

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: **15 February
2021**

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
NGAISSONA***

Public

**Public Redacted Version of “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)”, 28 June 2019, ICC-01/14-01/18-
233-Conf**

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 James Stewart

Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops

Mr Richard Omissé-Namkeamaï

Ms Sara Pedroso

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri

Mr Thomas Hannis

Legal Representatives of the 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 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 Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence of Patrice-Edouard Ngaïssona (“the Defence”) hereby respectfully requests Pre-Trial Chamber II (“the Chamber”) to be granted 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” (“the Impugned Decision”).¹

II. Confidentiality

2. Pursuant to regulation 23*bis* of the Regulations of the Court, the Defence requests that this filing be received by the Chamber as “confidential” as it refers to a decision of the same classification. A public redacted version will be filed in due time.

III. Procedural History

3. On 5 March 2019, the Chamber issued the “Decision Establishing the Principles Applicable to Victims’ Applications for Participation”,² thereby instructing the Registry to, *inter alia*, (i) transmit to the Chamber on a rolling basis, and in unredacted form, all complete victims’ applications for participation, including those for which the Registry could not make a clear determination (the ‘Group C Applications’), and (ii) prepare assessment reports highlighting the difficulties encountered in relation to the assessment of the Group C Applications.³
4. On 14 May 2019, the Registry filed the “Registry’s First Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings”⁴ and the “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial

¹ ICC-01/14-01/18-227-Conf.

² ICC-01/14-01/18-141.

³ *Ibid.*, para. 41.

⁴ ICC-01/14-01/18-197, together with Annexes 1-15 Confidential EX PARTE only available to the Registry and Redacted Annexes 1-15 Confidential.

Proceedings”.⁵

5. On 23 May 2019, the Chamber issued the “Decision on the Legal Representation of Victims”.⁶
6. On 24 May 2019, the Defence for Alfred Rombhot Yekatom and the Defence filed 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”).⁷
7. On 27 May 2019, the Prosecution filed 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)”.⁸
8. 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”).⁹
9. On 14 June 2019, the Prosecution filed the “Prosecution’s Additional Observations on the “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings” (“the Prosecution’s Request”),¹⁰ that specifically addressed three victim’s applications concerning allegations of rape in Bangui on or around 5 December 2013 (“the Three Applications”).¹¹
10. On 21 June 2019, the Chamber issued the Impugned Decision.
11. On 27 June 2019, the Defence filed the “Ngaïssona Defence Response to the “Prosecution’s Additional Observations on the “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings” (ICC-01/14-

⁵ ICC-01/14-01/18-198, together with a confidential annex.

⁶ ICC-01/14-01/18-205.

⁷ ICC-01/14-01/18-208-Conf. A public redacted version is also available, see ICC-01/14-01/18-208-Red.

⁸ ICC-01/14-01/18-212-Conf.

⁹ ICC-01/14-01/18-220-Conf.

¹⁰ ICC-01/14-01/18-224-Conf.

¹¹ Victim applications [REDACTED].

01/18-198)”, ICC-01/14-01/18-224-Conf” (“the Defence’s Response”).¹²

12. On 28 June 2019, the Defence was informed by email that the Chamber could not take the Defence’s Response into account and that it had become moot.¹³

IV. Applicable law

13. The Defence recalls Articles 21(3), 67(1), and in particular 67(1)(b), 67(2) and 82(1)(d) of the Rome Statute (“the Statute”), and Regulations 24(1), 24(2) and 86(7) of the Regulations of the Court (“the Regulations”).

V. Submissions

14. The Defence hereby submits that the Impugned Decision meets all of the following cumulative legal criteria as set forth in article 82(1)(d) of the Statute:

- a. The Impugned Decision involves one appealable issue,
- b. Which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,
- c. And for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

- a. The Impugned Decision raised one appealable issue (the “Issue”)

15. The Appeals Chamber of the Court has ruled that an “issue” is “*a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is a*

¹² ICC-01/14-01/18-231-Conf.

¹³ Email sent to the Defence on 28 June 2019, at 10:14, by [REDACTED] on behalf of the Chamber.

disagreement or conflicting opinion".¹⁴ An "issue" must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.¹⁵

16. The Impugned Decision raises an Issue, which clearly does not merely consist of a disagreement or a conflicting opinion. Rather, it raises fundamental questions of law, namely, with respect to the scope of Mr Ngaïssona's core procedural guarantees such as his right to be heard, particularly in the context of the submission of victims' applications, as provided for in Article 67(1) of the Statute and international human rights law as provided for in Article 21(3) of the Statute:

Whether the Chamber erred by issuing the Impugned Decision without allowing the Defence the opportunity to present a response to the Request.

17. Moreover, the Issue arises directly from the Impugned Decision, as it arises directly from the very issuance of the Impugned Decision, before the time had elapsed for the Defence to submit its observations.

18. Regulation 24(1) of the Regulations provides that:

[t]he Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.¹⁶

19. By issuing the Impugned Decision on 21 June 2019,¹⁷ the Defence was prevented from presenting a response to the Prosecution's Request following the Order of 11 June 2019,¹⁸ contrary to the requirement of regulation 24(1) of the Regulations. The only opportunity the Defence had to present its views and observations on applications from victims materialised in the Defence Joint Observations, filed on 24 May 2019, i.e. before both the issuance of the Order and the filing of the Prosecution's Request. Additionally, the Order does not contain any restriction to the

¹⁴ ICC-01/04-168, para. 9.

¹⁵ Pre-Trial Chamber I, *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, 31 July 2013, ICC-02/11-01/11-464, para. 8; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, Decision on the "Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014 », 4 July 2014, ICC-01/04-02/06-322.

¹⁶ Emphasis added.

¹⁷ ICC-01/14-01/18-227-Conf.

¹⁸ ICC-01/14-01/18-220-Conf.

right of the Defence to present a response or, even a shortening of the deadline to file such a response.

20. Providing the Defence with an opportunity to respond was particularly paramount given that the Order was based on both a need to “take into account the rights of the Defence”¹⁹ and to “avoid raising the expectations of persons who may have suffered terribly, by first admitting them as victims for the purposes of the confirmation of charges hearing, only for these individuals to be possibly excluded at a later stage”.²⁰

21. Therefore, the fact that the Order was based on the concern that “it must duly take into account the rights of the Defence”²¹ and that it nonetheless rendered the Impugned Decision on the basis of the Prosecution’s Request and before the time for the Defence to present the Defence’s Response had elapsed, consists of an appealable issue, rather than a mere disagreement with the Impugned Decision. This is also contrary to the fundamental principle of *audi alteram partem*, as enshrined in Article 21(3) of the Rome Statute.

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

22. The two disjunctive criteria under the second prong of the test provided under Article 82(1)(d) of the Statute are met for the Issue, namely that its resolution would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial.

23. The Issue goes to the very heart of fairness since it concerns Mr Ngaissona’s due process rights, including his right to be heard and to be informed of the evidence and charges against him. Fairness is preserved when “*a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the*

¹⁹ ICC-01/14-01/18-220-Conf, para. 13.

²⁰ ICC-01/14-01/18-220-Conf, para. 13.

²¹ ICC-01/14-01/18-220-Conf, para. 13.

*observations and evidence submitted to the Court that might influence its decision”.*²²

Adversarial proceedings and equality of arms are central features of a fair trial.²³ The right to a fair trial and the right to be heard should be practical and effective²⁴ and extend to investigations and pre-trial proceedings.²⁵

24. Furthermore, the concept of “expeditiousness” must be read as “*closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*”.²⁶

25. *First*, the resolution of the Issue would significantly affect the fairness of the proceedings, in that the Impugned Decision did not take into account the Defence’s Response to the Prosecution’s Request on a core issue relating to the very scope of the case alleged against Mr Ngaïssona. This puts the Defence at a substantial disadvantage vis-à-vis the Prosecution, which will taint future proceedings. Thus, the resolution of the Issue goes to the very heart of a fair trial.

26. *Second*, the resolution of the Issue would also affect the expeditiousness of the proceedings in that it would resolve any doubt as to the Defence’s right to be heard on the issue of victims’ applications and the scope of the case against Mr Ngaïssona at this stage. The Defence’s denial of the right to present its views contributes to the expeditiousness of proceedings in avoiding extensive and future litigation on the matter.

27. *Third*, should the Chamber find that the Issue would not affect the fair and expeditious conduct of the proceedings, the Defence submits that had the Chamber considered the Defence’s Response, had it had an opportunity to do so before the issuance of the Impugned Decision, this would have affected its ultimate findings, which in turn, would affect the outcome of the trial.

²² 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.

²³ 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.

²⁴ Prosecutor v. Bemba, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, 31 July 2008, para. 22.

²⁵ Situation in the Democratic Republic of Congo, Judgement 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.

²⁶ 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. 17.

28. *Finally*, and for the sake of clarity and transparency, the Defence recalls that, on 27 June 2019, it still filed the Defence's Response.²⁷ On 28 June 2019, the Defence was informed by email that:

"the Judges of Pre-Trial Chamber II have decided that it cannot be taken into account. The Judges consider that, following the submission of the 'Joint Defence Observations' (ICC-01/14-01/18-208-Conf) in accordance with the 'Decision Establishing the Principles Applicable to Victims' Applications for Participation' (ICC-01/14-01/18-141), the 'Order for the Submission of Additional Observations' (ICC-01/14-01/18-220-Conf) arose from regulation 86(7) of the Regulations of the Court, which does not allow for a response by the Defence. In addition, the Judges consider that, having issued the 'Decision regarding the Registry's First Assessment Report on Applications for Victim Participation and the Registry's First Transmission of Group C Applications' (ICC-01/14-01/18-227-Conf), this filing has, in any event, become moot."²⁸

29. As explained above,²⁹ the Defence submits that, contrary to the Chamber's assessment, it had a right to respond that should have been taken into account by the Chamber before issuing the Impugned Decision, especially in light of the circumstance that the Joint Defence Observations had to be presented before the Prosecution's Request was filed.

30. The Impugned Decision has been issued by the Chamber after hearing the arguments developed by the Prosecution in the Prosecution's Request, in the absence of an opportunity for the Defence to present a response, or at least its views and observations.

31. The Defence is of the view that in such a situation, and given the arguments developed by the Prosecution in the Prosecution's Request, the Impugned Decision significantly affects the fair and expeditious conduct of the proceedings, as it admitted the Three Applications without receiving the views and observations of the Defence beforehand.

32. In light of the arguments developed by the Prosecution in the Prosecution's Request, a response from the Defence was especially needed. However, the Defence will not

²⁷ ICC-01/14-01/18-231-Conf.

²⁸ Email sent to the Defence on 28 June 2019, at 10:14, by [REDACTED] on behalf of the Chamber.

²⁹ *Supra*, paras 18-21.

repeat the arguments already developed in the Defence's Response that was not taken into account by the Chamber.

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

33. The Appeals Chamber has held that for leave to appeal to be granted, the issue must be such "*that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial*".³⁰

34. Given that the Issue directly concerns Mr Ngaïssona's right to a fair trial, his right to be heard before the issuance of a decision that affects his situation in the proceedings, and his right to respond to any document filed by any participant in the case, pursuant to Regulation 24(1) of the Regulations, the immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings by "[r]emoving doubts about the correctness of [the] decision" which may later "*unravel the judicial process*".³¹

35. If leave to appeal were to be denied, the Impugned Decision could taint the most significant aspects of the case going forward, namely Mr Ngaïssona's right to be heard. An eventual determination that the Chamber did not adequately assess the potential serious prejudice caused by the Impugned Decision could jeopardize the integrity of the entire proceedings. The resolution of the Issue at this stage would remove doubts about the "correctness of [the] decision or mapping a course of action

³⁰ Situation in the Democratic Republic of Congo, Judgement 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. 14.

³¹ Situation in the Democratic Republic of Congo, Judgement 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, paras 14-20; *See also*, 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. 20.

along the right lines,”³² would ensure that proceedings “*follow the right course*”, and provide “*a safety net for the integrity of the proceedings*”.³³

RELIEF SOUGHT

36. In light of the foregoing, the Defence respectfully requests the Chamber to:

- **GRANT** to the Defence leave to appeal the Impugned Decision.

Respectfully submitted,



Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 15 February 2021,

At The Hague, the Netherlands

³² Situation in the Democratic Republic of 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. 15.

³³ Situation in the Democratic Republic of Congo, Judgement 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. 15.