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**International
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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

PUBLIC

**Prosecution's Response to "Yekatom Defence Submissions for First Status
Conference" (ICC-01/14-01/18-472)**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) responds to the “Yekatom Defence Submissions for First Status Conference” (“Defence Submission”)¹ as follows:

2. *First*, Trial Chamber V (“Chamber”) should reject the Defence requests relating to a) the use of experts; b) testimony given by audio or video link; c) the lifting of redactions to information related to ongoing investigations; and d) the proposal to amend the Redaction Protocol. The Prosecution notes with some concern that the Defence Submission goes beyond the scope of the specific issues identified in the Chamber’s 19 March 2020 Order², and appears to pre-litigate matters yet to be formally raised.

3. *Second*, regarding those issues on which the Defence intends to file motions, as set out in Section B of this filing, the Prosecution will respond as appropriate upon their submission. Section C, briefly addresses certain general complaints the Defence advances for which no specific remedy is sought.

II. SUBMISSIONS

A. Specific requests raised

a. Use of Expert Witnesses

4. The Defence request that the Chamber “require the parties to identify the subject of an expert evidence that it believes is necessary in this case and to justify how such evidence would advance the proceedings”, “order the parties to jointly instruct an expert”, and direct that “[n]o party should be allowed to call its own

¹ ICC-01/14-01/18-472.

² ICC-01/14-01/18-459.

expert unless leave is granted pursuant to Regulation 44(3)",³ is unnecessary and unfounded.

5. There is no statutory requirement for a Party to seek leave to call an expert, or to jointly instruct one. Although the Chamber may in the proper exercise of its discretion direct the joint instruction of experts in the interests of judicial economy, it must also balance the Parties' rights pursuant to article 64(2) and (3). If implemented, the proposal would impose pre-conditions unreasonably restricting a Party's discretion, right, and ability to efficiently prepare and present their case.

6. As previously noted, the Prosecution anticipates calling between five and eight experts, most of whom it already engaged in anticipation of the confirmation proceedings.⁴ However, the Prosecution is not opposed to and, as stated "intends to invite the Defence's consideration of a joint engagement in respect of others".⁵

b. Testimony Given by Audio or Video Link

7. The Prosecution disagrees with the Defence's proposal requiring a Party seeking video-link testimony to file a motion setting out the merits of the video-link testimony for the particular witness, to then be considered by the Chamber on a case-by-case basis.⁶ The filing of such a motion is not a statutory requirement and, as the Defence concedes,⁷ previous Chambers have accorded the Parties a degree of discretion in their use of video-link testimony,⁸ especially when it enables the Party to present evidence more efficiently.

³ ICC-01/14-01/18-472, para. 7.

⁴ ICC-01/14-01/18-474, para. 16.

⁵ ICC-01/14-01/18-474, para. 16.

⁶ ICC-01/14-01/18-472, para. 11.

⁷ ICC-01/14-01/18-472, para. 8.

⁸ Such as the Ongwen and Bemba et al. cases. See ICC-02/04-01/15-497, para. 17 and ICC-01/05-01/13-1697, para. 16.

8. Requiring the Parties to file a motion each time video-link is proposed as a means to facilitate witness testimony will create an additional obstacle to the efficiency of the proceedings, lead to multiple requests being filed, and place an unnecessary strain on the Court's limited resources.

9. Notably, previous Chambers have recognised that video-link and in-court testimony are not "meaningfully different" and that "the legal texts of the Court equate in-court and video-link testimony".⁹ Witnesses testifying via video-link do so *viva voce* directly to the Chamber in real-time under oath, like in-court witnesses do. They can be examined and cross-examined without additional constraints.¹⁰ Therefore, the use of video-link is not prejudicial to or inconsistent with the rights of the Accused.

10. Moreover, recourse to video-link testimony may become more conducive to the efficient administration of justice in view of the COVID-19 pandemic. Depending on the development of the current situation, video-link testimony may need to be relied on more heavily, augmenting the number of potential requests. Other Chambers have found that logistical difficulties related to witnesses' travel to the seat of the Court, which may seriously affect the expeditious conduct of the proceedings, is a relevant factor in justifying video-link testimony.¹¹

11. Therefore, the Parties should be accorded a level of discretion in terms of deciding which of their witnesses to present via video-link. In circumstances where the Defence objects to the appearance of Prosecution witnesses via video-link, it would be more efficient to address such specific concerns through a motion brought on a case-by-case basis, as opposed to burdening the Parties and the Chamber with a general requirement.

⁹ ICC-01/05-01/13-1697, paras. 9-10.

¹⁰ ICC-01/05-01/13-1697, para. 12; ICC-01/05-01/08-947-Red, para. 12.

¹¹ ICC-01/05-01/08-2525-Red, para. 7.

c. Lifting of Redactions to Information Related to Ongoing Investigations

12. The Defence requests for the Chamber to “set a firm deadline for the Prosecution to lift all redactions based on its ongoing Seleka investigation (A.8) and leads and sources (A.6.1)”¹² are impractical and untenable. Setting a firm deadline to reveal this information is not only arbitrary, but would contravene the Prosecution’s and the Court’s obligations under article 68. It would further unnecessarily and unreasonably jeopardise the Prosecution’s ongoing investigations.¹³

13. The Defence’s assertion that the Prosecution’s ongoing investigations could be “used as an excuse for the Prosecution’s failure to fully meet its disclosure obligations or to delay the start of the trial”,¹⁴ is unfortunate. That aside, it is premature and lacks any concrete basis. The Prosecution exercises due diligence in relation to its obligations. It has, and continues to, disclose material that falls within article 67(2) and rules 76 and 77 on a rolling basis.

14. Many standard redactions relating to ongoing investigations, leads, and sources, are not material to the preparation of the Defence, nor fall within the ambit of article 67(2) or rule 77. A general deadline to lift all A.8 and A.6.1. redactions would thus also encompass this irrelevant information, unnecessarily endangering the Prosecution’s separate ongoing investigations and risking the security of sources. When redactions to material information are also justified pursuant to rule 81(2), a balance needs to be struck. In this regard, as the Defence points out,¹⁵ there have been fruitful *inter partes* discussions which led to the Prosecution’s lifting of additional redactions in the past.

¹² ICC-01/14-01/18-472, para. 17.

¹³ The Prosecution is also continuing limited investigations in the present case, narrowly focussed on progressing limited matters which arose prior to the confirmation hearing. *See* “Prosecution’s Response to the “Defence Submissions pursuant to Trial Chamber V’s “Order Scheduling First Status Conference””, paras. 6-9 (submitted on 20 April 2020).

¹⁴ ICC-01/14-01/18-472, para. 16.

¹⁵ ICC-01/14-01/18-472, para. 18.

15. As noted previously, the Prosecution welcomes *inter partes* discussions in view of settling disclosure disagreements. Further, in case of continuing disagreements between the Parties on specific redactions, the receiving Party may challenge them in accordance with the existing regime.¹⁶

d. Amendments to the Redaction Protocol

16. The Defence's proposed amendments to the current redaction regime are not warranted as concerns category B.1, B.2 and B.3 redactions. The proposed amendments are unnecessary and duplicative of existing safeguards and the Prosecution's disclosure obligations. Moreover, they unreasonably limit the information that can be redacted pursuant to these established standard categories.

17. Contrary to the Defence's concern that information material to its preparation is being redacted under these categories,¹⁷ the Prosecution's disclosure obligations pursuant to article 67(2) and rule 77, and the current redaction protocol sufficiently address and safeguard the Defence's interests.

18. The Prosecution has adapted its process of disclosure review and applied redactions under the established protocol, which comprises categories "well-founded in the case-law and practice of this Court".¹⁸ Were the Chamber to alter the balance struck in the Pre-trial Chamber's redaction protocol, it would adversely affect the Prosecution's process, create inefficiencies, and potentially delay disclosure. The Prosecution also reviews existing redactions with a view to lifting those that become redundant as the case develops.

19. As with rule 81(2) redactions discussed above, when redactions to information that is material to the Defence also fall within the standard redaction categories B.1,

¹⁶ ICC-01/14-01/18-64-Conf, para. 28; ICC-01/14-01/18-459, para. 8.

¹⁷ ICC-01/14-01/18-472, paras. 72-77.

¹⁸ ICC-01/14-01/18-64-Conf, para. 28.

B.2, or B.3, a balance will need to be struck between the competing obligations. As stated above, the Prosecution is open to *inter partes* discussions, failing which a Party may reasonably address the Chamber in accordance with the existing regime.¹⁹

B. Notices of filing a motion submitted by the Defence

20. The Defence Submission provides notice of an intention to file separate motions relating to the following issues:

- Disclosure of draft witness statements;²⁰
- Disclosure of annexes to witness statements pursuant to rule 76 and of all material shown to or obtained from Prosecution witnesses that were an integral part of a witness statement;²¹
- Disclosure of Sango statements in the original language;²²
- Disclosure of exculpatory material from another case;²³
- Additional details relating to the charges.²⁴

21. As noted, the Prosecution will respond to these issues setting out in detail its positions, if and when they are formally raised by the Defence.

C. Other issues raised by the Defence

22. The Defence Submission raises several matters for which no specific remedy is sought. Among these are the Defence's intention to interview all witnesses whose

¹⁹ ICC-01/14-01/18-64-Conf, para. 28; ICC-01/14-01/18-459, para. 8.

²⁰ ICC-01/14-01/18-472, paras. 20-25.

²¹ ICC-01/14-01/18-472, paras. 26-29.

²² ICC-01/14-01/18-472, paras. 30-32.

²³ ICC-01/14-01/18-472, paras. 33-36.

²⁴ ICC-01/14-01/18-472, paras. 46-54.

evidence is sought to be admitted under rule 68(2)(b)²⁵ and delayed disclosure of witness's identities.²⁶

23. In relation to rule 68(2)(b) witnesses, the Prosecution notes that the Defence have already conducted interviews of several of its witnesses in accordance with the relevant protocol. The Prosecution welcomes continued cooperation between the Parties in this respect.

24. As concerns matters related to delayed disclosure, these have been addressed in the "Prosecution's Observations on the Agenda of the First Status Conference".²⁷

III. RELIEF SOUGHT

For the above reasons, the Prosecution requests the Chamber to reject Defence requests relating to a) the use of experts; b) testimony given by audio or video link; c) lifting of redactions to information related to ongoing investigations; and d) Defence proposal to amend the Redaction Protocol.



Fatou Bensouda, Prosecutor

Dated this 20th day of April 2020
At The Hague, The Netherlands

²⁵ ICC-01/14-01/18-472, para. 12.

²⁶ ICC-01/14-01/18-472, para. 40.

²⁷ ICC-01/14-01/18-474, paras. 30-31.