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Pénale
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**International
Criminal
Court**

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Date: **8 April 2020**

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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Public
with Confidential Annex**

Yekatom Defence Submissions for First Status Conference

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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1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully make the following submissions pursuant to the *Order Scheduling First Status Conference*.¹

A. Commencement Date of the Trial

2. Mr. Yekatom’s case is most appropriately tried by the Special Criminal Court of the Central African Republic. The Chamber is requested to, first and foremost, consider his complementary challenge,² and ultimately find his case inadmissible.

3. Nevertheless, trial preparation should take place in parallel to the consideration of the complementarity challenge so that the trial is not unduly delayed should that challenge fail. If his complementarity challenge is denied and Mr. Yekatom has to be tried at the ICC, he wishes his trial to begin at the earliest opportunity. Bearing in mind the current situation in relation to the coronavirus pandemic, the Defence also respectfully requests the Trial Chamber to ensure that “the impact of this situation on the expeditious conduct of the proceedings be kept to a minimum”³, by setting disclosure deadlines and resolving disclosure and redaction issues without waiting for a Status Conference to be held.

4. Starting the trial depends primarily upon the Prosecution’s timely fulfilment of its disclosure obligations. Using the *Ongwen* and *Al Hassan* cases as a model,⁴ the Defence would be prepared for opening statements to be made three months after disclosure is complete and to begin cross examining Prosecution witnesses four months after disclosure is complete.

¹ [ICC-01/14-01/18-459](#).

² [ICC-01/14-01/18-456](#).

³ *Prosecutor v. Gbagbo & Blé Goudé*, [Order scheduling a hearing before the Appeals Chamber and setting a time limit for any request for leave to reply](#), ICC-02/11-01/15-1318, 20 March 2020, para. 7.

⁴ *Prosecutor v. Ongwen*, [Decision Setting the Commencement Date of the Trial](#), ICC-02/04-01/15-449, 30 May 2016, para. 6; *Prosecutor v. Al Hassan*, [Decision Setting the Commencement Date for the Trial](#), ICC-01/12-01/18-548, 6 January 2020, para. 12.

B. Anticipated Evidence

5. The Defence has the following submissions on selected items within this category:

(2) Use of Expert Witnesses

6. To avoid the common law practice of “duelling experts”, which consumes a great deal of the parties’ resources and courtroom time, the Defence proposes that all experts be jointly instructed pursuant to Regulation 44(2) of the Regulations of the Court. Trial Chambers have noted that joint instruction of experts significantly assists the Court’s work and is in the interests of justice.⁵ For example, the time savings if jointly instructed experts had been used in the *Ongwen* case would have been considerable.

7. The Defence respectfully requests the Chamber to require the parties to identify the subject of an expert evidence that it believes is necessary in this case and to justify how such evidence would advance the proceedings. If the Chamber is satisfied that expert evidence on that subject would be of assistance, it should order the parties to jointly instruct an expert. If the parties cannot agree on a jointly instructed expert, the Trial Chamber should instruct its own expert pursuant to Regulation 44(4). No party should be allowed to call its own expert unless leave is granted pursuant to Regulation 44(3).

(3) Testimony Given by Audio or Video Link

8. The Defence urges the Chamber not to follow the practice in the *Ongwen* case of allowing video link at the discretion of a party⁶ and to instead require a party seeking to offer video link testimony to apply for judicial authorisation. This

⁵ *Prosecutor v. Lubanga*, [Decision on the Procedures to be Adopted for Instructing Expert Witnesses](#), ICC-01/04-01/06-1069, 10 December 2007, paras. 14-16; *Prosecutor v. Muthaura & Kenyatta*, [Decision on the Schedule Leading up to Trial](#), ICC-01/09-02/11-451, 9 July 2012, para. 17. See also: [Regulations of the Office of the Prosecutor](#), Regulation 51(d).

⁶ *Prosecutor v. Ongwen*, [Initial Directions on the Conduct of the Proceedings](#), ICC-02/04-01/15-497, 13 July 2016, para. 17.

is the practice followed by other Chambers at the ICC,⁷ and it provides an opportunity for the Trial Chamber to evaluate whether taking the witness' testimony by video link would be "prejudicial to or inconsistent with the rights of the accused."⁸

9. While the Defence does not object in principle to video-link evidence, there are some important witnesses for whom video-link testimony would be prejudicial to the rights of the accused. These are persons who are themselves perpetrators, had a personal relationship with the accused, such as his subordinates or associates, and whose testimony covers a wide range of the alleged offenses.

10. In the Defence's view, these witnesses would be significantly more likely to tell the truth if they testify in the presence of the accused and within the solemnity of the courtroom. It was for this reason that the ICTR Appeals Chamber held that Trial Chamber erred by taking testimony of an important prosecution witness in The Hague while the accused remained in Arusha and observed the proceedings by video-link.⁹

11. Therefore, the Defence requests that a party seeking video link testimony should be required to file a motion. The merits of the video-link testimony for that particular witness should then be considered on a case-by-case basis.

(5) Use of Rule 68 of the Rules

12. The Defence will address Rule 68 issues on a case-by-case basis. Nevertheless, the Defence wishes to interview all witnesses whose evidence is sought to be admitted under Rule 68(2)(b) so that it can supplement the Prosecution's

⁷ *Prosecutor v. Ntaganda*, [Public redacted version of Decision on Prosecution's request to hear P-0039's testimony by way of video-link](#), ICC-01/04-02/06-897-Red2, 12 October 2015, para. 12; *Prosecutor v. Gbagbo and Blé Goudé*, [Decision on the mode of testimony of Rule 68\(3\) witnesses](#), ICC-02/11-01/15-721, 11 October 2016, para. 12; *Prosecutor v. Lubanga*, [Redacted Decision on the defense request for a witness to give evidence via video-link](#), ICC-01/04-01/06-2285-Red, 9 February 2010, para. 15.

⁸ [Rome Statute](#), Article 69(2).

⁹ *Zigiranyirazo v. Prosecutor*, No. ICTR-2001-73-AR73, [Decision on Interlocutory Appeal](#), 30 October 2006.

statement with additional relevant information beneficial to the Defence since “prior recorded testimony under Rule 68(2)(b) of the Rules does not, in and of itself, prevent that a supplementary statement from being obtained from the witness, should the Defence consider it useful”.¹⁰

C. Agreed Facts under Rule 69 of the Rules

13. The Defence will consider any proposals for agreed facts.

D. Languages

14. Mr. Yekatom requests the assistance of a Sango interpreter during his trial. The Defence expects that some Prosecution and Defence witnesses will also require a Sango interpreter.

E. Disclosure Issues

15. Disclosure is an issue of vital importance to the fairness and expeditiousness of the trial. The Defence notes with concern that the Pre-Trial Chamber found three separate instances in which the Prosecution has already violated its disclosure obligations in this case.¹¹

(1) Ongoing Investigations

16. While it is for the Prosecution to say whether its investigations are still ongoing, the Defence will strongly object if the Prosecution’s ongoing investigation is used as an excuse for the Prosecution’s failure to fully meet its disclosure obligations or to delay the start of the trial.

17. Accordingly, the Defence requests that the Chamber set a firm deadline for the Prosecution to lift all redactions based on its ongoing Seleka investigation (A.8) and leads and sources (A.6.1). Should the Prosecution not be able to lift all

¹⁰ *Prosecutor v. Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), ICC-02/04-01/15-596-Red, 18 November 2016, para. 48.

¹¹ [ICC-01/14-01/18-315-Conf](#), Public redacted version: [ICC-01/14-01/18-315-Red](#), para. 78; [ICC-01/14-01/18-342](#), paras. 18, 21.

redactions, or otherwise fulfil its disclosure obligations as a result of its ongoing Seleka investigations, the proper remedy is to grant Mr. Yekatom interim release and postpone his trial until the Prosecution is in a position to fully comply with its disclosure obligations and the Chamber is able to provide Mr. Yekatom with a fair trial.

(2) Timing and Volume of Disclosure

18. The Defence has made great efforts to obtain full disclosure, sending the Prosecution detailed requests for items it believes it is entitled to, and following up with *inter partes* meetings to narrow the issues that need to be resolved by the Chamber. The Prosecution has been responsive to *inter partes* discussions, and they have been fruitful. The Defence would welcome a standing order requiring such *inter partes* consultation as suggested by the Chambers Practice Manual and enacted in the *Ongwen* case.¹²

19. After *inter partes* consultation, the following disclosure issues remain unresolved at this time:

(a) Disclosure of Draft Witness Statements

20. When the Prosecution interviews a person who is not suspected of having committed a crime, it does not make an audio recording of that interview. Instead, the investigators prepare a draft statement for the witness to sign. The investigator meets with the witness, who makes changes to the draft statement, and a final statement is produced and signed by the witness. The Defence contends that is entitled to these draft statements pursuant to Rule 76(1). The Prosecution disagrees.¹³

¹² [Chambers Practice Manual](#), para. 74(i); *Prosecutor v. Ongwen*, [Decision on Disclosure Issues Arising out of the First Status Conference](#), ICC-02/04-01/15-457, 7 June 2016, para. 5.

¹³ The Pre-Trial Chamber ordered the Prosecution to “verify whether she has in her possession any additional material that may fall within Rule 76, and if so, disclose it to the Defence by 9 September 2019.” [ICC-01/14-01/18-315-Red](#), para. 41. The Prosecution never disclosed any draft witness statements. Upon further *inter partes* discussions with the Prosecution on 27 March 2020, the latter posits that draft statements of Prosecution witness are not subject to disclosure.

21. Rule 76(1) provides that:

“[t]he Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses.”

22. A witness statement is a “record of questions put to witnesses by the prosecution and of the answers given”.¹⁴ The Appeals Chamber has held that “the ordinary meaning of the term “statement” as used in rule 76 is broad and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded.”¹⁵

23. Investigators’ notes of interviews with Prosecution witnesses have been held to come within the meaning of Rule 76.¹⁶ Draft versions of witness statements are no different than investigators’ notes in that they represent the investigator’s understanding of what the witness has said. If the witness makes changes in the final statement, the draft statement may be useful for cross-examination by showing a possible inconsistency in the witness’ version or even the fact that the witness’ drew attention to that particular part of the witness statement, making later claims of a misunderstanding less credible. Draft statements show how the witness’s version has evolved.

24. Draft versions of witness statements have been specifically held to come within the meaning of “witness statements” at the ICTY¹⁷ and the STL.¹⁸

¹⁴ *Niyitegeka*, Case No. ICTR-96-14-A, [Judgement](#), 9 July 2004, para. 33.

¹⁵ *Prosecutor v. Banda & Jerbo*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled “Reasons for the Order on translation of witness statements, \(ICC-02/05-03/09-199\) and additional instructions on translation”](#), ICC-02/05-03/09-295, 17 February 2012, para. 23.

¹⁶ *Prosecutor v. Ntaganda*, [Decision on Defence Requests Seeking Disclosure Orders and a Declaration of Prosecution Obligation to Record Contacts with Witnesses](#), ICC-01/04-02/06-904, 16 October 2015, para. 29.

¹⁷ *Haradinaj*, Case No. ICTY-04-84bis-T, [Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Respect of Witness 81](#), 18 November 2011, para. 27: “Preliminary versions of a witness statement transcribed by another person must be disclosed, as Rule 66(A) is not limited to final official statements that have been signed and adopted by a witness. There is no valid distinction between official statements signed by a witness and other statements.”

¹⁸ *Ayyash et al.*, Case No. STL-11-01/T/TC, [Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230](#), 2 June 2017, paras. 77-83; *In the Matter of El Sayed*, Case No. CH/AC/2011/01, [Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011](#), 19 July 2011, paras. 85, 87-88.

The ICTR has held that “records of all questions put to witnesses and of the answers given, even in cases where such questions and answers are repetitive” must be disclosed.¹⁹

25. The Defence intends to file a motion asking the Chamber to compel the Prosecution to disclose the draft statements of its witnesses.

(b) Disclosure of annexes to witness statements pursuant to Rule 76

26. Annexes to statements of Prosecution witnesses often contain material that was shown to or provided by the witness during the interviews. During the lead-up to the confirmation hearing, the Defence requested that the Prosecution disclose all material shown to or obtained from Prosecution witnesses that were an integral part of the witness statement.²⁰ The Prosecution took the position that only those materials that it deemed relevant need be disclosed.²¹

27. The Pre-Trial Chamber declined to decide the issue due to the limited nature and imminence of the confirmation hearing. It did order disclosure of some photographs identified by the witnesses in the statements, but declined to order disclosure of photographs shown to the witness that the witness did not identify.²² The Defence contends that this was an error, as a witness’ failure to identify someone may well be valuable impeachment of the witness’ testimony.

28. The Defence contends that material provided by, or shown to the witness by the Prosecution, when referenced in the witness’ statement, constitutes an integral part of the statement such as to come within Rule 76. By analogy, prior recorded testimony under Rule 68 includes any annex to the witness’s statement, or

¹⁹ *Nizeyimana*, Case No. ICTR-00-55C-PT, [Decision on Urgent Defence Motion for Disclosure of Prior Statements](#), 31 January 2011, para. 8

²⁰ [ICC-01/14-01/18-331-Conf](#), Public redacted version: [ICC-01/14-01/18-331-Red](#).

²¹ [ICC-01/14-01/18-333-Conf](#).

²² [ICC-01/14-01/18-341-Conf](#), Public redacted version: [ICC-01/14-01/18-341-Red](#).

document otherwise associated with it, that is used or explained by the witness.²³ If such material is admissible as an integral part of the witness' statement, surely it must be disclosable as such.

29. The Defence intends to file a motion to compel the Prosecution to disclose all material shown to or obtained from Prosecution witnesses that were an integral part of a witness' statement.

(c) Disclosure of Sango statements in the original language

30. Rule 76(3) provides that "[t]he statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks." Three Prosecution witnesses provided their answers in Sango during their recorded interviews. However, the Prosecution refuses to provide a recording or Sango transcript of their statements, claiming that a French translation is sufficient to meet its obligations under Rule 76(3).

31. The investigator asked questions in French, which was in turn interpreted in Sango and the witness answered in Sango. The Defence is entitled to the original answers in Sango. The plain meaning of the word "original" as well as the Prosecution's past practice,²⁴ requires this.

32. The Defence intends to file a motion to compel the Prosecution to disclose the recordings or Sango transcripts.

(d) Disclosure of exculpatory material from another case

33. During the confirmation process, the Pre-Trial Chamber found that the Prosecution had violated its obligations under Article 67(2) to disclose exculpatory

²³ *Prosecutor v. Ongwen*, [Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68\(2\)\(b\) and \(c\)](#), ICC-02/04-01/15-600, 22 November 2016, para. 10.

²⁴ *Prosecutor v. Banda and Jerbo*, [Prosecution's Submission of Additional Details and Information on the Evidence Disclosed to the Defence Pursuant to Article 67\(2\) of the Statute or Provided Pursuant to Rule 77 of the Rules of Procedure and Evidence](#), ICC-02/05-03/09-343, 4 June 2012, fn 3: "Transcripts of witness interviews have been disclosed in the languages in which the interviews were conducted – usually English and the language used by the witness."

evidence by failing to disclose material indicating that a prosecution witness had participated in the fabrication of evidence in another case before the Court.²⁵

34. The Prosecution subsequently notified the Chamber that it was not in a position to disclose the material because of existing protective measures in the other case.²⁶ The Chamber reiterated that the Prosecution had violated its disclosure obligations and, as a remedy, decided not to make any findings based solely on the witness' evidence at the confirmation hearing as a result of the failure to disclose the exculpatory material.²⁷

35. Following the confirmation decision, the Defence requested the Pre-Trial Chamber to vary the protective measures in the other case so that it could obtain the exculpatory material.²⁸ The Prosecution did not oppose the Defence request.²⁹ The Pre-Trial Chamber held that the issue should be decided by the Trial Chamber.³⁰

36. Therefore, unless the Chamber is willing to rely on the briefing before the Pre-Trial Chamber, the Defence intends to refile its motion before the Trial Chamber.

(3) Transcription and Translation Issues

37. The Defence is unaware of any particular issues relating to transcription or translation at this time.

(4) Protective Measures

38. The Defence agrees with the Chamber in the *Ongwen* case that "in determining whether in-court protective measures are warranted, the Chamber must ensure that any such measure is demanded by an 'objectively justifiable risk' and is

²⁵ [ICC-01/14-01/18-315-Red](#), para. 78.

²⁶ [ICC-01/14-01/18-330-Conf](#), para. 6.

²⁷ [ICC-01/14-01/18-403-Conf](#), paras. 33-34, Public redacted version: [ICC-01/14-01/18-403-Red](#).

²⁸ [ICC-01/14-01/18-407-Conf](#), Public redacted version: [ICC-01/14-01/18-407-Red](#).

²⁹ [ICC-01/14-01/18-415-Conf](#), para. 10, Public redacted version: [ICC-01/14-01/18-415-Red](#).

³⁰ [ICC-01/14-01/18-422-Conf](#), Public redacted version: [ICC-01/14-01/18-422-Red](#).

proportionate to the rights of the accused.”³¹ It also agrees that presumptive decisions on protective measures should be made before the trial commences, as done in the *Ongwen* case.

39. The Defence will make its comments on the appropriateness of protective measures on a case-by-case basis when responding to the Prosecution’s Motion.

(5) Delayed Disclosure of Witness’ Identities

40. The Prosecution has had almost 18 months to put measures in place to protect any vulnerable witnesses.³² There should be no need to further delay the disclosure of the identity of any witness to the Defence. Any motions for delayed disclosure should be filed and ruled on as soon as possible.

(6) Article 54(3)(e) Material

41. The Defence requests that the Chamber and parties be informed if there is any material obtained by the Office of the Prosecutor pursuant to Article 54(3)(e) that a provider has refused to consent be disclosed to the Defence, and if so, the steps that it is taking to make the information available.

F. Defence Disclosure

42. The Defence anticipates relying on an alibi defence for some of the charges. It will provide the required notice pursuant to Rule 79 at a time fixed by the Chamber. It does not anticipate raising any other defences enumerated in Rules 79 and 80. The Defence takes its disclosure obligations very seriously and will not only fulfill, but exceed its disclosure requirements throughout the proceedings.

³¹ *Prosecutor v. Ongwen*, [Decision on the ‘Prosecution’s application for in-Court protective and special measures’](#), ICC-02/04-01/15-612-Red, 29 November 2016, para. 8.

³² [ICC-01/14-01/18-40-Conf](#), para. 4(h)(i).

G. Pre-Trial Brief

43. The Defence would welcome a Pre-Trial Brief from the Prosecutor. As stated in the *Al Hassan* case, “the Pre-trial Brief is a very useful document used here in this court to prepare the trial and such a document provides an explicit explanation of the manner in which the Prosecution intends to show the charges confirmed by the Pre-Trial Chamber.”³³ The Chambers Practice Manual notes that “A ‘Pre-trial brief’, or its equivalent, has been filed in nearly all cases and is standard practice.”³⁴

44. The Defence undertakes to provide a Pre-Defence Brief prior to the commencement of its case.

H. Estimated length of Opening Statements

45. The Defence wishes to defer its opening statement until the commencement of its case.

I. Additional Items

(1) Vagueness of the charges

46. Rule 134(2) of the Rules is designed to ensure that proceedings between the confirmation hearing and commencement of trial are settled before the trial commences and to ensure procedural economy and enable the Trial Chamber to focus on the evidence at trial.³⁵ Bearing that principle in mind, the Defence considers that the Trial Chamber should be privy to the communications it initiated with the Prosecution in view of obtaining further details on four charges against Mr. Yekatom.

³³ *Prosecutor v. Al Hassan*, [Decision Setting the Commencement Date of the Trial](#), ICC-01/12-01/18-548, 6 January 2020, para. 15.

³⁴ [Chambers Practice Manual](#), para. 75.

³⁵ *Prosecutor v. Ongwen*, [Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’](#), ICC-02/04-01/15-1562, 17 July 2019, para. 75.

47. To avoid unnecessary litigation before the Trial Chamber, the Defence initiated an *inter partes* discussions with the Prosecution by sending a detailed request for clarification on 9 March 2020.³⁶

48. The request aimed at notifying the Prosecution that the Defence was proceeding on the basis that the location underpinning the charges set out in Count two and three, charging Mr. Yekatom with murder of “four Muslims persons in Cattin” as well as Count six which charges Mr. Yekatom with destruction of “the Boeing Mosque”, corresponded to the GPS locations provided by the Prosecution in its disclosure. The Prosecution has not stated otherwise, so the Defence is proceeding on the basis that the locations charged are at the GPS coordinates provided.

49. In addition, the Defence also asked the Prosecution to provide the names of the victims underpinning the charge of murder at the Boeing Market and at the Cattin crossroad. Taking into account that the Prosecution is in possession of victims’ names, the Defence asked the Prosecution to voluntarily provide the names of the alleged victims.

50. Furthermore, as for Count 29 the Defence requested the Pre-Trial Chamber to order the Prosecution to provide the names of the individuals under the age of fifteen years who it claims were conscripted, enlisted and/or used to participate actively in hostilities.³⁷ Unfortunately, the Pre-Trial Chamber never ruled on the Defence request.³⁸

51. Noting that the Prosecution is in possession of a list of children³⁹ which was relied upon in the DCC⁴⁰, the Defence contends that the said list and the material provided by the Prosecution does not give the Defence adequate notice.

³⁶ The relevant correspondence can be provided to the Chamber if it estimates it necessary.

³⁷ [ICC-01/14-01/18-T-004-CONF-ENG](#), p. 30-33, Public redacted version: [ICC-01/14-01/18-T-004-Red2-ENG](#).

³⁸ The Coc Decision failed to address the Defence challenge.

³⁹ See CAR-OTP-2071-0279-R01.

52. Indeed, the list contains identities of children over 15 years old⁴¹ as well as children who were not conscripted and did not participate in military activity⁴². It is also unclear if the Prosecution is relying on children who are not on the list.

53. The Defence therefore requested that the Prosecution reconsider its position and voluntarily provide the Defence with the names of the alleged victims underpinning Count 29. The Prosecution has not responded to this request.

54. If the Prosecution fails to provide the Defence with the names of the alleged victims underpinning Counts 2, 3 and 29, the Defence will file a formal motion seeking additional details in order to be able to adequately defend Mr. Yekatom at trial.

(2) Interim Release

55. The Defence motion for Mr. Yekatom's interim release,⁴³ made before the Pre-Trial Chamber, has been referred to the Trial Chamber.⁴⁴ The Defence requests a prompt determination of this motion.⁴⁵ While the anticipated delays due to a possible interlocutory appeal have been avoided, the Prosecution has now sought to amend the charges, requiring a second confirmation hearing.⁴⁶ In addition, the coronavirus pandemic and its delayed impact on the African continent is likely to significantly disrupt the commencement of the trial. Release of Mr. Yekatom to his home in the Central African Republic during this period would mitigate the hardships on him and his family from the already lengthy pre-trial detention, as well

⁴⁰ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 360, fn. 749, Public redacted version: [ICC-01/14-01/18-282-Conf-AnxB1-Red](#).

⁴¹ See CAR-OTP-2071-0279-R01, for examples numbers 3, 4 and 6.

⁴² See for example CAR-OTP-2110-0556-R03, para. 199: speaks about numbers 3 and 43 who, according to him, are not Anti-Balaka.

⁴³ [ICC-01/14-01/18-438](#).

⁴⁴ [ICC-01/14-01/18-447](#), para. 37.

⁴⁵ [Chambers Practice Manual](#), para. 11:

“Applications for interim release should be disposed of as a matter of urgency and, ordinarily, decided within 30 days.”

⁴⁶ [ICC-01/14-01/18-468-Conf](#), Public redacted version: [ICC-01/14-01/18-468-Red](#).

as the coronavirus pandemic, and would mitigate the harm should he ultimately be acquitted.

(3) Ex Parte Filings

56. There are currently 96 *ex parte* filings in the record of this case.⁴⁷ During the Pre-Trial proceedings, the Defence requested the Chamber to require the submitting party to justify the continuing need for its filings to remain *ex parte*.⁴⁸ The Chamber issued such an order, but the Prosecution simply insisted on maintaining the *ex parte* status for most of its filings without providing any justification.⁴⁹ The Pre-Trial Chamber then accepted the Prosecution's position without inquiring for the continuing need to maintain those filings under seal.⁵⁰ Since then, additional *ex parte* filings to which the Defence does not have access have been made.

57. The Yekatom and Ngaïssona defences have now agreed that both teams should have access to each other's detention-related pleadings in the case and that public redacted versions of all such pleadings should be filed. As a result it seeks the reclassification of all such pleadings from *ex parte* to confidential, and once that is done, will undertake to file public redacted versions. Going forward, it will file all such pleadings on a confidential, rather than *ex parte* basis with the simultaneous public redacted version. The Defence teams urge the Registry and the Prosecution to do the same with its, respectively, reports and observations on detention matters, and respectfully request the Chamber to issue public decisions, redacted if necessary, on those same detention matters.

58. The Defence also respectfully requests, pursuant to Regulation 23*bis* (3), that the Trial Chamber undertake its own review of all other filings in the case and

⁴⁷ Annex.

⁴⁸ [ICC-01/14-01/18-283](#).

⁴⁹ [ICC-01/14-01/18-292-Corr.](#)

⁵⁰ [ICC-01/14-01/18-348](#).

reclassify as many of them as possible or order public redacted versions to be filed.⁵¹ The Defence is prepared to file a motion for reclassification for all such pleadings if the Chamber prefers to act on a formal motion.

59. The Defence requests that, as done in other cases, the Trial Chamber require any party making an *ex parte* filing in the future to file an accompanying public notice describing the nature and existence of the filing.⁵²

(4) Public Redacted Versions

60. As suggested by the *Chambers Practice Manual*,⁵³ the Defence requests that all parties be required to file simultaneous public redacted versions of any confidential filings to avoid the “domino” effect of responses and replies having to also be filed confidentially.

(5) Victims’ Responses to Prosecution Motions

61. The Defence requests that the Chamber, pursuant to Regulation 24(2), order that responses by the victims to Prosecution motions must be filed within five days of the filing of the motion, instead of the current ten-day limit.

62. The reason for this proposal is that the responses of the victims most often support the Prosecution, sometimes injecting new arguments. Since the Defence and victims currently file their responses simultaneously with a ten-day deadline, this leaves the Defence with no opportunity to address the additional arguments in favor of the Prosecution’s motion. By requiring the victims to file their responses within five days, the Chamber will leave the Defence with five days to incorporate the victims’ arguments into its response to the Prosecution’s motion.

⁵¹ See *Prosecutor v. Al Hassan*, [First Order on the Classification of Decisions initially Issued Ex Parte by Pre-Trial Chamber I](#), ICC-01/12-01/16-701, 31 March 2020.

⁵² *Prosecutor v. Lubanga*, [Decision on the procedures to be adopted for ex parte proceedings](#), ICC-01/04-01/06-1058, 6 December 2007, para. 12; *Prosecutor v. Ntaganda*, [Decision on requests in relation to D-0308](#), 29 August 2019, ICC-01/04-02/06-2387, para. 12.

⁵³ [Chambers Practice Manual](#), para. 74(iii).

The result will be better briefing, and presumably greater assistance to the Chamber.⁵⁴

(6) Requests for Leave to Appeal

63. The Defence believes that requests for leave to appeal should be made sparingly and only when the issue meets the criteria of Article 82(d). The Defence does not intend to seek leave to appeal every decision.

64. However, the Defence notes with concern that in the *Al Hassan* case, the Chamber used the failure of the Defence to seek leave to appeal against the Defence:

The Chamber points out nonetheless that in its decision of 5 October 2018, **which the Defence did not appeal**, it made a determination on the necessity for the Prosecutor to identify the victims in the DCC...⁵⁵

65. In addition, the Common Legal Representatives for Victims contended in its opposition to the Defence Motion for Interim Release that the Defence's failure to seek leave to appeal the confirmation decision was "implicitly acknowledging that the requirement of article 58(1)(a) of the Statute is met."⁵⁶

66. There may be many issues where the Defence believes a decision is incorrect, and would like to appeal it, but the issues do not meet the criteria for leave to appeal. The Trial Chamber is urged to clearly indicate at the outset of this case that it understands that a failure to seek leave to appeal is no indication of the party's view of the merits of the decision, and should not be used to prejudice the party.

8. Redaction Protocol

67. The Defence seeks some minor amendments to the redaction protocol.

⁵⁴ The Legal Representatives of Victims have indicated, in *inter partes* discussions, that they oppose this proposal.

⁵⁵ *Prosecutor v. Al Hassan*, [Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case](#), ICC-01/12-01/18-459-tEng, 27 September 2019, para. 55 (emphasis added).

⁵⁶ [ICC-01/14-01/18-450](#), para. 23.

68. Soon after the Prosecution disclosed its first items of evidence to Mr. Yekatom, the Defence has approached the Prosecution directly and in good faith with a view of lifting what the Defence considered as unwarranted redactions. The Defence sent detailed requests for redaction lifts that it believed were unwarranted, and followed up with *inter partes* meetings to narrow the issues that need to be resolved by the Chamber. The process became resource and time-consuming and led to avoidable litigation during the pre-trial phase.⁵⁷

69. While Standard redaction category B.2 allows for the redaction of “identifying and contact information of family members of witnesses, insofar as necessary to protect their safety”⁵⁸, the Prosecution has used this category to redact the identifying information of virtually every family member mentioned by the witness, including those who were eye-witnesses to the events or whose identity are relevant to the evidence of the witness in that they can contradict, or confirm, relevant information provided by the witness, contrary to the established case law.⁵⁹

70. Under standard redaction category B.1, the Prosecution is allowed to redact “recent contact information of witnesses, insofar as necessary to protect the safety of the witness”.⁶⁰ However, the Prosecution has misused this category⁶¹ to redact telephone numbers used by the witness at the time of the events, preventing the Defence from determining, through call data records disclosed and/or referred to in the DCC, information that may contradict the witness.

⁵⁷ [ICC-01/14-01/18-290](#); [ICC-01/14-01/18-290-Conf-AnxA](#); [ICC-01/14-01/18-290-Conf-AnxB](#); [ICC-01/14-01/18-290-Conf-AnxC](#); [ICC-01/14-01/18-290-Conf-AnxD](#); [ICC-01/14-01/18-290-Conf-AnxE](#).

⁵⁸ [ICC-01/14-01/18-64-Conf](#), para. 26, Public redacted version: [ICC-01/14-01/18-64-Red](#).

⁵⁹ *Prosecutor v. Ntaganda*, [Decision on the Protocol establishing a redaction regime](#), ICC-01/04-02/06-411, 12 December 2014, para. 35; *Prosecutor v. Gbagbo*, [Decision on the Protocol establishing a redaction regime](#), ICC-02/11-01/11-737, 15 December 2014, para. 50(iii); *Prosecutor v. Ntaganda*, [Decision on Defence request for lifting of redactions in documents related to victims authorised to present evidence](#), ICC-01/04-02/06-1835, 24 March 2017, para. 15; *Prosecutor v. Kenyatta*, [Decision on two Prosecution applications to maintain B3 redactions to certain disclosed materials, 4 April 2013](#), ICC-01/09-02/11-712-Conf, ICC-01/09-02/11-712-Red, 3 February 2017, paras 34-36.

⁶⁰ [ICC-01/14-01/18-64-Conf](#), para. 26, Public redacted version: [ICC-01/14-01/18-64-Red](#).

⁶¹ *Prosecutor v. Ntaganda*, [Public redacted version of ‘Decision on Defence requests regarding certain materials relating to P-0190 and P-0899’](#), ICC-01/04-02/06-1440-Red, 6 July 2016, para. 12.

71. While the redaction regime allows for standard category B.3 to be redacted when it relates to “[i]dentifying and contact information of ‘other persons at risk as a result of the activities of the Court’ (‘innocent third parties’), insofar as necessary to protect their safety”⁶², the Prosecution has used this category to redact the names of individuals who have substantive connection to the events, contrary to the established case law.⁶³ As the Single Judge in the *Al Hassan* case recently observed:

“Identifying information of individuals, family members or not, who were physically present at the scene of an alleged crime or individuals who have in any other way acquired or established knowledge of the events or circumstances part of a witness’s narrative cannot be redacted pursuant to these two categories as no standard justification applies.”⁶⁴

72. The Defence is therefore proposing a few amendments to the redaction regime based on lessons learnt.

73. The proposed amendments to the redaction regime aim at capturing the main principles set out in the case law established by the Court in relation to three categories of redaction, B.1, B.2 and B.3. The proposed amendments will also serve judicial economy as they will streamline the number of redactions initially misapplied by the Prosecution and reduce *inter partes* discussions and ultimately litigation.

74. The Defence therefore proposes the following amendments to the redaction regime:

⁶² [ICC-01/14-01/18-64-Conf](#), para. 26, Public redacted version: [ICC-01/14-01/18-64-Red](#).

⁶³ *Prosecutor v. Bemba et al.*, [Annex to the Decision on Modalities of Disclosure: Protocol Establishing a Redaction Regime](#), ICC-01/05/01/13-959-Anx, 22 May 2015, para. 43; *Prosecutor v. Gbagbo*, [Annex A to Decision on the Protocol Establishing a Redaction Regime](#), ICC-02/11-01/11-737-AnxA, 15 December 2014, para. 43.

⁶⁴ *Prosecutor v. Al Hassan*, [Decision on the evidence disclosure protocol and related matters](#), ICC-01/12-01/18-546, 30 December 2019, fn. 19.

75. Category “B.1”: Recent contact information of witnesses, insofar as necessary to protect the safety of the witness **except for phone numbers used the at the time of the events.**

76. Category “B.2”: Identifying and contact information of family members of witnesses **who are mentioned in an incidental manner or by way of general biographical background,** or only **where his or her identity has no relevance to a known issue in the case,** insofar as necessary to protect their safety; **Identifying information for all other family members should be disclosed, either immediately or, in the case of any witnesses for whom delayed disclosure may be granted, at the time of disclosing the identity of the relevant witness.**

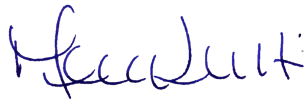
77. Category “B.3”: Identifying and contact information of “other persons at risk as a result of the activities of the Court **and who are of no relevance to any known issues in the case**” (“innocent third parties”), insofar as necessary to protect their safety.

78. These amendments, which mirror existing case law, will avoid further litigation as the Prosecution begins to disclose redacted statements of witnesses who it did not rely on during the confirmation hearing but intends to call at trial.

CONCLUSION

79. The Defence believes that Mr. Yekatom’s trial should take place in the Special Criminal Court of the Central African Republic. If his case must be tried at this Court, the Defence pledges its full cooperation towards a fair and efficient trial.

RESPECTFULLY SUBMITTED ON THIS 8th DAY OF APRIL 2020 ⁶⁵



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