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No. ICC-01/14-01/18

Date: 24 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***

Public

Decision on the 'Ngaïssona Defence Request for Leave to Appeal
the Second 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

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Legal Representatives of Victims

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**Unrepresented Applicants for
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**The Office of Public Counsel
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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 ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’.

I. PROCEDURAL HISTORY

1. On 11 November 2018 and 7 December 2018, the Chamber issued warrants of arrest for Alfred Yekatom and Patrice-Edouard Ngaïssona for their alleged criminal responsibility for crimes against humanity and war crimes committed in various locations in the Central African Republic respectively.¹

2. On 11 January 2019, the Single Judge issued the ‘Decision on Language Proficiency of Alfred Yekatom for the Purposes of the Proceedings’ in the case of *The Prosecutor v. Alfred Yekatom*, thereby deciding that Yekatom is proficient in French for the purposes of the proceedings (the ‘Language Proficiency Decision’).²

3. On 23 January 2019, the Single Judge issued the ‘Decision on Disclosure and Related Matters’ in the case of *The Prosecutor v. Alfred Yekatom* (the ‘First Disclosure Decision’).³

4. 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’ (the ‘Joinder Decision’), thereby joining the cases against Yekatom and Ngaïssona.⁴ In this decision, the Chamber, *inter alia*, considered ‘it appropriate to permit the Defence for Ngaïssona to make observations on the [First Disclosure Decision] in order to safeguard Ngaïssona’s right to be heard on the issue’ at the latest on 11 March 2019.⁵

5. On 5 April 2019, the Chamber issued the ‘Second Decision on Disclosure and Related Matters’ (the ‘Second Disclosure Decision’).⁶

¹ ICC-01/14-01/18-1-US-Exp. A public redacted version is also available, see [ICC-01/14-01/18-1-Red](#); ICC-01/14-01/18-89-US-Exp. A public redacted version is also available, see [ICC-01/14-01/18-89-Red](#).

² ICC-01/14-01/18-56-Conf. A public redacted version is also available, see [ICC-01/14-01/18-56-Red](#).

³ ICC-01/14-01/18-64-Conf. A public redacted version is also available, see [ICC-01/14-01/18-64-Red](#).

⁴ [ICC-01/14-01/18-121](#). See also [ICC-01/14-01/18-87](#).

⁵ [ICC-01/14-01/18-121](#), para. 21. See also [ICC-01/14-01/18-87](#), para. 21.

⁶ [ICC-01/14-01/18-163](#).

6. On 15 April 2019, the Ngaïssona Defence submitted the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’ (the ‘Request’).⁷

7. On 23 April 2019, the Prosecutor filed the ‘Prosecution’s Response to the Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters (ICC-01/14-01/18-177-Conf)’ (the ‘Response’).⁸

8. On 15 May 2019, the Chamber issued the ‘Decision on the “Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines”’, in which it determined that the Confirmation Hearing in the case against Yekatom and Ngaïssona will now commence on 19 September 2019.⁹

II. APPLICABLE LAW

9. The Chamber recalls 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.

10. Mindful of the exceptional nature of the remedy of an interlocutory appeal, the Chamber notes that, for such leave 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 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.

11. The above requirements are cumulative in nature, and therefore, each criterion must be met in order to obtain leave to appeal.¹⁰

⁷ ICC-01/14-01/18-177-Conf. A public redacted version is also available, *see* [ICC-01/14-01/18-177-Red](#).

⁸ ICC-01/14-01/18-183. This document was originally filed as confidential, and was later reclassified to public.

⁹ [ICC-01/14-01/18-199](#).

¹⁰ *See, for example*, Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on “Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’”](#), 24 July 2015, ICC-01/05-01/08-3273, para. 8.

12. 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’.¹¹ ‘[T]he “issue” identified by the appellant must emanate from the relevant decision itself and cannot represent a hypothetical concern or an abstract legal question’.¹²

III. ANALYSIS

13. The Ngaïssona Defence seeks leave to appeal on four proposed issues (cumulatively, the ‘Four Issues’):

- i. Whether the Chamber erred by refusing to examine requests for reconsideration of the First Disclosure Decision, in light of the finding in the Katanga-Ngudjolo case that in the case of a joinder, the defence must have an opportunity to request reconsideration or leave to appeal where the interests of the defence are affected (the ‘First Issue’);
- ii. Whether the Chamber erred by considering that the Ngaïssona Defence made requests for clarification of the First Decision on Disclosure, whereas the Defence expressly submitted requests for amendments to the First Decision on Disclosure (the ‘Second Issue’);
- iii. Whether the Chamber erred by rejecting the Defence’s request to order the Prosecutor to provide French translations of all the evidence it intends to rely on at the Confirmation Hearing, with the exception of the statements of the Prosecutor’s witnesses, as provided for by Rule 76(3) of the Rules [...] (the ‘Third Issue’);
- iv. Whether the Chamber erred by imposing on the Defence the burden to request, on an ad hoc basis, the translation by the Prosecutor of specific items considered to be essential for the preparation of the defence, and, in the event of a disagreement, to apply to the Chamber for a ruling, in contravention of Article 67(1)(a) of the Statute (the ‘Fourth Issue’).

14. The Ngaïssona Defence submits that the Four Issues require an immediate resolution by the Appeals Chamber in order to materially advance the proceedings,

¹¹ Appeals Chamber, [Situation in the Democratic Republic of the Congo, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168, para. 9.

¹² Pre-Trial Chamber I, *The 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; *see also* Pre-Trial Chamber II, *The 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, para. 10.

since: (i) the issues directly concern Ngaïssona's right to a fair trial; (ii) Ngaïssona has the right to seek reconsideration of decisions which were rendered before the joinder; and (iii) there appears to have been some misapprehension of the Ngaïssona Defence's requests in relation to the First Disclosure Decision. The Ngaïssona Defence argues that, if leave to appeal were denied, the Second Disclosure Decision could taint the parties' disclosure obligations and Ngaïssona's right to be informed of the charges against him.

A. First issue

15. The Ngaïssona Defence submits that, while the Chamber found that the legal texts do not permit reconsideration, neither is there anything in the texts to preclude reconsideration. In this regard, the Ngaïssona Defence refers to a decision adopted in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (the 'Katanga Decision'), where, in the situation of a joinder of cases, the Single Judge found that the defence of each accused 'must have an opportunity to request reconsideration, and alternatively, leave to appeal of those decisions in the case against the person co-prosecuted, where it can be shown that the interests of the respective Defences are affected', while noting that requests for reconsideration are confined to exceptional circumstances.¹³

16. In the view of the Ngaïssona Defence, the opportunity to seek reconsideration, or alternatively leave to appeal, of decisions adopted in a co-suspect's case is the only remedy that would allow a co-suspect, after joinder, to participate actively and fully in the discourse that led to the issuance of decisions. Further, the Ngaïssona Defence asserts that 'given the importance of the redaction regime in a criminal trial, to the extent that it directly affects the Defence's investigations and the Defence's ability to challenge the Prosecution's evidence, the Defence submits that, by essence, the redaction regime affects the interests of the Defence'.

17. The Ngaïssona Defence submits that resolution of the First Issue would significantly affect the fairness of the proceedings as, in its view, Ngaïssona was not granted an effective opportunity to present his views relating to disclosure, thus

¹³ [ICC-01/14-01/18-177-Red](#), paras 26-27, referencing Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision Establishing a Calendar in the Case against Germain KATANGA and NGUDJOLO CHUI](#), 10 March 2008, ICC-01/04-01/07-259.

putting the Ngaïssona Defence at a clear and substantial disadvantage *vis-à-vis* the Prosecutor. The Ngaïssona Defence argues that the First Issue would affect the expeditiousness of the proceedings in that it would resolve any doubt as to the rights of suspects to seek reconsideration rendered at the pre-joinder phase in relation to another co-suspect. The Ngaïssona Defence also submits that, had the Chamber considered the Katanga Decision in the Second Disclosure Decision, this would have affected its ultimate findings, which would affect the outcome of the trial. Given the central role of evidence disclosure and redaction regimes, failure to resolve the First Issue would impact almost every aspect of the Ngaïssona Defence's preparation for the Confirmation hearing, which would ultimately affect the outcome of the trial.

18. In the Response, the Prosecutor asserts that the First Issue mischaracterises the Second Disclosure Decision. In the Prosecutor's view, the Chamber's observation that the Ngaïssona Defence's arguments amounted to a request for reconsideration concerned the *substance* of the request, and was not a procedural bar to either their submission or consideration. Thus, the Prosecutor argues that in considering the proposed amendments to the redaction protocol, the Chamber found that the Ngaïssona Defence had failed to explain why the Chamber should do so. In addition, the Prosecutor argues that the Ngaïssona Defence was granted an effective opportunity to present its views relating to the modalities and parties' obligations related to disclosure. Accordingly, the Prosecutor considers that the fact that the Second Disclosure Decision did not accord with the Ngaïssona Defence's proposals does not render the matter an appealable issue.

19. The Chamber notes that the Katanga Decision differs from the present case in one notable respect. In the former case, the Defence was not provided with the opportunity to present its views on decisions issued prior to the joinder. Rather, Pre-Trial Chamber I referred only to the defence options to request leave to appeal and the possibility of reconsideration in exceptional circumstances. In contrast, in the present case, although the Ngaïssona Defence alleges that it was not granted an opportunity to present its views in relation to disclosure, it simultaneously acknowledges that the Chamber invited it to provide its observations on the First Disclosure Decision. The Ngaïssona Defence fails to explain why, despite this fundamental difference between the two cases, the First Issue involves an identifiable subject or topic requiring a

decision for its resolution. Rather, the Ngaïssona Defence expresses its disagreement with the Second Disclosure Decision.

20. In the view of the Chamber, reconsideration is allowed as an exceptional measure which should only be undertaken when the conditions upon which the decision was grounded have changed, and it is necessary to prevent an injustice. The Chamber considers that such circumstances are not met in the case at hand.

21. Even if, *arguendo*, the First Issue would satisfy the first criterion arising from article 82(1)(d) of the Statute, it is the view of the Chamber that the Ngaïssona Defence entirely ignores that the Chamber fully considered its submissions before finding that the same arguments had already been raised by the Yekatom Defence and, in addition, held that, '[i]n any event, the Ngaïssona Defence fail[ed] to explain why, despite the aforementioned safeguards contained in the First Disclosure Decision, the Chamber should do away with these categories'. The Chamber finds that the Ngaïssona Defence has already had the opportunity to present its views in full and have them considered by the Chamber. Therefore, the First Issue does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

B. Second issue

22. The Ngaïssona Defence asserts that, while it presented observations requesting amendments to the First Disclosure Decision, the Chamber erroneously characterized two of the amendments as requests for clarification, and that, as such, its requests were not fully appraised by the Chamber. The amendments in question were intended to: (i) clarify the parties' obligations regarding disclosure, and (ii) request the Chamber to define the term 'leads' in Category A.6 of the redaction regime. The Ngaïssona Defence submits that a request for clarification consists of seeking an explanation for a decision, and unlike a request to amend a decision, does not seek the addition of substance through proposed amendments.

23. The Ngaïssona Defence asserts that it was deprived of its right to be heard on core aspects of disclosure obligations, thus affecting its right to a fair trial, and that, if leave to appeal is not granted for the Second Issue, this could result in future litigation on the matter, which would in turn affect the expeditiousness of proceedings. The Ngaïssona Defence also submits that resolution of the issue would affect the outcome of the trial, as Ngaïssona's right to have his views considered regarding disclosure is

fundamental, and non-resolution of the Second Issue would affect every aspect of the pre-trial proceedings.

24. The Prosecutor argues that the Second Issue similarly contests the Chamber's characterization of the Ngaïssona Defence's submission with respect to two proposed amendments to the redaction protocol, but ignores that the Chamber expressly considered the proposed amendments. In particular, the Prosecutor points to the Chamber's finding that the Ngaïssona Defence had failed to provide 'a sufficient basis to amend the First Disclosure Decision'. Irrespective of the Chamber's characterization of the Ngaïssona Defence observations, the Prosecutor asserts that the Ngaïssona Defence was not deprived of its ostensible right to be heard in respect of disclosure matters.

25. The Chamber finds that, while the Ngaïssona Defence disputes the characterization of the submissions in relation to two of its proposed amendments, as argued by the Prosecutor, the Ngaïssona Defence ignores the fact that the Chamber considered its submissions in full prior to rejecting the proposals. Indeed, the Second Issue simply repeats the Ngaïssona Defence's arguments that were already properly considered and dismissed in the Second Disclosure Decision, and as such, this issue does not involve an identifiable subject or topic requiring a decision for its resolution. According to established jurisprudence, a request for leave to appeal repeating arguments already considered in a previous decision amounts to a mere disagreement with the relevant rulings, and the fact that the Ngaïssona Defence is not satisfied with the dismissal of its submissions does not establish an appealable issue. In addition, the Chamber notes that the Ngaïssona Defence cannot use the prospect of repeating the same submissions in future filings towards an argument regarding the expeditious conduct of the proceedings.

C. Third and Fourth issues

26. As the Third and Fourth Issues relate to the Ngaïssona Defence's request for translation of items of evidence into French and the Chamber's decision on this point, these issues will be addressed together.

27. As to the Third Issue, the Ngaïssona Defence asserts that the Chamber erred by rejecting its request to order the Prosecutor to provide French translations of all the evidence it intends to rely on at the Confirmation hearing, with the exception of the

statements of the Prosecutor's witnesses. The Ngaïssona Defence submits that it is necessary for Ngaïssona to receive French translations of all documents the Prosecutor intends to rely on at the Confirmation Hearing in order to be informed of the nature, cause, and content of the charges, pursuant to Article 67(1)(a) of the Statute.

28. The Ngaïssona Defence submits that Article 67(1) of the Statute does not preclude the Chamber from going beyond the requirement set out in Rule 76(3) of the Rules, and notes that the Ngaïssona Defence has not requested the translation of all documents into French. Rather, the Ngaïssona Defence asserts that it has limited its proposed amendment to the evidence that the Prosecutor intends to rely on at the Confirmation Hearing and the evidence that may be material to the Ngaïssona Defence, namely, exculpatory evidence and evidence collected pursuant to Rule 77 of the Rules.

29. Turning to the Fourth Issue, the Ngaïssona Defence asserts that the Chamber erred by imposing on the Defence the burden to request, on an *ad hoc* basis, the translation by the Prosecutor of specific items considered to be essential for the preparation of the Defence, and in the event of disagreement, to apply to the Chamber for a ruling. The Ngaïssona Defence submits that only the Prosecutor may identify the alleged incriminating evidence on which it intends to rely at the Confirmation Hearing and determine that it must be translated into French.

30. Further, the Ngaïssona Defence argues that, based on the imminence of the Confirmation Hearing, it will likely be impossible for the Defence to engage in *inter partes* discussions to obtain translations, and apply to the Chamber for a ruling in the event of disagreement.

31. The Ngaïssona Defence asserts that the resolution of the Third and Fourth Issues affects the fair conduct of proceedings in that these issues directly engage the minimum guarantees provided for under Article 67(1)(a) of the Statute. Placing the burden on the Defence to request translations which, in the view of the Ngaïssona Defence, it is entitled to, impairs Ngaïssona's exercise of his rights under Article 67(1)(a) of the Statute, which affects both fairness and expeditiousness. The Ngaïssona Defence submits that this further affects Ngaïssona's rights considering the likelihood that the Prosecutor will disclose most of her evidence only one month

before the hearing. The Ngaïssona Defence is of the view that the requirement to make requests on an *ad hoc* basis could also be lengthy and cumbersome, which would affect the expeditiousness of proceedings.

32. The Prosecutor submits that the Third and Fourth Issues do not amount to appealable issues, and that the Ngaïssona Defence has misunderstood the Second Disclosure Decision by asserting that it places a burden on the Defence to request individual items of evidence to be translated. The Prosecutor argues that the Decision does not say this or operate this way, and as such, neither issue actually arises from the decision. In the alternative, the Prosecutor submits that the Third and Fourth Issues 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. The Prosecutor further asserts that the Decision accommodates the Defence's interests beyond what is required in the rules, in that it stipulates that the Ngaïssona Defence *may* request the Prosecutor to translate additional items of evidence that it considers to be essential in the preparation of its Defence.

33. Further, the Prosecutor submits that the Ngaïssona Defence arguments regarding the effect of the decision on the fairness of the proceedings or outcome of a trial are unsubstantiated, and the assertion that the intervention of the Appeals Chamber may materially advance the proceedings is unexplained, particularly to the extent that the Third and Fourth issues relate to well-settled law and the plain wording of the Statute.

34. The Chamber finds that the Ngaïssona Defence, in effect, contests rule 76(3) of the Rules and the jurisprudence of the Court in relation thereto. As noted in the Second Disclosure Decision and in the Language Proficiency Decision, it is the established practice of the Court that 'suspects do not have an absolute right to have all documents translated into a language which they fully understand and speak'.¹⁴ The Chamber further recalls that, as noted in respect to Yekatom in the Language Proficiency Decision, Ngaïssona is duly assisted by counsel, who, in accordance with

¹⁴ [Language Proficiency Decision](#), ICC-01/14-01/18-56-Red, para. 14, [Second Disclosure Decision](#), ICC-01/14-01/18-163, para. 38.

rule 22 of the Rules, is able to work in both working languages of the Court.¹⁵ Thus, in the view of the Chamber, the Third and Fourth issues amount to disagreement with the texts and jurisprudence of the Court as applied by the Chamber in the Second Disclosure Decision and, for this reason, do not constitute appealable issues.

35. Furthermore, while the Ngaïssona Defence claims that the Second Disclosure Decision imposes a burden upon them in relation to requesting the translation of additional items of evidence, the Chamber considers that, by providing the Defence with such an opportunity, the Chamber has in fact accommodated the request of the Ngaïssona Defence beyond what is required under rule 76(3) of the Rules. Therefore, the Ngaïssona Defence has failed to establish that the Fourth Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request for leave to appeal.

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


¹⁵ [Language Proficiency Decision](#), ICC-01/14-01/18-56-Red, para. 19.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Friday, May 24 2019

At The Hague, The Netherlands