of the terms “further and ongoing investigation” pursuant to Rule 81(2). However, it is not the last. The Prosecution’s second request for withholding witness identities and applying non-standard redactions is currently *sub-judice*.³³ The Prosecution made the second request after being granted an extension of time by the Chamber.³⁴ After the Prosecution made the second request on 18 April 2019, the Chamber again pushed back the deadline for such requests to 7 June 2019. It is therefore likely, that this deadline could be pushed back again, and thus further requests may be entertained by the Chamber.

26. Given that the Defence were not notified of the 18 April 2019 Prosecution request until two months after it was filed, it is likely other requests have been filed by the Prosecution. The Defence submit that the Appeals Chamber must settle the matter so that the Chamber’s decisions on the same fundamental issues in the future are free from judicial error. If the matter is not resolved now, there will continue to be doubts regarding the correctness of these decisions, which will likely result in marring the outcome of the Confirmation of Charges proceedings. Therefore, the Appeals Chamber should entertain the issues at this stage and ensure that the

³¹ ICC-01/04-01/06-168, para. 14.

³² ICC-01/04-01/06-168, paras 14-19; *See also*, ICC-01/05-01/08-75, para. 20.

³³ ICC-01/14-01/18-179-Conf-Red; ICC-01/14-01/18-230.

³⁴ ICC-01/14-01/18-168, para. 21.

proceedings “follow the right course”, and “provides a safety net for the integrity of the proceedings”.³⁵

RELIEF SOUGHT

27. In light of the foregoing, the Defence respectfully request the Chamber to:

- **GRANT** to the Defence leave to appeal the Impugned Decision.

Respectfully submitted,



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Dated this 27 January 2020,

At The Hague, the Netherlands

³⁵ ICC-01/04-01/06-168, para. 15.