

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 18 March 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
NGAISSONA***

Public

Ngaïssona Defence Response to the “Prosecution’s Request for Leave to Reply to the “Ngaïssona Defence Observations on the Protocol on the Handling of Confidential Information during Investigations and Contacts with Witnesses” (ICC-01/14-01/18-144)” (ICC-01/14-01/18-150)

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Defence of Mr Ngaïssona (the “Defence”) opposes the “Prosecution’s Request for Leave to Reply to the “Ngaïssona Defence Observations on the Protocol on the Handling of Confidential Information during Investigations and Contacts with Witnesses” (ICC-01/14-01/18-144)” dated 15 March 2019 (the “Request”) for two reasons.¹ First, allowing further submissions on the issues would not assist the Chamber in determining the final terms of the Protocol of Handling Confidential Information and Contacts with Witnesses. Rather, allowing such submissions would be inconsistent with principles of judicial economy, since the Chamber is already well placed to decide on the terms of such Protocol. Second, the request in relation to the second issue merely consists of the Prosecution’s attempt to get a second chance to enter into substantive discussions by requesting to make submissions on an issue which should have been raised in its original request for leave to reply to the Defence of Mr Yekatom’s “Response to the Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses” (the “Yekatom’s Response”) (the “First Request for Leave”).² This issue is not novel, as it has already been addressed in the Yekatom’s Response. Since the two issues upon which the Prosecution seeks leave to reply fall outside the permissible scope of a reply under Regulation 24(4) and 5 of the Regulations of the Court, Pre-Trial Chamber II (the “Chamber”) should reject the Request.

II. Applicable Law

2. In the interests of judicial economy, Regulation 24(5) of the Regulations of the Court limits the submissions a party may make with respect to a certain matter under judicial scrutiny. It requires leave of the Chamber for a

¹ ICC-01/14-01/18-150.

² ICC-01/14-01/18-51; ICC-01/14-01/18-54.

participant to reply to a response, and “unless otherwise permitted by the Chamber” limits the scope of a reply to “new issues raised in the response, which the replying participant could not reasonably have anticipated.”³ While the Regulation does not define the factors that the Chamber should consider, the Court’s jurisprudence shows that leave to reply should be granted in cases where further submissions are necessary for the adjudication of the matter under scrutiny.⁴

III. Submissions

A. The further submissions the Prosecution seeks to make on both issues are not necessary for the Chamber to make its decision

3. The Defence submits that for both issues raised by the Prosecution, the Chamber is well placed to assess for itself whether the Defence has in fact made any unreasonable, inappropriate or unfeasible suggestions since the Defence’s submissions are not made on the basis of any undisclosed information, but rather on the protocol annexed to the Chambers Practice Manual and on the Prosecution’s initial submissions made on that protocol.
4. The Chamber, by simply referring to the different proposed protocols, can verify whether according to it, the Defence has suggested unreasonable changes to the Protocol as the Prosecution submits. Thus, the question of whether the Defence’s suggestion “*comports with the nature and object of a confidentiality protocol*” will constitute the general essence of the determination of the Chamber.⁵ Similarly, the question of whether the Defence’s proposal to limit under paragraph 11 of the Defence proposed protocol the disclosure obligations of the parties and participants regarding, specifically, the *identity* of those individuals not in the ICC Protection Programme but otherwise

³ Regulation 24(5) of the Regulations of the Court.

⁴ See ICC-01/04-02/06-1813.

⁵ Request, para. 3(i).

protected by the VWU, without prejudice to paragraph 12 of the Defence proposed protocol, would (i) jeopardize the confidential nature of the relevant individual's involvement with the Court or (ii) be inconsistent with the *Laurent Gbagbo and Charles Blé Goudé* case law reference given by the Defence will necessarily be part of the Chamber's assessment.⁶ Consequently, the issues raised can be adjudicated by the Chamber without further submissions.

5. It seems to the Defence that the Prosecution merely disagrees with the Defence's submissions without providing any submissions as to why further information is necessary for the Chamber to adjudicate the issues. Mere disagreement with an opposing party's arguments is not sufficient to warrant a leave to reply.⁷

B. The second issue should have been addressed in the First Request for Leave

6. The Prosecution's submissions regarding the second issue are an attempt to supplement its earlier submissions by raising arguments that should have been raised in its First Request for Leave (to reply to the Yekatom's Response). The Prosecution fails to demonstrate why this issue has not been raised at the time. The second issue of the Request concerns the feasibility of disclosure obligations on the parties and participants in relation to protected witnesses which protection measure has not been disclosed to them. The reasoning presented by the Defence in paragraph 18 of its observations is the mere reiteration of the reasoning used in the Yekatom's Response.⁸ The additional modifications were merely requested by the Defence at paragraph 11 of the Protocol for consistency purposes. They are a mere consequence of both Defence teams' above referenced reasoning and their position that the disclosure obligations as initially set out in paragraph 11 of the Protocol

⁶ Request, paras 3(i) and 3(ii).

⁷ See ICC-01/04-02/06-1994, para. 13.

⁸ See Yekatom's Response, paras 38-40.

should not extend to witnesses “*who are subject to other protection measures, including those applicable in other cases before the Court*”, which could be not known to the investigating party.⁹ Therefore, submissions on the reasonableness of the Defence’s observation on this point “*in view of the nature and objectives of a confidentiality protocol*”¹⁰ could have been raised in the Prosecution’s previous application, which the Prosecution chose not to do.

7. In conclusion, leave to reply on this issue would be tantamount to giving the Prosecution a second chance to enter into substantive discussions.

RELIEF SOUGHT

In light of the foregoing, the Defence respectfully requests the Chamber to:

- **REJECT** the Prosecution’s Request.

Respectfully submitted,



Mr. Knoop, Lead Counsel

Dated this
18 March 2019
At The Hague, the Netherlands

⁹ See ICC-01/14-01/18-35-AnxA, paragraph 10; the Yekatom’s Response, para. 38; ICC-01/14-01/18-144, paras 16, 18.

¹⁰ Request, para. 3(ii).