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**No. ICC-01/14-01/18
Date: 18 November 2020**

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

**Decision on the Prosecution Request for Extension of Time Limit
to Disclose certain Transcripts and Translations**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64 and 67 of the Rome Statute (the ‘Statute’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Prosecution Request for Extension of Time Limit to Disclose certain Transcripts and Translations’.

I. Procedural history

1. On 16 July 2020, the Chamber set 9 November 2020 as the final deadline for disclosure of all material falling under the disclosure obligations of the Office of the Prosecutor (the ‘Prosecution’) and for the submission of the Prosecution’s list of evidence (the ‘Deadline’ and the ‘List of Evidence’, respectively).¹
2. On 5 November 2020, pursuant to Regulation 35 of the Regulations, the Prosecution requested an extension of the Deadline until 11 December 2020 in relation to: (i) the transcripts and translations of seven audio recordings (the ‘First Sub-Request’); and (ii) the transcripts and translations relating to 36 audio visual materials (the ‘Second Sub-Request’ and, collectively, the ‘Request’). It further indicated that it may seek extensions of time to disclose and add to its List of Evidence items that may later come into its possession (the ‘Information on outstanding evidentiary materials’).²
3. On 6 November 2020, the Chamber suspended the Deadline with respect to the materials that are subject to the Request, and shortened the time limit for responses.³
4. On 9 November 2020, the Yekatom Defence informed the Chamber that it did not oppose the Request.⁴

¹ Decision Setting the Commencement Date of the Trial, ICC-01/14-01/18-589, paras 10, 14.

² Prosecution’s Request Extension of time pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/14-01/18-715-Conf, paras 1-2, 13-15, 16.

³ Email from the Chamber, 6 November 2020, at 17:31.

⁴ Email from the Yekatom Defence, 9 November 2020, at 11:54.

5. On 10 November 2020, the Ngaïssona Defence (the ‘Defence’) responded to the Request, requesting that it be rejected (the ‘Response’).⁵

II. Submissions and analysis

A. Preliminary remark: Timing of the Request

6. At the outset, the Chamber notes that the Request was filed on 5 November 2020, at 18:55, and notified on 6 November 2020, *i.e.* one working day prior to the expiry of the Deadline. As this timing did not allow the Chamber to render a decision on the Request before the expiry of the original time limit, it had no choice but to suspend the Deadline with respect to the material subject to the Request.⁶ The Chamber further notes that the Prosecution appears to have been aware of the potential delay for the translation and transcription of the audio recordings as early as 23 October 2020,⁷ but waited until 5 November 2020 to request an extension of time. No explanation for this delay has been provided. Similarly, no explanation has been provided for the late timing concerning the material subject to the Second Request.
7. The Chamber again recalls⁸ that any requests for extension of time are to be submitted sufficiently in advance of the set time limit, so as to enable the other participants to respond and the Chamber to rule on the matter in a timely manner. Respecting this principle is necessary to avoid a situation as in the case at hand, where the Chamber and the participants were presented with a *fait accompli*, leaving the Chamber with no alternative but to suspend the Deadline.

B. Merits of the Request

8. The Chamber recalls that pursuant to Regulation 35(2) of the Regulations, a chamber may extend a time limit at the request of a participant ‘if good cause is

⁵ Defence Response to the “Prosecution’s Request [sic] Extension of time pursuant to Regulation 35(2) of the Regulations of the Court” (ICC-01/14-01/18-715-Conf), ICC-01/14-01/18-725-Conf, paras 2, 22.

⁶ See email from the Chamber, 6 November 2020, at 17:31.

⁷ See Request, ICC-01/14-01/18-715-Conf, para. 5.

⁸ For previous directions on this issue, *see e.g.* Decision on the Prosecution Request to Vary the Time Limit for Disclosure of Evidence related to Witnesses on the Preliminary Witness List, 11 September 2020, ICC-01/14-01/18-648-Conf-Red, para. 19; *see also* Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Prosecution’s witness order and variation of time limit for filing applications for in-court protective measures, 22 July 2020, ICC-01/12-01/18-968, para. 21.

shown and, where appropriate, after having given the participants an opportunity to be heard’.

1. *First Sub-Request*

9. The Prosecution argues that good cause exists for the requested extension, noting that, following a request for assistance dated 25 June 2020, it only became aware of the existence of the recordings with a total approximate length of two hours on 23 October 2020. It submits that the recordings are potentially highly relevant to the case as they may contain incriminatory material on which it may seek to rely at trial, or comprise material disclosable under Rule 77 of the Rules of Procedure and Evidence or Article 67(2) of the Statute. The Prosecution further submits that it is coordinating with the Language Services Unit (the ‘LSU’) to complete the transcription and translation of the material, which is ‘time-consuming and resource intensive’. According to the Prosecution, the requested extension causes no prejudice to the Defence, because the recordings themselves will be disclosed prior to the Deadline, and because both accused are able to understand the content of the material without translations.⁹
10. The Defence responds that the Prosecution has failed to show good cause and to ‘objectively provide justification’ for its inability to comply with its disclosure obligations. According to the Defence, the Prosecution’s reliance on the fact that it only became aware of the recordings on 23 October 2020 is insufficient, noting that: (i) the Prosecution fails to sufficiently explain its lack of foresight in submitting the request for assistance ‘so close to the final disclosure deadline’; (ii) the Prosecution fails to clarify when it received the recordings and transmitted the items to the LSU; (iii) the Prosecution’s ‘strategic choice’ of launching new formal requests of assistance as late as June 2020 ‘should not be accommodated to Mr Ngaïssona’s detriment without valid reasons’; (iv) the prejudice caused by the late disclosure is heightened by the alleged potential relevance of the recordings; and (v) the Defence team members also need to rely

⁹ Request, ICC-01/14-01/18-715-Conf, paras 5-9.

on the transcripts and translations to engage with the evidence together with Mr Ngaïssona and to conduct content searches in E-court.¹⁰

11. At the outset, the Chamber notes that in its First Sub-Request, the Prosecution relies on the fact that it received a response from the competent authorities only in October 2020, following a request for assistance made in June 2020.¹¹ In this regard, the Chamber recalls that it has previously cautioned the Prosecution that investigations should have been largely completed at the stage of the confirmation of charges hearing and that ongoing investigations would not be the determinative factor in setting disclosure deadlines.¹² Against this background, the Prosecution's submission, providing no further information on the timing of its request, gives rise to concern.
12. That notwithstanding, turning to the specific material at issue, the Chamber observes that the recordings have been disclosed prior to the Deadline, and that the extension of time is sought for the disclosure of the corresponding transcripts and translations. The pending transcripts and translations are important for the participants and the Chamber to prepare for trial and analyse the recordings. Noting further that the transcription and translation is carried out by, and subject to the resources of, the LSU, the Chamber considers that good cause exists for the requested extension. Given that the requested extension is limited to four weeks and that the transcripts and translations will be disclosed two months prior to the commencement of the trial, the Chamber considers that the requested extension would not unduly prejudice the accused.
13. The Chamber therefore grants the First Sub-Request.

2. *Second Sub-Request*

14. The Prosecution submits that good cause exists for the extension of time to disclose the transcripts and translations of the 36 audio visual materials, on the basis that: (i) the transcription and translation of the materials is 'time-consuming and resource intensive'; and (ii) the requested extension would not

¹⁰ Response, ICC-01/14-01/18-725-Conf, paras 11-15.

¹¹ Request, ICC-01/14-01/18-715-Conf, para. 5, n. 2.

¹² Transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 12, lines 17-23.

‘derail the proceedings from their ordained course’.¹³ According to the Prosecution, there is no prejudice to the Defence because it is already in possession of the audio visual materials and because the 36 outstanding transcripts and translations constitute a small percentage of the total number of 1,485 transcripts and translations that have already been disclosed to the Defence.¹⁴

15. The Defence submits that the Second Sub-Request does not meet the good cause standard, noting that: (i) the Prosecution fails to substantiate and justify its untimely referral of the items to the LSU; (ii) the metadata associated with the 36 items reveals that all items have been in the Prosecution’s possession for at least two to six years; and (iii) the Prosecution’s arguments that there is no prejudice caused by the Second Request is unconvincing.¹⁵
16. The Chamber recalls that in order to demonstrate good cause, the party seeking an extension is required to ‘objectively provide justification’ for its inability to comply with its obligations.¹⁶ In the case at hand, noting the scarcity of information provided by the Prosecution in support of the Second Sub-Request, the Chamber considers that little effort has been made to meet this requirement. Specifically, the Chamber observes that no explanation has been provided for the late referral of the items to the LSU, especially since they were disclosed a long time ago.
17. That notwithstanding, the Chamber notes that the audio visual materials were disclosed prior to the Deadline, that the pending transcriptions and translations are important for the participants and the Chamber to prepare for trial and

¹³ Request, ICC-01/14-01/18-715-Conf, para. 11 *referring to* Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the “Decision on the ‘Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor’s Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation’”, 27 June 2008, ICC-01/04-01/07-653 (OA7), para. 6.

¹⁴ Request, ICC-01/14-01/18-715-Conf, paras 10, 12.

¹⁵ Response, ICC-01/14-01/18-725-Conf, paras 16-18.

¹⁶ See *e.g.* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Reasons for the ““Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007”” issued on 16 February 2007, 21 February 2007, ICC-01/04-01/06-834 (OA8), para. 7.

analyse the materials, and that the requested extension is limited to four weeks. Given that the transcription and translation has to be completed by, and is subject to the resources of, the LSU, the Chamber considers that good cause exists for the requested extension. Noting further that the outstanding translations and transcriptions relate to 36 out of a total of 1,485 transcripts and translations that have already been disclosed to the Defence, and that they will be disclosed two months prior to the commencement of the trial, the Chamber considers that the requested extension would not unduly prejudice the accused.

18. The Chamber therefore grants the Second Sub-Request.

C. Information on outstanding evidentiary materials

19. The Prosecution refers to material not yet in its possession and submits that ‘if appropriate’, it ‘may request the addition of such material to its List of Evidence as may be justified in the circumstances’.¹⁷ The Chamber recalls that it has previously cautioned the parties that it expects to receive submissions with a concrete relief and does not wish to receive ‘notifications which anticipate future requests that, in the end, may or may not come to fruition’.¹⁸ The Chamber regrets the Prosecution’s failure to comply with this direction and reminds the participants to refrain from providing such notifications in the future.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request;

EXTENDS the time limit for the Prosecution to disclose and add to its List of Evidence the material subject to the Request until 11 December 2020; and

DIRECTS the parties to file public redacted versions of the Request and the Response within five days of notification of the present decision.

¹⁷ Request, ICC-01/14-01/18-715-Conf, para. 15.

¹⁸ Transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, page 6, lines 20-22.

Done in both English and French, the English version being authoritative.

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 18 November 2020

At The Hague, The Netherlands