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**International
Criminal
Court**

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Date: 15 May 2020

TRIAL CHAMBER V

Before:

**Judge Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

With public annexes A and B

**Public redacted version of “Defence response to the ‘Prosecution’s Submission of
Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness
Familiarisation’, ICC-01/14-01/18-476”, 15 May 2020**

Source: Defence of Patrice-Edouard Ngaïssona

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 Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
Ms Antonina Dyk
Ms Lauriane Vandeler
Ms Margaux Portier

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
Mr Peter Robinson

Legal Representatives of the Victims

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

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Paddy Craig

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 14 April 2020, the Office of the Prosecutor (“Prosecution”) submitted the “Prosecution’s Submission of Proposed Directions for the Conduct of Proceedings and Proposed Protocol on Witness Familiarisation” (“Prosecution’s Submissions”).¹ The Prosecution requests that Trial Chamber V (“the Chamber”) adopt its Directions for the Conduct of Proceedings (“Prosecution’s Proposed Directions”), contained in a single comprehensive document.² The Defence for Mr Patrice-Edouard Ngaïssona (“the Defence”) hereby submits its response together with an amended version of the Prosecution’s Proposed Directions as set out in Annex A (revised version) and Annex B (clean version) (“Defence’s Proposed Directions”).

II. Confidentiality

2. The Defence files the present response confidentially since it refers to items of evidence that is classified as such. A public redacted version of the present response will be filed on the same day.

III. Submissions

A. Directions on the conduct of proceedings

a. Witness preparation should not be authorized in the present case

3. The Defence strongly opposes the adoption of a witness preparation protocol in the instant case. None of the factors addressed by the Prosecution in favor of witness preparation, even when considered in their totality, outweigh the inherent risks of authorizing such a procedure.

4. Witness preparation carries an inherent risk of coaching witnesses, such that the truth of the witnesses’ account of the alleged facts and circumstances to which they will testify is distorted to fit the narrative of the calling party.³ Such a risk stems from “the calling party who, irrespective of his/her intentions, can unwittingly transmit expectations to the witness”.⁴ The

¹ ICC-01/14-01/18-476.

² ICC-01/14-01/18-476-AnxA.

³ *The Prosecutor v. Ongwen*, ICC-02/04-0/15-504, para. 8 citing *The Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1252, para 22.

⁴ ICC-02/04-0/15-504, para. 10.

Prosecution in its submissions acknowledges this inherent risk when it submits that the procedure would not prejudice the Defence because of the safeguards contained in their proposed witness preparation procedure.⁵

5. While Article 64 of the Rome Statute accords trial chambers with a significant degree of discretion in determining procedures to ensure the fairness and expeditiousness of the trial, witness preparation remains a minority rule among trial chambers.⁶ Indeed, in the history of the Court, only three trial chambers have authorized the procedure, whereas five chambers have strongly rejected the practice.⁷ In each case in which such a procedure was exceptionally authorized, the trial chamber considered case specific factors, which were dispositive in their authorization of witness preparation.⁸ Trial chambers take into account these factors while balancing the potential benefits of witness preparation against its inherent risks.⁹

6. The Prosecution fails to identify any considerations specific to this case that would tip the balance in favor of witness preparation. The Prosecution presents five arguments in support of its position, of which only two address the specific circumstances of this case.¹⁰ The Prosecution's general arguments in favor of witness preparation are that the procedure will: (1) allow witnesses to feel more comfortable and confident,¹¹ (2) enhance the efficiency of the proceedings and recognize the Parties' right to present their cases such that the truth is established,¹² (3) be a limited form of preparation that trial chambers have authorized and thus does not affect the integrity of the proceedings or be prejudicial to the Defence.¹³ Given the

⁵ Prosecution's Submissions, para 16.

⁶ Compare *The Prosecutor v. Lubanga*, ICC-01/04-01/06-679; *The Prosecutor v. Bemba*, ICC-01/05-01/08-1016; *The Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1252; *The Prosecutor v. Ongwen*, ICC-02/04-01/15-504; *The Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-355, prohibiting witness preparation with *The Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-524; *The Prosecutor v. Ntaganda*, ICC-01/04-02/06-652; *The Prosecutor v. Al-Hassan*, ICC-01/12-01/18-666.

⁷ Ibid.

⁸ *The Prosecutor v. Al-Hassan*, ICC-01/12-01/18-666, para.10 citing *The Prosecutor v. Ntaganda*, ICC-01/04-02/06-652, para. 17 ("any decision on witness preparation should be made after a careful review of the circumstances prevailing in each case at the court"); *The Prosecutor v. Ruto & Sang* ("Notwithstanding the provisions of the ICTR Rules, the Chamber finds that Articles 64(2) and (3)(a) provide ample authority for the Chamber to adopt a case-specific approach to the issue of witness preparation"), ICC-01/09-02/11-588, para.33

⁹ *The Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-355, para.19; *The Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1252, paras 21-25; *The Prosecutor v. Ntaganda*, ICC-01/04-02/06-652, paras 18, 24; ICC-01/12-01/18-666, para. 17.

¹⁰ Prosecution's Submissions, paras 11-16.

¹¹ Prosecution's Submissions, paras 11-13.

¹² Prosecution's Submissions, para. 13.

¹³ Prosecution's Submissions, paras 15-16. The Prosecution presents this argument as two separate arguments, but they are related to the integrity of the proceedings.

general nature of these arguments, they are incapable of answering the issue in question, namely whether the circumstances of this case warrant witness preparation.

7. The five trial chambers rejecting witness preparation have already considered *inter alia* these arguments raised by the Prosecution and found that: (1) the VWU is a unique neutral organ in the Registry of the ICC, which was created to provide assistance to witnesses and make them feel at ease with testifying, including familiarizing those witnesses who are deemed to be vulnerable,¹⁴ (2) rather than contributing to the establishment of the truth, witness preparation distorts it by compromising the “principle of immediacy” in which the trial chamber observes the spontaneity of the witnesses responses, and assesses how inconsistencies are resolved or not as the witness testifies¹⁵ and (3) the safeguards necessary to ensure that the procedure contains no risk of witness coaching would basically amount to witness familiarization as assured by VWU, which is better placed to perform such a function.¹⁶

8. The Prosecution’s case specific arguments regarding the need for witness preparation in this case do not withstand scrutiny. The Defence identifies three arguments in the Prosecution’s submissions that are case specific, which are: (1) witness preparation is necessary because the witnesses will be testifying to events that took place six years ago, (2) the budgetary constraints prevent visits in the field in this case as they were in the *Ongwen* case, and (3) the COVID-19 pandemic limits the feasibility of field visits. None of these arguments shift the balance in favor of witness preparation in the instant case.

9. The Prosecution’s argument regarding the need to refresh witnesses’ memories because of the time gap between the alleged crimes and the date of testimony does not pass muster. First, the temporal scope of the *Yekatom & Ngaïssona* case compared to other Article 5 cases before the Court is one of the most recent. Second, and contrary to the Prosecution arguments, many of the Prosecutions’ witnesses were interviewed within the last two years. For example, out of the fifteen most cited witnesses in the Confirmation Decision,¹⁷ almost all of witnesses

¹⁴ *The Prosecutor v. Ongwen*, ICC-02/04-01/15-504, para. 8; *The Prosecutor v. Lubanga*, ICC-01/04-01/06-679, paras 22, 24, 26; *The Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1252, para. 26.

¹⁵ *The Prosecutor v. Ongwen*, ICC-02/04-01/15-504, para. 8; *The Prosecutor v. Lubanga*, ICC-01/04-01/06-679, footnote 41; *The Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1252, para. 25; *The Prosecutor v. Gbagbo & Blé Goudé*, ICC-02/11-01/15-355, para. 16.

¹⁶ *The Prosecutor v. Ongwen*, ICC-02/04-01/15-504; see *The Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1252, paras 22, 26-27; *The Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-355, para. 25.

¹⁷ ICC-01/14-01/18-403-Conf (“Confirmation Decision”). See its public redacted version ICC-01/14-01/18-403-Red.

were most recently interviewed between the years 2018-2019. The Defence provides the table below to illustrate the recent nature of the Prosecution interviews with these witnesses:

No.	Witness	No. of times cited in the Confirmation Decision	Latest witness interview	ERN
1.	[REDACTED]	61	[REDACTED] 2019	CAR-OTP-2100-2569-R01
2.	[REDACTED]	40	[REDACTED] 2016	CAR-OTP-2041-0741-R01
3.	[REDACTED]	37	[REDACTED] 2017	CAR-OTP-2061-1534-R01
4.	[REDACTED]	35	[REDACTED] 2019	CAR-OTP-2110-0556-R02
5.	[REDACTED]	34	[REDACTED] 2016	CAR-OTP-2131-0241-R01
6.	[REDACTED]	32	[REDACTED] 2018	CAR-OTP-2080-1603-R01
7.	[REDACTED]	28	[REDACTED] 2018	CAR-OTP-2093-0010-R01
8.	[REDACTED]	22	[REDACTED] 2018	CAR-OTP-2083-0279-R01
9.	[REDACTED]	20	[REDACTED] 2017	CAR-OTP-2046-0603-R01
10.	[REDACTED]	18	[REDACTED] 2016	CAR-OTP-2027-2290-R01
11.	[REDACTED]	18	[REDACTED] 2017	CAR-OTP-2050-0654-R02
12.	[REDACTED]	17	[REDACTED] 2018	CAR-OTP-2088-2173-R02
13.	[REDACTED]	17	[REDACTED] 2018	CAR-OTP-2088-2146-R02
14.	[REDACTED]	15	[REDACTED] 2017	CAR-OTP-2054-1136-R02
15.	[REDACTED]	15	[REDACTED] 2019	CAR-OTP-2111-0452-R02

10. As demonstrated by the table above, crucial witnesses underpinning the charges in this case were interviewed quite recently. The recent nature of the interviews is consistent with the procedural history of this case. Both Mr Ngaïssona and Mr Yekatom were arrested within mere days of the arrest warrants being issued at the end of 2018.¹⁸ Thus, the Prosecution's alleged case against Mr Ngaïssona has been built quite recently. The Defence has identified that the oldest witness statement in its possession dates from [REDACTED] 2015¹⁹ and the most recent interview was conducted just three months ago from [REDACTED] 2020.²⁰

11. Therefore, this case stands in stark contrast with the *Ntaganda* case in which the time gap was taken into account in the Trial Chamber's decision to authorise witness preparation. First, the Trial Chamber in *Ntaganda* gave due regard to the parties agreeing to have witness preparation apply in the present case. Here, the Defence strongly opposes such a procedure. Second, in *Ntaganda*, the time gap between the date of the crimes and the start of trial was significant, since the Prosecution witnesses testified about events which occurred at least 12 years before the start of trial,²¹ whereas in the instant case the events occurred 6 years ago. Moreover, the Prosecution in *Ntaganda* submitted that many of the witnesses provided their

¹⁸ ICC-01/14-01/18-121, para. 2.

¹⁹ [REDACTED], CAR-OTP-2005-5407-R01.

²⁰ [REDACTED], CAR-OTP-2126-0058-R01

²¹ ICC-01/04-02/06-444, para. 38.

first statements in 2005, whereas the trial against Mr Ntaganda began in 2015.²² Unlike Mr Ngaïssona, Mr Ntaganda was surrendered to the Court several years after the first arrest warrant against him was issued.²³ Therefore, the Prosecution had been building its case against Mr Ntaganda for several years prior to his arrest. It comes as no surprise that many of the witnesses were first interviewed many years before the start of the trial. In the present case, many of the interviews were conducted within the last three years, since the case against Mr Ngaïssona is quite recent. Therefore, the Prosecution's case specific argument regarding the time gap between the start of trial and alleged crimes coupled with the date of the witness interviews is without merit.

12. Similarly, the Prosecution's arguments regarding the inability of conducting missions to the field because of resource constraints, and the effect of the COVID-19 pandemic on travel are unconvincing. First, assuming *arguendo* that the Prosecution does have less resources to conduct field missions in Central African Republic than it did in the *Ongwen* case, this is a mere budgetary consideration, which is wholly unrelated to a specific consideration related to the witnesses in this case, and how their anticipated evidence would be best adduced through witness preparation. Witnesses can still be contacted, through other means than field visits such as video technology. Moreover, a mere budgetary consideration is not a factor that outweighs the real risks of witness coaching that is present when substantive witness preparation is allowed on the eve of a witness anticipated testimony.

13. Contrary to the Prosecution's arguments, the travel restrictions due to the COVID-19 pandemic should be a factor which weighs against the Prosecution's proposal to authorize witness preparation in the present case. As the Prosecution itself admits, witness preparation carries with it the possibility that new evidence will come to light during preparation sessions.²⁴ In such a scenario, if new last minute evidence is brought to light during a preparation session, the Defence will have the burden of organizing last minute investigative activities when travel within the country and to the country is restricted due to social distancing measures. Therefore, information leading to new evidence being adduced on the eve of testimony should be avoided during the COVID-19 crisis so as to ensure that Mr Ngaïssona can fully examine the witnesses against him under Article 67 of the Rome Statute.

²² *Ibid.*

²³ ICC-01/04-02/06-309, para. 1.

²⁴ Prosecution's Submissions, para. 16.

b. The admission evidentiary regime should be adopted in the present case

14. While the legal framework of the Court mixes aspects of both civil and common law systems, the Rome Statute provides for key aspects of the proceedings to be conducted in an adversarial nature.²⁵ Unlike in inquisitorial systems, the Statute does not provide for the safeguard of an impartial magistrate that both collects and sifts through evidence. Thus, any filter during trial against evidence of uncertain authenticity, probative value and/or relevance is entirely dependent on the evidentiary rulings made by trial chambers, should they choose to do so. In this context, four main reasons arise why the Chamber should opt for an admission regime.

15. *First*, ruling an item inadmissible for lack of relevance, authenticity or probative value saves everyone valuable time by keeping the case record focused on the charges.

16. In its submissions, the Prosecution points out that the evidence in the CAR II situation is one of the largest at the Court. The Prosecution has 122 000 exhibits thus far, which does not yet account for the whole case record.²⁶ The Prosecution also estimates it will call between 120 and 140 witnesses during trial.²⁷ While, as a result of the Confirmation Decision and the final number of charges confirmed for Mr Ngaïssona and Mr Yekatom respectively, the Defence anticipated that the volume of evidence, seeing how irrelevant a large part of it had now become, would drastically reduce post confirmation, the Defence is very much concerned that this is far from being the Prosecution's intention. In fact, the Prosecution responded to the Defence's 8 April 2020 submissions²⁸ that "[n]early all evidence submitted [...] at confirmation remain[ed] highly relevant to the confirmed charges"(emphasis added),²⁹ which the Defence will strongly contest on the basis of the material, geographical and temporal scope of the charges as clearly circumscribed by the Pre-Trial Chamber.³⁰ Given that the Defence

²⁵ Articles 66(2) and Article 67(1)(e) of the Statute, for instance, confine the discharge of the burden of proof to the Prosecution and provide for the confrontation of the evidence by the accused.

²⁶ ICC-01/14-01/18-474-Conf, para. 23.

²⁷ ICC-01/14-01/18-474-Conf, para. 15.

²⁸ ICC-01/14-01/18-473-Conf ("8 April 2020 Submissions"), para. 13.

²⁹ ICC-01/14-01/18-488-Conf, page 6 (emphasis added).

³⁰ Any elaboration on this matter should be the object of separate detailed submissions. However, for the sake of clarity, intending to submit an unreasonable amount of evidence that is now outside of the scope of the charges, such as for instance (i) all evidence related to the alleged crimes committed in the provinces in the course of 2014 or (ii) endless details about the alleged functioning of the coordination after the last crime charged, in order to assist proving certain contextual elements or intent *post facto* (despite the Pre-Trial Chamber's ruling that "post facto validation is inadequate to prove that Ngaïssona had the required intent in relation to the crimes allegedly committed") is unacceptable as it would unduly affect the overall expeditiousness and fairness of the proceedings and violate the rights of the accused. Confirmation Decision, para. 182.

anticipates much litigation between the parties on a question as crucial to an accused as the scope of the charges, and given the consequences the volume of evidence may have on the length of the trial, the adoption of an admission of evidence regime is particularly necessary in the present case. It will allow the Chamber to act as a gatekeeper against any attempt to undermine the fundamental filtering function of the Pre-Trial Chamber.

17. More generally, without admissibility decisions on a rolling basis, the parties are not encouraged to limit the overall amount of evidence presented as they will not be certain as to which items will be admitted and which items will be considered repetitive or unduly cumulative. In a party driven trial, this may result in the evidential record being flooded with evidence of dubious or no relevance. This is in no one's interest, and is certainly not conducive to efficiency, especially in a case of such considerable scale and magnitude.

18. As held by Judges Van den Wyngaert and Judge Morrison, the Chamber must “apply the admissibility criteria of article 69(4) of the Statute sufficiently rigorously to avoid crowding the case record with evidence of inferior quality”.³¹ Therefore, by adopting an admission of evidence regime, the Chamber would be able to fulfill its obligation that the case record remains focused and free from evidence that lacks relevance or probative value.

19. *Secondly*, an admission evidentiary regime allows the Defence to know which evidence it should focus its limited time and resources on. The consequences of a submission regime for the parties and participants are the allocation of precious time and resources to conduct investigations and prepare their respective cases in light of all evidence submitted, even though such evidence may ultimately be considered inadmissible. This may have a significant impact in this trial where the anticipated body of evidence is extremely large, and therefore be unduly prejudicial to the Defence, by placing on it an unreasonable burden and hindering its capacity to prepare its case.

20. *Thirdly*, it is only before the trial concludes that potential prejudice to the Defence can be averted or, depending on the circumstances, adequately remedied. Even assuming a prejudicial item of evidence would be excluded during deliberation, it cannot change the course of the trial once it has concluded.

³¹ *Prosecutor v. Jean-Pierre Bemba*, Separate Opinion of Judges Van den Wyngaert and Morrison, ICC-01/05-01/08-3636-Anx2, para. 18.

21. *Fourthly*, an admission regime assists the Defence in knowing what the state of the evidence is at the close of the Prosecution's case, whether to stay silent or to give evidence and if so, what may be considered important to respond to.³² The Appeals Chamber had held that, in the absence of a ruling as to inadmissibility or irrelevance, the evidence considered formally submitted must be presumed to be 'not [...] inadmissible'.³³ Therefore, the impact on the Defence could be considerable should the Chamber decide to not issue an admissibility ruling before the Defence presents its evidence and makes its representations. It would impede the Defence from streamlining the presentation of its case and from presenting efficient closing arguments, as it would need to cover all eventualities concerning the evidence.

22. Similarly, if at the close of the Prosecution's case, special circumstances warrant the conduct of no case to answer proceedings, rulings on admissibility and relevance before this stage will be essential to allow the defence to argue insufficiency of the actual evidence of the case.³⁴ In the *Laurent Gbagbo and Charles Blé Goudé* case, in which Trial Chamber I had opted for a submission regime³⁵ – which led to countless litigation between the parties, including now on appeal against the acquittal decision,³⁶ and various dissenting opinions from Judge Henderson on this subject³⁷ – the latter explained that the no case to answer proceedings constituted “specific circumstances where the Chamber should have [...] rendered rulings on the items of evidence that it consider[ed] ‘not-irrelevant’ and/or ‘not-inadmissible’”.³⁸ Judge Tarfusser, in his separate opinion, while finding “conceptually difficult, if not impossible, to discuss the matter” given the exceptional weakness of the evidence,³⁹ recognised that had any items of evidence adduced by the Prosecution “support[ed] any of the charges levelled against the accused”,⁴⁰ it “would have then indeed been necessary to determine whether such items possessed enough indicia of authenticity, relevance and probative value so as to require the defence to respond to them”.⁴¹ Therefore, even an ICC judge very much in favour of the

³² *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Dissenting Opinion of Judge Henderson, ICC-02/11-01/15-405-Anx, para. 9.

³³ Appeals Chamber, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2275-Red, para. 598.

³⁴ See *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1263, Reasons of Judge Geoffrey Henderson (“Judge Henderson’s Reasons”), paras 20-30.

³⁵ ICC-02/11-01/15-405.

³⁶ See e.g. ICC-02/11-01/15-995; ICC-02/11-01/15-612; ICC-02/11-01/15-1197; ICC-02/11-01/15-1277-Red, paras 65-69.

³⁷ See e.g. the following dissenting opinions of Judge Henderson: ICC-02/11-01/15-405-Anx; ICC-02/11-01/15-773-AnxI; ICC-02/11-01/15-1172-Anx; ICC-02/11-01/15-1188-Anx.

³⁸ Judge Henderson’s Reasons, para. 23. See also Judge Henderson’s Reasons, para. 26.

³⁹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1263, Opinion of Judge Cuno Tarfusser, paras 68-70.

⁴⁰ *Ibid.*, para. 68.

⁴¹ *Ibid.*, para. 70.

submission regime recognizes that a preliminary evaluation of the evidence might become necessary at the half way stage of the proceedings, so as to allow the Defence to respond.

23. Opting for an admission regime would have the benefit of providing both the parties and the Chamber with an evidential record prior to the parties making their final submissions. Such an approach would also permit the Chamber, during its deliberations, to focus on the weight to attach to such evidence without being flooded under irrelevant or unduly cumulative evidence.

24. While the Chamber may decide that an item's ultimate relevance and probative value can only be assessed in light of the totality evidence at the end of the trial, this does not prevent the Chamber from determining *prima facie* relevance and probative value for purposes of admissibility, or to determine at the outset that an item of evidence is irrelevant or unreliable. It is the responsibility of the Prosecution to assist to this effect in explaining what an item is meant to prove, in light of the totality of the evidence it will have compiled before the trial begins.

25. As cautioned by the Appeals Chamber, the Trial Chamber must balance its discretion to defer consideration of relevance and admissibility with its obligations under article 64(2) of the Statute.

26. Any limited benefit of a submission regime to the expeditiousness of the proceedings, on balance, cannot justify the prejudice to be caused to the parties, participants, and overall fairness and expeditiousness of the proceedings.

27. Therefore, the Defence respectfully asks the Chamber to safeguard the above-mentioned fundamental rights of Mr Ngaïssona by adopting an admission evidentiary regime. In the *Ongwen* case, it seems that Trial Chamber IX gave due regard, in adopting a submission regime, to the parties agreeing to have such regime apply. Here, the Defence strongly opposes the adoption of such regime.⁴²

28. Should the Trial Chamber opt for a submission regime, which the Defence firmly opposes, the Defence urges the Chamber to inject elements of the admission regime into it, so

⁴² See ICC-02/04-01/15-1546, para. 23.

as to, at least partially, balance its choice with the obligations towards the Defence pursuant to article 64(2) of the Statute. This option was also suggested by the Prosecution.⁴³ In particular:

- a. When requesting to formally submit a particular item of evidence, the submitting party should always provide a proper and detailed justification of each of the relevance, authenticity and probative value of such item and in particular, how it advances the theory of its case, – refraining from providing the same information for both relevance and probative value - so as to allow for a full assessment of the exhibits;⁴⁴
- b. The submitting party should refrain from providing evidence which is of *de minimus* probative value or does not show sufficient indicia of reliability;⁴⁵
- c. Early determinations on admissibility should be permitted, not only where an exclusionary rule applies, but also in relation to “hotly contested items of evidence”,⁴⁶ so as to provide early clarity to the parties and participants. This should include, *inter alia*, items of evidence the relevance or probative value of which the Defence contests based on the boundaries fixed in the Confirmation Decision, and the submission of which could have an impact on the fairness and expeditiousness of the proceedings;
- d. An admissibility ruling on the totality of the evidence submitted by the Prosecution should be issued at the close of its case. It will allow (i) the Chamber to assess the evidence in light of the totality of the Prosecution’s case and (ii) the Defence to either (x) present its case or, if the circumstances so warrant, (y) request a no case to answer;⁴⁷

⁴³ Prosecution’s Submissions, para. 18.

⁴⁴ This should apply whichever regime is chosen. See Appeals Chamber, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-995, para. 38: “[...] it is generally desirable and in the interests of fairness and efficiency for all known information regarding relevance or admissibility to accompany the submission of evidence [...]”. As held by Judge Henderson in the same case, a situation where the Defence is left guessing or must speculate to “surmise why the Prosecution has submitted a given exhibit” is “not a model for fairness and good trial management”. See ICC-02/11-01/15-1172-Anx, paras 4-5. See in the same case again, ICC-02/11-01/15-773, para. 38 where Trial Chamber I reminded the Prosecution that succinct information should not be understood as deficient or incomplete.

⁴⁵ This should apply whichever regime is chosen. See Dissenting Opinion of Judge Henderson, ICC-02/11-01/15-1172-Anx, para. 12: “The burden to prove the charges and therefore to present the best possible evidence in support of them rests squarely upon the Prosecutor. They should not be permitted to simply dump reams of documents and videos into these trial proceedings without providing a proper and detailed justification, for each individual exhibit, on how it advances their theory of the case. There is no point in cluttering the case record with exhibits whose relevance to the charges is not clearly demonstrated or that are of such doubtful probative value that no sensible Trial Chamber could reasonably base any findings upon them.”

⁴⁶ Prosecution’s Submissions, para. 18.

⁴⁷ It would be unfair to leave the parties entirely in the dark until the end of the trial and even beyond and it would amount to an “opaque decision making”. See Dissenting Opinion of Judge Henderson, ICC-02/11-01/15-1172-Anx, para. 5.

- e. The Chamber should rule immediately on the admissibility of prior recorded testimonies should there be any request under rule 68.⁴⁸

c. Other matters

29. Most provisions of the Defence's Proposed Directions are self-explanatory and do not require any further development. The Defence will only briefly elaborate on the specific points below.

Opening statements

30. The Defence opposes the limitation to only one unsworn statement during the trial. Such a limitation would improperly limit Mr Ngaissona's right pursuant to article 67(1)(i) of the Rome Statute. Trial Chamber VI expressly authorized Mr Ntaganda to make two unsworn statements: one during the opening statements, and one during the presentation of this Defence,⁴⁹ which he did.

31. Paragraph 7 of the Prosecution's Proposed Directions needs to be completed, to apply to all material to be used during the Opening Statements. In its current formulation, the ten days deadline applies only to material which has not been previously disclosed.

No case to answer motions

32. The Defence should be authorized in principle to submit a 'no case to answer' motion at the end of the Prosecution case for the following reasons.

33. First, the ICC Appeals Chamber accepted that jurisdictions following an adversarial trial structure, *i.e.* a party driven presentation of evidence, typically provide for a 'no case to answer' procedure.⁵⁰ *Ad hoc* tribunal Rules of Procedure and evidence,⁵¹ as well as domestic common law jurisdictions⁵² usually include a right to submit 'no case to answer motions',

⁴⁸ *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1285, at para. 13. It adopted a submission regime, nevertheless decided that it would rule on the admissibility of requests under rule 68 of the Rules immediately.

⁴⁹ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-619, footnote 9 and para. 19.

⁵⁰ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2026, para. 50.

⁵¹ Rule 98 *bis* of the ICTY Rules of Procedure and Evidence, Rule 98 *bis* of the ICTR Rules of Procedure and Evidence, Rule 167 of the STL Rules of Procedure and Evidence, Rule 98 of the SCSL Rules of Procedure and Evidence, Rule 127 of the Kosovo Specialist Chambers & Specialist Prosecutor's Office Rules of Procedure and Evidence.

⁵² See *e.g.* South Africa, Criminal Procedure Act, 1977 s. 174; Singapore, 189(1), Criminal Procedure Code, Chap 68, 1985 Rev Ed, s. 189(1); United States, Federal Rules of Criminal Procedure, Rule 29; W. LaFave et al.,

without requesting leave from the Trial Chamber. Even though the Rome Statute does not include such a provision, permitting such a motion in principle, at this stage, pursuant to the power of the Chamber under Article 64(2) would ensure that the trial is conducted with full respect of the rights of the Accused.⁵³ As stated by the Appeals Chamber, referring to the ICTY,:

a ‘no case to answer motion’ protects “the right of an accused not to be called on to answer a charge unless there is a credible evidence of his implication in the offence with which he is charged”. In the context of the Statute, such a procedure is, therefore, most directly connected with the right of the accused “to raise defences and to present other evidence admissible under this Statute” pursuant to article 67(1)(e) of the Statute and, in addition, with the right “[n]ot to be compelled to testify [...] and to remain silent” pursuant to article 67(1)(g) of the Statute”.⁵⁴

34. Second, authorizing the Defence to submit ‘no case to answer’ motions at this stage would significantly enhance the expeditiousness of the proceedings by avoiding the lengthy litigations often linked to the submissions of requests for leave to submit a ‘no case to answer’ motion. Moreover, and as stated by Trial Chamber V when it authorized the submission of ‘no case to answer’ motions in principle, before the trial began:

By paring away charges which are found not to be sufficiently supported by evidence after the conclusion of the presentation of evidence by the Prosecution, a ‘no case to answer’ motion has the potential to contribute to a shorter and more focused trial, thereby providing a means to achieve greater judicial economy and efficiency in a manner which promotes the proper administration of justice and the rights of an accused.⁵⁵

35. Third, such a procedure is necessary in light of the specific circumstances of the case. As already submitted, by noting the weakness of the evidence related to the 31 charges confirmed and the stricter standard at trial,⁵⁶ Pre-Trial Chamber II foreshadowed the likelihood that the Prosecution will be unable to produce sufficient evidence to sustain a conviction against Mr Ngaïssona.⁵⁷ As a consequence, the Defence must be authorized at this stage to present a ‘no case to answer’ motion at the end of the Prosecution’s case.⁵⁸

Criminal Procedure, (West, 5th ed., 2009), p. 1167; Scotland, Criminal Procedure (Scotland) Act 1975 ss. 140A and 345A; New Zealand, Criminal Procedure Act 2011, s. 147(4); Quebec, Code of Penal Procedure, s. 210.

⁵³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1334, para. 16.

⁵⁴ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2026, para. 46 citing ICTY, *Prosecutor v. Strugar*, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 bis, 21 June 2004, para. 13.

⁵⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1334, para. 16.

⁵⁶ ICC-01/14-01/18-403-Red, para.102, 103.

⁵⁷ 8 April Submissions, paras 9, 12.

⁵⁸ Should the Chamber deem it necessary, the Defence is ready to offer more submissions on this specific issue.

Order of witnesses

36. The Proposed Directions concerning the order of witnesses should be more precise and deadlines should be extended.

37. First, the global witness order should be provided as soon as possible, and at least 40 days in advance. This is consistent with the practice followed by Trial Chamber IX in *Ongwen*, where the Prosecution was required to provide a global witness order along with its final list of witnesses, 3 months in advance.⁵⁹ Second, any updates to the witness order must be strictly limited to compelling reasons only, and provided sufficiently in advance, to allow the non-calling Parties to prepare for the testimony of the witness. The Defence submits the procedure adopted by Trial Chamber I in the *Gbagbo and Blé Goudé* case, which provides sufficient notice to the Chamber, Parties and Participants.⁶⁰ Third, the Defence proposes that more details be provided by the calling party when submitting its global list of witnesses, and five days in advance of the testimony. A final time estimate for each examination-in-chief is necessary for the Chamber to estimate the global length of the Parties respective cases. In the same vein, the Defence also proposes the use of Witness Examination Sheets, which were also used in the *Gbagbo and Blé Goudé* case. The information it contains will provide the non-calling Parties and the Chamber with the most up to date basic information related to the witness, and allow a more focused examination.

Scope and mode of questioning

38. The Defence opposes the adoption of paragraph 40 of the Prosecution's Proposed Directions which provides that "[h]earsay evidence is admissible". Even though hearsay evidence is not *per se* inadmissible, reliance on it should be avoided,⁶¹ and it is for the Trial Chamber to decide, after having heard the parties, whether hearsay evidence is admissible. Anonymous hearsay in particular is not admissible.⁶² Trial Chambers should proceed with

⁵⁹ ICC-02/04-01/15-449 ; ICC-02/04-01/15-497.

⁶⁰ ICC-02/11-01/15-498-AnxA, para. 4.

⁶¹ *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/11-432, paras. 28-29.

⁶² ICC-01/09-01/11-1353, para. 44 ; *Ndindabahizi v. Prosecutor*, No. ICTR-01-71-A, Judgement, 16 January 2007, para. 115.

caution in the assessment of the weight and probative value to be afforded to hearsay evidence.⁶³

39. In line with the Defence's submissions concerning witness preparation,⁶⁴ the Defence submits that refreshing the witness memory should not be allowed in the present case. The recent temporal scope of the charges renders such a procedure unnecessary. The prejudice to the Accused caused by such a procedure, which comes close to the use of leading questions or Calling Party testifying, by far outweighs its potential benefits.

40. To avoid lengthy litigation during the questioning of the witness, the Defence proposes the adoption of guidelines when referring to another witness's testimony or statement.⁶⁵

41. In line with its 8 April 2020 Submissions, the Defence opposes in principle the use of testimony given by audio or video link.⁶⁶ In the Defence's view, Article 69(2) provides enough guidance, and the appropriate limitations to the use of video or audio link testimony. In particular, "[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused". The use of audio or video link testimony should be exceptional, and subject to a decision from the Chamber on a case-by-case basis.

Use of material with witnesses

42. The Defence respectfully suggests a few modifications to the deadlines proposed by the Prosecution in relation to the use of material with witnesses and corresponding objections, in line with conduct of proceedings adopted in other ICC cases, and to provide with a more realistic view of the time needed to prepare for the examination of a witness.

Expert witnesses

⁶³ *Prosecutor v. Prlic et al*, No. IT-04-74-A, Judgement, 29 November 2017, para. 1646 ; *Muvunyi v. Prosecutor*, No. ICTR-2000-55A-A, Judgement, 29 August 2008, para. 70 ; *Prosecutor v. Nahimana et al*, No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003, para. 97.

⁶⁴ See above, paras 2-12.

⁶⁵ Annex A, para. 27.

⁶⁶ 8 April 2020 Submissions, para. 15.

43. The Defence hereby refers to its 8 April 2020 Submissions concerning expert witnesses,⁶⁷ and accepts to submit its notice on the challenge to their qualification 30 days within the disclosure of the expert witnesses' material.

44. However, applying the same deadline to the remaining parts of the notice is not practicable. The trial is likely to start much later than that deadline, rendering meaningful observations difficult to be submitted, while the Defence only shortly before calling the expert can make a fully informed decision. In relation to these three issues, the Defence respectfully suggests an alternative deadline of 30 days before the expert witness be called to testify, in line with the protocol adopted in the *Ongwen* and in the *Gbagbo and Blé Goudé* cases.⁶⁸

45. In addition, the Defence opposes the Prosecution's proposition that expert reports be admitted into evidence without the witness coming to testify.

Protective measures

46. The deadline proposed by the Prosecution for the submission of application for in-court protective measures, *i.e.* five days,⁶⁹ is too short to "enable the Chamber to consult with the VWU, the other Parties and Participants (where applicable) to file responses, and ultimately the Chamber to rule on the application before the commencement of the witness's testimony".⁷⁰ Instead, a deadline of four weeks⁷¹ before the beginning of the witness testimony would allow the Chamber to consult with the VWU, the Parties and Participants to respond within the 10 days statutory time-limit for responses, and the Chamber to rule on the application.

Publication of public redacted transcripts

47. The Defence proposes the adoption of Trial Chamber I's procedure concerning the publication of public redacted transcripts, which is clearer and will allow for public versions of the transcripts to be published much faster.

B. Protocol on Witness Familiarisation

⁶⁷ 8 April 2020 Submissions, para. 14.

⁶⁸ ICC-02/04-01/15-497, para. 32 ; ICC-02/11-01/15-205, para. 52.

⁶⁹ Prosecution's Proposed Directions, para. 123.

⁷⁰ Prosecution's Proposed Directions, para. 123.

⁷¹ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-619, para. 50.

48. While no form of witness preparation during the course of the trial should be authorized, the Defence submits that witnesses should be taken through a process that familiarizes them with the Court prior to their testimony. However, the Defence opposes the version of the witness familiarisation protocol advanced by the Prosecution since it is the version applied by trial chambers that authorize witness preparation.

49. The Defence requests that the Chamber adopt the witness familiarisation protocol applied in the *Ongwen* case, which was also recommended by the Registry for cases in which witness preparation is prohibited.⁷²

C. Existing protocols

50. The Defence does not oppose the adoption by the Chamber of the four existing protocols. Nonetheless, it wishes to join the Defence for Mr Yekatom in its request to have minor amendments made to the Redaction Protocol.⁷³ Additionally, with respect to the E-court Protocol, the Defence respectfully requests that the parties be required to make *inter partes* disclosures via Ringtail in addition to disclosing through E-court. As previously submitted by the Defence,⁷⁴ its search and analysis tools are limited on E-Court, and thus it requests to be able to fully benefit from the search and analysis tools available only on Ringtail.

RELIEF SOUGHT

51. The Defence respectfully requests the Chamber to adopt (i) the Defence's Proposed Directions, as contained in Annex B, electing a Submission Regime and (ii) the witness familiarisation protocol applied in the *Ongwen* case.

Respectfully submitted,



⁷² See ICC-01/14-01/18-470, para. 15 citing ICC-02/04-01/15-504-Anx1.

⁷³ ICC-01/14-01/18-472, paras 67-78.

⁷⁴ ICC-01/14-01/18-473-Conf, para. 25.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 15 May 2020,

At The Hague, the Netherlands.