

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/14-01/18

Date: 11 July 2019

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR V. ALFRED YEKATOM AND*
PATRICE-EDOUARD NGAÏSSONA

Confidential

Decision on the Ngaïssona Defence Request for Leave to Appeal
the Decision of 21 June 2019

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

The Office of the Prosecutor
Fatou Bensouda

Counsel for Alfred Yekatom
Stéphane Bourgon
Mylène Dimitri

Counsel for Patrice-Edouard Ngaïssona
Geert-Jan Alexander Knoops

Legal Representatives of Victims
Abdou Dangabo Moussa
Yaré Fall
Elisabeth Rabesandratana
Paolina Massidda
Christine Priso Ouamballo
Marie Edith Douzima Lawson

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**
Dmytro Suprun

**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**
Philipp Ambach

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision on the Ngaïssona Defence request for leave to appeal the decision of 21 June 2019.

I. Procedural History

1. On 11 November 2018, the Chamber issued the ‘Warrant of Arrest for Alfred Yekatom’,¹ who was surrendered to the Court by the authorities of the Central African Republic on 17 November 2018.

2. On 7 December 2018, the Chamber issued the ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’,² who was surrendered to the Court by the authorities of the French Republic on 23 January 2019.

3. On 20 February 2019, the Chamber issued the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’, thereby joining the cases against Yekatom and Ngaïssona.³

4. On 5 March 2019, the Chamber issued the ‘Decision Establishing the Principles Applicable to Victims’ Applications for Participation’, thereby, *inter alia*, setting out parameters to the Registry in relation to victims’ applications for participation.⁴

5. On 14 May 2019, the Chamber received the ‘Registry’s First Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings’ (the ‘Registry’s First Transmission of Group C Applications’)⁵ and the ‘Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings’ (the ‘Registry’s First Assessment Report’).⁶

6. On 15 May 2019, the Chamber issued the ‘Decision on the “Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure

¹ ICC-01/14-01/18-1-Conf-Exp. A public redacted version is also available, see [ICC-01/14-01/18-1-Red.](#)

² ICC-01/14-01/18-89-Conf-Exp. A public redacted version is also available, see [ICC-01/14-01/18-89-Red.](#)

³ [ICC-01/14-01/18-87](#); [ICC-01/14-01/18-121](#).

⁴ [ICC-01/14-01/18-141](#).

⁵ [ICC-01/14-01/18-197](#), together with 15 confidential, *ex parte*, annexes only available to the Registry.

⁶ [ICC-01/14-01/18-198](#), together with a confidential annex.

Deadlines””, thereby deciding that the confirmation hearing in the case against Yekatom and Ngaïssona shall commence on 19 September 2019.⁷

7. On 24 May 2019, the Chamber received the ‘Joint Defence Observations relating to the “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings” (ICC-01/14-01/18-198)’ (the ‘Joint Defence Observations’).⁸

8. On 27 May 2019, the Chamber received the ‘Prosecution’s Observations on “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings” (ICC-01/14-01/18-198)’.⁹

9. On 11 June 2019, the Chamber issued the ‘Order for the submission of additional observations by the Prosecutor regarding the “Registry’s First Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings” and the “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings” (the ‘Order for Additional Observations’).¹⁰

10. On 14 June 2019, the Chamber received the ‘Prosecution’s Additional Observations on the “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings” (ICC-01/14-01/18-198)’ (the ‘Prosecutor’s Additional Observations’).¹¹

11. On 21 June 2019, the Chamber issued the ‘Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position’ (the ‘Impugned Decision’).¹²

12. On 27 June 2019, the Chamber received the ‘Ngaïssona Defence Response to the “Prosecution’s Additional Observations on the “Registry’s First Assessment

⁷ [ICC-01/14-01/18-199](#).

⁸ ICC-01/14-01/18-208-Conf. A public redacted version is also available, see [ICC-01/14-01/18-208-Red](#).

⁹ [ICC-01/14-01/18-212](#).

¹⁰ ICC-01/14-01/18-220-Conf.

¹¹ ICC-01/14-01/18-224-Conf.

¹² ICC-01/14-01/18-227-Conf. A public redacted version is also available, see [ICC-01/14-01/18-227-Red](#).

Report on Applications for Victims' Participation in Pre-Trial Proceedings" (ICC-01/14-01/18-198)", ICC-01/14-01/18-224-Conf' (the 'Ngaïssona Defence Response').¹³

13. On 28 June 2019, the Chamber informed the Ngaïssona Defence, *via* email, that the Ngaïssona Defence Response could not be taken into account because: (i) the Order for Additional Observations arose from regulation 86(7) of the Regulations of the Court (the 'Regulations'), which does not allow for a response by the Defence; and (ii) having issued the Impugned Decision, the Ngaïssona Defence Response had, in any event, become moot.¹⁴

14. On 28 June 2019, the Chamber received the 'Ngaïssona Defence Request for Leave to Appeal the "Decision regarding the Registry's First Assessment Report on Applications for Victim Participation, the Registry's First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims' procedural position" (ICC-01/14-01/18-227-Conf)', (the 'Request for Leave to Appeal').¹⁵

15. On 2 July 2019, the Chamber received the 'Prosecution's Response to the Ngaïssona Defence Request for Leave to Appeal the "Decision regarding the Registry's First Assessment Report on Applications for Victim Participation, the Registry's First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims' procedural position" (ICC-01/14-01/18-227-Conf)', (the 'Prosecutor's Response').¹⁶

II. Submissions

A. The Ngaïssona Defence

16. The Ngaïssona Defence requests leave to appeal on the following proposed issue: *'[w]hether the Chamber erred by issuing the Impugned Decision without allowing the Defence the opportunity to present a response to the [Prosecutor's Additional Observations]'* (the 'Proposed Issue').

¹³ ICC-01/14-01/18-231-Conf.

¹⁴ Email from the Chamber sent on 28 June 2019 at 10:14.

¹⁵ ICC-01/14-01/18-233-Conf.

¹⁶ ICC-01/14-01/18-236-Conf.

17. The Defence submits that the Proposed Issue concerns Ngaïssona's due process rights, and affects the fair and expeditious conduct of proceedings because: (i) the Ngaïssona Defence Response was not taken into account on a core issue, putting the Defence at a substantial disadvantage vis-à-vis the Prosecutor, which will taint future proceedings; and (ii) the resolution of the Proposed Issue would resolve any doubt as to the Defence's right to be heard on victims' applications, and avoid extensive future litigation on the matter. In the alternative, the Defence argues that had the Chamber considered the Defence's response before issuing the Impugned Decision, this would have affected its ultimate findings, which in turn would affect the outcome of the trial.

18. The Defence submits that by not allowing it to submit a response to the Prosecutor's Additional Observations, the Impugned Decision runs contrary to the requirement of regulation 24(1) of the Regulations. Further, while the Impugned Decision references the need to consider the rights of the Defence, the Defence argues that it was based on the Prosecutor's Additional Observations, without taking into consideration the Ngaïssona Defence Response. In its view, this runs contrary to the principle of *audi alteram partem*, as enshrined in article 21(3) of the Rome Statute (the 'Statute').

B. The Prosecutor

19. In the Prosecutor's Response, the Prosecutor argues that the Proposed Issue does not arise from the Impugned Decision, which deals with accepting or rejecting victims' applications at this stage of the proceedings. The subject of the Impugned Decision does not concern the matter of whether the Defence had a right to respond.

20. Assuming that the Proposed Issue arises from the Impugned Decision, which the Prosecutor argues it does not, it nevertheless amounts to a disagreement as to whether the Chamber took into account the rights of the Defence. The Prosecutor further points out that the Defence 'had *already* provided substantive observations on the victims' applications in question'.

21. In the alternative, the Prosecutor submits that the Request for Leave to Appeal 'simply argues with the procedure the Chamber applied in arriving at a determination on the victims' applications', which does not 'transform the matter into an appealable issue'.

22. The Prosecutor further argues that the Request for Leave to Appeal fails to meet the remaining criteria of article 82(1)(d) of the Statute, since: (i) it does not substantiate that the Impugned Decision will affect the fairness or outcome of the confirmation, let alone the trial; and (ii) immediate resolution of the Proposed Issue would not materially advance the proceedings, but ‘only work to delay them since the substantive arguments raised therein are legally incorrect’.

III. Determination by the Chamber

23. The Chamber recalls article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations.

24. Mindful of the exceptional nature of the remedy of an interlocutory appeal, the Chamber notes that, for such leave to be granted, the following requirements must be met:

- a. the decision must involve an issue that would significantly affect (i) both the ‘fair’ and ‘expeditious’ conduct of the proceedings; or (ii) the outcome of the trial; and
- b. in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

25. The above requirements are cumulative in nature, and therefore, each criterion must be met in order to obtain leave to appeal.¹⁷

26. The Defence argues that ‘the Order [for Additional Observations] does not contain any restriction to the right of the Defence to present a response’. The Chamber notes that the Order arose from regulation 86(7) of the Regulations, which must be considered *lex specialis* with respect to the general provision under Regulation 24 (1), which is referred to by the Defence. According to Regulation 86 (7) the Defence is not entitled to a right to respond. The Chamber further notes that the Defence had the opportunity to present its views on the victims’ applications for participation in the Joint Defence Observations, and thus, its views in relation to this

¹⁷ See, for example, Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on “Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’”](#), 24 July 2015, ICC-01/05-01/08-3273, para. 8.

issue had already been properly heard and considered by the Chamber. Conclusively, the Chamber considers that the argument of the Defence amounts to a mere disagreement with the Chamber on the applicable procedure.

27. Having found that the Proposed Issue does not constitute an appealable issue, the Chamber is not required to consider the remaining criteria under article 82(1)(d) of the Statute. Accordingly, the Request for Leave to Appeal is rejected.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Appeal; and

ORDERS the Prosecutor and the Ngaïssona Defence to, as appropriate, (i) indicate whether their respective filings may be reclassified as public, without redactions, or (ii) file public redacted versions of their respective filings.

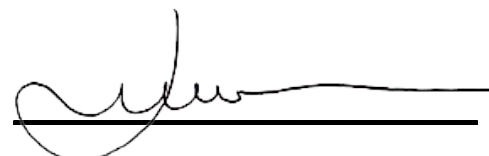
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua,
Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Thursday, 11 July 2019
At The Hague, The Netherlands