

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No. ICC-01/14-01/18

Date: 23 July 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 YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Confidential

Decision on the 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'

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

The Office of the Prosecutor
Fatou Bensouda
James Stewart

Counsel for Alfred Yekatom
Stéphane Bourgon
Mylène Dimitri

Counsel for Patrice-Edouard Ngaïssona
Geert-Jan Alexander Knoops

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit
Nigel Verrill

Detention Section

**Victims Participation
and Reparations Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision on the 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’.

I. Procedural History

1. On 11 November 2018, the Chamber issued the ‘Warrant of Arrest for Alfred Yekatom’.¹ On 17 November 2018, Yekatom was surrendered to the Court by the authorities of the Central African Republic (the ‘CAR’).²
2. On 7 December 2018, the Chamber issued the ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’.³ On 23 January 2019, Ngaïssona was surrendered to the Court by the authorities of the French Republic.⁴
3. On 20 February 2019, the Chamber issued the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’, thereby joining the cases against Yekatom and Ngaïssona.⁵
4. On 15 May 2019, the Chamber issued the ‘Decision on the “Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines”’, thereby deciding that the confirmation hearing in the case against Yekatom and Ngaïssona shall commence on 19 September 2019.⁶
5. On 28 June 2019, the Chamber issued the ‘First Decision on the Prosecutor’s Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-Standard Redactions’ (the ‘First Decision’).⁷

¹ ICC-01/14-01/18-1-US-Exp. A public redacted version of the warrant of arrest is also available; see [ICC-01/14-01/18-1-Red](#).

² Registry, Rapport du Greffe sur l’Arrestation et la Remise de M. Alfred Yekatom, ICC-01/14-01/18-17-US-Exp, paras 19-24.

³ ICC-01/14-01/18-89-Conf-Exp. A public redacted version of the warrant of arrest is also available; see [ICC-01/14-01/18-89-Red](#).

⁴ Registry, Rapport du Greffe sur la Remise de Patrice-Edouard Ngaïssona, ICC-01/14-01/18-101-US-Exp, paras 5-14.

⁵ [ICC-01/14-01/18-87](#); [ICC-01/14-01/18-121](#).

⁶ [ICC-01/14-01/18-199](#).

⁷ ICC-01/14-01/18-232-Conf-Exp. A confidential redacted version was registered on 5 July 2019, see ICC-01/14-01/18-232-Conf-Red.

6. On 15 July 2019, the Chamber received the ‘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’ submitted by the Yekatom Defence and the Ngaïssona Defence (the ‘Defence’ and the ‘Joint Defence Request’).⁸

7. On 19 July 2019, the Chamber received the ‘Prosecution’s Response to “Joint Defence Request for leave to appeal ‘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’.⁹

II. Submissions

A. The Defence

8. The Defence seeks leave to appeal the following four issues:

[...] 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 (the ‘First Issue’);

[...] Whether the Pre-Trial Chamber erred when determining that it is permissible under Rule 81(2) to disclose mere extracts of documents (the ‘Second 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 (the ‘Third 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 (the ‘Fourth Issue’).

9. According to the Defence, ‘[t]he four issues arise from the decision and do not merely consist of a disagreement or a conflicting opinion’ but rather

⁸ ICC-01/14-01/18-248-Conf.

⁹ ICC-01/14-01/18-250-Conf.

‘raise fundamental questions of law and fact with respect to the Defence’s right to disclosure under Article 67(2), Rules 76 and 77’.

10. Furthermore, the Defence submits that ‘[a]ll 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)’. The Defence is further of the view that, in light of these considerations, ‘the expeditiousness of the proceedings could also be significantly affected’ since resolving these matters ‘will avoid the extensive litigation of future Prosecution requests to withhold witness identities and apply non-standard redactions to witness statements’ or the ‘relitigation of previous non-disclosure decisions’. The Defence also submits that, ‘if the [four] issues are not resolved now, they could affect the outcome of a potential trial against Mr Ngaïssona and Mr Yekatom’ seeing as the First Decision ‘will impact their ability to challenge the evidence of the Prosecution’.

11. Lastly, the Defence avers that ‘the immediate resolution of the four issues by the Appeals Chamber could materially advance the proceedings’. In this regard, the Defence takes the view that, if the four issues are ‘not resolved now, there will continue to be doubts regarding the correctness of [the First Decision and any other decisions on withholding witness identities and applying non-standard redactions that could be rendered], which will likely result in marring the outcome of the Confirmation of Charges proceedings’.

B. The Prosecutor

12. The Prosecutor submits that the Joint Defence Request ‘should be rejected’.

13. According to the Prosecutor, the ‘First Issue comprises a question of law [...] which the Appeals Chamber has already settled’. Furthermore, the Prosecutor asserts that ‘[t]he Second, Third and Fourth Issues either misread the Decision, or merely disagree with the Chamber’s exercise of its discretion’.

14. The Prosecutor adds that the Joint Defence Request ‘fails by ignoring or misreading the Chamber’s holistic assessment of all information before it in authorising non-disclosure under article 81(2) vis-à-vis other competing interests, including the rights of the Defence’.

15. Lastly, the Prosecutor asserts that ‘the Chamber ordered the Prosecution “to [...] immediately inform the Chamber of any changes which may warrant a variation

of the present ruling” and, for this reason, ‘appellate intervention would merely delay rather than advance the proceedings’.

III. Determination by the Chamber

16. The Chamber notes article 82(1)(d) of the Rome Statute (the ‘Statute’), rule 155 of the Rules of Procedure and Evidence (the ‘Rules’), and regulation 65 of the Regulations of the Court.

17. Mindful of the exceptional nature of the remedy of an interlocutory appeal, the Chamber notes that, for such leave to appeal to be granted, the following requirements must be met:

- a. the decision must involve an issue that would significantly affect (i) both the ‘fair’ and ‘expeditious’ conduct of the proceedings; or (ii) the outcome of the trial; and
- b. in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

18. The above requirements are cumulative in nature and, therefore, each criterion must be met in order to obtain leave to appeal.

19. With regard to the First Issue, the Defence argues that ‘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’. The Chamber notes that, in the First Decision, it considered and addressed an identical argument raised by the Defence. By including this argument in the Joint Defence Request once more without specifying why it is ‘an identifiable subject or topic requiring a decision for its resolution’, the Chamber considers that the Defence is proposing an alternative interpretation of the notion of ‘further and ongoing investigations’ contained in rule 81(2) of the Rules. Therefore, the Chamber considers that the Defence merely disagrees with the interpretation the Chamber gave to this notion. Accordingly, the Chamber is not required to consider the remaining criteria under article 82(1)(d) of the Statute and rejects leave to appeal for the First Issue.

20. In relation to the Second Issue, the Defence avers that: (i) ‘[e]xtracting 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)'; and (ii) the First Decision 'significantly limits the disclosure of information to the Defence' and '[t]his could affect not only the outcome of the Confirmation of Charges proceedings, but also the trial if the charges are confirmed'. The Chamber recalls that, in the First Decision, it found that 'the disclosure of excerpts is not *per se* [impermissible]' provided that the Prosecutor 'can demonstrate that all remaining portions of the document concerned fall under rules 81(2) or 81(4) of the Rules'. The Chamber subsequently assessed whether each paragraph proposed for non-disclosure by the Prosecutor met the criteria for allowing her to withhold information if the disclosure of such information would 'prejudice further or ongoing investigations'. Therefore, the Chamber ensured that the non-disclosure of the excerpts complied with the established criteria as contained in rule 81(2) of the Rules. On this basis, the Chamber finds that the Second Issue does not significantly affect either the fair conduct of the proceedings or the outcome of the trial. Accordingly, the Chamber is not required to consider the remaining criteria under article 82(1)(d) of the Statute and rejects leave to appeal for the Second Issue.

21. According to the Defence, the Third Issue 'stems from the Chamber's application of [...] Rule 81(2)' as, in referring to the criterion of an 'objectively justifiable risk of prejudice', the Chamber failed to 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"'. The Chamber recalls that it, *inter alia*, found that, in light of the circumstances prevailing in the CAR, information disclosed to the Defence could be revealed inadvertently, including by the suspects. On this basis, the Chamber excluded the possibility that the risk of prejudice to further or ongoing investigations could be avoided by ruling that the information should remain confidential. Therefore, the Chamber finds that the Defence merely disagrees with the Chamber's assessment. Accordingly, the Chamber is not required to consider the remaining criteria under article 82(1)(d) of the Statute and rejects leave to appeal for the Third Issue.

22. As concerns the Fourth Issue, the Defence asserts that 'the Chamber found that the Prosecution must have not included some of the paragraphs in its request due to an oversight [while] for other paragraphs the Chamber determined *proprio motu* that

they should not be disclosed in order to protect the Prosecution's Seleka investigation'. However, in the view of the Defence, '[i]n both instances, the Chamber failed to articulate the legal basis for withholding portions of statements that were deemed by the Prosecution to be disclosable'. The Chamber considers that the Defence misreads the First Decision. Contrary to the Defence argument, the Chamber did not *proprio motu* order the Prosecutor to withhold information under rule 81(2) of the Rules. The Chamber rather indicated that, having authorised the non-disclosure of certain information pursuant to the Prosecutor's request under rule 81(2) of the Rules, the Prosecutor would also be authorised to withhold related information either for the sake of consistency or to correct oversights. Therefore, the Chamber finds that this issue does not arise from the First Decision. Accordingly, the Chamber is not required to consider the remaining criteria under article 82(1)(d) of the Statute and rejects leave to appeal for the Fourth Issue.

FOR THESE REASONS, THE CHAMBER HEREBY

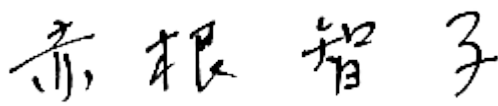
REJECTS the Joint Defence Request.

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

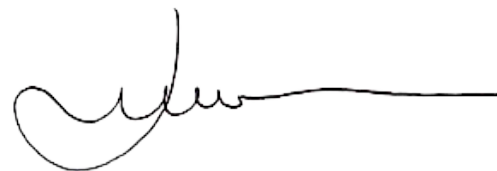


Judge Antoine Kesia-Mbe Mindua

Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Tuesday, 23 July 2019

At The Hague, The Netherlands