

**Cour
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**International
Criminal
Court**

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

Date: **23 April 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

**Prosecution's Response to the Ngaissona Defence Request for Leave to Appeal the
Second Decision on Disclosure and Related Matters (ICC-01/14-01/18-177-Conf)**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Mr Stéphane Bourgon

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The NGAISSONA Defence's request for leave to appeal¹ Pre-Trial Chamber II's "Second Decision on Disclosure and Related Matters"² should be rejected. The Request fails to establish an appealable issue under article 82(1)(d) of the Statute. Rather, all four alleged 'issues' merely disagree with the Chamber's determination or are otherwise founded on a misreading of the Decision. Further, the Request does not meet either of the cumulative requirements of article 82(1)(d).

II. CONFIDENTIALITY

2. This response is filed as "confidential" pursuant to regulation 23*bis* of the Regulations of the Court as it responds to a filing of the same classification. The Prosecution will file a public redacted version as soon as practicable.

III. SUBMISSIONS

A. The Request fails to identify appealable issues

3. The First Issue³ mischaracterises the Decision in asserting that "the Chamber erred by refusing to entertain Defence requests for reconsideration of the First Disclosure Decision."⁴ *First*, the Chamber's observation that the Defence arguments amounted to "a request for reconsideration"⁵ concerned the *substance* of the request⁶, and was not a procedural bar to either their submission or consideration. Thus, in considering the proposed amendments to the Redaction Protocol, the Chamber

¹ ICC-01/14-01/18-177-Conf ("Request").

² ICC-01/14-01/18-163 ("Decision").

³ ICC-01/14-01/18-177-Conf, paras. 50-55.

⁴ ICC-01/14-01/18-177-Conf, para. 50.

⁵ ICC-01/14-01/18-163, para. 34 (concerning the arguments advanced by the Defence regarding categories A8 and B5 of the Redactions Protocol); *see* ICC-01/14-01/18-177-Conf, para. 24.

⁶ ICC-01/14-01/18-163, para. 34 (noting that "the exact same arguments have been raised in the Yekatom Defence Response to Prosecutor's Proposed Redaction Protocol and rejected in the First Disclosure Decision").

found that the Defence had “fail[ed] to explain why” the Chamber should do so.⁷ *Second*, the Defence was granted “an effective opportunity to present [its] views relating to the modalities and parties’ obligations related to disclosure.”⁸ That the Decision did not accede to the Defence’s proposals does not render the matter an ‘appealable issue.’ Rather, it demonstrates nothing more than a mere disagreement.

4. The Second Issue⁹ similarly contests the Chamber’s characterisation of the Defence submissions with respect to two proposed amendments to the Redactions Protocol as a “request to clarify the First Disclosure Decision.”¹⁰ It disagrees with the Chamber’s determination that “nothing in the legal texts of the Court allows the parties to seek clarification of a decision.”¹¹ However, the Request ignores the Chamber’s express consideration of the proposed amendments, namely that the Defence had failed to provide “a sufficient basis to amend the First Disclosure Decision.”¹² Thus, contrary to the Request and irrespective of the Chamber’s characterisation of the Defence’s observations — with which the Defence merely disagrees¹³ — the Decision did not “deprive” the Defence of its ostensible right to be heard in respect of disclosure matters.¹⁴

5. The Third Issue and Fourth Issue, which respectively concern the Defence’s access to French translations of material on which the Prosecution intends to rely, as well as material falling under article 67(2) and rule 77 of the Rules of Procedure and Evidence (“Rules”)¹⁵, do not amount to appealable issues. *First*, the Request misreads the Decision in asserting that it “plac[es] the burden on the Defence to request from the Prosecution that individual items of evidence be translated” or “revers[es] the

⁷ ICC-01/14-01/18-163, para. 34.

⁸ ICC-01/14-01/18-177-Conf, para. 52; *see contra*, ICC-01/14-02/18-34, para. 21 (noting that the purpose of permitting NGAISSONA to provide his observations was “to safeguard [his] right to be heard on the issue”).

⁹ ICC-01/14-01/18-177-Conf, paras. 56-60.

¹⁰ ICC-01/14-01/18-163, para. 22; *see* ICC-01/14-01/18-177-Conf, para. 30.

¹¹ ICC-01/14-01/18-163, para. 22.

¹² ICC-01/14-01/18-163, para. 22.

¹³ ICC-01/14-01/18-177-Conf, para. 32, 57-59.

¹⁴ ICC-01/14-01/18-177-Conf, para. 58.

¹⁵ ICC-01/14-01/18-177-Conf, para. 37.

burden.”¹⁶ The Decision neither says this nor operates to such effect. Neither issue thus actually arises from the Decision. Alternatively, they amount to a mere disagreement with the Chamber’s determination that the Court’s statutory framework does not “vest the suspect with the right to receive translations of all the evidence disclosed.”¹⁷ *Second*, the corresponding inference is that the statutory framework establishes no burden on the Prosecution to provide translations exceeding the scope of rule 76(3). The Court’s prescribed course of action in no way reverses a burden — indeed, there is no burden to reverse. And, the Chamber’s refusal to find one irrespective of the “documentary” nature of the case¹⁸ does not amount to an appealable issue. Moreover, the Decision actually accommodates the Defence’s interests beyond the rules — *i.e.*, “the Ngaissona Defence *may* request the Prosecutor to translate items of evidence other than the statements of the Prosecutor’s witnesses if it considers that to be essential for preparing its defence and, in the event of disagreement, either party may apply to the Chamber for the ruling.”¹⁹

B. The Request fails to meet the remaining article 82(1)(d) criteria

6. Assuming *arguendo* that the Request identifies appealable issues, it otherwise fails to meet the cumulative requirements of article 82(1)(d). The arguments advanced concerning the effect of the Decision on the fairness of the proceedings or outcome of a trial are conclusory and unsubstantiated. The Defence’s assertion that immediate appellate intervention may materially advance the proceedings is unexplained, particularly to the extent that the Third and Fourth issues arise from well-settled law and the Statute’s plain wording. Similarly, as applied to the First

¹⁶ ICC-01/14-01/18-177-Conf, paras. 61-63.

¹⁷ ICC-01/14-01/18-163, para. 38; *see contra* ICC-01/14-01/18-177-Conf, para. 63.

¹⁸ ICC-01/14-01/18-177-Conf, paras. 39, 40 (note that the Defence mischaracterises the Prosecution’s Observations Pursuant to Decision (ICC-01/14-01/18-33) - ICC-01/14-01/18-40-Conf, p.4 – in suggesting that the 800 prospective exhibits on which it intended to rely regarding the more insular case against YEKATOM, was a “previous announce[ment]” as concerns the case against NGAISSONA, whose alleged criminal responsibility is more extensive).


¹⁹ ICC-01/14-01/18-163, para. 38.

and Second issues, the Request fails to articulate, let alone substantiate, a cogent basis for an interlocutory appeal. Simply asserting in different ways that the Decision “could taint the most significant aspects of the case going forward, namely the parties’ disclosure obligations and Mr Ngaissona’s rights to be informed of the charges against him”²⁰, without substantiating how or why cannot reasonably satisfy the requisite legal threshold under article 82(1)(d).

7. Nothing in the Request establishes that the Decision will inevitably, or even reasonably, affect the fairness or the outcome of the confirmation proceedings, much less the trial. As such, appellate intervention would further delay the proceedings, rather than advance them and promote their expeditious conduct.

IV. RELIEF SOUGHT

8. For the reasons set out above, the Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 23rd day of April 2019
At The Hague, The Netherlands

²⁰ ICC-01/14-01/18-177-Conf, para. 68 (*see also*, para. 52).