

Pursuant to Trial Chamber V 's instruction, dated 11-01-2023, document ICC-01/14-01/18-1692-Conf-Corr is reclassified as "Public"

**Cour
Pénale
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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

**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**

Source: Office of the Prosecutor

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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 NGAISSONA Defence ("Defence") request¹ for leave to appeal Trial Chamber V's ("Chamber") "Decision on the Ngaissona Defence Request for Further Directions on the Contact Protocol" ("Impugned Decision")² should be rejected.

2. The two issues raised for certification are premised on mere disagreement with the Impugned Decision and do not constitute appealable issues within the meaning of article 82(1)(d) of the Rome Statute. Additionally, the remaining cumulative criteria for interlocutory appeal are not met.

II. CONFIDENTIALITY

3. Pursuant to regulation 23bis(2) of the Regulations of the Court ("RoC"), this document is filed as "Confidential", as it responds to a document bearing this classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

4. The Defence Request seeks leave to appeal the Impugned Decision in relation to two issues proposed for certification:

i) whether the Impugned Decision lacks reasoning ("First Issue");

ii) whether the Chamber erred in law and in fact in reaching the Impugned Decision ("Second Issue").

¹ ICC-01/14-01/18-1686-Conf ("Defence Request").

² ICC-01/14-01/18-1681 ("Impugned Decision").

A. No appealable issue arises from the Impugned Decision

5. The Second Issue is not focused on the Impugned Decision. It challenges, and aims to seek clarification about a prior decision³ adopting 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" ("Contact Protocol"),⁴ from which the ambiguity purported by the Defence stems. Notably, the Defence did not seek leave to appeal the decision adopting the Contact Protocol, which has been in force in the instant case for approximately two years. Therefore, the Second Issue does not arise from the Impugned Decision, and on this basis alone is not appealable.

6. Moreover, none of the purported issues is appealable within the meaning of article 82(1)(d), for the reasons stated in the paragraphs below. As pointed out by the Appeals Chamber, "[t]here may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable issue".⁵

i) The Impugned Decision does not lack reasoning

7. The Defence request for further directions on the Contact Protocol ("Initial Defence Request")⁶ sought clarity as to the scope of its paragraph 27. More specifically, the Defence requested the Chamber to shed light on when the intention of a party or participant to call a witness to testify, or to rely on his or her statement, is "otherwise clearly apparent".⁷ The Defence was apparently seeking a ruling that would support its own interpretation of the above-mentioned provision, limiting the Prosecution's

³ ICC-01/14-01/18-459, para. 8.

⁴ ICC-01/14-01/18-156-AnxA.

⁵ Appeals Chamber, *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 9.

⁶ ICC-01/14-01/18-1623-Conf ("Initial Defence Request").

⁷ Initial Defence Request, paras. 7-15.

ability to contact individuals that it considered 'Defence witnesses', regardless of whether such contacts concerned the investigation of other cases. However, the Chamber did not provide the clarification requested by the Defence, as it considered it unnecessary.⁸

8. The Defence fails to demonstrate that the Impugned Decision lacks reasoning in this respect. The Chamber sufficiently took into consideration the Defence's submissions and arguments. The basis of the ruling is explained with sufficient clarity and the facts relevant to the conclusion reached are identified.

9. The Defence's assertion that the issue of interpreting paragraph 27 of the Contact Protocol is still unresolved and requires an effective resolution is also misplaced. While the Defence disagrees with the Chamber's ruling, there is nothing unclear about the functioning of paragraph 27 and of the Contact Protocol as a whole.

10. Contrary to the Defence's assertion,⁹ the Chamber did not rule *proprio motu* on an issue that neither party raised when stating that "[t]he Prosecution is therefore free to contact individuals for the purpose of calling them as witnesses in the *Mokom* case, or any other case before this Court."¹⁰ The Chamber rather provided reasoning as to why the clarification sought by the Defence is unnecessary on the basis of the applicable legal framework.¹¹

11. In essence, the Defence's arguments consist of mere disagreements with the Chamber's ruling about the non-applicability of the Contact Protocol across cases and with its consequences. These disagreements, in the guise of the Chamber's supposed lack of reasoning, clearly do not amount to an appealable issue.

⁸ Impugned Decision, para. 13.

⁹ Defence Request, para. 13.

¹⁰ Impugned Decision, para. 12.

¹¹ For these same reasons, the Chamber's ruling does not amount to an error in law, contrary to the allegations in para. 16 of the Defence Request.

ii) *The Chamber did not err in law and fact in reaching the Impugned Decision*

12. The Defence argues that the Chamber erred in law when it ruled 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”;¹²
- And the Contact Protocol does not apply across cases.¹³

13. The Defence further asserted that the Chamber erred in fact and in law, as it did not take into consideration the proximity of the instant case with the *Mokom* case and the impact that the two proceedings have on each other.

14. The Defence’s submissions, and the indication therein of alternative interpretations of facts and legal provisions, again, merely amount to disagreement with the Chamber’s findings.

15. Moreover, the Defence misrepresents the Impugned Decision when it contends that “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.”¹⁴ To the contrary, the Impugned Decision does not relieve the Prosecution of any obligation in the context of the instant case. The Defence position omits the obvious — that the Prosecution is also engaged in other cases within the Central African Republic situation, and that contacts with individuals in the investigation of these matters are necessary to fulfil its statutory mandate. The Impugned Decision simply articulates the fact that the Protocol does not supersede the Statute. There is no unilateral obligation on the part of the Defence, stemming from the Contact Protocol, and the Chamber’s ruling does not amount to an error in law. Rather, the Defence merely disagrees with the Chamber’s balancing

¹² Defence Request, paras. 16, 17.

¹³ Defence Request, para. 17.

¹⁴ Defence Request, para. 16.

of the competing interests at stake. As such, the Defence again fails to demonstrate an appealable issue.

B. The remaining article 82(1)(d) criteria are not met

16. Article 82(1)(d) criteria are cumulative. A failure to fulfil any of those criteria inevitably requires that an application for leave to appeal be rejected. As there are no appealable issues within the meaning of article 82(1)(d), as demonstrated above, the Defence Request should be rejected on this basis alone.

17. In any event, even assuming for the sake of argument that one or more of the proposed issues constitute appealable issues, the Defence fails to demonstrate that the two remaining cumulative criteria for an interlocutory appeal are met.

18. The Defence fails to substantiate its arguments on how the two issues would affect the fair and expeditious conduct of the proceedings.

19. As to the First Issue, the Defence has not elaborated its argument that the conduct of the proceedings is affected. The Defence submissions are limited to the fact that the impact of the asserted lack of reasoning in the Impugned Decision on the fairness of the proceedings is self-evident.¹⁵

20. As to the Second Issue, the Defence's arguments are based on mere conjecture, that prejudice would result from the Prosecution relying on its investigation in the *Mokom case* to further its investigation against NGAISSONA.¹⁶

21. *First*, safeguards of the integrity of the proceedings are already in place, as the Chamber has observed that the Prosecution submitted its Final Witness List, and

¹⁵ Defence Request, para. 21.

¹⁶ Defence Request, para. 21

further is aware that the Prosecution "... is not contacting further individuals with the purpose of testifying *in the present case*."¹⁷

22. *Second*, the Prosecution has disclosed and added items to its list of evidence, after its initial list of evidence was submitted, in compliance with the applicable law.¹⁸ Any prejudice arising from the addition of new items has been assessed by the Chamber, and will continue to be, if necessary. Therefore, the scenarios advanced in paragraphs 22 and 23 of the Defence Request, alleging prejudice to the conduct of the proceedings, the Defence case, and to the integrity of its investigation, are speculative and unfounded.

23. In light of the submissions above, the Defence also fails to demonstrate any bearing that the two proposed issues may have on the outcome of the trial.

24. Significantly, the Contact Protocol has been in force for approximately two years and has proved effective in promoting the fair and efficient conduct of the proceedings.

25. For the same reasons, the two purported issues do not require an immediate resolution to materially advance the proceedings. No matter has been identified by the Defence that needs the Appeals Chamber's determination to rectify mistakes potentially tainting the fairness of the proceedings or affecting the outcome of the trial.

¹⁷ Impugned Decision, para. 11.

¹⁸ ICC-01/14-01/18-589, para. 10; ICC-01/14-01/18-989, paras. 5, 6; ICC-01/14-01/18-1080, para.7; ICC-01/14-01/18-1301, para.10.

IV. CONCLUSION

26. For the reasons above, the Prosecution requests that the Chamber reject the Defence Request.

A handwritten signature in blue ink, appearing to be 'K.A.K.', followed by a horizontal line and a period.

Karim A. A. Khan KC, Prosecutor

Dated this 9th day of December 2022.

At The Hague, The Netherlands