

**Cour
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**International
Criminal
Court**

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Date: **03/04/2023**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding
Judge Tomoko Akane
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public

Defence Response to Prosecution's request to vary a time limit, and/or request for reconsideration

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

The Office of the Prosecutor
 Karim A. A. Khan KC
 Mame Mandiaye Niang
 Kweku Vanderpuye

Counsel for the Defence
 Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants
 (Participation/Reparation)**

The Office of Public Counsel for Victims
 Paolina Massidda

**The Office of Public Counsel for the
 Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar
 Peter Lewis

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section Other**

I. INTRODUCTION

1. Pursuant to Regulation 24(1) of the Regulations of the Court (“Regulations”), and the Pre-Trial Chamber’s instructions on time limits,¹ the Defence for Mr. Mokom responds to the 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’.²

2. The Prosecution submissions in support of its request for variation of the applicable time limits³ do not demonstrate good cause, and fail to demonstrate that there is no prejudice to the Defence, as would be required for the *post facto* alternation of these disclosure deadlines. The criteria for the exceptional measure of reconsideration are also absent, meaning that the Chamber’s decision of 16 March 2023 should remain in effect.⁴

II. PROCEDURAL HISTORY

3. On 24 January 2023, the Chamber ordered the Prosecution to fulfil its disclosure obligations regarding material it intends to rely upon for the confirmation of charges hearing by no later than 23 February 2023, and to submit its Document Containing the Charges (“DCC”) by 9 March 2023.⁵

4. On 23 February 2023, the Prosecution submitted its Witness Table.⁶

5. On 9 March 2023, the Prosecution submitted its DCC⁷ (Annex A), a French Translation (Annex B), a table containing an explanation of the supporting evidence for the

¹ Pre-Trial Chamber II, ‘Second order on the conduct of the confirmation of charges proceedings’, 13 February 2023, ICC-01/14-01/22-157, para. 18.

² Office of the Prosecutor, ‘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)’, 24 March 2023, ICC-01/14-01/22-180.

³ Request, para. 1. The prosecution seeks to vary time limits concerning the 27 June 2022 “Order on the conduct of the confirmation of charges proceedings” and 24 January 2023 “Order for observations and decision on the Prosecution’s request for a status conference”.

⁴ Pre-Trial Chamber II, Decision on issues arising from the submission of the Document Containing the Charges, 16 March 2023, ICC-01/14-01/22-177 (“Decision”).

⁵ Pre-Trial Chamber II, ‘Order for observations and decision on the Prosecution’s request for a status conference’, 24 January 2023, ICC-01/14-01/22-138, para. 12.

⁶ Office of the Prosecutor, ‘Prosecution’s Submission of its Witness Table’, 23 February 2023, ICC-01/14-01/22-167.

⁷ Office of the Prosecutor, ‘Prosecution’s Submission of the Document Containing the Charges’, 9 March 2023, ICC-01/14-01/22-174 (“ICC-01/14-01/22-174”).

allegations presented in the DCC (Annex C.1), an analysis of Call Data Records (“CDRs”) (Annex C.2) and its List of Evidence (Annex D).

6. The Prosecution indicated that the ERNs referred to in Annex C.2 and the ERNs referred to in the attribution table (CAR-OTP-0000-1197, referenced in Annex C.2) were not in the List of Evidence, and noted that there were references to witness statements in the Annex to the DCC (Annex C.1) that were also not contained in the Witness Table.⁸ The Prosecution sought the Chamber’s authorisation to amend the metadata of 21 Disclosed Rule 77 items and 39 Disclosed INCRIM items, and to formally disclose nine Trial Transcripts cited in the DCC Annex C.1 which had not yet been formally disclosed.⁹

7. On 13 March 2023, the Defence responded that the request to formally disclose the nine trial transcripts should be rejected, having been submitted after the expiry of the 23 February 2023 deadline.¹⁰ The Defence asked the Chamber to order the Prosecution to submit a list of references not included in the Witness Table, or a new version of the table including the additional statement references, in order to ensure efficient and meaningful Defence preparation prior to the confirmation of charges hearing.¹¹

8. On 16 March 2023, the Chamber ordered the Prosecution to file a revised version of its List of Evidence and the Witness Table by 24 March 2023. As regards the Prosecution’s request to amend the impugned metadata and disclosure notes and to disclose the nine trial transcripts, the Chamber recalled that “the deadline for the Prosecution to complete its disclosure obligations **expired** on 23 February 2023” and as such the Prosecution was essentially requesting an extension of time **after** the lapse of a time limit under regulation 35(2) of the Regulations of the Court (“Regulations”). The Chamber accordingly rejected the Prosecution request, noting that the Prosecution had not demonstrated that it was “unable to submit such a request before 23 February 2023 for reasons outside its control”.¹²

9. In its Decision, the Chamber held “without prejudice to a properly substantiated request under regulation 35(2) of the Regulations, the disclosure metadata or disclosure notes

⁸ ICC-01/14-01/22-174, para. 6.

⁹ ICC-01/14-01/22-174, para. 9.

¹⁰ Mokom Defence Response to ‘Prosecution’s Submission of the Document Containing the Charges’, 13 March 2023, ICC-01/14-01/22-175, paras. 12-19.

¹¹ ICC-01/14-01/22-175, para. 22.

¹² Decision, para. 5 (emphasis added).

of the relevant items shall not be amended, while the trial transcripts under consideration shall not be considered for the purposes of the confirmation of charges procedure.”¹³

10. On 24 March, the Prosecution filed a revised List of Evidence (Annex A) to reflect the items referenced in the Witness Table, that were not originally included in Annex C.1 of the DCC.¹⁴ It also filed two revised Witness Tables: an analytical witness table (Annex B) and a witness table containing all Trial Transcripts of the witnesses concerned (Annex C).

11. On 24 March 2023, the Prosecution filed a regulation 35(2) application to vary the time limit to add items to its list of evidence. In the alternative, it asked the Chamber to reconsider its Decision.¹⁵

III. SUBMISSIONS

(a) Request for Variation of the Time Limits under Regulation 35(2)

12. With regards to the metadata, disclosure notes and nine trial transcripts, the Prosecution failed to comply with the disclosure deadlines set by the Chamber. In the Request, the Prosecution first seeks to justify this failure on the basis of what it calls an “unusual disclosure procedure” set by the Chamber in this case.¹⁶

13. Under the heading “the Court’s normative disclosure processes”, the Prosecution submits that the Chamber has put in place a regime that is “substantially at variance with the Court’s regular disclosure practice”,¹⁷ while emphasising that it has complied with obligations under the Court’s broader statutory framework and the apparent “long-recognised norms” of disclosure at the International Criminal Court.¹⁸ Essentially, therefore, the Prosecution is asserting that non-compliance with the Chamber’s deadlines is somehow excusable or justifiable because the Chamber imposed what the Prosecution feels are heightened or irregular disclosure obligations in this case, and the Prosecution complied with a pre-existing framework which it accepts as being fair.

¹³ Decision, para. 6.

¹⁴ Prosecution’s Submission Related to the Chamber’s Decision on issues arising from the submission of the Document Containing the Charges with confidential Annexes A-D, 24 March 2013, ICC-01/14-01/22-179,.

¹⁵ ICC-01/14-01/22-180.

¹⁶ Request, para. 14.

¹⁷ Request, para. 11.

¹⁸ Request, para. 14.

14. If the Prosecution believed that it would be unable to comply with the disclosure regime as set by the Chamber, or that the timeframes in place were unduly onerous or incompatible with the Court's "long recognised norms", it was open to the Prosecution to seek reconsideration of the decisions(s) governing this process at the time. Failing to comply with the Chamber's deadlines, and then submitting that they are irregular or unusual, is an improper way of proceeding.

15. The Prosecution then provides, for the first time, an explanation of the alleged technical difficulties which led to the metadata errors for the 60 items in question, explaining that it had been "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 This is the information that should have been provided on 9 March 2023, in the context of a properly substantiated request under regulation 35(2).

16. The Prosecution submits, however, that its failure to file a regulation 35(2) request was "out of its control,"²⁰ citing prior cases in which a failure by the Prosecution to list disclosed items on a list of evidence did not result in the Prosecution being precluded from later relying on that evidence.²¹ A failure to list disclosed evidence is different from a failure to disclose the evidence in the first place. Importantly, if the Prosecution's position was that regulation 35(2) was not applicable (a position it maintains),²² this should have been advanced in the 9 March 2023 submission.

17. As regards the alleged lack of prejudice, the Prosecution centres its submissions on the purported "inordinate time" given to the Defence to prepare in the present case, concluding that "there is no prejudice caused to the Defence's preparation".²³

18. The Prosecution's failure to meet the Chamber's disclosure deadlines cannot be retroactively justified by its own view of the time it asserts the Defence should have to prepare. In any event, the Prosecution's contention of an "inordinate time" cannot be

¹⁹ Request, paras. 17-19.

²⁰ Request, para. 20.

²¹ Request, paras. 20-21.

²² Request, para. 19: "Indeed, in such circumstances, the Court's jurisprudence suggests that regulation 35 does not apply at all."

²³ Request, paras. 38, 40.

reconciled with the scope of the disclosure in this case, which requires the Defence team to read, review, and seek instructions on: (i) 5290 pages of witness statements and transcribed interviews linked to its 70 witnesses in NUIX; (ii) 5850 pages of trial transcripts disclosed in NUIX; (iii) 161 confidential trial transcripts made available to the Defence on Records Manager by the Registry; and (iv) 748 items of CDRs, the vast majority of which contain thousands of items of raw call data information which must now be formatted and analysed by the Defence, with 651 CDRs having been disclosed under Rule 77 as being material to the preparation of the Defence.

19. More broadly, the allegation of “inordinate time” ignores the reality of what a Defence team must do to prepare for a confirmation hearing. The Prosecution has been investigating in the CAR since May 2007. The Prosecution team in this case has been running a trial centred around allegations similar to those made against Mr Mokom since February 2021. Lead Counsel for Mr Mokom was appointed at the end of January 2023 and has no prior exposure to the situation or the allegations against his client. The Defence team of Mr. Mokom is therefore already expected in an “inordinate” period of seven months to catch up with an investigation of sixteen years which has produced thousands of documents and countless bytes of data.

20. In addition to these 70 witnesses, the disclosure contains material related to at least 248 additional witnesses, for whom there are either screening notes, statements or transcripts from the *Yekatom and Ngaïssona* trial. The Defence must read and analyse the material related to each of these witnesses to assess whether they have provided information which may nuance or undermine the various inferences at the core of the Prosecutor’s theory.

21. Furthermore, the Defence cannot limit its preparation to reading the material disclosed by the Prosecution, whether or not that material is relied for the confirmation hearing. It must have the same opportunity to investigate and learn about the events at issue in the case, whether through spending meaningful time seeking instructions from their new client, or through performing independent investigations of what occurred in the relevant geographical area during the indictment period. For example, for each of the 70 witnesses on whom the Prosecution intends to rely at confirmation, preparation is not limited to reading the thousands of pages of disclosed interviews and transcripts. The Defence must also perform independent investigations and assessments of who these people are, what they were doing at

the relevant time, and whether they are in a position to give credible evidence about the events which can be relied upon by the finders of fact.

22. This reality undermines the attempts by the Prosecution to paint the time remaining before the confirmation hearing as “such a lengthy period”,²⁴ and to assert that the two-week delay between the 23 February disclosure deadline and the 9 March submission cannot reasonably be considered to abrogate the “inordinate amount of time afforded the Defence to prepare”.²⁵ The time afforded to the Defence to prepare for the confirmation hearing was considered by the Chamber to be reasonable and proportionate (subject to the Defence receiving the resources to which it is entitled under the Legal Aid Policy),²⁶ and was **subject to the Prosecution meeting its disclosure deadlines**. In the context of the number of weeks that remain before the confirmation hearing, and in the absence of good cause being demonstrated, the disclosure deadlines must be final. A constantly shifting and expanding Prosecution case is incompatible with the right and the ability of the accused to prepare.

23. Remarkably, the Prosecution then asserts that the relief ordered by this Chamber will “**undermine [...] the confirmation hearing**, and the Court’s ultimate duties to establish the truth and to **hold those most responsible for crimes** committed within its jurisdiction to account.”²⁷ This is an extraordinary statement. The Chamber is aware of its duties, and has been acting strictly in accordance with them. Those duties include regulating the disclosure process and the pre-trial phase, and setting and maintaining deadlines. The Prosecution’s failure to comply with these deadlines, or to seek leave in advance not to do so, is not without consequences. The Chamber’s remedy was a reasonable one.

(b) The Request for Reconsideration

24. Reconsideration is an exceptional measure. It should only be available “when the conditions upon which the decision was grounded have changed, and it is necessary to prevent an injustice.”²⁸ These requirements have not been met here. The conditions upon which the Decision was grounded have not changed; rather, the Prosecution did not present them in the first place.

²⁴ Request, para. 38.

²⁵ Request, para. 38.

²⁶ Defence Request for Review of the Registrar’s Decision on Legal Assistance and for a Stay of Proceedings, ICC-01/14-01/22-178-Conf-Exp.

²⁷ Request, para. 40.

²⁸ *Prosecutor v. Yekatom & Ngaïssona*, Decision on the ‘Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’, 24 May 2019, ICC-01/14-01/18-206, para. 20.

25. The Prosecution's focus on the time afforded to the Defence to prepare ignores the additional year it was given to organise its casefile and manage its disclosure. The Defence has no reason to dispute that the disclosure anomalies at issue result from "merely technical irregularities", as asserted.²⁹ However, when these irregularities meant that the Prosecution failed to meet the disclosure deadlines, the appropriate path was to explain these mistakes, and seek leave to exceptionally vary the deadlines in place. Simply disclosing the material out of time, and then submitting that the remedies rightfully imposed will cause "irreparable harm to the case, and an injustice",³⁰ is insufficient to move the Chamber from the original position. Nor does the Prosecution attempt to explain the source of the "irreparable harm" and "injustice" in the context of the wealth of other material on which it seeks to rely at confirmation. The criteria for reconsideration have not been met.

IV. CONCLUSION

26. The Decision and remedies contained therein were appropriate. In the Request, the Prosecution maintains that it was not required to seek a variation of the time limit under regulation 35(2).³¹ Its submissions do not demonstrate a sufficient basis to do so, nor is the exceptional remedy of reconsideration available in the present circumstances. For the above reasons, the Defence submits that the Decision should remain in effect, and the Request should be dismissed.

Respectfully submitted,



Philippe Larochelle,
Counsel for Maxime Mokom

The Hague, The Netherlands
Monday, 3 April 2023

²⁹ Request, para. 45.

³⁰ Request, para. 45.

³¹ Request, para. 19.