

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Yekatom Defence Response to Request for Leave
to Appeal the Decision on Trial Protocols**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Me Mylène Dimitri

Mr. Thomas Hannis

Ms. Yuqing Liu

Counsel for Mr. Ngaïssona

Me Geert-Jan Alexander Knoops

Legal Representatives of Victims

Mr. Dmytro Suprun

Mr. Abdou Dangabo Moussa

Ms. Elisabeth Rabesandratana

Mr. Yaré Fall

Ms. Marie-Edith Douzima-Lawson

Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

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

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully oppose *Prosecution’s Request for Leave to Appeal the “Decision on Protocols at Trial” 8 October 2020 (ICC-01/14-01/18-677) (“Request”)*.¹ The criteria for an interlocutory appeal is not met, as the issues do not significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial, and an appeal would retard, rather than advance, the proceedings.

RELEVANT PROCEDURAL BACKGROUND

2. On 14 April 2020, the Prosecution filed its submissions on the conduct of the proceedings, proposing, *inter alia*, the adoption of the practices of witness preparation.²
3. On 14 and 15 May 2020, the Registry,³ the Common Legal Representatives of Former Child Soldiers and that of Victims of Other Crimes,⁴ the Ngaïssona Defence⁵ and the Yekatom Defence⁶ submitted their respective responses.
4. On 8 October 2020, the Trial Chamber rejected the practices of witness preparation for the present case and adopted the protocols for witness familiarisation facilitated by the Victims and Witnesses Section.⁷
5. On 14 October 2020, the Prosecution sought leave to appeal the Impugned Decision on two issues:
 - a. 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 (“First Issue”);

¹ [ICC-01/14-01/18-682](#).

² [ICC-01/14-01/18-476](#), paras. 9-16, with the corresponding proposed protocol at [ICC-01/14-01/18-476-AnxB](#).

³ [ICC-01/14-01/18-516-Conf](#). Public redacted version: [ICC-01/14-01/18-516-Red](#).

⁴ [ICC-01/14-01/18-520](#).

⁵ [ICC-01/14-01/18-521-Conf](#). Public redacted version: [ICC-01/14-01/18-521-Red](#).

⁶ [ICC-01/14-01/18-519](#).

⁷ [ICC-01/14-01/18-677](#) (“Impugned Decision”), p. 31.

- b. 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 compelling basis or without otherwise meaningfully considering reasonable alternatives ("Second Issue").

APPLICABLE LAW

6. Article 82(1)(d) of the Statute provides that:

Either party may appeal [...] [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.

ARGUMENT

7. Even if the issues identified by the Prosecution arise from the Impugned Decision,⁸ which is a matter of doubt, the immediate resolution by the Appeals Chamber on whether the Prosecution's right is not properly recognised through the Trial Chamber's alleged misuse of the discretion in rejecting the form of witness preparation, will neither significantly affect the fairness or the expeditiousness of the proceedings or the outcome of the trial. Nor will it materially advance the proceedings within the meaning of Article 82(1)(d).

A. Fairness and Expeditiousness of the Proceedings and Outcome of the Trial

⁸ The Appeals Chamber finds that in order for a request for leave to appeal to be granted, it should identify specific "issues" which were dealt with in the impugned decision, and that:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.

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. 9.

8. *First*, the *Bemba* Pre-Trial Chamber found that fairness is preserved when a party is provided the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent.⁹ In this regard, the Prosecution failed to present argument as to how it is *specifically* and *substantially* disadvantaged by the absence of witness preparation such that an appeal is warranted to uphold the procedural fairness.
9. On one hand, the Defence is equally barred from using the form of witness preparation. It has gained no comparative advantage – let alone *substantial* advantage – through the Chamber’s decision.
10. On the other, the Defence is similarly affected by the COVID-19 pandemic and the budgetary constraints¹⁰ in its meeting of the witnesses in advance of the presentation of its case. Although the circumstances surrounding the pandemic may hopefully have changed by the start of the Defence case, the mere references to these concerns are inadequate to support an argument of a substantial disadvantage to the Prosecution, in particular vis-à-vis the Defence.¹¹
11. *Second*, the Prosecution’s ability to properly question its witnesses and

⁹ *Prosecutor v. Bemba*, [Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure](#), ICC-01/05-01/08-75, 25 August 2008, para. 14, concurring *Prosecutor v. Kony & Otti*, [Decision on the Prosecutor’s Applications for Leave to Appeal dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006](#), ICC-02/04-01/05-90, 10 July 2006, para. 24. See also *Prosecutor v. Tadić*, IT-94-I-A, [Judgment](#), 15 July 1999, para. 48: “It can safely be concluded from the ECHR jurisprudence [...] that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”

¹⁰ [Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report](#), 30 September, 2020, para. 831:

Legal aid for the Defence accounted for only 2.2% of the total budget request of the Court for 2020, compared to 32% of resources allocated to the OTP. Even when the size of the respective units may be different, there should be some sort of balance in the remuneration of Defence counsel and staff of Defence teams, as well as in the access to resources with a view to conducting investigations that are essential to preparing and conducting an effective defence. The Experts believe Defence teams ought to be provided with the resources required to ensure a fair trial.

¹¹ *Prosecutor v. Ongwen*, [Decision on Prosecution Request for Leave to Appeal the Decision on Witness Preparation](#), ICC-02/04-01/15-537, 19 September 2016, para. 10.

effectively prepare and present its case in a manner best suited to establish the truth¹² is not significantly affected. As stated in *Ongwen*, the absence of witness preparation does not pose any condition or impediment on the questioning of witnesses. The Prosecution is still in position to fully examine its witnesses and to resolve any imprecision, confusion or incompleteness during the testimony.¹³ The Prosecution is in no way hindered from conducting effective investigations to cover all relevant facts and evidence or from calling certain witnesses or examining them.¹⁴ The Impugned Decision does not affect the Prosecution's onus or its duties and powers with respect to investigations, let alone unfairly.

12. *Third*, contrary to the Prosecution's assertion, the Impugned Decision has no impact on its ability to inform its "decisions and strategies in how to present the witness's evidence, or more fundamentally, whether to call the witness at all".¹⁵ As the case in *Ongwen*, the adopted protocol only concerns the Prosecution's ability to communicate with its witnesses before the familiarisation process commences and after the testimony concludes.¹⁶ The Prosecution can still elicit the information *in advance*, strategise and decide, as appropriate, whether or not it ought to call the witness without permitting the practice of witness preparation.¹⁷
13. *Fourth*, the Prosecution has failed to demonstrate that either Issue significantly affects the expeditiousness of the proceedings. The argument that without witness preparation, the testimony is more time-consuming, unfocussed and

¹² [ICC-01/14-01/18-682](#), paras. 5, 11, 30, and 31.

¹³ *Prosecutor v. Ongwen*, [Decision on Prosecution Request for Leave to Appeal the Decision on Witness Preparation](#), ICC-02/04-01/15-537, 19 September 2016, para. 9.

¹⁴ Request, paras. 5 and 11.

¹⁵ Request, para. 21.

¹⁶ *Prosecutor v. Ongwen*, [Decision on Prosecution Request for Leave to Appeal the Decision on Witness Preparation](#), ICC-02/04-01/15-537, 19 September 2016, para. 8.

¹⁷ *Prosecutor v. Ongwen*, [Decision on Prosecution Request for Leave to Appeal the Decision on Witness Preparation](#), ICC-02/04-01/15-537, 19 September 2016, para. 8.

may well extend beyond the allotted time,¹⁸ is unconvincing and merely speculative. An experienced and well-organised counsel leading his/her witness through direct examination can achieve a well-focused testimony within the allotted time. In addition, the Trial Chamber is also there to safeguard the accused's right to be tried without undue delay and can always intervene if the testimony appears to be irrelevant, unfocussed or repetitive such that the efficiency of the proceedings is jeopardised.¹⁹

14. *Lastly*, even assuming *arguendo* that the Prosecution has a right to prepare and present its case “in the matter *it deems* best suited to established the truth”,²⁰ which is not expressly provided for in any of the cited articles of the Statute,²¹ its characterisation of witness preparation as the optimal manner is misguided.²² This practice is not ubiquitous across all jurisdictions. Rather, the notion of lawful and ethical witness preparation is unknown to the criminal process in jurisdictions of the Romano-Germanic legal tradition, where witness preparation is not regarded as part of the regular function of lawyers.²³ Should the Prosecution's argument stand,²⁴ it follows that these jurisdictions are somewhat inferior and prone to unfair criminal trials.
15. The absence of witness preparation will not on its own eradicate the chance of fair and expeditious proceedings. The “inconsistent” approaches to this matter adopted by various domestic jurisdictions as well as different chambers at this Court are well within the margin of appreciation of the fair trial rights. The discretionary choice by this Trial Chamber is neither anomalous nor requires additional justifications.²⁵

¹⁸ [ICC-01/14-01/18-682](#), paras. 39-40.

¹⁹ [ICC-01/14-01/18-631](#), para. 23.

²⁰ Request, para. 31 (emphasis added).

²¹ Request, para. 31, fn. 25, citing Articles 54(1), 64(2), and 69(3).

²² Request, First Issue.

²³ Sergey Vasiliev, “[From Liberal Extremity to Safe Mainstream? The Comparative Controversies of Witness Preparation in the United States](#)” (2011) 9(2) *International Commentary on Evidence*, Article 5, pp. 26-27.

²⁴ Request, para. 33.

²⁵ Cf. Request, para. 25.

16. Similarly, regardless of which fact-finding arrangement is deemed optimal by the Prosecution, the outcome of the trial will not be significantly affected. This is readily shown by the successful prosecution of Mr. Lubanga and Mr. Katanga on one hand,²⁶ and Mr. Ntaganda on the other.²⁷
17. Therefore, the first criterion for leave to appeal is not met.

B. Material Advance of the Proceedings

18. Although the failure to meet any one of the criteria of Article 82(1)(d) is fatal to a request for leave to appeal,²⁸ the proposed appeal also failed to meet the second criterion.
19. Within the statutory framework of the Court, the responsibility to ensure that the trial is fair and expeditious lies primarily with the Trial Chamber.²⁹ It therefore enjoys the discretion to adopt procedures for this purpose.
20. Therefore, the Appeals Chamber is not “best placed” to impose or preclude one form of pre-trial interview.³⁰ Besides its preference against fragmentation, the Prosecution did not meaningfully present any argument for necessity of the unification of the approach by the Appeals Chamber at the cost of eroding the discretion of a Trial Chamber.
21. Further, whereas the Impugned Decision involves the exercise of the Trial Chamber’s discretion, the decision would be reviewed under a highly deferential “abuse of discretion” standard.³¹ The likelihood of the Appeals Chamber reversing the Trial Chamber’s decision is low.

²⁶ Cf. Request, para. 35.

²⁷ Cf. Request, para. 38.

²⁸ [ICC-01/14-01/18-215-Conf](#), para. 11.

²⁹ See Article 64(2).

³⁰ Request, para. 7.

³¹ *Prosecutor v. Al Hassan*, [Judgment on the Appeal of Mr. Al Hassan against the Decision of Pre-Trial Chamber I entitled “Decision relative a l’exception d’irrecevabilite pour insuffisance de gravite de l’affaire soulevee par la Defense”](#), ICC-01/12-01/18-601-Red, 19 February 2020, para. 39.

22. Even if the decision were reversed, considerable discretion would reside in the Trial Chamber as to whether to allow witness preparation. It can thus not be said that an immediate resolution by the Appeals Chamber could materially advance the proceedings within the meaning of Article 82(1)(d).

23. Therefore, the second criterion for leave to appeal is not met.

CONCLUSION

24. In light of the above, the Defence respectfully requests the Chamber to:

REJECT the *Request*.

RESPECTFULLY SUBMITTED ON THIS 19th DAY OF OCTOBER 2020³²



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Mr. Thomas Hannis
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

³² The assistance of Legal Interns Ms. Camille Gillain of France and Ms. Audrey Gagne Breton of Canada in the preparation of this response is gratefully acknowledged.