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**No. ICC-01/14-01/18
Date: 11 November 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

**Decision on the Prosecution Request for Leave to Appeal the Decision on
Protocols at Trial**

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

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TRIAL CHAMBER V of the International Criminal Court in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Prosecution Request for Leave to Appeal the Decision on Protocols at Trial’.

I. Procedural history and submissions

1. On 8 October 2020, the Chamber issued the ‘Decision on Protocols at Trial’ (the ‘Impugned Decision’),¹ where it, *inter alia*, rejected the Prosecution’s request to allow Witness Preparation,² *i.e.* the practice of a meeting between a witness and the entity calling the witness (the ‘Calling Party’) for the purpose of discussing matters relating to the witness’s upcoming testimony.³
2. On 14 October 2020, the Office of the Prosecutor (the ‘Prosecution’) filed a request for leave to appeal the Impugned Decision (the ‘Request’).⁴ The Prosecution requests leave to appeal two issues (jointly, the ‘Issues’), namely:
 - (i) 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 (the ‘First Issue’);⁵ and
 - (ii) 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 (the ‘Second Issue’).⁶
3. The Prosecution submits that the Issues arise from the Impugned Decision and satisfy the requirements of Article 82(1)(d) of the Statute.⁷ It argues that the Issues are not mere disagreements with the Impugned Decision.⁸ Further, the Prosecution submits that (i) the Issues significantly affect the fair and

¹ Impugned Decision, ICC-01/14-01/18-677 (with five public annexes).

² Impugned Decision, ICC-01/14-01/18-677, para. 30, p. 32.

³ Impugned Decision, ICC-01/14-01/18-677, para. 9.

⁴ Prosecution’s Request for Leave to Appeal the “Decision on Protocols at Trial” 8 October 2020 (ICC-01/14-01/18-677), ICC-01/14-01/18-682.

⁵ Request, ICC-01/14-01/18-682, para. 3(a).

⁶ Request, ICC-01/14-01/18-682, para. 3(b).

⁷ Request, ICC-01/14-01/18-682, para. 4; *see also* paras 9-15 (First Issue), 16-29 (Second Issue).

⁸ Request, ICC-01/14-01/18-682, paras 14, 28.

expeditious conduct of the proceedings;⁹ and (ii) their immediate resolution by the Appeals Chamber would materially advance the proceedings.¹⁰

4. On 19 October 2020, the Yekatom Defence and the Ngaïssona Defence (jointly, the ‘Defence’) filed their respective responses, requesting that the Request be rejected as it does not meet the criteria provided in Article 82(1)(d) of the Statute.¹¹
5. The Ngaïssona Defence submits that the Issues are ‘mere disagreements’ with the Impugned Decision and therefore do not amount to appealable issues,¹² and that they do not meet the remaining statutory criteria for leave to appeal.¹³
6. The Yekatom Defence submits that the immediate resolution of the Issues 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.¹⁴

II. Analysis

7. The Chamber recalls the applicable law governing requests for leave to appeal under Article 82(1)(d) of the Statute, as set out in its previous decision.¹⁵
8. The Issues relate to the following conclusions drawn in the Impugned Decision:

[T]he Chamber notes that the parties do not agree on allowing Witness Preparation in the present case. The Prosecution argues that Witness Preparation would enable the Calling Party to meaningfully exercise its ‘statutory right to effectively prepare and present its case’ in a manner best suited to establish the truth. Yet, the Prosecution does not point to the legal basis of the aforementioned statutory right. The Chamber also notes that neither one of the Defence teams is in favour of adopting Witness

⁹ Request, ICC-01/14-01/18-682, para. 5; *see also* paras 30-40.

¹⁰ Request, ICC-01/14-01/18-682, para. 6; *see also* paras 41-46.

¹¹ Yekatom Defence Response to Request for Leave to Appeal the Decision on Trial Protocols, ICC-01/14-01/18-689 (the ‘Yekatom Defence Response’), paras 1, 7 *et seq.*, 24; 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)’, ICC-01/14-01/18-690 (the ‘Ngaïssona Defence Response’), paras 1, 6 *et seq.*, p. 10.

¹² Ngaïssona Defence Response, ICC-01/14-01/18-690, paras 1, 7-13.

¹³ Ngaïssona Defence Response, ICC-01/14-01/18-690, paras 1, 14-16.

¹⁴ Yekatom Defence Response, ICC-01/14-01/18-689, paras 7, 18-23.

¹⁵ Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525-Conf-Exp, confidential *ex parte*, only available to the Prosecution, the Defence and the Registry, paras 15-21.

Preparation. Be that as it may, the Chamber does not consider that Witness Preparation is necessary for a Calling Party to effectively prepare and present its case. Even without adopting Witness Preparation, witnesses are able to review their statements before testifying (within the framework of Witness Familiarisation), which adequately ensures the quality of their testimony.¹⁶

9. The Chamber observes that the Request does not contest that chambers have discretion in adopting procedures to ensure that the trial is fair and expeditious.¹⁷ Rather, the raised Issues concern the Chamber's appreciation of the Calling Party's right to effectively prepare and present its case when deciding whether or not to adopt Witness Preparation.¹⁸

A. First Issue

10. The Prosecution submits that (i) the 'notion of Witness Preparation is inherent to the Statute's express procedural guarantees of fair trial among the Parties',¹⁹ (ii) procedural fairness extends to the Prosecution, by virtue of which it enjoys the right to prepare a case and to present evidence;²⁰ and (iii) whether a party's right to effectively prepare its case and to present evidence is a component of its right to a fair trial is an issue that not only arises from the Impugned Decision, but necessarily affects the scope and standard of a Chamber's exercise of discretion with respect to Witness Preparation.²¹
11. In the Chamber's view, the Prosecution tries to re-litigate issues already decided by the Chamber, by presenting further arguments as to why its initial request for witness preparation should have been granted. In particular, the Prosecution's submission that this right may be 'inherent' to the legal framework²² attempts to re-litigate the Prosecution's position that allowing Witness Preparation would 'recognise the Parties' right to prepare and present their cases in a manner best

¹⁶ Impugned Decision, ICC-01/14-01/18-677, para. 25 (footnotes omitted).

¹⁷ See *e.g.* Request, ICC-01/14-01/18-682, paras 13, 17.

¹⁸ Request, ICC-01/14-01/18-682, paras 13-14, 18-22.

¹⁹ Request, ICC-01/14-01/18-682, para. 10.

²⁰ Request, ICC-01/14-01/18-682, para. 11.

²¹ Request, ICC-01/14-01/18-682, para. 13; *see also* para. 12.

²² Request, ICC-01/14-01/18-682, para. 10.

suited to establishing the truth'.²³ In its submissions leading up to the Impugned Decision, it made no submissions advancing these aforementioned arguments.²⁴

12. In any event, the Chamber notes that Witness Preparation is not expressly provided for in the legal framework of the Court. The trial chambers that have allowed Witness Preparation have also acknowledged this.²⁵ The Chamber is equally not persuaded by the Prosecution's argument that Witness Preparation may be 'inherent' to the procedural guarantees of the parties and participants in the Statute. The very fact that some trial chambers have allowed Witness Preparation and others have not, demonstrates that chambers have neither considered Witness Preparation to be indispensable for a Calling Party to exercise its right to prepare a case nor to be a procedural guarantee within the statutory framework of the Court.
13. For these reasons, the Chamber finds that the First Issue merely expresses a disagreement with the Impugned Decision and does not constitute an appealable issue.

B. Second Issue

14. The Prosecution submits that (i) the Chamber identified an incorrect standard for the exercise of its discretion by determining that Witness Preparation was not 'necessary for a Calling Party to effectively prepare and present its case',²⁶ and (ii) even if it had identified the correct standard, it failed to apply it.²⁷ The latter argument centres on the Prosecution's submissions that the Chamber (i) did not strike a reasonable balance between the rights and interests at stake;²⁸ and (ii) failed to consider 'reasonable and viable alternatives to extinguishing

²³ See Impugned Decision, ICC-01/14-01/18-677, para. 25.

²⁴ Prosecution's Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation, ICC-01/14-01/18-476, paras 9-16.

²⁵ See e.g. Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on witness preparation and familiarisation, 17 March 2020, ICC-01/12-01/18-666 (the '*Al Hassan Decision*'), para. 10; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on witness preparation, 16 June 2015, ICC-01/04-02/06-652 (the '*Ntaganda Decision*'), para. 13; Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524 (the '*Ruto and Sang Decision*'), para. 26.

²⁶ Request, ICC-01/14-01/18-682, para. 18.

²⁷ Request, ICC-01/14-01/18-682, paras 19-26.

²⁸ Request, ICC-01/14-01/18-682, para. 18; see also paras 23-24, 26-27.

the Prosecution's ability to avail itself of Witness Preparation'.²⁹ The Request further alleges that the Impugned Decision fails to engage with the Court's prior jurisprudence favouring the practice of Witness Preparation.³⁰

15. The Chamber finds no merit in the Prosecution's argument that the Chamber identified an incorrect standard for assessing its discretion and considers that it merely expresses disagreement with the Chamber's assessment. The Chamber recalls that the Impugned Decision clearly specified and assessed the Chamber's statutory obligations, *inter alia*, pursuant to Articles 64 and 68(1) of the Statute,³¹ and as noted therein, trial chambers allowing Witness Preparation have also relied on these provisions.³² Further, the Impugned Decision acknowledged that in exercising such discretion, some trial chambers have allowed Witness Preparation;³³ however, it concluded that 'its [own] statutory duties are best fulfilled by not adopting [it]'.³⁴
16. As regards the application of the aforementioned standard, the Chamber notes that the Impugned Decision expressly elaborated on the factors that it considered when exercising its discretion. These included, *inter alia*, the well-being of witnesses and the quality of their testimony, and the fairness and integrity of the proceedings.³⁵ Further, in its effort to strike a balance between the rights and interests at stake, the Impugned Decision addressed all the aforementioned factors individually and considered them cumulatively within the specific circumstances of the case and the participants' positions on the matter.³⁶
17. The Chamber weighed the risks inherent to Witness Preparation, *inter alia*, the risk of rehearsing and distorting the witnesses' evidence, which has a bearing not only on the quality of witness testimony but also on the fairness and

²⁹ Request, ICC-01/14-01/18-682, para. 23; *see also* paras 16, 22.

³⁰ Request, ICC-01/14-01/18-682, para. 25.

³¹ Impugned Decision, ICC-01/14-01/18-677, paras 17, 30.

³² *See* Impugned Decision, ICC-01/14-01/18-677, para. 17, n. 44 *referring to* the *Al Hassan* Decision, ICC-01/12-01/18-666, paras 9-10; *Ntaganda*, Decision, ICC-01/04-02/06-652, paras 13-14; *Ruto and Sang* Decision, ICC-01/09-01/11-524, para. 27.

³³ Impugned Decision, ICC-01/14-01/18-677, para. 17.

³⁴ Impugned Decision, ICC-01/14-01/18-677, para. 26.

³⁵ Impugned Decision, ICC-01/14-01/18-677, paras 19-24.

³⁶ *See* Impugned Decision, ICC-01/14-01/18-677, paras 17-29.

integrity of the proceedings.³⁷ As to the latter, the Impugned Decision reasoned that it was ‘preferable 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’ so that the participants may react to such information on an equal footing.³⁸ Further, the Chamber was not persuaded that the risks inherent to Witness Preparation could be sufficiently mitigated by the safeguards proposed by the Prosecution.³⁹ It concluded that this concern outweighed the Prosecution’s arguments in favour of Witness Preparation.⁴⁰

18. Having regard to the above and as is clearly shown below, the Chamber finds that the Request merely disagrees with the appreciation of the risks associated with Witness Preparation and how the Chamber weighed those risks against its own obligations towards the conduct of the trial proceedings.
19. First, the Request argues that, allowing Witness Preparation would advance a clear and focused testimony,⁴¹ whereas the Impugned Decision considered that it was more important that the witnesses’ evidence was not inadvertently tainted by the Calling Party’s expectations.⁴²
20. Second, the Request asserts that the Impugned Decision did not ‘reasonably consider’ the safeguards underlying the practice of Witness Preparation,⁴³ whereas the Impugned Decision had expressly considered this factor.⁴⁴ It found that ‘such safeguards would need to exceed those proposed by the Prosecution’ and would ‘consequently lead to a very limited role and number of tasks of the Calling Party’.⁴⁵

³⁷ Impugned Decision, ICC-01/14-01/18-677, paras 21-23, 26.

³⁸ Impugned Decision, ICC-01/14-01/18-677, para. 23.

³⁹ Impugned Decision, ICC-01/14-01/18-677, para. 21.

⁴⁰ Impugned Decision, ICC-01/14-01/18-677, para. 26.

⁴¹ Request, ICC-01/14-01/18-682, para. 24.

⁴² Impugned Decision, ICC-01/14-01/18-677, para. 22.

⁴³ Request, ICC-01/14-01/18-682, para. 37.

⁴⁴ Impugned Decision, ICC-01/14-01/18-677, para. 21.

⁴⁵ Impugned Decision, ICC-01/14-01/18-677, para. 21.

21. Third, the Request argues that Witness Preparation would advance witness well-being,⁴⁶ whereas the Impugned Decision considered that the Victims and Witnesses Unit (the 'VWU') is better suited to do so, as a neutral entity specifically tasked with this obligation.⁴⁷
22. Fourth, the Request argues that the Impugned Decision did not address the potential impact of the Coronavirus Pandemic as well as the Prosecution's budgetary constraints on its ability to prepare its case,⁴⁸ whereas the Impugned Decision had assessed both of these factors and concluded that the absence of pre-testimony sessions in the field did not present a risk to the fairness and integrity of the proceedings.⁴⁹
23. Fifth, the Prosecution argues that the Chamber's concerns about risks associated with Witness Preparation are 'speculative', because such risks were 'realised' even in a case where Witness Preparation was not allowed.⁵⁰ However, the Impugned Decision did not conclude that Witness Preparation extinguishes *all* risks of interference with witnesses. Rather, it concluded that, Witness Preparation would avoid the Calling Party from 'inadvertently contaminat[ing] the witness's recollection of the events'.⁵¹
24. For these reasons, the Chamber finds that the Second Issue constitutes a mere disagreement with the Impugned Decision and does not constitute an appealable issue.
25. Having found that neither of the two issues constitute appealable issues, the Chamber will not address the remaining requirements of Article 82(1)(d) of the Statute.

⁴⁶ See Request, ICC-01/14-01/18-682, paras 34-35.

⁴⁷ Impugned Decision, ICC-01/14-01/18-677, para. 22.

⁴⁸ Request, ICC-01/14-01/18-682, para. 26.

⁴⁹ Impugned Decision, ICC-01/14-01/18-677, para. 28.

⁵⁰ Request, ICC-01/14-01/18-682, para. 36, referring to *The Prosecutor v. Jean-Pierre Bemba*.

⁵¹ Impugned Decision, ICC-01/14-01/18-677, para. 21.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the Registry to reclassify decision ICC-01/14-01/18-525-Conf-Exp as public.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 11 November 2020

At The Hague, The Netherlands