

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1686-Conf is reclassified as "Public"

**Cour
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**International
Criminal
Court**

Original: English

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

Date: **4 December 2022**

TRIAL CHAMBER V

Before:

Judge Bertram Schmitt, Presiding Judge

Judge Péter Kovács

Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Confidential

**Defence Request for Leave to Appeal the "Decision on the Ngaiissona Defence Request
for Further Directions on the Contact Protocol, ICC-01/14-01/18-1681-Conf"**

Source: Defence of Patrice-Edouard Ngaiissona

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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 Mr Ngaissona ('Defence') hereby requests for a leave to appeal ('Leave') Trial Chamber V's 'Decision on the Ngaissona Defence Request for Further Directions on the Contact Protocol' ('Impugned Decision'), notified on 30 November 2022.¹ The Defence submits that the Impugned Decision is insufficiently reasoned and comprises errors in law and in fact that affect the fair and expeditious conduct of the proceedings and for which an immediate resolution by the Appeals Chamber is necessary to materially advance the proceedings.

II. Procedural history

2. On 19 October 2022, the Defence submitted its 'Request for Further Directions on the "Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or a Participant"'² ('Request'), requesting the Chamber to clarify the scope of paragraph 27 of the Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or a Participant ('Contact Protocol'). Specifically, the Defence sought clarification on when a participant's intention to call a witness to testify or to rely on their statement is "otherwise clearly apparent".³
3. On 31 October 2022, the Common Legal Representatives of the Victims of the Other Crimes and the Common Legal Representative of the Former Child

¹ ICC-01/14-01/18-1681.

² ICC-01/14-01/18-1623-Conf.

³ Paragraph 27 of the Contact Protocol.

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Soldiers responded to the Request, submitting that the Contact Protocol needs no further clarification.⁴

4. On the same day, the Defence for Mr Yekatom supported the Request.⁵
5. Also on the same day, the Office of the Prosecutor ('Prosecution') indicated that it does not intend to respond to the Request and deferred to the Chamber's discretion. However, it provided the Chamber with *inter partes* communications between the Prosecution and both Defence teams to "avoid any misunderstanding or inaccurate representations" regarding its position on paragraph 27 of the Contact Protocol.⁶
6. On 25 November 2022, and pursuant to the Chamber's instruction,⁷ the Defence provided it with an email from 3 October 2022, in which it asked the Prosecution to abstain from contacting a certain individual, whom the Defence intends to call as a witness and subsequent exchanges between itself and the Prosecution.⁸
7. On 30 November 2022, the Chamber issued the Impugned Decision.

III. Confidentiality

8. In accordance with regulation 23bis(1) of the Regulations of the Court, this request for leave is filed confidentially as it makes references to an ongoing

⁴ ICC-01/14-01/18-1642-Conf.

⁵ ICC-01/14-01/18-1643-Conf.

⁶ See emails from the Prosecution, 31 October 2022, at 17:59, 18:17 and 18:31. The latter includes an attachment with three *inter partes* communications: email from the Prosecution to the Yekatom Defence, 6 October 2022, at 19:34; email from the Prosecution to the Ngaïssona Defence, 6 October 2022, at 11:58; email from the Prosecution to the Ngaïssona Defence, 19 October 2022, at 19:46.

⁷ Email from the Chamber to the Defence, 24 November 2022, at 12:59.

⁸ Email from the Defence to the Chamber, 25 November 2022, at 12:26.

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investigation and contains confidential information. A public redacted version will be filed in due course.

IV. Submissions

9. Pursuant to article 82(1)(d) of the Rome Statute ('Statute'), either party may, in accordance with the Rules of Procedure and Evidence ('RPE'),⁹ request leave to appeal of:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

10. The Impugned Decision meets all of the cumulative criteria set forth in article 82(1)(d) of the Statute, i.e. two appealable issues stem out from the Impugned Decision, which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

A. The Impugned Decision raises two appealable issues ('Issues')

11. The Impugned Decision (i) lacks reasoning ('First Issue') and (ii) the Chamber erred in law and in fact in reaching the Impugned Decision ('Second Issue'). As demonstrated below, both Issues are constituted by a subject the resolution of which is essential for the determination of matters arising in the

⁹ Rule 155(1) of the RPE: "When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal".

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judicial cause under examination and are not merely a question about which there is disagreement or conflicting opinions.¹⁰

i. The Impugned Decision lacks reasoning

12. Decisions of courts and tribunals should adequately state the reasons on which they are based.¹¹ Reasoned decisions serve the purpose of demonstrating to the parties and participants that their submissions have been examined and taken into consideration. Additionally, reasoned decisions oblige judges to base their reasoning on objective arguments, while preserving the rights of the Defence. Courts should therefore indicate with sufficient clarity the grounds on which they base their decision. The Appeals Chamber in *Lubanga* has indicated the need for a well-reasoned decision, noting that the extent of the reasoning will depend on the circumstances of the case but that it is nonetheless essential that a decision indicates with sufficient clarity its basis.¹² The reasoning need not recite and set out each and every factor, but it must identify facts it found to be relevant to the conclusion reached.¹³

13. *First*, contrary to what is set out above, the Impugned Decision lacks reasoning. While the Defence's request was clear, in that it sought guidance as to the scope of paragraph 27 of the Contact Protocol, given the Prosecution's different interpretation of the said paragraph, the Impugned

¹⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para. 22; *Situation in Darfur, Sudan*, Decision on Request for leave to appeal the 'Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor', ICC-02/05-118, 23 January 2008, p. 3.

¹¹ ECtHR, *Moreira Ferreira v. Portugal (No. 2)*, Judgment, Application no. 19867/12, 11 July 2017, para. 84.

¹² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-774, 14 December 2006, para. 30.

¹³ *Idem*, para. 30.

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Decision does not address the issue. The Defence requested the Chamber to provide guidance on the type of conducts, steps or ways of communication that can make an intention to call a witness "otherwise clearly apparent" to the non-calling party or participant. While the Prosecution argues that the intention to call a witness can only be established by the communication of List of Witnesses,¹⁴ the Defence argues that "such intention can also be determined by the opposing party based on its exchange with the individual approached".¹⁵ However, the Chamber ruled on an issue that was raised neither by the Prosecution nor the Defence, and decided that the Prosecution is free to contact individuals for the purpose of calling them as witnesses in the Mokom Case, or any other case [...]," even if these individuals are Defence Witnesses in the present case.¹⁶

14. *Second*, the Chamber "sees no need to further clarify paragraph 27 of the Contact Protocol",¹⁷ without explaining what served as the basis for this conclusion. The mere reference to "previous directions" and the Chamber's view that the Prosecution can freely "contact individuals for the purpose of calling them as witnesses in the *Mokom* Case, or any other case before this Court, even if these individuals might be, or become, witnesses for the defence in the present case"¹⁸ constitutes insufficient reasoning. In addition, the Chamber did not clarify the subsequent obligations of the Prosecution with regard to the disclosure of contacts with such individuals and of the outcome of such contacts, should, for example, the information obtained from these individuals go to the acts and conducts of Mr Ngaïssona.

¹⁴ See email from the Prosecution to the Ngaïssona Defence, 6 October 2022, at 11:58; email from the Prosecution to the Ngaïssona Defence, 19 October 2022, at 19:46.

¹⁵ ICC-01/14-01/18-1623-Conf., para. 9.

¹⁶ ICC-01/14-01/18-1681, para.12.

¹⁷ ICC-01/14-01/18-1681, para.13.

¹⁸ ICC-01/14-01/18-1681, para.12.

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15. Therefore, the issue of interpreting paragraph 27 is still unresolved and requires an effective resolution as the interpretation of paragraph 27 directly and inevitably impacts the integrity of Defence investigations, the credibility of the witnesses the Defence intends to call, and the preparation of the Defence case overall, as explained in subsection B of the present Request.

ii. The Chamber erred in law and in fact in reaching the Impugned Decision

16. *First*, the Chamber erred in law when it decided that the Prosecution can freely "contact individuals for the purpose of calling them as witnesses in the *Mokom* Case, or any other case [...]", even if these individuals are Defence Witnesses.¹⁹ Such decision distorts the purpose of paragraph 27 of the Contact Protocol by turning the bilateral nature of the obligation set forth therein into an unilateral obligation to which only the Defence is bound. As such, this effectively amounts to a deviation of the Contact Protocol. Yet, paragraph 3 of the Contact Protocol implies that any requests for deviation from it should emanate from the parties, and be subsequently authorised by the Chamber to take effect.²⁰ Therefore, the Chamber erred in law when it rendered a decision *proprio motu* on an issue that not only was not raised by either party but that effectively amounts to a non-requested deviation.

17. *Second*, the Chamber erred in law when determining that "the Contact Protocol does not apply across cases" and that "the Prosecution is therefore free to contact individuals for the purpose of calling them as witnesses in the *Mokom* Case, or any other case [...], even if these individuals might be, or become, witnesses for the defence in the present case".²¹ The Office of the

¹⁹ ICC-01/14-01/18-1681, para.12.

²⁰ Contact Protocol, ICC-01/14-01/18-677-Anx5, para. 3.

²¹ ICC-01/14-01/18-1681, para.12.

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Prosecutor is one, indivisible organ of the Court, as previously argued by the Prosecution itself and confirmed by Pre-Trial Chamber II.²² Therefore, the Office of the Prosecutor and its Deputy Prosecutors are bound by the Contact Protocol and the obligations set forth therein, regardless of the cases they prosecute or for which they conduct investigations.

18. *Finally*, while the Defence does not contest that “nothing in the Court’s legal framework prevents a witness from testifying as a Prosecution witness in one case and as a defence witness in another”,²³ it takes issue with the Chamber extending such general position to the *Mokom* case, without taking into consideration the implications for the present case. Indeed, the Chamber did not take into consideration the factual proximity the present case has with the *Mokom* case. Although the Court’s legal framework is silent with regard to “cross-cases” witnesses and testimonies, the Chamber should not ignore the impact that one proceeding has on the other, and vice-versa. Therefore, in reaching a decision based on no statutory grounds without providing further explanation on its *rationale* and without taking into account the exceptional parallels that exist between the *Mokom* case and the *Yekatom & Ngaiissona* case, the Chamber erred in fact and in law.

B. The Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

19. With respect to the fair and expeditious conduct of the proceedings, the Appeals Chamber held that “[t]he term "fair" in the context of article 82(l)(d) of the Statute is associated with the norms of a fair trial, the attributes of

²² *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the Admissibility of the Appeal, ICC-01/14-01/21-514, 25 October 2022, para. 14; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence Request for Reconsideration and, in the Alternative, Leave to Appeal the “Decision on Witness Preparation and Familiarisation”, ICC-01/12-01/18-734,9 April 2020, para. 13.

²³ ICC-01/14-01/18-1681, para.12.

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which are an inseverable part of the corresponding human right incorporated in the Statute by distinct provisions of it (articles 64(2), 67(1) and 21(3))".²⁴ In the same judgment it is underlined that "[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial".²⁵ The fairness of the proceedings implies the evaluation of the proceedings of a particular case as a whole²⁶ and "[t]he term "proceedings" as encountered in the first part of article 82(1)(d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto".²⁷ In other words, the Chamber, in its evaluation of the application for leave to appeal, shall consider whether or not the issue raised by either of the parties would significantly affect the fair and expeditious conduct of the proceedings in its entirety.

20. Regarding the significant effect on the outcome of the trial requirement, an issue may constitute the subject of an appeal where the "possibility of error in an interlocutory or intermediate decision may have a bearing thereupon" and such an assessment by the Chamber necessarily "involves a forecast of its consequences".²⁸

²⁴ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 11.

²⁵ *Idem*, para. 11.

²⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para. 24, citing ECtHR, *Monnell and Morris v. United Kingdom*, Judgement, 2 March 1987, Series A, No. 115; ECtHR, *Barbera, Mességué and Jabardo v. Spain*, Judgement, 6 December 1988, Series A, No. 146; ECtHR, *Granger v. United Kingdom*, Judgement, 28 March 1990, Series A, No. 174.

²⁷ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 13.

²⁸ *Idem*, para. 13.

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i. The lack of reasoning from the Chamber goes to the core of fair trial rights

21. The First Issue goes to the core of fair trial; according to the Appeals Chamber in *Lubanga* “[t]he right to a reasoned decision is an element of the right to a fair trial” and “only on the basis of a reasoned decision will proper appellate review be possible”.²⁹ The Appeals Chamber has further quoted jurisprudence from the European Court of Human Rights (‘ECtHR’) where it was held that a well-reasoned decision is part of the fair trial guarantees under article 6 of the European Convention on Human Rights.³⁰ Evidently, the lack of reasoning in the Impugned Decision significantly affects the fair conduct of the proceedings.

ii. The errors in law and in fact entailed in the Impugned Decision unduly affect the fair and expeditious conduct of the proceedings

22. The Impugned Decision unduly affects the fair conduct of the proceedings as it allows the Prosecution to meet, interview and obtain information from Defence witnesses. While the Defence notes that the Chamber “trusts the Prosecution is not contacting further individuals with the purpose of testifying in the present case”,³¹ the procedural history of the present case has established a pattern from the Prosecution to rely on its investigation in the *Mokom* case to further its investigation against Mr Ngaïssona.³² Consequently, the Impugned Decision opens the door for the following scenarios that would, in fact and beyond theory, unfairly prejudice the

²⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-774, 14 December 2006, para. 30, citing ICTY, *Prosecutor v. Momir Nikolić*, Judgment on Sentencing Appeal, Case No. IT-02-60/1-A, 8 March 2006, para. 96; ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, Case No. IT-96-23 & 23/1-A, 12 June 2002, para. 41.

³⁰ ECtHR, *Hadjianastassiou v. Greece*, Judgment, Application No. 12945/87, 16 December 1992 para. 33.

³¹ ICC-01/14-01/18-1681, para. 11.

³² ICC-01/14-01/18-1394-Conf; ICC-01/14-01/18-1653-Conf.

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conduct of the proceedings, the Defence case and the integrity of its investigation.

23. *First*, the Issues, specifically (1) the non-applicability of the Contact Protocol across cases in the Central African Republic situation, (2) the now-effective unilateral nature of its paragraph 27 coupled with (3) the absence of directions and instructions regarding the Prosecution's disclosure obligations, allow the Prosecution to not disclose any contacts it has had or maintains with a Defence Witness in the course of its confidential investigation against Mr Mokom. This means that:

- the Defence would not be in a position to know when the Prosecution interferes with Defence Investigation by contacting Defence Witnesses;
- the Defence would not be aware of any confidential information given by Defence Witnesses to the Prosecution that pertains directly to the Defence Case in breach of any confidentiality agreement between the Defence and the witness;
- the Defence would not be in a position to re-evaluate the credibility of its own witnesses in light of the information they gave to the Prosecution in the context of the *Mokom* case; and
- The Prosecution would be in a position seek leave to add items stemming from the *Mokom* case that were obtained directly or indirectly from Defence witnesses to its List of Evidence.

24. In other words, the Prosecution would be in a position to obtain information on the Defence's strategy in the present case without the Defence's knowledge. Not only this would affect the integrity of the Defence case but

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the Defence will not be in a position to readjust its strategy accordingly, thus jeopardising the fairness of the proceedings.

25. *Second*, the Impugned Decision authorises, in effect, the Prosecution to knowingly contact Defence Witnesses and obtain information on the Central African Republic Situation during the Defence's presentation of evidence. Meanwhile, the Defence is not authorised to knowingly contact Prosecution Witnesses during the Prosecution's presentation of evidence. This is a clear violation of the principle of equality of arms as it will give an unfair advantage to the Prosecution during the prospective examination of Defence Witnesses before the Chamber. Ultimately, this is highly prejudicial to the fairness of the proceedings which Mr Ngaissona is entitled to by statutory right.

26. *Finally*, there are no practical remedies to the unfairness caused by the above-mentioned scenarios. There are no effective procedural remedies to breaches of confidentiality of the Defence's investigation and strategy. Equally, any Defence requests for disclosure or inspection of material in possession of the Prosecution obtained through the *Mokom* case from Defence witnesses would most likely be confronted with the argument that this amounts to a fishing expedition, as the Defence is kept in the dark with regard to the *Mokom* investigation. And, should there be any procedural remedy to the above mentioned scenario, they presuppose the filing of requests, responses and replies that would unduly affect the expeditiousness of the proceedings, and unfairly and unnecessarily stretch Defence resources. Therefore, Leave to Appeal should be granted as it is the only viable remedy.

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C. The Issues require an immediate resolution by the Appeals Chamber in order to materially advance the proceedings

27. The fulfilment of the first two criteria found in article 81(1)(d) of the Statute does not automatically qualify the Issues as subjects of an appeal. The Issues have to be such that the proceedings may be materially advanced should the Appeals Chamber immediately resolve them meaning that "prompt reference of the issue to the Appeals Chamber will ensure that the proceedings follow the right course, pre-empting any repercussions of erroneous decisions on the fair and expeditious conduct of the proceedings or the outcome of the trial".³³

28. As previously analysed, both Issues affect not only the fair and expeditious conduct of the proceedings, but also could have an effect on the outcome of the trial. The Request sought clarifications on a highly contested matter, i.e. when a participant's intention to call a witness to testify or to rely on their statement is "otherwise clearly apparent".³⁴ By delivering a decision which lacks reasoning and does not even address the matter at hand, the Chamber allowed the parties to have different interpretations of the Contact Protocol which are bound to generate more litigation in the future, directly affecting the expeditiousness of the proceedings. In addition, giving a *carte blanche* to the Prosecution to contact Defence witnesses will greatly undermine the Defence case and will consequently affect the outcome of the trial. Referring the matter to the Appeals Chamber is the only remedy which can prevent any further repercussions on the proceedings stemming from the Impugned Decision, therefore materially advancing the proceedings.

³³ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para. 26.

³⁴ Paragraph 27 of the Contact Protocol.

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V. Relief Sought

29. The Defence respectfully requests the Chamber to grant **LEAVE TO APPEAL** the Impugned Decision.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard
Ngaissona

Dated this 4 December 2022,

At The Hague, the Netherlands