

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

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

Date: **8 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public with Confidential Annex

**Public redacted version of 'Defence Request pursuant to Regulation 35 to vary the
time limit' (ICC-01/14-01/18-2157-Conf-Exp), filed on 20 October 2023**

Source: Defence of Patrice-Edouard Ngaïssona

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 Patrice-Edouard Ngaïssona ('Defence') hereby submits its request for an extension of time under Regulation 35 of the Regulations of the Court ('RoC') for the Defence to file its Final Witness List and Final List of Evidence, provide witness statements or summaries of the anticipated testimony of all witnesses, file any applications pursuant to Rule 68(2) and (3) of the Rules of Procedure and Evidence ('Rules') and disclose all items intended to be used by the Defence during its evidence presentation.
2. As set out below, an extension of the 17 November 2023 deadline imposed in Trial Chamber V's "Further Directions on the Conduct of Proceedings"¹ ('Further Directions') is substantiated by good cause. The extension is sought due to the effect of the Prosecution's persistent delay in the fulfilment of its Rule 77 disclosure obligations and other external circumstances related to the Defence field investigations and to the Court's current cyber security issues.
3. Accordingly, the Defence respectfully requests Trial Chamber V ('Chamber') to vary the time limit for the Defence to file its Final Witness List and Final List of Evidence, provide witness statements or summaries of the anticipated testimony of all witnesses, file any applications pursuant to Rule 68(2) and (3) of the Rules and disclose all items intended to be used by the Defence during its evidence presentation, until 15 December 2023. The extension would allow the Defence to [REDACTED] and to properly prepare for the presentation of its case. The requested extension of four weeks is minimal when considered in the global context of what is already one of the longest trials at the Court, and it will not unduly prolong the proceedings.

¹ ICC-01/14-01/18-1892.

4. Should the Chamber reject the Defence's request and maintain the 17 November deadline, the Defence respectfully requests the Chamber to allow the Defence to provide witness statements or summaries of the anticipated testimony of all witnesses, file any applications pursuant to Rule 68(2) and (3) of the Rules and disclose all items intended to be used by the Defence during its evidence presentation on a rolling basis as of 17 November 2023, and no later than 22 December 2023.

II. PROCEDURAL HISTORY

5. On 26 August 2020, the Chamber issued the "Initial Directions on the Conduct of Proceedings".² 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'".³
6. On 29 May 2023, the Chamber issued the "Further Directions on the Conduct of the Proceedings" through which it set several deadlines.⁴ 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 the Defence by 17 November 2023 to:

(1) file the Defence's final list of witnesses and of evidence;

² ICC-01/14-01/18-631.

³ ICC-01/14-01/18-631, para. 1.

⁴ ICC-01/14-01/18-1892.

- (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; and
- (4) complete disclosure of all items intended to be used by the Defence during its evidence presentation.

7. On 25 August 2023, the Defence filed its notice of intent to present evidence, along with its Preliminary List of Witnesses.⁵
8. On 31 August 2023, the Defence addressed to the Prosecution *via* email a request for disclosure of material relating to the Defence Preliminary List of Witnesses on the basis of Rule 77 of the Rules of Procedure and Evidence.⁶ On 1 September 2023, the Prosecution informed the Defence that it expected to provide the Defence “[REDACTED]”.⁷ As will be further explained below, as of the day of the present response, the Prosecution still has not provided the Defence with any information as to the timing or volume of potential disclosure.
9. On 18 September 2023, the Immediate Office of the Registrar informed all the staff of the Court that a serious cyber security incident had been detected, and that immediate action had been taken [REDACTED].⁸

III. CONFIDENTIALITY

⁵ Ngaïssona Defence notice of intent to present evidence pursuant to Trial Chamber V’s “Further Directions on the Conduct of the Proceedings” (ICC-01/14-01/18-1892), ICC-01/14-01/18-2055-Conf.

⁶ Email from the Defence dated 31 August 2023, at 17h24. *See* Annex.

⁷ Email from the Prosecution dated 1 September 2023, at 11h30. *See* Annex.

⁸ Email from the Immediate Office of the Registrar dated 18 September 2023, at 17h37.

10. In accordance with regulation 23bis(1) of the Regulations of the Court, this request is filed simultaneously in two 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;
- (2) Confidential redacted available to the Defence and all other Parties and Participants to the case as it refers to confidential information.

IV. APPLICABLE LAW

11. Pursuant to Regulation 35 of the RoC, entitled "Variation of time limits",

- 1. Applications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought.
- 2. The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After 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.

V. SUBMISSIONS

12. Pursuant to Regulation 35 of the RoC, the Defence submits there is good cause to extend the 17 November 2023 deadline due to the Prosecution's persistent delay in the fulfilment of its Rule 77 disclosure obligations and other logistical constraints, both on the field of investigations and at the Court's premises.

A. The Prosecution's persistent delay in the fulfilment of its obligation to disclose Rule 77 Material related to the Defence's Preliminary List of Witnesses

13. As already briefly explained above, the Defence requested the Prosecution to disclose material relating to the Defence Provisional List of Witnesses on the basis of Rule 77 of the Rules of Procedure and Evidence on 31 August 2023.⁹ The Prosecution informed the Defence that it expected to provide the Defence “[REDACTED]”.¹⁰ After a couple of first follow-up emails from the Defence on 13 and 29 September 2023¹¹ – about a month since the Defence’s first email –, the Prosecution informed the Defence that it would be able to provide the Defence with an update on 13 October 2023.¹² After a third follow-up email from the Defence on 13 October 2023,¹³ the Prosecution replied to the Defence on 16 October 2023 that they were still in the process of identifying and evaluating the materials and requested the Defence to establish a priority list of witnesses.¹⁴ At this stage, and given the tight deadlines imposed to the Defence, the delay in fulfilling its disclosure obligations is akin to constructive denial.

14. As a result of the Prosecution’s persistent delay in the fulfilment of its disclosure obligations, the Defence is still not in possession of Rule 77 material pertaining to its provisional witnesses. As highlighted by Trial Chamber II in the *Katanga* case,

The Statute and the Rules impose on the Prosecution specific obligations of disclosure of incriminating and exculpatory material to the Defence, in time to allow the accused to adequately prepare its defence.¹⁵

⁹ Email from the Defence dated 31 August 2023, at 17h24. *See* Annex.

¹⁰ Email from the Prosecution dated 1 September 2023, at 11h30. *See* Annex.

¹¹ Emails from the Defence dated 13 September 2023, at 11h40 and 29 September 2023, at 15h36. *See* Annex.

¹² Email from the Prosecution dated 2 October 2023, at 12h01. *See* Annex.

¹³ Email from the Defence dated 13 October 2023, at 16h16. *See* Annex.

¹⁴ Email from the Prosecution dated 16 October 2023, at 17h56. *See* Annex.

¹⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the “Prosecution’s Application Concerning Disclosure Pursuant to Rules 78 and 79(4)”, 14 September 2010, ICC-01/04-01/07-2388, para. 36.

15. The Defence is still deprived of information which is essential to its assessment of the evidence and credibility of its [REDACTED] witnesses, effectively depriving Mr Ngaïssona of adequate facilities to finalise the preparation of his Defence. Even assuming that the Prosecution was able and willing to disclose all requested material related to Defence provisional witnesses by the 17 November 2023 deadline, it would give the Defence extremely limited time – or no time at all – to analyse the material, take appropriate action and adapt, where necessary, its Final Witness List and Final List of Evidence, to ensure an effective and efficient defence for Mr Ngaïssona.
16. The failure of the Prosecution to meet its obligations in a timely manner affects the ability of the Defence to meet the 17 November 2023 deadline and severely impedes the Defence's ability to finalise both its Final Witness List and Final List of Evidence. Indeed, as of [REDACTED], the Defence is planning [REDACTED]. Without any reliable provisional timeline of disclosure, nor any estimate of the volume of items to be potentially disclosed, and no indication as to the content of the undisclosed material, the Defence is left in the dark as to whether it will have to conduct additional field investigations, add or remove witnesses from its Preliminary List of Witnesses, decide whether or not to conduct additional or new interviews or file further requests for assistance. The Defence will also be unable to address any information contained in the undisclosed material with the witnesses it meets and will be deprived of the opportunity to seek clarification or address potential inconsistencies with them.
17. Although the Defence endeavours to investigate its provisional witnesses at its best, it cannot begin its Defence case without being fully aware of all the information the Prosecution possesses on them. As long as the Prosecution does not fulfil its Rule 77 disclosure obligations, the Defence cannot reasonably finalise its Final Witness List and Final List of Evidence.

18. Despite being fully aware of the tight 17 November 2023 deadline imposed by the Chamber and of the Chamber's unwavering determination to maintain such deadline, the Prosecution keeps delaying knowingly its disclosure obligation without providing any explanation, nor any estimate as to the timing or volume of potential disclosure. Given the repeated attempts of the Defence to have the Prosecution comply with its obligations promptly, this circumstance is no longer within the Defence's control and seriously prejudices Mr Ngaïssona's right to have adequate time and facilities for the preparation of his defence, justifying a postponement of the 17 November 2023 deadline.

B. Logistical constraints due to the effect of external circumstances on the Defence's field investigations

19. As of [REDACTED], the Defence [REDACTED]. However, due to external circumstances outside of the Defence's control, [REDACTED].

20. [REDACTED].¹⁶

21. [REDACTED].¹⁷

22. In addition, the recent admission into evidence, under Rule 68(2)(d) of the prior-recorded statements of witness P-1847, which relates to core issues of the case, significantly intensifies the already dense workload of the Defence [REDACTED]. The Defence had previously not fully investigated P-1847's statements allegations as they were not on the case record, and the Defence's [REDACTED] is due to the Defence having only limited investigating resources.

23. As previously experienced in [REDACTED], contact with [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

24. In addition, for the past few weeks, the Defence has had to invest considerable resources in finalising the preparation of significant responses to numerous bar table motions filed by the Prosecution, anticipating the in-court testimony of Chamber witness P-0952 and the uncertain rescheduling of witness V44-0001's testimony, and [REDACTED]. Due to such monopolisation of its team members on other crucial aspects of the preparation of the Defence case, the Defence was not able to arrange [REDACTED] is essential for the determination of the Defence's Final Witness List and Final List of Evidence and further justifies the minimal extension requested.
25. The above-mentioned external logistical constraints leave the Defence with extremely limited time and resources to adapt [REDACTED]. Coupled with potential further delays in the Prosecution's fulfilment of its Rule 77 disclosure obligations described above, these logistical constraints inevitably overburden the extremely dense programme of the Defence's [REDACTED] and hinders the Defence's ability to meet the 17 November 2023 deadline.

C. Logistical constraints resulting from the Court's cyber incident

26. Since the [REDACTED] notification of an unprecedented cyber security incident targeting the Court,¹⁸ the Defence has been seriously slowed down in the preparation of the Defence case. In particular, [REDACTED].
27. [REDACTED],¹⁹ [REDACTED],²⁰ [REDACTED].
28. The Defence is fully aware that this cyber security incident was unforeseeable and affected [REDACTED]. However, it forced the Defence to adapt and fully rethink its organisation at a most crucial period in the preparation of its

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

presentation of evidence. The significant difficulties created by the incident caused an unfortunate delay that is now nearly impossible to recover from.

VI. CONCLUSION

29. Since Mr Ngaïssona has been in pretrial detention for several years, the Defence is committed to playing a role in ensuring the expeditiousness of the proceedings. However, the Defence's ability to carry out its [REDACTED] investigations and finalise its Final Witness List and Final List of Evidence by the 17 November 2023 deadline is hindered by the Prosecution's persistent delay in the fulfilment of its Rule 77 disclosure obligations and other logistical constraints, both on the field of investigations and at the Court's premises. Maintaining the 17 November 2023 deadline would put the Defence in an impossible situation where, due to circumstances that are not within its control, it could not comply with the Chamber's deadline without seriously undermining the adequate preparation of the Defence of its client. While the expeditiousness of the proceedings is an important right under Article 67 of the Statute, if not fairly balanced with the right of the defence to have adequate time and facilities, the overall fairness of the trial will be affected.

30. Although the Defence was fully aware that the deadline for the submission of its Final Witness List and Final List of Evidence was fast approaching, it already alerted the Chamber, as soon as July 2023, on the fact that it did not feel confident that it would be able to meet the 17 November 2023 deadline.²¹ Besides, the Defence made its best efforts to anticipate such deadline by carrying out investigations as soon as the early stages of the Prosecution case, rearranging field missions and conducting additional interviews, as the progressive developments of the case went by. However, the Defence could not

²¹ Defence Request for Reconsideration of the "Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence)", 21 July 2023, ICC-01/14-01/18-1997.

reasonably anticipate that it would have, within two months, to deal with the Prosecution's persistent delay in the fulfilment of its disclosure obligations, field investigations logistical constraints and an unprecedented cyber incident affecting the Court's system for several weeks. At this stage, the Defence is very concerned with its ability to provide an effective defence to Mr Ngaïssona within the existing deadlines.

31. For all the above reasons, the Defence submits there is good cause to grant a limited extension of time of four weeks.

VII. RELIEF SOUGHT

32. The Defence respectfully requests the Chamber to:

GRANT the Defence's request to vary the time limit to file its Final Witness List and Final List of Evidence, provide witness statements or summaries of the anticipated testimony of all witnesses and file any applications pursuant to Rule 68(2) and (3) of the Rules and disclose all items intended to be used by the Defence during its evidence presentation by setting the deadline to file to 15 December 2023.

33. In the alternative, should the Chamber reject the Defence's request and maintain the 17 November 2023 deadline, the Defence respectfully requests the Chamber to:

ALLOW the Defence to provide witness statements or summaries of the anticipated testimony of all witnesses and file any applications pursuant to Rule 68(2) and (3) of the Rules and disclose all items intended to be used by the Defence during its evidence presentation on a rolling basis as of 17 November 2023, and no later than 22 December 2023.

Respectfully submitted,

A handwritten signature in black ink, consisting of a series of loops and a final horizontal stroke.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 8 November 2023

At The Hague, the Netherlands.