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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

Request for leave to appeal the 'Decision on the Yekatom Defence Request for Partial Reconsideration of the 'Decision on the Sentencing Procedure and Amended Directions on the Conduct of the Proceeding' (ICC-01/14-01/18-2645)'

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Mr Karim Asad Ahmad Khan
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Mr. Yekatom

Ms Mylène Dimitri
Ms Anta Guissé
Ms Sarah Bafadhel
Mr Thomas Hannis

Counsel for Mr. Ngaïssona

Mr Geert-Jan Alexander Knoops
Ms Marie-Hélène Proulx
Ms Lauriane Vandeler

Legal Representatives of Victims

Mr Dmytro Suprun

Legal Representatives of Applicants

Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**
Ms Marie O'Leary

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. The Defence for Mr. Yekatom ('Defence') requests leave to appeal Trial Chamber V's 'Decision on the Yekatom Defence Request for Partial Reconsideration of the 'Decision on the Sentencing Procedure and Amended Directions on the Conduct of Proceeding'.¹
2. Specifically, the Issue arising from the Decision concerns whether the Chamber erred in law in finding that no further Article 76(2) hearing would be held after the Article 74 judgment even when the Defence seeks such a hearing to present additional evidence relevant to sentencing in the event of a conviction ('Issue').
3. This issue concerns a matter of fundamental statutory interpretation and as elaborated further below, meets the criteria for leave to appeal in accordance with Article 82(1)(d) of the Statute.

SUBMISSIONS

a) The Issue arises from the Decision and is appealable

4. In its Decision, the Trial Chamber held that as it had already scheduled a sentencing hearing *proprio motu* for 8 to 10 January 2025 (i.e. prior to the issuance of the Article 74 judgment), 'there is no obligation to convene a further separate hearing after the issuance of its judgment'.² The Chamber will recall that the Decision itself followed the Defence's request to file additional written evidence relevant to sentencing within ten (10) working days of the issuance of the Article 74 judgment,³ and that in doing so, the Defence sought to exercise its right under Article 76 of the Statute.⁴ As such, it was only up until the point in time when the Chamber was seized with the Defence request in accordance with Article 76(2) that the error followed – that is, after the Defence filed its Request for Partial Reconsideration on 2 August 2024.

¹ ICC-01/14-01/18-2645 ('Decision').

² Decision, para. 15.

³ ICC-01/14-01/18-2614 ('Request for Partial Reconsideration').

⁴ Request for Partial Reconsideration, paras. 3, 5, 7, 12, 14-15 and 25.

In the absence of any Article 76(2) request up until that point, no error could be said to have stemmed from the Chamber's Sentencing Procedure Decision,⁵ which was issued without the benefit of the positions of the parties.

5. Rather the Issue as framed clearly emanates from the Decision and the Chamber's finding that it was not obliged to hold a further hearing for the purposes of sentencing after the issuance of the Article 74 judgment despite the Defence's trigger of Article 76(2).⁶ The Chamber's finding is based on its consideration that Article 76(2) 'stipulates that a chamber *'may'* hold such a hearing on its own discretionary motion and *'shall'* do so if it is seized of a request by the parties' and that '[i]n the Chamber's view, these triggers are to be understood as alternatives'.⁷
6. The Chamber's finding in this regard is premised on a statutory misinterpretation of Article 76 and ignores fundamental canons of construction.
7. First, the plain text of Article 76(2) does not support the position that the so-called triggers in Article 76(2) are equal alternatives without distinction. Indeed by adopting such an interpretation, the Chamber inserts a disjunctive term into Article 76(2) where none is to be found. Article 76(2) explicitly states that the 'Trial Chamber may on its own motion **and shall**, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence (emphasis added)'. In doing so, the drafters of the Rome Statute have deliberately inserted conjunctive and mandatory terms within Article 76(2) so that a further hearing **must** be held where triggered by a party.⁸ The same

⁵ ICC-01/14-01/18-2600 ('Chamber's Sentencing Procedure Decision').

⁶ Decision, para. 15. Specifically, the Defence had sought to present additional evidence no later than ten (10) working days following the issuance of the judgment under Article 74 of the Statute. In doing so, the Defence 'remained amenable to the Trial Chamber's supervisory powers as to whether an oral hearing is required in the same period' see Request for Partial Reconsideration, paras. 26 and 28.

⁷ Decision, para. 14.

⁸ With reference to Article 31(1) VCLT which requires international treaties, including the Rome Statute, to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. For a comprehensive overview of textual and substantive canons of construction which provide additional guidance for the interpretation of statutes see Scalia, A., and Garner, B., Reading Law: The Interpretation of Legal Texts (Thomson/West 2012) ('Scalia/Garner'). See in particular Chapter 11 'Mandatory/Permissive Canon' (i.e. mandatory words impose a duty; permissive words grant discretion see in particular page 104, whereby even accounting for any 'sloppy' drafters, 'when the word shall can reasonably be

is also true in all other versions of the Rome Statute in the official languages of the Court, which utilise conjunctive mandatory terms in the respective texts which removes any ambiguity as to whether the triggers under Article 76(2) are equal alternatives.⁹

8. The fact that the Trial Chamber has scheduled a hearing for sentencing purposes on a *proprio motu* basis does not alter the application of Article 76(2).¹⁰ Indeed, the Chamber is entitled to hold as many hearings as it deems necessary for the purposes of sentencing which is compatible with the simultaneous sentencing procedure i.e. evidence which is relevant for the purposes of sentencing is expected to be heard throughout the course of the main proceedings.¹¹ The fact that the Chamber has therefore scheduled a hearing for the 8 to 10 January 2025 for sentencing purposes is immaterial where a party has triggered Article 76(2).
9. Second, and relatedly, the harmonious interpretation of sub-paragraph (1) and (2) of Article 76 does not support the Chamber's finding that it is not obliged to hold a hearing after the issuance of the Article 74 judgment where it has already scheduled a hearing before.¹² This interpretation renders the phrase 'in the event of a conviction' to be meaningless, but more pertinently fails to give effect to the fundamental and procedural rights enshrined elsewhere in the Rome Statute. This includes the right against self-incrimination pursuant to Article 67(1)(g), and the right of an accused to present all relevant evidence which is targeted to findings of guilt and therefore necessary for the correctness of a sentence in accordance with

read as mandatory, it ought to be so read'); Chapter 12 Conjunctive/Disjunctive Canon (i.e. *And* joins a conjunctive list, *Or* a disjunctive list); and Chapter 17 Grammar Canon (i.e. words are to be given the meaning that proper grammar and usage would assign them see in particular page 124 '[a]lthough drafters, like all other writers and speakers, sometimes perpetrate linguistic blunders, they are presumed to be grammatical in their compositions. They are not presumed to be unlettered').

⁹ See French version whereby the mandatory conjunction follows the inclusion of a comma (i.e. ' , et doit'). The same punctuation also appears in the Arabic and Spanish texts of Article 76 (text not copied). The Defence recalls Article 33(1) VCLT and Article 50 of the Statute, whereby the text of each of the official languages of the Court is equally authoritative in each language (noting that Russian and Chinese versions of the Statute are not available on the Court's website).

¹⁰ *Contra.*, Decision, para. 15.

¹¹ See also Request for Partial Reconsideration, para. 20.

¹² Decision, para. 15.

Article 67(1)(e) and Article 76(2).¹³ In other words, the mandatory inclusion of a party's right to a 'further hearing' for sentencing purposes only makes sense where the hearing is held following conviction in order to safeguard fundamental and procedural rights which will logically result in an appropriate and fair sentence.

10. This reading of sub-paragraphs (1) and (2) of Article 76 is further supported by the existence of the Article 65 exception within Article 76(2).¹⁴ That is, a party does not have a mandatory right to a further hearing for sentencing purposes under Article 76(2) where an accused has pled guilty given that: (i) substantively, there is no right against self-incrimination to be enjoyed in such circumstances and (ii) procedurally, there is no disadvantage to either party as the legal and factual findings of guilt are set out in the plea agreement.
11. Third, the Chamber appears to have reasoned its decision to dismiss the Defence's request to submit additional sentencing evidence in the event of conviction on the basis of an incorrect and in any case, inconsequential consideration.¹⁵ This goes to the core of the Issue and further demonstrates that it arises from the Decision. Indeed, contrary to the Decision,¹⁶ the fact that parties have a mandatory right to a 'further hearing' following the Article 74 judgment does not: (i) automatically mean that parties will trigger such a right in each and every case so as to render

¹³ *Ibid.*, fn. 8 including Scalia/Garner Chapter 27 'Harmonious-Reading Canon' (i.e. the provisions of a text should be interpreted in a way that renders them compatible not contradictory); Chapter 26 'Surplusage Canon' (i.e., if possible, every word and every provision is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence' see in particular page 151 'this canon prevents not the total disregard of a provision, but instead an interpretation that renders it pointless. Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant); Chapter 4 'Presumption against ineffectiveness' (i.e. a textually permissible interpretation that furthers rather than obstructs the document's purposes should be favoured).

¹⁴ *Ibid.*, fn. 8 including Scalia/Garner Chapter 24 'Whole Text Canon' (i.e. the text must be construed as a whole see in particular page 145 '[p]erhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts').

¹⁵ *Ibid.*, fn. 8 including Scalia/Garner Chapter 58 'The false notion that the spirit of a statute should prevail over its letter', see further Chapter 61 'The half-truth that consequences of a decision provide the key to sound interpretation'.

¹⁶ Decision, para. 14 ('[t]he Chamber is therefore not persuaded by the Defence's submissions that [...] it is only 'in the event of a conviction', that a further hearing to hear additional evidence relevant to sentence under Article 76(2) can take place'. If that was the case, simultaneous decisions under Article 74 and 76 of the Statute would essentially never be permitted. Such an interpretation runs counter to the Court's legal framework providing for both options of simultaneous decisions or bifurcated proceedings (emphasis added)).

simultaneous decisions to ‘essentially never be permitted’;¹⁷ and (ii) even if this were the case, this does not and should not alter the correct interpretation and application of Article 76. A party still retains the rights afforded under Article 76(2) irrespective of whether it means that the bifurcated sentencing approach is more frequently in play.

12. Moreover, the Chamber’s decision to adopt a consequence-driven interpretation of Article 76 is vulnerable to the very same criticism in reverse. In particular, by denying the Defence its right to trigger Article 76(2) on the basis that the Chamber had already *proprio motu* scheduled a hearing would – by the same logic adopted in the Decision – mean that chambers would routinely invoke Article 76(2) on a *proprio motu* basis and schedule sentencing hearings prior to the Article 74 judgment. In doing so, both the accused and the Prosecution would be effectively denied the right to request a further hearing for sentencing purposes following conviction, and bifurcated ‘decisions under Article 74 and Article 76 of the Statute would essentially never be permitted’.¹⁸ The logical extension of the Chamber’s consequence-driven interpretation further bolsters the need to ensure that the correct interpretation of Article 76 is applied regardless of whether the outcome favours bifurcated or simultaneous sentencing procedures.
13. The Chamber’s interpretation of Article 76(2) is an outlier in this respect as is evidenced by the consistent jurisprudence of this Court – namely, that each time a party has requested a further hearing for sentencing purposes under Article 76(2), the hearing itself has been held and scheduled after the Article 74 judgment.¹⁹ The Issue is not therefore a mere disagreement or conflicting opinion with the Chamber’s Decision.²⁰ Rather, whether the Chamber is obliged to permit the submission of additional sentencing evidence after the Article 74 judgment

¹⁷ Insofar as the implication being that an accused will consistently exercise his/her rights under Article 76(2) the Defence recalls ICC-01/05-01/08-3071, paras 6 and 7 (with reference to Mr. Bemba’s waiver of a hearing on sentencing issues).

¹⁸ Tracking the language of paragraph 14 of the Decision.

¹⁹ See e.g. ICC-01/05-01/08-3071, ICC-01/04-01/06-2844 and ICC-01/04-01/07-3437.

²⁰ With reference to ICC-01/04-168 OA4, para. 9.

following the Defence's request under Article 76(2) is a clear matter of statutory construction which is essential for the determination of the correctness of the Decision. As such, the Issue arises from the Decision and is appealable within the context of Article 82(1)(d).

b) The Issue significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial

14. The Issue has a direct and substantial impact on the fair and expeditious conduct of proceedings and outcome of the trial as it concerns the Defence's mandatory right to be able to lead evidence which is: (i) tailored to the factual and legal findings upon any conviction and (ii) relevant to sentencing but which does not violate Mr. Yekatom's protection against self-incrimination prior to the issuance of the Article 74 judgment. The Decision significantly curtails these rights.
15. An appropriate, proportionate and fair sentence is at the very core of fair and expeditious proceedings in that it determines the period in which a convicted person is detained. The correctness of the sentence to be imposed upon conviction – and therefore the outcome of the trial²¹ – hinges on an assessment of the evidence led by the parties, which is both relevant to sentence, and which is made available to the Chamber. The full exercise of a party's rights under Article 76(2) is therefore key to the Chamber's ability to issue a complete and informed Article 76 decision.
16. However, the Defence is only able to ensure that it has led all relevant sentencing evidence once it has assessed the fact-specific basis for any conviction,²² and unwound the factual and legal matrix by which any conviction is entered. By

²¹ Noting that the sentencing stage forms part of the trial proceedings see e.g. ICC-01/12-01/18-2585, para. 13. The integral nature of the sentencing phase to trial proceedings is also reflected in the practice of regional and domestic authorities see, for example Article 5(1) ECHR where by the term 'conviction' signifies both a finding of guilt, and the imposition of a penalty or other measure involving the deprivation of liberty see (Del Río Prada v. Spain [GC], 2013, § 125; James, Wells and Lee v. the United Kingdom, 2012, § 189; M. v. Germany, 2009, § 87; Van Droogenbroeck v. Belgium, 1982, § 35; B. v. Austria, 1990, § 38).

²² See also ICC-01/05-01/13-2276-Red A6 A7 A8 A9, para. 60 ('the sentencing factors enunciated in the Statute and the Rules are fact-specific and ultimately depend on a case-by-case assessment of the individual circumstances of each case').

depriving the Defence of an opportunity to review the Article 74 judgment, the Chamber is adversely preventing the Defence from being able to make an internal determination, which balances the protections under article 67(1)(g), as to whether there is any additional material to bring before the Chamber in its determination of a fair sentence. This unjustifiably curtails Mr. Yekatom's rights under Article 67(1)(e) and his ability to present relevant evidence which goes towards a correct and fair sentence.

17. The Issue also draws on a statutory right – as provided for by the State Parties to the Rome Statute - which is made available to parties under Article 76(2). This statutory right has been enacted in all other proceedings before this Court where a party has sought to trigger Article 76(2) and filed a request for a further hearing to present evidence in the event of conviction after the issuance of the Article 74 judgment.²³ This exceptional approach not only unfairly discriminates against the Defence in this case, but will inevitably extend the duration of the sentencing appeals period given that: (i) the Appeals Chamber will have to adjudicate upon the correct statutory construction of Article 76 in addition to the standard appellate grounds concerning the disproportion between the crime and sentence in accordance with Article 81(2); and (ii) the Appeals Chamber may remand the sentence back to the Trial Chamber upon finding a material error of law arising from the Decision in accordance with Article 83(2). The undue protraction of the sentencing phase directly impacts the duration in which Mr. Yekatom unjustifiably remains detained whilst the correctness of any sentence is determined.

²³ *Ibid.*, fn. 19.

c) *Immediate appellate resolution of the Issue may materially advance the proceedings*

18. The immediate resolution of the Issue would materially advance the proceedings.

As stated above, the Chamber's interpretation and application of Article 76 both defeats fundamental tenets of statutory construction and moreover, constitutes the first Decision in the twenty-two-year history of the ICC whereby an Article 76(2) request by a party to file sentencing evidence after the Article 74 judgment has been rejected. The intervention of the Appeals Chamber and its authoritative determination on this discrete Issue at this stage will therefore permit this Chamber to proceed along the correct course.²⁴ This will ensure that: (i) Mr. Yekatom's detention is not unjustifiably protracted, (ii) in the event of conviction, any sentence imposed on Mr. Yekatom is correct, appropriate and fair, (iii) the necessary 'safety net for the integrity of proceedings' is in place,²⁵ and (iv) other pending cases before the Court do not incorrectly follow suit in the interim period.²⁶ The final resolution of the Issue is therefore a matter for the authoritative determination of the Appeals Chamber in order to rid 'the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial'.²⁷

19. The fact that the Issue has arisen towards the end of the presentation of evidence is a symptom of the timing of the *ad hoc* Presidency's decision in the *Al Hassan* proceedings,²⁸ but it is not a procedural bar to granting leave to appeal at this stage. The proceedings which are to be materially advanced in this respect are not limited to the presentation of evidence phase but necessarily encompass the final determination of the sentence.

²⁴ ICC-01/04-168 OA3, paras 14-15, 18.

²⁵ ICC-01/04-168 OA3, paras 14-15, 18.

²⁶ Currently this would include the *Abd-Al-Rahman* case which is nearing the close of the presentation of evidence and the *Said* case whereby the Prosecution is presenting its case.

²⁷ ICC-01/04-168 OA3, para. 14.

²⁸ ICC-01/12-01/18-2596.

20. Consideration must therefore be given to the fact that the proper determination of the Issue will materially advance the outcome of these proceedings in respect of the appropriateness of any sentence rendered and the duration in which the correct sentence is reached.
21. The timely intervention of the Appeals Chamber will also avert the danger of irreparable harm to Mr. Yekatom. In particular, if the Issue is not immediately resolved by the Appeals Chamber during the mandate of the current composition of judges, there is a real risk that the Appeals Chamber – upon finding a material of error of law in the Decision during the sentencing appellate phase – either remands the Article 76 Decision back to the Trial Chamber in accordance with Article 83(2) or may vary the sentence itself in accordance with Article 83(3). Both options would inevitably be rendered after the expiry of the Judges’ mandate,²⁹ and would mean that in the event of conviction, Mr. Yekatom would face having his sentence re-determined by judges who are unfamiliar with the underlying case record – i.e. the very scenario which the Chamber has sought to avoid in these proceedings.³⁰
22. Mr. Yekatom is acutely aware of the fact that there is a clock running in relation to the composition of this Trial Chamber, however his rights and the associated infringements to his rights do not come to a stop at the end of the judges’ mandate. The immediate resolution of the Issue by the Appeals Chamber at this stage will therefore protect Mr. Yekatom’s right to be tried and sentenced by the same composition of judges whilst at the same time, secure the imposition of a fair and correct sentence in the event of any conviction.

²⁹ See ICC-01/14-01/18-2600, fn. 3 and ICC-02/05-01/12-44, fn. 12.

³⁰ Chamber’s Sentencing Procedure Decision, para. 2.

RELIEF

23. For the foregoing reasons, the Defence respectfully requests that Trial Chamber V grants leave to appeal the Decision on the Issue.

RESPECTFULLY SUBMITTED ON THIS 26th DAY OF AUGUST 2024



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands