

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/14-01/18**

Date: **21 January 2019**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM***

Public

**Prosecution's Response to the Defence's Request Seeking Leave to Appeal the
"Decision on Language Proficiency of Alfred Yekatom for the Purposes of the
Proceedings" (ICC-01/14-01/18-57)**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. Pre-Trial Chamber II (“Chamber”) should grant the Defence’s request for leave to appeal its determination that YEKATOM is proficient in French for purposes of these proceedings – the “First Issue” identified by the Defence.¹ Although the Chamber’s determination on YEKATOM’s proficiency for statutory purposes is correct, the issue implicates YEKATOM’s fair trial rights and has important implications for the Court’s organisation and resources. As explained below, it is better that the Appeals Chamber settle the matter now at the case’s inception, rather than late in the proceedings.

2. The Defence’s “Second Issue” and “Third Issue” should be dismissed.² Neither constitutes an appealable issue. Both express a mere disagreement with decisions fully within the Chamber’s discretionary powers or are otherwise based on a misreading of the Impugned Decision.

II. SUBMISSIONS

A. The Chamber should grant leave to appeal the First Issue

3. The Chamber should grant the Defence’s request to appeal the First Issue, which concerns YEKATOM’s proficiency in French for purposes of article 67.³ In the Impugned Decision, the Chamber correctly recounted the law on assessing a suspect’s language for statutory purposes, including the prevailing appellate jurisprudence on the subject.⁴ The Chamber’s determination was also correctly based on the Registry’s Language Services Section’s (“LSS”) expert assessment of

¹ ICC-01/14-01/18-57, para. 16.

² ICC-01/14-01/18-57, paras. 17-19.

³ ICC-01/14-01/18-57, para. 16.

⁴ ICC-01/14-01/18-56-Conf, paras. 11-14.

YEKATOM's French and Sango proficiencies and the Defence's representations concerning those matters, including concessions.⁵

4. Although the Chamber's assessment was comprehensive, and its determinations were manifestly fair and correct in respect of the First Issue, the Chamber should invite the Appeals Chamber's review at this early stage. A settled disposition of the First Issue now would be preferable to one following a final judgment, or otherwise occurring late in the proceedings. Were the Appeals Chamber to disagree with this Chamber, any error found could easily be remedied and rectified before the proceedings advance through critical stages. Conversely, if the Appeals Chamber were to affirm the Impugned Decision on this matter – as the Prosecution fully expects it should – any delay to the proceedings would be marginal, if that.⁶ It is for this reason that a determination whether to grant an appeal under article 82(1)(d) is not determined on the incorrectness or correctness of a decision, but on the importance of the issue to the case. As noted by the Appeals Chamber, article 82(1)(d) “rid[s] [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”⁷ In that regards, the object of article 82(1)(d) “is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.”⁸

5. In light of the attendant circumstances and given that this case is at its inception, appellate resolution of the First Issue now is warranted, if not prudent.

⁵ ICC-01/14-01/18-56-Conf, paras. 15-17.

⁶ The Prosecution notes that the timing of the disclosure process would not be significantly affected by granting leave to appeal the First Issue, since the Defence has, in any case, agreed to receive disclosure in French: ICC-01/14-01/18-50, para. 4; ICC-01/14-01/18-48-Conf, para. 7; ICC-01/14-01/18-45-Conf, para. 38.

⁷ ICC-01/04-168, para. 14.

⁸ ICC-01/04-168, para. 19.

B. The Second Issue and Third Issue fail to meet the requirements for granting leave to appeal

6. The Second Issue and Third Issue proposed by the Defence do not meet the requirements for appeal under article 82(1)(d). As recognised by previous Chambers of this Court, including previous compositions of Pre-Trial Chamber II, disagreements or conflicting opinions do not constitute appealable issues, particularly when they relate to decisions that typically fall within the Pre-Trial Chamber's full discretion.⁹ Here, the remaining issues for which the Defence seeks leave to appeal amount to no more than a mere disagreement with the Chamber's discretion to identify (1) when to make available a Sango-French interpreter; and (2) what filings and decisions require translation into French. Both of these decisions fall entirely within the Chamber's broad discretionary power to fashion a remedy to meet the requirements of fairness as provided for under article 67 while efficiently managing Court resources.

a. The Second Issue does not meet the requirements for appeal

7. The Second Issue does not constitute an appealable issue because it merely expresses a disagreement with or misreads the Chamber's discretionary decision to provide YEKATOM with an *ad hoc* interpreter only when needed. Nothing in the Statute or the Rules mandates the assignment of a permanent interpreter to YEKATOM. The assignment of an interpreter on an *ad hoc* basis was well within the Chamber's discretion to ensure YEKATOM's fair trial rights in view of his language proficiencies in French and Sango as expertly assessed, and its obligation to ensure that Court resources are managed efficiently and effectively. The Chamber's

⁹ See e.g. Appeals Chamber: ICC-01/04-168, para. 9; Pre-Trial Chamber I: ICC-02/05-02/09-267, para.25; ICC-01/12-01/18-130-tENG, paras. 31-33; Pre-Trial Chamber II: ICC-01/05-01/08-532, para.17; ICC-02/04-01/15-287, paras. 8, 13; Trial Chamber I: ICC-01/04-01/06-1557, para.30; Trial Chamber II: ICC-01/04-01/07-2035, para.25; Trial Chamber III: ICC-01/05-01/08-3536, para. 15; Trial Chamber IV: ICC-02/05-03/09-179, para. 27; Trial Chamber VI: ICC-01/04-02/06-604, para. 15; Trial Chamber VII: ICC-01/05-01/13-1963, para. 18; Trial Chamber IX: ICC-02/04-01/15-650, para. 9-10.

balancing of these interests by providing YEKATOM with a Sango-French interpreter only when he *actually* requires assistance is practical and reasonable. Further, it prevents wastage attendant to permanently assigning YEKATOM a Court resource which may not be needed. In this regard, contrary to the Defence's reading of the Impugned Decision,¹⁰ YEKATOM suffers no harm since the Chamber's decision would not deprive him of Sango interpretation were it ever *actually* necessary.

8. The Second Issue appears to concern the Chamber's requiring the Defence to liaise with the Registry whenever *ad hoc* interpretations are required; as opposed to simply having one on stand-by at all times, irrespective of whether the interpreter is actually being used.¹¹ This is an administrative concern. It does not amount to an alleged error of law or of fact. Requiring the Defence to liaise with the Registry whenever interpretation is needed may be inconvenient for the Defence, but it is an entirely reasonable and fair accommodation which does not affect any of the Suspect's substantive or procedural interests. A disagreement as to how reasonable a *practical* accommodation is in this context does not amount to an appealable issue.

9. Similarly, the Defence's assertion that a permanent interpreter would "indirectly assist Mr. Yekatom's Defence team" by allowing Counsel to focus on "duties and responsibilities rather than on the translation of documents"¹² ignores the Chamber's important reasoning — it is Counsel's responsibility, *not* an interpreter's, to provide technical expertise to the Suspect and assist his understanding of the evidence and charges against him.¹³ And, in circumstances where YEKATOM requires the assistance of a Sango-French interpreter to

¹⁰ ICC-01/14-01/18-57, paras. 25-28.

¹¹ ICC-01/14-01/18-57, para. 29.

¹² ICC-01/14-01/18-57, para. 28.

¹³ ICC-01/14-01/18-56-Conf, para. 18. *See also*, paras. 17, 19.

understand the evidence or charges against him, the Impugned Decision provides for this precisely, on an *ad hoc* basis.¹⁴

10. The Defence's argument also misreads the Impugned Decision. It appears to be based on an erroneous understanding that an interpreter will only be provided to enable the Suspect's understanding of documents disclosed under rule 76(3).¹⁵ However, the Decision states that an interpreter will be allowed to visit YEKATOM in detention, if need be, to "provide the assistance in the context of Yekatom's preparation of his defence [...] regardless of whether counsel is present during the visit."¹⁶ This naturally includes circumstances where YEKATOM requires an interpreter to understand filings and decisions essential for his understanding of the nature, cause, and content of the charges against him. Appellate resolution of the Second Issue is not warranted.

b. The Third Issue does not meet the requirements for appeal

11. The Third Issue does not constitute an appealable issue because it merely expresses a disagreement with the Chamber's discretionary decision to require French translation of only those documents "that are essential for Yekatom to understand the nature, cause and content of the charges within the meaning of article 67(1)(a)".¹⁷ The Impugned Decision is properly in agreement with the practice of other Pre-Trial Chambers, which "have consistently held [that] suspects do not have an absolute right to have *all* documents translated into a language which they fully understand and speak."¹⁸

12. The Defence's contention that *all* documents filed in the case should be translated into French simply expresses a disagreement with the Chamber's

¹⁴ ICC-01/14-01/18-56-Conf, para. 18.

¹⁵ ICC-01/14-01/18-57, para. 30.

¹⁶ ICC-01/14-01/18-56-Conf, para. 21.

¹⁷ ICC-01/14-01/18-56-Conf, para. 19.

¹⁸ ICC-01/14-01/18-56-Conf, para. 14. *See also* ICC-01/12-01/18-42-tENG, para. 12.

reasoning. It also appears to be inconsistent with the Defence's previous assertions that the provision of French translations "will make it *easier* for the Counsel to familiarise Mr. Yekatom with the content of *material* issues and decisions".¹⁹ Clearly, not *all* filings and decisions in a case fall into this category.

13. The Defence's arguments are also speculative. The Defence fails to identify any filing or decision relevant to YEKATOM's understanding of the charges in the case that has not been translated into French. It also ignores the Chamber's reasoning that the YEKATOM's Defence team comprises of at least two attorneys able to work in French and English, and can thus ensure YEKATOM's awareness of the nature and content of the charges against him.²⁰ Finally, the Defence fails to account for the Chamber's prophylactic measure, allowing the Defence the right to request that additional documents filed with the Court be translated to French, to the extent they are essential for YEKATOM's understanding of the nature, cause and content of the charges.²¹

14. Similarly, the Defence's concern regarding the "burden" of explaining filings or decisions to YEKATOM in French²² amounts to a mere disagreement over the extent of the accommodation provided by the Chamber. While the Defence disagrees, the Impugned Decision is correctly predicated on the fact that the obligation to advise and render legal assistance to YEKATOM – including explaining legal filings and decisions – belongs to Counsel and not an interpreter.²³ In any event, the Impugned Decision provides YEKATOM with access to an interpreter should he need one to

¹⁹ ICC-01/14-01/18-48-Conf, para. 33 (emphasis added).

²⁰ ICC-01/14-01/18-56-Conf, para. 19.

²¹ This is inherent in the Chamber's determination that it would simply not require that all documents be translated into French "as a matter of course". ICC-01/14-01/18-56-Conf, para. 19.

²² ICC-01/14-01/18-57, para. 33.

²³ ICC-01/14-01/18-56-Conf, paras. 17, 19. *See also* art. 15(1), Code of Professional Conduct for counsel ("Counsel shall provide the client with all explanations reasonable needed to make informed decisions regarding his or her representation.").

understand the nature, cause and content of the charges.²⁴ Appellate resolution of the Third Issue is not warranted.

III. RELIEF SOUGHT

15. For the above reasons, the Chamber should grant the Defence's request for leave to appeal the First Issue. However, the Chamber should reject the Second Issue and Third Issue.



Fatou Bensouda, Prosecutor

Dated this 21st day of January 2019
At The Hague, The Netherlands

²⁴ See ICC-01/14-01/18-56-Conf, para. 21.