

**Cour
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**International
Criminal
Court**

Original: English

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

Date: **4 September 2023**

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***

PUBLIC

Defence Request for Leave to Appeal the “Decision on the Ngaïssona Defence Request for Reconsideration of the Further Directions on the Conduct of the Proceedings (ICC-01/14-01/18-2068)”

Source: Defence of Patrice-Edouard Ngaïssona

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

The Office of the Prosecutor

Mr Karim A. A. Khan, KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamaï
Ms Marie-Hélène Proulx
Ms Despoina Eleftheriou

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Legal Representatives of the Victims

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

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence for Mr Ngaïssona ('Defence') hereby requests leave to appeal Trial Chamber V's ('Chamber') 'Decision on the Ngaïssona Defence Request for Reconsideration of the Further Directions on the Conduct of the Proceedings' ('Impugned Decision'), notified on 29 August 2023.¹ The Defence submits that the Chamber erred in failing to consider relevant factors when issuing the Impugned Decision and as such affected the fairness and expeditiousness of the proceedings.

II. Procedural history

2. On 26 August 2020, the Chamber issued the 'Initial Directions on the Conduct of Proceedings'. The Chamber indicated that "it 'may take into account the submissions of the parties on these matters, but reserves the right to give directions in such a manner so as to comply with the principles of expeditiousness and fairness'".²
3. On 29 May 2023, without first consulting the parties and participants, the Chamber issued the 'Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence)' ('Further Directions') through which it set several deadlines for the closure of the Prosecution's case, as well as for a potential case by the CLRV.³ The Chamber also instructed the Registry to take all measures necessary to facilitate the appearance of the Chamber's witness starting on 23 October 2023, noting that the time afforded to the examination of the witness will be dependent on the outcome of the

¹ ICC-01/14-01/18-2068.

² ICC-01/14-01/18-631, para. 1.

³ ICC-01/14-01/18-1892.

Decision of the Chamber to introduce P-0952's previously recorded testimony pursuant to Rule 68(3).⁴

4. With regard to the Defence case, the Chamber ordered the Defence by **25 August 2023** to (1) file a notice as to whether it intends to present evidence, (2) indicate whether the accused intends to exercise his right under Article 67(1)(h) of the Rome Statute ('Statute') to make an unsworn oral or written statement and, (3) provide a preliminary list of witnesses and an estimate of how many hours of witness questioning it will require.⁵ The Chamber, bearing in mind a potential presentation of evidence by the CLRV, also ordered the Defence to (1) file the Defence's final list of witnesses and of evidence, (2) provide witness statements or summaries of the anticipated testimony for all witnesses, (3) file any applications pursuant to Rule 68(2) and (3) of the Rules of Procedure and Evidence ('Rules') and, (4) complete disclosure of all items intended to be used by the Defence during its evidence presentation by **17 November 2023**.⁶ Moreover, the Chamber set to **11 December 2023**, the date of the hearing of the first Defence witness.⁷
5. On 21 July 2023, the Defence submitted its 'Request for Reconsideration of the "Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence)"' ('Request').⁸ The Defence respectfully requested the Chamber to reconsider its Further Directions and postpone (1) the 17 November 2023 deadline to submit its Final Witness List, provide witness statements or summaries of the anticipated testimony for all witnesses, file any applications pursuant to Rule 68(2) and (3) of the Rules and

⁴ ICC-01/14-01/18-1892, page 10.

⁵ ICC-01/14-01/18-1892, paras 18-19.

⁶ ICC-01/14-01/18-1892, para. 21.

⁷ ICC-01/14-01/18-1892, para. 23.

⁸ ICC-01/14-01/18-1997-Conf-Exp.

complete disclosure of all items it intends to use, to 15 December 2023 and (2) the 11 December 2023 deadline to call its first witness on 22 January 2024.

6. On 25 August 2023, the Defence submitted its 'Notice of intent to present evidence pursuant to Trial Chamber V's "Further Directions on the Conduct of the Proceedings" (ICC-01/14-01/18-1892)',⁹ as per the deadline set in the Further Directions.
7. On 29 August 2023, the Chamber issued the Impugned Decision, rejecting the Defence's Request.¹⁰

III. Submissions

8. Pursuant to Article 82(1)(d) of the Statute, either party may, in accordance with the Rules,¹¹ 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".

9. The Impugned Decision meets all of the cumulative criteria set forth in Article 82(1)(d) of the Statute, i.e. one appealable issue stems 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 one appealable Issue ('Issue')

⁹ ICC-01/14-01/18-2055-Conf.

¹⁰ ICC-01/14-01/18-2068.

¹¹ 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".

10. The Chamber erred in reaching the Impugned Decision as it did not take into consideration key relevant factors relating to the Defence's preparation of its case and its pending investigations.
11. The Impugned Decisions mentions that "the fact that the Defence would be faced with having to meet certain deadlines in preparation of its presentation of evidence could not have come as a surprise after more than two years of presentation of evidence by the Prosecution".¹² The Defence, however, never argued that the deadlines set in the Further Directions caught them by surprise. All along the present proceedings, the Defence has demonstrated the outmost diligence and rigour, requesting extension of time in a reasonable manner and estimating the time needed to prepare in a sensible way. The current schedule is not realistic for the Defence, and will result in a definite infringement of Mr Ngaïssona's right to a fair trial. The Chamber would have benefitted from consulting with the parties before issuing the Further Directions, allowing the Chamber to make an informed decision on the deadlines for the remainder of the proceedings.
12. Furthermore, the Chamber significantly underestimated both the time needed for the finalisation of the Defence's preparations prior to the presentation of its case before it and the impact the testimony of the Chamber's witness will have on the defence case, its final list of witnesses and evidence.¹³ As demonstrated below, delays and last-minute changes would be prevented if the Defence was afforded the very limited extension requested; as such, the Issue at hand is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination and

¹² ICC-01/14-01/18-2068, para. 9.

¹³ See ICC-01/14-01/18-1997-Conf-Exp, paras 24-26.

are not merely a question about which there is disagreement or conflicting opinions.¹⁴

b. The Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial

13. 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(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of 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))”.¹⁵ 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”.¹⁶

14. The fairness of the proceedings implies the evaluation of the proceedings of a particular case as a whole¹⁷ 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”.¹⁸ 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

¹⁴ *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.

¹⁵ *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.

¹⁶ *Idem*, para. 11.

¹⁷ *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.

¹⁸ *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.

the fair and expeditious conduct of the proceedings in its entirety. A ruling that would prevent or inhibit one of the parties in presenting evidence is one that may affect the fair and expeditious conduct of the proceedings.¹⁹

15. 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”.²⁰

16. *First*, the deadlines set by the Chamber in its Further Directions will considerably inhibit the Defence from presenting evidence, as they do not allow sufficient time for the Defence to complete its investigations in preparation of the defence case. As mentioned in the Request, the Defence has several missions planned to wrap up its investigations, meet with last prospective witnesses, eventually have them sign a statement if necessary and secure their agreement to testify before the Chamber. All these investigative tasks will not be completed by the time the Defence will be required to start presenting its case, meaning that investigations will have to continue in parallel with the Defence calling its witnesses on the stand. It is paramount for a party presenting evidence to have an overall view of its case before starting to present evidence, especially considering the very limited resources available to the Defence. Consequently, the Defence will be prevented from presenting all its evidence at the right time or in a relevant order, affecting the quality of the defence case and the overall outcome of the proceedings.

¹⁹ *The Prosecutor v. Laurent Gbagbo*, Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, ICC-02/11-01/11-464, 31 July 2013, para. 38.

²⁰ *Idem*, para. 13.

17. The Chamber also seemingly neglected to account for the heavy logistics related to the calling of witnesses. The Defence will have to conduct security assessments for each of its witness, and abide by VWU's procedures and methods. It will also have to prepare a yet undetermined number of requests for protective measures. Similarly, the novel co-presentation of defence cases, as ordered by the Chamber, will require a considerable amount of consultation between defence teams, both ahead of the deadlines and thereafter.

18. *Second*, granting the Defence sufficient preparation time ahead of the deadlines will eventually prevent any further delays in the proceedings, such as late additions in the Defence's List of Evidence or significant changes in the Defence's List of Witnesses. As such, not only Mr Ngaïssona's fair trial rights are preserved by presenting a complete and comprehensive defence case, but also the expeditiousness of the proceedings is served by minimising future delays which could have easily been prevented had the Defence had adequate time to finalise its investigations. Hence, the Issue directly concern the manner in which the Chamber balanced the right to expeditious proceedings with the right of Mr Ngaïssona to have adequate time and facilities to prepare its case in the same terms and conditions the Prosecution called and introduced its evidence.

c. The Issue requires an immediate resolution by the Appeals Chamber in order to materially advance the proceedings

19. The fulfilment of the first two criteria found in Article 81(1)(d) of the Statute does not automatically qualify the Issue as subject of an appeal. The Issue has to be such that the proceedings may be materially advanced should the Appeals Chamber immediately resolve it 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”.²¹

20. Should the deadlines remain as set in the Further Directions, the effects on the fairness and expeditiousness of the proceedings, as well as the overall outcome of the trial will cause irreparable prejudice to Mr Ngaïssona.²² Thus the issue should be promptly referred to the Appeals Chamber in order to ensure that the proceedings follow the right course and do not irreparably damage Mr Ngaïssona’s fair trial rights as enshrined in Article 67 of the Statute.

IV. Relief Sought

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

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard
Ngaïssona

Dated this 4 September 2023,

At The Hague, the Netherlands

²¹ *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.

²² *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. 28.