

Trial Hearing
Procedural Matters

(Open Session)

ICC-01/14-01/18

1 International Criminal Court
2 Trial Chamber V
3 Situation: Central African Republic II
4 In the case of The Prosecutor v. Alfred Rombhot Yekatom and Patrice-Edouard
5 Ngaïssona - ICC-01/14-01/18
6 Presiding Judge Bertram Schmitt, Judge Péter Kovács
7 and Judge Chang-ho Chung
8 Trial Hearing - Courtroom 1
9 Monday, 5 December 2022
10 (The hearing starts in open session at 9.32 a.m.)
11 THE COURT USHER: [9:32:35] All rise. The International Criminal Court is now in
12 session. Please be seated.
13 PRESIDING JUDGE SCHMITT: [9:32:49] Do we have a connection to the detention
14 centre? Yes, because last time we have seen Mr Ngaïssona and, I would, of course,
15 prefer that too today.
16 Court Officer, please call the case.
17 THE COURT OFFICER: [9:33:02] Good morning, Mr President. Good morning, your
18 Honours. This is Situation in the Central African Republic, in the case of The
19 Prosecutor versus Alfred Rombhot Yekatom and Patrice-Edouard Ngaïssona, case
20 reference ICC-01/14-01/18.
21 And for the record, we are in open session.
22 PRESIDING JUDGE SCHMITT: [9:33:21] Thank you.
23 I'll ask for the appearances of the parties. We start with Mr Vanderpuye.
24 MR VANDERPUYE: [9:33:29] Good morning, Mr President. Good morning, your
25 Honours. Good morning, everyone. Today the Prosecution is represented by Irina

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- 1 Galupa, Yassin Mostfa, and myself, Kweku Vanderpuye.
- 2 PRESIDING JUDGE SCHMITT: [9:33:44] Thank you.
- 3 Ms Douzima, next.
- 4 MS DOUZIMA: [9:33:49](Interpretation) Thank you very much, your Honour,
- 5 honourable members of the bench. The victims are represented today by Counsel
- 6 Douzima, myself.
- 7 PRESIDING JUDGE SCHMITT: [9:33:56] Thank you.
- 8 Mr Suprun.
- 9 MR SUPRUN: [9:34:00] Good morning, Mr President, your Honours. The former child
- 10 soldiers are represented by myself, Dmytro Suprun, counsel at the Office of Public
- 11 Counsel for Victims. Thank you.
- 12 PRESIDING JUDGE SCHMITT: [9:34:07] Thank you.
- 13 Ms Dimitri.
- 14 MS DIMITRI: [9:34:09] good morning, Mr President. Good morning, your Honours.
- 15 Good morning, everyone in the courtroom. Mr Yekatom is present in the courtroom
- 16 and he is represented today by Ms Anta Guissé and myself, Mylène Dimitri.
- 17 PRESIDING JUDGE SCHMITT: [9:34:20] Thank you very much.
- 18 Mr Knoops.
- 19 MR KNOOPS: [9:34:22] Good morning, Mr President. Good morning, your Honours.
- 20 Good morning, everyone in the courtroom. I am actually representing at this moment
- 21 on my own Mr Ngaïssona.
- 22 PRESIDING JUDGE SCHMITT: [9:34:31] Well, but, you know, it's not about quantity.
- 23 It's about quality always. Let me put it this way. Mr Ngaïssona is following the
- 24 proceedings from the detention centre according to a decision from -- I don't know
- 25 from when but we made a decision in that regard. And as this decision already

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1 indicated, whenever there is a need to confer with your client, you can do that. You
2 can ask also for an interruption, for a break.

3 I hope that the communication between Mr Ngaïssona and counsel has been, indeed,
4 facilitated by the Registry. Thank you. So it seems okay.

5 Mr Knoops, you had two procedural issues. But first of all, before we start with that,
6 what is it about?

7 MR KNOOPS: [9:35:30] Mr President, thank you very much for giving me the floor.

8 It's about actually three matters on law, and I can assure you we are mindful to your
9 decision last Friday. We're not here to raise any political issues, but I have three
10 questions of law. And I've also the instructions of Mr Ngaïssona to convey those
11 requests to the Chamber.

12 It needs probably 15 minutes to address the Chamber with those issues, and I ask the
13 permission of the Court to --

14 PRESIDING JUDGE SCHMITT: [9:36:06] Well, perhaps we discuss this better in
15 private session.

16 So let's go to private session.

17 MR KNOOPS: [9:36:11] I have no problem if it's in open session, Mr President.

18 PRESIDING JUDGE SCHMITT: [9:36:14] Well, if it is about the, what you say, political
19 issues, this has been -- the wording is now financial and labour-related agendas. If it is
20 about that, I think we do that better in private session.

21 (Private session at 9.36 a.m.) Reclassified into public

22 THE COURT OFFICER: [9:36:45] We're in private session, Mr President.

23 MR KNOOPS: [9:36:47] Thank you, Mr President.

24 Mr President, your Honours, we are here today, Ms Dimitri, Ms Guissé, and myself,

25 because we are servants of the Court. We realise that we are servants of this Court. We

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1 are not part of the support staff, and we respect the decision of the Court of last Friday.

2 But still, Mr President, your Honours, to fulfil my professional and also ethical

3 obligations towards my client, and based on the instructions I received this morning

4 writtenly from him, I rise with three requests to the Chamber.

5 Two of them have to do with a request for leave to appeal with the request --

6 PRESIDING JUDGE SCHMITT: [9:37:34] Well, then we stop this immediately. Please

7 put all that in writing.

8 MR KNOOPS: [9:37:39] Well --

9 PRESIDING JUDGE SCHMITT: [9:37:40] We have a witness here, and we don't discuss

10 appeal -- leave to appeal here in the courtroom now. We have a procedure for that.

11 You put that in writing.

12 Next point, please.

13 MR KNOOPS: [9:37:52] Yes, Mr President. I am mindful of Rule 155(1).

14 PRESIDING JUDGE SCHMITT: [9:37:58] And --

15 MR KNOOPS: [9:38:01] But I have --

16 PRESIDING JUDGE SCHMITT: [9:38:02] -- I recall paragraph 5 of our decision, it is

17 clearly stated that the Chamber does not appreciate that this is continued in the

18 courtroom. And, well, we have also to be consistent as a Chamber here. Or perhaps

19 counsel also has to ask herself, himself, whoever, if this is the right way to pursue these

20 things.

21 So we have made absolutely clear that we do not have any stance on the question if any

22 of these claims are justified or not. We have absolutely clearly said that there are other

23 venues, avenues to pursue that, and that it is something that has to be kept out of the

24 courtroom. We are not -- the simple reason is we are not talking about the case

25 anymore. We are talking now about some issues that pertain to financial and labour-

1 related things.

2 So now then I think we can go to open session and start with the witness, I would say.

3 MR KNOOPS: [9:39:08] Mr President, with all due respect, I fully agree with what you
4 just said. But if you would allow me to finish my sentence.

5 PRESIDING JUDGE SCHMITT: [9:39:15] I allow you to finish your sentence. But when
6 you said 15 minutes, we do not accept that. We have to continue with the trial here,
7 and there are other also now legal avenues.

8 If the Defence thinks they need to pursue some, let's say, leave to appeal things, do that
9 in writing, please. Yes?

10 MR KNOOPS: [9:39:38] Mr President, how on earth --

11 PRESIDING JUDGE SCHMITT: [9:39:41] Well, please.

12 MR KNOOPS: [9:39:45] Okay. Leave this aside. Is the Court mindful of the filing
13 which was done yesterday on Regulation 135(2) of the regulations of the Registry and
14 with reference to your Honours' ruling in the Bemba case on this issue? The case is
15 being brought before the Chamber in the context of Regulation 135(2), and your
16 Honours have, in the Bemba case, ruled on the basis of section (2) that your Court is
17 competent to rule on the very issue which is now at the heart of the reason.

18 I'm not here to advocate for the support staff. We are here simply because I have no
19 adequate facilities this week. I cannot examine a witness under the same conditions as
20 the Prosecution. Mr Ngaïssona didn't waive his right to be present. Article 36(1) and
21 (2) only allows in exceptional circumstances that the defendant is not present, and your
22 Honours have ruled on 20 November that the witnesses of last week were not affecting
23 Mr Ngaïssona.

24 Mr Ngaïssona is affecting by this witness. Your Court has ruled in 11 November in the
25 context of a rejection of 68(3) that this witness is central to the anticipated evidence of

1 the Prosecution case. He wants to be here. I cannot receive instructions from him
2 through videolink. With all due respect, I cannot professionally adequately continue
3 with an examination of a witness who is that important.

4 PRESIDING JUDGE SCHMITT: [9:41:29] Well --

5 MR KNOOPS: [9:41:30] And that is the reason why I raise --

6 PRESIDING JUDGE SCHMITT: [9:41:34] Yes, yes, yes.

7 Okay. Mr Vanderpuye, shortly.

8 MR VANDERPUYE: [9:41:41] Thank you, Mr President.

9 I think there are three different issues before the Chamber. The first is what we dealt
10 with last week concerning the labour dispute, if you want to put it that way, and the
11 motion that the Defence has filed under Regulation 135.

12 The second has to do with the absence of the accused from the courtroom under, I
13 think, it's Rule 134, 134 bis through quater.

14 And then the third issue has to do with whether counsel is capable in the circumstances
15 of discharging their obligations under the Code of Conduct, which, of course, is
16 enforceable under the Statute.

17 So there are three issues that need to be resolved. The concern that we have is that they
18 are resolved in relation to the hearing of the witness so that there is not an ancillary
19 concern about a potentially important record on appeal in the case.

20 So I think it may be worth -- I know that the Chamber wants to get on with the witness,
21 but it may be worth to consider taking a few minutes to try to resolve those three issues
22 independently. I think it's within the capacity of the Chamber to rule on an
23 interlocutory application for appeal from the Bench. I think it's -- and as well as to
24 perhaps consider what the alternatives might be under Regulation 135 with respect to
25 the labour dispute, and the third issue regarding the accused's presence.

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1 But I would ask the Chamber to consider those issues and -- even if it's on a relatively
2 brief basis. But I would strongly urge the Chamber to resolve those issues as fully as
3 possible in the circumstances, Mr President.

4 PRESIDING JUDGE SCHMITT: [9:43:45] So we go to the deliberation room for 15
5 minutes with that.

6 Well, I have the impression that everything is sort of connected, probably, or not, we
7 don't know. And let me put it this way: We have counsel here in the courtroom. It
8 would be your turn to question the witness, I assume, for a couple of days. And the
9 Chamber is of the opinion that counsel for the Defence in the courtroom would be able
10 to make any objections without the help of -- to questions by you without the help of
11 the support staff. But let's discuss that later.

12 MS DIMITRI: [9:44:34] Mr President, just if I may. I --

13 PRESIDING JUDGE SCHMITT: [9:44:36] Yes, are we now in a discussion round or
14 what?

15 MS DIMITRI: [9:44:44] No, if I may, Mr President, before you go to the deliberation
16 room, I think it's important that you hear us. We do respect this Court, we do respect
17 your Honours. We are here. We are not striking. It is --

18 PRESIDING JUDGE SCHMITT: [9:44:54] Well, that would of course be something that
19 would have to be dealt with --

20 MS DIMITRI: [9:44:57] Yes, but we have --

21 PRESIDING JUDGE SCHMITT: [9:44:57] -- the Statute.

22 MS DIMITRI: [9:44:59] Mr President, we have the greatest respect for all three of you.
23 We do. But we need to be heard. And we had submissions to make this morning. The
24 Registry is the one who put us in that position. For years, the Registry is the one who
25 put us in that position. The Registry has the power to stop the strike but he's not.

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1 When we had problems with interpreters, with court reporters, some Chambers raised
2 their voice to the Registrar that he does something so we could receive edited
3 transcripts on time, but the Defence was left aside for years, Mr President.

4 But all three of us are here for a reason, because we respect your Honours, because we
5 respect the courtroom, because we respect our obligation, but we cannot - we cannot -
6 give our client an effective representation and a quality representation if we are not
7 supported by the people who have read hundreds and hundreds of pages since the
8 beginning of the case.

9 PRESIDING JUDGE SCHMITT: [9:46:00] So this means, effectively, that it is up to the
10 Defence to decide when we have hearings?

11 MS DIMITRI: [9:46:04] No, Mr President --

12 PRESIDING JUDGE SCHMITT: [9:46:04] So we go to the deliberation room now.

13 MS DIMITRI: [9:46:04] Mr President, just if I --

14 PRESIDING JUDGE SCHMITT: [9:46:09] No.

15 THE COURT USHER: [9:46:10] All rise.

16 (Recess taken at 9.46 a.m.)

17 (Upon resuming in private session at 10.15 a.m.) Reclassified into public

18 THE COURT USHER: [10:15:10] All rise. Please be seated.

19 PRESIDING JUDGE SCHMITT: [10:15:16] Thank you very much, first of all,

20 Mr Vanderpuye, for breaking the whole thing down into three discrete issues.

21 On issue three, that is the Regulation 134 request, well, that's clearly something we
22 have to think about, and we will decide in a written decision. And, by the way, it
23 escaped the attention of the Chamber, it was filed yesterday, 10.30, on a Sunday, and
24 only now notified. Okay.

25 With regard to the request for leave to appeal, I give Mr Knoops the floor.

1 It is, indeed, a good idea, Mr Vanderpuye, to deal with that orally now.

2 And to give the floor, Mr Knoops, you can make your submissions, and then we will
3 make a break, we will make a deliberation on that, and then we reconvene and decide
4 on it.

5 Please, Mr Knoops.

6 MR KNOOPS: [10:16:17] Mr President, your Honours, I'm very grateful for the
7 Chamber to allow me to address you on two requests for leave to appeal and one
8 request for reconsideration, but that's, I think, legally less important than the principal
9 issues we'd like to address in our request for leave to appeal.

10 Mr President, the Defence counsel are in an exceptional situation that I am not able to
11 open my own computer. Meaning that I seek leave from the Court to orally get
12 authorisation from the Court to appeal two of your decisions. I know that the rules
13 stipulate that leave to appeal has to be filed in a written form within five days after
14 notification of the decision. Yet, in the absence of support staff, irrespective of the
15 reasons, I'm bound to apply this --

16 PRESIDING JUDGE SCHMITT: [10:17:43] That's fine.

17 MR KNOOPS: [10:17:44] -- orally.

18 PRESIDING JUDGE SCHMITT: [10:17:45] It's okay, Mr Knoops.

19 MR KNOOPS: [10:17:47] Thank you.

20 Mr President, it's our decision that your decision of 2 December, last Friday, on the
21 adjournment and suspension of deadlines is, in our view, raising the issues which are
22 meant in Article 81(1)(d) and, specifically, 82(1)(d) of the Statute.

23 Mr President, at the outset we, again, Ms Dimitri and I, Ms Guissé, would like to stress
24 we're here as servants of the Court. We know we are not here -- I never, in my whole
25 career as a lawyer, never litigated a political issue because I fully agree with the

1 Chamber, with the Bench, that we are not here to pursue, like the Court rightfully said
2 in its decision, paragraph 5, financial or labour law-related agendas. We fully agree
3 with the Bench. That's not an issue.

4 We are, in a way, very affected by the Court's remark in its decision that the Court has
5 the impression that we, counsel, abuse judicial proceedings in the present case.

6 If that's the impression, Mr President, I do apologise, with Ms Dimitri and Ms Guissé,
7 because that was never the intention. I would never -- I never in my whole life, in my
8 career, I never misused judicial proceedings for my own benefit. I'm here to protect the
9 rights of Mr Ngaïssona. I have an ethical, professional responsibility. I'm even,
10 according to my bar, liable if I would not stand up today to raise questions of law.

11 And, Mr President, your Honours will have noticed that in no point of time we,
12 Defence, have delayed proceedings, have asked for adjournments beyond, of course,
13 the scope of medical reasons or sought adjournments because we didn't have sufficient
14 time to prepare, et cetera.

15 Instead, Mr President, this request is about the application of the law. Nothing more or
16 less. Which, indeed, and we also agree with your Honours in this respect in paragraph
17 3 of your ruling last Friday, indeed, trials have to be conducted expeditiously.

18 Expeditiously can, however, not go to the expense to the rights of the accused. It has to
19 be balanced against the law on effective representation instead of representation as
20 such, a principle which was set out in the famous judgement of the European Court of
21 Human Rights in the case of *Stanford v. United Kingdom* in which right is to be
22 materialised by two subrights, first having adequate facilities, 67(1)(b), and hearing a
23 witness under the same condition as the prosecution, 67(1)(e).

24 Now, this request for leave to appeal, Mr President, your Honours, is about one
25 discrete question of law: Whether, in the absence at trial of the support staff,

1 irrespective of the underlying reasons for it, the representation of counsel, as set forth
2 by your Chamber in its ruling last Friday, is deemed to be effective for the examination
3 of a witness like P-0487 in light of two circumstances, and that is the principal question
4 we'd like to convey to the Appeals Chamber with your leave, of course.

5 Representation by counsel cannot be effective in light of two main elements. First, the
6 centrality of the examination of P-0487 for the charges. And I'll remind the Chamber,
7 of course, needless, of course, that your Chamber held in its ruling of 11 November of
8 this year, when it rejected the application of the Prosecution to introduce the
9 statements of P-0487 under 68(3), that the anticipated evidence of P-0487 is central to
10 the Prosecution case. That's factor one which makes the absence of support staff an
11 almost irrefutable factor to say there is no effective representation this week despite
12 counsel being here.

13 The second factor which makes the conclusion and the interpretation thereof by the
14 Appeals Chamber which, we hope, even more pressing is a second element, apart from
15 the centrality of the potential testimony of P-0487 in court, and that is the substantive
16 role of a support staff on a Defence team - our team, the team of Ms Guissé and
17 Ms Dimitri - not only for preparation in advance but also during the examination-in-
18 chief and the examination by the non-calling party in court.

19 Apart from essential logistical assistance court -- and the Court, Mr President, yourself,
20 alluded that you, and also me, we are from analogue era. Right now I am here with a
21 black computer screen. I cannot even open my own computer.

22 Interpretation issues, how can we follow them as counsel paying attention to the
23 examination-in-chief? How can we liaise with people in the field through WhatsApp
24 or e-mail to ask for quick investigation remarks pending the examination? It's an
25 ongoing process of communication with the support staff and the support staff with

1 the investigators in the field.

2 To receive information instructions while the witness is on the stand, it's not a static
3 examination, Mr President, it's a dynamic process. And I cannot blame the Chamber
4 for, perhaps, not being mindful to this process, but I can assure you that for a witness
5 like P-0487, the Defence starts way in advance for two months before such a hearing to
6 prepare.

7 That means that the intellectual contribution from support staff during the hearing is
8 vital. They have information I do not have. They can give me Post-its and say,
9 "Mr Knoops, ask this, refer to that." I don't have that information.

10 I know, of course, the transcripts. I know the exhibits. But the overall connection with
11 other witnesses, the overall view, the strategic input is vital. Support staff is not just
12 here to open a computer, to print transcripts, which I, by the way, cannot do tonight. I
13 don't know how I can receive tonight the transcripts. Maybe somebody here in this
14 courtroom has those skills, but I don't have those skills. I am a lawyer for 35 years. I
15 was not educated in such an era of computers.

16 That means that the intellectual contribution is vital without support staff, I cannot
17 even formulate -- I can formulate objections, but if you don't have the overall view of
18 the case and connections with the other evidence which support staff has, we are
19 actually really handicapped and we would damage the position of Mr Ngaïssona if I
20 would say to the Court, "Okay, let's start with the examination-in-chief, we break, and
21 next week, when the support staff has returned, we start with the examination by the
22 non-calling party." That is a very lucrative option, but for us it would not solve this
23 immense problem.

24 Support staff is, therefore, essential for the intellectual and the material contribution to
25 and of the examination of a key witness such as 487, which is central to the anticipated

1 evidence of the Prosecution and the case.

2 So, Mr President, your Honours, this means that if we agree, and I hope the
3 Prosecution can also concede to this, that support staff in every team - either
4 Prosecution, Defence, or LRV - are essential for the substantive preparation,
5 investigation, and examination at trial, part of the strategic discussions pertaining also
6 to the plan of examination-in-chief and cross-examination, if we agree that even during
7 the examination of witnesses questions are amended because of the input of support
8 staff - these are lawyers, these are not just legal assistants, they are full-fledged lawyers
9 who can exchange suggestions, comments, and even documents through intranet and
10 chat box - if we all agree to this, this second factor, in combination with the centrality of
11 P-0487 constitutes that the absence of support staff this week in court leads to, for the
12 Defence, irreparable consequences, irrefutable consequences in the absence of adequate
13 facilities, the absence of the same conditions, and, hence, we represent, of course, the
14 defendant, but it will not be effective.

15 Accordingly, your decision of 2 December, in our submission, Mr President, with all
16 due respect, qualifies as a decision under Article 82(1)(d). First, it pertains to an issue
17 that would significantly affect, significantly, second, a fair and expeditious conduct of
18 the proceedings or the outcome, third, for which an immediate resolution by the
19 Appeals Chamber may, fourth, materially advance the proceedings.

20 Your Honours, we started this submission with the remark that the issue at stake is far
21 from political. Actually, the underlying reason why a support staff is absent in court is,
22 in our humble submission, not decisive when it comes down to the interpretation and
23 application of the law, the law pursuant to Article 67(1)(b) and (e). It's, namely, an
24 objective standard abstracted from the underlying reasons why a Defence team is not
25 here in its full-fledged composition.

1 We came not before the Chamber this morning, Ms Guissé, Ms Dimitri, and I, to argue
2 labour and financial issues. That's something for the Regulation 135(2) application
3 which was filed yesterday in which, by the way, your Court, on 21 May 2015,
4 paragraph 17 in the Bemba et al case, assumed competence and ruled in favour of the
5 application.

6 Indeed, that's the mechanism. That's, indeed, the mechanism in place for the matter
7 and the scrutiny by the support staff. But the fact of life, the reality is that we, counsel,
8 servants of the Court, here respectfully appearing before the Court, not striking, we
9 cannot mount an effective representation for Mr Ngaïssona and Mr Yekatom.

10 Now, based on the jurisprudence of various courts before the ICC, and the ICC, we,
11 therefore, can submit that the criteria for leave to appeal are met. First, there is no mere
12 disagreement about a question or conflict of opinions. We are here about the
13 interpretation of the terminology - representation versus effective representation - in
14 light of the case law of the Court and the European Court of Human Rights.

15 Secondly, the term "fair" in Article 81 and 82 of the Statute pertains to a decision of
16 which in severally a human right is incorporated or is part of, and various Chambers
17 have alluded to Article 67(1) for this purpose, which also is at stake here. And the term
18 "significantly affect" pertains, according to the case law of this court, the possibility of
19 an error in a decision which might have a bearing on the outcome of the trial.

20 Now, the Court, your Honours, have ruled yourselves on 11 November that the
21 potential testimony of P-0487 is central to the Prosecution case. In the trial brief of the
22 Prosecution, this witness appears multiple times in connection to several allegations
23 contra Mr Ngaïssona. That means if the Court would continue with the hearing of this
24 witness while the counsel cannot effectively represent the defendant for this witness
25 only, it will create an irreversible negative effect on the outcome of the trial, the

1 position of Mr Ngaïssona, and it would also undermine a potential ground to appeal if
2 the Defence would nonetheless accept to continue while we are beyond our control not
3 capable.

4 And Ms Dimitri said rightfully we are taking the heat, Mr President. I feel very sorry
5 that I am now to blame. Your Court will look at me, Mr Knoops, as obstructing the
6 trial. Well, Mr President, the Registry, since 2013, the expert report of Rogers of 2017,
7 the expert review of 2020, the Registry had the chance with the contingency fund to
8 solve it like your Honours ordered in the Bemba case. They didn't. And I have to
9 respect the rights of the people of support staff. I have no contractual relation with
10 them. They are not my employees, employers.

11 So I feel very uptight, Mr President, that your Chamber is blaming now counsel for
12 obstructing this case, because that is actually the underlying argument in your ruling. I
13 understand. But, Mr President, we are brought into this situation because the Registry
14 is not competent to deal with this issue for years, and we are here to take the heat.
15 I had to call my bar association what to do. I never, Mr President, in my whole career
16 of 35 years ever experienced a strike of the people working on my team. And that's
17 only to say, Mr President, my only reason why I have to ask leave to appeal is because I
18 cannot be kept liable as a counsel ethically by Mr Ngaïssona if years later your
19 Chamber would say, "Well, Mr Knoops was present in court, he didn't do anything, but
20 Mr Ngaïssona was represented." I would really jeopardise his potential rights. That's
21 the issue.

22 So, Mr President, indeed, this decision of you significantly will affect the outcome of
23 the trial, at least the proceedings, because this is not just a witness. This is a very
24 important witness for the Prosecution, which the Court acknowledges. And, indeed,
25 leave to appeal would materially advance the proceedings. Why?

1 A prompt reference of the issue to the Appeals Chamber will ensure, and that's the
2 criterion, that the proceedings follow the right course, pre-empting any repercussions
3 of erroneous decisions. And I refer to the Lubanga decision of 24 May 2007, paragraph
4 22, 24, and 26.

5 Mr President, maybe the Court can take into consideration that if the Court would
6 grant leave to appeal, it can only have an effect if it has a suspensive effect. 81(3) does
7 say that, in principle, a request for leave to appeal has no suspensive effect.

8 Considering the fundamental issue which has arisen in this Court, which is, I think, in
9 the history of the Court unique, if support staff was not there and counsel cannot
10 continue, that leave to appeal, if granted, has only effect with suspension of the
11 hearing.

12 And it will, in the long run, materially advance the proceedings. Because let us
13 suppose the Chamber continues, and let us suppose the Court would convict, and let
14 us suppose there would be an appeal, this will be a major issue in appeal. Such a vital
15 witness and the Defence for reasons beyond their control, because we cannot order
16 support staff to be here -- the Court might be through the Registry. Why didn't the
17 Registry do something? The Registry didn't stop the support staff, Mr President. Why
18 did the Registry not call them back and say, "We're going to solve it"?

19 The Registry tacitly approved the strike, Mr President. Is this something you didn't
20 notice? Why didn't the Registry intervene? They let it go, and they let me and

21 Ms Dimitri and Ms Guissé take the heat. We are the bad guys here. And I feel really
22 sorry that your Court is blaming me in a decision, last Friday, for abusing the process.
23 You know what it means to me after 35 years of practice about my integrity?

24 And finally, Mr President, we also believe that leave to appeal should be granted for
25 the fact that your Honour yesterday ruled that Mr Ngaïssona can follow the hearing of

1 487 per videolink.

2 We believe that this principal question for such a witness, which is central to the

3 Prosecution case, as the Court ruled on 11 November, pertains to a potential violation

4 but also interpretation of Article 63(1), the accused shall be present; section 2, only in

5 case of a continuation or a disruption of the proceedings, the Court might under

6 exceptional circumstances allow a videolink.

7 Your Honours asked the Defence yesterday if Mr Ngaïssona did request for a remote

8 attendance, implying that he needed his approval to do it. As your Honours know,

9 Mr Ngaïssona did not give approval to this, because he believes that - you're seeing

10 him there - he has no -- he cannot participate effectively with this witness as such.

11 These were also his instructions to me.

12 There is no waiver, there are no exceptional circumstances, because as your Honours

13 ruled on 28 November, transcript page 59, English realtime transcript, your Honours

14 said:

15 "Well, for exceptional reasons, we have talked about that, and these exceptional reasons

16 justify the absence of Mr Ngaïssona."

17 But in line 13 to 16, Mr President, you, yourself, with all due respect, you, yourself,

18 said:

19 "I may also add perhaps that the witness we currently are questioning is, let's say,

20 perhaps not a witness whose testimony would affect the accused, Mr Ngaïssona, more

21 than peripherally, so to speak."

22 That means that for the Chamber it was clear the witnesses last week were, indeed, not

23 affecting the position of Mr Ngaïssona, but that is different with 487. 487 is a witness

24 who has a different potential anticipated evidence to be given, and that means that the

25 video-conference which is now established, apart from the quality, is not for me a

1 sufficient compensation.

2 I have no support staff. I cannot check the transcript. I cannot contact the investigator
3 during the hearing. I have no direct communication with Mr Ngaïssona. What am I
4 supposed to do, Mr President? I am fully handicapped. I cannot effectively represent
5 Mr Ngaïssona this week with this witness.

6 Secondly, for the second leave to appeal on the absence of Ngaïssona during this
7 hearing. The criteria 67(1)(e) to the right to hear witnesses under the same conditions.
8 We submit that a leave to appeal to the Appeals Chamber not only is important for the
9 interpretation of 63 but also for 67 because both pertain to a fundamental right of the
10 accused to be here, to be confronted with an important witness, to look him in the face
11 like everyone in the courtroom, and not per videolink, apart from the fact that I am told
12 Mr Ngaïssona cannot see the witness through videolink.

13 Finally, Mr President, yes, the witness is in The Hague. Yes, the adjournment was on
14 the 11th hour. You're fully right. But please, Mr President, with all due respect, keep
15 in mind the fact that a witness is in The Hague -- and we had the same with a major
16 witness who came from the Central African Republic and refused to testify, you know
17 what I mean. The fact that a witness is already in The Hague does not change the
18 principles of law, the principle of justice. One cannot bend these principles for reasons
19 of convenience in a logistic, financial, and any setback in the court schedule.

20 And we are aware because we also want to proceed for Mr Ngaïssona's benefit, but we
21 cannot bend the principles of law simply because we say, "Well, the witness is in The
22 Hague. It will totally ruin the schedule." You are right about that. But if we slip down
23 that road, then the principles of law are worthless.

24 Lastly, adjournment on the 11th hour. As the Court noted, the medical situation of
25 Mr Ngaïssona deteriorated the last two weeks. Unforeseeable. (Redacted)

1 (Redacted), and, of course, he can follow some parts of

2 the hearing but he is not well. Unforeseen.

3 The support staff, also for our position as counsel, unforeseeable, because the decision
4 of the Registry was rendered 24 November. After having several consultations, letters
5 from various parties, 24 November was the end. Unforeseeable.

6 And, Mr President, lastly -- and I'm very sorry that I took more time, and I'm grateful,
7 your Honours, that you gave me the time. I really appreciate this, because it also
8 affects me as a person, as a professional person, what's happened today in court.

9 Please be aware that this is something we are not taking lightly.

10 We got letters from our support staff, official letters, that they will not attend this week,
11 and I cannot force them.

12 But one thing, Mr President, lastly, professionally and ethically I was bound today to
13 rise and also to beg for your apologies for the impression we have given to you with
14 our motion, which was never the intention to use this arena for those purposes.

15 Today I am only here to protect Mr Ngaïssona's rights and to make sure that your
16 Honours, and I know your Honours did already say in your decision last Friday, yes,
17 Mr Knoops represents, so there's nothing wrong, so that's already an admission of the
18 Court that if I will stay in the courtroom during the hearing of 487, your Honours will
19 say in the ruling, whatever the ruling may be, well, there's no harm done, Mr Knoops
20 was there. You know what I mean?

21 This puts me in a huge dilemma professionally and ethically, and I really would like to
22 stress that Ms Dimitri and Ms Guissé and me, we talked this weekend. We used this
23 weekend to consult what can we do. We consulted our bar associations. We spoke
24 with colleagues. We were not taking this lightly, Mr President. Please be assured we
25 are not here to obstruct. We want to proceed with 487. We are ready, in a way, to

1 proceed, but we cannot proceed without support staff.

2 And, lastly, please take into account the request we made to you yesterday, actually
3 notified this morning, on Regulation 135(2).

4 Your Honours, Mr President, if you, like in the Bemba case, this afternoon, calls the
5 Registry here and says, "Mr Registrar, how could this happen? How can it be that we,
6 Defence counsel, are taking the heat here while it is the responsibility of the Registry
7 for support staff, they are not our employers, order -- Mr President, there is a
8 contingency fund of 7 million in reserve. Order the Registry at the least to give these
9 young people who work day and night in our team at least the promise that they will
10 have this year the increase for the inflation remuneration. Everything will be solved.

11 But that's not done. And it's in the Registry's powers, not the ASP. And, your
12 Honours, in your ruling in the Bemba case, your Honours did exactly the same. You
13 have the power, Mr President, to continue tomorrow. Solve it this afternoon. We are
14 ready to start with the support staff in case this is solved. Call the Registry in court and
15 solve it, Mr President. It's not political. It's in your power.

16 And Mr Vanderpuye said rightly Friday in his e-mail, and maybe you read it through
17 the lines, Mr Vanderpuye said it's in the power of the Court to solve this.

18 PRESIDING JUDGE SCHMITT: [10:49:43] That was what you wanted to say
19 (Overlapping speakers)

20 MR KNOOPS: [10:49:46] Yes. And we ask, therefore, for reconsideration, that was my
21 third point, legally, based on the law, for reconsideration of your decision of
22 adjournment of last Friday.

23 And I am very grateful, Mr President, and also your two colleagues, that I was able to
24 take the floor. And I do apologise for what happened. And I feel also as a lawyer and
25 a human being very sorry for what happened in an institution like the ICC which is

1 proud of human rights. We are proud to be here. We are proud to work here. But it
2 has to be fair.

3 PRESIDING JUDGE SCHMITT: [10:50:22] Okay.

4 MR KNOOPS: [10:50:23] And, Mr President, please, you have the power to solve it this
5 afternoon with your colleagues.

6 PRESIDING JUDGE SCHMITT: [10:50:28] Yes, thank you.

7 Shortly -- Ms Dimitri, I would appreciate if you would say you agree with your
8 colleague.

9 MS DIMITRI: [10:50:36] Yes, Mr President, I will. But if you just allow me two minutes
10 just to add a few things.

11 PRESIDING JUDGE SCHMITT: [10:50:41] Please, short.

12 MS DIMITRI: [10:50:44] I'll be short.

13 PRESIDING JUDGE SCHMITT: [10:50:45] Short, yeah.

14 MS DIMITRI: [10:50:47] I'll be short.

15 First of all, Mr President, your Honours, I would like to apologise as well, because the
16 intention was never to use your Honours, but these people have been kept in the dark
17 for so long that we needed to raise awareness because we could see what was going to
18 happen. And I tried to stop it. And it was in my obligation, my ethical obligation to
19 attempt to resolve it by either asking an adjournment and by filing yesterday night,
20 very late, the motion, because I think these are solutions.

21 Needless to say, Mr President, that I fully agree and support Mr Knoops. And as he
22 said in his last words, I believe that you have the power to reconsider your decision to
23 prevent an injustice, because I cannot achieve quality without the support staff. It's not
24 only about quantity. But that's the reason why we're so on point when we are
25 questioning witnesses, when we are objecting, when we are listening to an

1 examination-in-chief, when we go through the binders, the reason why we are so on
2 point, it's because of them. That's how we achieve quality.

3 And if you reverse the table and you imagine yourself, during the presentation of the
4 Defence case, if I bring one of my biggest witnesses and Mr Vanderpuye is alone on the
5 other side, he won't be able, in my opinion, to be as effective without his own support
6 staff.

7 And the support staff is not only the support staff you see in court, Mr President.

8 There's a team upstairs who are sending points for objections, comments on the chat.

9 That's how the team works. And this is why when you have a witness like 487 who

10 brings onto the table dozens of CDRs, satellite imagery, you need not only their

11 intellectual brain, but you need the technicalities behind what Mr Vanderpuye is going
12 to use during the examination-in-chief.

13 And as Mr Knoops said, expeditiousness cannot be at the detriment of the other

14 fundamental rights of Mr Yekatom, and I truly believe that the presence of support

15 staff also assists in achieving expeditiousness. When they are here, we are expeditious.

16 As he said, we never asked for adjournments. We're ready even with the biggest

17 witnesses because of them. They help with the expeditiousness.

18 And for those reasons, and to avoid an injustice, Mr President, we do ask you to

19 reconsider your decision, and we do also ask you to perhaps expedite the responses on

20 the motion you received last night and that was officially notified this morning and ask

21 the Registry to come and respond to the motion or -- and he has the power to order the

22 staff to come back, and we'll be ready to proceed.

23 PRESIDING JUDGE SCHMITT: [10:54:11] Okay.

24 Mr Vanderpuye, please, shortly. Please, shortly.

25 MR VANDERPUYE: [10:54:17] Yes, Mr President. Good morning again, and thank

1 you for your consideration of the matter.

2 I have a bunch of notes scattered here as I was scribbling things down as Mr Knoops
3 was speaking and also while Ms Dimitri was speaking. And I agree with some things,
4 and I disagree with others.

5 The first thing is with respect to the decision on the motion for an adjournment. I do
6 not believe that the requirements of Rule 82(1)(d) have been met insofar as the decision
7 does not give rise to an issue that is appealable.

8 The circumstances under which the motion was filed were such that it was filed before
9 there was the absence of support staff, before a decision to take a strike had been taken.

10 It makes sense that it should be filed in anticipation of that, but certainly at the time
11 that the decision was rendered, that was not the circumstance. And so I don't believe
12 that the issue arises from the decision.

13 Rather aptly, the circumstance arises from, as counsel has repeatedly suggested, a
14 dispute that has nothing to do with the Court and has nothing to do with the decision.

15 It has nothing to do with the Chamber, rather than the Court, and has nothing to do
16 with the decision. It has to do labour relations between the Defence support staff and
17 the Registry. So that's a separate issue altogether. It's not to say that it's not an
18 important one, a viable one that should be resolved as expeditiously as possible, but is
19 not one that arises from the decision.

20 So I think the fundamental criteria for 82(1)(d) certification has not been met. And that
21 is with respect to the motion for an adjournment.

22 The Regulation 135(2) application, I do believe and I have considered that it is within
23 the power or authority of a Chamber to intercede or intervene in these types of matters
24 when there is a risk, particularly as assessed by the Chamber in its discretion, that it
25 could affect the fairness and expeditious conduct of the proceedings.

1 I don't know, and I don't believe, though, that 135(2) requires an immediate resolution
2 of the matter by the Chamber that is seized with the matter. So I'm not convinced that
3 even if the Chamber exercises or can exercise its authority to review a contract dispute
4 or remuneration dispute involving the Registry, that it obliges the Chamber to do it
5 instantaneously.

6 There is some merit, I think, in requesting the Chamber to do that given the
7 circumstances that we're in, but I don't think that there's anything under the Statute
8 that obliges the Chamber to do that.

9 With respect to the decision rendered, I guess by e-mail, concerning Mr Ngaïssona's
10 appearance via videolink as opposed to in person, that does, to me, seem to be a more
11 tricky issue under Article 63(1) and Rule 134, I think it's bis, but it's either bis, ter, or
12 quater, insofar as Mr Ngaïssona is unwilling to waive his right to be present under
13 Article 63(1). It's right and an obligation as I understand the jurisprudence.

14 There are circumstances, I think, under which the Chamber could proceed even in the
15 absence of the accused's physical presence before the court.

16 Here it appears to be the result of a physical impairment or a health issue.

17 PRESIDING JUDGE SCHMITT: [10:58:12] That's fine. Yeah.

18 MR VANDERPUYE: [10:58:15] And so for that reason I think it's something that is
19 worth deliberating on and certainly making a record with respect to.

20 PRESIDING JUDGE SCHMITT: [10:58:19] Well -- yes, indeed. Thank you.

21 MR VANDERPUYE: [10:58:21] The last thing --

22 PRESIDING JUDGE SCHMITT: [10:58:22] Because we want to deliberate at some point
23 in time.

24 MR VANDERPUYE: [10:58:26] I'm sorry. The last thing that I would ask you to think
25 about is Mr Knoops's representation, and I think Ms Dimitri to an extent, but at least

1 the Defence's concern about their ethical obligations in order to be able to represent
2 their clients effectively within the meaning of the Code of Professional Conduct.

3 I don't hear that either is refusing to proceed, but I do hear that they have raised their
4 concern with respect to their capacity to discharge their obligations under the Court's
5 code, which is a part of the Statute. So I would ask the Chamber to consider that,
6 obviously, to make any record that I think is -- that the Chamber feels is appropriate.

7 PRESIDING JUDGE SCHMITT: [10:59:09] Thank you very much.

8 MR VANDERPUYE: [10:59:09] Thank you, Mr President.

9 PRESIDING JUDGE SCHMITT: [10:59:10] Ms Douzima, very shortly, please. Do you
10 agree or not? You can simply say also defer to the discretion of the Chamber.

11 MS DOUZIMA: [10:59:20](Interpretation) Thank you very much, your Honour.

12 Indeed, in our reply to the Defence motion, we made it clear that we place ourselves at
13 the discretion of the Chamber, and we'll abide by the Chamber's decision. But we do,
14 on our side, we have said that the LRVs find themselves in the same set of
15 circumstances. Consequently, we wish for a swift answer to these matters.

16 Now, generally speaking, your Honour, this revolves around a question of working
17 conditions. And the LRVs have had to raise this --

18 PRESIDING JUDGE SCHMITT: [11:00:06] Yes, but we do not repeat that now. You are
19 on the same page. Yes, okay. That was what you wanted to say?

20 MS DOUZIMA: [11:00:15](Interpretation) Yes. I would just simply conclude by saying
21 that at a given point in time, January 2009, I had these problems. I was struggling with
22 these working conditions that I laid before you at the beginning of the hearing.

23 PRESIDING JUDGE SCHMITT: [11:00:33] Well, yes, but 2009 is not interesting now.

24 We have -- we interrupt now --

25 MS DOUZIMA: [11:00:39](Interpretation) What I wanted to say is simply this: I was

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1 supported by the opposing party who is currently the Prosecutor in this very Court.

2 PRESIDING JUDGE SCHMITT: [11:00:53] But that is his -- no, really, really, really,
3 that's it, so we have now heard enough.

4 And we are -- no. And we have -- no. We are going to deliberation until, let's say,
5 12.00, and we convene then.

6 MR KNOOPS: [11:01:11] Mr President --

7 PRESIDING JUDGE SCHMITT: [11:01:13] Mr Knoops.

8 MR KNOOPS: [11:01:14] -- it is just an observation of the Prosecution, very important
9 for your deliberation.

10 What I am going to say is not in any way meant to offend the Court, but there is a
11 decision of the Court of Appeal in my jurisdiction that I cannot proceed under these
12 circumstances. And I would like the Court to know that it's not that I respect -- but that
13 I am liable according to my own ethical code if I would continue.

14 PRESIDING JUDGE SCHMITT: [11:01:45] Well, yes, you have made this point clear --

15 MR KNOOPS: [11:01:48] The highest court of the -- the highest (Overlapping speakers)
16 court in the Netherlands has ruled --

17 PRESIDING JUDGE SCHMITT: [11:01:51] Yes, yes, yes.

18 MR KNOOPS: [11:01:54] -- so that means that, in answer to Mr Vanderpuye, I think
19 that this factor could also be relevant for the Chamber to assess.

20 PRESIDING JUDGE SCHMITT: [11:01:58] Very well. So let's try 12.00. If we take
21 longer, you get an e-mail.

22 THE COURT USHER: [11:02:04] All rise.

23 (Recess taken at 11.02 a.m.)

24 (Upon resuming in private session at 12.34 p.m.) Reclassified into public

25 THE COURT USHER: [12:34:31] All rise. Please be seated.

1 PRESIDING JUDGE SCHMITT: [12:34:42] So we have the following decision to
2 announce.

3 The Chamber takes note of the Ngaïssona Defence's request for leave to appeal and the
4 request for reconsideration of the first decision on the urgent joint Defence motion for
5 an adjournment and a suspension of deadlines, 2 December 2022, ICC-01/14-01/18-
6 1684, which I will refer to as the 2 December decision; and, second, the e-mail decision
7 of 1 December 2022 at 20.24, which I will refer to as the 1st December decision. The
8 Chamber also notes that the Yekatom Defence supports these motions and likewise
9 takes note of the Prosecution and legal representative responses.

10 The Chamber recalls the applicable law governing requests for leave to appeal under
11 Article 81(1)(d) of the Statute as set out in its decision ICC-01/14-01 /18-525.

12 As regards the 2 December decision, the Chamber notes that the issue raised is the
13 following:

14 "Whether in the absence at trial of the support staff, irrespective of the underlying
15 reasons for it, the representation of counsel as set forth by your Chamber in its ruling
16 last Friday is deemed to be effective for the examination of a witness like P-0487 in light
17 of two circumstances ..."

18 According to the Ngaïssona Defence, these circumstances are the centrality of P-0487's
19 prospective evidence and the substantive role of the Defence support staff.

20 The Chamber considers that the issue raised is not an appealable issue. Rather, the
21 Chamber is of the view that it is a mere disagreement with the Chamber's reasoning
22 and findings. As indicated in the 2 December 2022 decision, the Chamber considers
23 that the governing factor in determining whether an accused is appropriately
24 represented is whether counsel is present and available to represent the accused in and
25 outside the courtroom.

1 The Chamber notes that this is still the case.

2 Accordingly, the request for leave to appeal is rejected.

3 For the same reasons, the Chamber does not see the need to reconsider this decision
4 and rejects this request.

5 As regards the 4 December 2022 decision, we have just received a medical update from
6 the detention centre. In light of this, and also bearing in mind the arguments
7 presented, the Chamber decides to reconsider its decision.

8 The Chamber cancels the hearing this afternoon and -- until we receive further updates
9 of the medical unit at the detention centre on the health status of Mr Ngaïssona. The
10 Registry is ordered to provide us with this update, the next update at the latest on
11 Thursday this week.

12 And furthermore, the Chamber stresses also the importance in that regard of the return
13 of Mr Ngaïssona to be physically present in the courtroom.

14 As regards the request under Regulation 135 of the regulations of the Registry,
15 ICC-01/14-01/18-1688, the Chamber notes that it will rule on the motion in due course.
16 It does not consider there to be a need to shorten the response deadlines.

17 This concludes the oral ruling.

18 What about having another witness, perhaps, this week that we could -- that does not
19 affect Mr Ngaïssona in the way that 487 does?

20 MR VANDERPUYE: [12:39:17] Thank you, Mr President. I was just mumbling about
21 that, trying to sort something out. The next witness I think we have is 1858. I don't
22 believe that witness is as impactful for Mr Ngaïssona's Defence, and I understand that
23 that witness is set to fly out tomorrow.

24 I'll look into seeing whether or not it's possible to have that witness available shortly
25 thereafter and I'll come back to the Chamber.

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- 1 PRESIDING JUDGE SCHMITT: [12:39:43] Thank you very much for that.
- 2 From what we understand from the medical update is that it does not look promising
- 3 that we could come back to the courtroom with this -- under the circumstances with
- 4 this witness the whole week. So I don't know if -- you haven't received it probably yet,
- 5 okay, but, it simply says this.
- 6 And so I don't know for how many days 1858 would be ...
- 7 MR VANDERPUYE: [12:40:16] Three days is the consensus.
- 8 PRESIDING JUDGE SCHMITT: [12:40:18] Okay. It will be difficult.
- 9 MR VANDERPUYE: [12:40:27] It will be difficult to get them in -- get the witness in --
- 10 PRESIDING JUDGE SCHMITT: [12:40:30] But we are in a limbo here, so we --
- 11 MR VANDERPUYE: [12:40:32] Exactly.
- 12 PRESIDING JUDGE SCHMITT: [12:40:33] We cannot determine that now. We have to,
- 13 let's say, decide and live, so to speak, from day to day at the moment. And if the
- 14 impact to the accused, Mr Ngaïssona, of this witness is not so great as potentially the
- 15 impact of 487 would be, I take it from the submissions by Mr Knoops that he and his
- 16 client would consider a waiver in that regard and so that we could continue with that
- 17 one.
- 18 MR VANDERPUYE: [12:41:02] Yes, Mr President. I will get back to the Chamber as
- 19 soon as I have more information on that, and I will also talk with Mr Knoops and
- 20 Ms Dimitri about the -- if there is going to be any impact in advancing that witness.
- 21 PRESIDING JUDGE SCHMITT: [12:41:14] Okay. Thank you very much.
- 22 The Court is adjourned.
- 23 THE COURT USHER: [12:41:24] All rise.
- 24 (The hearing adjourned in private session at 12.41 p.m.) Reclassified into public