

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **24 November 2023**

**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**

**Prosecution's Urgent Request for Clarification and  
Order for Disclosure of Defence Witness Statements**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

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## I. INTRODUCTION

1. The Prosecution requests Trial Chamber V (“Chamber”) to provide clarification of paragraph 21(ii) of the ‘Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence)’<sup>1</sup> and, as may be necessary, to direct that the Defence provide any and all signed or acknowledged statements of witnesses in their respective final witness lists in their possession or control forthwith, pursuant to Rule 79(4) of the Rules of Procedure and Evidence (“Rules”).

## II. SUBMISSIONS

### A. Clarification of Paragraph 21(ii) of the Further Directions

2. In the course of recent interviews of Defence witnesses by the Prosecution under the relevant protocol, it has become clear that both the Ngaissona and Yekatom Defence teams have obtained and possess signed and acknowledged statements of witnesses appearing in their respective Final Witness Lists (“Defence Witness Statements”). Paragraph 21(ii) of the Further Directions expressly requires the provision of these Defence Witness Statements, stating that the Defence:

“provide witness statements or summaries of the anticipated testimony for all witnesses; *in case no statements are available*, the summaries should be sufficiently detailed and comprehensive to enable the participants and the Chamber to meaningfully prepare.”<sup>2</sup>

3. This language calls for the Defence to provide detailed comprehensive summaries only “*in case no statements are available*.”<sup>3</sup> It does not permit the disclosure of summaries of anticipated testimony *in lieu of* existing statements within the possession and control of the Defence. However, in a recent exchange, the Yekatom

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<sup>1</sup> ICC-01/14-01/18-1892 (“Further Directions”).

<sup>2</sup> ICC-01/14-01/18-1892, para. 21(ii) (emphasis added).

<sup>3</sup> ICC-01/14-01/18-1892, para. 21(ii) (emphasis added).

Defence has indicated its disagreement and rejected the Prosecution's request for the disclosure of the Defence Witness Statements in its possession or control. The Defence considers that the Further Directions instead provide for an option to disclose summaries in substitution for witness statements, even when such statements are available. This position strains both the reading and clear intention of paragraph 21(ii) of the Further Directions – *i.e.*, “to enable the participants and the Chamber to meaningfully prepare.”<sup>4</sup> Obviously, the provision of a signed or acknowledged statement of witnesses put forth to provide testimony at trial allows for a more meaningful preparation than a summary – whose content has not been confirmed by the witness and which may omit important details, mask deficiencies, or present assertions from which a witness may freely disassociate.

4. Nevertheless, as worded, the Further Directions may indeed be susceptible to different understanding. For this reason, and given that the presentation of evidence in the Defence case is to commence on 11 December 2023, the Chamber's urgent clarification of paragraph 21(ii) of the Further Directions is sought.

## **B. Disclosure of Defence Witness Statements**

### *a. Rule 79*

5. The Prosecution further requests that the Chamber order the disclosure of signed or acknowledged statements of all intended Defence witnesses pursuant to Rule 79, in any event. Defence disclosure under the Court's framework is governed by Rule 78 – requiring inspection of material intended to be relied on; and Rule 79 – requiring disclosure of material related to article 31 defences and concerning the existence of an alibi. However, Rule 79(4) provides that the Rule (titled ‘Disclosure by the defence’) “does not prevent a Chamber from ordering disclosure of any other evidence.”<sup>5</sup> It

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<sup>4</sup> ICC-01/14-01/18-1892, para. 21(ii) (emphasis added).

<sup>5</sup> Rule 79(4) of the Rules.

thus confirms the Chamber's authority to require the disclosure of Defence witness statements in the appropriate exercise of its discretion – as paragraph 21(ii) of the Further Directions appears to do.

6. The provision of the Defence Witness Statements is of clear importance to the Parties' and Participants' ability to properly test evidence presented in the Defence case in chief, and to do so effectively and efficiently. In turn, this also advances the truth-seeking function of the Court, assists in the corresponding responsibilities of the Chamber, as well as promotes judicial economy, by mitigating (if not avoiding altogether) foreseeable delay and inefficiency that will result if witnesses testify at variance with the 'detailed' summary provided.<sup>6</sup>

7. Such an eventuality is moreover not unlikely, and would pose difficulties in examining the witnesses on discrepancies between their testimony and the detailed summary. Similarly, the provision of acknowledged witness statements will facilitate the proceedings. For instance, should a witness's memory require refreshing, their statement would be more effective in this than a summary which they have never acknowledged, confirmed, or likely have ever read.

*b. Article 64(2)*

8. Disclosure of the Defence Witness Statements is essential to the Prosecution's ability to exercise its right to a fair process, subsumed in article 64(2).<sup>7</sup> The provision obliges the Court to ensure that neither party is put at a procedural disadvantage.<sup>8</sup>

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<sup>6</sup> Disclosure of the Defence Witness Statements may also serve to protect the interests of Counsel if a witness's testimony about the contents of their prior statement is not truthful.

<sup>7</sup> ICC-01/04-02/12-271-AnxA, para. 6 (Dis. Op. J. Tarfusser and J. Trendafilova) (acknowledging that "in line with the principle of fair trial, both the Prosecutor, acting in public interest, and the defence are entitled pursuant to article 69(3) of the Statute to submit evidence relevant to the case and *to examine the existing evidence at trial*. This principle – as endorsed inter alia by rule 140(2)(a) and (b) of the Rules of Procedure and Evidence – ensures that the parties are accorded by law equal opportunities to present their case *including through the examination of relevant evidence provided by witnesses* in the course of the trial") (emphasis added).

<sup>8</sup> See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para.25; *Prosecutor v. Prlić*, Case No. IT-04-74-AR73, Decision on Prosecution Appeal Concerning Reduction of Time for the Prosecution Case, 6 February 2007, para.14; *Prosecutor v. Martić*, IT-95-11-AR73.2, *Appeals Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness*

Moreover, it reflects the Chamber's duty "to safeguard the rights of the accused *and equally* the procedural rights of the Prosecutor, acting in the public interest."<sup>9</sup> As prior ICC trials have shown, withholding such statements has impeded Chambers' ability to detect testimony that is seriously questionable, to say the least. One need not look farther than the *Bemba* case to appreciate the gravity and impact of such a procedural lapse.

*c. Article 67*

9. Requiring the disclosure of signed and acknowledged Defence witness statements does not undermine any article 67 interests.

10. *First*, this is well within the Court's exercise of discretion and does not affect the Accused's right to remain silent. This is even more so, as article 67(1)(g) is not violated where the Defence – as here – had advance notice that it would be required to disclose available statements. In any case, the disclosure sought here does not require that the defendants testify, nor that they call any given witness, or present evidence.

11. *Second*, it does not require that the defendants produce evidence against themselves – indeed, the Defence has communicated its intention to call the very witnesses for whom the disclosure of their statements is sought – including to testify as to matters ostensibly contained within them. They have done so of their own volition.

12. *Third*, although the Accused are not obliged to mount a direct case, having elected to do so, they necessarily subject that case to scrutiny through meaningful examination. The Defence cannot seriously propose to proffer the evidence of witnesses in its direct case on the one hand, while attempting to make that evidence

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*Milan Babić*, 14 September 2006, para.13; *see also Prosecutor v. Duško Tadić*, "Judgement", IT-94-1-A (ICTY, Appeals Chamber), 15 July 1999, paras 43, 44, 48 and 52 (acknowledging that the right to a fair trial "means that the Prosecution and the Defence must be equal before the Trial Chamber"): *See also e.g.*: R v Sang (1979) 69 Cr App R 282, 290 and 302 (UK); Snyder v Massachusetts, 291 U.S. 97,117 and 122 (1934).

<sup>9</sup> ICC-01/04-02/12-271-AnxA, para. 12 (Dis. Op. J. Tarfusser and J. Trendafilova).

immune from meaningful scrutiny or examination through obscuring the Defence Witness Statements actually in their possession and control.

### III. CONCLUSION

13. For the foregoing reasons, the Prosecution urgently requests (1) clarification of the Further Directions as set out above; and (2) that the Chamber direct the Defence to disclose all signed or acknowledged statements of individuals in the respective final witness lists in their possession and control forthwith.

A handwritten signature in blue ink, appearing to be 'K.A.A. Khan', with a horizontal line underneath it.

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**Karim A. A. Khan KC, Prosecutor**

Dated this 24<sup>th</sup> day of November 2023  
At The Hague, The Netherlands