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No. ICC-01/14-01/18

Date: 2 August 2024

TRIAL CHAMBER V

Before:

Judge Bertram Schmitt, Presiding Judge

Judge Péter Kovács

Judge Chang-ho Chung

Judge Beti Hohler, Alternate 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 Ngaïssona Defence Request for Leave to Appeal the
‘Decision on the Sentencing and Amended Directions on the Conduct of the
Proceedings’**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Ngaïssona Defence Request for Leave to Appeal the “Decision on the Sentencing and Amended Directions on the Conduct of the Proceedings”’.

I. Procedural history

1. On 18 July 2024, noting the decision of the *ad hoc* Presidency in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (the ‘*Al Hassan* case’ and the ‘*ad hoc* Presidency Decision’, respectively)¹ and its impact on its future composition, and considering the interests of justice and expeditiousness in this case, the Chamber issued a ‘Decision on the Sentencing and Amended Directions on the Conduct of the Proceedings’ (the ‘Impugned Decision’).² The Chamber decided to render any potential decision on sentencing pursuant to Article 76 of the Statute simultaneously with its judgment under Article 74 of the Statute. To that end, it, *inter alia*, (i) amended the timing previously set for the closing statements; (ii) decided to hold a hearing under Article 76(2) of the Statute; and (iii) adopted a procedural calendar for the presentation of additional evidence and written submissions under Article 76(2) of the Statute.³
2. On 24 July 2024, the Ngaïssona Defence (the ‘Defence’) requested leave to appeal the Impugned Decision (the ‘Request’). It raises the following two issues:
 - (i) Whether the Chamber abused its discretion under Article 76 of the Statute, when it decided, without any prior notice to the parties and participants, to render any potential decision on sentencing pursuant to Article 76 of the Statute simultaneously with its judgment under Article 74 of the Statute, and included within the decision a procedural calendar that is untenable considering the Defence’s current workload (the ‘First Issue’); and
 - (ii) Whether the Chamber abused its discretion by imposing a premature and excessive remedy in creating a scheduling order that simultaneously orders the

¹ *Ad hoc* Presidency, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision Replacing Judges in Trial Chamber X, 28 June 2024, ICC-01/12-01/18-2596.

² ICC-01/14-01/18-2600.

³ Impugned Decision, ICC-01/14-01/18-2600, para. 2, pp. 6-7. *See also ad hoc* Presidency Decision, ICC-01/12-01/18-2596, paras 5, 10.

parties to close their cases and prepare sentencing submissions based solely on the potential risk that the judges of the Chamber could be replaced after the delivery of the Article 74 decision (the ‘Second Issue’).⁴

3. On 29 July 2024, the Office of the Prosecutor (the ‘Prosecution’) opposed the Request.⁵
4. On the same day, the Yekatom Defence informed the Chamber that it does not intend to respond to the Request, but will file a request for partial reconsideration of the Impugned Decision no later than 2 August 2024.⁶
5. On 31 July 2024, the Common Legal Representatives of Victims of the Other Crimes and the Common Legal Representative of the Former Child Soldiers informed the Chamber that they do not intend to file a response to the Request.⁷

II. Analysis

6. The Chamber recalls the applicable law governing requests for leave to appeal under Article 82(1)(d) of the Statute, as previously set out.⁸

A. The First Issue

7. The Defence argues that the Chamber abused its discretion by ‘improperly balancing the interests of justice and interests of expeditiousness of retaining the same composition of the Trial Chamber in the event of a conviction against Mr Ngaïssona’s right to a fair trial’. The Defence contends *inter alia* that it was impossible for it to foresee that it would need to prepare for both the closing of its case and potential sentencing proceedings, and that the Chamber did not give adequate notice.⁹

⁴ Request, ICC-01/14-01/18-2608, para. 8.

⁵ Prosecution’s Response to the “Defence request for leave to appeal the “Decision on the Sentencing and Amended Directions on the Conduct of the Proceedings”, ICC-01/14-01/18-2600” (ICC-01/14-01/18-2608), ICC-01/14-01/18-2610 (the ‘Response’), paras 1, 24.

⁶ Email from the Yekatom Defence, 29 July 2024, at 16:21.

⁷ Joint email from the Common Legal Representatives of Victims of the Other Crimes and the Common Legal Representative of the Former Child Soldiers, 31 July 2024, at 22:33.

⁸ See Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, paras 15-21.

⁹ Request, ICC-01/14-01/18-2608, paras 9-26.

8. The Prosecution submits that the Defence expresses a mere disagreement based on a speculative assessment of the factors considered by the Chamber and its balancing thereof. In particular, the Prosecution argues that the Defence disagrees with the sufficiency or adequacy of the notice regarding the Chamber's intention to render a joint decision under Articles 74 and 76 of the Statute.¹⁰
9. The Chamber first recalls that the possibility of a joint decision under Articles 74 and 76 of the Statute has always existed under the legal framework of the Court. As recalled in the Impugned Decision, this possibility was further explicitly confirmed by the Appeals Chamber¹¹ and recently mentioned in the Presidency Decision.¹² The Defence could have anticipated the possibility that the Chamber might not follow bifurcated proceedings in this case and prepared accordingly.¹³
10. Furthermore, the Chamber recalls that the procedural calendar was set forth in the Impugned Decision 'in order to give the participants as much notice as possible'.¹⁴ In setting the relevant time limits, the Chamber took into consideration the impact that the Impugned Decision would have on the preparation of the Defence and the accused's right to a fair trial. By indicating that the procedural calendar 'does not adequately accommodate the logistical and resource constraints' faced by the Defence, the Request is not raising an appealable issue, but merely expresses a disagreement with the assessment carried out by the Chamber and the extent of the notice provided.¹⁵

¹⁰ Response, ICC-01/14-01/18-2610, paras 5-10.

¹¹ Impugned Decision, ICC-01/14-01/18-2600, n. 5 referring to Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence", 15 December 2022, ICC-02/04-01/15-2023, para. 56: 'by stipulating that a trial chamber "may [...] hold a further hearing", article 76(2) allows for either a bifurcated system or the possibility of the sentence being pronounced together with the conviction decision. Although in practice, separate sentencing proceedings have been preferred, joint proceedings with one decision are also possible'.

¹² Impugned Decision, ICC-01/14-01/18-2600, n. 2 referring to *ad hoc* Presidency Decision, ICC-01/12-01/18-2596, para. 10: '[o]f course, article 76 of the Rome Statute does not exclude the possibility of article 74 and 76 decisions being handed down simultaneously, so long as all requirements for the hearing of evidence and submissions relevant to the sentence have been met, in which case the Trial Chamber will necessarily have an identical composition' and that 'in circumstances where a trial chamber decides to render the article 74 and article 76 decision simultaneously, [...] this timing of the article 74 and article 76 decisions would necessarily coincide'.

¹³ See also Response, ICC-01/14-01/18-2610, para. 7.

¹⁴ Impugned Decision, ICC-01/14-01/18-2600, para. 3.

¹⁵ See Request, ICC-01/14-01/18-2608, para. 18. See also Response, ICC-01/14-01/18-2610, paras 6, 8-9.

11. Finally, the Chamber considers the Defence's argument, that the Impugned Decision is 'in complete dissonance with Mr Ngaïssona's right to be presumed innocent' in that it gives 'the appearance that the Chamber is set to convict him',¹⁶ is based on a misunderstanding of the Impugned Decision and does not amount to an appealable issue. In this regard, the Chamber recalls that the Impugned Decision clearly stated that the procedural calendar has been set *in the event of a conviction*,¹⁷ within the applicable legal framework, as decided by the Appeals Chamber.¹⁸
12. In light of the above, the Chamber rejects the Request with regard to the First Issue.

B. The Second Issue

13. The Defence contends that the Second Issue arises from the Chamber's interpretation of the *ad hoc* Presidency Decision. Specifically, it submits that the Chamber erred in finding that the *ad hoc* Presidency Decision had any 'concrete impact' on the proceedings in this case and that it gave excessive weight to it in detriment of other considerations, namely Mr Ngaïssona's right to a fair trial, the procedural distinctions between the *Al Hassan* case and the present one, and the legality of the *ad hoc* Presidency Decision.¹⁹
14. The Prosecution submits that the Request misapprehends the Impugned Decision's findings, and that the Defence's submissions on a supposed misinterpretation of the *ad hoc* Presidency Decision, the circumstances in which it was issued, and any impact it may have on the present case are 'simply irrelevant'. The Prosecution further argues that the Defence merely disagrees with the Chamber by contending that it 'improperly balanced the interest of justice and interests of expeditiousness of retaining the same composition of the Trial Chamber'.²⁰

¹⁶ Request, ICC-01/14-01/18-2608, para. 21.

¹⁷ The Chamber notes that the Defence 'is cognisant of the careful wording of the [Impugned Decision]'. See Request, ICC-01/14-01/18-2608, n. 16.

¹⁸ Impugned Decision, ICC-01/14-01/18-2600, para. 2.

¹⁹ Request, ICC-01/14-01/18-2608, paras 27-33.

²⁰ Response, ICC-01/14-01/18-2610, paras 11-16.

15. The Chamber considers that the Defence misread the Impugned Decision when it argues that the Chamber addressed the consequences derived from the *ad hoc* Presidency Decision as a ‘certainty’ rather than a ‘possibility’.²¹ The Chamber recalls that while it noted the *ad hoc* Presidency Decision, it was guided by considerations regarding the interests of justice and expeditiousness in this case when issuing the Impugned Decision.²² In light of this, the Chamber sees no need to further address the Defence’s submissions regarding the legality of the *ad hoc* Presidency Decision. As noted above in relation to the First Issue, the Chamber, in the exercise of its discretion, gave due consideration to Mr Ngaïssona’s right to a fair trial and the potential implications of the Impugned Decision on the preparation of the Defence.
16. As to whether the Chamber provided for a ‘premature and excessive remedy in creating a scheduling order that simultaneously orders the parties to close their cases and prepare sentencing submissions’,²³ the Chamber recalls that the Impugned Decision provided several months of notice to the participants for the filing of written submissions and for the holding of the hearing under Article 76(2) of the Statute.²⁴ It further stressed that it would limit the presentation of any additional evidence, given the abundance of material on the record, so as to ensure a fair and expeditious conduct of the proceedings.²⁵ The Defence is thus merely expressing a disagreement with the Chamber’s assessment and trial management.²⁶
17. In light of the above, the Chamber rejects the Request with regard to the Second Issue.
18. Having found that neither of the two issues are appealable, it is not necessary to address the remainder of the cumulative criteria of Article 82(1)(d) of the Statute. Accordingly, the Chamber rejects the Request in its entirety.

²¹ Request, ICC-01/14-01/18-2608, para. 33.

²² Impugned Decision, ICC-01/14-01/18-2600, paras 1-2.

²³ Request, ICC-01/14-01/18-2608, paras 8, 27.

²⁴ Impugned Decision, ICC-01/14-01/18-2600, paras 9-10, p. 7.

²⁵ Impugned Decision, ICC-01/14-01/18-2600, para. 7.

²⁶ See also Response, ICC-01/14-01/18-2610, para. 15.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung	 _____ Judge Chang-ho Chung	 _____ Judge Chang-ho Chung
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Dated 2 August 2024

At The Hague, The Netherlands