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Date: **24 March 2023**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
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 with Confidential Annex

**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)**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Pre-Trial Chamber II (“Chamber”) to vary the time limits concerning the 27 June 2022 “Order on the conduct of the confirmation of charges proceedings”¹ and 24 January 2023 “Order for observations and decision on the Prosecution’s request for a status conference”,² pursuant to regulation 35(2) of the Regulations of the Court (“RoC”), article 61(3), and rules 121(2) and 121(3) of the Rules of Procedure and Evidence (“Rules”). As set out below, the Request is supported by good cause, and granting it would not occasion any unfair prejudice. Should the Chamber grant the request, the Prosecution considers that by 5 April 2023, it would be able to implement the metadata amendments/updates concerning the disclosed material discussed below.

2. Alternatively, the Prosecution requests the Chamber’s reconsideration of its 16 March 2023 “Decision on issues arising from the submission of the Document Containing the Charges”³ (*see* section B *infra*). Reconsideration is necessary to prevent an irreparable harm to the Prosecution’s case, the presentation of evidence at the confirmation hearing scheduled for 22 August 2023, and to prevent an injustice.⁴

II. CONFIDENTIALITY

3. This filing is classified as “Public.” However, the Annex is classified as “Confidential”, pursuant to regulation 23*bis*(2) of the RoC since it refers to documents and evidence subject to the same classification.

¹ ICC-01/14-01/22-62 (“27 June 2022 Order”).

² ICC-01/14-01/22-138, para. 12 (24 January 2023 Order”).

³ ICC-01/14-01/22-177 (“16 March 2023 Decision”).

⁴ *See* ICC-01/12-01/18-734, para. 11 (noting that “[n]ew facts and arguments arising since the decision was rendered may be relevant to [assess whether reconsideration is necessary to prevent an injustice]”). *See also*, ICC-01/12-01/18-1335-Conf-Red, para. 5.

III. SUBMISSIONS

4. On 9 March 2023, the Prosecution filed the Document Containing the Charges (“DCC”),⁵ accompanying Annex⁶ (“DCC Annex”), and List of Evidence (“LoE”).⁷ In its Submission,⁸ the Prosecution explained that of the 754 items listed in the LoE, 21 items had been disclosed as Rule 77 (“21 Disclosed Rule 77 items”), and 39 items disclosed as INCRIM did not have a disclosure note (“39 Disclosed INCRIM items”). The Prosecution also indicated that 9 trial transcripts cited in the DCC Annex had not yet been *formally* disclosed, noting that the Defence’s access to 8 of them had been provided pursuant to the order of Trial Chamber V (“9 Trial Transcripts”).

5. In its Submission, the Prosecution thus requested to amend the meta-data of the 21 Disclosed Rule 77 items and 39 Disclosed INCRIM items, and to formally disclose the 9 Trial Transcripts.⁹

6. On 16 March 2023, the Pre-Trial Chamber rejected the Prosecution’s request ‘without prejudice to a properly substantiated request under Regulation 35’.¹⁰

7. *First*, although the Prosecution indicated that the 9 Transcripts had not been disclosed in its 9 March 2023 Submission, this was erroneous. In fact, the 9 Transcripts had been timely disclosed as INCRIM on 21 February 2023. This error resulted from an internal inconsistency in labelling the transcripts.¹¹ As the 9 Transcripts were properly disclosed and referenced in the Witness Table¹² and in the DCC Annex,¹³ they

⁵ ICC-01/14-01/22-174 (“Submission”), with Annexes A (DCC), C1 (DCC Annex), and D (LoE).

⁶ ICC-01/14-01/22-174.

⁷ ICC-01/14-01/22-174-Conf-AnxC1.

⁸ ICC-01/14-01/22-174 (“Submission”).

⁹ ICC-01/14-01/22-174-Conf-AnxD.

¹⁰ ICC-01/14-01/22-177, para. 6.

¹¹ The 9 Trial Transcripts had not been identified internally because they were labelled inconsistently in terms of their meta-data type. The Prosecution has internal processes in place to correct such mislabelling after documents are registered. However, in the case at hand, these processes had not yet been finalised.

¹² ICC-01/14-01/22-167-Conf-AnxB.

¹³ *See* Annex.

are addressed herein in respect of the Chamber's direction that the Prosecution amend its LoE.¹⁴

8. *Second*, as explained below, the request for a variance of the applicable time limits and alternative reconsideration concerns only the 21 Disclosed Rule 77 items, and the 39 Disclosed INCRIM items. These are listed in the Annex.¹⁵

A. The requirements of Regulation 35(2) are met

9. Regulation 35(2) of the RoC provides that an extension of time may be granted after the lapse of a time limit "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".

10. The Prosecution is mindful that the Chamber has taken several steps intended to expedite the disclosure process in respect of the confirmation of charges hearing, particularly given the intractable delay that has affected the proceedings. However, the Prosecution underscores that this delay is not attributable to it in any respect. To the contrary, the Prosecution has taken several affirmative actions to provide the Suspect with material to facilitate his preparation as of his initial appearance.

11. The Chamber's article 61(3) instructions on disclosure have evolved since June 2022 through various amendments and/or corrections. As previously observed, they are substantively at variance with the Court's regular disclosure practice, including through non-standardised meta-data requirements. This has created novel legal interpretation issues as well as technical challenges. In particular, as noted below, the Prosecution could not have anticipated that *mere* amendments and/or updates to metadata ("Metadata Amendments/Updates") — which are *routine* in the Court's established practice — would amount to a regulation 35(2) issue, having otherwise

¹⁴ I.e., to ensure that the items listed in the Annex to the DCC and in the Witness Table correspond exactly to the evidentiary items listed in the LoE, cfr. ICC-01/14-01/22-104, Order on Disclosure, para. 10. See ICC-01/14-01/22-62, para. 31, *a contrario*.

¹⁵ This list is relevant for the issue at hand but it shall also be part of the 24 March 2023 Prosecution's filing as per the Pre-Trial Chamber's 16 March 2023 Decision, para. 6.

timely met the existing requirements for disclosure within the established practice of the Court.

a. The Court's normative disclosure practices

12. The Court's legal framework requires that the DCC and the evidence the Prosecution intends to rely on at the confirmation hearing must be provided to the Chamber and the Suspect no later than 30 days before the confirmation hearing. The Chambers Practice Manual recognises this a "final time limit",¹⁶ which also "serves the purpose of guaranteeing the person adequate time and facilities for preparation of his or her defence".¹⁷ Moreover, it bears noting that the 30-day deadline would have been established in full contemplation of the types of complex proceedings which the Court is intended to address. Although a Chamber may enlarge this period to provide greater advance notice within the reasonable exercise of its discretion, the five months afforded in this instance is without precedent.

13. Additionally, the standard E-court Protocol provides, *inter alia*, which meta-data information relating to evidence and material in electronic form should be transmitted. There are no requirements in the E-court Protocol applied by the Chambers of the Court and adopted by this Chamber, to provide disclosure notes with specific sections, pages, and paragraphs references in relation to *each* disclosed item.¹⁸ Again, while this may be subject to the discretion of the Chamber, the purpose of the protocol is to establish an agreed upon and uniform practice within the institution as a whole. The burden of departing from the same should not fall exclusively on the shoulders of the Prosecution to which, as a Party, the Statute affords an equally fair process.

¹⁶ Chambers Practice Manual, sixth version, para. 22.

¹⁷ Mark Klamberg, "Rule 121(3)-(10)", in Mark Klamberg, Jonas Nilsson and Antonio Angotti (eds.), *Commentary on the Law of the International Criminal Court – Rules of Procedure and Evidence*, Lexisnexus (<https://cilrap-lexisnexus.org/en/rpe/clicc/121-3>, last accessed on 19.03.2023).

¹⁸ ICC-01/14-01/18-64-Anx, paras. 31-33.

b. The Prosecution has effected disclosure in good faith

i. In general

14. Notwithstanding the unusual disclosure procedure established in this case, the Prosecution has, in good faith, complied with its obligations consistent with the Statute, the Rules, the Chambers Practice Manual, the E-court Protocol, and the Court's long-recognised norms.

15. The Prosecution has made its best efforts to comply with the Chamber's specific instructions regarding the identification of relevant sections, pages and/or paragraphs references, and providing disclosure notes to that effect (even retroactively to material disclosed before the evolution of the Chamber's disclosure orders). Moreover, in meeting the Chamber's strict direction to only disclose evidence of "true relevance", the Prosecution has drastically limited the pool of evidence on which it will rely for the purposes of the confirmation hearing, in order to facilitate the Defence's ability to prepare efficiently for the confirmation hearing.

16. Significantly, as the Chamber's disclosure orders (both in terms of scope and timing) *preceded* the filing of the DCC, its assessment of the nature of the case and charges, and consequently the time sufficient for the Defence to prepare was predicated on the much more expansive charges set out in the Warrant of Arrest. In practical terms, rather than having to prepare for a potential 205 witnesses, as indicated in the Prosecution's Disclosure Submissions,¹⁹ the Defence need prepare only for the 67 on which the Prosecution has committed itself to rely. The same obviously holds true for the substantially reduced charges, and the overall number of disclosed items – originally assessed as potentially 33,000 as disclosed in the context of the parallel *Yekatom* and *Ngaissona* case,²⁰ now less than 5,000 items.

¹⁹ ICC-01/14-01/22-54-Conf, Para. 10, i.e., 180 witnesses and 25 insiders.

²⁰ ICC-01/14-01/22-109, para. 4.

ii. Meta-data errors occurred with regard to 60 items among more than 4,700 disclosed items

17. It was only during the process of finalising its LoE and the DCC Annex — when comparing, evaluating, and prioritising the different items of substantiating evidence, that the Prosecution determined that it would be more effective to *rely* on 21 Disclosed Rule 77 items. Thus, it requested to update the corresponding meta-data to ‘INCRIM’.

18. In respect of the 39 Disclosed INCRIM items, it bears noting that they were duly disclosed as such in July 2022. At that time, there was no further instruction to provide disclosure notes. Notwithstanding, the Prosecution undertook to add these notes *retroactively* to materials already disclosed as INCRIM, even though the Chamber had not ordered the Prosecution to do so. It managed to do so for the majority of the approximately 800 items disclosed as INCRIM as concerns the application for warrant of arrest. Thus, of these 800 items, some 500 were slated to be ‘rediscovered’ with notes. However, because technical limitations imposed by CMS do not allow the same redacted version of an item to be “rediscovered” in a different case or in a different stage of the same case, adding a disclosure note precipitated unexpected technical glitches in Ringtail. As a consequence, although disclosure notes were in fact added to the 39 Disclosed INCRIM items (as among the 500), the meta-data update was apparently not uploaded to the system. The Prosecution is not yet apprised of the reasons for this failure. As such, the Prosecution was unaware of the meta-data upload problem until finalising the DCC and its Annex, and thus immediately moved for authorisation, on 9 March 2023 to make the necessary adaptations as soon as practicable.

19. As mentioned, 39 Disclosed INCRIM and 21 Disclosed Rule 77 items were all *timely* disclosed, and they should be taken into account for the purposes of the confirmation hearing.²¹ Based on the Court’s case law set out below, the Prosecution did not anticipate that the Metadata Amendments/Updates implicated regulation 35(2) where the transmittal of the subject material to the Chamber and the Parties had

²¹ ICC-01/14-01/22-62, para. 31, *a contrario*.

been timely achieved. Indeed, in such circumstances, the Court's jurisprudence suggests that regulation 35 does not apply at all.

c. The Prosecution's failure to file a regulation 35(2) request was out of its control

20. Chambers of the Court have held that:

"[...] [A] request to add items to a list of evidence does not constitute a request for the variation of a time limit in accordance with Regulation 35 of the Regulations of the Court, but rather a request for leave from the Chamber to add items in accordance with its decision fixing the time limit for filing the initial list of evidence". It must be determined in the concrete circumstances whether reliance by the Prosecution on items additional to those included in the initial list of evidence causes undue prejudice to the procedural rights of the Defence. Factors to be considered in this determination include, *inter alia*, the extent to which the requested addition is opposed by the Defence, the time when the addition was sought, the nature and amount of the material concerned, the intended purpose of the Prosecution's requested reliance on such material, and its prospective significance in light of the charges brought against the accused and the rest of the available evidence".²²

21. Moreover, Chambers have held that precluding consideration of such evidence would be imprudent:

"it would be unreasonable for the Chamber, to which a truth-seeking function is assigned by the Statute, to determine that potentially relevant evidence could

²² ICC-01/14-01/18-989-Conf (ICC-01/14-01/18-989-Red), para. 5, referring to Trial Chamber IX, The Prosecutor v. Dominic Ongwen, Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), 22 November 2016, ICC-02/04-01/15-600, para. 14; Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence', 2 December 2016, ICC-02/04-01/15-619 (hereinafter: 'Ongwen Decision 619'), para. 10; Decision on Prosecution's Request to Add Updated Forensic Report to its List of Evidence, 22 August 2017, ICC-02/04-01/15-956-Corr (corrigendum notified on 25 August 2017), para. 10; Decision on Prosecution's Request to Add 14 Items to its List of Evidence, 24 August 2017, ICC-02/04-01/15-957 (hereinafter: 'Ongwen Decision 957'), para. 6; Trial Chamber IX, The Prosecutor v. Dominic Ongwen, Decision on Defence Request to Add 14 Items to its List of Evidence, 24 July 2018, ICC-02/04-01/15-1314, para. 7.

not, under any circumstance, be used by the Prosecution at trial if not itemised in the list of evidence [...] *before the trial commences*”²³

It would seem that this rationale is equally applicable (if not more so) to the confirmation of hearing process, given that it is fundamentally a *preliminary* function of the Court.

22. Hence, the Prosecution’s 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. For this reason, the matter was duly raised and addressed in the 9 March 2023 Submission requesting to amend timely filed and disclosed material, rather than under regulation 35.

23. In any event, the Prosecution could not have filed a regulation 35(2) request before the 23 February 2023 deadline elapsed, since it was not aware of the failures in the meta-data fields concerning the 60 disclosed items. As noted, as soon as the technical error became apparent, the Prosecution’s effort to address and correct the failure was prompt.

d. A variation of the time limit is justified

24. Granting a variation of the time limit to amend the meta-data 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. Further, given the limited scope of the Metadata Amendments/Updates, it is justified.

25. The Metadata Amendments/Updates would in no way derail the proceedings or unduly prejudice the Suspect.

²³ ICC-01/14-01/18-989-Conf (ICC-01/14-01/18-989-Red), para. 6, referring to Ongwen Decision 619, ICC-02/04-01/15-619, para. 8 (emphasis added).

i. The 21 Disclosed rule 77 items

26. Among the 21 Disclosed Rule 77 items, there are 11 transcribed statements of witness P-0889; and 10 various items comprising two videos and their transcripts; Facebook material; two transcripts of videos that were duly disclosed as INCRIM;²⁴ a selection of September 2013 media articles; and an email referring to the FROCCA Protocol Agreement. These items are also referenced in the DCC Annex and in the LoE.²⁵ Finally, there is the English version of one of witness P-1962's trial transcripts (T-141), which was referenced in the Witness Table, meaning he would be relied on for the purposes of confirmation. This trial transcript was, in addition, referenced in the DCC Annex and included in the LoE.²⁶

P-0889's 11 transcribed statements

27. P-0889 is included in the Witness Table. His 11 transcribed statements are included in the DCC Annex and in the LoE.²⁷ The witness's statement had been disclosed as INCRIM to the Defence in July 2022, and "rediscovered" on 23 February 2023 with disclosure notes. His T-109, T-110, and T-112 trial transcripts were disclosed as INCRIM on 20 February 2023.

28. For months, the Defence has known of the Prosecution's intention to rely on P-0889 as an incriminating witness. In any event, this was made clear with the Witness Table filed on 23 February 2023, in which P-0889 was included.

29. The 11 transcribed statements disclosed as rule 77, when they should instead have been disclosed as INCRIM, are of particular importance for the Chamber to determine the sufficiency of evidence to establish substantial grounds to believe that the Suspect committed each of the charged crimes. Excluding those 11 transcripts on the basis of an inadvertent meta-data error, which the Prosecution promptly sought

²⁴ Decision on Defence Request to Add 14 Items to its List of Evidence, ICC-02/04-01/15-1314, paras. 11-12.

²⁵ See Annex.

²⁶ See Annex.

²⁷ See Annex.

to correct, would be a disproportionate and unreasonable sanction especially in the absence of any appreciable prejudice.

10 Various items

30. As the Prosecution has already reduced its case to its bare substance, the evidentiary items that it intended to disclose as INCRIM are, by definition, “truly relevant” to its case and necessary.

31. Excluding 21 items actually timely disclosed because of a technicality and in the absence of any substantiated prejudice would not serve the interests of justice or advance the Court’s truth-seeking function.

ii. The 39 Disclosed INCRIM items

32. As noted, the 39 Disclosed INCRIM items were disclosed as such in July 2022. They were “rediscovered” in February 2023 in connection with the application of disclosure notes. Thus, *with or without disclosure notes*, since July 2022 – for the better part of a year now – the Defence has been aware that the Prosecution considered these items INCRIM, and intended to rely on them for the purposes of the confirmation of charges hearing. The 39 Disclosed INCRIM items have thus been timely disclosed *twice* as INCRIM in this case.

33. Excluding these items for lacking a disclosure note (which was not *required* when they were first disclosed), which is an equally minimal technicality as a mere change in legal classification, is disproportionate. This is all the more so, given the Prosecution’s good faith effort *retroactively* to provide disclosure notes even beyond the Chamber’s order, as noted above.

34. In line with the Prosecution’s conduct and intentions to date, allowing the amendment of the meta-data to upload the disclosure notes would provide information useful to the Defence, as has the Prosecution’s application for access to material filed on behalf of the Suspect, and its further effort to migrate material

disclosed in the *Yekatom and Ngaissona* case, to put at the Defence's ready disposal in its preparation to address related charges.

iii. A variation of the time limit does not cause prejudice

35. No prejudice arises from granting the Prosecution's request.

36. Indeed, the 15 March 2023 "Mokom Defence Response to 'Prosecution's Submission of the Document Containing the Charges'"²⁸ is unclear and conclusory. Since the assignment of Permanent Counsel, the Defence would be hard pressed to find another case at the ICC affording Counsel as much time – five months *post-disclosure* – to prepare for the confirmation of charges hearing. That said, such an accommodation should not inhere to the Prosecution's detriment.

37. It goes without saying that such a lengthy period, given the reduction of the charges and evidence relied on here, easily meets article 61(3)'s directive to provide the evidence on which the Prosecutor intends to rely within a reasonable time before the hearing, and allows the suspect more than enough time to adequately prepare for confirmation, per rule 121(2) of the Rules.

38. It cannot be reasonably entertained that the two-week delay between 23 February 2023 (disclosure deadline) and the 9 March 2023 Submission abrogates the inordinate amount of time afforded the Defence to prepare. Indeed, even if the Defence were to only now for the first time come to know about the 60 items, in relative terms, the suggestion that the five months remaining ahead of the confirmation of charges hearing would be insufficient to accommodate the addition of such material would be, at best disingenuous. And, in any event, enlargement of the preparation period if necessary would easily accommodate such concern – if ever it were genuine.

39. Although the meta-data mistakes reported in the 9 March 2023 Submission are unfortunate, the disclosure achieved is clearly and overwhelmingly in substantial

²⁸ ICC-01/14/01/22-175.

compliance with the Chamber's ultimate disclosure order. Moreover, as it stands, it is undeniably more favourable and beneficial to the Defence than the disclosure required by the Chamber and effected in the larger related *Yekatom and Ngaissona* case.

40. Under such circumstances, there is no prejudice caused to the Defence's preparation. Denying the request would thus effectively amount to an unwarranted and disproportionate *sanction*, undermining the confirmation hearing, the Court's ultimate duties to establish the truth and to hold those most responsible for crimes committed with its jurisdiction to account.

41. The conditions for a variation of the time limit as per regulation 35(2) RoC are met.

B. In the alternative: Request for Reconsideration

42. Should the Chamber consider that the requirements of regulation 35 of the RoC are not met, the Prosecution considers that its reconsideration of the 16 March 2016 Decision is warranted.

43. As noted, Chambers have the power to exceptionally reconsider their decisions if, *inter alia*, 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.²⁹

44. Here, facts and arguments unknown to the Chamber at the time of the 16 March 2016 Decision are potentially dispositive. In particular, the Prosecution's erroneous representation that the 9 Transcripts had *not* been disclosed, when in fact they had been disclosed timely and were available both to the Chamber and the Defence,³⁰ impacts both the scope of the requests made in the Prosecution's 9 March 2023

²⁹ ICC-01/12-01/18-2460, para. 4, referring to Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', 9 April 2020, ICC-01/12-01/18-734, para. 11; Decision on Defence request for reconsideration of Decision on requests related to the submission into evidence of Mr Al Hassan's statements, 23 November 2022, ICC-01/12-01/18-2414, para. 7.

³⁰ A search under "ICC-01/14-01/18-T" would have revealed the subject transcripts.

Submission, as well as any assessment of proportionality of the requested relief (or its denial).

45. Precluding the Prosecution's use of evidence because of merely technical irregularities would result in irreparable harm to the case, and an injustice — particularly absent serious prejudice.

46. Such a result would defeat the regulatory framework which, particularly at the confirmation stage is receptive of evidence towards establishing the truth. For this reason, the statute permits for instance the introduction of non-sworn statements and even *summary evidence*.

47. Here, the Defence *is more than able* to meaningfully prepare for the confirmation hearing. The Defence are neither misled by the material on which the Prosecution has indicated an intention to rely, nor swamped by thousands of evidentiary items. The material at issue 60 evidentiary items is minimal — and the time to address them ample.

48. It follows that the Request for Reconsideration should be granted.

IV. RELIEF SOUGHT

49. The Prosecution respectfully requests the Chamber to vary the time limits concerning the 27 June 2022 Order and 24 January 2023, pursuant to Regulation 35(2) of the RoC and authorise the Prosecution to proceed with the Metadata Amendments/Updates.

50. In the alternative, the Prosecution respectfully requests the Chamber to reconsider its 16 March 2023 Decision, and allow the Prosecution to use the indicated documents as evidence in the confirmation hearing in accordance with Rule 121(3).

A handwritten signature in black ink, appearing to be 'K.A.K.', followed by a horizontal line and a period.

Karim A. A. Khan KC, Prosecutor

Dated this 24th day of March 2023

At The Hague, The Netherlands