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Date: **10 June 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public Redacted

**Second Public Redacted Version of “Prosecution’s Observations on the Agenda of
the First Status Conference “**

8 April 2020 (ICC-01/14-01/18-474-Conf)

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) submits its observations pursuant to the 19 March 2020 order¹ of Trial Chamber V (“Chamber”), in preparation for the first status conference.

II. CONFIDENTIALITY

2. This filing is classified as “Confidential”, as it refers to material that is not available to the public. The Prosecution will file a public redacted version as soon as possible.

III. PROCEDURAL HISTORY

3. On 11 December 2019, Pre-Trial Chamber II issued its decision on the confirmation of charges, committing Alfred YEKATOM and Patrice-Edouard NGAISSONA to trial (“Confirmation Decision”).²

4. On 16 March 2020, the Presidency constituted the Chamber and transmitted to it the full record of the proceedings.³

5. On 19 March 2020, the Chamber scheduled the first status conference for 21 April 2020, ordering the parties to provide written submissions by 8 April 2020 (“Order”).⁴

6. On 26 March 2020, the Chamber deferred the first status conference to an undetermined date due to the current COVID-19 pandemic, noting the “current state of public health in the Host State and other countries” and “the continuing

¹ ICC-01/14-01/18-459.

² ICC-01/14-01/18-403-Conf.

³ ICC-01/14-01/18-451.

⁴ ICC-01/14-01/18-459.

evolvment of the situation and measures taken in response by the Host State which are also affecting the functioning of the Court.”⁵

IV. SUBMISSIONS

7. The Prosecution provides its observations on each item enumerated in the Chamber’s Order below.

8. As a threshold matter, the Prosecution would like to add two items to the agenda of the first status conference.⁶ The first item, as the Chamber’s deferral of the status conference recognises, is the rapidly evolving global health crisis - the coronavirus pandemic – which has created uncertainty and limitations for the Court’s operations and particularly, the Prosecution.

9. The pandemic and the measures implemented in The Netherlands, Central African Republic (“CAR”), and other States, continues to affect the Prosecution’s ability to [REDACTED]. For example, the Prosecution still has about 26 additional trial witnesses whose statements it anticipates disclosing to the Defence. Most of these statements cannot currently be disclosed, however, due to the travel and contact restrictions in CAR in place since 26 March 2020,⁷ and the Prosecution’s resultant [REDACTED]. Unfortunately, the Prosecution is therefore currently unable to provide a timeline for disclosure of these witness statements.

10. The present COVID-19 situation in CAR further significantly impacts much of the Prosecution’s operational capabilities, including [REDACTED] ongoing since before the Confirmation Hearing. With the virus now spreading there, together with

⁵ ICC-01/14-01/18-464, paras. 1 and 2.

⁶ ICC-01/14-01/18-459, para. 6.

⁷ 26 March 2020, Statement of President Touadera (available at <http://lepotentielcentrafricain.com/centrafrique-message-a-la-nation-de-son-excellence-le-professeur-faustin-archange-touadera-president-de-la-republique-chef-de-letat-a-la-suite-de-la-decouverte-du-premier-cas-din/>) [last accessed 08/04/2020].

the lack of medical facilities,⁸ and the partial closure of the country's borders,⁹ [REDACTED].

11. Although, it is unknown how long this situation will continue, the Prosecution expects that it will be a number of months at least, before it can reasonably resume 'normal' operations. This new reality has already affected and will continue to affect pending investigative steps, cooperation efforts, as well as the timing and extent of disclosure, in terms of material for which [REDACTED]. This uncertainty is compounded by health hazards and accompanying travel restrictions in other countries where investigative steps may be taken, [REDACTED], or cooperation requests likewise planned or pending. Furthermore, given that the duration of national response measures, including significantly, the partial closure of borders in CAR and other countries of relevance to the ongoing investigation is unclear, [REDACTED].

12. The second item the Prosecution would like to add to the status conference agenda pertains to its 31 March 2020 request filed with Pre-Trial Chamber II to amend charges pursuant to article 61(9) and for correction of the decision on the confirmation of charges, and notice of intention to add additional charges.¹⁰ This request sought to amend the charges against NGAISSONA by including a second instance of rape under counts 40 and 41 of the Document Containing the Charges, based off of more recently collected evidence from leads that the Prosecution has been following since mid-2019. This request also provided notice of the Prosecution's intention to seek two additional charges against YEKATOM pursuant to article 61(9), specifically, the war crimes of rape and sexual slavery, in violation of articles

⁸ 06 April 2020, Oxfam Press Release (available at <https://republiquecentrafricaine.oxfam.org/latest/press-release/covid-19-la-crise-de-trop-pour-le-sahel-et-la-rca>), 31 March 2020 [last accessed 07/04/2020], Norwegian Refugee Council Press Release (available at <https://www.nrc.no/news/2020/march/just-three-ventilators-to-cope-with-covid-19-in-central-african-republic>) [last accessed 07/04/2020].

⁹ 26 March 2020, Statement of President Touadera (available at <http://lepotentielcentrafricain.com/centrafrique-message-a-la-nation-de-son-excellence-le-professeur-faustin-archange-touadera-president-de-la-republique-chef-de-letat-a-la-suite-de-la-decouverte-du-premier-cas-din/>) [last accessed 08/04/2020].

¹⁰ ICC-01/14-01/18-468-Conf+Conf-Anx.

8(2)(e)(vi)-1 and 8(2)(e)(vi)-2. These two additional charges against YEKATOM relate to two victims [REDACTED].

13. The Prosecution does not anticipate at this stage that these filings and resultant litigation will have an impact on the proposed trial start date of early 2021. Nevertheless, this litigation is a factor for the Chamber to consider, especially given [REDACTED] the two witnesses supporting the additional charges against YEKATOM. Pre-Trial Chamber II's decision on these requests may be litigated, and the Prosecution will not logically be in a position to file a comprehensive Pre-Trial Brief before a decision is issued on both requests. Lastly, the granting of the requests would have a marginal impact on the number of witnesses called and additional evidence submitted.

A. Commencement date of the Trial

14. The Prosecution actively continues to search for and develop ways to advance the proceedings in the current unprecedented circumstances. However, for the reasons stated above related to the global pandemic, it is not yet in a position to approximate a firm start date for trial. In the best case scenario — if all travel restrictions are lifted in a few months, related measures significantly rolled back in CAR and other stakeholder countries, and the health and safety of staff and witnesses can be reasonably assured — the Prosecution estimates that early 2021 would be the earliest period in which a trial could realistically begin.

B. Anticipated evidence

- a. Estimated number of witnesses to be called and number of hours of in-court testimony

15. The Prosecution estimates it will call between 120 and 140 trial witnesses. The Prosecution is not yet in a position to estimate the hours of in-court testimony for each witness particularly, but considers that it may be able to present its case-in-chief

in about 400 hours overall.¹¹ That said, the Prosecution continues to review the viability of alternative evidentiary mechanisms to further streamline the in-court presentation of its case.

b. Use of expert witnesses

16. The Prosecution anticipates calling between five and eight expert witnesses in the following areas: general CAR background, child soldiers, satellite imagery analysis, victim trauma, call data records, sexual and gender-based violence, military structure, and demographics. While most experts were engaged in anticipation of the confirmation proceedings, the Prosecution intends to invite the Defence's consideration of a joint engagement in respect of others.

c. Testimony given by audio-visual link

17. The Prosecution intends to use audio-visual link testimony where possible. It has identified about thirty witnesses so far who will provide testimony by such means. As noted however, given the uncertainty of the prevailing circumstances, this number could easily increase.

d. Estimated volume of documentary and other non-testimonial evidence to be relied upon at trial

18. The Prosecution intends to seek the admission of certain evidence *in limine* from the bar table, mainly comprising the following categories: call data records; financial records; documents collected from the CAR government; documents collected from the UN and related agencies; audio and video items; photographs; as well as social media, email, and other electronic evidence; and open source material.

e. Use of rule 68

¹¹ This estimate refers to the number of hours the Prosecution currently anticipates it will use to examine its own witnesses. It does not include an estimate of how long other Parties and Participants will examine Prosecution witnesses.

19. The Prosecution intends to rely on rule 68 significantly. But for various reasons, including the uncertain situation caused by the global pandemic and related national measures on witness availability, safety, and ability to travel, it is not yet in a position to estimate the full extent of its reliance on this provision. That said, the Prosecution intends to use both rule 68(2)(b) and rule 68(3) to introduce prior statements of crime-base witnesses to prove charged incidents, as well as the contextual elements, as appropriate.

C. Agreed facts

20. Pursuant to rule 69, the Prosecution intends to invite the Defence's agreement initially on certain categories of facts so as to streamline the presentation of its case and indeed, of the case overall. These categories include: contextual elements, background of the Accused, the Anti-Balaka group structure, and the authenticity of certain documentary and other electronic evidence. The Prosecution had not proposed specific facts, pending the relative completion of its disclosure. Nevertheless, it has now sought the Defence's position in respect to these categories of evidence, and will proceed from there.

D. Languages to be used by the parties, participants, and the witnesses the parties intend to call

21. The Prosecution witnesses currently envisaged may testify in English, French, and Sango. The Prosecution anticipates litigating in English and French.

E. Disclosure of outstanding material in the Prosecution's possession and related issues

a. Whether the Prosecution's investigations are still ongoing

22. The Prosecution's investigations are ongoing, in the manner referred to above in paragraphs 10 and 11, in line with paragraph 14 of the Chamber's Practice

Manual, and the Court's established jurisprudence.¹² Due to the reasons stated above in relation to the global pandemic and corresponding national measures, and especially the pervasive border closures and travel restrictions in many countries, the Prosecution cannot currently provide a reliable estimation of the end date for its investigative activities. As noted, the Prosecution continues to seek ways to advance its efforts in the prevailing circumstances. However, it is too early to know whether and to what extent these efforts will pan out in order to provide the Chamber with reasonably concrete information. The Prosecution expects to be able to update the Chamber by month's end.

b. Timing and volume of disclosure of outstanding evidence pursuant to article 67(2) of the Statute and rules 76 and 77

23. The CAR II evidence collection is one of the largest of any Situation at the Court. The Prosecution has reviewed about [REDACTED] of this collection, which comprises some [REDACTED]. The disclosure of the remaining materials will require substantial time and resources. [REDACTED].

24. Further, the separate ongoing investigation of the Seleka ("Seleka Investigation") occasionally produces documents or other evidence triggering the Prosecution's disclosure obligations, for example, under rule 77. While these disclosures would necessarily continue on a rolling basis, it is not possible to predict their volume.

25. That said, before the COVID-19 pandemic and all things being equal, the Prosecution anticipated being able to complete its disclosure by mid-fall 2020. However, this is not remedied by simply shifting timelines back day for day relative to the period of crisis. Clearly, even after the prevailing circumstances have substantially abated, the disruption further entails a significant residual impact on

¹² Chamber's Practice Manual (Fourth Edition) 2019, para. 14.

the pending investigation and the collection and securing of evidence and witnesses. In short, once States have lifted their national restrictions and other response measures respectively (and this will not be done simultaneously) there will not simply be a resumption of 'business as usual' for the Prosecution or the Court for some time.

c. Transcription and translation issues

26. The Prosecution has three pending translation requests and 31 pending transcription requests, which Language Service Unit ("LSU") has confirmed should be done by the end of May 2020. As indicated above, the Prosecution is still reviewing its evidence collection, and anticipates making additional requests for video transcription, which LSU indicated would be completed around the end of June 2020. This deadline does not, of course, include translation or transcription of material yet to be obtained.

d. Protective measures of witnesses (including additional need for redactions, delayed disclosure, or referrals to the Court's witness protection programme)

27. [REDACTED].

28. The Prosecution intends to disclose about 26 additional trial witnesses to the Defence. [REDACTED].

29. The Prosecution intends to seek standard in-Court protective measures, including pseudonyms, voice and/or facial distortion, and closed or private session, for approximately [REDACTED] witnesses. This assessment is subject to change depending on the evolution of the public health and security situation in CAR, as well as the individual circumstances of each witness.

- e. Disclosure of witnesses' identities which have been withheld from the Defence

30. The Prosecution has only withheld the identity of one INCRIM witness from the Defence (P-1792), and anticipates being in a position to disclose this witness's identity in the near future, subject to access to CAR [REDACTED].

31. To protect the integrity of the Seleka Investigation, Pre-Trial Chamber II authorized redactions to the identity of six CAR IIA witnesses pursuant to rule 81(2), upon the disclosure of their statements.¹³ The Prosecution does not intend to call these witnesses at trial, and expects these redactions should remain as long as necessary to protect the Seleka Investigation.

- f. Disclosure of material obtained pursuant to article 54(3)(e)

32. The Prosecution did not obtain any material pursuant to article 54(3)(e) in this case.

F. Disclosure by the Defence

33. The Prosecution defers to the Defence for this sub-category.

G. Provision of a Pre-trial brief by the Prosecutor

34. The Prosecution intends to submit a Pre-trial brief or "Trial Brief"¹⁴ in this case not less than 30 days before the start of the trial.

H. Estimated length of opening statements

35. The Prosecution estimates its opening statements will take approximately six hours.

¹³ ICC-01/14-01/18-232-Conf-Exp

¹⁴ See Chamber's Trial Manual (Fourth Edition), paras, 73, 75.

I. Update and forecast on (additional) applications by victims to participate in the proceedings.

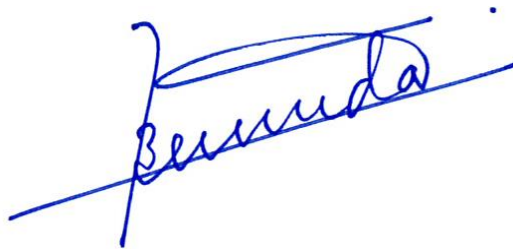
36. The Prosecution defers to the Common Legal Representatives for Victims for this sub-category.

J. Conduct of proceedings

37. The Prosecution further notes the Chamber's intention to issue directions on a variety of matters pursuant to article 64(8)(b), and that the Chamber may consider the submissions of the parties on the matter.¹⁵ The Prosecution respectfully requests the Chamber consider its proposed Conduct of Proceedings, to be filed shortly upon its completion, and which includes protocols on witness preparation, treatment of dual witnesses, and witness familiarisation.

V. CONCLUSION

38. The Prosecution respectfully submits these observations in preparation for the first status conference before the Chamber.



Fatou Bensouda, Prosecutor

Dated this 10th day of June 2020
At The Hague, The Netherlands

¹⁵ Order at para. 7.