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**No. ICC-01/14-01/18**

**Date: 16 July 2020**

**TRIAL CHAMBER V**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

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

**Public**

**Decision Setting the Commencement Date of the Trial**

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

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**TRIAL CHAMBER V** of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 64(3) of the Rome Statute (the ‘Statute’), and Rules 101 and 132(1) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision Setting the Commencement Date of the Trial’.

1. On 9 July 2020, the Chamber, after having received written submissions from the Office of the Prosecutor (the ‘Prosecution’),<sup>1</sup> the Yekatom Defence,<sup>2</sup> the Ngaïssona Defence,<sup>3</sup> the Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of Victims of Other Crimes (jointly, the ‘CLR’)<sup>4</sup> and the Registry,<sup>5</sup> held a status conference in order to set the date of the trial (the ‘Status Conference’).<sup>6</sup>
2. The present decision sets the commencement date of the trial, fixes the attendant calendar leading up to this date and sets the deadline for the transmission of victim applications. The Chamber will address each part of the calendar in turn.

**A. Provisional list of Prosecution witnesses (with summaries of anticipated witness testimony)**

3. The Chamber recalls that on 15 June 2020 the Prosecution, as instructed by the Chamber in light of the special circumstances under the Coronavirus Pandemic,<sup>7</sup>

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<sup>1</sup> Prosecution’s Observations on the Agenda of the First Status Conference, 8 April 2020, ICC-01/14-01/18-474-Conf (public redacted versions filed on 24 April 2020, ICC-01/14-01/18-474-Red, and 10 June 2020, ICC-01/14-01/18-474-Red2) (the ‘Prosecution Submissions’).

<sup>2</sup> Yekatom Defence Submissions for First Status Conference, 8 April 2020, ICC-01/14-01/18-472 (with confidential Annex A) (the ‘Yekatom Defence Submissions’).

<sup>3</sup> Defence Submissions pursuant to Trial Chamber V’s “Order Scheduling First Status Conference” (ICC-01/14-01/18-459), 8 April 2020, ICC-01/14-01/18-473-Conf (with confidential *ex parte* Annex 1, only available to the Ngaïssona Defence and the Registry) (public redacted version notified on 5 June 2020, ICC-01/14-01/18-473-Red) (the ‘Ngaïssona Defence Submissions’).

<sup>4</sup> Common Legal Representatives’ joint submissions on the matters identified in the “Order Scheduling First Status Conference”, 8 April 2020, ICC-01/14-01/18-471 (the ‘CLR Submissions’).

<sup>5</sup> Registry Submissions in View of the Upcoming Status Conference, 8 April 2020, ICC-01/14-01/18-470 (with confidential *ex parte* Annex I, only available to the Prosecution and the Registry; confidential *ex parte* Annexes II and III, only available to the Registry) (confidential redacted version of Annex II notified on 17 April 2020; confidential redacted version of Annex III notified on 8 April 2020 and public redacted version of Annex III notified on 22 May 2020) (the ‘Registry Submissions’).

<sup>6</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 5, lines 15-16.

<sup>7</sup> Order to provide a Preliminary Witness List, 22 May 2020, ICC-01/14-01/18-528 (the ‘Preliminary Witness List Order’). *See also* transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 22, lines 15-22.

filed preliminary submissions regarding its anticipated witnesses for trial.<sup>8</sup> These submissions contain a list of witnesses that the Prosecution is already certain it will call to testify (the ‘Preliminary Witness List’),<sup>9</sup> as well as a list of witnesses it is already certain it will *not* to call to testify.<sup>10</sup>

4. In light of the delays caused by the Coronavirus Pandemic, the Preliminary Witness List served as a crucial step to ensure the accused’s rights to a fair trial and to have adequate time to prepare their defence. Nonetheless, the Chamber is mindful of its exceptional nature under the present circumstances and the early stage when it had to be provided. Therefore, and as indicated during the Status Conference,<sup>11</sup> the Chamber considers that in line with the practice at the Court,<sup>12</sup> a provisional list of Prosecution witnesses (the ‘Provisional Witness List’) must be provided, along with brief summaries of their anticipated testimonies.<sup>13</sup> These summaries should include information on (i) the type of witness (e.g. crime base, expert, insider witness, etc.), (ii) the intended mode of testimony (i.e. *viva voce* or Rule 68 of the Rules) and (iii) estimated length of testimony.
5. As regards the timeline, the Chamber notes the Prosecution’s proposal to submit the Provisional Witness List and the list of evidence (the ‘List of Evidence’) 90 days before the start of trial; the Trial Brief and witness summaries 30 days before the start of trial. The Chamber further notes the Prosecution’s submission that the Provisional Witness List and the List of Evidence should ‘follow the disclosure or the completion of disclosure’.<sup>14</sup>

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<sup>8</sup> Prosecution’s Submission in Compliance of the Single Judge’s “Order to provide a Preliminary Witness List”, ICC-01/14-01/18-528, ICC-01/14-01/18-553 (with confidential Annex A, ICC-01/14-01/18-553-Conf-AnxA; and confidential *ex parte* Annex B, only available to the Prosecution, ICC-01/14-01/18-553-Conf-Exp-AnxB) (the ‘Preliminary Witness List Submissions’).

<sup>9</sup> Annex A and B to the Preliminary Witness List Submissions, ICC-01/14-01/18-553-Conf-AnxA and ICC-01/14-01/18-553-Conf-Exp-AnxB.

<sup>10</sup> Annex A to the Preliminary Witness List Submissions, ICC-01/14-01/18-553-Conf-AnxA.

<sup>11</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 22, line 23 to p. 23, line 1.

<sup>12</sup> See Chambers Practice Manual (2019), <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>, para. 76 (iii).

<sup>13</sup> The summaries of the anticipated testimony are without prejudice to the evidence that might be produced in the course of the trial.

<sup>14</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 23, line 17 to p. 24, line 6.

6. In accordance with the practice at this Court,<sup>15</sup> the Chamber however considers that receiving this list *prior* to the disclosure deadline and the reception of the Trial Brief, even if later revised, would facilitate the Defence's preparation for trial, as well as the Chamber's understanding of the Prosecution's upcoming evidence presentation. The Prosecution is therefore ordered to provide a Provisional Witness List with anticipated testimony summaries by **31 August 2020**. In this regard, the Chamber also reminds the Prosecution to take the Chamber's remarks during the Status Conference regarding the number of witnesses into account.<sup>16</sup>
7. These documents must be made available to the Defence and the CLRV, with redactions as applicable. This Provisional Witness List may be changed by the Prosecution between this date and the final list of witnesses' deadline without leave of the Chamber. Nonetheless, the Chamber recalls that such changes are expected to be limited. Major changes should be limited to instances where a concrete justification exists.<sup>17</sup>

#### **B. Disclosure of material in the Prosecution's possession**

8. The Chamber considers it appropriate to set a deadline for the Prosecution to disclose any incriminating material it intends to rely on at trial, in addition to any material in its possession falling under Article 67(2) of the Statute and Rule 77 of the Rules.
9. In determining the disclosure deadline, the Chamber must balance the competing interests of the parties, whilst taking into consideration the specific circumstances at hand. The Chamber has taken note of the Yekatom Defence's<sup>18</sup>

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<sup>15</sup> Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449 (the '*Ongwen* Decision'), para. 3; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision Setting the Commencement Date of the Trial, 6 January 2020, ICC-01/12-01/18-548, para. 5 (the '*Al Hassan* Decision'). See also Chambers Practice Manual (2019), <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>, para. 76.

<sup>16</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 30, line 24 to p. 31, line 3.

<sup>17</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 22, line 25 to p. 23, line 1.

<sup>18</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 26, lines 16-23; Yekatom Defence Submissions, ICC-01/14-01/18-472, para. 18.

and Ngaiissona Defence's submissions,<sup>19</sup> and recalls that the Prosecution expects disclosure to be finalised by 'mid to end of November'.<sup>20</sup> Moreover, the Chamber recalls the Court's practice of setting a disclosure deadline three months before the trial start date. Finally, the Chamber notes that although disclosure has been conducted on a rolling basis in this case, the non-disclosure of a number of items remains a matter of litigation and several motions by the Defence have been filed in this regard, following unsuccessful *inter partes* consultations.

10. In light of the date set for the commencement of trial below, the final disclosure deadline is set to **9 November 2020**. By this date, the Prosecution must review all the materials in its possession and disclose all materials falling under its disclosure obligations. The Prosecution may – and in some cases, must<sup>21</sup> – continue disclosing materials after this date, but leave of the Chamber is required for the Prosecution to rely on such materials as incriminating evidence at trial. The Prosecution is expected to disclose material on a rolling basis up until the deadline.
11. In the particular circumstances of this case, the Chamber finds it prudent to set one intermediate disclosure deadline. The Chamber considers this deadline necessary to safeguard the accused's fair trial rights, noting that despite the Chamber's order to disclose evidence related to the witnesses on the Preliminary Witness List *immediately*,<sup>22</sup> the disclosure of a number of witnesses appears to be still outstanding.<sup>23</sup> The Chamber stresses that disclosure of the evidence related to witnesses listed on the Preliminary Witness List must be affected immediately, but latest by **31 August 2020**.

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<sup>19</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 25, lines 7-13; Ngaiissona Defence Submissions, ICC-01/14-01/18-473-Conf, paras 22-24.

<sup>20</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 16, line 23.

<sup>21</sup> *See e.g.* Article 67(2) of the Statute (potentially exculpatory evidence must be disclosed 'as soon as practicable').

<sup>22</sup> Preliminary Witness List Order, ICC-01/14-01/18-528, para. 5.

<sup>23</sup> The Chamber particularly notes the Yekatom Defence's submissions during the Status Conference, *see* transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 26, line 15 to p. 28, line 25.

**C. Final list of Prosecution witnesses (with summaries of anticipated witness testimony), List of Evidence and Trial Brief**

12. As indicated during the Status Conference, the Chamber considers a Trial Brief, a list of witnesses with summaries and the List of Evidence to be useful tools for the preparation of trial, for all parties and participants, as well as the Chamber.<sup>24</sup> Moreover, it is noted that a Trial Brief has become common practice at the Court.<sup>25</sup>
13. The Chamber recalls the Prosecution's submissions regarding the deadlines for the Trial Brief and other documents.<sup>26</sup> The Ngaïssona Defence submits that the provision of a Trial Brief 30 days before trial is too short and does not comply with the practice before this Court and that, in light of the reduced scope of the charges, 90 days appears reasonable.<sup>27</sup>
14. In line with the practice at the Court,<sup>28</sup> the Chamber considers a deadline of 90 days before the trial appropriate in order to enable the Defence to adequately prepare for trial. It thus orders the Prosecution to provide, by **9 November 2020**: (i) its final list of Prosecution witnesses (the 'Final Witness List');<sup>29</sup> (ii) the List of Evidence, containing the materials which the Prosecution intends to submit as evidence during trial; and (iii) its Trial Brief.
15. The Final Witness List should be accompanied by an estimated order and timing of scheduling of testimony and summaries of the anticipated witness testimony, including the following information:
- i.* witness code and identity (including dual status, where applicable);
  - ii.* type of witness (e.g. crime base, expert, insider witness, etc.);
  - iii.* expected relevance of witness's testimony to the charges;

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<sup>24</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 22, lines 10-14.

<sup>25</sup> See Chambers Practice Manual (2019), <https://www.icc-cpi.int/iccdocs/other/191129-chamber-manual-eng.pdf>, para. 75.

<sup>26</sup> See paragraph 5 above. Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 23, line 17 to p. 24, line 6.

<sup>27</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 25, line 24 to p. 26, line 10.

<sup>28</sup> *Ongwen* Decision, ICC-02/04-01/15-449, para. 8; *Al Hassan* Decision, ICC-01/12-01/18-548, para. 16.

<sup>29</sup> The summaries of the anticipated testimony are without prejudice to the evidence that might be produced in the course of the trial.

- iv. intended mode of testimony (i.e. *viva voce* or Rule 68 of the Rules; at the Court or via video-link);
  - v. estimated length of testimony;
  - vi. anticipated requests for protective measures; and
  - vii. anticipated requests under Rule 74 of the Rules.
16. Witnesses and evidence may be added to the lists after the deadline only with leave of the Chamber. Should the Defence or CLRV wish to file their own Trial Briefs by the same deadline as the Prosecution, they may do so.
17. By the same deadline, the parties are also expected to file their joint submissions on joint experts, if any, as instructed during the Status Conference.<sup>30</sup> The Chamber, once more, strongly encourages the parties to reach agreement at least on a number of experts.

#### **D. Applications by victims to participate in the proceedings**

18. The Chamber notes that both the CLRV<sup>31</sup> and the Victims Participation and Reparations Sections<sup>32</sup> submit that victim applications should be submitted on a rolling basis and that either no cut-off date should be imposed, or that such date be set at the end of the Prosecution case at a minimum. Furthermore, the Chamber notes the Ngaïssona Defence's submission that a cut-off date should be set either at the beginning of trial or 90 days before.<sup>33</sup>
19. In order to facilitate the fair and expeditious conduct of the proceedings, the Chamber considers it appropriate to set a cut-off date for transmission of victim applications to participate at trial. Normally, such cut-off date should in the Chamber's view be set prior to trial in order to ensure that victims' counsel fulfil their mandates consistently during trial.<sup>34</sup>
20. However, the Chamber is cognisant of the present difficulties of reaching out to victims and to collect applications in the circumstances caused by the

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<sup>30</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 48, lines 21-25.

<sup>31</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 55, lines 13-15; CLRV Submissions, ICC-01/14-01/18-471, para. 38.

<sup>32</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 58, lines 17-23; Annex III to the Registry Submissions, ICC-01/14-01/18-470-AnxIII-Red2, paras 23-24.

<sup>33</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 59, lines 18-20; Ngaïssona Defence Submissions, ICC-01/14-01/18-473-Red, para. 38.

<sup>34</sup> See *Ongwen* Decision, ICC-02/04-01/15-449, paras 9-10.

Coronavirus Pandemic. The Chamber is thus of the view that additional time is required to ensure that victims have appropriate time and opportunities to apply for participation. Consequently, the Chamber finds it appropriate to set the cut-off date at the **end of the Prosecution's presentation of evidence**. This deadline is without prejudice to receipt and review of subsequent applications to participate in reparations proceedings, if any.

#### **E. Motions requiring resolution prior to the commencement of trial**

21. As has been done in previous cases, and in order to ensure that no issues affecting the commencement of the trial are unresolved by the commencement date, the Chamber sets a deadline for all motions which require resolution prior to the commencement of trial. This deadline is set to **11 January 2021**.

#### **F. Agreed facts**

22. As indicated during the Status Conference, the Chamber encourages the parties to reach agreement on facts under Rule 69 of the Rules to the extent possible.<sup>35</sup> In order to provide the parties with as much time as possible to reach such agreement, the Chamber orders that a joint submission on agreed facts can be filed until shortly before trial, latest by **11 January 2021**.

#### **G. Commencement date of the trial**

23. The Chamber notes the parties' submissions with regard to the commencement date of trial. The Prosecution submitted that the trial could start in 'early 2021'.<sup>36</sup> The Yekatom Defence submitted that trial should start 'at the earliest opportunity',<sup>37</sup> and that it would be prepared to give its opening statements and begin cross-examining Prosecution witnesses three and four months, respectively, after disclosure is completed.<sup>38</sup> The Ngaïssona Defence indicated

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<sup>35</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 50, lines 3-23.

<sup>36</sup> Prosecution Submissions, ICC-01/14-01/18-474-Conf, para. 14.

<sup>37</sup> Yekatom Defence Submissions, ICC-01/14-01/18-472, para. 3.

<sup>38</sup> Yekatom Defence Submissions, ICC-01/14-01/18-472, para. 4.

that it wishes to proceed to trial ‘as soon as possible’, perhaps even by the end of the year.<sup>39</sup>

24. The Chamber is mindful of its obligation to ensure a fair and expeditious trial and that the accused are tried without undue delay. Moreover, the Chamber recalls that the accused must be provided with adequate time and facilities to prepare their defence. In light of these factors, and taking into consideration the duration of the pre-trial proceedings and of the detention of the accused, the Court’s obligations with regard to the protection of victims and witnesses pursuant to Article 68(1) of the Statute, the special circumstances under the Coronavirus Pandemic, as well as the above final disclosure deadline, the Chamber decides that the trial will commence on **9 February 2021**.
25. The Chamber will hear opening statements from 9 February 2021 onwards. The evidence presentation will commence in March 2021. The exact date will be communicated to the parties in due course.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**DECIDES** that the trial will commence on **9 February 2021**;

**SETS** the following deadlines leading up to the trial commencement:

**31 August 2020:** Provisional Witness List (with summaries of anticipated witness testimony, as described above in paragraph 4).

**9 November 2020:** Disclosure of material in the Prosecution’s possession, Final Witness List (with summaries of anticipated witness testimony, as described above in paragraph 15), List of Evidence, and Trial Briefs.

**11 January 2021:** Motions requiring resolution prior to the commencement of trial.

**11 January 2021:** Agreed facts between the parties.

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<sup>39</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 11, lines 22-24. *See also* Ngaïssona Defence Submissions, ICC-01/14-01/18-473-Conf, para. 10.

**SETS** the end of the Prosecution's presentation of evidence as the deadline for the transmission of victim applications by the Registry;

**INSTRUCTS** the Prosecution to disclose the evidence related to witnesses listed on the Preliminary Witness List, as described in paragraph 11 above, immediately, and at the latest, by **31 August 2020**.

Done in both English and French, the English version being authoritative.

  
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**Judge Péter Kovács**

  
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**Judge Bertram Schmitt**  
**Presiding Judge**

  
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**Judge Chang-ho Chung**

Dated 16 July 2020

At The Hague, The Netherlands