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Original: **English**

No.: **ICC-01/14-01/18**
Date: **2 August 2024**

TRIAL CHAMBER V

Before: **Judge Bertram Schmitt, Presiding Judge**
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA

Public

Yekatom Defence Request for Partial Reconsideration of 'Decision on the Sentencing Procedure and Amended Directions on the Conduct of the Proceedings' (ICC-01/14-01/18-2600)

Source: **Defence for Mr. Alfred Rombhot Yekatom**

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. Alfred Rombhot Yekatom ('Defence') respectfully requests Trial Chamber V to reconsider its decision that the sentencing hearing - to be held between 8 to 10 January 2025 - 'will be the last procedural step before the delivery of any potential sentence' as set out in the Decision on the Sentencing Procedure and Amended Directions on the Conduct of the Proceedings.[1]

2. Under the current schedule, the Chamber has opted to render any potential decision pursuant to Article 76 of the Statute simultaneously with the judgment under Article 74.[2] Whilst the Defence acknowledges that the Chamber is correct, in that the simultaneous issuance of a decision under Article 76 and a judgment under Article 74 is a possible avenue within the statutory framework, this possibility hits a roadblock where either the Prosecution or Defence request to provide additional evidence or submissions relevant to the sentence in the event of a conviction in accordance with sub-paragraphs (1) and (2) of Article 76.

3. Prior to issuing the Sentencing Procedure Decision, the Chamber did not benefit from the position of the parties including, most pertinently, that Mr. Yekatom intends to exercise his right, *where necessary*, to provide additional evidence relevant to the sentence in accordance with sub-paragraphs 1 and 2 of Article 76 following the issuance of the judgment under Article 74. As such the Defence requests that in the event of his conviction, Mr. Yekatom is provided with the opportunity to review the judgment under Article 74 and submit any additional evidence in order to target and address any specific findings against him by the Chamber.

[1] ICC-01/14-01/18-2600 ('Sentencing Procedure Decision'), para. 10.
[2] Sentencing Procedure Decision, para. 2.

4. In doing so, the Defence is mindful of the overarching objectives addressed by the Chamber, namely that any potential decision under Article 76 is issued by the same composition of judges in a timely manner.[3] Mr. Yekatom shares these very same objectives.

5. It is with this in mind that the Defence seeks a partial reconsideration which, upon review of the judgment under Article 74, allows for the submission of additional evidence relevant to the sentence within a limited period of no more than ten (10) working days after the issuance of the judgment under Article 74. Such submissions are not intended to replace the entire schedule as set out in the Sentencing Procedure Decision. Rather, it is intended that all parties and participants are to follow the procedural calendar provided for by the Chamber,[4] and to provide additional evidence targeted to the specific findings in the Article 74 judgment and which, for example, concern particularly prejudicial evidence, within the requested ten (10) working day period. Partial reconsideration in this manner will prevent any potential injustice to Mr. Yekatom's right to provide additional submissions on his sentence in the event of a conviction; allowing him to do so before this very Chamber and without unduly prolonging the issuance of any decision under Article 76.

II. SUBMISSIONS

a) The present request is limited in scope and justified

6. As set out above, and for clarity, the Defence intends to follow the procedural calendar as set out by the Trial Chamber in the Sentencing Procedure Decision. To this end, the Defence has already commenced investigations and is in the midst of

[3] Sentencing Procedure Decision, paras 1 and 2.
[4] Sentencing Procedure Decision, p. 7: ('by 6 September 2024: any requests to present additional evidence; • by 13 September 2024: any responses to the requests to present additional evidence; • 9 to 12 December 2024: closing statements; • by 13 December 2024: any written submissions relevant to sentencing; • 8 to 10 January 2025: hearing under Article 76(2) of the Statute to hear (i) any additional evidence; (ii) any submissions on potential sentencing; and (iii) any responses and replies authorised by the Chamber to the written submissions').

drafting cooperation requests and mission requests in order to meet the relevant deadlines therein as the Defence intends to make full submissions which are relevant to the sentencing of Mr. Yekatom in the event of his conviction.

7. The present request is limited and narrowly focused to ensure that, in the event of his conviction, Mr. Yekatom is afforded with the opportunity to review the Chamber's ultimate findings specific to his guilt and provide additional evidence relevant to his sentencing. Given that the Chamber will have heard the majority of submissions in this regard by 10 January 2025,[5] ten (10) working days is sufficient to allow the Defence to present any additional evidence targeted to any precise findings of guilt,[6] and where the submission of mitigating evidence is outweighed by the prejudicial nature of presenting it prior to the Article 74 judgment.

8. Relatedly, the postponement of the last procedural step, after the issuance of the judgment under Article 74, is critical to the preservation of Mr. Yekatom's rights - namely his right to present mitigating evidence without renouncing his right to silence and his protection against self-incrimination pursuant to Article 67(1)(g).[7] This is not a theoretical risk nor a strategical consideration. By its very nature before

[5] The Defence recalls, that in accordance with Article 76(1), the Chamber may consider all evidence and submissions presented during trial see Sentencing Procedure Decision, para. 4. See also ICC-01/04-01/06-2901, para. 20 and cites therein ('[a]dditionally for reasons for efficiency and economy, [Trial Chamber I] ordered that evidence relating to sentence could be admitted during the trial').

[6] The Defence notes that pursuant to Rule 162 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers, parties are permitted to submit any relevant information that may assist the Panel in determining an appropriate sentence within fifteen (15) days of the Trial Judgment where a bifurcated sentencing approach is permitted ('[i] f the Panel finds the Accused guilty of one or more crime(s), unless sentence was pronounced pursuant to Rule 159(6), the Specialist Prosecutor and the Defence may submit any relevant information that may assist the Panel in determining an appropriate sentence within fifteen (15) days of the Trial Judgment').

For completion, the Defence further recalls Rule 100 of the Rules of Procedure of Evidence of the Special Court of Sierra Leone (presently the Residual Special Court for Sierra Leone) which provided the Defence up to 14 days after conviction to present information relevant to sentencing ('[i]f the Trial Chamber convicts the accused or the accused enters a guilty plea, the Prosecutor shall submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence no more than 7 days after such conviction or guilty plea. The accused shall thereafter, but no more that 7 days after the Prosecutor's filing submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence').

[7] Schabas/Ambos, in Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 76 mn. 5 ('[f]ailure to hold a separate sentencing hearing may put the accused at a real disadvantage during the trial. S/he may be in a position to submit relevant evidence in mitigation of sentence […] [t]he only way to introduce such evidence may be for the accused to renounce the right to silence and the protection against self-incrimination').

this Court, the case against Mr. Yekatom involves complex factual and legal qualifications concerning his alleged individual criminal responsibility in the commission of crimes and his alleged specific role *vis-à-vis* his 'accomplices'.[8] This is compounded by the nature of the purported 'inter-linked common plans' as confirmed by Pre-Trial Chamber II, as well as the extensive introduction of fabricated material which is now before this Chamber for the purposes of its Article 74 deliberations.

9. Whilst it may be reasonable for lawyers to untangle the myriad combinations of factual and legal characterisations upon which an accused is convicted on, it is exceptionally challenging for Mr. Yekatom to do so in the abstract whilst also exercising his rights under Article 67(1)(g).

10. In this regard, it is recalled that the *ad hoc* tribunals' early shift from separate sentencing hearings towards a simultaneous sentencing procedure was subject to heavy criticism from notable figures with first-hand experience of the shift at the ICTY. This criticism centered on the fact that the simultaneous sentencing procedure eventually proved to be both inefficient and prejudicial to the fundamental rights of an accused and the procedural rights of the Prosecution.[9]

[8] Schabas/Ambos, in Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 76 mn. 5.

[9] See for example Harmon, M.B and Gaynor, F, Ordinary Sentences for Extraordinary Crimes, 5 Journal of International Criminal Justice 683 (2007) at 708 ('[t]o give sentencing issues greater clarity and attention, the unitary trial-and sentencing procedure currently in use at the ICTY should be abolished. The Tribunal should revert to the bifurcated procedure previously in use, in which a dedicated sentencing hearing took place some time after a conviction had been entered. Such a procedure would allow the Defence and the Prosecution to put forward detailed and comprehensive sentencing submissions on the crimes for which convictions have been entered, rather than making hypothetical submissions before the charges, if any, on which the accused will be convicted are known to the parties'). Mark Harmon was a senior prosecutor at the ICTY for 17 years before his appointment as an International Co-Investigating Judge before the Extraordinary Chambers in the Courts of Cambodia in 2012. Fergal Gaynor was a prosecutor at the ICTY and ICTR between 2001 and 2012 and is currently appointed as a judge before the Kosovo Specialist Chambers.

See also ICC-01/05-01/08-3053, para. 2 and ICC-01/05-01/08-3065, paras 4 and 5 whereby the Prosecution requested a separate sentencing hearing in circumstances where the Defence had waived its right to the same. See also Schabas/Ambos, in Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 76 mn. 6 ('[f]rom the Prosecutor's standpoint, there are also advantages to a sentencing hearing. Aggravating evidence, such as proof of bad character or of prior convictions, might well be deemed inadmissible at trial, yet it would possibly pass the relevance test once guilt had been established and the only remaining issue was the establishment of a fit penalty'). See also Harmon, M.B and Gaynor, F, Ordinary Sentences for Extraordinary Crimes, 5 Journal of International Criminal Justice 683 (2007) at 708 ('[t]he Prosecution […] makes its submissions in a vacuum, before it knows which parts

This included the late Judge Antonio Cassese, the first ICTY President, who described the move away from the bifurcated sentencing procedure as:

> 'a mistake, because, as a result: (i) there may arise some confusion when Judges have to hear at the same trial stage both fact witnesses and character witnesses; and (ii) during trial, the Trial Chamber may have to hear many "character witnesses" concerning an accused even when it may ultimately decide to acquit that accused. In short, hearing character witnesses at a stage where the Court has not yet formally decided whether to acquit or convict the defendant may prove to be a waste of time. Moreover, the accused and his counsel are often put in a difficult position in that they have to argue as to the accused's lack of responsibility for the crime, while at the same time putting forward evidence and arguments relevant to any sentence which may be imposed.'[10]

11. Judge Cassese further emphasised the advantage of separate sentencing proceedings to provide 'counsel time to absorb and reflect upon the verdict, which may be a mixture of convictions or acquittals on a multi-count indictment, and then more appropriately make submissions on sentence to the court'.[11] It was on this basis that Judge Cassese sought a return to separate sentencing hearings at the international level during the adoption of the Rules of Procedure of the Special Tribunal for Lebanon in 2009,[12] and subsequently led to the express possibility of both the simultaneous and bifurcated sentencing procedures before the Kosovo Specialist Chambers in 2017.[13]

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of its case will be accepted by the Trial Chamber, and on which counts the accused will be convicted. Commentators have said that the portion of the judgment concerning sentencing appears to be little more than an 'afterthought', and tends to be 'highly perfunctory' (fns omitted)').

[10] Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rev.1 (as of 10 June 2009), Explanatory Memorandum by the Tribunal's President, para. 41.

[11] Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rev.1 (as of 10 June 2009), Explanatory Memorandum by the Tribunal's President, para. 41.

[12] Special Tribunal for Lebanon, Rules of Procedure and Evidence (STL-BD-2009-01-Rev.10), Rule 171 ('[i]f the Trial Chamber finds the accused guilty of a crime, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence').

[13] As with the ICC, the adoption of the Rules of Procedure before the Kosovo Specialist Chamber, adopted in 2017 and amended in 2020, also provides for the possibility of simultaneous and bifurcated sentencing procedures see Rule 159(6) ('[i]f the Panel finds the Accused guilty of one or more crime(s), it shall determine the appropriate sentence to be imposed on the Accused with the pronouncement of the Trial Judgment, unless, having heard the Parties, the Panel decides to proceed in accordance with Rule 162 and Rule 164') and Rule 162 (1) ('[i]f the Panel finds the Accused guilty of one or more crime(s), unless sentence was pronounced pursuant to Rule 159(6), the Specialist Prosecutor and the Defence may submit any relevant information that may assist the Panel in

b) Mr. Yekatom is entitled to select a bifurcated sentencing procedure pursuant to Article 76(2)

12. It is not the Defence's position that the bifurcated sentencing system is mandatory or an automatic procedure under the statutory framework.[14] Indeed, the Defence is in agreement with the Trial Chamber's determination that the simultaneous rendering of any decision under Article 76 and the judgment under Article 74 is available before the ICC. As referenced by the Trial Chamber, this was explicitly held by the Appeals Chamber in the *Ongwen* proceedings,[15] and more recently by the *ad hoc* Presidency in reference to the *Al Hassan* proceedings, whereby it was held that '[o]f course, article 76 of the Rome Statute does not exclude the possibility of article 74 and 76 decisions being handed simultaneously, so long as all requirements for the hearing of evidence and submissions relevant to the sentence have been met [emphasis added]'.[16] Whilst the *ad hoc* Presidency does not directly address what the requirements and conditions are for a simultaneous sentencing procedure, this would have been arguably superfluous with reference to the text of Article 76(2).

13. The plain reading of Article 76(2) makes clear that there are three possibilities whereby a further hearing for the purposes of sentencing is to be held: (i) where the Trial Chamber exercises its discretion to hold a further hearing,[17] (ii) where the Prosecution requests for a further hearing to be held,[18] and (iii) where the Defence requests for a further hearing to be held.[19] Where these three options are not exercised, then the simultaneous issuance of any decision under Article 76 and judgment under Article 74 is a possibility.

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determining an appropriate sentence within fifteen (15) days of the Trial Judgment') see KSC-BD-03/Rev3/2020/1 of 130.
[14] See also Schabas/Ambos, in Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 76 mn. 3.
[15] ICC-02/04-01/15-2023, para. 56.
[16] ICC-01/12-01/18-2596, para. 5.
[17] See e.g. ICC-01/05-01/13-1990 (*Bemba et al*., proceedings), ICC-01/04-02/06-2360 (*Ntaganda* proceedings) and ICC-02/04-01/15-1763 (*Ongwen* proceedings).
[18] ICC-01/05-01/08-3071 (*Bemba* proceedings).
[19] ICC-01/04-01/06-2844 *(Lubanga* proceedings) and ICC-01/04-01/07-3437 (*Katanga* proceedings).

14. Notably, the exercise of the Trial Chamber's discretion to hold a further hearing for sentencing purposes is limited to its own decision to hold such a hearing in the absence of any request from the parties. In other words, should either the Prosecution or Defence request a hearing, the Trial Chamber shall hold a further hearing to hear any additional evidence or submissions relevant to the sentence as mandated by the express language of Article 76(2). The term 'shall' is to be understood to impose a binding obligation on the Chamber irrespective of the exercise of its own discretion in this regard.

15. As set out further below, the Defence's request to present additional evidence relevant to sentencing following the issuance of the Article 74 judgment, falls squarely within the text of Article 76(2) and must therefore be effected.

> *c) In accordance with sub-paragraphs (1) and (2) of Article 76, the further sentencing hearing must take place after the issuance of the judgment under Article 74*

16. The Defence understands that the Chamber has exercised its discretion to hold a 'hearing under Article 76(2) of the Statute to hear (i) any additional evidence; (ii) any submissions on potential sentencing; and (iii) any responses and replies authorised by the Chamber to the written submissions (emphasis added)'.[20]

17. Whilst the Defence shares the Trial Chamber's concerns, particularly following the *ad hoc* Presidency's decision of 28 June 2024 in connection to the *Al Hassan* case,[21] Article 76(2) must be read in connection with Article 76(1) namely, that it is only 'in the event of a conviction',[22] that a further hearing to hear additional evidence relevant to sentence under Article 76(2) can take place. This is the case whether the hearing is held following the discretion of the Chamber, or upon request by the parties.

[20] Sentencing Procedure Decision, para. 4 and p. 6.
[21] ICC-01/12-01/18-2956.
[22] See text of Article 76(1).

18. It is this very language of sub-paragraphs (1) and (2) of Article 76 when read together, which has allowed for the bifurcated sentencing procedure to exist as an option before the ICC as evidenced by the practice before the Court. In the *Lubanga* case, having heard from the parties and participants with regard to the interpretation of the applicable procedure under Article 76 during the preparation stage of the trial,[23] Trial Chamber I deemed it necessary to 'hold a separate sentencing hearing in the event of a conviction (emphasis added)' following a defence request under Article 76(2).[24] Subsequently, the further sentencing hearing took place after Trial Chamber I issued its Article 74 judgment.[25] Indeed, in each and every case before the ICC, the 'further hearing' under Article 76(2) has taken place after the issuance of the Article 74 judgment whether the request has come from either the Defence or Prosecution,[26] or where the Trial Chamber has exercised its discretion under Article 76(2) in the absence of any request from the parties.[27]

19. The implementation of the Article 76(2) hearing *after* the Article 74 judgment also gives practical effect to both the simultaneous sentencing procedure and the bifurcated sentencing procedure. As set out above, the very purpose of the bifurcated sentencing procedure is to ensure full respect to the rights of the accused[28] and, as set out by the ICC Prosecution in the *Bemba* case, to allow parties 'to make informed and targeted submissions on the most pertinent issues and factors that should be considered in determining the appropriate sentence', noting that '[w]ithout the benefit of an Article 74 decision, such considerations and/or

[23] See also ICC-01/04-01/06-T-99-ENG, pp. 38 to 39 and references therein.
[24] ICC-01/04-01/06-2901, para. 20 see also ICC-01/04-01/06-T-99-ENG page 39, line 11 to page 40, line 4.
[25] ICC-01/04-01/06-2871.
[26] *Supra*., fn. 18 and 19 (re *Lubanga*, *Katanga* and *Bemba* proceedings).
[27] *Supra*., fn. 17 (re *Bemba et al*., *Ntaganda* and *Ongwen* proceedings). The *Al Madhi* sentencing proceedings fall within the exception as set out in Article 76(2) with reference to Article 65 see e.g. ICC-01/12-01/15-136.
[28] This position has been accepted by the Prosecution and legal representatives of victims in the *Lubanga* proceedings and *Katanga* proceedings respectively see ICC-01/06-1256, para. 5 ('the Chamber may wish to delay the reception of highly prejudicial or particularly complex evidence relevant only to sentencing factors until a later sentencing hearing') and ICC-01/05-01/08-3050, para. 7 ('Par ailleurs, du point de vue de l'accusé, la mise en œuvre d'une telle procédure l'obligerait d'une certaine manière à renoncer à son droit à ne pas s'incriminer lui-même s'il souhaite présenter des éléments devant la Chambre afin que celle-ci en tienne compte pour la fixation de sa peine dans l'hypothèse d'une décision prononçant sa culpabilité').

submissions may be unnecessary or uninformed, which will negatively affect the fair and expeditious conduct of proceedings pursuant to Article 64(2) of the Statute'.[29] This approach is circumvented if the 'further hearing' under Article 76(2) is only scheduled prior to the issuance of the Article 74 judgment.[30]

20. Similarly, the advantages of the simultaneous sentencing procedure, as advanced before the *ad hoc* tribunals, is to ensure that parties and participants are to bring evidence which is relevant to the determination of guilt or innocence of an accused, as well as any appropriate sentence during the course of the main case. It is often argued that this limits the need to duplicate the testimony of witnesses (i.e. where a witness can speak to both the role of an accused *vis-à-vis* the commission of the crime and the character of the accused) thereby contributing to the efficiency of proceedings. This efficiency goal is no longer met if it is envisaged that the 'further hearing' under Article 76(2) is to allow for separate sentencing submissions to be made outside the main case and yet prior to the issuance of the judgment under Article 74.[31]

[29] ICC-01/05-01/08-3053, para. 2.

[30] For the purposes of the present proceedings however, the Defence clarifies that it intends to provide full submissions relevant to sentencing during the scheduled hearing on 8 to 10 January 2025. The Defence does not consider that this hearing however falls within the scope of its right for a 'further hearing' in the event of a conviction under Article 76(2). Nonetheless, as set out below, the Defence considers that the exercise of this right is met with the submission of written evidence relevant to sentencing where necessary, in the event of conviction see *infra*., para. 26.

[31] See also ICC-01/05-01/08-3065, para. 8 where the Prosecution in the *Bemba* proceedings opposed the introduction of a separate sentencing following the close of the presentation of evidence phase prior to the issuance of the Article 74 judgment ('[i]f the Chamber decides to issue a single judgment, this would inevitably mean that a separate sentencing phase would be held prior to the decision on the merits and sentencing. This would equally result in hearing further witnesses and presenting additional evidence on sentencing in the abstract without the benefit of the Chamber's ruling on the merits pursuant to Article 74 of the Statute. In addition, the conduct of such additional proceedings may prove unnecessary in the event of an acquittal').

These submissions were adopted by Trial Chamber III and a separate sentencing procedure was implemented following the Article 74 judgment see e.g. ICC-01/05-01/08-3071, para. 13 ('n the present case, the prosecution has made a clear request pursuant to Article 76(2) of the Statute for a further sentencing hearing, and the Chamber, noting the prosecution's submissions, is satisfied that the request is well-founded. Accordingly, the Chamber will issue separate decisions pursuant to Article 74 and, in the event of a conviction. Article 76 of the Statute. In the event of a conviction, this procedure will allow the parties to benefit from the judgment on the merits and make focused and meaningful submissions on sentencing for the purposes of Article 78 of the Statute, including submissions on mitigating or aggravating circumstances as set out under Rule 145(2) of the Rules').

21. The timing of the Article 76(2) hearing after the issuance of the Article 74 judgment is also reflected in the drafting history of Article 76,[32] as well as the Court's ancillary documents. For example, the new legal aid policy, effective from 1 January 2024, refers to the 'trial stage' as ending 'with the closing argument',[33] and that the following 'appeals stage' starts with the notice of appeal filed by either the Defence or Prosecution.[34] As observed by Judge Prost, in her capacity as Single Judge of Trial Chamber X, there is a degree of 'uncertainty as to how the sentencing stage […] is to be addressed in terms of resource allocation' recognising that 'in the case of a (partial) conviction […] a defence team will not only have to analyse the trial judgment for any notice to appeal and prepare the appeals brief, but also concurrently, deal with sentencing matters'.[35] The issue is resolved in the case of a simultaneous sentencing procedure where parties lead evidence relevant to the main case and sentencing and the 'trial stage' thereby ends with closing arguments. For the case of a bifurcated sentencing system, where a separate sentencing hearing is held in the event of conviction, then the matter is addressed where the sentencing phase falls under the appeals stage which starts with the preparation of the notice of appeal by either the Defence or the Office of the Prosecutor as observed in the *Al Hassan* proceedings.[36]

22. The routine scheduling of an Article 76(2) hearing prior to the issuance of an Article 74 judgment would therefore fall foul of the discrete stages recently accepted by State Parties in the new legal aid policy, and would entail unwarranted

[32] See e.g. Schabas/Ambos, in Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 76 mn. 3. '[t]he Final Draft Text adopted by the PrepCom included the requirement that the request for such a hearing be 'made before the completion of the trial', and the phrase was retained in the version adopted by the [Working Group]. This seems superfluous, which must explain why the Drafting Committee eliminate the words 'made before the completion of the trial'. Obviously, the trial ends with imposition of sentence, and any application to hold a hearing on such questions must be made before sentence is pronounced. It would be appropriate, the, for the Court to inquire of the parties at the time it issues a verdict of guilt as to whether they seek a sentencing hearing'). This procedure has been adopted in various proceedings before the Court see e.g. *supra*, fn. 17 (concerning *Bemba et al*., *Ntaganda* and *Ongwen* proceedings).
[33] ICC-ASP/22/9, para. 32
[34] ICC-ASP/22/9, para. 33.
[35] ICC-01/12-01/18-2585, para. 13.
[36] ICC-01/12-01/18-2585, para. 14.

complications to ensure an accused's right to adequate resources under Article 67(1)(b). Accordingly, it is reasonable to conclude from the practice of the State Parties, that the 'further hearing' provided for under Article 76(2) is to take place after the Article 74 judgment.

23. The scheduling of the Article 76(2) hearing after the Article 74 judgment is also accommodated within the Chambers Practice Manual,[37] and formed part of the considerations to ensure that a separate sentencing procedure after conviction, was still an option following an amendment to Rule 165.[38]

24. The practice of this Court, and the ancillary texts in support are clear indicators in support of the plain language of sub-paragraphs (1) and (2) of Article 76 and demonstrate that there is no such half-way option between the simultaneous and bifurcated sentencing procedures available under the statutory framework.

d) The present request preserves Mr. Yekatom's statutory rights including his right to expeditious proceedings

25. Having invoked his right under Article 76(2), and read in conjunction with Article 76(1), Mr. Yekatom is entitled to present additional evidence in the event of his conviction i.e. after the issuance of the judgment under Article 74. In doing so, Mr. Yekatom's rights under Article 67(1)(g) are protected in order to allow him to present mitigating evidence without curtailing his protections against self-incrimination.

[37] Chambers Practice Manual, 7th edition, 13 July 2024, paras 88 – 90 ('88. The written decision under Article 74 of the Statute shall be delivered within 10 months from the date the closing statements end. 89. In order to assist the timely issuance of the judgment, the closing statements shall begin within 90 days from the date the Presiding Judge declares the submission of evidence to be closed under Rule 141, sub-rule 1. 90. The written decision under Article 76 shall be delivered within four months of the date of the decision on conviction').

[38] See ICC-ASP/15/7, Report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence, Annex II dated 29 February 2016 at para. 14 ('[i]t was also considered that removing the separate sentencing hearing procedure under article 76 and leave to appeal procedures from article 70 proceedings would further expedite article 70 proceedings and allow for more resources to be diverted to the article 5 proceedings which form the core of the Court's mission. Even with these amendments, it was discussed that the Trial Chamber of one judge could still allow for a separate sentencing hearing under article 76 if circumstances warranted such a hearing').

26. However, mindful of the Trial Chamber's considerations, as well as the balance of Mr. Yekatom's rights under Article 67(1)(c), the Defence considers that its request for a further hearing under Article 76(2) in the event of a conviction, is met in these proceedings, with the submission of additional evidence no later than ten (10) working days after the Article 74 judgment. The Defence however, remains amenable to the Trial Chamber's supervisory powers as to whether an oral hearing is required in the same period. The Defence takes this position in the full exercise of Mr. Yekatom's rights under Article 76(2) and without prejudice to its request to submit any targeted additional evidence, if necessary upon conviction. [39]

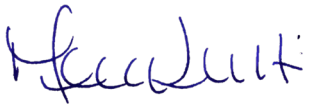
27. The Defence considers that this proposal is reasonable, in that it allows for the composition of the Chamber to be maintained and for any decision under Article 76 to be rendered swiftly thereafter. This is emphasised by the fact that the current Chamber will have already considered all evidence and submissions presented during the trial in accordance with Article 76 (1),[40] and further still, have been seized of the sentencing process as of at least, 10 January 2025.

III. RELIEF SOUGHT

28. In light of the above, the Defence respectfully requests that Trial Chamber V partially reconsider its Decision on the Sentencing Procedure and Amended Directions on the Conduct of the Proceedings and allow for the submission of additional evidence no later than ten (10) working days following the issuance of the judgment under Article 74 of the Statute.

RESPECTFULLY SUBMITTED ON THIS 2nd DAY OF AUGUST 2024

[39] The Defence recalls that the further hearing may be postponed in exceptional circumstances, by the Trial Chamber, on its own motion or at the request of the Prosecutor, the defence or the legal representatives of the victims in accordance with Rule 143.
[40] Sentencing Procedure Decision, para. 4 and e.g. ICC-01/04-01/06-2901, para. 20 and cites therein.



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