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**No. ICC-01/14-01/18
Date: 20 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-EDOUARD
NGAISSONA***

Public

**Decision on the Nguissoua Defence Request for Leave to Appeal the Decision for
Further Directions on the Contact Protocol**

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

The Office of the Prosecutor

Karim A. A. Khan
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis
Anta Guissé

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops
Richard Omissé-Namkeamai
Marie-Hélène Proulx

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision for Further Directions on the Contact Protocol’.

I. Procedural history and submissions

1. On 30 November 2022, the Chamber issued its ‘Decision on the Ngaïssona Defence Request for Further Directions on the Contact Protocol’¹ (the ‘Impugned Decision’ and the ‘Contact Protocol’). It recalls the procedural history set out therein.²
2. On 5 December 2022, the Ngaïssona Defence (the ‘Defence’) requested leave to appeal the Impugned Decision, pursuant to Article 82(1)(d) of the Statute (the ‘Request’), arguing that it ‘lacks reasoning’ (the ‘First Issue’) and that the ‘Chamber erred in law and in fact in reaching the Impugned Decision’ (the ‘Second Issue’).³
3. On 9 December 2022, the Office of the Prosecutor (the ‘Prosecution’),⁴ as well as the Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of Victims of Other Crimes (the ‘CLR’)⁵ responded to the Request (the ‘Prosecution Response’ and the ‘CLR Response’, respectively). They submit that the Request should be rejected as it does not meet the criteria of Article 82(1)(d) of the Statute.

¹ 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, Annex 5 to the Decision on Protocols at Trial, 8 October 2020, ICC-01/14-01/18-677-Anx5.

² Impugned Decision, ICC-01/14-01/18-1681, paras 1-7.

³ 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”, ICC-01/14-01/18-1686-Conf, paras 11-18.

⁴ Corrected version of “Prosecution’s Response to the “Ngaïssona Defence Request for Leave to Appeal Decision (ICC-01/14-01/18-1681)”, 9 December 2022, ICC-01/14-01/18-1692-Conf, ICC-01/14-01/18-1692-Conf-Corr.

⁵ 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’”, ICC-01/14-01/18-1693-Conf.

II. Analysis

4. The Chamber recalls the applicable law governing requests for leave to appeal under Article 82(1)(d) of the Statute, as previously set out by the Chamber.⁶
5. As regards the First Issue, the Defence alleges that ‘the Impugned Decision lacks reasoning’ and fails to explain ‘what served as the basis’ for the Chamber’s conclusion that ‘it sees no need to further clarify paragraph 27 of the Contact Protocol’.⁷
6. The Chamber considers, first, that by challenging the entirety of the Chamber’s reasoning, the Defence failed to identify discrete issues for the Appeals Chamber’s resolution.⁸ Second, the Chamber recalls that the Impugned Decision clearly stated the reasons for not providing further clarifications on paragraph 27 of the Contact Protocol. In particular, it held that the Prosecution is expected to abstain from contacting further witnesses for the purpose of testifying *in the present case* at this stage of the proceedings and observed that ‘no allegations to the contrary have been made by the defence’. Furthermore, it noted that the Contact Protocol does not apply to other cases and recalled its previous directions on this matter.⁹ In this respect, the Chamber notes that the Request also does not allege that the Prosecution is contacting witnesses in order to call them to testify *in the present case*.

⁶ Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, paras 15-21.

⁷ Request, ICC-01/14-01/18-1686-Conf, paras 13-14 *with reference to the* Impugned Decision, ICC-01/14-01/18-1681, para. 13. The Chamber notes in this context, for the sake of completeness, that the Impugned Decision in fact stated that ‘the Chamber sees no need to further clarify paragraph 27 of the Contact Protocol *at this point*’ (emphasis added).

⁸ See also Trial Chamber X, *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’, 9 April 2020, ICC-01/12-01/18-734, para. 14; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, para. 6; Trial Chamber VII, *The Prosecutor v. Bemba et al*, Decision on Motion for Reconsideration or Leave to Appeal Decision ICC-01/05-01/13-1284, 27 October 2015, ICC-01/05-01/13-1425, para. 11.

⁹ Impugned Decision, ICC-01/14-01/18-1681, paras 11-12.

7. In light of the above, the Chamber considers the Defence's submissions to amount to no more than a mere disagreement¹⁰ with its findings, in particular with regard to the non-applicability of the Contact Protocol across cases. Accordingly, the Chamber does not consider the First Issue to be an appealable issue.
8. With regard to the Second Issue, the Defence contends that the Chamber erred in law (i) when finding that 'the Prosecution can "contact individuals for the purpose of calling them as witnesses in [*The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawak* (the 'Mokom Case')], or any other case [...]"', even if these individuals are Defence witnesses'; and (ii) when determining that 'the Contact Protocol does not apply across cases'. It further argues that the Chamber erred in law and fact by extending its finding 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' to the Mokom Case.¹¹
9. The Chamber considers the Second Issue to be based on a misapprehension and mere disagreement with the Impugned Decision. The decision did not alter the Contact Protocol, nor did it turn the obligations set out therein into an 'obligation to which only the Defence is bound', as alleged by the Defence.¹² The Contact Protocol continues to apply to all participants in the same manner within the context *of the present case*.
10. It must however be acknowledged that the Prosecution, as an organ, is also engaged in other cases – contrary to the Defence, whose mandate is limited to the present case. In order to fulfil its statutory obligations in all these cases, the Prosecution may thus need to contact individuals as potential witnesses, irrespective of whether they are already witnesses in another case, be it for the Prosecution or for a defence team. Assuming the opposite would effectively hinder the Prosecution from advancing its investigations in other cases,

¹⁰ Appeals Chamber, *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, 13 July 2006, ICC-01/04-168, para. 9.

¹¹ Request, ICC-01/14-01/18-1686-Conf, paras 16-18 *with reference to the Impugned Decision*, ICC-01/14-01/18-1681, para. 12.

¹² Request, ICC-01/14-01/18-1686-Conf, para. 16.

particularly given the limited number of potential witnesses for cases within the same situation and with overlapping factual allegations.

11. In light of the above, the Chamber does not consider the Second Issue to be an appealable issue. Having found that neither of the two issues constitute appealable issues, the Chamber will not address the remaining requirements of Article 82(1)(d) of the Statute.


FOR THESE REASONS, THE CHAMBER HEREBY


REJECTS the Request; and

ORDERS the Ngaïssona Defence, the Prosecution and the CLRV, respectively, to file public redacted versions of the Request, ICC-01/14-01/18-1686-Conf; the Prosecution Response, ICC-01/14-01/18-1692-Conf-Corr; and the CLRV Response, ICC-01/14-01/18-1693-Conf, by 16 January 2023.

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



Judge Péter Kovács


Judge Bertram Schmitt
Presiding Judge


Judge Chang-ho Chung

Dated 20 December 2022

At The Hague, The Netherlands