



**Original: English**

**No. ICC-01/14-01/22**

**Date: 12 April 2023**

**PRE-TRIAL CHAMBER II**

**Before:** Judge Rosario Salvatore Aitala, Presiding  
Judge Tomoko Akane  
Judge Sergio Gerardo Ugalde Godínez

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**  
**IN THE CASE OF**  
***THE PROSECUTOR v. MAXIME JEOFFROY ELI MOKOM GAWAKA***

**Public**

Decision on the Prosecution's requests to vary a time limit and/or for reconsideration (ICC-01/14-01/22-180) and to amend its witness table (ICC-01/14-01/22-184)

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

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for the Defence**

**States Representatives**

*Amicus Curiae*

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**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER II** of the International Criminal Court issues this ‘Decision on the Prosecution’s requests to vary a time limit and/or for reconsideration (ICC-01/14-01/22-180) and to amend its witness table (ICC-01/14-01/22-184)’.

## **I. PROCEDURAL HISTORY**

1. On 23 February 2023, pursuant to the Chamber’s instructions,<sup>1</sup> the Prosecution completed the disclosure process, and provided its Witness Table, comprised of: (i) the relevant documents and information for each witness (Annex A); and (ii) the elements the Prosecution intends to prove by relying on each of these witnesses (Annex B).<sup>2</sup>

2. On 9 March 2023, the Prosecution submitted *inter alia*: (i) the Document Containing the Charges (the ‘DCC’); (ii) the Annex to the DCC ‘providing an explanation of the supporting evidence for the allegations presented’ therein; and (iii) the List of Evidence (the ‘9 March 2023 Submission’).<sup>3</sup> The Prosecution also requested the Chamber’s authorisation to: (i) amend the disclosure metadata of 21 documents from Rule 77 material to INCRIM (the ‘21 Rule 77 Items’); (ii) insert the missing disclosure notes relating to 39 items disclosed as INCRIM (the ‘39 INCRIM Items’); and (iii) formally disclose 9 trial transcripts which were referenced in the Annex to the DCC without having been disclosed (the ‘9 Transcripts’).

3. On 16 March 2023, the Chamber *inter alia*: (i) decided that, without prejudice to a properly substantiated request under regulation 35(2) of the Regulations of the Court (the ‘Regulations’), the metadata of the 21 Rule 77 Items and the disclosure notes of the 39 INCRIM Items shall not be amended, while the 9 Transcripts shall not be considered for the purposes of the confirmation of charges procedure; and (ii) ordered the Prosecution to provide a revised version of the Witness Table in compliance with the Chamber’s instruction to ensure that the evidence referenced in the Annex to the

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<sup>1</sup> [Order on the conduct of the confirmation of charges proceedings](#), 27 June 2022, ICC-01/14-01/22-62, public, paras 32-33 (the ‘27 June 2022 Order’); [Order on disclosure and related matters](#), 7 November 2022, ICC-01/14-01/22-104, public, paras 9-10 (the ‘7 November 2022 Order’).

<sup>2</sup> Prosecution’s Submission of its Witness Table, ICC-01/14-01/22-167, public, with Annexes A-B, confidential.

<sup>3</sup> [Prosecution’s Submission of the Document Containing the Charges](#), ICC-01/14-01/22-174, public, with Annexes A-D, confidential (public redacted versions of Annexes A and B were notified on 13 March 2023, [ICC-01/14-01/22-174-AnxA-Red](#) and [ICC-01/14-01/22-174-AnxB-Red](#)).

DCC corresponds exactly to the evidentiary items listed in the Witness Table by no later than 24 March 2023 (the ‘16 March 2023 Decision’).<sup>4</sup>

4. On 24 March 2023, the Prosecution provided: (i) a revised List of Evidence (Annex A); (ii) a revised Witness Table (Annexes B and C); and (iii) a list of the items for which amendments to the disclosure metadata or disclosure notes had been sought (Annex D) (the ‘24 March 2023 Submission’).<sup>5</sup>

5. On 24 March 2023, the Prosecution requested the Chamber to: (i) vary the time limit for the completion of the disclosure process, i.e. 23 February 2023, for the Prosecution to amend and/or update the metadata of the 21 Rule 77 Items and the disclosure notes of the 39 INCRIM Items; and/or (ii) reconsider the 16 March 2023 Decision (the ‘First Request’).<sup>6</sup> On 3 April 2023, the Defence responded to the First Request.<sup>7</sup>

6. On 29 March 2023, the Prosecution requested the Chamber to authorise the amendment of Annex B to the 24 March 2023 Submission, which was originally submitted as Annex A to the Witness Table (the ‘Second Request’).<sup>8</sup> The Defence has not responded to the Second Request.

## II. SUBMISSIONS

### A. First Request

7. The Prosecution indicates that it had erroneously asserted that the 9 Transcripts had not been disclosed in the 9 March 2023 Submission, as the 9 Transcripts had been timely disclosed as INCRIM on 21 February 2023. It, therefore, clarifies that the First Request only concerns the 21 Rule 77 Items and the 39 INCRIM Items.

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<sup>4</sup> [Decision on issues arising from the submission of the Document Containing the Charges](#), ICC-01/14-01/22-177, public.

<sup>5</sup> [Prosecution’s Submission Related to the Chamber’s Decision on issues arising from the submission of the Document Containing the Charges](#), ICC-01/14-01/22-179, public, with Annexes A-D, confidential.

<sup>6</sup> [Prosecution’s Request pursuant to regulation 35\(2\) to vary a time limit, and/or Request for Reconsideration of the ‘Decision on issues arising from the submission of the Document Containing the Charges’ \(ICC-01/14-01/22-177\)](#), ICC-01/14-01/22-180, public, with Annex, confidential.

<sup>7</sup> [Defence Response to Prosecution’s request to vary a time limit, and/or request for reconsideration](#), ICC-01/14-01/22-188, public.

<sup>8</sup> [Prosecution’s Request to Amend Annex B of Prosecution’s Submission Related to the Chamber’s Decision on issues arising from the submission of the Document Containing the Charges \(ICC-01/14-01/22-179\)](#), ICC-01/14-01/22-184, public, with Annexes A-B, confidential.

8. In the view of the Prosecution, the Chamber's instructions on disclosure are substantively at variance with the Court's regular disclosure practice, including through non-standardised metadata requirements. It submits that it could not have anticipated that *mere* amendments and/or updates to metadata would amount to a regulation 35(2) issue (emphasis in original). The Prosecution adds that the five months period to provide the DCC and the evidence the Prosecution intends to rely upon is without precedent. It also avers that there are no requirements in the E-court Protocol to provide disclosure notes with specific sections, pages, and paragraphs references in relation to *each* disclosed item (emphasis in original). The Prosecution additionally contends that it has, in good faith, complied with its disclosure obligations.

9. The Prosecution specifies that, during the process of finalising its List of Evidence and the Annex to the DCC, it determined that it would be more effective to *rely* on the 21 Rule 77 Items, and requested to update the corresponding metadata to 'INCRIM' (emphasis in original). In respect of the 39 INCRIM Items, the Prosecution avers that it bears noting that they were duly disclosed as such in July 2022 and that, at that time, there was no further instruction to provide disclosure notes. It argues that, although disclosure notes were in fact added to the 39 INCRIM Items, the metadata update was apparently not uploaded to the system. The Prosecution further indicates that its understanding was that the relevant analysis in view of the Court's case law and practice was one that devolves on the relative prejudice caused.

10. In the Prosecution's submission, granting a variation of the time limit to amend the metadata for evidentiary items provided within the set deadline is necessary for the Chamber to have an adequate understanding and appreciation of the Prosecution's case. It adds that the amendments or updates requested would in no way derail the proceedings or unduly prejudice the Suspect.

11. The Prosecution alternatively requests reconsideration of the 16 March 2023 Decision. It contends that there are facts and arguments unknown to the Chamber given the Prosecution's erroneous representation that the 9 Transcripts had *not* been disclosed (emphasis in original). It adds that precluding the Prosecution's use of evidence because of merely technical irregularities would result in irreparable harm to the case, and an injustice. The Prosecution also submits that the Defence *is more than able* to meaningfully prepare for the confirmation hearing as it is neither misled by the

material on which the Prosecution has indicated an intention to rely, nor swamped by thousands of evidentiary items (emphasis in original).

12. The Defence requests the Chamber to reject the First Request. The Defence argues that failing to comply with the Chamber's deadlines, and then submitting that they are irregular or unusual, is an improper way of proceeding. It adds that the Prosecution should have explained the technical difficulties or that it is of the view that regulation 35(2) of the Regulations does not apply in its 9 March 2023 Submission. The Defence further avers that the Prosecution's failure to meet the Chamber's disclosure deadlines cannot be retroactively justified by its own view of the time it asserts the Defence should have to prepare and that, in any event, the Prosecution's assertion cannot be reconciled with the scope of the disclosure in this case or the reality of what a Defence team must do to prepare. Lastly, the Defence contends that the requirements for reconsideration have not been met as the conditions upon which the 16 March 2023 Decision was grounded have not changed.

## **B. Second Request**

13. According to the Prosecution, it has identified errors in Annex B to the 24 March 2023 Submission falling outside the scope of a corrigendum, namely: (i) formatting issues; (ii) missing witness codes and related documents; and (iii) four misattributed trial transcripts. The Prosecution is of the view that the requested amendment causes no prejudice to the Defence as the updated information has been disclosed and accounted for in Annex A to the Witness Table. It adds that it is in the interest of the Chamber, the Parties, and the Participants to have at their disposal a comprehensive reference listing all the related documents per witness, including their transcripts, to understand the 24 March 2023 Submission more fully, and the content and scope of the witnesses' evidence.

## **III. DETERMINATION**

### **A. First Request**

14. The Chamber notes that, pursuant to regulation 35(2) of the Regulations, '[a]fter the lapse of a time limit, an extension of time may only be granted if the participant

seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control’.

### 1. *Preliminary matters*

15. In view of the Prosecution’s clarification that it had mistakenly asserted that the 9 Transcripts had not been disclosed in its 9 March 2023 Submission, the Chamber will only address the 21 Rule 77 Items and the 39 INCRIM Items.

16. Before doing so, the Chamber observes that a number of remarks made by the Prosecution reveal a misapprehension of the disclosure regime arising from the applicable legal texts and specified in the Chamber’s decisions and orders.

17. First, the Prosecution submits that it ‘could not have anticipated that *mere* amendments and/or updates to metadata [...] would amount to a regulation 35(2) issue’ because, in its view, ‘the matter was duly raised and addressed [on] 9 March 2023 [by] requesting to amend timely filed and disclosed material, rather than under regulation 35’. The Chamber’s orders expressly indicate that disclosure metadata and disclosure notes are a fundamental element of the disclosure process and that, consequently, any related obligations are to be fulfilled within the time limit set for the completion of such process.<sup>9</sup> The absence of disclosure notes or incorrect disclosure metadata entails that an evidentiary item cannot be considered as having been ‘disclosed’ for the purposes of these proceedings. Therefore, as opposed to constituting a mere technical matter, errors in disclosure metadata – particularly those regarding the nature of the evidence (INCRIM, PEXO, R77) – or the absence of disclosure notes engages the Prosecution’s disclosure obligations, and any requests to add or amend disclosure metadata or disclosure notes must be submitted pursuant to regulation 35(2) of the Regulations. While certain Trial Chambers may have adopted other approaches,<sup>10</sup> such practice is not binding. It is for the Chamber, in the exercise of its discretion under the Statute and the Rules of Procedure and Evidence, to determine the procedural requirements to be fulfilled at the present stage of the proceedings in this case.

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<sup>9</sup> [27 June 2022 Order](#), paras 30-31; [7 November 2022 Order](#), public, para. 8; [Second order on disclosure and related matters](#), 30 November 2022, ICC-01/14-01/22-116, public, paras 9, 13-14.

<sup>10</sup> [First Request](#), paras 20-21.

18. Second, the Prosecution claims that it has ‘taken several affirmative actions to provide the Suspect with material to facilitate his preparation as of his initial appearance’, and that it has ‘effected disclosure in good faith’, including through a ‘reduction of the charges and evidence relied on’. Considerations relating to the Prosecution’s good faith as to the disclosure process are irrelevant for substantiating a regulation 35(2) request. The Prosecution’s good faith is to be presumed and cannot be invoked to justify a particular procedural approach.

19. Third, the points raised by the Prosecution in support of its assertion that the Chamber’s instructions on disclosure ‘have evolved since June 2022 through various amendments and/or corrections’ and ‘are substantively at variance with the Court’s regular disclosure practice, including through non-standardised meta-data requirements’ are inaccurate in several respects. For instance, the ‘meta-data requirements’ imposed in this case have also been applied by this Chamber in the confirmation of charges proceedings in *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”) and *The Prosecutor v. Mahamat Said Abdel Kani*. The fact that ‘[t]here are no requirements in the E-court Protocol [...] to provide disclosure notes with specific sections, pages, and paragraphs references in relation to *each* disclosed item’ evidently cannot displace specific instructions issued by the Chamber. In addition, when asserting that ‘the five months afforded in this instance’ for the preparation of the confirmation hearing ‘is without precedent’, the Prosecution ignores the Court’s consistent jurisprudence according to which the time limits referred to in rules 121(3), (4), (5) and (6) of the Rules of Procedure and Evidence ‘are only indicative of the *minimum* notice period a party may avail itself to comply with its disclosure obligations’.<sup>11</sup> In any event, the Chamber emphasises that instructions relating to the disclosure process fall within its discretion.

20. Lastly, the preceding submissions convey the impression that the Prosecution is disputing the Chamber’s orders outside the formal remedies available under the Court’s

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<sup>11</sup> [27 June 2022 Order](#), para. 34 (emphasis in original).

legal texts. The Chamber recalls that it is self-evident that the Prosecution is under an obligation to comply with the Chamber's instructions.<sup>12</sup>

## 2. 21 Rule 77 Items

21. The 21 Rule 77 Items are comprised of: (i) 11 transcribed statements of witness P-0889; and (ii) '10 various items', i.e. (a) two videos and their transcripts; (b) Facebook material; (c) two transcripts of videos that were duly disclosed as INCRIM; (d) media articles; (e) an email referring to the FROCCA Protocol Agreement; and (f) the English version of one of witness P-1962's trial transcripts.

22. With regard to the 11 transcribed statements of witness P-0889, the Chamber notes that this witness was mentioned in the Witness Table and that other evidentiary material related to this witness, i.e. his statement and certain trial transcripts, was correctly disclosed as INCRIM within the relevant time limit. As to the two transcripts of videos identified as CAR-OTP-2127-6281 and CAR-OTP-2127-7186, the Chamber notes that the related videos were also disclosed as INCRIM within the relevant time limit. In these circumstances, the Chamber considers that it is not implausible that the Prosecution's mistaken disclosure of these items as Rule 77 material resulted from a mere oversight. As the Defence was on notice of the fact that the Prosecution would rely on P-0889 as an incriminating witness, as well as on the two abovementioned videos for the purposes of the confirmation hearing, the Chamber finds that no prejudice is caused to the Defence. Accordingly, the Chamber finds it appropriate to exceptionally grant the Prosecution's request for extension of time to remedy the errors and amend the relevant disclosure metadata of the aforementioned items from Rule 77 material to INCRIM within one week of notification of this decision.

23. As to the remaining items among the '10 various items', the Chamber is of the view that the Prosecution has not submitted sufficient information to conclude that their

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<sup>12</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU"](#), 8 October 2010, ICC-01/04-01/06-2582, para. 48; Pre-Trial Chamber I, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, [Decision on the "Application for Judicial Review by the Government of the Union of the Comoros"](#), 15 November 2018, public, ICC-01/13-68, paras 101-104, 107.

mistaken disclosure as Rule 77 material was due to reasons outside its control. Accordingly, these items shall be excluded from this case and will not be relied upon for the purposes of the confirmation of charges proceedings.

### 3. *39 INCRIM Items*

24. At the outset, the Chamber notes that the Prosecution seems to suggest that it was under no obligation to provide disclosure notes for the 39 INCRIM Items, as they were ‘duly disclosed’ prior to the Chamber’s corresponding instruction. This submission is unfounded, since it clearly results from the 7 November 2022 Order that disclosure notes were to be applied to ‘each disclosed item’ in the present case.<sup>13</sup> The Chamber fails to see how the Prosecution could infer that this instruction did not apply to items disclosed before the issuance of the 7 November 2022 Order. In addition, as already set out above, as opposed to a ‘minimal technicality’, disclosure notes are an important element for an item to be considered ‘disclosed’.

25. However, in light of the fact that the disclosure notes for the 39 INCRIM Items were indeed provided by the Prosecution but were not uploaded due to a technical error, the Chamber finds it appropriate to exceptionally grant the Prosecution’s request for extension of time to remedy the error and update the relevant disclosure notes within one week of notification of this decision.

### 4. *Reconsideration request*

26. In light of the preceding determination, the request to reconsider the 16 March 2023 Decision, insofar as it pertains to the 11 transcribed statements of witness P-0889, the two transcripts of videos identified as CAR-OTP-2127-6281 and CAR-OTP-2127-7186, and the 39 INCRIM Items, need not be addressed any further.

27. As to the remainder of the 21 Rule 77 Items, the Chamber is not persuaded that the Prosecution’s unspecified assertions as to irreparable harm to the case satisfy the criteria related to the exceptional remedy of reconsideration. Accordingly, the request

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<sup>13</sup> [7 November 2022 Order](#), para. 8.

to reconsider the 16 March 2023 Decision, to the extent that it relates to the remainder of the 21 Rule 77 Items, is rejected.

## **B. Second Request**

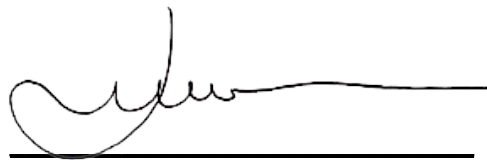
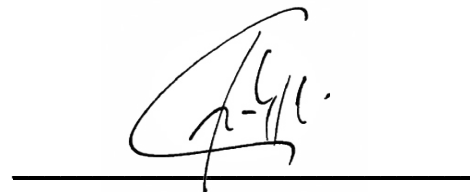
28. As a preliminary matter, the Chamber observes that, in the 24 March 2023 Submission, the Prosecution asserts that its revised List of Evidence includes *inter alia* ‘the items referenced in the (analytical) Witness Table, that were not originally included in Annex to the DCC, which, pursuant to the Chamber’s directions, was to include only “the most probative supporting evidence”’ (emphasis in original). To the extent that it is suggested that the order to provide a revised List of Evidence is not compatible with the Chamber’s aforementioned direction, the Prosecution is misguided. Both the order and direction aim at ensuring that the Prosecution identifies and organises its evidence in accordance with the limited scope of the confirmation of charges proceedings and the suspect’s right to a fair trial. As also set out above, the Prosecution shall implement the Chamber’s orders and directions without calling them into question outside the formal remedies available under the legal framework.

29. Turning to the substance of the Second Request, the Chamber agrees that certain errors identified by the Prosecution exceed the scope of a corrigendum. Inserting missing witness codes and related documents, and altering the attribution of trial transcripts, amounts to a substantive amendment of Annex B to the 24 March 2023 Submission that requires judicial authorisation.

30. The Chamber finds that the amendment sought by the Prosecution would not materially prejudice the Defence, since the relevant material has already been disclosed and there remains sufficient time for the Defence to prepare for the confirmation of charges hearing. In addition, the requested amendment would contribute to a proper understanding of the case. Therefore, the Second Request is granted, and the Prosecution is instructed to file an amended Annex B to the 24 March 2023 Submission within one week of notification of the present decision.

**FOR THESE REASONS, THE CHAMBER HEREBY****PARTIALLY GRANTS** the First Request;**REJECTS** the remainder of the First Request;**GRANTS** the Second Request; and**ORDERS** the Prosecution to implement the instructions set out in the present decision.

Done in English. A French translation will follow. The English version remains authoritative.

**Judge Rosario Salvatore Aitala****Presiding****Judge Tomoko Akane****Judge Sergio Gerardo****Ugalde Godínez**

Dated this Wednesday, 12 April 2023.

At The Hague, The Netherlands.