

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 28 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 Redacted

Public Redacted Version of “Ngaïssona Defence Observations on Disclosure and Related Matters (ICC-01/14-01/18-64-Conf)”, 11 March 2019, ICC-01/14-01/18-143-Conf

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 for Patrice-Edouard Ngaïssona (“the Defence”) hereby presents its observations on the “Decision on Disclosure and Related Matters” (“the Decision on Disclosure”)¹ issued by Pre-Trial Chamber II (“the Chamber”) on 23 January 2019, in order to seek necessary amendments of the said Decision.

II. Confidentiality

2. Pursuant to regulation 23*bis* of the Regulations of the Court (“RoC”), the Defence requests that this filing be received by the Chamber as “confidential” as it refers to information that is subject to the same classification and as it is related to a confidential decision from the Single Judge. A public redacted version will be filed in due time.

III. Procedural History

3. On 14 December 2018, in the *Yekatom* case, the Single Judge issued the “Decision Seeking Observations” for the purpose of establishing a disclosure calendar.²
4. On 21 December 2018, the Prosecution submitted the “Prosecution’s Request for a Protocol on Redactions”³ and the “Prosecution’s Observations pursuant to Decision ICC-01/14-01-18-33” (“the Prosecution’s Observations”);⁴ the same

¹ ICC-01/14-01/18-64-Conf with one public annex.

² ICC-01/14-01/18-33.

³ ICC-01/14-01/18-39 with one public annex.

⁴ ICC-01/14-01/18-40-Conf, with one confidential annex.

day, the Registry also submitted the “Registry’s Observations pursuant to ICC-01/14-01/18-33”⁵

5. On 28 December 2018, the Defence for Alfred Rombhot Yekatom (“the Yekatom Defence”) submitted the “Observations on behalf of Mr. Yekatom pursuant to ‘Decision Seeking Observations’”.⁶
6. On 2 January 2019, the Yekatom Defence requested, on an expedited basis, that it be allowed to submit its response to the Prosecution’s Proposed Redaction Protocol on 7 January 2019,⁷ which was granted by the Single Judge the same day *via* email.⁸
7. On 7 January 2019, the Yekatom Defence responded to the Prosecution’s Proposed Redaction Protocol (“the Yekatom Response to the Prosecution’s Proposed Protocol”).⁹
8. On 10 January 2019, the Prosecution requested leave to reply on discrete issues emanating from the Yekatom Defence Response to the Prosecution’s Proposed Redaction Protocol,¹⁰ which was rejected on 11 January 2019.¹¹
9. On 23 January 2019, the Single Judge issued the Decision on Disclosure.¹²
10. On 28 January 2019, the Yekatom Defence filed the “Request on behalf of Mr. Yekatom seeking leave to appeal ‘Decision on Disclosure and Related

⁵ ICC-01/14-01/18-38-Conf-Exp..

⁶ ICC-01/14-01/18-45-Conf..

⁷ ICC-01/14-01/18-46.

⁸ Email dated 2 January 2019 at 12:12 from the Senior Legal Adviser of the Pre-Trial Division to the Defence.

⁹ ICC-01/14-01/18-47 with one public annex.

¹⁰ ICC-01/14-01/18-53.

¹¹ ICC-01/14-01/18-55.

¹² ICC-01/14-01/18-64-Conf with one public annex.

Matters''' ("the Yekatom Defence Leave to Appeal"),¹³ seeking leave to appeal the Decision on Disclosure.

11. On 30 January 2019, the Prosecution filed the "Prosecution's Response to 'Request on behalf of Mr. Yekatom seeking leave to appeal "Decision on Disclosure and Related Matters'" (ICC-01/14-01/18-68)".¹⁴

12. [REDACTED].¹⁵

13. On 8 February 2019, the Chamber rejected the Yekatom Defence Leave to Appeal.¹⁶

14. 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"),¹⁷ and invited the Defence to present observations on the Decision on Disclosure "in order to safeguard Ngaïssona's right to be heard on the issue."¹⁸

15. On 26 February 2019, the Defence¹⁹ and the Yekatom Defence²⁰ requested leave to appeal the Joinder Decision.

16. On 4 March 2019, the Prosecution filed the "Prosecution's Response to Defence Request for Leave to Appeal 'Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters (ICC-01/14-01/18-87)' (ICC-01/14-01/18-127 & ICC-01/14-01/18-128)".²¹

¹³ ICC-01/14-01/18-68.

¹⁴ ICC-01/14-01/18-74.

¹⁵ [REDACTED].

¹⁶ ICC-01/14-01/18-79.

¹⁷ ICC-01/14-02/18-34.

¹⁸ *Ibid.*, para. 21.

¹⁹ ICC-01/14-01/18-127.

²⁰ ICC-01/14-01/18-128.

²¹ ICC-01/14-01/18-139.

IV. Observations

17. The Defence hereby presents its observations on the principles governing disclosures, on the redaction regime adopted by the Single Judge on 23 January 2019, on the translation issues that may emerge in view of the Confirmation Hearing and on related matters.

1) Principles governing disclosures

18. The Defence welcomes the Single Judge's reminders of the necessity for the Defence to receive the evidence disclosed by the Prosecution sufficiently in advance in order to prepare adequately for the confirmation hearing.²² In particular, the Defence emphasises the Single Judge's reminder that the deadlines referred to in Rule 121(3), (4), (5) and (6) of the Rules of Procedure and Evidence ("the Rules") are only indicative of the minimum notice period a party may avail itself to comply with its disclosure obligations.²³ The Defence finally emphasises the Single Judge's reminder that the overarching principle of fairness guides the disclosure process.²⁴

19. With regards to the evidence referred to in article 67(2) of the Rome Statute ("the Statute"), the Defence welcomes and emphasises the Single Judge's reminder that "the phrase 'as soon as practicable' within the meaning of article 67(2) of the Statute has been understood as being the earliest opportunity after the evidence comes to the Prosecution's possession."²⁵ The Defence also welcomes and emphasises the Single Judge's reminder that such evidence must be received by the Defence "sufficiently in advance prior to the

²² The Decision on Disclosure, para. 13.

²³ *Ibid.*

²⁴ The Decision on Disclosure, para. 14.

²⁵ The Decision on Disclosure, para. 16.

commencement of the confirmation hearing in order to make effective use of the right provided in article 61(6) of the Statute.”²⁶

20. Since its designation in February 2019, the Defence has received two packages of alleged incriminating evidence.²⁷ For at least one of these packages, the Defence has encountered major technical difficulty to import the material disclosed, technical difficulty that cannot be attributed to the Defence’s use of the Court’s software.²⁸ Regarding the content of the packages already disclosed, the Defence notes that they are composed exclusively of alleged incriminating evidence. To date, the Defence has not received exculpatory evidence from the Prosecution or evidence referred to in Rule 77 of the Rules.

21. For the foregoing reasons, the Defence hereby submits that some amendments should be made to the Decision on Disclosure, so as to fluidify the process of disclosure, especially given the fact that the Confirmation Hearing will be held in approximately three months.

22. At the outset, and without entering into fastidious electronic details, the Defence would like to recall the difference between the release of evidence onto e-Court and the disclosure of evidence. Disclosure of evidence is an *inter partes* process that takes place between the parties to the trial,²⁹ *via* a software called Ringtail that is commonly used by parties before the Court. The release of evidence, on the contrary and as explained in the e-Court protocol, is a process involving the disclosing party and the Registry, which consists of the upload of evidence onto e-Court, that can be seen as a “twin version” of Ringtail. Although the Chamber, the parties, the participants and the Registry have access to e-Court, this system cannot substitute Ringtail for the parties.

²⁶ *Ibid.*

²⁷ [REDACTED] and [REDACTED].

²⁸ Emails retracing the exchanges between the Defence and IMSS will be provided to the Chamber and the parties, if the Chamber deems it necessary.

²⁹ *See*, Rule 121(2)(c) of the Rules; ICC-01/12-01/18-31, para. 13.

Ringtail offers different facilities to the parties, notably it allows to store, review, analyse and compare evidence that has been uploaded into it but not necessarily disclosed yet, to complete the meta-data of the evidence and to annotate the evidence, which is not possible via e-Court. Ringtail and e-Court are complementary instruments for the parties, but they are certainly not substitutable. When the Defence addresses the technical difficulty it has encountered with the uploading of the evidence disclosed by the Prosecution,³⁰ this difficulty should be read in light of the tremendous importance of Ringtail in the Defence preparation for the Confirmation Hearing.

23. First, the Defence notes that in the current disclosure process, disclosures are not necessarily announced. The Defence hence submits that every disclosure should be announced *via* email, at least 24 hours in advance, in order for the receiving party to properly prepare for the disclosure to come and to liaise with IMSS in case of any technical difficulty to perform the import of evidence. In the same vein, the announcement should mention the classification of the evidence to be disclosed: “INCRIM” for alleged incriminating evidence, “RULE 77” for evidence disclosed pursuant to Rule 77 of the Rules and “PEXO” for evidence disclosed pursuant to article 67(2) of the Statute.

24. Second, the Defence takes note of the Single Judge’s reminder that:

“[t]he parties are reminded to include in their submission of evidence: (i) a list of evidence comprising all pieces of evidence enclosed with their respective document ID as defined in the e-Court protocol (see Annex 1); and (ii) a list of recipients; and (ii)[*sic*] the level of confidentiality applicable to each item and the justification for its classification other than public.”³¹

³⁰ See para. 20.

³¹ The Decision on Disclosure, para. 20.

25. However, the Defence submits that the parties' above-mentioned obligations should be clarified. The lists mentioning the items of evidence disclosed in each package should be communicated in a separate document to the receiving party at the time of the disclosure. The party disclosing evidence should hence send a separate letter mentioning the date and content of the disclosure, accompanied by a list of the items disclosed. This letter, signed by the representative of the disclosing party, should then be signed by the receiving parties, acknowledging receipt of the disclosure, and sent back to the disclosing party. Not only this process would comply with courtesy obligations of the parties, but it would allow the receiving party to formally receive the disclosure when it is confirmed that this disclosure can be imported in the Court's software.

26. Third, the Defence submits that every disclosure of alleged incriminating evidence should be accompanied by an In-Depth Analysis Charter ("IDAC"), to allow the Defence to properly identify to what portion of the charges the evidence disclosed refers to. This approach has been adopted in several other cases brought before the Court, notably at the Confirmation stage.³² IDAC should also accompany disclosures of exculpatory evidence and evidence disclosed under Rule 77 of the Rules, when applicable.

27. Fourth, the Defence takes note of the [REDACTED] in which it announced that "[REDACTED]".³³ However, in the Prosecution's Observations, the Prosecution also announced that it intends to rely on approximately [REDACTED].³⁴ The Defence therefore understands that the said [REDACTED] will be alleged incriminating evidence but that exculpatory evidence and evidence pursuant to Rule 77 of the Rules will be disclosed in

³² See ICC-01/12-01/18-31, paras 44-52; See also ICC-01/05-01/08-55, paras 64-73; ICC-01/05-01/08-232 and its annex, ICC-01/05-01/08-232-Anx; ICC-01/04-02/06-47, para. 31.

³³ [REDACTED].

³⁴ The Prosecution's Observations, para. 4.a.i.

addition, which would actually lead to the disclosure of more than [REDACTED] pages of evidence. To assess the time necessary for the Defence to adequately prepare for the confirmation hearing, it is of tremendous importance to consider the time necessary for evidence review. In its “Public redacted version of the ‘Prosecution’s Application for Postponement of the Confirmation Hearing’, 10 February 2015, ICC-02/04-01/15-196-Conf-Exp”,³⁵ in the *Ongwen* case, the Prosecution wrote that:

“[d]isclosure review is a slow and labour-intensive exercise. From experience in previous cases, the average time required to review documents, including “unsearchables”, is 50 pages per person per day”.³⁶

28. From experience in previous cases, the Defence agrees with the above-mentioned estimation made by the Prosecution. In the present case, considering that the overall evidence will represent 14.500 pages, it would require one person to work for 290 days, only on evidence review. If the Defence allocates four persons to the review of the evidence disclosed by the Prosecution only, these persons would need to work 72 days in a row to complete the evidence review.

29. Therefore, given the time necessary for the Defence to adequately prepare for the confirmation hearing, as recalled by the Single Judge, the Defence submits that it is necessary, at this stage, to adopt a deadline for the disclosures to come. All the alleged incriminating evidence should be disclosed no later than 18 April 2019, i.e. two months prior to the commencement of the confirmation hearing, given the instrumental importance of this evidence for the parties. The Defence would hence commit to finish the alleged incriminating evidence review by the beginning of the Confirmation Hearing. In order to then allow the Prosecution to finalise its disclosure obligations, pursuant to the minimum

³⁵ ICC-02/04-01/15-196-Red2.

³⁶ *Ibid.*, para. 17.

deadlines imposed by the statutory documents of the Court, all exculpatory evidence and evidence collected under Rule 77 of the Rules should be disclosed no later than 18 May 2019, i.e. one month prior to the Confirmation Hearing. Adopting such a double deadline would allow the Prosecution to efficiently prioritise its disclosures and, in return, would allow the Defence to efficiently prioritise its evidence review. It would preserve the rights of the Suspect and the deadlines organised by the statutory texts of the Court. Both the parties and the Chamber would benefit from the proposed double deadline.

30. Finally, the Defence would like to draw the Chamber's attention on the difference of means available to the Prosecution and to the Defence when disclosing evidence. From experience in previous cases, the Defence has noted that, for several years, the Prosecution has had the opportunity to resort to electronic disclosure of evidence, with the support of their in-house IT Section. Unfortunately, to date, the Defence is not certain that the same facility would be available for its own disclosures of evidence. From experience in previous cases, and unless the situation has changed, the Defence still resorts to physical disclosure. Concretely, and without entering into fastidious electronic details, the Prosecution, when disclosing evidence, has the possibility to create an electronic link to be sent to the receiving parties *via* email. The receiving parties can then upload the evidence disclosed to their own Ringtail system. On the contrary, and unless the situation has changed, the Defence, when disclosing evidence, still has to burn CDs and DVDs and to physically hand them over to the receiving parties. If electronic disclosure could be available to the Defence, it would need familiarization, training and the assistance of IMSS to master the process. This difference of means results in a difference of time necessary to perform disclosures.

2) Exceptions to Disclosure (Redactions)

31. The Defence takes note of the redaction regime adopted by the Single Judge as it is applied in the case of *the Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mohamoud*.³⁷ This is by far the most far-reaching redaction protocol adopted in pre-trial proceedings before the International Criminal Court, which is bound to seriously impact the fairness of the proceedings. In this regard, the Defence notes and agrees with the submissions made by the Yekatom Defence team, which have been overruled by the Single Judge. The Prosecution has not demonstrated the necessity of being authorized to redact *proprio motu* so much information, which is required for the conduct of Defence investigations. Nonetheless, considering the litigation that has already taken place on this matter, in the absence of Mr. Ngaïssona, and taking stock of the Chamber's decision rejecting the Yekatom Defence Leave to Appeal, the Defence will not reiterate arguments already examined by the Chamber. Instead, the Defence hereby limits its observations to three discrete issues raised by the redaction regime adopted.

32. First, the Defence submits that when the Single Judge determined that under Rule 81(2) of the Rules, the Prosecutor may withhold information falling under Category A.6,³⁸ he did not consider that the "leads" referred in Category A.6 are not defined under the redaction regime and may embrace large categories of persons and entities who could be of interest to the receiving party. The Defence hence respectfully invites the Chamber to define the term "leads" so as to protect the parties from any unnecessary redactions.

33. Second, as to Categories A.8 and B.5 of the redaction regime,³⁹ the Defence submits that such categories are too broad and too vague as they may apply

³⁷ The Decision on Disclosure, para. 23.

³⁸ The Decision on Disclosure, para. 25.

³⁹ The Decision on Disclosure, para. 26.

to information that presents a tenuous link to the information effectively protected under Rule 81(2) and (4) of the Rules, which would ultimately result in impeding the ongoing and future investigation of the receiving party. Therefore, the Defence respectfully requests the Chamber to suppress Categories A.8 and B.5, inviting the Prosecution to apply to the Chamber when requesting redactions not encompassed by the other categories of current redaction regime, pursuant to Rule 81(2) and (4) of the Rules.

34. Third, as the redaction regime authorizes the disclosing party to apply *proprio motu* redactions to information that should have normally been communicated to the receiving party, the Defence is extremely preoccupied by the current impossibility offered to the receiving party to challenge the application of redactions. It therefore deems it necessary for the Chamber to implement a strict responsive mechanism, accompanied by strict deadlines, that will allow the receiving party to challenge the redactions applied by the disclosing party, in case *inter partes* requests for the lifting of redactions would fail.

35. The resolution of disagreements between the disclosing and the receiving parties on the lifting or the application of redactions should be undertaken in a timely manner, in order to avoid that these debates take place shortly before the Confirmation Hearing or the testimony of a witness. From experience in previous cases, these situations are far from being hypothetical.

36. The Defence therefore adopts and recalls the mechanism proposed by the Yekatom Defence in the Yekatom Response to the Prosecution's Proposed Protocol and invites the Chamber to adopt the following mechanism:

"First, in normal circumstances, a limit of 72 hours should be imposed for good faith consultations with a view to resolving the matter. Should the matter not be resolved after 72 hours, the receiving party may apply to the Chamber for a ruling, thereby

triggering a 3-day response time for the disclosing party, along with a concurrent 5-day period for the Chamber to adjudicate the matter. Pursuant to this mechanism, disputes would be resolved within eight days.

Second, during the 30-day period before the confirmation hearing or during trial, before the scheduled testimony of a witness, the receiving party should be entitled to apply directly to the Chamber for a ruling, thereby triggering: (i) a compulsory 2-day response time for the calling party; followed by (ii) a 1-day reply time for the receiving party; along with (iii) a concurrent 4-day period for the Chamber to adjudicate the matter. Pursuant to this mechanism, disputes would be resolved within four days.”⁴⁰

37. The above-mentioned procedure put forward by the Yekatom Defence in The Yekatom Response to the Prosecution’s Proposed Protocol, albeit rejected by the Single Judge, is a fine example of a serious and responsible approach to tackling this very important issue. Other options are available. However, the Defence underscores the necessity for the implementation of a strict procedure accompanied by fixed deadlines for the review and adjudication of disagreements between the Prosecution and Defence regarding the lifting of redactions, which have become unnecessary. It is paramount to adopt a procedure that will safeguard the rights of Mr. Ngaïssona to gain access timely to information, which is disclosable pursuant to the Statute and the Rules, in the event of disagreements concerning *proprio motu* redactions applied unnecessarily by the Prosecution.

3) The Issue of Translation of Evidence into a Language the Suspect Speaks and Understands and Related Matters

38. On 25 January 2019, during the First Appearance Hearing, Mr Ngaïssona informed the Chamber that the only working language of the Court that he

⁴⁰ The Yekatom Response to the Prosecution’s Proposed Protocol, paras 67-69.

speaks and understand is French.⁴¹ From the evidence disclosed so far by the Prosecution, the Defence notes that the majority of the items are in English, including several hours of audio-video materials.

39. Considering the fact that Mr Ngaïssona only speaks French,⁴² the Defence requests the Chamber to order the Prosecution to provide translations into French of the material disclosed so far in English and intended to be disclosed in the future in English.

40. In the Decision on Disclosure, the Single Judge specifically reminded the parties that:

“only such evidence is disclosed which is of true relevance to the case and apt to support a particular factual allegation underlying the requisite legal elements. As previously held, the Prosecutor should not ‘disclose the greatest volume of evidence, but [...] disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory’”.⁴³

41. The Defence hence considers that all the evidence disclosed so far by the Prosecution will be used for the purpose of the Confirmation Hearing, consistently with the above-mentioned excerpt of the Decision on Disclosure. Given the important amount of evidence already disclosed and to be disclosed, the Defence expresses the highest concern as to the issue of translations, especially considering Mr Ngaïssona’s right to have access to the evidence brought against him in a language that he understands, i.e. French. The Defence also recalls that evidence disclosed under Rule 77 of the Rules and exculpatory evidence are also material to the Defence that needs to be fully understood by Mr Ngaïssona. Therefore, the Defence respectfully

⁴¹ ICC-01/14-01/18-T-2-FRA ET, p. 5, lns. 18-22.

⁴² And Sango, but Sango is not a working language of the Court.

⁴³ The Decision on Disclosure, para. 18. Footnotes omitted.

requests the Chamber to order the Prosecution to provide French translations of all the evidence it intends to rely on at the Confirmation Hearing.

42. Finally, the Defence is of the view that, considering the proximity of the Confirmation Hearing, and the subsequent necessity for the parties to communicate swiftly, responses to correspondence should not take more than five days. The Defence hence requests the Chamber to direct the parties to examine and respond to their correspondence swiftly and diligently, and ultimately, no later than five days after their reception. The Defence will itself commit to respect this deadline.

RELIEF SOUGHT

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

- **IMPLEMENT** the amendments to the Decision on Disclosure as suggested by the Defence in paras 23, 25, 26, 29, 32, 33, 34-37, 39, 41 and 42 of the “Ngaïssona Defence Observations on Disclosure and Related Matters (ICC-01/14-01/18-64-Conf)”.

Respectfully submitted,



Mr. Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this

28 March 2019

At The Hague, the Netherlands