

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1693-Conf is reclassified as "Public"

**Cour
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**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/18
Date: 9 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 YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA**

Confidential

Common Legal Representatives' Joint Response to the "Defence Request for Leave to Appeal the 'Decision on the Ngaïssona Defence Request for Further Directions on the Contact Protocol, ICC-01/14-01/18-1681-Conf'"

Source: Common Legal Representatives of Victims

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1693-Conf is reclassified as "Public"

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I. INTRODUCTION

1. The Common Legal Representatives of the Victims of Other Crimes and the Common Legal Representative of the Victims Former Child Soldiers (together the "CLRV") submit that the "Defence Request for Leave to Appeal the 'Decision on the Ngaissona Defence Request for Further Directions on the Contact Protocol, ICC-01/14-01/18-1681-Conf'" (the "Defence Request")¹ should be rejected because it fails to meet the specific requirements for leave to appeal to be granted, pursuant to article 82(l)(d) of the Rome Statute (the "Statute").

2. In particular, the CLRV posit that both purported issues do not arise from the "Decision on the Ngaissona Defence Request for Further Directions on the Contact Protocol" (the "Decision")², in accordance with the established jurisprudence of the Court. In particular, the First Purported Issue raised by the Defence fails to properly form an "appealable issue" since it is insufficiently discrete to qualify as an appealable issue and, in any event, Trial Chamber V (the "Chamber") did provide a sufficient reasoning in the Decision. Moreover, the Second Purported Issue does not arise from the Decision since the Defence's arguments actually challenge previous rulings contained in a decision of Pre-Trial Chamber II or previous two decisions of the Chamber on the matter and thus are extraneous to the actual content of the Decision.

3. If, by extraordinary, the Chamber were to decide that any of these purported issues does constitute an appealable issue, the CLRV submit that they do not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. Moreover, the immediate resolution of the said issues by the Appeals Chamber will not materially advance the proceedings.

¹ See the "Defence Request for Leave to Appeal the "Decision on the Ngaissona Defence Request for Further Directions on the Contact Protocol, ICC-01/14-01/18-1681-Conf", [No. ICC-01/14-01/18-1686-Conf](#), 5 December 2022 (the "Defence Request").

² See the "Decision on the Ngaissona Defence Request for Further Directions on the Contact Protocol" (Trial Chamber V), [No. ICC-01/14-01/18-1681](#), 30 December 2022 (the "Decision").

II. PROCEDURAL BACKGROUND

4. On 19 March 2020, the "Chamber adopted the Protocol on the Handling of Confidential Information and Contacts with Witnesses (the "Contact Protocol").³

5. On 13 October 2022, the Defence for Mr Patrice-Edouard Ngaïssona (the "Defence") sought via an email the Chamber's guidance as to the scope of paragraph 27 of the Contact Protocol.⁴ On 14 October 2022, the Chamber by e-mail instructed the Defence to submit its request by way of formal filing.⁵ On 19 October 2022, the Defence filed 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 of a Participant'", seeking a further directions on the Contact Protocol (the "Initial Request").⁶

6. On 31 October 2022, the CLRV jointly responded to the Initial Request (the "CLRV Response").⁷ On the same day, the Yekatom Defence responded to the Initial Request⁸ and the Prosecution indicated via email that it did not intend to respond to

³ See the "Order Scheduling First Status Conference (Trial Chamber V)", [No. ICC-01/14-01/18-459](#), 19 March 2020 and the "Decision on Protocols at Trial (Trial Chamber V)", [No. ICC-01/14-01/18-677](#), and [No. ICC-01/14-01/18-677-Anx5](#), 8 October 2020. See also the "Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses" (Pre-Trial Chamber II), [No. ICC-01/14-01/18-156](#) and [No. ICC-01/14-01/18-156-AnxA](#) 22 March 2019 (the "Contact Protocol").

⁴ See the Email correspondence from the Defence on 13 October 2022 at 11:03.

⁵ See the Email correspondence from the Chamber on 14 October 2022 at 16:38.

⁶ See the "Defence 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 of a Participant' (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)", [No. ICC-01/14-01/18-1623-Conf](#), 19 October 2022, (the "Initial Request").

⁷ See the "Common Legal Representatives' Joint Response to the 'Defence 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 of a Participant' (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)", [No. ICC-01/14-01/18-1642-Conf](#), 31 October 2022.

⁸ See the "Yekatom Defence Response to Ngaïssona 'Defence 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 of a Participant' (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)", No. ICC-01/14-01/18-1623-Conf, 19 October 2022", No. ICC-01/14-01/18-1643-Conf-Exp, Confidential *Ex Parte*, only available to the Yekatom Defence and the

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the Initial Request.⁹ On 4 November 2022, the Yekatom Defence requested leave to reply to the CLRV Response (the "Request for Leave to Reply").¹⁰ The CLRV responded to the Request for Leave to Reply on 9 November 2022.¹¹

7. On 30 December 2022, the Chamber issued the Decision.¹²

8. On 5 December 2022, the Defence filed its Request.¹³

III. LEVEL OF CLASSIFICATION

9. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Defence. However, the CLRV indicate that the present submission does not contain information which should remain confidential and thus can be reclassified as public.

Prosecution (confidential redacted version was notified on 2 November 2022 as: [No. ICC-01/14-01/18-1643-Conf-Red](#)).

⁹ See the Email correspondence from the Prosecution on 31 October 2022 at 17:59.

¹⁰ See the "Yekatom Defence Request for Leave to Reply to the 'Common Legal Representatives' Joint Response to the 'Defence 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 of a Participant' (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)", 31 October 2022, ICC-01/14-01/18-1642-Conf", [No. ICC-01/14-01/18-1654-Conf](#), 4 November 2022.

¹¹ See the "Common Legal Representatives' Joint Response to the 'Yekatom Defence Request for Leave to Reply to the 'Common Legal Representatives' Joint Response to the 'Defence 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 of a Participant' (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)", [No. ICC-01/14-01/18-1660-Conf](#), 9 November 2022.

¹² See the Decision, *supra* note 2.

¹³ See the Defence Request, *supra* note 1.

IV. SUBMISSIONS

A. The criteria under article 82(1)(d) of the Statute

10. Article 82(1)(d) of the Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. For the purposes of the first prong of this test, the Appeals Chamber defined an "issue" as "*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*".¹⁴ Moreover, the Appeals Chamber ruled that "*the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue*".¹⁵ In addition, an appealable issue cannot be based on a misunderstanding of the decision¹⁶ or on the re-litigation of previously settled arguments.¹⁷

11. Consequently, it must first be determined whether the purported "issue" identified in the Defence Request is an "appealable issue" within the meaning of article 82(1)(d) of the Statute, as interpreted by the jurisprudence of the Court. Indeed, "*while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the*

¹⁴ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 9.

¹⁵ *Idem*, para. 20.

¹⁶ See the "Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008" (Trial Chamber I), [No. ICC-01/04-01/06-1191](#), 26 February 2008, para. 25.

¹⁷ See also the "Public redacted version of 'Decision on Defence request for reconsideration, or leave to appeal, 'Decision on Defence request in relation to P-0626'" (Trial Chamber X), [No. ICC-01/12-01/18-1295-Red](#), 10 February 2021, paras. 11-14.

*Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”.*¹⁸

12. According to the established jurisprudence, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Statute, the notion of “fairness” must be understood as referring to situations “when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”.¹⁹ In turn, “expeditiousness” must be read as “closely linked to the concept of proceedings ‘within a reasonable time’, [...] namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”.²⁰

13. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²¹

¹⁸ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 30 November 2012, para. 70.

¹⁹ See, *inter alia*, the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

²⁰ *Idem*, paras. 17-18.

²¹ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 14, para. 13.

B. Application of the criteria under article 82(1)(d) of the Statute to the Defence Request

1. The purported "issues" do not arise from the Decision

14. In its Request, the Defence raises two purported issues, arguing that the Decision: (i) lacks reasoning; and (ii) the Chamber erred in law and in fact in reaching said Decision.

15. As for the First Purported Issue, the Defence argues that the Decision lacks reasoning since the Chamber did not address the Defence's Initial Request, seeking guidance as to the scope of paragraph 27 of the Contact Protocol.²² The Defence also argues that the Chamber ruled not to clarify paragraph 27 of the Contact Protocol without explaining what served as the basis for its conclusion.²³ Then the Defence adds that the mere reference to its previous directions and the Chamber's view that the Prosecution can freely contact individuals for the purpose of calling them as witnesses in other cases constitutes insufficient reasoning.²⁴

16. In the Decision, the Chamber recalled that the Prosecution already submitted its Final Witness List on 10 November 2020 and the Prosecution is expected not to contact further individuals with the purpose of testifying in the present case.²⁵ The Chamber further reasoned that, to the extent that the Prosecution is contacting individuals as part of its investigations in another case, the Contact Protocol does not apply.²⁶ The Chamber also recalled its previous directions on this matter²⁷ which clearly provide, *inter alia*, that the Chamber is not competent to direct the Prosecution to amend the latter's request concerning various protocols (including a similar Contact

²² See the Defence Request, *supra* note 1, para. 13.

²³ *Idem*, para. 14.

²⁴ *Ibid.*

²⁵ See the Decision, *supra* note 2, para. 11.

²⁶ *Idem*, para. 12.

²⁷ *Ibid.*

Protocol) submitted before Pre-Trial Chamber II in the context of the *Mokom* case.²⁸ In conclusion, the Chamber added that the Prosecution is therefore free to contact individuals for the purpose of calling them as witnesses in other cases, even if those individuals might be, or become, witnesses for the defence in the present case.²⁹ Thus, the Chamber determined that there was no need to further clarify paragraph 27 of the Contact Protocol.³⁰

17. The CLRV recall first the constant jurisprudence of the Court according to which disputing the entirety of the Chamber's reasoning³¹ by merely being unsatisfied with a certain outcome³² or by generally claiming that the Chamber failed to provide a reasoned opinion³³ would not be sufficient to qualify as an appealable issue.³⁴ Rather than specifically articulating a discrete issue, the Defence argues under the First Purported Issue that the Chamber failed to provide a reasoned opinion. In light of the above constant jurisprudence of the Court, "failing to provide a reasoned opinion" is insufficiently discrete to qualify as an appealable issue and, accordingly, the First

²⁸ See footnote 15 of the Decision and para. 14 of the "Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the Yekatom and Ngaïssona Case" (Trial Chamber V), [No. ICC-01/14-01/18-1552](#), 23 August 2022.

²⁹ See the Decision, *supra* note 2, para. 12.

³⁰ *Idem*, para. 13.

³¹ See the "Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision on 'Defence Request for Disclosure and Judicial Assistance'" (Trial Chamber VII), [No. ICC-01/05-01/13-1282](#), 22 September 2015, para. 10. See also the "Decision on three applications for leave to appeal", *supra* note 18, para. 70; the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 11; the "Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800" (Trial Chamber VII), [No. ICC-01/05-01/13-877](#), 27 March 2015, para. 7.

³² See the "Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters' (Pre-Trial Chamber II), [No. ICC-01/14-01/18-206](#), 24 May 2019, para. 25. See also the "Decision on Defence Request for Leave to Appeal the 'Decision on Defence Request for a Stay of Proceedings'" (Pre-Trial Chamber II), [No. ICC-02/05-01/20-202](#), 9 November 2020, para. 16.

³³ See the "Decision on Motion for Reconsideration or Leave to Appeal Decision ICC-01/05-01/13-1284" (Trial Chamber VII), [No. ICC-01/05-01/13-1425](#), 27 October 2015, para. 11. See also the "Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses'" (Trial Chamber V(a)), [No. ICC-01/09-01/11-983](#), 24 September 2013, para. 17; and the "Decision on Requests for Leave to Appeal the Decision on Request in Response to Two Austrian Decisions" (Trial Chamber VII), [No. ICC-01/05-01/13-1963](#), 3 August 2016, para. 25.

³⁴ See the "Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation'" (Trial Chamber X), [No. ICC-01/12-01/18-734](#), 9 April 2020, para. 14.

Purported Issue should be dismissed on this basis alone. Notwithstanding, the CLRV submit that it is absolutely clear that the Chamber did provide clear and sufficient reasoning in the Decision. The Defence's allegation to the effect that the Chamber failed to do so is a misrepresentation of the Chamber's ruling on the matter. Indeed, the Appeals Chamber held numerous times that "[the extent of reasoning in judicial decision] will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before [the Chamber] to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion".³⁵

18. The Appeals Chamber also held that a Trial Chamber is "*not required to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision*".³⁶ It is thus presumed that the Chamber evaluated all the arguments and evidence before it as long as there is no indication that it proceeded otherwise,³⁷ in accordance with its discretion as to what to address and what not to address in its reasoning. Whether its reasoning was *convincing* or whether a reasonable Chamber could have reached the factual finding in question is *not* relevant to the determination of whether said Chamber provided a sufficient reasoning in its decision.³⁸

19. Moreover, the Appeals Chamber held that a Chamber's reasoning is sufficient even if it appears "*relatively sparse*" as long as it is still comprehensible how the latter reached the conclusions it did.³⁹ The Appeals Chamber stressed that this is especially

³⁵ See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'" (Appeals Chamber), [No. ICC-01/04-01/06-773 OA5](#), 14 December 2006, para. 20.

³⁶ See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), [No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 105.

³⁷ *Ibid.*

³⁸ *Idem*, para. 106.

³⁹ See the "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the 'Requête de la Défense demandant la mise en liberté

the case if the reasoning provided in a decision (read together with the relevant documents/pieces of evidence and the submissions of the parties and participants) shows clearly what conclusions the Chamber reached and on what basis it did so.⁴⁰ Such reasoning thus meets the legal standard for a reasoned decision, established in the jurisprudence of the Appeals Chamber.⁴¹ That is to say, a sparse or short statement of a Chamber's reasoning does not undermine the correctness and adequacy of a decision.⁴²

20. Indeed, as recalled above, the reasoning of the Chamber rejecting the Defence's Initial Request contained in the Decision (read together with the Chamber's previous directions on this matter issued in relation to the *Mokom* case) is sufficient since the Chamber explained with abundant clarity the basis for its ruling, according to the Appeals Chamber's jurisprudence.⁴³ Indeed, when the reasons for a decision is "discernible"⁴⁴ or "comprehensible" from the decision itself or it is "perfectly possible to understand", the Chamber's conclusions and how it arrived at them, the concerned ruling does not suffer from a lack of reasoning.⁴⁵ Hence, the Defence's arguments to the contrary are simply misplaced since the Decision *do* plainly contain reasons.⁴⁶ As a result, the First Purported Issue raised by the Defence does not arise from the Decision and fails to form a proper appealable issue.

provisoire du président Gbagbo" (Appeals Chamber), [No. ICC-02/11-01/11-278-Red OA](#), 26 October 2012, paras. 48-49.

⁴⁰ *Idem*, para. 49.

⁴¹ *Ibid.*

⁴² See the "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'" (Appeals Chamber), [No. ICC-01/05-01/08-323 OA](#), 16 December 2008, para. 53.

⁴³ See the "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'" (Appeals Chamber), [No. ICC-01/11-01/11-547-Red OA4](#), 21 May 2014, paras. 89-90.

⁴⁴ See the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 Jul 2015 entitled 'Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute'" (Appeals Chamber), [No. ICC-02/11-01/15-208 OA6](#), 8 September 2015, para. 61.

⁴⁵ See the "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", *supra* note 43, para. 90.

⁴⁶ See the "Decision on the Defence request for leave to appeal three decisions authorising exemptions from disclosure" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-568](#), para. 27.

21. The Defence formulates its Second Purported Issue as the Chamber erred in law when it decided that the Prosecution can freely contact individuals for the purpose of calling them as witnesses in other cases, even if said individuals are Defence Witnesses.⁴⁷ Then, the Defence argues that the Chamber erred in law when determining that the Contact Protocol does not apply across cases.⁴⁸

22. The CLRV posit that these arguments are extraneous to the actual content of the Decision. It has always been absolutely clear that the Contact Protocol is only applicable to the present case and thus does not concern other cases before the Court. In fact, prior to its adoption, the Pre-Trial Chamber received various submissions from the parties on the Proposed Contact Protocol.⁴⁹ Subsequently, the Contact Protocol was tailored specifically to the unique characteristics of the present case as advocated by the parties themselves. The Defence cannot now seriously argue that it had somehow assumed that the Contact Protocol applies to other cases as well. There exists no judicial precedent at the Court indicating that protocols similar to the Contact Protocol apply across cases at the pre-trial and/or trial stage of the proceedings conducted before various Chambers.

23. If, in fact, the Defence had disagreed with the application of the Contact Protocol only to the present case, it should have appealed the Pre-Trial Chamber's decision adopting the Contact Protocol mentioned above and/or the Chamber's two previous decisions to continue to apply said protocol to the trial stage of the proceedings.⁵⁰ Evidently, it had failed to do so within the relevant time limit. Indeed, the statement of the Chamber saying that the Contact Protocol does not apply across cases is not a new ruling contained in the Decision. By stating this, the Chamber was simply re-iterating the practice of the Court as adopted by its previous decisions.

⁴⁷ See the Defence Request, *supra* note 1, para. 16.

⁴⁸ *Idem*, para. 17.

⁴⁹ See the "Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses", *supra* note 3, paras. 2-15.

⁵⁰ See the "Order Scheduling First Status Conference" (Trial Chamber V) and the "Decision on Protocols at Trial" (Trial Chamber V), *supra* note 3.

24. As held by the Appeals Chamber, a properly constituted appealable issue must first and foremost arise from the concerned decision.⁵¹ In other words, the issue identified by the appellant must be a specific issue which has been dealt within⁵² or must emanate from the said decision.⁵³ On the contrary, the Defence Request raises a purported issue which did not actually form a part of the Decision and thus is unavailable for the Appeals Chamber's review. As a result, the Second Purported Issue must be equally dismissed.

25. Hence, as demonstrated *supra*, none of the purported issues raised by the Defence constitutes an appealable issue, it is not necessary for the Chamber to consider the remaining criteria under article 82(1)(d) of the Statute.⁵⁴ Nonetheless, should the Chamber be mindful to entertain them, the CLRV will briefly address *infra* the other relevant criteria.

2. The purported "issues" do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their litigation before the Appeals Chamber will not materially advance the proceedings

26. If, by extraordinary, the Chamber were to find that one or both purported "issues" identified by the Defence arise(s) from the Decision, the CLRV submit that none of them has an impact on the fairness and expeditiousness of the proceedings or the outcome of the trial, as required by article 82(1)(d) of the Statute.

⁵¹ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 14, para. 9.

⁵² See the "Decision on the 'Defence Application for Leave to Appeal the 'Decision on the defence request for a temporary stay of proceedings'" (Trial Chamber IV), [No. ICC-02/05-03/09-428](#), 13 December 2012, para. 7.

⁵³ See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-464](#), 31 July 2013, para. 8; and the "Decision on the Defence Request for Leave to Appeal" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-207](#), 13 January 2014, para. 11.

⁵⁴ See the "Decision on the Ngaïssona Defence Request for Leave to Appeal the 3 February 2020 Decision Pursuant to Regulation 101" (Pre-Trial Chamber II), [No. ICC-01/14-01/18-431-Red](#), 28 January 2021, para. 25 and the "Decision on the Yekatom Defence Request for Leave to Appeal the Twelfth Rule 68(3) Decision regarding P-1704" (Trial Chamber V), [No. ICC-01/14-01/18-1383](#), 29 April 2022, para. 16.

27. In fact, the trial has reached an advanced stage as the Prosecution has called more than half of its witnesses up-to-date. Indeed, as stressed by the Chamber in the Decision, the Prosecution is expected not to contact further individuals with the purpose of testifying in the present case since its submission of the Final Witness List on 10 November 2020.⁵⁵ Thus, even if the Appeals Chamber sides with the Defence on the matter at hand, there will be no effect on the fair and expeditious conduct of proceedings or the outcome of the trial since the presentation of evidence by the Prosecution is already nearing its end. As a result, granting a leave to appeal of the Decision will offer no practical or tangible benefits for both parties even if the Appeals Chamber ultimately decides in one way or another. In other words, the relief sought by the Defence's Initial Request has become moot already.

28. In its Request, the Defence lists a number of would-be "*scenarios*", supposedly affecting the fair and expeditious conduct of the proceedings.⁵⁶ Yet, all of the Defence's arguments in this regard appear premature and purely speculative since *none* of these possible *scenarios* is substantiated and supported with facts showing that they will indeed materialise in the future and impact negatively upon the forthcoming trial proceedings.

29. Moreover, the immediate resolution of the purported issues by the Appeals Chamber will not materially advance the proceedings since, again, the Prosecution had submitted its Final Witness List already two years ago and is not expected to contact further individuals with the purpose of testifying in the present case. Even if the Chamber grants a leave to appeal the Decision, the Appeals Chamber's intervention cannot in any way concretely advance the proceedings or, in particular, further expedite the Prosecution case which is already in the process of finalisation. Needless to say, extra litigation of this matter on appeal will, in fact, considerably delay and further lengthen the trial proceedings.

⁵⁵ See the Decision, *supra* note 2, para. 11.

⁵⁶ See the Defence Request, *supra* note 1, paras. 22-26.

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1693-Conf is reclassified as "Public"

V. CONCLUSION

30. For the foregoing reasons, the Common Legal Representatives respectfully request the Chamber to reject the Defence Request in its entirety because none of the issues identified by the Defence constitutes appealable issues; nor do they meet the stringent requirements for granting interlocutory appeal under article 82(1)(d) of the Statute.



Dmytro Suprun
Common Legal Representative
Victims Former Child Soldiers



Paolina Massidda
For the team of the Common Legal
Representatives of the Victims of Other
Crimes

Dated this 9th day of December 2022

At The Hague (The Netherlands)