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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Decision on the Ngaiissona Defence's Request to dismiss *in limine* ICC-01/14-01/18-1874 and for orders concerning the Prosecution's prospective bar table applications

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64 and 67(1) of the Rome Statute and Regulation 35 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Ngaïssona Defence Request to dismiss *in limine* ICC-01/14-01/18-1874 and for orders concerning the Prosecution’s prospective bar table applications’.

I. Procedural history and submissions

1. On 26 August 2020, in his ‘Initial Directions on the Conduct of Proceedings’ (the ‘Initial Directions’), the Presiding Judge directed, *inter alia*, that when requesting to submit evidence in writing, ‘the tendering participant shall inquire whether the opposing participant consents or objects [to the bar table application] and include this information in the table’.¹ The Single Judge noted that this information should be provided to assist the Chamber later in its holistic assessment of the evidence during the deliberation of the judgment.²
2. On 17 May 2023, the Prosecution requested formal submission of 682 items of evidence obtained from, or related to, ten Facebook accounts (the ‘Items’ and ‘Application’ respectively).³ The Prosecution submits that prior to filing this application, it inquired with the Yekatom Defence and the Ngaïssona Defence (collectively, the ‘Defence’) whether they consent or object to the Items, and that the Defence had ‘indicated that they would not provide an answer within the eight weeks deadline proposed by the Prosecution’, falling on 11 May 2023.⁴ Consequently, the annex underlying the Application (the ‘Bar Table Annex’) does not contain the views of the Defence under the column ‘Defence position’.⁵
3. On 19 May 2023, the Ngaïssona Defence requested to dismiss *in limine* the Application (the ‘Request’).⁶ The Ngaïssona Defence submits that it had

¹ ICC-01/14-01/18-631, para. 62.

² Initial Directions, ICC-01/14-01/18-631, para. 62.

³ Prosecution’s Seventh Application for Submission of Facebook Evidence from the Bar Table, ICC-01/14-01/18-1874-Conf (with confidential annex, ICC-01/14-01/18-1874-Conf-Anx).

⁴ Application, ICC-01/14-01/18-1874-Conf, para. 8.

⁵ See Bar Table Annex, ICC-01/14-01/18-1874-Conf-Anx.

⁶ Defence Request to dismiss *in limine* ICC-01/14-01/18-1874 and for orders concerning the Prosecution’s prospective bar table applications, ICC-01/14-01/18-1875.

informed the Prosecution that it would provide its views on the Items by 26 May 2023 and that this is the second time that the Prosecution has clearly disregarded the Initial Directions.⁷

4. The Ngaïssona Defence further submits that there is a ‘significant amount of outstanding bar table applications yet to be filed at this crucial juncture of the case’. In light of these, it requests the Chamber to (i) dismiss the Application *in limine* without prejudice (the ‘First Request’); (ii) suspend the deadline for the Defence to respond until the Application is filed in accordance with the Initial Directions (the ‘Second Request’); (iii) order the Prosecution to inform the Chamber and the participants how many outstanding bar table applications there are yet to be filed before the close of the Prosecution case, and their volume (the ‘Third Request’);⁸ and (iv) suspend the deadline to respond to the Application during the period it takes the Chamber to rule on the Request.⁹
5. On 19 May 2023, the Single Judge (i) shortened the deadline for responses to the Request to 23 May 2023; (ii) suspended, until further notice, the response deadline to the Application; and (iii) instructed the Prosecution not to file any prospective bar table applications until the determination of the Request.¹⁰
6. On 23 May 2023, the Yekatom Defence fully supported the Request, asking that the Request be granted.¹¹ It requests, in the alternative, an extension of time to respond to the Application until 25 August 2023.¹²
7. On the same day, the Common Legal Representatives of the Victims informed the Chamber that they do not intend to respond to the Request.¹³
8. Also on the same day, the Prosecution requested the Chamber to reject the Request (the ‘Prosecution Response’); it submits that the Defence had two

⁷ Request, ICC-01/14-01/18-1875, paras 2-3.

⁸ Request, ICC-01/14-01/18-1875, para. 3.

⁹ Request, ICC-01/14-01/18-1875, para. 4.

¹⁰ Email from the Chamber, 19 May 2023, at 17:01.

¹¹ Yekatom Defence Response to the Ngaïssona Defence Request to dismiss *in limine* ICC-01/14-01/18-1874 and for orders concerning the Prosecution’s prospective bar table applications, ICC-01/14-01/18-1882 (the ‘Yekatom Defence Response’), paras 2, 13.

¹² Yekatom Defence Response, ICC-01/14-01/18-1882, paras 15-20.

¹³ Email to the Chamber, 23 May 2023, at 14:41.

months to provide their views, and this was sufficient time to develop their positions on the formal submission of the Items.¹⁴ It defers to the Chamber's discretion to grant the Defence an extension of time to respond to the Application.¹⁵

II. Analysis

9. The Single Judge recalls the Initial Directions as set out above. The Single Judge further recalls that, in another decision, the Chamber directed the Prosecution to initiate the *inter partes* consultations on intended bar table applications sufficiently in advance before filing such requests,¹⁶ expressing concern that the Prosecution had sought to obtain the Defence's positions 'contemporaneously' with the filing of the bar table application.¹⁷
10. The Chamber notes that the Defence had informed the Prosecution that they would provide their views by 26 May 2023,¹⁸ however, the Prosecution filed the Application before this deadline could be met. The Prosecution Response does not provide an explanation for why the Prosecution did not wait until after 26 May 2023.
11. Having regard to this, the Single Judge finds that the Prosecution disregarded the Initial Directions in filing the Application.
12. The Single Judge notes the Prosecution submission that the *inter partes* procedure in relation to bar table applications provided in the Initial Directions was not intended as a procedural hurdle above the Court's statutory and regulatory framework, but to facilitate the efficient and timely disposal of bar table applications.¹⁹ In respect of this, given that the Prosecution fails to explain why it could not wait until 26 May 2023, a period of a mere nine days, the Single Judge

¹⁴ Prosecution's Response to the Defence Request to dismiss *in limine* ICC-01/14-01/18-1874-Conf and for orders concerning the Prosecution's prospective bar table applications (ICC-01/14-01/18-1875), ICC-01/14-01/18-1883, paras 2-5, 11.

¹⁵ Prosecution Response, ICC-01/14-01/18-1883, paras 3, 10-11.

¹⁶ Decision on the Second Prosecution Submission Request from the Bar Table (P-0889), 24 May 2022, ICC-01/14-01/18-1429 (the 'Decision on the P-0889 Bar Table Application'), para. 11.

¹⁷ Decision on the P-0889 Bar Table Application, ICC-01/14-01/18-1429, para. 8.

¹⁸ Request, ICC-01/14-01/18-1875, para. 2; Yekatom Defence Response, ICC-01/14-01/18-1882, para. 14.

¹⁹ Prosecution Response, ICC-01/14-01/18-1883, para. 6.

is not convinced that following the *inter partes* procedure under the Initial Directions in the present case created a ‘procedural hurdle’ or that a deviation from it was necessary in the interest of judicial economy.

13. For this reason, the Single Judge expects the Prosecution to abide by the Initial Directions, as well as the directions recalled above, when filing future bar table applications.
14. As regards the adequacy of time provided by the Prosecution to review the Items, the Single Judge recalls that the Chamber has held that, for the opposing participant to indicate whether they consent or object, it requires a certain time to review the intended application and such time may vary according to each request. Therefore, for future submission requests from the bar table, the Chamber had directed the tendering participant to consider and provide adequate time when inquiring about the position.²⁰
15. In the present instance, the Prosecution requested a response on 682 items, amounting to 24,484 pages, initially within six weeks (deadline of 28 April 2023) and subsequently within eight weeks (deadline of 11 May 2023).²¹
16. The Single Judge notes that there appears to have been disagreement between the Prosecution and the Defence on the amount of time necessary to do so. Should disagreements between the participants arise on the adequacy of time to provide views on bar table applications which they fail to solve with reasonable effort *inter partes*, the Single Judge considers that it is for the tendering party to approach the Chamber with a view to assessing this disagreement and ruling on the adequacy of time given. The tendering party is not to file a bar table application disregarding the Initial Directions purely because the participants fail to agree on a deadline to give views. Accordingly, for prospective bar table applications, the Prosecution is directed to seize the Chamber in case of

²⁰ Decision on the P-0889 Bar Table Application, ICC-01/14-01/18-1429, para. 10.

²¹ See Application, ICC-01/14-01/18-1874-Conf, paras 1, 8; *see also* Yekatom Defence Response, ICC-01/14-01/18-1882, para. 14; Request, ICC-01/14-01/18-1875, paras 1-2; Prosecution Response, ICC-01/14-01/18-1883, para. 4.

disagreements which the participants fail to solve after reasonable *inter partes* efforts.

17. In the same vein, the Single Judge is not persuaded by the Prosecution's submission that responding to the Items did not require an in-depth analysis at this stage. While the Initial Directions only provide for recording in the bar table application whether the opposing party consents or objects to an item, the review by the opposing party may require a certain amount of analysis in preparation of its response to the application, including with submissions on the relevance and probative value of an item, as considered necessary.
18. The Single Judge notes that the Prosecution provided the Bar Table Annex to the Defence on 17 March 2023 and therefore, the Defence has had some time to review the Items.
19. Having regard to the above and the stage of the proceedings, the Single Judge is not persuaded that dismissal *in limine* of the Application is in the interest of judicial economy in the current circumstances. Accordingly, he rejects the First Request.
20. However, for the same reasons and noting that the Prosecution does not object, the Single Judge considers that good cause has been shown, pursuant to Regulation 35 of the Regulations, to extend the deadline for responses to the Application to 21 July 2023.
21. In light of the above, the Single Judge sees no need to rule on the Second Request.
22. The Single Judge shares the concerns expressed by the Defence in relation to bar table applications yet to be filed by the Prosecution at this stage of the proceedings. In the interests of fairness and judicial economy, he directs the Prosecution to inform the Chamber and the participants of the following details about any prospective bar table applications by 9 June 2023: (i) the expected number of applications; (ii) their subject-matter; (iii) their volume (for example, the number of pages, and/or the duration in case of audio/visual material); and (iv) the anticipated timelines, including concerning the receipt of the Defence's views in respect of each application.

23. Accordingly, the Single Judge grants the Third Request.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the First Request;

GRANTS the Third Request;

INSTRUCTS the participants to file responses, if any, to the Application by 21 July 2023;

INSTRUCTS the Prosecution to inform the Chamber and the participants in accordance with paragraph 22 above by 9 June 2023; and

INSTRUCTS the Prosecution file a public redacted version of the Application, ICC-01/14-01/18-1874-Conf within two weeks of the notification of the present order.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Bertram Schmitt', is written over a horizontal line.

Judge Bertram Schmitt

Single Judge

Dated the 25 May 2023

At The Hague, The Netherlands