

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **4 September 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

Public redacted version ‘Defence Request for Reconsideration of the “Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence)” (ICC-01/14-01/18-1892), 29 May 2023’

Source: Defence of Patrice-Edouard Ngaiissona

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

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I. INTRODUCTION

1. The Defence for Mr Ngaïssona ('the Defence') hereby submits its request for reconsideration of Trial Chamber V's "Further Directions on the Conduct of the Proceedings"¹ ('Directions' or 'Further Directions'), as the schedule set out therein currently restricts the ability of the Defence to adequately prepare for its Defence case. Accordingly, the Defence requests a reconsideration of the Further Directions regarding the following two deadlines:

(1) the 17 November 2023 deadline to submit its Final Witness List, provide witness statements or summaries of the anticipated testimony for all witnesses, file any applications pursuant to Rule 68(2) and (3) of the Rules of Procedure and Evidence ('Rules') and complete disclosure of all items it intends to use ('17 November 2023 deadline'), to be postponed to 15 December 2023; and

(2) the 11 December 2023 deadline for the Defence to call its first witness ('11 December 2023 deadline') to be postponed to 22 January 2024.

2. Significant changes affected the court schedule and delayed the closing of the presentation of the evidence by the Prosecution until the end of September 2023 at the earliest. In addition, the Defence is still conducting investigative activities, as well as concurrently preparing several responses to the Prosecution Bar Table Applications and Rule 68(2) Requests, preparing the examination for the remainder of the Prosecution witnesses (at least four witnesses), preparing for the presentation of the evidence by the Common Legal Representative of Victims of the Former Child Soldiers and the Common

¹ ICC-01/14-01/18-1892.

Legal Representatives of Victims of Other Crimes (together, the 'CLRV') and preparing the examination of witness [REDACTED].

3. Preparing for the presentation of a Defence case requires considerable time and resources, that the Defence is currently compelled to allocate to other tasks; this can result in an injustice that can be avoided by postponing the above deadlines. The limited extension that is requested by the Defence will not unduly delay the proceedings, taking into consideration the winter recess. This extension of time is without prejudice to the timely adjudication of Mr Ngaïssona's case or to the Prosecution. Considering the significant workload currently faced by the Defence, as well as logistical constraints, the limited extension is warranted to mount an effective defence and thus appropriate to prevent an injustice.

II. PROCEDURAL HISTORY

4. On 26 August 2020, Trial Chamber V issued the "Initial Directions on the Conduct of Proceedings". The Chamber indicated that "it 'may take into account the submissions of the parties on these matters, but reserves the right to give directions in such a manner so as to comply with the principles of expeditiousness and fairness'".²
5. On 31 January 2023, the Chamber decided to hear witness [REDACTED] as a Chamber witness pursuant to Articles 64(6)(d) and 69(3) of the Statute, no later than two weeks after the end of the testimony of the last witness to be called by the Prosecution.³

² ICC-01/14-01/18-631, para. 1.

³ ICC-01/14-01/18-1739-Conf, para. 12.

6. On [REDACTED], the Defence [REDACTED].⁴ [REDACTED].⁵ In addition, [REDACTED].⁶
7. On 29 May 2023, Trial Chamber V issued the “Further Directions on the Conduct of the Proceedings” through which it set several deadlines for the closure of the Prosecution’s case, as well as for a potential case by the CLRV. The Chamber also instructed the Registry to take all measures necessary to facilitate the appearance of the Chamber’s witness starting on 23 October 2023. With regard the Defence case, the Chamber ordered the Defence by **25 August 2023** to (1) file a notice as to whether it intends to present evidence (2) indicate whether the accused intends to exercise his right under Article 67(1)(h) of the Statute to make an unsworn oral or written statement (3) provide a preliminary list of witnesses and an estimate of how many hours of witness questioning it will require. The Chamber also ordered by **17 November 2023** and bearing in mind a potential presentation of evidence by the CLRV, to (1) file the Defence’s final list of witnesses and of evidence (2) provide witness statements or summaries of the anticipated testimony for all witnesses (3) file any applications pursuant to Rule 68(2) and (3) of the Rules (4) complete disclosure of all items intended to be used by the Defence during its evidence presentation. Fourth, the Chamber set to **11 December 2023**, the date of the hearing of the first Defence witness. *Fifth*, the Chamber decided to hear witness [REDACTED] from **23 October 2023** onwards noting that the time afforded to the examination of the witness will be dependent on the outcome of the Decision of the Chamber to introduce [REDACTED] previously recorded testimony pursuant to Rule 68(3).⁷

⁴ ICC-01/14-01/18-1881-Conf-Exp.

⁵ ICC-01/14-01/18-1906-Conf-Exp.

⁶ Email from the Prosecution to the Defence, on 14/07/2023, at 17:37.

⁷ ICC-01/14-01/18-1739-Conf.

8. On 1 June 2023, the CLRV filed a “Joint Request for extension of time to file a request for leave to present evidence”⁸ seeking an extension of time of nine weeks, until 11 September 2023, to file their “respective requests for leave to present evidence, together with the final list of witnesses and the summary of their respective testimony, and to disclose all relevant evidence.”⁹ The Request was rejected by the Trial Chamber on 9 June 2023.¹⁰
9. On 5 June 2023, Trial Chamber V issued its “Second Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules”.¹¹ The Chamber decided that witnesses P-1576, P-2973, P-2050 and P-2687 should be introduced pursuant to Rule 68(3).
10. On 9 June 2023, the Prosecution filed its “Prosecution’s information regarding its outstanding Bar Table Applications (pursuant to ICC-01/14-01/18-1884)”¹² pursuant to which it indicated that it is yet to file nine Bar Table Applications, all of which totalises 982 items at the minimum (the number of items of the miscellaneous BTM is unknown) comprising over 11,477 pages and 17h19m37 hours of audio/video.¹³ The Prosecution also foresees the possibility to file a Bar Table Application related to material associated to P-1819 depending on the outcome of its Request pursuant to Rule 68(2)(c), dated 7 July 2023.¹⁴
11. On 4 July 2023, the Prosecution filed Rule 68(2)(c) Requests for witnesses P-2269¹⁵ and P-2602.¹⁶ On 6 July 2023, the Prosecution filed a Rule 68(2)(c) Request

⁸ ICC-01/14-01/18-1905-Conf.

⁹ ICC-01/14-01/18-1905-Conf, para. 2.

¹⁰ ICC-01/14-01/18-1913.

¹¹ ICC-01/14-01/18-1907-Conf.

¹² ICC-01/14-01/18-1916.

¹³ The calculation of pages and items relies on the Prosecutions’ indications in its filing. In addition, the calculation does not comprise an estimation of the size of the Miscellaneous bar table application.

¹⁴ On the Prosecution’s intention to file a Bar Table Application, *see* ICC-01/14-01/18-1916, para. 3. On the Rule 68(3) Request, *see* ICC-01/14-01/18-1968-Conf.

¹⁵ ICC-01/14-01/18-1957-Conf.

¹⁶ ICC-01/14-01/18-1958-Conf.

for witness P-0975.¹⁷ On 7 July 2023, the Prosecution filed Rule 68(2)(c) Requests for witnesses P-2200¹⁸ and P-1819¹⁹ and a Rule 68(2)(d) Request for the formal submission of the prior recorded testimony of witness P-1847.²⁰

12. On 7 July 2023 the CLRV filed their Requests for leave to present evidence.²¹

13. On 13 July 2023, the Prosecution sent to the parties and participants its schedule for Block 24, running from 14 August to 1 September 2023 and the provisional Block 25 running from 11 to 29 September 2023 comprising the attendance of witnesses P-2050, P-2973, P-2687 and P-0925. The Prosecution indicated to be [REDACTED]. As such, there is to date no certainty as to the Prosecution's ability to close its case by the end of September 2023.

III. CONFIDENTIALITY

14. In accordance with regulation 23bis(1) of the Regulations of the Court, this response is filed simultaneously in three different versions as detailed below. A public redacted version will be filed as soon as practicable.

- (1) Confidential *ex parte* only available to the Defence as it contains confidential information related to the Defence's investigative activities and refers to filings of the same classification;
- (2) Confidential redacted *ex parte* only available to the Defence and the Prosecution as it refers to filings from the same classification;
- (3) Confidential redacted as it refers to confidential information.

¹⁷ ICC-01/14-01/18-1965-Conf.

¹⁸ ICC-01/14-01/18-1967-Conf.

¹⁹ ICC-01/14-01/18-1967-Conf.

²⁰ ICC-01/14-01/18-1971-Conf.

²¹ ICC-01/14-01/18-1972-Conf-Red and ICC-01/14-01/18-1969-Conf.

IV. APPLICABLE LAW

15. Article 67(1)(b)(c) provides that the accused has the right to fairness of proceedings, to be tried without undue delay and to have adequate time and facilities for the preparation of the defence.
16. The Chamber indicated in the Further Directions that it may reconsider the time limits defined for the presentation of the evidence by the Defence if there are significant changes to the expected conclusion of the Prosecution's presentation of evidence, or in case of other unforeseen developments.²²
17. The Defence recalls that the test to be applied for reconsideration of Trial Chamber's decisions is 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."²³
18. In addition, the Defence notes that Trial Chamber I in the Lubanga case also established the necessity for a reconsideration procedure of administrative decisions of the Chamber.²⁴ The Chamber recalled that "[t]his approach by the ad hoc Tribunals reflects the position in many common law national legal systems, in the sense 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."²⁵

²² ICC-01/14-01/18-1892, para. 8.

²³ *The Prosecutor v. Ruto and Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, ICC-01/09-01/11-1813, 10 February 2015, para. 19. See also *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863, para. 11.

²⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 13.

²⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.

V. SUBMISSIONS

19. Despite the increase in the workload since July 2023, the Defence is making its best efforts and is confident that it will be able to present a Provisional Witness List by 25 August 2023. However, the current workload and logistical constraints prevents the Defence from meeting the 17 November 2023 and 11 December 2023 deadlines.

a) Significant changes affect the ability of the Defence to meet the 17 November 2023 deadline and call its first witness on 11 December 2023

20. *First*, as announced in its latest update of Witness schedule dated 13 July 2023, the Prosecution is at present unable to close its case by end of August 2023, as per the timing envisaged by the Chamber in its Further Directions. The Prosecution informed the Chamber and the parties and participants that its case would continue running until end September 2023 at the earliest and could run past that deadline, if necessary. Indeed, the current trial schedule is not complete. The Prosecution informed the Chamber that [REDACTED], which are currently not scheduled in Blocks 24 and 25. At present the Prosecution is four weeks behind the tentative schedule set forth in the Further Directions. The possibility of the Prosecution's presentation of evidence to spill over the month of October is therefore very likely and has the potential to delay the court calendar even further. Therefore, postponing the deadlines applicable to the Defence is consistent with the schedule initially foreshadowed by the Chamber and is in accordance with paragraph 8 of the Further Directions. Those facts could not have been taken into consideration by the Chamber when issuing the Further Directions, as they arose after the issuance of the decision.

21. *Second*, over the months of June and July 2023, the Prosecution filed a significant number of Bar Table and Rule 68(2) applications. Analysing and responding to those applications is a burdensome exercise that puts a significant strain on the

Defence's limited resources. These applications are of paramount importance to the case against Mr Ngaïssona, and the Defence has to invest substantial resources to in order to ensure that Mr Ngaïssona's interests are best represented.

22. The Defence had to divert its resources from the preparation of the Defence case to respond to Rule 68(2) applications for witnesses P-2269, P-2602 and P-0975. In addition, the Defence is currently completing its analysis of the remaining bar table applications sent by the Prosecution pursuant to paragraph 62 of the Initial Directions. Finally, the Defence has to respond to two remaining Rule 68(2) requests by 1 and 7 August 2023, to the Eight and Ninth Bar Table applications by 18 August 2023²⁶ and to the Tenth Bar Table application by 28 August 2023 and will have to prepare responses for the reminder of the Bar Table Applications announced by the Prosecution. The fact that the Prosecution chose to file all these applications in the last few months of its case could not have been anticipated by the Defence and could not have been taken into consideration by the Chamber in issuing its Further Directions, since the Prosecution only made its intentions clear after the issuance of the Directions.

23. *Third*, the [REDACTED]²⁷ [REDACTED].²⁸ [REDACTED].

24. *Fourth*, the Defence's investigations are not complete. Several [REDACTED] which outcomes are crucial for the preparation of the Defence are still to be processed.

a. On [REDACTED].²⁹ [REDACTED]³⁰ [REDACTED].³¹ [REDACTED].

²⁶ ICC-01/14-01/18-1960.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

b. The Defence [REDACTED].³² On [REDACTED].

c. On [REDACTED]³³ [REDACTED].

d. On [REDACTED].³⁴ [REDACTED]³⁵, [REDACTED].

25. *Fifth*, the Defence intends to [REDACTED] before the Chamber. Given the tight schedule, the Defence is left with limited time and resources to [REDACTED] timely and to analyse and adapt to the outcome of the [REDACTED].

26. At the moment and taking into account the delay in the closing of the presentation of the evidence by the Prosecution, the Court schedule is too dense to allow the Defence to meaningfully focus on the preparation of its case. As the situation stands now, the Defence will have to (1) prepare the examination of four Prosecution witnesses; (2) eventually examine three additional witnesses not currently scheduled to testify in Blocks 24 and 25; (3) prepare for the presentation of the evidence by the CLRV if any, noting that the relevant disclosure has not been received, nor any investigations led in this regard; (4) prepare the examination of witness [REDACTED] currently scheduled to testify starting 23 October 2023; (5) finalise its investigations, i.e. all the [REDACTED] and conduct further investigations depending on [REDACTED] and of the evidence entered into the case record following the examinations of the abovementioned witnesses; and (6) [REDACTED] before the Chamber.

b) Logistical matters warrant the postponement of the appearance of the Defence's first witness until 22 January 2024

27. The Defence requests that the deadline for the appearance of the first witness be postponed of six weeks, until 22 January 2024. This new deadline would fall

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

two weeks after the end of the winter recess. *First*, as elaborated above, the Defence is at present not able to meet the initial deadline of 11 December 2023. *Second*, the Defence requests an extension of the 11 December 2023 deadline of two additional weeks following the end of the winter recess in order to have sufficient time to prepare its Defence and for logistical purposes.

28. Should the deadline be pushed of only four weeks, the Defence would have to present its first witness on Monday 8 January 2023, on the first day following the end of the winter recess. In addition to the workload described above, the Defence will be working in reduced activity during the winter recess and would benefit from two additional weeks of full activity to organize the attendance of the first witness. Organizing the testimony of a witness requires logistical arrangements that can only be carried out in liaison with other sections of the Court, such as VWU, which are equally not working in full capacity during the winter recess. Following the Protocol on preparation and familiarization of witnesses, VWU recalls that “[c]areful planning is required to ensure sufficient time for all the necessary logistical and operational arrangements and to allow proceedings to run smoothly”.³⁶ As such, VWU requires the calling party to submit the Witness Information Form no less than 35 days before the witness is scheduled to arrive at the location of testimony as well as the pre-security assessment form. Keeping in mind that [REDACTED].

29. Providing two additional weeks from the end of the winter recess will allow the Defence to gather the relevant documentation from the witnesses, liaise with the relevant sections of the Court to [REDACTED], and be fully operational to present the first witness by 22 January 2024. These additional weeks are in the interests of expedited and efficient proceedings and

³⁶ ICC-01/14-01/18-677-Anx1.

consequently will reduce any further delays that could emanate from potential miscommunications or logistical constraints.

c) The requested reconsideration is limited and is in the interest of justice

30. The requested additional time is limited and is necessary to prevent an injustice. The heavy workload and the delays in the current schedule tips the balance in favour of a reconsideration of the current deadlines. The Defence's Request to respectively postpone the deadlines of four and six weeks is narrow and the impact on the expeditiousness of the proceedings will be contained, while the additional weeks will allow the Defence to efficiently prepare and organise its List of Witnesses, carry out its disclosure obligations and effectively organize the presentation of its case.

31. In addition, and as mentioned above, despite the intense workload and the Summer Recess, the Defence is making its best efforts in order to meet the 25 August deadline and provide the parties and participants with a Provisional Witness List. Having a first overview of the Defence case through the Preliminary Witness List will mitigate the impact, if any, resulting from the postponement of the two deadlines.

VI. RELIEF SOUGHT

The Defence respectfully requests the Chamber to:

- **RECONSIDER** its Further Directions and postpone :

- (1) the 17 November 2023 deadline to submit its Final Witness List, provide witness statements or summaries of the anticipated testimony for all witnesses, file any applications pursuant to Rule 68(2) and (3) of the Rules and complete disclosure of all items it intends to use, to 15 December 2023 and ;

(2) the 11 December 2023 deadline to call its first witness to 22 January 2024.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized 'N' or 'G' followed by a horizontal line.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 4 September 2023

At The Hague, the Netherlands.