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**International
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Court**

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No: *ICC-01/14-01/18*
Date: **19 October 2020**

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

**Defence Response to “Prosecution’s Request for Leave to Appeal ‘the Decision on
Protocols at Trial’ 8 October 2020 (ICC-01/14-01/18-677)”**

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 Mr Ngaïssona (“Defence”) hereby responds to the request (“Request”)¹ of the Office of the Prosecutor (“Prosecution”) for leave to appeal the Decision on Protocols at Trial issued on 8 October 2020 (“Impugned Decision”).² The Defence submits, first, that the issues raised by the Prosecution in the Request are mere disagreements and therefore do not amount to appealable issues; and second, that the issues do not meet the remaining criteria for leave to appeal under Article 82 (1) (d).

II. Applicable Law

2. Article 82 (1) (d) provides that:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) [...]; (b) [...]; (c) [...]; (d) 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.

III. Submissions

3. According to the jurisprudence of the Court, the provision under Article 82 (1) contains two distinct and cumulative criteria both of which must be satisfied by the party seeking leave to appeal the decision of the Trial Chamber.³ The first is that the request for leave to appeal must raise an appealable issue which significantly affects the fair and expeditious conduct of proceedings or the outcome of the trial; and, the second is that an immediate resolution of the issue by the Appeals Chamber is necessary for the advancement of

¹ The Request, ICC-01/14-01/18-682.

² The Impugned Decision, ICC-01/14-01/18-677.

³ ICC-01/05-01/08-532, para 15. See also ICC-02/04-01/15-537, para 13.

proceedings.⁴ With regard to the first criterion, the Appeals Chamber defined an appealable 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.”⁵ An issue must also arise directly from the Impugned Decision and not from abstract of hypothetical matters.⁶

4. Furthermore, the Appeals Chamber noted that the requirement that the issue affect “fair and expeditious conduct of proceedings” is intrinsically related to fair trial rights and should be interpreted with respect to the rights of the accused as provided for in Articles 64 (2) and 67 (1) of the Rome Statute and internationally accepted human rights.⁷ The Appeals Chamber further found that fairness is preserved “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.”⁸
5. The Appeals Chamber was clear that even if the first criterion is met, the issue does not qualify as appealable except if in the opinion of the Trial Chamber the immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings. This was interpreted as a decision which “unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.”⁹
6. The Defence submits that the request does not meet either of the criteria delineated by the Appeals Chamber as illustrated below:

⁴ ICC-01/04-I68, para 8-20.

⁵ ICC-01/04-I68, para 9.

⁶ ICC-01/05-01/08-532, para 17

⁷ ICC-01/04-I68, para 11.

⁸ ICC-01/05-01/08-532, para 18.

⁹ ICC-01/04-I68, para 16.

- a. The issues presented by the Prosecution are mere disagreements, which do not amount to appealable issues**

7. The issues presented by the Prosecution are mere disagreements which do not amount to an appealable issue according to the jurisprudence of the Court.

The first issue presented by the Prosecution is:

“Whether the Chamber erred in failing to properly recognise the Prosecution's right to prepare its case and to present evidence in a manner best suited to establish the truth as a component of its right to a fair trial.”¹⁰

Contrary to the Prosecution's assertions, the Chamber properly considered the Prosecution's right to prepare its case and concluded that it “does not consider that Witness Preparation is necessary for a Calling Party to effectively prepare and present its case.”¹¹ The Prosecution merely disagrees with the Chamber's conclusion on this matter. Therefore, the first issue does not amount to an appealable issue within the meaning accepted in the Court's jurisprudence. This mere disagreement is furthermore inconsistent with the clear mandate of the Court, as noted in the Impugned Decision where the Chamber held that adopting witness preparation would be contrary to the Chamber's duty to establish the truth.¹²

8. The second issue presented in the Request is:

“Whether the Chamber applied an incorrect standard of discretion or misapplied the correct standard in abridging the Prosecution's exercise of a procedural right under the Statute when precluding Witness Preparation, absent a concrete and

¹⁰ The Request, ICC-01/14-01/18-682, para 3.

¹¹ ICC-01/14-01/18-677, para 25.

¹² The Impugned Decision, ICC-01/14-01/18-677 para 26.

compelling basis or without otherwise meaningfully considering reasonable alternatives.”¹³

9. To begin with, the Defence observes that the Second Issue is similar to the First Issue raised by the Prosecution in the *Ongwen* case where the Prosecution sought leave to appeal a similar decision by Trial Chamber IX to deny witness preparation by arguing that the Chamber had abused or misapplied its discretion.¹⁴ In *Ongwen*, Trial Chamber IX held that the Chamber had properly applied its discretion and that this was a mere disagreement and not an appealable issue.¹⁵ The similarity with the present case is evident.

10. With regard to the present case, the Defence notes that in the Impugned Decision, the Chamber rightly recognised its discretion granted by Article 64 (2) and (3), which authorises the Chamber to conduct proceedings in a fair and expeditious manner and to adopt procedures necessary for that purpose.¹⁶ This discretion extends to the choosing of the protocol to be used in the conduct of proceedings and entitles the Chamber to determine whether or not to adopt the practice of witness preparation.¹⁷ The discretionary nature of a decision not to allow witness preparation was further stressed by Trial Chamber I in *Gbagbo and Blé Goudé* where the Chamber refused to grant request for leave to appeal a similar decision denying witness preparation.¹⁸ In that case, the Majority of Trial Chamber I denied witness preparation and noted the following risks associated with the practice: that there was an inherent risk of interference with witnesses and the distortion of truth; that new evidence could emerge during witness preparation which could further delay disclosure; that it may

¹³ The Request, ICC-01/14-01/18-682, para 3.

¹⁴ ICC-02/04-01/15-537, para 2.

¹⁵ ICC-02/04-01/15-537, para 2

¹⁶ ICC-01/14-01/18-677, para 17.

¹⁷ ICC-01/14-01/18-677, para 17-26.

¹⁸ ICC-01/11-01/15-388, paras 10-11.

lead to witness rehearsal, practice and coaching; and, that it could reduce spontaneity of a witness while giving testimony. The Defence submits that these risks exist in the present case too and therefore the Chamber applied the correct standard of discretion.¹⁹

11. Therefore, the Defence submits that by deciding not to adopt witness preparation, the Chamber in this case correctly applied its discretion under Article 64 (2) and (3), especially since the Impugned Decision was made after conferring with the parties.²⁰ The Prosecution is therefore incorrect in stating that the Chamber applied an incorrect standard of discretion.

12. Furthermore, the Prosecution's assertion that the Chamber issued the Impugned Decision "absent a concrete and compelling basis or without otherwise meaningfully considering reasonable alternatives"²¹ is incorrect because in the Impugned Decision the Chamber noted the potential risks of allowing witness preparation. Indeed the Chamber came to the conclusion that witness preparation has the inherent risk of rehearsing and distorting the witnesses' evidence; that the Prosecution may inadvertently convey its expectations to the witness; and, that witness preparation would hinder the principle of immediacy.²² By stating that these risks are "speculative in general and empirically unsupported",²³ the Prosecution is merely disagreeing with the Chamber's assessment and presenting a contrary opinion, which does not amount to an appealable issue.

¹⁹ ICC-02/11-01/15-355, para 17.

²⁰ See ICC-01/14-01/18-677, para 10-16 where the Chamber summarises of the Parties' submissions with regard to witness preparation.

²¹ The Request, ICC-01/14-01/18-682, para 3.

²² The Impugned Decision, ICC-01/14-01/18-677, para 21.

²³ The Request, ICC-01/14-01/18-682, para 36.

13. Similarly, in the Impugned Decision, the Chamber noted that witness preparation had been permitted in other cases before the Court, but nevertheless proceeded to disallow it while taking into consideration the specific circumstances of this case.²⁴ It is clear that the Impugned Decision had a concrete and compelling basis and the Chamber considered reasonable practice of other Chambers contrary to the Prosecution's assertion. The Chamber further considered the concerns raised by the Prosecution with regard to the effects of the COVID-19 pandemic and budgetary limitations which, according to the Prosecution, prevented it from having pre-testimony sessions with witnesses in the field.²⁵ The Chamber concluded that these concerns were not sufficient to justify the presence of witness preparation in this case.²⁶ Therefore, the second issue is a mere disagreement with the Decision and does not amount to an appealable issue. The Defence submits that it should be dismissed as Trial Chamber IX dismissed a similar issue in the *Ongwen* case.²⁷

b. The issues do not significantly affect the fair and expeditious conduct of the proceedings

14. The Defence submits that the issues raised do not significantly affect the fair and expeditious conduct of the proceedings for at least two reasons. The first is based on the decision in *Ongwen* where Trial Chamber IX held that it failed to see how denial of witness preparation affects the fairness of the proceedings. The Chamber found that such an argument was "too unspecific and unpersuasive".²⁸ The Defence respectfully requests the Chamber to apply a

²⁴ The Impugned Decision, ICC-01/14-01/18-677, para 17.

²⁵ The Impugned Decision, ICC-01/14-01/18-677, para 28

²⁶ The Impugned Decision, ICC-01/14-01/18-677, para 28.

²⁷ ICC-02/04-01/15-537, para 8.

²⁸ ICC-02/04-01/15-537, para 8

similar reasoning in this case and arrive at a similar conclusion that the denial of witness preparation does not affect the fairness of proceedings.

15. Secondly, according to the jurisprudence of the Appeals Chamber, fairness is preserved “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.”²⁹ This standard is met by the Impugned Decision which states that one of the reasons for disallowing witness preparation is to ensure that:

“any additional information from a witness, who has been afforded an opportunity to review their statement, is first presented in court rather than only in the presence of the Calling Party permit[s] all the participants in the courtroom to react to and examine a witness’s testimony immediately and on an equal footing.”³⁰

The above excerpt of the Impugned Decision shows that the Chamber sought to ensure fairness between the Prosecution and the Defence, which is also clear from the fact that both parties are equally barred from practicing witness preparation. The Defence submits that the denial of witness preparation does not affect the fairness of proceedings especially since it is denied to both the Prosecution and the Defence. The Defence notes that Trial Chamber IX correctly arrived at the same reasoning in the *Ongwen* case³¹ and therefore the Defence respectfully requests the Chamber to adopt a similar conclusion in this case.

²⁹ ICC-01/05-01/08-532, para 18.

³⁰ The Impugned Decision, ICC-01/14-01/18-677, para 23.

³¹ ICC-02/04-01/15-537, para 10.

c. The issues do not need the immediate resolution of the Appeals Chamber in order to advance the proceedings

16. The Defence submits that the issue submitted by the Prosecution does not warrant the immediate resolution of the Appeals Chamber to advance the proceedings. For an issue to meet this criterion it has to be one which: “unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.”³² The Defence submits that the Impugned Decision to deny witness preparation is not fraught with error. In fact, the Trial Chambers in *Ongwen*,³³ *Gbagbo and Blé Goudé*,³⁴ *Bemba et al.*,³⁵ *Bemba*,³⁶ *Lubanga*,³⁷ and *Katanga*,³⁸ all have made the balanced decision not to permit witness preparation, in light of the Court’s mandate, while these cases proceeded efficiently without the unravelling of the judicial process. The Defence, therefore, submits that the resolution of this issue by the Appeals Chamber is not necessary to advance the proceedings.

IV. Request

From the foregoing arguments, the Defence requests the Chamber to deny the Prosecution’s request for leave to appeal the Decision on Protocols at Trial issued on 8 October 2020.

Respectfully submitted on 19 October 2020,

³² ICC-01/04-I68, para 16.

³³ ICC-02/04-01/15-504.

³⁴ ICC02/11-01/15-355.

³⁵ ICC-01/05-01/13-1252.

³⁶ ICC-01/05-01/08-1016.

³⁷ ICC-01/04-01/06-1049.

³⁸ ICC-01/04-01/07-1134.



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