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**International
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Date: 30 November 2023

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

**Defence Response to
“Prosecution’s Urgent Request for Clarification and
Order for Disclosure of Defence Witness Statements”
(ICC-01/14-01/18-2221), filed 24 November 2023**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. The Defence for Mr Ngaïssona ('Defence') requests Trial Chamber V ('Chamber') to reject the Prosecution's "Prosecution's Urgent Request for Clarification and Order for Disclosure of Defence Witness Statements"¹ in entirety. This is because:
 - a. Granting the Rule 79(4) Request to disclose all "signed and acknowledged statements of witnesses"² on Defence witness lists would *on principle* infringe Article 67(1)(g) of the Statute;
 - b. The Prosecution's interpretation of paragraph 21(ii) of the Further Directions³ is at odds with the jurisprudence and practice of the ICC;
 - c. The Prosecution speculates when it suggests that granting the Request will advance the truth;
 - d. The Request misconstrues the meaning of equality of arms; and
 - e. It proceeds from an assumption of bad faith and lack of conformity with professional standards by the Defence which should be rejected.

II. SUBMISSIONS

2. The Request is a fishing expedition and is careless regarding the collateral impacts it might have upon a fair trial. It is also premature since the Prosecution will not necessarily be in possession of all the witness summaries and/or statements until 15 December 2023.⁴

¹ ICC-01/14-01/18-2221 ('Request'). The deadline to respond was varied to 30 November 2023 by email on 24 November 2023 at 17h05, subject 'Order shortening the time limit to respond to Prosecution request ICC-01/14-01/18-2221'.

² Request, para. 2.

³ ICC-01/14-01/18-1892 ('Further Directions').

⁴ ICC-01/14-01/18-2181, para. 9.

3. The Prosecution cannot reasonably assert that the order it seeks will lead to no prejudice or contribute to the truth. Yet, the order it seeks is counter to the practice and jurisprudence of the ICC and undercuts the internationally recognised right of an accused to remain silent.
4. The Prosecution Request is internally inconsistent in its argumentation. It cannot be both the case that an order to disclosure material causes no prejudice because the Defence “had advance notice that it would be required to disclose available statements”⁵ but the Prosecution seeks a clarification because “the Further Directions may indeed be susceptible to different understanding”.⁶
5. The Chamber should also reject the Requests oblique argumentation referring to “the Bemba case”.⁷ The Request provides no reference to findings or decisions made by either Trial Chamber III or Trial Chamber VII. It is not clear what the Request refers to but to the extent that it seeks to persuade by telegraphing arguments which may even involve information that is not available to the *Ngaïssona and Yekatom* trial it is inappropriate, not transparent, and should be rejected.

A. The Rule 79(4) Request should be rejected for being counter to ICC jurisprudence infringing the right against self-incrimination

6. The Request for an order pursuant to Rule 79(4) is contrary to ICC jurisprudence. Trial Chamber II in *Katanga and Ngudjolo* in interpreting Rule 79(4), noted that:

The Chamber is of the view that an obligation to disclose a document outlining the defences, as well as any information regarding the identification of Defence witnesses, their statements or summaries thereof, cannot be inferred from Rule 79(4). Such material cannot be considered as

⁵ Request, para. 10.

⁶ Request, para. 4.

⁷ Request, para. 8 (“As prior ICC trials have shown, withholding such statements has impeded Chambers’ ability to detect testimony that is seriously questionable, to say the least. One need not look farther than the Bemba case to appreciate the gravity and impact of such a procedural lapse.”)

“evidence” and does not therefore fall within the material which the Defence may be ordered to disclose pursuant to this rule.⁸

7. That Chamber clearly drew the connection between orders under Rule 79(4) and risks around infringing Article 67(1)(g). It noted that:

there are other provisions envisaging disclosure that may go beyond the scope of Rules 78 and Rule 79(1), namely Rule 79(4), Regulation 54 of the Regulations of the Court and Regulation 52 of Regulations of the Registry. However, **these rules must always be read in light of the statutory rights of the accused**; the Chamber has a "duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded"⁹

B. Interpreting the Further Directions to require the disclosure of all statements of testifying witnesses is untenable

8. The Prosecution advances no legal explanation for its interpretation of the Further Directions.¹⁰ If the Further Directions had provided for the disclosure of all signed and acknowledged statements as suggested by the Prosecution, then the Defence would expect a clear articulation of the legal reasoning due to the significant departure from the jurisprudence at the ICC and the impact upon internationally recognised human rights described next. In the absence of such reasoning, the Further Directions can only be interpreted as an application of the clear and constant jurisprudence of the Court regarding the disclosure obligations of the Defence.
9. That the Chamber would alter years of practice at the ICC and the ICTY before it in six words without reasoning, and apply a Defence version of Rule 76, does not comport with a reasonable set of assumptions about a predictable and fair legal process.

⁸ ICC-01/04-01/07-2388, para. 55.

⁹ ICC-01/04-01/07-2388, para. 40 (bold underline added).

¹⁰ The Further Directions make no mention of Rule 79(4). The only reference to Rule 79 concerns the Yekatom Defence and alibi. *See* Further Directions, footnote 18 and para. 16.

10. The jurisprudence setting out the standard rules of Defence disclosure are clear. As the Single Judge of Trial Chamber VII noted, the prior finding of Trial Chamber VII and other Chamber are that:

the disclosure **obligations of the defence differ significantly from those of the Prosecution**. Rule 78 of the Rules provides that objects ‘which are intended for use by the defence as evidence’ have to be disclosed. From the wording of Rule 78 of the Rules, **it is clear** that **only** an item which the defence ‘intends to use’ falls under its disclosure obligations. The **scope of the Rule 78 of the Rules is accordingly limited to the defence’s choice of evidence**. This narrow interpretation of the defence’s disclosure obligations is in accordance with the required protection of the rights of the defence.¹¹

The Single Judge of Trial Chamber VII also noted that he was:

not persuaded by the Prosecution’s argument that evidence falls under the purview of Rule 78 of the Rules because other evidence going to the same content was led by the defence.¹²

In other words, the obligation to disclose cannot be transferred to other material in the Defence’s possession simply by being linked to some material that the Defence is obliged to disclose. This underscores how limited the disclosure obligations are in comparison to those of the Prosecution.

11. This does not mean that there are no legal criteria. The obligation of disclosure extends to “materials as soon as the defence makes a decision **to use an item as evidence**”.¹³ If there is no final decision to submit the item pursuant to Article 69, then an item does not get **used as evidence** and therefore does not need to be disclosed pursuant to Rule 78. The Yekatom Defence reading of paragraph 21(ii) referred to by the Prosecution in paragraph 3 of the Request is consistent with the standard application of Rule 78.

¹¹ ICC-01/05-01/13-1820, para. 8 (bold underline added).

¹² ICC-01/05-01/13-1820, paras 6-8.

¹³ ICC-01/05-01/08-2141, para. 17.

C. The Request implicates the right of an accused to remain silent

12. That the Request dedicates four paragraphs¹⁴ to the issue of self-incrimination is a tacit recognition that the interpretation the Prosecution is giving paragraph 21(ii) implicates the rights in Article 67(1)(g) and the internationally recognised human rights.
13. The starting point for consideration of ordering the defence to disclose evidence is that “the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence”.¹⁵ The jurisprudence interpreting Rule 78 discussed above, all started from this important principle. Trial Chamber VII explained that the narrow interpretation of Rule 78 discussed above results from the need to give effect to the protection of the rights of the Defence.¹⁶ By implication, ordering the Defence to provide material it does not intend to use immediately impacts upon this right.
14. *In contrast*, the Request has adopted a narrow interpretation of the right against self-incrimination that does not comport with the law. The Prosecution argues that the Request does not infringe the right to remain silent, by in part suggesting that it does not seek the defendants to testify.¹⁷ That is not the legal standard. Trial Chamber VII, for example, decided that ordering the provision of statements taken by the Defence in the Bemba Main Case in a subsidiary Article 70 case, which *could* have been in the possession of one of the Accused, would constitute infringing the right against self-incrimination.¹⁸ This demonstrates that the right involves more than prohibiting compelling testimony. Similarly, Trial Chamber VII later dismissed¹⁹ the request for provision of a recording of an interview which led to a statement citing this decision.

¹⁴ Further Directions, paras 9-12.

¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on disclosure by the Defence, 20 March 2008, ICC-01/04-01/06-1235-Anx1, para. 12.

¹⁶ ICC-01/05-01/13-1820, para. 6.

¹⁷ Request, para. 10.

¹⁸ ICC-01/05-01/13-907.

¹⁹ ICC-01/05-01/13-1820.

15. Trial Chamber VII's approach is consistent with a human rights-based interpretation that ensures that the right is effective and broadly construed. The European Court of Human Rights ('ECtHR') has for example noted that the "the privilege against self-incrimination is not confined to actual confessions or to remarks which are directly incriminating; for statements to be regarded as self-incriminating it is sufficient for them to have substantially affected the accused's position".²⁰ In other words, the Chamber should consider the impact of granting the Request notwithstanding that it does not seek compelled testimony.
16. In another ECtHR judgment, that court considered that the protection against self-incrimination concerns "exculpatory remarks or mere information on questions of fact, [that] may be deployed in criminal proceedings in support of the prosecution case".²¹ In other words, as a principled point, the protection against self-incrimination relates to an accused not having to assist in his or her own prosecution whether that assistance is ultimately useful or not.
17. In the abstract, ordering the blanket provision of statements may lead to the Defence being forced to lead evidence that it would not otherwise have to. Unlike some national jurisdictions, the ICC trial procedure does not limit cross-examination solely to topics raised in direct examination.²² Yet therefore, the Prosecution does not suffer prejudice from not having statements, since they are able to explore any issue, they deem relevant in cross examination.
18. For these reasons, it is ill-conceived for the Request to suggest that it does not require that the defendants produce evidence against themselves.²³ It is impossible for the

²⁰ *Beuze v. Belgium* [GC], [no. 71409/10](#), 9 November 2018, para. 178.

²¹ *Ibrahim and Others v. the United Kingdom* [GC], nos. [50541/08](#) and 3 others, 13 September 2016, para. 268.

²² See for example the United States federal rules of evidence

(https://www.law.cornell.edu/rules/fre/rule_611) , Rule 611(b):

"Scope of Cross-Examination. Cross-examination **should not go beyond the subject matter of the direct examination** and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination" (bold underline added).

²³ Request, para. 11.

Prosecution to assert this in the abstract, and has all the indications of being a fishing expedition.

D. The Request incorrectly speculates that the hypothetical provision of statements will assist the search for the truth

19. As noted above, the Request implicates the right to be protected against self-incrimination. The Prosecution speculation that granting the Request will advance the truth²⁴ needs to be considered against this backdrop. The ECtHR has rejected that crime-control expediency trumps all Defence interests. It has noted that “[p]ublic-interest concerns cannot justify measures which extinguish the very essence of an applicant’s defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention”.²⁵ In other words, the pursuit of the truth cannot brush aside all other human rights considerations.
20. Yet, the Prosecution argument that granting the Request will advance the truth is also misplaced and speculative. The Prosecution assumes that a statement will, in the abstract, lead to a more accurate representation of the anticipated testimony of the witness and permit scrutiny of the Defence case than a detailed summary. There are many reasons why this is potentially incorrect. Among the reasons are that statements might have been taken on different subject matter than the reasons a witness is ultimately called, or the statement might contain a terse account of the subject matter to be led and include many other issues. By contrast a Defence summary may reflect information uncovered in conversation with the witness that was not included in the statement for whatever reason and/or mention information the Defence expects the witness to confirm based upon other investigations. Secondly, as was illustrated during the Prosecution case, statements may not ultimately assist with preparation. As has occurred before this Chamber, witnesses may testify that their statement is

²⁴ Request, para. 6.

²⁵ *Bajić v. North Macedonia*, [no. 2833/13](#), 10 June 2021, para. 68.

merely a summary of part of what they said and that it omits important context that they discussed with the interviewer.

21. The underlying argument²⁶ of the Rule 79(4) Request: that because information *could* assist the Prosecution or the truth, it should be disclosed, is a principle without a limit. Although it possible to speculate that many types of material would assist the proceedings, Trial Chambers of the ICC and the rules of the court have, unless compelling reasons are offered to the contrary, prevented materials like victims' applications and internal Prosecution analysis from entering the proceedings for numerous reasons.

E. The Prosecution's understanding of equality of arms is overly broad

22. The Request seeks to transform Rule 79(4) into Rule 76(1) through rhetorical arguments about equality of arms that ignore the wider legal structure in which Rule 79(4) and the Defence presentation of evidence occur. The case-law cited by the Request are dissenting opinions and do not address the question of defence disclosure²⁷ or are broad statements of principle from the *ad-hocs* tribunals.
23. Trial Chamber II and others have explained why the Prosecution's argument based on equality of arms is ill-conceived. That Chamber noted that:

the Statute's framework does not provide for a reciprocal disclosure regime. The disclosure obligations of the Prosecution and the Defence differ significantly, **because of the particular roles that these two parties have at trial.** While the Prosecution bears the burden of proof and has to investigate both incriminating and exonerating circumstances pursuant to Article 54(1)(a) of the Statute, the role of the Defence is largely reactive to the

²⁶ Request, para. 6 ("The provision of the Defence Witness Statements is of clear importance to the Parties' and Participants' ability to properly test evidence presented in the Defence case in chief, and to do so effectively and efficiently. In turn, this also advances the truth seeking function of the Court, assists in the corresponding responsibilities of the Chamber, as well as promotes judicial economy, by mitigating (if not avoiding altogether) foreseeable delay and inefficiency that will result if witnesses testify at variance with the 'detailed' summary provided.")

²⁷ Request, footnotes 7 and 9.

Prosecution's presentation of evidence. The Statute and the Rules impose on the Prosecution specific obligations of disclosure of incriminating and exculpatory material to the Defence, in time to allow the accused to adequately prepare its defence. **Different and more limited disclosure obligations are imposed on the Defence by Rules 78 and 79 of the Rules.**²⁸

24. As noted by the Appeals Chamber in the appeal against the *Ongwen* Trial Judgment the *travaux préparatoires* indicates that even the requirements of disclosure in Rule 79(1)(b) relation to affirmative defences were even found to be controversial.²⁹ Thus, agreeing with the Prosecution thus using Article 64(2) to transform Rule 79(4) into a mirror of the Prosecution's disclosure obligation in Rule 76(1) is not sustainable.
25. The practice of the *ad-hoc* tribunals discussing equality of arms and disclosure obligations are also illustrative of how ill-conceived the Prosecution argument is. For example, judges at the ICTR note: "There is no blanket right for the prosecution to see the witness statement of a Defence witness [...] Strictly speaking, the principle of equality of arms is not relevant to the problem".³⁰
26. Similarly, at the SCSL judges noted that:

The Chamber opines, as matter of law, that the Prosecution logically has no right to disclosure of the Defence witness statements, and thereby there is no correlative obligation on the Defence to produce such witness statements to

²⁸ ICC-01/04-01/07-2388, para. 36 (bold underline added).

²⁹ Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", 15 December 2022, ICC-02/04-01/15-2022-Red, footnote 631 ("The Appeals Chamber considers that rule 79(1)(b) of the Rules gives effect to the adversarial principle (*contradictorio*) which allows each of the parties to contest the statement of facts and the legal grounds brought against them and underscores the principle of "equality of arms" before the Court. In particular, the drafting history of rule 79, reveals that while some delegations "**expressed resistance to imposing any reciprocal disclosure obligations on the defence**" the prevailing view was that "in light of the nature of cases falling within the Court's jurisdiction and the principle of 'equality of arms' before the Court, reciprocal disclosure was appropriate". As a result, **limited disclosure obligations** by the Defence, **with respect to grounds excluding criminal responsibility under article 31(1) of the Statute, was imposed** to ensure that the Prosecutor was "forewarned" and had "sufficient time to investigate such matters" and to avoid "lengthy adjournments"." bold underline added)

³⁰ *Prosecutor v. Bagosora et al.*, [Decision on Sufficiency of Defence Witness Summaries](#), Case No. ICTR-98-41-T, T. Ch. I, 5 July 2005, para. 6.

the prosecution [...] it is not perceived to be necessary to insist upon reciprocal disclosure of witness statements on the part of the Defence.³¹

27. Under the hypothesis of undisclosed statements, as implicitly acknowledged by the Prosecution,³² the purported procedural inequality is not asymmetrical. As was noted by Trial Chamber VII,

If a party chooses to submit evidence while not presenting other available and purportedly more probative evidence on the same proposed fact, it will ultimately bear the risk of these choices during the upcoming assessment of the evidence by the Chamber.³³

28. To conclude this point, the Prosecution's argument based upon ensuring equality of arms is not sustainable in light of the jurisprudence and rules of the court.

F. The Request's underlying assumption of bad faith by the Defence should be rejected by the Chamber

29. The Chamber must reject the Requests attempt to re-cast Defence rights as deception and manipulation. The Prosecution suggests that failure to grant the request will lead to the failure to detect "testimony that is seriously questionable, to say the least".³⁴ It further links this claim to the Bemba trial, albeit does not explain whether it is referring to the Article 70 *Bemba et al* or Main Case hearings. It also suggested that asserting Defence rights are an attempt "to make [...] evidence immune from meaningful scrutiny or examination through obscuring the Defence Witness Statements actually in their possession and control".³⁵ These arguments appear to lay bare an assumption of dishonesty from the Defence that the Chamber must reject.

³¹ *Prosecutor v. Norman et al.*, [Decision on Prosecution Request for Order to Defence Pursuant to Rule 73 ter \(B\) to Disclose Written Witness Statements](#), Case No. SCL-04-14-T, Trial chamber I, 21 February 2006, paras 11-12.

³² Request, footnote 6 ("Disclosure of the Defence Witness Statements may also serve to protect the interests of Counsel if a witness's testimony about the contents of their prior statement is not truthful.")

³³ ICC-01/05-01/13-1820, para. 10.

³⁴ Request, para. 8.

³⁵ Request, para. 12.

30. A crucial safeguard that is not mentioned by the Request but crosscuts all the above rights is that Defence Counsel are bound by Code of Professional Conduct and Defence Counsel's national professional and/or deontological standards. The Chamber regularly invokes its assumption that the Prosecution is making Rule 77 assessments in good faith and in a professional way.³⁶ The basis for this is an expectation of professionalism. There is no reason this should not apply equally to the Defence.

III. CONCLUSION

31. Therefore, for the reasons above, the Defence requests that Chamber to REJECT the request to the Chamber to direct the Defence to disclose all signed or acknowledged statements of individuals in the respective final witness lists in their possession and control forthwith.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 30 November 2023

At The Hague, the Netherlands.

³⁶ See, for example, ICC-01/14-01/18-2196, paras 7-8.