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**International
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Court**

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

Date: **25 January 2021**

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***

Confidential

**Prosecution's Observations on the "*Requête des Représentants Légaux Communs des
Victimes des autres crimes aux fins de réalisation partielle des déclarations
d'ouverture par liaison vidéo*" (ICC-01/14-01/18-838-Conf)**

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") provides its observations concerning the *"Requête des Représentants Légaux Communs des Victimes des autres crimes aux fins de réalisation partielle des déclarations d'ouverture par liaison vidéo"*.¹ First, the Prosecution defers to the discretion of Trial Chamber V ("Chamber") in the disposition of the Request. Second, insofar as the Request concerns opening statements, the Prosecution notes that the Chamber has not provided the Participants or the Parties specific guidance on their appropriate scope and purpose. Accordingly, the Prosecution requests that the Chamber provide such direction, including as set out below.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(1) of the Regulations of the Court ("RoC"), this Observation is filed as "Confidential", as it concerns a filing of the same designation. A "Public Redacted" version will be filed as soon as practicable.

III. SUBMISSIONS

A. The Prosecution Defers to the Chamber's Discretion

3. The Prosecution considers that the reasons for the relief set out in the Request are justified. They directly correspond to the prevailing restrictions in the Host State regarding the COVID-19 pandemic,² and are a direct result of the 10-day quarantine period currently in place, as well as the associated financial and/or budgetary burdens.

4. The Prosecution considers that the Legal Representatives should be accorded the opportunity fully to participate in the proceedings. As this appears technically feasible

¹ ICC-01/14-01/18-838-Conf ("Request").

² ICC-01/14-01/18-838-Conf, para. 6.

via video link or other technologies as proposed,³ it may indeed be the least costly and most efficient means to accommodate their interests and importantly, those of the victims.

5. Accordingly, the Prosecution defers to the Chamber's discretion on how to best balance the competing interests at stake including, *inter alia*, judicial economy, the rights of the Legal Representatives and victims, and the budgetary impact of the appropriate mode(s) of participation.

B. The Chamber Should Provide Clear Direction on the Scope and Purpose of Opening Statements

6. As noted, the Prosecution observes that the Chamber has not yet given the Parties and Participants specific guidance on the appropriate parameters of opening statements. Clarity in this respect is necessary.

7. The purpose of opening statements, quite distinct from that of closing statements, is limited to the summarisation of, or commentary on, the evidence that a given Party intends to adduce during its case-in-chief and what that evidence will prove. An opening statement is not evidence in itself, nor is it for the purpose of argument.⁴ The Prosecution considers that the Chamber should provide such

³ See ICC-01/14-01/18-849-Conf, paras. 6-10.

⁴ See e.g., ICC-01/04-01/06-1346, para. 1 (noting that the purpose of opening statements is so that the Parties can "explain their respective cases"); *Prosecutor v. Kunarac et al.*, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, Case Nos. IT-96-23 & 23/1, 3 July 2000, para. 10 ("the Trial Chamber does emphasise that there is no justification for the defence submission that the material in the opening statement cannot be limited. The opening statements which the parties are permitted by Rule 94 to make *are intended only to assist the Trial Chamber in understanding the evidence which is to be placed before it*") (emphasis added); *Prosecutor v. Sesay et al.*, Prosecution Opening Statement, Case No. SCSL-04-15-T, 5 July 2005, p. 6, Ins. 32-34, p. 8, Ins. 21-22 (an opening statement "is not evidence, it is merely a statement of expectations" and "a mere declaration of intentions"); *Prosecutor v. Sesay et al.*, Status Conference, Case No. SCSL-04-15-T, 2 May 2007, p. 31, Ins. 2-4 (an opening statement "isn't the final argument" but "what [the Defence] intend to lead as evidence"); *Prosecutor v. Norman et al.*, Status Conference, Case No. SCSL-04-14-T, 19 January 2006, pp. 24, Ins. 17-21, 24-25, pp. 28-29, Ins. 26-6 (stating that "a party may make an opening statement confined to the evidence he intends to present in support of his case", that "opening statements is not the arguments at the end of the trial, as such", and "[t]o argue about the validity and trustworthiness or otherwise of a witness for the Prosecution is not part of what is normally contained in an opening statement, as such. It is to be confined to the evidence you intend to lead"); ADC-ICTY, Manual on International Criminal Defence: ADC-ICTY Developed

guidance to the Parties, and such other guidance as may be appropriate in respect of the Participants.

8. Moreover, should the Accused intend to make an oral unsworn statement pursuant to article 67(h), the Chamber should further direct that timely notice be provided, and set reasonable and clear parameters in terms of time and content in accordance with the Court's jurisprudence.⁵

IV. CONCLUSION

9. For the reasons above, the Prosecution defers to the Chamber's discretion regarding the Request, and considers that the Chamber should provide guidance and direction to the Parties and Participants on the relevant scope of opening statements.



James Stewart, Deputy Prosecutor

Dated this 25th day of January 2021

At The Hague, The Netherlands

Practices, 2011, para. 42 (noting that "[t]he primary purpose of the Defence opening statement [...] is to *provide an overview of the Defence evidence*: the witnesses who will be called and the nature of the information they are expected to present." Also noting that opening statements are "*not meant to be argumentative*") (emphasis added).

⁵ See ICC-02/11-01/15-205, para. 25 ("Shall either accused decide to exercise this right, the respective Defence team shall file a notice with the Chamber, prior to the start of its presentation of evidence, if any. Thereafter, the Chamber will rule on the appropriate moment and modalities for the accused to exercise this right."); ICC-01/05-01/08-1023, para. 21 ("He may make an unsworn statement at his convenience but shall nonetheless inform the Trial Chamber in order that it may decide on the appropriate moment and modalities for so doing."); ICC-01/04-02/06-619, para. 19 ("Should the accused decide to exercise his right under Article 67(1)(h) of the Statute to make an unsworn oral or written statement, the Defence shall file a notice prior to the start of the Defence's case, if applicable, so as to allow the Chamber to rule on the appropriate moment and modalities."); ICC-01/04-01/07-1665, para. 12 ("Whenever an accused wishes to make an unsworn statement, he or she shall inform the Chamber, which will decide on the appropriate moment and modalities for making the statement.").