

Pursuant to Trial Chamber V's Decision ICC-01/14-01/18-2417, dated 22 March 2024, this document is reclassified as "Public"

**Cour
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**International
Criminal
Court**

Original: English

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

Date: 12 March 2024

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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Confidential

Yekatom Defence Response to "Prosecution's Request for Partial Reconsideration of the 'Further Directions on the Conduct of the Proceedings' (End of Defence Presentation of Evidence and Closure of Evidence) (ICC-01/14-01/18-2342)", 1 March 2024, ICC-01/14-01/18-2391-Conf

Source: Defence for Mr. Alfred Rombhot Yekatom

Pursuant to Trial Chamber V's Decision ICC-01/14-01/18-2417, dated 22 March 2024, this document is reclassified as "Public"

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INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby files this Response to the 'Prosecution's Request for Partial Reconsideration of the 'Further Directions on the Conduct of the Proceedings' (End of Defence Presentation of Evidence and Closure of Evidence) (ICC-01/14-01/18-2342)',¹ whereby the Prosecution requests the Trial Chamber to: (i) extend the page limit of up to 375 pages regarding the Prosecution's closing brief, and (ii) extend the time limit of 10 weeks in which to file the Prosecution's closing brief.
2. The Defence is in agreement with the Prosecution that whilst the timeframe and page number set out in the Trial Chamber's Further Directions were substantial,² there are justifiable reasons in support of a partial reconsideration of the Further Directions so as to allow for a more comprehensive and efficient briefing schedule following the close of the Defence case.
3. However, the Defence considers that the request concerning the page limit as presently formulated by the Prosecution is both unreasonably expansive and unjustifiably seeks to disadvantage the Defence. Rather, an extension of page limits should be applied equally to both the Prosecution and Defence and should not exceed 300 pages.
4. Further, whilst the Prosecution requests an extension of time for the filing of its closing brief, the Defence submits that the expeditious conduct of these proceedings would be better served by an extension of time for the preparation of closing arguments in response to the respective final briefs as opposed to an extension of time for the filing of the Prosecution closing brief. This would allow for streamlined oral responses to the respective final briefs and moreover,

¹ ICC-01/14-01/18-2391-Conf ('Request').

² ICC-01/14-01/18-2342 ('Further Directions').

maintain the simultaneous briefing set out by the Chamber in its Further Directions. As such, an extension of time should be granted to allow for closing arguments to be held 21 working days after the filing of the closing briefs and applicable to all parties and participants.

SUBMISSIONS

a. A 375-page final brief is unreasonably expansive

5. In its Request, the Prosecution seeks an extension of up to 375 pages in order to file its closing brief. It does so on the basis of the size and scope of the case, the complexity of the evidence, the joint proceedings against two accused and the deferred evidential assessments.
6. As a starting point, the Defence agrees that the aforementioned factors do – to varying degrees – warrant an extension of pages for the closing briefs. However, the Prosecution fails to justify why it requires a further 175 pages, in addition to the 200 pages granted by the Chamber in order to discharge its burden of proof.
7. Of note, the present request for an extension of a further 175 pages would amount to a closing brief which is nearly double the size of the Prosecution's Trial Brief whereby many – if not all – of the factors cited by the Prosecution were similarly taken into account.³
8. In this regard, the Defence agrees that a better or more 'reliable gauge' is the length of the Prosecution's Trial Brief whereby the Trial Chamber had granted the Prosecution 250 pages to submit its Trial Brief. In doing so, the Chamber considered both the complexity of the case and more specifically 'the fact that

³ The Prosecution's Trial Brief, excluding annexes, was 191 pages i.e., $191 \times 2 = 382$. In total, the Prosecution's Trial Brief amounted to a total of 251 pages (i.e. 191 pages main filing + 60 pages annexes) see ICC-01/14-01/18-723-Conf.

it concerns two accused charged with multiple counts under alternative modes of liability'.⁴

9. Whilst the Prosecution provides a statistical analysis of comparable ICC trial proceedings such an exercise is no more than a red herring when taking into account that each trial faces its own unique set of challenges and complexities which cannot accurately be depicted by statistics and figures alone.⁵ As such, it is the Prosecution Trial Brief which serves as a more accurate assessment of the scope of the Prosecution's case arguments, the nature of the evidence called and the complexity of core issues in these very proceedings.
10. Nor does the Prosecution specify the manner in which the Closing Brief will deviate to such a large extent from its Trial Brief so as to warrant an additional 184 pages⁶ – which itself would be of alarming concern to the fair trial rights of Mr. Yekatom.⁷ Unlike the Defence for example – which must be prepared to address the fabrication of evidence relied on against Mr. Yekatom in its closing brief – the Prosecution advances no new or additional factors which would warrant such a significant deviation from the size of its Trial Brief.
11. If anything, taking the Prosecution's submissions at face value – its case arguments have either not significantly altered from its Trial Brief as a result of its 'extensive use of rule 68 [and] the use of bar table motions'⁸ as well the fact that the Chamber has deferred its evidential assessments, or have diminished in light of the Prosecution 'cutting a substantial number of witnesses it might otherwise have called'.⁹

⁴ ICC-01/14-01-18-697, para. 7 see also *infra*, para. 19.

⁵ Request, paras. 12-14.

⁶ I.e. 375 pages (requested extended closing brief) - 191 pages (main Prosecution Trial Brief).

⁷ *C/f* Request, para. 11.

⁸ Request, para. 45.

⁹ Request, para. 45. Further, the withdrawal of witnesses has an impact on the scope of allegations raised by the Prosecution in its Trial Brief see as one example, ICC-01/14-01/18-723-Conf, para. 203 and fn. 566.

12. As such, and contrary to the Prosecution's position, closing briefs may very well be less comprehensive than a trial brief, as evidenced in the *Ongwen* case,¹⁰ or indeed equal to a trial brief as observed in the *Bemba et al.*, proceedings whereby Trial Chamber VII rejected the Prosecution's request for an extension of 200 pages to file its closing brief and granted 150 pages on the basis that the 'Prosecution was able to set out its core arguments and evidence against all five accused in a pre-trial brief of 126 pages, plus annexes, and has already filed 11 pages of legal submissions before the Chamber'.¹¹

13. Accordingly, the Defence considers that a more modest page extension of 300 pages is warranted and in alignment with the Prosecution's Trial Brief.

b. Any extension of page limits and time limits should apply equally to the Defence

14. In seeking a request for an extension of pages, the Prosecution avers that the provision of the same page limits for Prosecution and Defence is 'not procedurally 'equal' and that therefore, by inference, the Defence should not be granted any similar page extension.¹² Similarly, the Prosecution remains silent as to whether the ten-week extension it seeks to file its closing brief should apply equally to all parties and participants.¹³

15. The Defence strongly objects to the Prosecution's attempt to unfairly gain an advantage and compromise the fairness of these proceedings.

16. First, whilst the Defence is ready to give the Prosecution the benefit of the doubt in relation to the equal application of the ten-week extension, it remains prudent

¹⁰ In *Ongwen*, the Prosecution's Pre-Trial Brief amounted to 285 pages and its Closing Brief amounted to 200 pages see ICC-02/04-01/15-533 and ICC-02/04-01/15-1719-Red. *Contra* Request, para. 41 whereby the Prosecution asserts that it 'is unaware of any case at the ad hoc tribunals wherein the final trial brief or closing brief was actually less comprehensive than the pre-trial brief. To the extent this may have occurred at the Court — if ever — it would be the exception, by far (footnote omitted)'.
¹¹ ICC-01/05-01/13-1552, para. 8.
¹² Request, paras 34-38.
¹³ Request, paras 42-46.

to state that any intention for the Prosecution to file its closing brief two weeks after the Defence files its closing brief would contravene the fair trial rights with which the Trial Chamber is tasked with safeguarding in accordance with article 64(2). In concrete terms, a one-sided extension would mean that the Prosecution would be given an additional two weeks to tailor the mammoth 375-page closing brief (as per its Request) in response to the Defence's written arguments and then be afforded yet another opportunity to orally respond to the Defence closing brief during closing arguments – the timing of which would be rendered unclear if such an unequal time extension is granted. It would unquestionably reverse the burden of proof and materially violate Mr. Yekatom's right to speak last in accordance with Rule 141.

17. Second, with respect to the page limits, the Trial Chamber has already determined that the number of pages should be equal amongst both the Prosecution and Defence. The Request in this regard, fails to raise any new facts or arguments which would not have already been considered by the Chamber in this determination and which would meet the reconsideration threshold.
18. In particular, the crux of the Prosecution's submissions rests on the fact that this is a 'joint trial of two defendants' and that unlike the Defence, 'the Prosecution must demonstrate the individual criminal responsibility of both Accused, while additionally having to explain a substantially broader range of facts and circumstances all within the same page allotment (*i.e.*, 100 pages each). These comprise evidence establishing the contextual elements of the crimes, and the elements of the applicable modes of liability'.¹⁴
19. The Prosecution's calculation to this effect is misguided and directly contradicts its prior observations concerning the joinder of the two cases whereby it stated that 'there [was] significant duplication in the evidence and issues relevant to

¹⁴ Request, paras 34-35.

both [Mr. Yekatom and Mr. Ngaissona]' ¹⁵ noting in particular that: 'NGAISSONA's and YEKATOM's crimes substantially overlap', '[t]he contextual factors for articles 7 and 8 relevant to their criminal responsibility[...] is near-identical' and that '[t]he organisational policy relevant to both cases [...] is also the same', 'NGAISSONA's responsibility for certain crimes emanates from his coordination of and association with YEKATOM and YEKATOM is alleged to have committed his crimes pursuant to a common plan that includes NGAISSONA' and that '[t]he evidence the Prosecution intends to use in support of charges against YEKATOM is substantially the same as the evidence it intends to use against NGAISSONA given the overlap in the alleged crimes and contextual requirements. This means substantially the same witnesses, audio-visual information, and documentary evidence for both cases'.¹⁶

20. As is clear from these observations, and indeed the structure of the Prosecution's Trial Brief, it is unrealistic to propose or suggest that the Prosecution intends to compile two separate briefs addressing each accused in chronology which would necessitate a diverging number of pages between the Prosecution and Defence.
21. Nor is the Prosecution's statistical analysis in favour of such an unequal application. Although neatly side-stepped by the Prosecution in its Request, each of the Article 5 proceedings before the ICC, including the joint trial of *Katanga and Ngudjolo*, allotted the exact same page limit for closing briefs to the Prosecution and Defence.¹⁷ The only exception to this approach concerns the

¹⁵ ICC-01/14-01/18-111, para. 6.

¹⁶ ICC-01/14-01/18-111, para. 6.

¹⁷ In *Katanga & Ngudjolo*, the Prosecution and Defence were both allotted 300 pages for their respective closing briefs see ICC-01/04-01/07-3218-Red. In each of the further examples cited in paragraphs 12 and 13 of the Request, there was parity in the number of pages for the closing briefs of both parties see e.g. ICC-01/12-01/18-2308 (*Al Hassan*), ICC-02/04-01/15-1226 (*Ongwen*), ICC-01/04-02/06-2170 (*Ntaganda*), ICC-01/05-01/08-2731 (*Bemba*). The exception to this is *Lubanga* whereby the Defence was provided with more pages than the Prosecution to file its closing brief see ICC-01/04-01/06-2722 (Defence granted 300 pages to file final briefs which equated to the total number of pages allotted to the Prosecution and LRV (i.e. 250 and 50 pages respectively).

Bemba et al., case which concerned Article 70 proceedings involving *five* accused. Even then, Trial Chamber VII granted the Prosecution 50 pages more than the Defence,¹⁸ i.e., ten pages per accused which by no means amounts to the 'substantially more pages' requested by the Prosecution in these proceedings concerning two accused.¹⁹

22. Similarly, the Prosecution's reference to multi-accused cases at the *ad hoc* tribunals is also inapposite given the diverging statutory frameworks,²⁰ but even further, there are clear examples at the *ad hoc* tribunals whereby the Prosecution and Defence were permitted an equal number of pages to file their closing briefs in proceedings concerning two accused.²¹
23. The unequal approach requested by the Prosecution would also significantly prejudice the Defence given that the very same factors which would warrant an extension for the Prosecution equally apply to the Defence.²² If anything, there are additional factors which militate more in favour of an extension of pages for the Defence as opposed to the Prosecution including the fact that: (i) the Trial Chamber has not had the benefit of a Defence pre-trial brief in these proceedings and (ii) more pertinently, the fact that the burden to investigate and plead the fabrication of evidence concerning child soldiers both as witnesses and victims in this case has fallen on the shoulders of the Defence alone.
24. It is for this reason that the Defence considers that a modest extension should be equally granted to both the Defence and the Prosecution.

¹⁸ In the *Bemba et al.*, proceedings, each of the Defence teams was granted 100 pages to file closing briefs and the Prosecution was granted 150 pages see ICC-01/05-01/13-1518. *C/f* Request, para. 38 whereby the Prosecution asserts that 'Trial Chamber VII granted the Prosecution a 50% greater page limit for its closing brief than each of the five accused'.

¹⁹ Request, para. 37.

²⁰ *Contra* Request para. 38. See ICTY/ICTR Rule 86(A) and 86(B) as compared to ICC Rule 141

²¹ See e.g. Request, fn. 41 in reference to IT-03-69-T, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Decision on the Parties' Requests for Leave to Exceed Word Limit for Final Trial Briefs, 24 August 2012, p. 2

²² *Supra.*, para. 5.

c. An extension of time to prepare for closing arguments would allow for a more meaningful opportunity to succinctly respond to opposing final briefs

25. In its Request, the Prosecution seeks an additional two weeks in order to file its closing brief on the same basis which it states justifies an extension of the page limit,²³ further arguing that the extension of time would 'not unfairly delay the proceedings'.²⁴
26. The Defence agrees that an extension of two weeks would indeed not unfairly delay the proceedings particularly where on balance, the additional time would allow for more efficient and streamlined closing submissions.
27. However, the Defence considers that a two-week extension for the filing of the closing brief is at this stage unwarranted given the notice with which parties and participants have in order to prepare the final briefs.
28. In contrast, the current two-week period in which parties and participants are afforded in order to prepare closing arguments is markedly limited and does not allow for the Defence to effectively exercise its right to speak last.
29. The Defence emphasises that the opportunity to present oral closing arguments is necessary to allow it to respond to core arguments raised in the Prosecution's closing brief as well as the closing briefs of both the CLRV1 and CLRV2 but which were not previously addressed in the Defence closing brief. In this regard, the closing arguments are not intended to be used as a vehicle to reiterate arguments already raised in the Defence closing brief; however, to avoid doing so, the Defence requires adequate time in order to properly process all three closing briefs of the Prosecution, CLRV1 and CLRV2 – a position which is not faced by any other party or participant in these proceedings - and

²³ Request, para. 42.

²⁴ Request, para. 44.

subsequently group and streamline its oral arguments. A restrictive timeframe serves to undermine such an endeavour and risks protracted and repetitive arguments.

30. Moreover, an extension of time to prepare closing arguments is further necessitated by the Prosecution's repeated tendency to present unreferenced 'factual' arguments and/or cite material which has not been submitted in these proceedings. This includes, for example, reliance on: (i) prior versions of rule 68(3) statements which have been subsequently corrected,²⁵ (ii) witness statements which were not submitted,²⁶ or (iii) reliance on statements whereby the witness was called *viva voce* and the statement was not submitted.²⁷
31. Under the current timeframe, the Defence would have insufficient time to be able to identify such errors in order to preserve the correctness of the record against Mr. Yekatom and assist the Chamber in its Article 74 deliberations.
32. Therefore, the Defence considers that the efficiency of these proceedings and clarity of the closing arguments would best be served by an extension of 21 working days to prepare closing arguments following the submission of the closing briefs. This extension should apply equally to all parties and participants.

²⁵ A review of the redactions applied to the prior recorded testimony of Prosecution witnesses supports this point see e.g. the Prosecution's continued reliance on CAR-OTP-2025-0324 despite corrections made by P-0808 prior to his testimony see CAR-OTP-2134-1737 and CAR-OTP-2134-1742. The Prosecution also continues to rely on older versions of statements for e.g. P-0446 (see corrections made by P-0446 prior to his testimony: CAR-OTP-2135-2317-R01; P-1595 (see corrections made by P-1595 prior to his testimony: CAR-OTP-2135-2397); P-1811 (see corrections made by P-1811 prior to her testimony: CAR-OTP-2135-2512-R01 ; CAR-OTP-2135-2535-R01 ; CAR-OTP-2135-2536-R01 ; CAR-OTP-2135-2537-R01 ; CAR-OTP-2135-2538-R01 ; CAR-OTP-2135-2539-R01); P-1704 (see corrections made by P-1704 prior to his testimony: CAR-OTP-2136-0486-R01); P-2453 (see corrections made by P-2453 prior to his testimony: CAR-OTP-2135-3494-R01); P-2419 (see corrections made by P-2419 prior to his testimony: CAR-OTP-00000611-R01); and P-0974 (see corrections made by P-0974 prior to his testimony: CAR-OTP-00001761-R01).

²⁶ See e.g. ICC-01/14-01/18-2326, para 3(a) in reference to the Prosecution's reliance on non-submitted material in its response to the Exclusion Request (ICC-01/14-01/18-2313-Conf).

²⁷ See e.g. ICC-01/14-01/18-2289-Conf, para 3(c) in reference to the Prosecution's reliance on materials – including prior statements – which have either not been formally submitted by the Prosecution or improperly submitted by the Prosecution.

CONFIDENTIALITY

33. This Response is filed on a confidential basis as it concerns filings of the same designation. The Defence does not object to the public reclassification of this filing.

RELIEF SOUGHT

34. In light of the above, the Defence respectfully requests that Trial Chamber V **GRANT** the Request in part:

GRANT the Prosecution and Defence an extension of 300 pages for the closing briefs;

MAINTAIN the simultaneous filing of closing briefs for all parties and participants; and

GRANT an extension of time for closing arguments to be held 21 working days after the filing of the closing briefs for all parties and participants.

RESPECTFULLY SUBMITTED ON THIS 12th DAY OF MARCH 2024



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