

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 20 November 2020

TRIAL CHAMBER V

Before: Judge 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 of “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**

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. On 6 November 2020, at the eve of its final disclosure deadline ordered by Trial Chamber V (“Chamber”), the “Prosecution’s Request Extension [sic] of time pursuant to Regulation 35(2) of the Regulations of the Court” (“Request”)¹ was notified to the Defence. In its Request, the Prosecution seeks an extension of time until 11 December 2020 to disclose and add to the List of Evidence (i) transcripts and translation of seven speeches by Levy Yakité (“First Request”) and (ii) transcripts and translations relating to 36 audio visual materials (“Second Request”).² The Prosecution further ‘announced’ its intention to potentially seek extensions of time to disclose and add to its List of Evidence items that may later hypothetically come into its possession.
2. The Prosecution’s Request, which is lacking in substantiation, fails to meet the ‘good cause’ criteria and should therefore be rejected. Furthermore, the Prosecution’s affirmation that it may seek to disclose and add to its List of Evidence items which may come into its possession at a later stage should be rejected *in limine*, as it finds no legal basis and is premature and speculative in nature.

II. Relevant Procedural History

3. The Prosecution opened its investigation into the CAR II situation six years ago.³ The Decision on the confirmation of charges, by which the Prosecution’s investigation should have largely been completed, was issued on 11 December 2019.⁴

¹ ICC-01/14-01/18-715-Conf, para. 16 (“Request”).

² Request, paras 4, 10.

³ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic, ICC-OTP-20140924-PR1043, 24 September 2014.

⁴ ICC-01/14-01/18-403-Conf.

4. On 22 May 2020, the Single Judge ordered that the Prosecution file a Preliminary Witness List by 15 June 2020, *inter alia* to mitigate the delays caused by the Covid-19 pandemic. In its decision, the Chamber recalled the accused' right to a fair and expeditious trial and to have adequate time to prepare their defence as protected under the Rome Statute ("Statute") and the Rules of Procedure and Evidence ("Rules").⁵
5. On 16 July 2020, the Chamber ordered the Prosecution to disclose all witness-related evidence by 31 August 2020⁶ and set the Prosecution's final disclosure deadline to 9 November 2020.⁷
6. On 5 November 2020, the Prosecution filed the Request. The Request was notified the following day. On 6 November 2020, the Chamber shortened the response deadline to 10 November 2020.⁸
7. On 9 November 2020, the Defence for Mr Yekatom informed the Chamber, parties and participants that it did not intend to file a response to the Request.⁹

III. Confidentiality

8. In accordance with regulation 23*bis*(1) of the Regulations of the Court ("Regulations"), the response is filed confidentially as it responds to a document of the same classification. A public redacted version of this response will be filed as soon as possible.

IV. Applicable Law

9. Under regulation 35(2) of the Regulations, a chamber may extend or reduce a time limit if 'good cause' is shown. The Appeals Chamber has held that good

⁵ ICC-01/13-01/18-528, paras 4-5.

⁶ ICC-01/14-01/18-589.

⁷ ICC-01/14-01/18-589, para. 10.

⁸ Email from Trial Chamber V to parties and participants, 6 November 2020 at 17:31.

⁹ Email from the Defence for Mr Yekatom to Trial Chamber V, 9 November 2020, at 11:54.

cause within the meaning of regulation 35(2) translates to a party's inability to conform to a procedural rule or regulation, which "must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligation."¹⁰

V. Submissions

10. The timing of the Prosecution's Request, which was notified one working day before the expiry of its final disclosure deadline, is inopportune. The Prosecution's filing of the Request at the eleventh hour has left the Chamber with little choice but to suspend the deadline in relation to the materials that are subject to the Request and significantly shorten the response deadline.¹¹ It is regrettable that the Prosecution did not envisage filing its Request sooner, which would have allowed for the ordinary regulatory time limits to apply and would have prevented the Defence from being placed before a *fait accompli*.

A. Request for an extension of time to disclose and add to its List of Evidence transcripts and translations of seven speeches by Lévy Yakité ("First Request")

11. The Prosecution has failed to show good cause in relation to its First Request. More specifically, it failed to "objectively provide justification" for its inability to comply with its disclosure obligations.¹² The Prosecution relies on the fact that it [REDACTED] to justify the delay in obtaining the translation and

¹⁰ *Prosecutor v Lubanga*, "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 the 16 February 2007", ICC-01/04-01/06- 834 OA8, 21 February 2007, paras 7-9; *Prosecutor v. Katanga and Ngudjolo*, 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'", ICC-01/04-01/07-653, 27 June 2008, para. 5.

¹¹ Email from Trial Chamber V to parties and participants, 6 November 2020 at 17:31.

¹² *Prosecutor v Lubanga*, "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 the 16 February 2007", ICC-01/04-01/06- 834 OA8, 21 February 2007, paras 7-9.

transcription of the audio-visual material seized.¹³ However, this explanation is insufficient. *First*, the Prosecution provides no indication as to why it [REDACTED].¹⁴ By filing a [REDACTED] so close to the final disclosure deadline, the Prosecution was well aware of the palpable risk that [REDACTED] on time to meet the disclosure deadlines, including the time necessary to prepare transcripts and translations. Although the Defence recognises that the creation of transcripts and translation is resource-intensive, the Prosecution fails to sufficiently explain its lack of foresight in seeking the items of evidence subject to the First Request.

12. *Second*, the Prosecution's assertion that it [REDACTED] provides little clarity as to when the Prosecution actually received the items subject to the First Request. The language used by the Prosecution seems to suggest that it may have already been in possession of the seven items in questions before [REDACTED].¹⁵ Moreover, the Prosecution does not offer information about when the items were transmitted to the Language Services Unit ("LSU") for translation.¹⁶

13. *Third* the Prosecution did not show that the First Request would not be prejudicial to the Defence. The Prosecution's request for a variation of the time limits is a direct consequence of its own late [REDACTED]. The Prosecution's investigations should have largely been completed by the confirmation of charges stage, which concluded almost one year ago.¹⁷ Therefore, the

¹³ Request, paras 5-8.

¹⁴ Request, para. 5, footnote 2.

¹⁵ Emphasis added. Request, para. 5. [REDACTED].

¹⁶ Request, para. 5.

¹⁷ ICC-01/14-01/18-163, para. 28, relying on *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges", 30 May 2012, ICC-01/04-01/10-514, para. 44; *Prosecutor v. Kenyatta et al.*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11 728, paras 118-119; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568 (OA 3), para. 54.

Prosecution's strategic choice [REDACTED], rather than focusing on meeting its disclosure deadlines as established by the Chamber, should not be accommodated to Mr Ngaïssona's detriment without valid reasons.

14. *Fourth*, as averred by the Prosecution, the audio recordings [REDACTED] are allegedly of potential "high relevance to the case" and in particular, to its case against Mr Ngaïssona, claiming that "YAKITE was a prominent figure in the early development of the Anti-Balaka, playing a role in meetings with NGAISSONA and others in Cameroon and in Paris".¹⁸ The portions of the Prosecution's Document containing the charges to which it refers in the footnote, concern facts that are materially disputed and were contested by the Defence at the confirmation of charges hearing.¹⁹ As such, the prejudice caused to the Defence by the late disclosure of the seven transcripts and translations is heightened.

15. *Fifth*, the Prosecution asserts that there is no prejudice given Mr Ngaïssona is "fully able to understand the content of the material".²⁰ However, in the same way the Prosecution relies on the LSU to be apprised of the contents of the audio recordings, most Defence team members too, rely on translations and transcripts to engage with the evidence together with Mr Ngaïssona, in order to prepare for trial accordingly.²¹ In addition, the provision of transcripts and translations is a vital tool for conducting content searches in the Defence Ringtail evidence database, where the number of items disclosed by the Prosecution is voluminous.

¹⁸ Request, para. 5.

¹⁹ ICC-01/14-01/18-T-008-CONF-ENG ET, page 79, lines 10 ff; ICC-01/14-01/18-T-009-CONF-ENG ET, page 24, lines 7-9.

²⁰ Request, para. 9.

²¹ Request, para. 9.

B. The Prosecution’s request for an extension of time to disclose and add to its List of Evidence transcripts and translations relating to 36 audio visual materials (“Second Request”)

16. The Prosecution’s Second Request to disclose and add to its List of Evidence the transcripts and translations relating to 36 audio visual materials does not meet the ‘good cause’ test. *First*, the Prosecution fails to provide any indication in support of its untimely referral of the 36 audio visual items to the LSU.²² Rather, it merely relies on the argument that transcribing and translating videos is “time-consuming and resource intensive” and that LSU has limited resources for the Sango translations.²³ Such sparse argumentation clearly does not meet the threshold required for meeting the ‘good cause’ test as established by the Appeals Chamber.²⁴ As noted by the Prosecution, some items have been disclosed to the Defence in 2019. However, the Prosecution does not explain reasons why transcripts or translations associated with those items have not been timely prepared – despite its knowledge that it would likely rely on this evidence at trial – and whether the translations had been requested from the LSU promptly. Additionally, it appears that certain videos contain very little to no Sango passages, undermining the Prosecution’s affirmation that its late disclosure is due to LSU’s limited resources for Sango translations.²⁵

17. *Second*, significantly, the metadata associated with the 36 audio visual materials in question reveal that all items have been in the Prosecution’s possession for at least two to six years.²⁶ Despite this, several of the 36 items were only disclosed to the Defence in the last three weeks. For instance, item [REDACTED] was only disclosed by the Prosecution on [REDACTED], despite

²² Request, paras 10-12.

²³ Request, para. 11.

²⁴ *Prosecutor v Lubanga*, “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 the 16 February 2007”, ICC-01/04-01/06- 834 OA8, 21 February 2007, para. 7.

²⁵ For instance *see* [REDACTED], [REDACTED], [REDACTED].

²⁶ This is apparent from the “chain of custody” metadata associated with the 36 items.

having been in the Prosecution's custody since [REDACTED].²⁷ Similarly, items [REDACTED], [REDACTED] were only disclosed to the Defence on [REDACTED], despite having been in the Prosecution's possession since [REDACTED].²⁸ Additionally, items [REDACTED] and [REDACTED] were disclosed to the Defence on [REDACTED] despite these items having been in the Prosecution's custody as early as [REDACTED].²⁹

18. *Third*, the Prosecution's arguments that there is no prejudice caused by the Second Request are unconvincing: (i) the fact that the 36 outstanding translations form a "small percentage" of the total transcripts and translations has no logical bearing on the prejudice caused by the late disclosure of the outstanding 36 transcripts and translation and Mr Ngaïssona's right to have adequate time and facilities to prepare for trial;³⁰ (ii) the Prosecution's, reliance on the fact that the Defence has been in possession of *some* of the audio visual materials since 2019 does not support the alleged absence of prejudice. These affirmations regrettably provide little to no clarity as to the absence of prejudice to Mr Ngaïssona. The Second Request should therefore be rejected.

C. The Prosecution's announcement of intent to seek potential extensions of time in relation to several outstanding requests for assistance

19. Despite the Chamber's order that parties formulate specific requests and concrete reliefs rather than "notifications which anticipate future requests",³¹ the Prosecution announces its intent to potentially file requests for extension of time to disclose and add to its List of Evidence items resulting from pending requests for assistance.³² The Prosecution admits however, that it is not yet in

²⁷ This is apparent from the "chain of custody" metadata.

²⁸ This is apparent from the "chain of custody" metadata.

²⁹ This is apparent from the "chain of custody" metadata.

³⁰ Request, para. 12.

³¹ ICC-01/14-01/18-T-012-ENG ET, page 6, lines 20-22.

³² Request, para. 13.

possession of the requested material and is not “in a position to provide a cogent basis for an extension of time, even in the abstract”.³³ This affirmation not only fails to request any concrete relief, but is speculative, manifestly premature, and finds no legal basis.³⁴ Moreover, they do not contribute in any way to the procedural issue at hand.

20. Additionally, the Prosecution’s intention of filing potentially incriminating evidence well after the 9 November 2020 final disclosure deadline – although speculative – poses cause for concern. As recalled by the Chamber during the Status Conference hearing, Prosecution investigations should largely be completed at the stage of the confirmation of charges hearing.³⁵ Allowing the Prosecution to investigate and disclose incriminating items of evidence indefinitely would violate Mr Ngaïssona’s fair trial rights, including his right to have adequate time and facilities to prepare for trial, his right to be apprised of the evidence against him, and his right to an expeditious trial. It is for this reason that a “cutoff” date is ordered in cases before the Court, to avoid a situation of fundamental injustice and uncertainty.

21. As held by the Chamber during the Status Conference hearing, “while the Chamber will therefore take the Prosecution’s submissions into consideration, it likes to stress that the ongoing investigations will not be the determinative factor in setting disclosure deadlines and a date to commence the trial.”³⁶ As such the Prosecution’s notice of intent to file future requests under regulation 35(2) of the Regulations should be dismissed *in limine*.

³³ Request, para. 14.

³⁴ Request, paras 14-15.

³⁵ ICC-01/14-01/18-163, para. 28, relying on *Prosecutor v. Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the Confirmation of Charges”, 30 May 2012, ICC-01/04-01/10-514, para. 44; *Prosecutor v. Kenyatta et al.*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11 728, paras 118-119; *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’”, 13 October 2006, ICC-01/04-01/06-568 (OA 3), para. 54.

³⁶ ICC-01/14-01/18-T-012-ENG ET, page 12, lines 20-24.

VI. Relief Sought

22. The Defence respectfully requests the Chamber to:

– **REJECT** the Prosecution's Request in its entirety.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 20 November 2020,

At The Hague, the Netherlands.