



Original: English

No. ICC-01/14-01/18

Date: 8 February 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***

Public

Decision on Defence Leave to Appeal
the “Decision on Disclosure and Related Matters”

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence
Stéphane Bourgon

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, Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”) issues this decision on defence leave to appeal the “decision on disclosure and related matters”.

I. PROCEDURAL HISTORY

1. On 11 November 2018, the Chamber issued a warrant of arrest against Alfred Yekatom¹ (“Yekatom”) who was surrendered to the Court on 17 November 2018.
2. On 23 November 2018, Yekatom appeared before the Chamber.² The hearing to confirm or decline to confirm the charges was scheduled to commence on Tuesday, 30 April 2019.³
3. On 14 December 2018, the Single Judge issued the “Decision Seeking Observations”⁴ for the purposes of establishing a disclosure calendar.
4. On 21 December 2018, the Prosecutor submitted the “Prosecution’s Request for a Protocol on Redactions”⁵ and the “Prosecution’s Observations pursuant to Decision ICC-01/14-01/8-33”.⁶ On the same day, the Registry submitted the “Registry’s Observations pursuant to ICC-01/14-01/18-33”.⁷
5. On 28 December 2018, the Defence submitted the “Observations on behalf of Mr. Yekatom pursuant to ‘Decision Seeking Observations’”.⁸
6. On 2 January 2019, the Defence requested, on an expedited basis, that it be allowed to submit its response to the Prosecutor’s Proposed Redaction Protocol” on 7 January 2019,⁹ which was granted by the Single Judge *via* email on the same day.¹⁰

¹ ICC-01/14-01/18-1-US-Exp; a public redacted version of the warrant of arrest was issued on 17 November 2018, *see* ICC-01/14-01/18-1-Red.

² Pre-Trial Chamber II, Transcript of Hearing, ICC-01/14-01/18-T-1-ENG ET.

³ Pre-Trial Chamber II, Transcript of Hearing, ICC-01/14-01/18-T-1-ENG ET, p. 8, lines 20-25.

⁴ ICC-01/14-01/18-33.

⁵ ICC-01/14-01/18-39 with one public annex.

⁶ ICC-01/14-01/18-40-Conf with one confidential annex.

⁷ ICC-01/14-01/18-38-Conf-Exp.

⁸ ICC-01/14-01/18-45-Conf.

⁹ ICC-01/14-01/18-46.

¹⁰ Email dated 2 January 2019 at 12:12 from the Senior Legal Adviser of the Pre-Trial Division to the Defence.

7. On 7 January 2019, the Defence responded to the Prosecutor’s Proposed Redaction Protocol.¹¹

8. On 10 January 2019, the Prosecutor requested leave to reply to discrete issues emanating from the “Defence’s Response to the Prosecution’s Request for a Protocol on Redactions (ICC-01/14-01/18-47)”,¹² which was rejected on 11 January 2019.¹³

9. On 23 January 2019, the Single Judge issued the “Decision on Disclosure and Related Matters” (the “Disclosure Decision”).¹⁴

10. On 28 January 2019, the Defence for Yekatom filed the “Request on behalf of Mr. Yekatom seeking leave to appeal ‘Decision on Disclosure and Related Matters’” (the “Defence Request”) seeking leave to appeal the following issue:

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 Ag Mahmoud*” [...] – 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, constitutes an error law (the “Proposed Issue”).¹⁵

11. On 30 January 2019, the Chamber received the “Prosecution’s Response to the ‘Request on behalf of Mr. Yekatom seeking leave to appeal “Decision on Disclosure and Related Matters”’ (ICC-01/14-01/18-68)” submitting that the Chamber should reject the Defence Request.¹⁶

¹¹ ICC-01/14-01/18-47 with one public annex.

¹² ICC-01/14-01/18-53.

¹³ ICC-01/14-01/18-55.

¹⁴ ICC-01/14-01/18-64-Conf with one public annex; a public redacted version is also available, *see* ICC-01/14-01/18-64-Red.

¹⁵ ICC-01/14-01/18-68, para. 4 (footnotes omitted).

¹⁶ ICC-01/14-01/18-74, para. 1.

II. APPLICABLE LAW

12. The Chamber notes article 82(1)(d) of the Rome Statute, rule 155 of the Rules of Procedure and Evidence and regulations 24(5) and 65 of the Regulations of the Court.

13. Mindful of the exceptional character of the remedy of interlocutory appeal, the Chamber recalls that, in order for leave to appeal to be granted, the following requirements must be met:¹⁷

(a) the decision must involve an issue that would significantly affect (i) *both* the “fair” and “expeditious” conduct of the proceedings; *or* 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.

14. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.¹⁸ Most importantly, the “issue” identified by the appellant must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.¹⁹

III. ANALYSIS

15. According to the Defence for Yekatom, the Proposed Issue is “constituted by an identifiable subject, namely, whether the Single Judge’s decision [...] constitutes an error of law”.²⁰ The Defence for Yekatom further asserts that resolution of the Proposed Issue is essential as it is “vital to determine whether the Single Judge’s decision constitutes an error of law” and, “if the redaction regime is *ultra vires*, the redaction of any information by the Prosecution [...] would constitute a violation of

¹⁷ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (“Article 82(1)(d) Appeals Judgment”), 13 July 2006, ICC-01/04-168.

¹⁸ Article 82(1)(d) Appeals Judgment, ICC-01/04-168, para. 9.

¹⁹ *See*, for example, Pre-Trial Chamber I, *Prosecutor v Laurent Gbagbo*, “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, 31 July 2013, ICC-02/11-01/11-464, para. 8; Pre-Trial Chamber II, *Prosecutor v Bosco Ntaganda*, Decision on the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014”, 4 July 2014, ICC-01/04-02/06-322.

²⁰ ICC-01/14-01/18-68, para. 28.

the Statute and the Rules”.²¹ The Defence for Yekatom also takes the view that the Proposed Issue “would inevitably have significant repercussions on the fair and expeditious conduct of the proceedings”, considering that, “if the Defence is right [...], the redaction regime adopted by the Single Judge is *ultra vires*”²² and “any redaction of Rule 81(2) and (4) information by the Prosecution would thus require a discrete application to the Pre-Trial Chamber”.²³ Finally, the Defence for Yekatom asserts that “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 [...] follows the right course and is *intra vires*”.²⁴

16. The Prosecutor responds that “[t]he Defence’s arguments reflect nothing more than a mere disagreement”.²⁵ Furthermore, in the view of the Prosecutor, “[r]esolution of the issue would not significantly affect the fairness of the proceedings or the outcome of the trial since the Decision continues to permit the Defence to challenge the redactions imposed by the Prosecution and the Chamber will be provided with the unredacted evidence to verify, at its discretion, the necessity of any given redaction”.²⁶ The Prosecutor also asserts that “the issue [...] would delay, not materially advance, the conduct of proceedings”.²⁷

17. The Chamber finds that the Defence for Yekatom has not identified an issue in the Disclosure Decision that amounts to an identifiable subject or topic requiring a decision for its resolution. The Defence for Yekatom alleges, without providing supporting arguments, that the issue for which leave to appeal is sought amounts to “an error of law”.²⁸ However, as conceded by the Defence for Yekatom,²⁹ the Single Judge took note of its arguments in relation to the proposed redaction regime.³⁰ In addition, the Defence ignores that the Single Judge subsequently rejected these arguments on the basis of the established jurisprudence of the Court, the irrelevance of the approaches adopted by other international tribunals, the possibility afforded to

²¹ ICC-01/14-01/18-68, paras 29-30.

²² ICC-01/14-01/18-68, para. 33.

²³ ICC-01/14-01/18-68, para. 34.

²⁴ ICC-01/14-01/18-68, para. 37 (emphasis in original).

²⁵ ICC-01/14-01/18-74, para. 2.

²⁶ ICC-01/14-01/18-74, para. 3.

²⁷ ICC-01/14-01/18-74, para. 3.

²⁸ ICC-01/14-01/18-68, para. 28.

²⁹ ICC-01/14-01/18-68, para. 22.

³⁰ ICC-01/14-01/18-64-Red, para. 28.

the parties to challenge redactions and the discretionary power of the Chamber to verify redactions.³¹ It, thus, fails to explain why the Proposed Issue requires a decision for its resolution by the Appeals Chamber in spite of the specific arguments relied on by the Single Judge. This means that the Defence for Yekatom is merely expressing its disagreement with the Disclosure Decision.

18. In any event, the Chamber considers that the Defence for Yekatom has not established that the Proposed Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the proceedings. The Defence for Yekatom asserts that, if its arguments were to be accepted, the redaction regime would be “*ultra vires*”, which would mean that a discrete application to the Pre-Trial Chamber for each redaction request would be required.³² However, the Defence for Yekatom fails to take notice of the safeguards adopted by the Single Judge, namely the possibility afforded to the parties to challenge redactions and the discretionary power of the Chamber to verify redactions.³³ It is open to the Defence to initiate, within reason, the protection of the former safeguard whenever it considers that a redaction applied by the Prosecutor is not warranted. When these safeguards are taken into account, the Proposed Issue cannot be said to significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the proceedings.

19. Having found that the Defence for Yekatom has failed to establish the first requirement for leave to appeal to be granted, the Chamber need not address the remaining requirement. Accordingly, the Defence Request is rejected.

³¹ ICC-01/14-01/18-64-Red, para. 28.

³² ICC-01/14-01/18-68, para. 34.

³³ ICC-01/14-01/18-64-Red, para. 28.

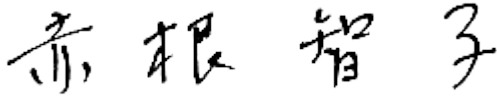
FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence Request.

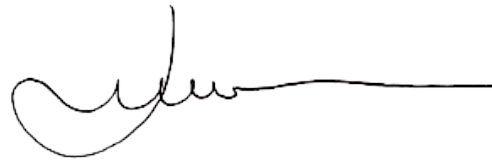
Done in both English and French, the English version being authoritative.



**Judge Antoine Kesia-Mbe Mindua,
Presiding Judge**



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Friday, 8 February 2019

At The Hague, Netherlands