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**International
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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

Yekatom Defence Submission on the Conduct of the Trial

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

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Me Mylène Dimitri

Mr. Peter Robinson

Counsel for Mr. Ngaïssona

Me Geert-Jan Alexander Knoops

Legal Representatives of Victims

Mr. Dmytro Suprun

Mr. Abdou Dangabo Moussa

Ms. Elisabeth Rabesandratana

Mr. Yaré Fall

Ms. Marie-Edith Douzima-Lawson

Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) hereby makes the following submissions on the conduct of the trial.

OVERVIEW

2. The Trial Chamber should adopt the trial procedures employed in the *Ongwen* case,¹ with modifications relating to (1) the “submission” of evidence, (2) testimony by video link, and (3) expert testimony. The Defence opposes the witness preparation regime suggested by the Prosecution.

ARGUMENT

A. Modifications to the *Ongwen* directions

(1) Submission vs Admission

3. The Defence objects to the “submission” procedure by which a Trial Chamber leaves the parties in the dark as to what is relevant and admissible until it issues its final judgment.
4. While the “submission” procedure was approved as an option in the *Bemba et al* appeal judgment,² since the *Ongwen* directions were issued in 2016, four judges of the Appeals Chamber have expressed their dissatisfaction with the “submission” procedure.
5. In the *Bemba et al* appeal, Judge Geoffrey Henderson forcefully argued that the submission procedure is unfair to the Defence, requiring it to devote precious time and resources to conduct investigations and prepare its cases to refute all

¹ *Prosecutor v. Ongwen*, [Initial Directions on the Conduct of the Proceedings](#), 13 July 2016, ICC-02/04-01/15-497, (“*Ongwen* directions”).

² *Prosecutor v. Bemba et al*, [Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aime Kilolo Musamba, Mr. Jean-Jacques Mangenda, Mr. Fidele Babala Wanda and Mr. Narcisse Arido against the Decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”](#), 8 March 2018, ICC-01/05-01/13-2275-Red, para. 628.

the evidence submitted.³ In the *Bemba* appeal, Judges Van den Wyngaert and Morrison noted that while the “submission” regime may have been unproblematic in the context of a case relating to offences against the administration of justice, it is not appropriate in complex war crimes cases to avoid crowding the case record with evidence of inferior quality.⁴ And President Eboe-Osuji, in the *Bemba* appeal, criticised the “submission” regime, pointing out that with no evidential ruling made at the time of tendering the evidence, the Defence is required to submit contrary evidence to rebut all the evidence that the Trial Chamber did not weed out by making rulings.⁵

6. The post-2016 criticism of the “submission” regime is not limited to the Judges. Amnesty International noted that:

If parties can freely submit evidence without having to substantiate why, and what they consider certain evidence relevant to, and judges decline to rule on any objections in this regard, the outcome is that defendants are ‘left in the dark’ until the end of the trial as to what evidence the Chamber will eventually admit and take into consideration. This places on the defence the onerous burden of responding to all evidence submitted, regardless of its relevance or probative value, and without a clear understanding of the relation between the evidence and the charges in the Prosecution’s case. The impact of this dynamic on the principle of equality of arms is enormous, especially considering that, at the commencement of a trial, the OTP will have been collecting and analysing evidence for years. Of course, much less time and fewer resources are available to defendants – especially those relying on legal aid to fund their defence. Hence, through current evidential practices, the right to adequate time and

³ *Prosecutor v. Bemba et al*, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aime Kilolo Musamba, Mr. Jean-Jacques Mangenda, Mr. Fidele Babala Wanda and Mr. Narcisse Arido against the Decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Anx, [Separate Opinion of Judge Geoffrey Henderson](#), paras. 43-45.

⁴ *Prosecutor v. Bemba*, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo’s Appeal against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, [Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison](#), ICC-01/05-01/08-3636-Anx2, para. 18.

⁵ *Prosecutor v. Bemba*, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo’s Appeal against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 14 June 2018, [Concurring Separate Opinion of Judge Eboe-Osuji](#), ICC-01/05-01/08-3636-Anx3, para. 314.

facilities to prepare a defence, an essential component of a fair trial, is seriously put into question.⁶

7. The International Bar Association also recently recommended that trial chambers be required to determine all challenges to admissibility of evidence promptly during the trial.⁷
8. The concerns expressed by the Appeals Chamber judges and others are very real as applied to this case.
9. The Prosecution appears to take an expansive view of what is relevant, proposing to call expert witnesses on general CAR background, child soldiers, satellite imagery analysis, victim trauma, call data records, sexual and gender-based violence, military structure, and demographics.⁸ If relevance and admissibility objections are not adjudicated until the judgment is issued, the Defence will have to spend considerable time and resources engaging its own experts on subjects that may ultimately not be relevant or important.
10. The Prosecution has also indicated that it intends to present a significant amount of evidence outside the temporal and geographical scope of the incidents contained in the confirmation decision. It has recently stated that, despite the Pre-Trial Chamber's refusal to confirm most of the charges from areas outside of Bangui, "nearly all evidence submitted by the Prosecution at confirmation remains highly relevant to the confirmed charges".⁹
11. Deferring rulings on the relevance of Prosecution evidence will have a detrimental effect on the Chamber's ability to manage the trial.

⁶ Amnesty International, "[Admitting Mistakes on Admitting Evidence—It's Not Too Late for the ICC to Get it Right](#)", 4 May 2018.

⁷ International Bar Association, "[Recommendations of the International Bar Association ICC and ICL Programme to the Independent Expert Review of the International Criminal Court \(April 2020\)](#)", pp. 16-18.

⁸ [ICC-01/14-01/18-474](#), para. 16.

⁹ [ICC-01/14-01/18-488-Red](#), p. 6, heading C.

12. For example, various Prosecution witnesses describe the involvement of Mr. Yekatom in events in the remote town of Boda, the site of many clashes between Christians and Muslims. Mr. Yekatom was never charged with crimes in Boda and the Pre-Trial Chamber declined to include Boda events in the charges it confirmed against Mr. Ngaissona.¹⁰ Absent a ruling on the relevance of the Boda events, the Defence will have to investigate and call witnesses to refute the Prosecution's evidence, because it would not know whether the Chamber would be considering evidence of Mr. Yekatom's conduct in Boda in its judgment.
13. Every non-decision on relevance has a doubling effect on the length of the proceedings. Not only is the Prosecution allowed to present evidence that may later be ruled irrelevant, but the Defence will be obliged to present its evidence on that issue and will indeed do so.
14. Given the opposition that has emerged to the "submission" procedure since it was included in the *Ongwen* directions, particularly among judges of the Appeals Chamber, it would appear imprudent to adopt the procedure in this case. In addition to the potential of an unfair trial, it would create uncertainty if any convictions obtained could be affirmed on appeal. For all of these reasons, the Defence urges the Trial Chamber not to adopt the "submission" procedure. It pledges not to make frivolous or unfounded objections to the admission of evidence.

(2) Video-Link

15. The Defence re-iterates its request that the party seeking to offer evidence by video link be required to justify the need for it.¹¹

¹⁰ [ICC-01/14-01/18-403-Red](#), para. 220.

¹¹ See [ICC-01/14-01/18-472](#), paras. 8-11.

(3) Expert Testimony

16. The Defence has made an innovative proposal that would improve the efficiency and fairness of the trial by limiting expert testimony to those subjects that would truly be of assistance to the Chamber and by eliminating the “dueling experts” manner of litigation.¹² It requests that the Chamber modify the *Ongwen* directions accordingly.

B. Response to the Prosecution’s Proposals

(1) Witness Preparation

17. The Defence prefers the *Ongwen* model over the Prosecution’s witness preparation proposal.¹³
18. Most Trial Chambers have not allowed witness preparation, or witness proofing.¹⁴ A large number of domestic jurisdictions of States parties also do not allow it.¹⁵ Trial Chambers have expressed the legitimate concern that witness preparation could lead to a distortion of the truth and may come close dangerously to constituting a rehearsal of in-court testimony.¹⁶ In the *Bemba et al.* case, Trial Chamber VII stated that:

¹² See [ICC-01/14-01/18-472](#), paras. 6-7.

¹³ [ICC-01/04-01/18-476](#), paras. 9-16.

¹⁴ *Prosecutor v. Lubanga*, [Decision on the Practices of Witness Familiarisation and Witness Proofing](#), 8 November 2006, ICC-01/14-01/06-679, paras 11, 32 and 33; *Prosecutor v. Lubanga*, [Decision Regarding Practices Use to Prepare and Familiarise Witnesses for Giving Testimony at Trial](#), 30 November 2007, ICC-01/04-01/06-1049, para. 36; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on a number of procedural issues raised by the Registry](#), 14 May 2009, ICC-01/04-01/07-1134, para.18; *Prosecutor v. Bemba*, [Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial](#), 18 November 2010, ICC-01/05-01/08-1016, para.34; *Prosecutor v. Ongwen*, [Decision on Protocols to be adopted at trial](#), 22 July 2016, ICC-02/04-01/15-504, para.7; *Prosecutor v. Al Hassan*, [Decision on witness preparation and familiarization](#), 17 March 2020, ICC-01/12-01/18-666, para. 10. (While the Prosecution refers to the *Ntaganda* case as a reference for allowing witness preparation, the Chamber should note that the *Ntaganda* Defence did not object to witness preparation, [ICC-01/04-02/06-652](#), para. 4)

¹⁵ *Prosecutor v. Lubanga*, [Decision Regarding Practices Use to Prepare and Familiarise Witnesses for Giving Testimony at Trial](#), 30 November 2007, ICC-01/04-01/06-1049, para.12; *Prosecutor v. Lubanga*, [Decision on the Practices of Witness Familiarisation and Witness Proofing](#), 8 November 2006, ICC-01/14-01/06-679, para. 42, See also paras. 34 to 41.

¹⁶ *Prosecutor v. Lubanga*, [Decision Regarding Practices Use to Prepare and Familiarise Witnesses for Giving Testimony at Trial](#), 30 November 2007, ICC-01/04-01/06-1049, para.51.

“It is undeniable that witness preparation entails risks that could affect the spontaneity and reliability of the testimonies of witnesses”.¹⁷

19. In addition, the possibility of new information arising from witness preparation sessions could be prejudicial to the Defense since the late disclosure may prevent it from properly preparing its cross-examination and conducting timely investigations. Hence witness preparation can interfere with the rights of the Accused.
20. Purported concerns for the well-being of the witness would not be advanced by additional sessions in which the witness’ testimony is rehearsed. The appropriate assistance to ensure the well-being of a witness prior to the hearing should be provided by the Victims and Witnesses Unit (“VWU”). VWU will enable the witness to refresh his or her memory by reading the previous statement in a neutral environment, thus ensuring the absence of a risk of undue influence.¹⁸ This would be the absolute safeguard. The *Bemba et al* and *Ongwen* trials were conducted without any detrimental effects to witness well-being from the absence of witness preparation.
21. Should the Chamber allow witness preparation, it should require the calling party to disclose the video file of the preparation session. Statements made during witness preparation sessions relate to the substance of the witness’ recollection of the events and fall within Rule 76.¹⁹ There is no reason to require a party to make a special showing to obtain the recording, or to accept a sanitized investigator’s note as a substitute, as proposed by the

¹⁷ *Prosecutor v. Bemba & al.*, [Decision on Witness Preparation and Familiarisation](#), 15 September 2015, ICC-01/05-01/13-1252, para. 22; See also *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on Witness Preparation and Familiarisation](#), 2 December 2015, ICC-02/11-01/15-355, para. 17.

¹⁸ *Prosecutor v. Lubanga*, [Decision on the Practices of Witness Familiarisation and Witness Proofing](#), 8 November 2006, ICC-01/14-01/06-679, paras. 24-27; *Prosecutor v. Bemba & al.*, [Decision on Witness Preparation and Familiarisation](#), 15 September 2015, ICC-01/05-01/13-1252, para.26; *Prosecutor v. Ongwen*, [Decision on Protocols to be adopted at trial](#), 22 July 2016, ICC-02/04-01/15-504, paras. 8, 15.

¹⁹ *Prosecutor v. Ntaganda*, [Judgment on the Appeal of Mr. Bosco Ntaganda against the Decision on Defence Requests Seeking Disclosure Orders and a Declaration of Prosecution Obligation to Record Statements of Witnesses](#), ICC-01/04-02/06-1330, 20 May 2016, para. 16, defining “statements” as made when witnesses are “questioned about their knowledge of the case”.

Prosecution.²⁰ The simplest and fairest procedure is to require the calling party to simply e-mail the video file to the other parties upon the conclusion of the preparation session. The parties will then be in a position to use the recording as impeachment should there be any suggestiveness in the preparation session or inconsistencies in the witness' testimony.

(2) Witness Familiarisation

22. The Defence agrees with the submissions of the Registry concerning the witness familiarisation process, except for those relating to joint travel and accommodation.²¹ The Defence agrees with the Prosecution that witness contamination during travel to and accommodation at the seat of the Court must be avoided. The Registry submission takes only operational considerations into account, but the fairness of the trial will be adversely affected by providing witnesses the opportunity to conform their testimonies. The joint travel or accommodation presents a threat to the Chamber's fact-finding ability and is detrimental to the search for the truth.

(3) Miscellaneous Provisions

23. The Defence objects to those portions of the Prosecution's proposed trial directions that differ from the regime set forth in the *Ongwen* directions. The Prosecution's proposal unnecessarily over-regulates the trial, at which an experienced judge will preside.
24. The Prosecution proposals are inferior to the procedures in the *Ongwen* directions. For example, the Defence prefers the *Ongwen* procedure requiring an immediate notice of changes to the order of witnesses,²² to the

²⁰ [ICC-01/14-01/18-476-AnxA](#), para. 22.

²¹ [ICC-01/14-01/18-516-Red](#), paras. 21-25.

²² [Ongwen directions](#), para. 16.

Prosecution's proposal of weekly updates.²³ The *Ongwen* directions provide the parties with earlier notice of proposed changes to the order of witnesses and more time to adjust its preparation.

25. The Defence also prefers the *Ongwen* procedure that requires the calling party to provide the ERN and highlight the passages within the documents it proposes to use with the witness.²⁴ The Prosecution's proposal does not include this requirement. Such specificity will greatly aid in the preparation for the testimony under the time pressure of the witness' imminent appearance.
26. The Defence also prefers the *Ongwen* directions, which requires the cross-examining party to disclose the documents it will use with a witness one working day prior to the witness' testimony,²⁵ to the Prosecution's proposal of three days.²⁶ Under the Prosecution's proposal, if witness preparation is allowed, the calling party could prepare the witness by sharing the exhibits to be used on cross-examination, thus frustrating the search for the truth.
27. The Defence sees no need for the Trial Chamber to pronounce itself on the availability of a "no case to answer" motion in a factual and procedural vacuum prior to trial.²⁷
28. Finally, in this joint trial, the Chamber is respectfully requested to allow the defence teams decide on their order of cross-examination and order of calling defence witnesses between themselves.²⁸

²³ [ICC-01/14-01/18-476-AnxA](#), para. 30.

²⁴ *Ongwen directions*, para. 19.

²⁵ *Ongwen directions*, para. 20.

²⁶ [ICC-01/14-01/18-476-AnxA](#), para. 51.

²⁷ [ICC-01/14-01/18-476-AnxA](#), para. 10.

²⁸ *The Prosecutor v. Bemba & al.*, [Decision on the conduct of the proceedings](#), 2 September 2015, ICC-01/05-01/13-1209, para. 10-11.

(4) Protocols

29. The defence re-iterates its requests that the redaction protocol be amended to require the Prosecution to conform its redaction procedures to the Court's jurisprudence.²⁹

CONCLUSION

30. The Defence appreciates the opportunity to have its views on the conduct of the trial considered and pledges its cooperation and collegiality to make Mr. Yekatom's trial a fair and efficient one.

RESPECTFULLY SUBMITTED ON THIS 15th DAY OF MAY 2020³⁰



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Peter Robinson
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

²⁹ See [ICC-01/14-01/18-472](#), paras. 67-78.

³⁰ The assistance of Legal Intern Kayrouz Abou Malhab of Canada to the research and drafting of this submission is gratefully acknowledged.