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**No. ICC-01/14-01/18
Date: 5 December 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

**Decision on the Prosecution Request for Clarification and for Order to Disclose
Defence Witness Statements**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2), 67 and 69 of the Rome Statute (the ‘Statute’) and Rules 78 and 79 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Prosecution Request for Clarification and for Order to Disclose Defence Witness Statements’.

I. Procedural history and submissions

1. On 29 May 2023, the Chamber issued further directions on the conduct of the proceedings (the ‘Further Directions’),¹ in which it, *inter alia*, ordered the Yekatom Defence and the Ngaïssona Defence (together, the ‘Defence’), by 17 November 2023, to ‘provide witness statements or summaries of the anticipated testimony for all witnesses; in case no statements are available, the summaries should be sufficiently detailed and comprehensive to enable the participants and the Chamber to meaningfully prepare’.²
2. On 1 November 2023, in response to a request from the Ngaïssona Defence,³ the Chamber granted a partial extension of the 17 November 2023 deadline, permitting the Ngaïssona Defence to (i) provide witness statements or summaries of the anticipated testimony for its witnesses; (ii) file applications pursuant to Rule 68(2) and (3) of the Rules; and (iii) complete disclosure of items it intends to use during its evidence presentation on a rolling basis, from 17 November 2023, and until no later than 15 December 2023, for witnesses that are not to be called in the hearing weeks scheduled for December 2023 and between 15 January and 2 February 2024 (the ‘Decision Granting Extension’).⁴

¹ Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence), ICC-01/14-01/18-1892.

² Further Directions, ICC-01/14-01/18-1892, para. 21(ii).

³ Defence Request pursuant to Regulation 35 to vary the time limit, 20 October 2023, ICC-01/14-01/18-2157-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence (confidential redacted version notified the same day, ICC-01/14-01/18-2157-Conf-Red; public redacted version notified on 8 November 2023, ICC-01/14-01/18-2157-Red) (with one confidential annex).

⁴ Decision on the Ngaïssona Defence Request for Extension of Time, ICC-01/14-01/18-2181, para. 9, p. 6.

3. On 17 November 2023, in accordance with the Further Directions, the Defence filed, *inter alia*, their final lists of witnesses.⁵ That same day, the Ngaïssona Defence also informed the Chamber that it would not call any witnesses in the hearing weeks scheduled for December 2023 and between 15 January and 2 February 2024.⁶
4. On 24 November 2023, the Office of the Prosecutor (the ‘Prosecution’) requested the Chamber to (i) clarify that paragraph 21(ii) of the Further Directions foresees the providing of summaries only in case no statements are available; and (ii) in any event, order the Defence to disclose signed or acknowledged statements of all Defence witnesses on their final witness lists pursuant to Rule 79 of the Rules (the ‘Request’).⁷ According to the Prosecution, it has become clear that the Defence have obtained and possess signed and acknowledged statements of witnesses on their final witness lists.⁸
5. On 27 November 2023, the Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of Victims of Other Crimes jointly expressed their support of the Request.⁹
6. On 30 November 2023,¹⁰ the Yekatom Defence responded, arguing that the Request should be dismissed *in limine* as moot as being based ‘on the Prosecution misconception that the Defence is in possession of signed and acknowledged statements of its witnesses’ (the ‘Yekatom Defence Response’).¹¹ It states that it ‘has disclosed all signed and acknowledged statements of all of its witnesses appearing in the Defence List of Witnesses’.¹² The Yekatom Defence argues that,

⁵ Yekatom Defence’s List of Witnesses and Evidence, ICC-01/14-01/18-2212-Conf (with confidential Annexes A-D); Defence Submission of its Final List of Witnesses and its List of Evidence, ICC-01/14-01/18-2215 (with confidential Annexes 1-2; corrected version of Annex 1 filed on 1 December 2023).

⁶ Defence Submission of its Final List of Witnesses and its List of Evidence, ICC-01/14-01/18-2215, para. 2.

⁷ Prosecution’s Urgent Request for Clarification and Order for Disclosure of Defence Witness Statements, ICC-01/14-01/18-2221.

⁸ Request, ICC-01/14-01/18-2221, paras 2-3.

⁹ Email from the CLRV, 27 November 2023, at 09:03.

¹⁰ The Single Judge shortened the time limit to respond to 30 November 2023. *See* email from the Chamber, 24 November 2023, at 17:06.

¹¹ Yekatom Defence Response to ‘Prosecution’s Urgent Request for Clarification and Order for Disclosure of Defence Witness Statements’ (ICC-01/14-01/18-2221), ICC-01/14-01/18-2230, para. 2.

¹² Yekatom Defence Response, ICC-01/14-01/18-2230, paras 5-6.

in any event, the Request should be denied since (i) clarification of the Further Directions is unnecessary as they ‘provide the Defence with two possible alternative avenues as regards disclosure in respect of the witnesses it intends to call’;¹³ (ii) the Prosecution has failed to meet the criteria for reconsideration;¹⁴ and (iii) the sought disclosure is ill-founded in law and contrary to Mr Yekatom’s fair trial rights.¹⁵

7. On the same day, the Ngaïssona Defence responded (the ‘Ngaïssona Defence Response’),¹⁶ arguing that the Request should be rejected in its entirety, because (i) granting the request to disclose all statements under Rule 79(4) of the Rules would infringe Article 67(1)(g) of the Statute;¹⁷ (ii) the Prosecution’s interpretation of paragraph 21(ii) of the Further Directions is at odds with prior jurisprudence and practice;¹⁸ (iii) the Prosecution speculates when suggesting that this would advance the truth;¹⁹ (iv) it misconstrues the meaning of equality of arms;²⁰ and (v) it proceeds from an assumption of bad faith and lack of conformity with professional standards by the Defence which should be rejected.²¹

II. Analysis

8. The Chamber clarifies that the Further Directions fully recognised the different disclosure obligations of the Defence,²² and, on this basis, expected the Defence to provide any witness statements that have been prepared. Only in case no such statements are available, and with a view to ensuring meaningful preparation by

¹³ Yekatom Defence Response, ICC-01/14-01/18-2230, paras 3, 12.

¹⁴ Yekatom Defence Response, ICC-01/14-01/18-2230, paras 3, 13.

¹⁵ Yekatom Defence Response, ICC-01/14-01/18-2230, paras 3, 14-19.

¹⁶ 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, ICC-01/14-01/18-2231.

¹⁷ Ngaïssona Defence Response, ICC-01/14-01/18-2231, paras 1, 6-7, 12-18.

¹⁸ Ngaïssona Defence Response, ICC-01/14-01/18-2231, paras 1, 8-11.

¹⁹ Ngaïssona Defence Response, ICC-01/14-01/18-2231, paras 1, 19-21.

²⁰ Ngaïssona Defence Response, ICC-01/14-01/18-2231, paras 1, 22-28.

²¹ Ngaïssona Defence Response, ICC-01/14-01/18-2231, paras 1, 29-30.

²² See Further Directions, ICC-01/14-01/18-1892, para. 20.

the participants as well as the Chamber, sufficiently detailed and comprehensive summaries are to be provided.²³

9. This already takes into account that formalised statements may not be available in all cases²⁴ and that, importantly, the Defence is under no obligation to prepare such statements. As such, there is no basis to consider that the disclosure obligations of the Prosecution under Rule 76 of the Rules would be ‘mirrored’ onto the Defence.
10. If defence teams are in possession of formalised statements, the Chamber does not consider that their provision to the participants and the Chamber risks undermining the mentioned differences in disclosure obligations or infringing on the accused’s rights, in particular under Article 67(1)(g) of the Statute. This is especially the case in light of the fact that sufficiently detailed and comprehensive summaries should anyhow contain the substance of what would otherwise be included in written statements.²⁵
11. In any event, and bearing in mind the Yekatom Defence’s indication that it has disclosed all statements in its possession of witnesses that are on its final witness list, the Chamber considers the Request moot in this regard.

²³ See, for a similar approach, Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Fifth decision on matters related to the conduct of the proceedings: presentation of evidence by the LRVs and Defence, 22 September 2021, ICC-01/12-01/18-1756, para. 11(ii).

²⁴ Other Trial Chambers have opted for ordering provision of written statements or summaries without indicating that summaries could be provided also if written statements are available. See Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-al-Rahman (‘Ali Kushayb’)*, Second Directions on the conduct of proceedings, 15 December 2022, ICC-02/05-01/20-836, para. 21(c); Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on defence disclosure and related issues, 24 February 2012, ICC-01/05-01/08-2141, paras 28-29, 36(c)(iv); Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the “Prosecution’s Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)”, 14 September 2010, ICC-01/04-01/07-2388, paras 54-60, p. 23, para. (b)(iii). See also Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Directions on Defence Presentation of Evidence, 3 November 2015, ICC-01/05-01/13-1450, para. 12; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235-Corr-Anx1, paras 31-34; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 20 January 2010, ICC-01/04-01/06-2192-Red, paras 58-59.

²⁵ See, in relation to the content of summaries, Yekatom Defence Response, ICC-01/14-01/18-2230, para. 18.

12. In this context, and as regards the Ngaïssona Defence, the Chamber recalls that it still has until 15 December 2023 to comply with the remainder of the instructions in the Further Directions.²⁶ The Chamber notes in this regard that, until now, only one application pursuant to Rule 68(2)(b) of the Rules has been received.²⁷ Yet, it appears that the Ngaïssona Defence anticipates presenting applications under Rule 68(2) and (3) of the Rules for a total of 13 witnesses.²⁸ The Chamber further notes the Ngaïssona Defence's indication that 'the Prosecution will not necessarily be in possession of all the witness summaries and/or statements until 15 December 2023'.²⁹
13. In light of this, the Ngaïssona Defence is reminded that while the final deadline is 15 December 2023, the instructions as recalled above are to be complied with 'on a rolling basis', and not only on the day of the final deadline.

²⁶ See Decision Granting Extension, ICC-01/14-01/18-2181, p. 6.

²⁷ First Ngaïssona Defence request to introduce prior recorded testimony pursuant to Rule 68(2)(b), 4 December 2023, ICC-01/14-01/18-2238-Conf (with Confidential Annex 1).

²⁸ See Confidential Annex 1 to the Defence Submission of its Final List of Witnesses and its List of Evidence, ICC-01/14-01/18-2215-Conf-Anx1-Corr.

²⁹ Ngaïssona Defence Response, ICC-01/14-01/18-2231, para. 2.

FOR THESE REASONS, THE CHAMBER HEREBY

FINDS the Request moot; and

REMINDS the Ngaïssona Defence of the instructions contained in the Further Directions and the Decision Granting Extension, as recalled in paragraphs 12-13 of this decision.

Done in both English and French, the English version being authoritative.

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 5 December 2023

At The Hague, The Netherlands