

**Cour  
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**International  
Criminal  
Court**

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Date: 12 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-ÉDOUARD NGAÏSSONA**

**Public**

**Response of the Common Legal Representative of the Former Child Soldiers to the "Request for reconsideration of the 'Decision on the Initial Directions on the Conduct of the Proceedings'"**

**Source:** Office of Public Counsel for Victims (CLR1)

**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 Common Legal Representative of the Former Child Soldiers (the “Legal Representative”) hereby files his response to the “Request for reconsideration of the ‘Decision on the Initial Directions on the Conduct of the Proceedings’” (the “Defence Request” or “Request”)<sup>1</sup> by the Defence for Mr Alfred Yekatom (the “Defence”).

2. The Defence seeks reconsideration of the “Decision on the Initial Directions on the Conduct of the Proceedings” (the “Initial Directions”).<sup>2</sup> It is submitted that the Defence Request does not meet the requirements for reconsideration and must therefore be dismissed.

## II. PROCEDURAL BACKGROUND

3. On 26 August 2020, Trial Chamber V (the “Chamber”) adopted the Initial Directions,<sup>3</sup> whereby it, *inter alia*, instructed the two Defence teams to make their opening statements collectively, either at the commencement of the trial or just prior to the presentation of their evidence, if any.<sup>4</sup>

4. On 5 January 2021, the Defence submitted, by e-mail, a request for reconsideration of the Initial Directions as regard the timing and modalities of opening statements to be made by the Defence teams.<sup>5</sup> On the same day, the Single Judge instructed the Defence to file its request formally on the record, and set a deadline of 5 days for any response as of the notification of the Defence filing.<sup>6</sup>

5. On 6 January 2021, the Defence filed the Request.<sup>7</sup>

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<sup>1</sup> See the “Request for reconsideration of the ‘Decision on the Initial Directions on the Conduct of the Proceedings’”, [No. ICC-01/14-01/18-801](#), 6 January 2021 (the “Defence Request”).

<sup>2</sup> See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber V), [No. ICC-01/14-01/18-631](#), 26 August 2021 (the “Initial Directions”).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Idem*, para. 11.

<sup>5</sup> See the E-mail communication by the Defence of 5 January 2021 at 11:02.

<sup>6</sup> See the E-mail communication by the Chamber of 5 January 2021 at 13:02.

<sup>7</sup> See the Defence Request, *supra* note 1.

6. On 11 January 2021, the Ngaïssona Defence filed its response to the Request.<sup>8</sup>

### III. SUBMISSIONS

#### 1. Applicable law

7. To date, Chambers of the Court have adopted diverging approaches on whether, and under which circumstances, they may reconsider their prior decisions.

8. Some Chambers have rejected all requests seeking reconsideration of previous decisions, concluding that there is no legal basis for such requests in the Court's statutory framework.<sup>9</sup> In particular, it was held that "[t]he instruments governing the Court's procedure make no provision for such a broad remedy as an unqualified 'motion for reconsideration'. Review of decisions by the Court is only allowed under specific circumstances, explicitly provided in the Statute and the Rules".<sup>10</sup> This position is based on the need to maintain "legal certainty and finality in judicial decisions [which] serve important purposes in achieving the orderly administration of justice".<sup>11</sup>

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<sup>8</sup> See the "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)", [No. ICC-01/14-01/18-810](#), 11 January 2021.

<sup>9</sup> See e.g. the "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification" (Pre-Trial Chamber II), [No. ICC-02/04-01/05-60](#), 28 October 2005, para. 18; the "Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents", (Pre-Trial Chamber I), [No. ICC-01/04-01/07-477](#), 15 May 2008, p. 5; the "Decision on the Prosecution motion for reconsideration" (Pre-Trial Chamber I), [No. ICC-01/04-01/06-123](#), 23 May 2006, p. 3; the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Pre-Trial Chamber II), [No. ICC-01/09-02/11-96](#), 30 May 2011, para. 38; and the "Decision on the 'Prosecution's Application for Extension of Time Limit for Disclosure" (Pre-Trial Chamber II), [No. ICC-01/09-01/11-82](#), 10 May 2011, para. 11.

<sup>10</sup> See e.g. the "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification" (Pre-Trial Chamber II), [No. ICC-02/04-01/05-60](#), 28 October 2005, para. 18; and the "Decision on the Prosecution motion for reconsideration" (Pre-Trial Chamber I), [No. ICC-01/04-01/06-123](#), 23 May 2006, p. 3.

<sup>11</sup> See the "Decision on 'Second Defence request for interim release'" (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-01/10-319](#), 28 July 2011, p. 6.

9. Other Chambers have accepted the possibility of reconsidering earlier decisions, but only as an exceptional remedy to be granted in extraordinary circumstances. In particular, Trial Chamber I held that *“it is well established that a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory, because, for instance, a decision was made in ignorance of relevant information”*.<sup>12</sup> However, it recognised the *“limits of this approach – most particularly given the need to achieve certainty in the proceedings – and the strong presumption is that a Chamber is bound by its own decisions”*<sup>13</sup> and pointed to *“the need to apply the test – that irregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory – sensu stricto when addressing the circumstances [of the request at hand]”*.<sup>14</sup>

10. Other Chambers have subsequently developed that *“[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment”*.<sup>15</sup> More recently, Chambers further developed that reconsideration *“should only be undertaken when the conditions upon which the decision was grounded have changed, and it is necessary to prevent injustice”*,<sup>16</sup> insofar making two criterion cumulative. The Presidency, while recognising that *“reconsideration of a decision may be considered in certain exceptional circumstances”*, held that *“a request for reconsideration should not be used to complement past arguments in*

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<sup>12</sup> See the “Decision on the defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010” (Trial Chamber I), [No. ICC-01/04-01/06-2705](#), 30 March 2011, para. 18.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> See *e.g.* the “Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on ‘Defence Request for Disclosure and Judicial Assistance’” (Trial Chamber VII), [No. ICC-01/05-01/13-1282](#), 22 September 2015, para. 8. See also the “Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits” (Trial Chamber V(a)), [No. ICC-01/09-01/11-1813](#), 10 February 2015, para. 19; the “Decision on Request for Reconsideration of the Order to disclose Requests for Assistance” (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-468](#), 15 June 2016, para. 4; and the “Decision on the Defence request for reconsideration and clarification” (Trial Chamber VI), [No. ICC-01/04-02/06-483](#), 27 February 2015, para. 13.

<sup>16</sup> See the “Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’” (Pre-Trial Chamber II), [No. ICC-01/14-01/18-206](#), 24 May 2019, para. 20 (emphasis added).

*response to the rejection of a request” and referred to the Court’s jurisprudence according to which “to entertain such arguments after an adverse ruling challenges the basic principle of judicial finality, with it being expected that all relevant arguments are advanced at the time of an initial request”.*<sup>17</sup>

## **2. The Request fails to satisfy the requirements for reconsideration**

11. In the practice of the Court, requests for reconsideration have been granted in exceptional circumstances, in particular where the party seeking reconsideration had demonstrated both that the relevant decision was “*manifestly unsound*” and that its consequences were “*manifestly unsatisfactory*”, because, for instance “*a decision was made in ignorance of relevant information*”.<sup>18</sup>

12. The Legal Representative notes that the Defence does not argue that the Initial Directions were ‘manifestly unsound’ and/or their consequences were ‘manifestly unsatisfactory’. The Defence does not also point to any “*material error that could cause significant prejudice*”.<sup>19</sup> Instead, the Defence requests the Chamber to reconsider its prior decision “*based on the need to prevent an injustice to Mr. Yekatom’s rights to a fair trial and the effective assistance of counsel*”<sup>20</sup> in further elaborating that the impasse encountered in discussions with the Ngaïssona Defence, the recently disclosed witness statements, and the prevailing circumstances impacting the speed of the Defence investigations, considered together, “*represent significant changes in circumstances and*

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<sup>17</sup> See the “Decision on the “Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute” (ICC-01/04-02/06-2337) and the “Request for Reconsideration of ‘Decision concerning the “Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki”, the “Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019”” (Filing #2336), and for Additional Disclosure” (ICC-01/04-02/06-2339) and related requests” (Appeals Chamber), [No. ICC-01/04-02/06-2346](#), 14 May 2019, para. 26.

<sup>18</sup> See the “Decision on the defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010”, *supra* note 12, para. 18.

<sup>19</sup> *Idem*, para. 20.

<sup>20</sup> See the Defence Request, *supra* note 1, para. 9.

*new and compelling reasons that justify reconsideration of the Chamber's Decision to prevent an injustice".<sup>21</sup>*

13. The Legal Representative submits that the Defence failed to provide compelling new or previously unavailable information which may significantly alter the basis on which the original decision was taken,<sup>22</sup> such as the developments in a witness's security situation.<sup>23</sup> The Defence also failed to demonstrate the existence of an injustice with respect to Mr Yekatom's right to a fair trial, when weighted against the requirements of legal certainty, judicial finality and integrity of proceedings.

*a) There is no compelling new or previously unavailable information justifying the reconsideration of the Initial Directions*

14. Upon the issuance of the Initial Directions, the Defence was aware that the timing of its opening statements was the subject of a collective decision by two Defence teams. The Defence had the right to seek leave to appeal the Initial Directions in order, for instance, to advocate for a more flexible approach regarding the modalities of opening statements based on the practice in other cases where two defence teams were involved,<sup>24</sup> but it opted not to do so. The Defence cannot now justify the recourse to an exceptional remedy such as reconsideration, which can only be granted in extraordinary circumstances, based on the inability of the Defence teams to reach an agreement on the matter. Indeed, such course of events could and should have reasonably been anticipated at the time of the issuance of the Initial Directions.

15. The other circumstances the Defence advances in support of its Request were equally all pre-existed the Chamber's directions and/or foreseeable well in advance.

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<sup>21</sup> *Idem*, para. 15.

<sup>22</sup> See the transcript of the hearing held on 2 December 2010, [No. ICC-01/05-01/08-T-42-Red2-ENG WT](#), page 4, lines 10-12.

<sup>23</sup> See the "Decision on prosecution's 'Urgent request for reconsideration pursuant to Trial Chamber V's 'Decision on the second and third Prosecution requests for delayed disclosure of witness identities'", [No. ICC-01/09-01/11-578-Red](#), 30 January 2013, paras. 8-9.

<sup>24</sup> See e.g. the "Directions on the Conduct of the Proceedings" (Trial Chamber I), [No. ICC-02/11-01/15-205](#), 3 September 2015, para. 10.

Indeed, the Initial Directions were issued on 26 August 2020,<sup>25</sup> and thus in the very midst of the COVID-19 pandemic that already had an impact on the operational activities of the parties and participants. Accordingly, the Defence's submissions relating to its operational difficulties,<sup>26</sup> do not represent significant changes in circumstances since the issuance of the Initial Directions, and do not constitute compelling new or previously unavailable information justifying reconsideration of the Chamber's decision.

***b) There will be no injustice if the Initial Directions are not reconsidered***

16. The Defence failed to demonstrate *in concreto* how the Initial Directions are unjust or prejudicial to Mr Yekatom's right to a fair trial. Instead, throughout the Request, the Defence merely expressed its belated disagreement with the Initial Directions, which manifestly cannot constitute ground for reconsideration.

17. *First*, absent an agreement between the two Defence teams, the Defence cannot now claim to be "forced" to make its opening statements at the beginning of the trial rather than at the beginning of the presentation of its case.<sup>27</sup> Indeed, making an opening or closing statement is not mandatory and cannot be imposed on a defendant.<sup>28</sup> The Initial Directions make it clear that the Defence may decide not to present its opening statements at the commencement of the trial and can simply inform the Chamber accordingly 15 days prior to the start of the trial.<sup>29</sup> Should the Defence decide so, it will still be in position to fully present its case and evidence after the closure of Prosecution's case.

18. *Second*, the Defence's claim that its investigations are still ongoing<sup>30</sup> does not have an impact on the Defence's ability to present its opening statements at the start

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<sup>25</sup> See the Initial Directions, *supra* note 2.

<sup>26</sup> See the Defence Request, *supra* note 1, para. 9.

<sup>27</sup> *Idem*, paras. 16 and 18.

<sup>28</sup> See the "Decision on opening and closing statements" (Trial Chamber I), [No. ICC-01/04-01/06-1346](#), 22 May 2008, para. 16.

<sup>29</sup> See the Initial Directions, *supra* note 2, para. 13.

<sup>30</sup> See the Defence Request, *supra* note 1, paras. 14-17.



of the trial, nor prejudicially affects the right of the Accused. The opening statement at the beginning of the trial is limited to outlining facts; this is each party's opportunity to set the basic scene for the judges, introduce them to the core dispute(s) in the case, and provide a general road map of how the trial is expected to unfold.<sup>31</sup>

19. *Third*, the Defence Request should be weighed against several fundamental competing interests, namely the requirements of legal certainty, judicial finality and integrity of proceedings. Indeed, Victims have a clear interest in seeing the proceedings advancing in a fair and expeditious manner.<sup>32</sup> The principle of legal certainty (*res judicata*) has been recognised as a fundamental aspect of the right to a fair trial.<sup>33</sup> Legal certainty and finality in judicial decisions indeed serve the utmost purpose of achieving the orderly administration of justice.<sup>34</sup> In this regard, the "fair trial" guarantees must apply throughout the proceedings and in respect of all parties and participants, including Victims.<sup>35</sup> In the same vein, the requirements of the integrity of the proceedings must apply to all parties and participants in the

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<sup>31</sup> See e.g. US Courts, [Opening Statement](#).

<sup>32</sup> See the "Judgment on the Prosecutor's Appeal against the Decision of Trial Chamber II entitled 'Judgment Pursuant to Article 74 of the Statute' - Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser", [No. ICC-01/04-02/12-271-AnxA A](#), 27 February 2015, paras. 6 and 12. See also the "Public redacted version of Decision on Defence Applications for Judgments of Acquittal" (Trial Chamber V(a)), [No. ICC-01/09-01/11-2027-Red-Corr](#), 16 June 2016, Reasons of Judge Eboe-Osuji, para. 190.

<sup>33</sup> See e.g. the "Decision on the Prosecutor's request for leave to appeal the Decision on the Application for Judicial Review by the Government of the Union of the Comoros" (Pre-Trial Chamber I), [No. ICC-01/13-73](#), 18 January 2019, para. 48. See also ECtHR, *Samat v. Turkey*, App. No. 29115/07, [Judgment](#), 21 January 2020, para. 54; *Driza v. Albania*, App. No. 33771/02, [Judgment](#), 13 November 2007, paras. 63-64; *Ryabykh v. Russia*, App. No. 52854/99, [Judgment](#), 24 July 2003, para. 52; *Brumarescu v. Romania*, App. No. 28342/95, [Judgment](#), 28 October 1999, para. 61.

<sup>34</sup> See the "Decision on 'Second Defence request for interim release'", *supra* note 11, p. 6.

<sup>35</sup> In this regard, the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985 calls for enabling victims' access to Justice and to obtain redress as well as for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96<sup>th</sup> plenary meeting, [UN Doc. A/RES/40/34](#), 29 November 1985, Principles 4 to 7.

proceedings before the Court, and not only to the suspect/accused,<sup>36</sup> and shall furthermore prevail over the specific interests of the parties.<sup>37</sup>

20. Accordingly, the Legal Representative submits that an alleged injustice shall not be prevented as submitted by the Defence insofar causing prejudice to the fundamental interests of paramount importance, namely the requirements of legal certainty, judicial finality and integrity of proceedings. It is worth noting in this regard that the Appeals Chamber, presented for the first time with the opportunity to address the circumstances under which it can reconsider its previous decisions,<sup>38</sup> opted not to generally determine on the question whether reconsideration may be based on the need “to prevent injustice”.<sup>39</sup>

21. Finally, the Legal Representative further cautions against granting the Request and allowing for a reconsideration on the basis of the Defence’s arguments. Such an approach would set the unsafe precedent of allowing parties to seek reconsideration of previous decisions on the ground of discrete operational difficulties, thereby negatively impacting the predictability and legal certainty of the Court’s legal framework.

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<sup>36</sup> See the “Decision on the admission of material from the ‘bar table’” (Trial Chamber I), [No. ICC-01/04-01/06-1981](#), 24 June 2009, para. 42. See also in the same sense TRAPP (K.), *Excluding Evidence: The Timing of a Remedy*, non-published manuscript (1998), Faculty of Law, McGill University, Canada, p. 21; quoted in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, Verlag C.H Beck, Munich, 2008, p. 1335, footnote 139. See also the “DECISION ON THE PROSECUTION’S APPLICATION FOR LEAVE TO APPEAL THE CHAMBER’S DECISION OF 17 JANUARY 2006 ON THE APPLICATIONS FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6” (Pre-Trial Chamber I), [No. ICC-01/04-135-tEN](#), 20 April 2006 (dated 31 March 2006), para. 38.

<sup>37</sup> See SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, [Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts](#), Case No. SCSL-04-16-PT, 31 March 2004, para. 26.

<sup>38</sup> See the “Decision on Mr Ntaganda’s request for reconsideration of the decision on time and page extensions” (Appeals Chamber), [No. ICC-01/04-02/06-2426 A A2](#), 1 October 2019, para. 6.

<sup>39</sup> *Ibid.*

#### IV. CONCLUSION

22. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to reject the Defence Request.

**RESPECTFULLY SUBMITTED**

A handwritten signature in black ink, appearing to read 'Dmytro Suprun', with a period at the end.

Dmytro Suprun  
Common Legal Representative of the Former Child Soldiers

Dated this 12<sup>th</sup> Day of January 2021

At The Hague, The Netherlands