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**International
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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 YEKATOM AND PATRICE-EDOUARD
NGAÏSSONA***

Confidential

Ngaïssona Defence's 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)", ICC-01/14-01/18-2391-Conf, 1 March 2024

Source: Defence of Patrice-Edouard Ngaïssona

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

The Office of the Prosecutor

Mr Karim A.A. Khan KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoop
Ms Marie-Hélène Proulx
Ms Lauriane Vandeler
Ms Despoina Eleftheriou

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Legal Representatives of the Victims

Mr Yaré Fall
Ms Marie Edith Douzima Lawson
Ms Paolina Massidda
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Mr Patrice-Edouard Ngaïssona ('Defence') hereby responds 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)" ('Request').¹ The Defence opposes the Request as it does not fulfil the criteria for reconsideration and should thus be rejected. In the alternative, should the Request be granted, the Defence submits that the same extensions, i.e. on the page and time limit, should apply for the Defence.

II. CONFIDENTIALITY

2. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court ("RoC"), these submissions are filed "confidential" as they are responsive to a filing of the same designation. The Defence will file a public redacted version in due course.

III. PROCEDURAL HISTORY

3. On 26 August 2020, Trial Chamber V ('Chamber') issued the "Initial Directions on the Conduct of the Proceedings" ('Initial Directions').²
4. On 29 May 2023, the Chamber issued its "Further Directions on the Conduct of the Proceedings".³
5. On 2 February 2024, the Chamber issued the "Further Directions on the Conduct of the Proceedings (End of Defence Presentation of Evidence and Closure of Evidence)" ('Further Directions') setting the deadline for submission of the closing briefs as well as their page limit. More specifically, the Chamber ordered that closing briefs (i) "are to be filed eight weeks after the declaration of the closure of

¹ ICC-01/14-01/18-2391-Conf.

² ICC-01/14-01/18-631.

³ ICC-01/14-01/18-1892.

the submission of evidence in accordance with Rule 141(1) of the Rules",⁴ and (ii) must be limited to 200 pages for the Prosecution and the Defence, while the Common Legal Representatives (CLRV1 and CLRV2) were given a limit of 120 pages.⁵

6. On 1 March 2024, the Prosecution filed its Request, seeking an extension "for a page limit of up to 375 pages regarding the Prosecution's closing brief and time limit of 10 weeks in which to file the same".⁶

IV. APPLICABLE LAW

7. As held by Trial Chamber V(A) in *Ruto and Sang*:

"The Statute does not provide guidance on reconsideration of interlocutory decisions, but the Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by one of the parties or *proprio motu*. Reconsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if 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".⁷

8. Trial Chamber I in *Lubanga* also established strict criteria for the reconsideration of decisions of the Chamber, stating that "it is well established that a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory, because, for instance, a decision was made in ignorance of relevant information."⁸

⁴ ICC-01/14-01/18-2342, para. 9.

⁵ ICC-01/14-01/18-2342, para. 11.

⁶ Request, para. 47.

⁷ *The Prosecutor v. Ruto and Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, ICC-01/09-01/11-1813, 10 February 2015, para. 19. See also *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para. 11 and *The Prosecutor v. Al-Hassan*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', ICC-01/12-01/18-734, 9 April 2020, para. 11.

⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.

V. SUBMISSIONS

a. The Request does not fulfil the criteria for reconsideration

9. The Prosecution fails to show how any of the criteria for reconsideration set out in the abovementioned jurisprudence are met in the case at hand. The Prosecution's arguments are confined to the reasons for granting the sought extensions and not on the grounds warranting a reconsideration.
10. *First*, the Prosecution argues that the "Further Directions did not benefit from the Parties' and Participants' submissions before its issuance".⁹ This sole statement cannot possibly amount to a reason justifying the reconsideration of the Further Directions. The Prosecution does not even attempt to demonstrate an error of reasoning and fails to show that the decision was made in ignorance of the information the Request is based on.
11. *Second*, the reasons set forth by the Prosecution to justify the sought extensions are not new facts and arguments which arose since the decision was rendered.¹⁰ The extensiveness of the trial record,¹¹ the complex nature of the evidence,¹² the pending appellate proceedings,¹³ the stage of the Defence cases¹⁴ or the fact that this is a joint case¹⁵ are not new facts nor new arguments and have certainly not arisen in the time between the issuance of the Further Directions and the submission of the Request.
12. *Third*, none of the arguments put forward by the Prosecution demonstrate that reconsideration is necessary to prevent an injustice. On the contrary, as shown below, the Request is but a veiled attempt by the Prosecution to receive

⁹ Request, para. 2.

¹⁰ See Request, para. 7.

¹¹ Request, paras 8-11.

¹² Request, paras 19-24.

¹³ Request, paras 27-28.

¹⁴ Request, paras 29-33.

¹⁵ Request, paras 15-18.

differentiated treatment which risks resulting in an injustice against the Defence and, ultimately, Mr Ngaissona.

b. The Prosecution should not receive differentiated treatment

13. The Prosecution argues that the extensive case record, as well as the complex nature of the evidence at hand justifies the extension of the page limit only for the Prosecution. However, the Defence is required to handle the exact same case record, both in terms of quality and quantity, in a case where the Prosecution, having already filed the Document Containing the Charges¹⁶ and the Trial Brief,¹⁷ can reference these documents in its closing brief, thereby gaining a distinct page-count advantage over the Defence.¹⁸

14. Moreover, it was the Prosecution which argued in favour of the joinder of the separate cases against Mr Ngaissona and Mr Yekatom, submitting that it was “the most appropriate course of action” in light of the “significant duplication in the evidence and issues relevant to both Suspects”.¹⁹ The Prosecution now contradicts itself by claiming that “[a]lthough some of the charged crimes overlap as between the Accused, the modes of liability and the circumstances and evidence underpinning them largely do not. In essence, in terms of establishing the Accused’s respective criminal liability, the underlying evidence against them largely does not coincide”.²⁰ If, as the Prosecution argued then, the cases were sufficiently similar to warrant a joinder, then the argument that they are too remote for the purposes of the closing brief must fail.

¹⁶ ICC-01/14-01/18-282-Conf-AnxB1.

¹⁷ ICC-01/14-01/18-723-Conf.

¹⁸ Incorporating by reference prior submissions in the closing brief is a practice adopted in the past by the Prosecution, see *The Prosecutor v. Ongwen*, Public Redacted Version of “Prosecution Closing Brief”, ICC-02/04-01/15-1719-Red, 24 February 2020, para 3, 5 and 157; *The Prosecutor v. Bemba et al.*, Public redacted version of “Prosecution’s Closing Brief”, 24 May 2016, ICC-01/05-01/13-1905-Conf, ICC-01/05-01/13-1905-Red, 10 June 2016, para. 317.

¹⁹ ICC-01/14-01/18-76 and ICC-01/14-02/18-24, para. 1 *et seq.*

²⁰ Request, para. 17.

15. On a similar note, the fact that in other joint cases before the *ad hoc* Tribunals the Prosecution was granted a greater page limit for closing submissions than that of each individual accused is not convincing. The Prosecution does not explain nor substantiate how the cases cited are comparable to the present case, aside from mentioning that these were also joint cases, with more than two defendants.²¹ What the Prosecution does, instead, is carefully omitting parts of the Court's case law cited in its Request which show that, as per standard practice, trial chambers set the same page limit for all parties²² even when there were two defendants.²³
16. Another example of cherry-picking the Court's jurisprudence to omit parts that are contradicting the Prosecution's arguments is the reference made to the *Lubanga* case;²⁴ the Prosecution mentions that a 250-page limit was set for their closing brief, in comparison to the 200-pages granted in the present case, without mentioning that the Lubanga Defence was ordered by Trial Chamber I to file a 300-page closing brief, i.e. 50 pages more than the Prosecution.²⁵
17. As far as the time limit is concerned, allowing the Prosecution to file its closing brief two weeks after the Defence has filed theirs would completely circumvent the Chamber's objective, as this is stipulated in paragraph 10 of the Further Directions:

"In the view of the Chamber, the purpose of such written submissions is for the participants to provide a *succinct summary of their views, positions and arguments* on the confirmed charges and the evidence presented during trial. The

²¹ Request, paras 38-39.

²² The cases cited by the Prosecution in paras 12 and 13 of the Request prove that, per standard practice, the parties are ordered to file closing briefs with the same page limit, see *the Prosecutor v. Dominic Ongwen*, Directions on Closing Briefs and Closing Statements, ICC-02/04-01/15-1226, 13 April 2018, para. 4; *The Prosecutor v. Al Hassan*, Sixth decision on matters related to the conduct of proceedings: end of Defence case, potential rebuttal/rejoinder evidence, and closure of evidence, ICC-01/12-01/18-2308, 29 August 2022, para. 12(i); *The Prosecutor v. Ntaganda*, Decision providing further directions on the closing briefs, ICC-01/04-02/06-2272, 13 April 2018, p. 9.

²³ *The Prosecutor v. Katanga and Ngudjolo*, Public redacted version of Order on the arrangements for the submission of the written and oral closing statements (regulation 54 of the Regulations of the Court) (ICC-01/04-01/07-3218-Conf), ICC-01/04-01/07-3218-Red-tENG, 4 January 2012, para. 12 cited in para. 14 of the Request.

²⁴ Request, para. 13.

²⁵ The page limit for each filing had been extended pursuant to Regulation 37, see *The Prosecutor v. Lubanga*, Order on the timetable for closing submissions, ICC-01/04-01/06-2722, 12 April 2011, para. 3(a) and (b).

Chamber considers that *they are not meant to be a discussion between the participants*, but rather an additional tool for the benefit of the Chamber. Accordingly, all closing briefs are to be filed on the same date".²⁶ (*emphasis added*)

Evidently, the parties are not meant to respond to each other in their closing briefs. If that was the case, it is the Defence that should file its closing brief after the Prosecution's because the Defence responds to the Prosecution's case and, as per the Rules of Procedure and Evidence, must have the last word.²⁷

18. In addition, as ordered by the Chamber, the closing statements will be held two weeks after the filing of the closing briefs.²⁸ Allowing the Prosecution to file its closing brief two weeks after the Defence will not only affect the trial schedule since the closing statements will have to be postponed, but will also give an unfair advantage to the Prosecution to respond in writing to the Defence's closing brief, whereas the Defence will only have the limited opportunity to address the Prosecution's arguments, made in its closing brief, orally, during the closing statement.

19. Finally, given that the Prosecution submitted 95% of the evidence in this case, the Defence questions why the Prosecution requires more time than the Defence to 'digest' the evidence it has held much longer and has collected since the beginning of its investigations.²⁹

²⁶ ICC-01/14-01/18-2342, para. 10.

²⁷ The trial principle of the Defence having the last word transcends the entirety of the proceedings before the Court, *see* for example Rules 140(2)(d) and 141(2) of the Rules of Procedure and Evidence. *See also The Prosecutor v. Lubanga*, Order on the timetable for closing submissions, ICC-01/04-01/06-2722, 12 April 2011, para. 2: "(...) In the circumstances, the logic underlying Rule 141(2) of the Rules that establishes the right of the defence to examine a witness last also applies to these final written submissions. The defence is therefore entitled to file its closing submissions once the arguments of the prosecution and the legal representatives have been submitted".

²⁸ ICC-01/14-01/18-2342, para. 11.

²⁹ *See* Request, paras 4 and 42. As of the submission of the present response, the case record comprises a total of 36.768 items, 34.903 of which belong to the Prosecution. The Ngaïssona Defence's items are a total of 795, whereas the Yekatom Defence's items are a total of 963. The remaining items belong to the Said Defence (2 items), The Mokom Defence (9 items), the Registry (11 items), CLRV1 (14 items) and CLRV2 (65 items).

c. The Defence should be granted the same extensions

20. Should the Request be granted, and to prevent the injustice and inequality caused against the Defence due to the Prosecution's extended page and time limit for the filing of the closing brief, the Defence should be granted the same extensions. This is conformity with the Chamber's past practice when assessing similar requests under Regulations 35 and 37 RoC.³⁰

VI. RELIEF SOUGHT

21. For the foregoing reasons, the Defence respectfully requests the Chamber to:

- **REJECT** the Prosecution's Request or, in the alternative;
- **GRANT** the Defence the same extensions regarding the page and time limit.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 12 March 2024

At The Hague, the Netherlands

³⁰ See for example email from the Chamber titled "Decision on Requests for extension of time to respond to the Prosecution's 14th and 17th 'bar table' applications" dated 04/09/2023 at 09:21; email from the Chamber titled "Decision on Yekatom Defence Request for Extension of Page Limits to File its First Rule 68(2)(b) Request" dated 15/11/2023 at 17:18; email from the chamber titled "Decision on Ngaïssona Defence Request for Time Extension regarding ICC-01/14-01/18-2143-Conf-Exp" dated 17/10/2023 at 10:46