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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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Yekatom Defence Response to 'Prosecution's Urgent Request for
Clarification and Order for Disclosure of Defence Witness Statements'
(ICC-01/14-01/18-2221)**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby responds to the 'Prosecution's Urgent Request for Clarification and Order for Disclosure of Defence Witness Statements' ('Request').¹
2. The Request should be dismissed *in limine* as moot, as it appears to be based on the Prosecution misconception that the Defence is in possession of signed and acknowledged statements of its witnesses.
3. In any event, the Request should be denied. Clarification of paragraph 21(ii) of the Chamber's 'Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CRLV and the Defence)'² ('Further Directions') is unnecessary in light of the established jurisprudence, legal framework, and Court practice regarding defence disclosure obligations. Moreover, the clarification request is in fact a smokescreen for the Prosecution's true intention to have the Further Directions reconsidered by the Chamber, as demonstrated by its request for unprecedented disclosure orders in respect of all signed and acknowledged witness statements for Defence witnesses. In any event the sought disclosure orders are ill-founded in law and contrary to Mr Yekatom's fair trial rights.

SUBMISSIONS

A. The Request should be dismissed *in limine*.

4. In the Request, the Prosecution claims that the Defence has 'obtained and posses[es] signed and acknowledged statements of witnesses appearing in' its final List of Witnesses.³

¹ ICC-01/14-01/18-2221.

² ICC-01/14-01/18-1892.

³ ICC-01/14-01/18-2221, para. 2.

5. This claim is incorrect. The Defence has disclosed all signed and acknowledged statements of all of its witnesses appearing in the Defence List of Witnesses.
6. This claim appears to be based on a misunderstanding arising from recent Prosecution interviews of Defence witnesses, conducted under the relevant protocol.⁴ The Defence notes that an administrative document (specifically, a '*fiche contact*') that has been used by the Defence and signed by potential Defence witnesses may be at the origin of this misunderstanding. The Defence makes clear that these '*fiche contact*' do not constitute 'signed and acknowledged statements' in any sense: their content is purely administrative, they are completed and kept for internal record-keeping purposes, and they do not include any information about interviewees' knowledge of matters relevant to the case.
7. To the extent that in the Request, it is suggested that in response to a Prosecution disclosure request, the Defence has acknowledged or implied that any such statements are 'in its possession or control', this too is incorrect.⁵ The Defence simply reiterated *inter partes* its position that it was in compliance with the Chamber's Further Directions and its statutory disclosure obligations.
8. The Defence therefore submits that the Request should be dismissed *in limine* as moot.

B. Clarification of paragraph 21(ii) of the Further Directions is unnecessary.

9. The Prosecution suggestion that paragraph 21(ii) of the Further Directions is 'susceptible to different understanding' and is otherwise ambiguous in its scope and meaning is without merit.⁶

⁴ ICC-01/14-01/18-2221, para. 2.

⁵ *Cf.* ICC-01/14-01/18-2221, para. 2.

⁶ *Ibid.* paras 2-4.

10. This suggestion ignores established Court practice as regards defence disclosure obligations. The direction within paragraph 21(ii) forms part of a long line of previous Trial Chambers' defence disclosure directions, either requiring only that detailed witness summaries be provided by the defence;⁷ or, at most, directing the defence to provide either such summaries or witness statements.⁸
11. In the same vein, previous Trial Chambers have rejected outright Prosecution requests for disclosure of defence witness statements on which the defence did not intend to rely.⁹ In so doing, these Trial Chambers have invoked the well-established principle that defence disclosure obligations differ significantly from those of the Prosecution;¹⁰ and that a narrow interpretation of the

⁷ See, *Prosecution v Lubanga*, Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, [ICC-01/04-01/06-2192-Red](#), 20 January 2010, ('Second Lubanga Decision') para. 58 ('given the limited resources (viz, time and personnel) of the defence team, the Chamber is of the view that it would be disproportionate, and in any event unnecessary, to order the accused to provide more extensive information [than that provided in summaries]'); *Prosecutor v Bemba et al.*, Directions on Defence Presentation of Evidence, [ICC-01/05-01/13-1450](#), 3 November 2015 ('Bemba et al. Directions Decision'), para. 12 ('the Defence is requested to prepare these summaries in a sufficiently detailed and comprehensive fashion to enable the parties and the Chamber to prepare meaningfully'); *Prosecutor v Ongwen*, Preliminary Directions for any LRV or Defence Evidence Presentation, [ICC-02/04-01/15-1021](#), 13 October 2017 ('Ongwen Directions'), paras 6-7 ('the Defence must provide [anticipated testimony summaries for all witnesses]').

⁸ See, *Prosecutor v Katanga & Ngudjolo Chui*, Decision on the 'Prosecution's Application Concerning Disclosure by the Defence pursuant to Rules 78 and 79(4), [ICC-01/04-01/07-2388](#), 14 September 2010 ('Katanga Decision'), para. 60 ('the Chamber orders the Defence to provide the Prosecution either with statements of the witnesses they intend to call to testify, or with a summary of the key elements that each witness will address during his or her testimony'); *Prosecutor v Bemba*, Decision on defence disclosure and related issues, [ICC-01/05-01/08-2141](#), 24 February 2012, para. 28 ('the Chamber decides that the defence should provide summaries of its witnesses' testimony, or alternatively, full witness statements'); *Prosecutor v Ntaganda*, Annex C to the Order placing on the record the parties' submissions and email decision of 17 September 2019 on the request by the Prosecution for disclosure of a statement of Witness D-0305, [ICC-01/04-02/06-2441-AnxC](#), 6 November 2019 ('Ntaganda Decision'), p. 2 ('the Chamber has instructed the Defence to ensure that the information made available to the Chamber, Prosecution, and Legal Representatives, is 'sufficiently detailed [...] to enable the parties, participants and Chamber to prepare meaningfully'. The Defence was permitted to provide this information by way of a summary of the anticipated evidence or a witness statement.'). *Prosecutor v Al Hassan*, Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, [ICC-01/12-01/18-1756](#), 22 September 2021 ('Al Hassan Decision'), para. 11(ii) ('the Defence must [...] provide witness statements or summaries of the anticipated testimony for all witnesses'); *Prosecutor v Abd-Al-Rahman*, Second Directions on the conduct of proceedings, [ICC-02/05-01/20-836](#), 15 December 2022, para. 21(c) ('the Defence must file [...] Witness statements or sufficiently detailed summaries of the anticipated testimony for Defence witnesses').

⁹ See, *Prosecutor v Bemba et al.*, Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence, [ICC-01/05-01/13-1820](#), 20 April 2016 ('Bemba et al. Disclosure Decision'), paras 6-7; Ntaganda Decision, p. 2.

¹⁰ Bemba et al. Disclosure Decision, para. 6; Ntaganda Decision, pp 2-3. Regarding the non-reciprocal nature of Defence and Prosecution disclosure obligations more broadly, see, ICC-01/14-01/18-1892, para. 20; Al Hassan Decision, para. 8; Katanga Decision, para. 36; Bemba et al. Directions Decision, para. 2(ii); Ongwen Directions, para. 2(iv); see also, Second Lubanga Decision, paras 63 and 54.

defence's disclosure obligations is in accordance with the required protection of an accused's fair trial rights.¹¹

12. Read in line with this established Court practice and jurisprudence, the disjunctive 'or' within paragraph 21(ii) thus clearly acts to provide the Defence with two possible alternative avenues as regards disclosure in respect of the witnesses it intends to call. In the same vein, reference to the 'unavailability' of witness statements refers to unavailability *vis-à-vis* the Prosecution, and is premised on the fact that the Defence is not obliged under the Court's legal and jurisprudential framework to make 'available' to the Prosecution witness statements that it does not intend to use as evidence.¹² The suggestion that such a reading 'strains both the reading and clear intention of paragraph 21(ii)' is thus without merit.¹³

C. The sought disclosure orders are ill-founded and prejudicial.

13. At the outset, the Defence submits that, given its manifestly unfounded nature, the Prosecution's request for clarification is in fact mere cover for what amounts to a de facto request for reconsideration in respect of paragraph of 21(ii) of the Further Directions, which itself sets out the scope of Defence disclosure obligations as duly determined by the Chamber in accordance with the Court's statutory and jurisprudential framework. The Prosecution has failed to even address the established criteria for reconsideration, let alone fulfil them. In any event they remain unmet: no clear error of reasoning has been demonstrated, nor are the sought disclosure orders necessary to prevent an injustice.¹⁴ The Prosecution's request for disclosure orders can thus be dismissed on this basis alone.

¹¹ Bemba et al. Disclosure Decision, para. 6, citing *Prosecution v Lubanga*, Decision on disclosure by the Defence, [ICC-01/04-01/06-1235](#), 20 March 2008 ('First Lubanga Decision'), para. 27; see also, Katanga Decision, para. 37.

¹² See *infra*, paras 15-17.

¹³ *Contra*, ICC-01/14-01/18-2221, para. 3.

¹⁴ See e.g., ICC-01/14-01/18-2182, para. 8.

14. In any event, the Prosecution's request for the disclosure of 'signed or acknowledged statements of all intended Defence witnesses' pursuant to rule 79(4) of the Rules of Procedure and Evidence is ill-founded in law and contrary to Mr Yekatom's fair trial rights.
15. First, as held by Trial Chamber II in *Katanga & Ngudjolo*, rule 79(4) cannot ground orders for disclosure of the sought statements, because the latter do not constitute 'evidence'.¹⁵ In this regard, Trial Chamber II's interpretation of rule 79(4) is consistent with rule 78, which limits the defence's disclosure obligations to those items which are 'intended for use by the defence as evidence [...] at trial'.¹⁶
16. Second, the Prosecution's interpretation of rule 79(4) is contrary to the Court's broader legal framework governing defence disclosure. The blanket disclosure of statements of witnesses whom the Prosecution intends to call is a statutory obligation that applies expressly and exclusively to the Prosecution.¹⁷ This is abundantly clear from the plain language of rule 76.¹⁸ The Prosecution's interpretation of rule 79(4) would thus improperly collapse the 'significant' distinction between defence and Prosecution disclosure obligations, contrary to the intentions of the drafters, and the well-established jurisprudence upholding this distinction.¹⁹
17. It would also contravene the fundamental fair trial rights underpinning this distinction.²⁰ As previous Trial Chambers have held, 'the starting point for

¹⁵ Katanga Decision, para. 55. See, also, First Lubanga Decision, para. 35.

¹⁶ See also, *ibid.*, fn. 62.

¹⁷ See, Ntaganda Decision, pp 2-3 ('The obligation to disclose all witness statements to be called only relates to the Prosecution, and the corresponding entitlement to such statements only to the Defence. Rule 79 does not include an obligation on the Defence similar to the one imposed on the Prosecution in Rule 76(1) of the Rules.')

¹⁸ See Rule 76, 'Pre-trial disclosure relating to prosecution witnesses'; *inter alia* 76(1) ('The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.')

¹⁹ See *supra*, para. 11, fn. 10.

²⁰ See *supra*, para. 11, fn. 11.

consideration of [defence disclosure] is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence'.²¹ In this regard, the Defence notes that in *Bemba et al.*, the Single Judge rejected a Prosecution request for disclosure of audio recordings of a Kilolo defence interview of a (Kilolo defence) witness, brought *inter alia* under rule 79(4).²² In so doing, the Single Judge '[took] into account [...] considerations of the protection of the rights of the accused', i.e. the fundamental rights against self-incrimination and to remain silent.²³ The Single Judge also noted that the *Bemba et al.* Trial Chamber had 'paid deference to the parties and the way they chose to present their evidence' in denying Prosecution requests for the recordings in question brought on alternative legal bases, notably finding that 'save for exceptional circumstances [...] the Chamber did not intervene on how parties sought to prove their factual propositions'.²⁴

18. In the Request, the Prosecution fails to provide any cogent reason for departing from this precedent; nor does it cite any circumstances that could justify the proposed encroachment on these fundamental rights.²⁵ Nowhere in the Request is it argued that the detailed and comprehensive witness summaries that have been provided do not allow for meaningful preparation by the Prosecution.²⁶ Indeed, the submission that the sought statements would merely '[allow] for a more meaningful preparation than a summary [emphasis added]' is telling in this respect.²⁷ In any event, in accordance with the established standards,²⁸ the

²¹ See, First Lubanga Decision, para. 27; Katanga Decision, para. 37; Bemba et al Disclosure Decision, para. 6.

²² Bemba et al Disclosure Decision, paras 8-9.

²³ Ibid., paras 6 and 9.

²⁴ Ibid., para. 9.

²⁵ *Contra* ICC-01/14-01/18-2221, paras 9-12.

²⁶ See, Katanga Decision, paras 35-37, where, in determining the scope and timing of defence disclosure obligations (in accordance with fair trial considerations and the rights of an accused), Trial Chamber II considered 'in particular' the fact that principle of *audi alteram partem* 'requires that a responding party has sufficient time to prepare a response'.

²⁷ *Contra* ICC-01/14-01/18-2221, para 3.

²⁸ See e.g., *Prosecutor v Ntaganda*, Decision on Prosecution Request related to the Defence 'Further Provisional List of Witnesses and Summaries', ICC-01/04-02/06-1862, 13 April 2017, para. 12.

disclosed witness summaries contain information as to the key elements the Defence witnesses will address, including exhaustive descriptions of the facts on which they will testify, including relevant personal history and background information, as well as the relevance of their testimony to the case.²⁹

19. In the same vein, the Prosecution's submissions regarding 'delays and inefficiency' resulting from witnesses testifying 'at variance' with the witness summaries,³⁰ or regarding 'more effective' manners of refreshing memory³¹ are vague and speculative and therefore cannot reasonably ground the sought disclosure orders.

RELIEF SOUGHT

20. In light of the above, the Defence respectfully requests that Trial Chamber V:
- DISMISS** the Request *in limine*; or, in the alternative,
- DENY** the Request in its entirety.

RESPECTFULLY SUBMITTED ON THIS 30th DAY OF NOVEMBER 2023



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²⁹ See, ICC-01/14-01/18-2212-Conf-AnxC; see also, ICC-01/14-01/18-2212-Conf-AnxB, pp 1-8.

³⁰ *Contra* ICC-01/14-01/18-2221, paras 6-7.

³¹ *Contra* ICC-01/14-01/18-2221, para 3.