

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/14-01/18

Date: 8 May 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 Request for Reconsideration of the Order on Reclassification

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

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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
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States Representatives

Amicus Curiae

REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this decision on the request for reconsideration of the order on reclassification.

I. PROCEDURAL HISTORY

1. On 11 November 2018, the Chamber issued the ‘Warrant of Arrest for Alfred Yekatom’, thereby deciding, *inter alia*, to retain the classification of the Prosecutor’s application under article 58 of the Rome Statute (the ‘Prosecutor’s Application’ and the ‘Statute’) as under seal, *ex parte*, only available to the Prosecutor.¹

2. On 7 December 2018, the Chamber issued the ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’, thereby deciding, *inter alia*, to retain the classification of the Prosecutor’s Application as under seal, *ex parte*, only available to the Prosecutor.²

3. On 11 December 2018, the Chamber received the ‘Expedited request on behalf of Mr. Yekatom seeking immediate disclosure of the Prosecutor’s application for issuance of a warrant of arrest’ (the ‘Defence Request for Disclosure’).³

4. On 12 December 2018, the Chamber issued the ‘Order on Reclassification’,⁴ thereby, *inter alia*, rejecting the Defence Request for Disclosure and, accordingly, maintaining the classification of the Prosecutor’s Application as under seal, *ex parte*, only available to the Prosecutor.⁵

5. 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.⁶ The Chamber scheduled the hearing regarding the confirmation of charges against Yekatom and Ngaïssona to commence on 18 June 2019.⁷

6. On 23 April 2019, the Chamber received the ‘Demande de la Défense de M Yekatom en reconsidération de l’Ordonnance portant reclassification rendue le

¹ ICC-01/14-01/18-1-Conf-Exp, para. 23. A public redacted version is also available, *see* [ICC-01/14-01/18-1-Red.](#)

² ICC-01/14-01/18-89-Conf-Exp, para. 23. A public redacted version is also available, *see* [ICC-01/14-01/18-89-Red.](#)

³ ICC-01/14-01/18-29-Conf-Exp.

⁴ ICC-01/14-01/18-31-Conf.

⁵ ICC-01/14-01/18-31-Conf, para. 6.

⁶ [ICC-01/14-01/18-87](#); [ICC-01/14-01/18-121](#).

⁷ [ICC-01/14-01/18-87](#), para. 18; [ICC-01/14-01/18-121](#), para. 18.

12 décembre 2018 (ICC-01/14-01/18-31-Conf)' (the 'Defence Request for Reconsideration').⁸

7. On 6 May 2019, the Chamber received the 'Prosecution's Response to « Demande de la Défense de M Yekatom en reconsidération de l'Ordonnance portant reclassification rendue le 12 décembre 2018 (ICC-01/04-01/18-31-Conf) »' (the Prosecutor's Response).⁹

II. SUBMISSIONS

8. The Defence for Yekatom takes the view that new facts require the Order on Reclassification to be reconsidered.¹⁰ It argues that, while the Chamber decided to maintain the *ex parte* classification of the Prosecutor's Application in order to protect the safety and well-being of witnesses as well as the confidentiality of the investigation, these considerations are no longer applicable.¹¹ In this regard, the Defence for Yekatom considers the following facts to be the most relevant:

- (i) the Chamber adopted a Redaction Protocol in its Decision on Disclosure and Related Matters of 23 January 2019, which allows for the investigation and the safety and well-being of witnesses to be protected by redacting information that would otherwise have to be disclosed;¹²
- (ii) the first witness statements containing redactions applied *proprio motu* by the Prosecutor in conformity with the aforementioned Redaction Protocol have been disclosed to the Defence for Yekatom on 27 March 2019, thus ensuring the confidentiality of the investigation;¹³
- (iii) in view of the arrest of Ngaïssona, his transfer to the Court, and the joinder of the cases against Yekatom and Ngaïssona, the situation regarding Ngaïssona can no longer serve as a reason to deny the Yekatom Defence access to the Prosecutor's Application;¹⁴

⁸ ICC-01/14-01/18-180-Conf.

⁹ ICC-01/14-01/18-188-Conf-Exp. A confidential redacted version is also available, *see* ICC-01/14-01/18-188-Conf-Red.

¹⁰ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 1.

¹¹ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 2.

¹² Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 11(i).

¹³ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 11(ii).

¹⁴ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 11(iii).

(iv) the Chamber has extended the restrictions on the contacts of Yekatom until the conclusion of the pre-trial stage and, according to the Chamber, these measures aim to protect the security and well-being of the witnesses as well as the confidentiality of the investigation;¹⁵

(v) in view of the expiry of the time limit set by the Chamber for submitting requests regarding the withholding of witnesses' identity and the expiry of the extension of this time limit on 18 April 2019, there are reasons to believe that the Prosecutor has adopted all measures she considers necessary to protect the security and well-being of witnesses;¹⁶

(vi) the Chamber adopted a Protocol on the Handling of Confidential Information and Contacts with Witnesses on 22 March 2019 and, according to the Protocol's preamble, its purpose is to protect the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations;¹⁷ and

(vii) in view of the approaching date of the commencement of the hearing regarding the confirmation of charges, namely 18 June 2019, the Prosecutor must be approaching the completion of her investigation and the disclosure process. In addition, taking into account the impending commencement of the hearing, it is essential that Yekatom's right to be informed promptly and in detail of the nature, cause and content of the charge is fully respected.¹⁸

9. In addition, the Defence for Yekatom argues that the Chamber held, in the Order on Reclassification, that the information contained in the Warrant of Arrest for Alfred Yekatom sufficed to allow him, at that stage, to seek provisional release and to challenge the admissibility of the case.¹⁹ According to the Defence for Yekatom, the Chamber thereby impliedly recognised that the information contained in the Warrant of Arrest for Alfred Yekatom was insufficient to allow him to prepare for the hearing regarding the confirmation of charges.²⁰ The Defence for Yekatom, thus, submits that Yekatom's right to be informed promptly and in detail of the nature, cause and

¹⁵ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 11(iv).

¹⁶ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 11(v).

¹⁷ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 11(vi).

¹⁸ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 11(vii).

¹⁹ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 13.

²⁰ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 13.

content of the charge must be assigned more weight.²¹ It also avers that this becomes even more important considering that more than 40% of the elements supporting the Warrant of Arrest for Alfred Yekatom have not been disclosed.²²

10. The Prosecutor submits that the Defence Request for Reconsideration ‘should be rejected’.²³ In the view of the Prosecutor, ‘the classification [of the Prosecutor’s Application] is necessary to ensure the confidentiality and integrity of the Prosecution’s ongoing investigation, and the security and wellbeing [sic] of witnesses’.²⁴ In addition, the Prosecutor argues that the Warrant of Arrest for Alfred Yekatom ‘fully informs the Defence of the nature and cause of the case alleged against YEKATOM, namely the charges and supporting evidence’.²⁵ Finally, the Prosecutor asserts that ‘the Defence will also receive the Document Containing the Charges [...] and the Prosecution’s Pre-Confirmation Brief, further detailing the case against YEKATOM, well in advance of the confirmation hearing’.²⁶

III. ANALYSIS

11. The Chamber recalls that 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 Evidence (the ‘Rules’).²⁷ The Chamber has

²¹ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 14.

²² Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 14.

²³ Prosecutor’s Response, ICC-01/14-01/18-188-Conf-Red, para. 1.

²⁴ Prosecutor’s Response, ICC-01/14-01/18-188-Conf-Red, para. 2. *See also* Prosecutor’s Response, ICC-01/14-01/18-188-Conf-Red, paras 4-10.

²⁵ Prosecutor’s Response, ICC-01/14-01/18-188-Conf-Red, para. 2. *See also* Prosecutor’s Response, ICC-01/14-01/18-188-Conf-Red, para. 11.

²⁶ Prosecutor’s Response, ICC-01/14-01/18-188-Conf-Red, para. 2. *See also* Prosecutor’s Response, ICC-01/14-01/18-188-Conf-Red, paras 11-12.

²⁷ *See for instance* Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo*, [Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II To Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification](#), 29 October 2005, ICC-02/04-01/05-60, para. 18; Pre-Trial Chamber II, *Regulation 46(3) of the Regulations of the Court*, [Decision on a Request for Reconsideration or Leave to Appeal the ‘Decision on the “Request for review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014”’](#), 22 September 2014, ICC-RoC46(3)-01/14-5, para. 5.

previously subscribed to this position as well.²⁸ It finds, therefore, that the Defence Request for Reconsideration lacks a basis in the legal texts of the Court.

12. Even accepting *arguendo* that the Chamber could reconsider the Order on Reclassification on the basis of the existence of new facts as argued by the Defence for Yekatom,²⁹ the Defence for Yekatom merely describes the evolvement of the pre-trial procedure leading up to the hearing regarding the confirmation of charges. These developments are the regular and foreseeable consequences of the application of the provisions of the Statute and the Rules relevant to this phase of the proceedings. Therefore, they do not amount to new facts requiring reconsideration of the order at stake. Accordingly, even if the Chamber had the power to do so, the Defence for Yekatom has failed to demonstrate the need to reconsider the Order on Reclassification in the specific circumstances of this case.

13. Lastly, the Chamber considers that the Defence for Yekatom misconstrues the Order on Reclassification by stating that the Chamber impliedly recognised that the information contained in the Warrant of Arrest for Alfred Yekatom is insufficient to allow him to adequately prepare for the hearing regarding the confirmation of charges.³⁰ In this order, the Chamber held that ‘the detailed information in the warrant of arrest suffices, at this stage, for Yekatom to be informed within the meaning of article 67(1)(a) of the Statute’.³¹ The reference to ‘this stage’ refers to Yekatom’s arrest. This is borne out by the fact that the Chamber invoked, in particular, the possibility of Yekatom requesting interim release under article 60(2) of the Statute and challenging the admissibility of the case or the jurisdiction of the Court under article 19(2) of the Statute.³² Over the course of the pre-trial phase, the information provided in the Warrant of Arrest for Alfred Yekatom will be gradually supplemented by, especially, the disclosure of evidence by the Prosecutor and the Document Containing the Charges together with the list of evidence the Prosecutor intends to present at the hearing regarding the confirmation of charges. This information, taken

²⁸ See for instance Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Second Decision on Disclosure and Related Matters](#), 4 April 2019, ICC-01/14-01/18-163, paras 34, 36.

²⁹ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 10.

³⁰ Defence Request for Reconsideration, ICC-01/14-01/18-180-Conf, para. 13.

³¹ ICC-01/14-01/18-31-Conf, para. 6.

³² ICC-01/14-01/18-31-Conf, para. 6.

together, ensures that Yekatom is informed promptly and in detail of the nature, cause and content of the charge in accordance with article 67(1)(a) of the Statute and allows him to adequately prepare for the hearing regarding the confirmation of charges. Therefore, considering that the Order on Reclassification did not address the question whether the information contained in the Warrant of Arrest for Alfred Yekatom, as such, allows him to adequately prepare for the hearing regarding the confirmation of charges, the Defence for Yekatom cannot seek reconsideration of the Order on Reclassification on this basis.

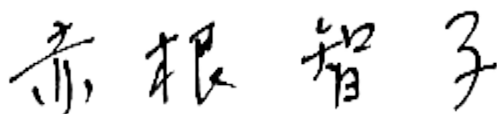
FOR THESE REASONS, THE CHAMBER HEREBY

- a) **REJECTS** the Defence Request for Reconsideration; and
- b) **ORDERS** the Yekatom Defence and the Prosecutor to either indicate that the Defence Request for Reconsideration and the Prosecutor's Response respectively can be made public without redactions or to file public redacted versions of said request and response respectively by Monday, 13 May 2019 at the latest.

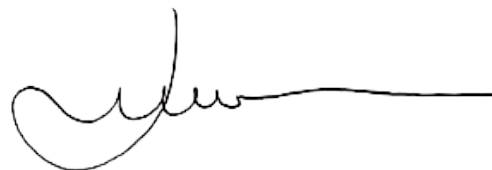
Done in both English and French, the English version being authoritative.



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



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Wednesday, 8 May 2019

At The Hague, The Netherlands