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No: *ICC-01/14-01/18*
Date: **11 January 2021**

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 YEKATOM AND PATRICE-EDOUARD NGAÏSSONA

PUBLIC

Ngaïssona Defence response to the Yekatom Defence's "Request for reconsideration of the 'Decision on the Initial Directions on the Conduct of the Proceedings'" (ICC-01/14-01/18-1243)

Source: **Defence of Patrice-Edouard Ngaïssona**

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

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I. INTRODUCTION

1. The Defence of Mr Ngaïssona ("Ngaïssona Defence") hereby presents its response to Mr Yekatom's "Request for reconsideration of the 'Decision on the Initial Directions on the Conduct of the Proceedings'" dated 6 January 2021.

2. The Defence submits that , *first*, that the two Defence teams should be allowed to choose separately the timing of their opening statements. *Second,* that making a Defence opening statement at the start of the trial is the norm in international and domestic jurisprudence. *Third,* that the difference in case preparation between the two teams allows the Ngaïssona Defence to present its opening statement at the commencement of the trial. *Fourth,* that the presentation of the opening statement after the Prosecution's case-in-chief will be prejudicial to Mr Ngaïssona.

II. PROCEDURAL HISTORY

3. On 16 March 2020, the Presidency constituted the Trial Chamber V and referred the case to the Chamber.[1]

4. On 19 March 2020, the Chamber ordered the schedule of the first status of conference on 21 April 2020. The parties were given the opportunity to file their submission on different matters by 8 April 2020. One of the subjects recommended by the Chamber was "opening statements".[2]

5. On 8 April 2020, the two Defence teams filed their submissions. The Ngaïssona Defence informed the Chamber on its intention to make its opening statements at the commencement of the trial.[3] On the contrary, Mr Yekatom's Defence

[1] ICC-01/14-01/18-451.
[2] ICC-01/14-01/18-459, para. 3.
[3] ICC-01/14-01/18-473-Red, para. 36.

("Yekatom Defence") expressed its wish to defer its opening statement at the commencement of its case.[4]

6. On 26 August 2020, the Chamber adopted the "Initial Directions on the Conduct of the Proceedings" ("Directions"). The Chamber stated that the Common Legal Representatives of Victims ("CLRV") and Defence "may make their opening statements either at the commencement of the trial or just prior to the presentation of their evidence, if any. However, this decision must be made collectively amongst the respective CLRV and Defence teams".[5] Furthermore, the Chamber stressed that it will not hear opening statements from the CLRV or the Defence teams at multiple points during the trial.[6]

7. On 6 January 2021, the Yekatom Defence submitted its "Request for reconsideration of the 'Decision on the Initial Directions on the Conduct of the Proceedings'" ("Yekatom Request"), requesting the reconsideration of the aforementioned decision "on the limited aspect of the timing of the Defence opening statement and to permit the Yekatom Defence to present its opening statement just prior to the presentation of its evidence, regardless of the timing of the Ngaïssona Defence opening statement".[7]

III. SUBMISSIONS

a. The two Defence teams should have the right to choose separately the timing of their opening statements.

8. As stated previously, the Chamber in its Directions called the CLRV and the Defence teams to make a collective decision as to the timing of their opening statements, citing the *Bemba et al.* "Directions on the conduct of the proceedings".[8]

[4] ICC-01/14-01/18-472, para. 45.
[5] ICC-01/14-01/18-631, para. 11.
[6] ICC-01/14-01/18-631, para. 11.
[7] ICC-01/14-01/18-1243, para. 19.
[8] ICC-01/14-01/18-631, para. 11, citing *The Prosecutor v. Jean Pierre Bemba Gombo et al.*, Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209, para. 5.

The *rationale* behind this direction is to prevent the presentation of opening statements at multiple points during the trial, especially in joint cases where there are many defendants.[9]

9. Nevertheless, as explained in the Yekatom Request, a collective decision is not possible since the two Defence teams wish to present their opening statements at different times. More specifically, the Ngaïssona Defence wishes to present its opening statement at the commencement of the trial in February, whereas the Yekatom Defence wishes to present theirs after the conclusion of the Prosecution's case-in-chief.[10]

10. Given the inability to reach a consensus, the Ngaïssona Defence agrees with the Yekatom Defence's request that each Defence team should be permitted to present their opening statement at different times, regardless of the timing chosen by the other Defence team.[11] Contrary to the *Bemba et al.* precedent, where there were five defendants and a collective decision appeared necessary for the better organisation of the trial, the present case has only two. Thus, the present case bears more resemblance to the *Gbagbo and Blé Goudé* case, where the Trial Chamber allowed the two Defence teams to "reserve all or part of their time to make their opening statements after the close of Prosecution's presentation of evidence and prior to the presentation of evidence, if any, by the Defence", without mentioning that such a decision should be made collectively.[12]

11. Furthermore, the abovementioned request is supported by rule 136(2) of the ICC Rules of Procedure and Evidence which states that:

[9] ICC-01/14-01/18-631, para. 11.
[10] ICC-01/14-01/18-1243, para. 8.
[11] ICC-01/14-01/18-1243, para. 19.
[12] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15-205, para. 10.

> "In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately".[13]

In its "Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters" Pre-Trial Chamber III emphasised that "[t]he Chamber shall ensure the fairness of these joint proceedings and under rule 136(2) of the Rules it shall accord the same rights to each suspect as if they were being tried separately".[14]

12. If Mr Ngaïssona was being tried separately, his Defence would be able to choose when to present its opening statement, either at the commencement of the trial or before presenting its evidence to the Chamber, following the Trial Chamber's directions on the conduct of the proceedings. Such a decision would reflect the Defence's desired strategy regarding the trial and the need to protect Mr Ngaïssona's rights. The same should apply in the present case; each Defence team should be able to make their opening statement at such point in time which they see fit for their case in order to represent their respective clients to the fullest.

13. A similar approach was followed in the *Gotovina et al.* case before the ICTY. Contrary to the ICC, the ICTY Rules of Procedure and Evidence regulate the presentation of opening statements. Pursuant to rule 84

> "Before presentation of evidence by the Prosecutor, each party may make an opening statement. The defence may, however, elect to make its statement after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the defence".[15]

As a result, although the default is that Defence opening statements are made at the commencement of trial, Defence teams were expressly allowed to choose when they would make their opening statements.

[13] Rule 136(2) of the Rules of Procedure and Evidence.
[14] ICC-01/14-01/18-87, para. 14.
[15] Rule 84 of the ICTY Rules of Procedure and Evidence.

14. In *Gotovina et al.*, the defendants did not make their opening statements at the same time or made a collective decision on the matter. As mentioned by Judge Orie: "[T]he Defence of Mr. Gotovina has announced that it would like to make an opening statement. The other parties have announced they would not, at least not at this stage (…)."[16] As a result, only the Defence for Mr Gotovina made an opening statement right after the Prosecution made theirs, without this decision affecting the Defence teams for Mr Čermak and Mr Markač. Evidently, and despite being a joint case, each accused was allowed to choose the timing of their opening statement, irrespective of what the other accused did.

b. Making a Defence opening statement at the start of the trial is the norm in international and domestic jurisprudence.

15. The Ngaïssona Defence is in a position to make its opening statement at the commencement of the trial in February. As will be further elaborated below, this not only reflects the differences in the charges the two defendants are facing, but is also the usual course of events in criminal trials. Both national and international jurisdictions reflect that making an opening statement at the start of the trial, i.e. before of the start of the Prosecution's case, thereby making it the norm.

16. ICC jurisprudence shows that making the Defence's opening statement directly after the Prosecution has made theirs, constitutes a standard practice,[17] while the

[16] *The Prosecutor v. Gotovina et al.*, Transcript of 12 March 2008, IT-06-90, page 512, lns 10-16. The Prosecution in the *Gotovina* case presented their statement the day before, on 11 March 2008, see *The Prosecutor v. Gotovina et al.*, Transcript of 11 March 2008, IT-06-90, page 414f.

[17] *The Prosecutor v. Ruto and Sang*, Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, ICC-01/09-01/11-847-Corr, para. 4; *The Prosecutor v. Bemba et al.*, Directions on the conduct of proceedings, 2 September 2015, ICC-01/05-01/13-1209, para. 5; *The Prosecutor v. Gbagbo and Blé Goudé*, Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15-205, para. 9; *The Prosecutor v. Ongwen*, Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 7.

ICTY Rules of Procedure and Evidence, as illustrated above, include it as a default provision.[18]

17. Domestic jurisprudence also follows the same pattern. Following Hon Sir Brian Leveson's recommendation in his "Review of Efficiency in Criminal Proceedings",[19] a recent amendment to the UK Criminal Procedure rules was adopted, allowing the defendant to give a brief opening speech, right after the prosecution's opening speech, to identify what is in issue.[20] The purpose of any such identification of issues is "to provide the court with focus as to what it is likely to be called upon to decide, so that the members of the court will be alert to those issues from the outset and can evaluate the prosecution evidence that they hear accordingly".[21] This is also one of the reasons that the Ngaïssona Defence wishes to make their opening statement at the start of the trial.

18. As far as Canada is concerned, Article 651(2) of the Canadian Criminal Code states that "counsel for the accused (…) is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of that opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence." This appears to allow defence opening statements at the start of the defence case. However, the Canadian judiciary has discretion to allow a defence opening statement to be presented at the start of trial in certain instances, for example when

[18] Rule 84 of the ICTY Rules of Procedure and Evidence: "Before presentation of evidence by the Prosecutor, each party may make an opening statement".
[19] Judiciary of England and Wales, "Review of Efficiency in Criminal Proceedings by the Rt Hon Sir Brian Levenson, President of the Queen's Bench Division" (January 2015), paras 275-279, available at https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf.
[20] *The Criminal Procedure (Amendment) Rules 2016*, S.I 2016/120, available at https://www.legislation.gov.uk/uksi/2016/120/contents/made. For the Magistrate's Court see Rule Rule 24.3 and for the Crown Court see Rule 25.9.
[21] "Criminal Practice Directions 2015 Amendment No. 11", 29 October 2020, Rule 24.3(3)(b) and Rule 25.9(2)(c).

a case is complex and lengthy – such as in the present case – in order to preserve fairness and good management of trial.[22]

19. With respect to US law, although there is no inherent right to make an opening statement before federal courts, when a state rule exists, judges typically permit parties to present brief statements of their anticipated evidence. Nonetheless, trial judges invariably allow opening statements in jury trials, recognizing that opening statements give the jury an overview of the anticipated evidence and each party's position of the disputed issues.[23]

c. The Ngaïssona Defence is ready to present its statement as early as February 2021 due to the different trial preparations of the Defence teams and the differences in the two cases.

20. In their request for reconsideration, the Yekatom Defence explains that their position to present their opening statement after the conclusion of the Prosecution's case-in-chief is justified by the need to continue investigations on the specific allegations against Mr Yekatom in order to produce a meaningful opening statement.[24] Due to circumstances hampering their ability to fully investigate the

[22] See for example *R v. Bekar* (2003), 157 C.C.C. (3d) 97 (B.C.C.A), para. 42: "The trial judge has discretion to permit the defence to provide an opening after the Crown opens and before the first Crown witness testifies if fairness requires it. Factors that a trial judge will consider include the complexity of the issues at trial and the length of the trial"; *R. v. Pickton*, 2007, BCSC 61, para. 9: "Accordingly, given the size and complexity of this case, it makes eminent sense that anything that can be done to assist the members of the jury by bringing some order to that complexity be encouraged. A defence opening immediately following that of the Crown will give them a reasonable sense of what is in issue, and this will enable them to engage in their task more effectively. This, undoubtedly, enhances the fairness of the trial"; in *R. v. Barrow*, Counsel for the accused wanted to open the jury immediately after Crown counsel concluded his opening statement, rather than wait until the completion of the examinations of all witnesses. The Supreme Court of Nova Scotia decided that even though the long-standing practice in criminal trials should not be changed, there are a few cases in which justice and the requirement of a fair trial demand an amended procedure, especially in *R. v. Barrow* which was a retrial and a lengthy case, see *R. v. Barrow* 1989 CanLII 7148 (NS SC), 48 C.C.C. (3d) 308, 310-314; *Proulx c. R.*, 2012, QCCA 1302, para. 30: "(…) La jurisprudence reconnaît au juge du procès un pouvoir discrétionnaire de permettre à l'accusé, dans des circonstances particulières, comme dans le cas d'un long procès, le droit de s'adresser au jury en réplique à la déclaration de la poursuite. Il s'agit de là d'une composante du droit de l'accusé à un procès équitable.

[23] Thomas A. Mauet, *Trials: Strategy, Skills and the New Powers of Persuasion* (Aspen Publishers, 2005), page 86.

[24] ICC-01/14-01/18-1243, para. 14.

specific allegations against Mr Yekatom, the Yekatom Defence is unable to present an opening statement as early as February 2021.[25]

21. Despite facing similar challenges as the Yekatom Defence, the Ngaïssona Defence managed to prepare its opening statement. Since the receipt of the Prosecution's Trial Brief on 9 November 2020,[26] the members of the Ngaïssona Defence have been preparing an opening statement to address the Prosecution allegations contained therein, which will be finalised in time for the commencement of the trial in February.

22. This difference in preparation reflects the fundamental differences between the cases against the two defendants, which were pointed out by the Ngaïssona Defence as early as the "Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters" was rendered.[27] In its appeal against that decision, the Ngaïssona Defence submitted that the Chamber erroneously based its reasoning to join the cases against Mr Ngaïssona and Mr Yekatom on the mere expectation that the evidence the Prosecution intends to rely on to establish the charges in the two cases against the suspects would be the same, whereas, at that stage, such an expectation was speculative and premature.[28] The evolution of the case, especially after the Decision on the Confirmation of Charges and in light of the evidentiary material disclosed by the Prosecution to this day, proves the point made by the Ngaïssona Defence.

23. For example, the difference between the cases against the two accused was also underlined by the Prosecution during the Status Conference on 9 July 2020. According to the Prosecution "Mr Yekatom is much more hands on in relation to the crimes with which he is charged than Mr Ngaïssona is. Mr Yekatom is charged

[25] ICC-01/14-01/18-1243, para. 9.
[26] ICC-01/14-01/18-723-Conf.
[27] ICC-01/14-01/18-87.
[28] ICC-01/14-01/18-127, para. 22.

as a principal in the commission of those crimes; Mr Ngaïssona is charged as an accessory". As a result, "the number of witnesses that relate to Mr Yekatom's involvement in the commission of the crimes is fundamentally different because the nature of his involvement is also different than Mr Ngaïssona".[29]

24. From all of the above, it is clear that Mr Ngaïssona's alleged role in the Anti-Balaka movement and his alleged involvement in the crimes committed differs significantly from that of Mr Yekatom. Consequently, the opening statements which will be tailored to each defendant require different time of preparation and will differ in content. Given that the Ngaïssona Defence is ready to make its opening statement at the commencement of the trial, it should be allowed to do so, whereas the Yekatom Defence should be allowed to make theirs before presenting their evidence in order to have adequate time and conclude their investigations.

d. Making an opening statement at the end of the Prosecution's case-in-chief will de prejudicial for Mr Ngaïssona.

25. Based on the Chamber's Directions, the abovementioned international and domestic practice and in light of the complexity and length of the present case, the Ngaïssona Defence prepared its opening statement to be presented at the commencement of the trial in February. Presenting the opening statement at a later stage, i.e. after the completion of the Prosecution's case-in-chief, will be prejudicial to Mr Ngaïssona. The Prosecution presented its narrative regarding Mr Ngaïssona's alleged involvement it the trial brief; the Ngaïssona Defence has not yet been presented with the opportunity to publicly present its narrative in relation to the Prosecution's trial brief. In February, the Prosecution will be able not only to repeat this narrative, but most importantly, to present it at a public hearing before

[29] *The Prosecutor v. Yekatom and Ngaïssona*, Transcript of Status Conference, 9 July 2020, ICC-01/14-01/18-T-012-ENG, page 33, lns 12-17.

the Judges, the witnesses and the public, advocating once again only one side of the story.

26. Witnesses may decide watch the opening statement of the Prosecution and thus be privy to the one-sided narrative, which could ultimately influence their testimony. In the present case, the Prosecution intends to rely on 147 fact witnesses, all of which will take note of the Prosecution narrative at the start of the case.[30] Therefore, they will be exposed to a one-sided and selective version of the events, as perceived by the Prosecution. It is likely that this will not only influence the perception of the public, but also these witnesses. As a result, their testimonies could be tainted and that would be outside the control of the Chamber.

27. If the Ngaïssona Defence makes its opening statement years after the Prosecution has closed its case-in-chief, an imbalance between the parties will be created since the momentum of raising issues important to the accused and to the Court, publicly, will be lost. To prevent this imbalance, the Ngaïssona Defence should be allowed to present its opening statement right after the Prosecution has made theirs, preserving as such the fairness of the proceedings.

IV. RELIEF SOUGHT

In light of the above, the Defence respectfully requests the Chamber to

-**GRANT** the Yekatom Request for reconsideration.

In the event the Request for reconsideration is denied, the Ngaïssona Defence respectfully requests the Chamber to allow the Ngaïssona Defence to

-**PRESENT** their opening statement at the commencement of the trial in February.

[30] ICC-01/14-01/18-724-Conf-AnxB.

Respectfully submitted,

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 11 January 2021

At The Hague, the Netherlands.