

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 19 May 2023

**TRIAL CHAMBER V**

**Before:** Judge 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  
NGAISSONA**

**URGENT**

**PUBLIC**

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

**Source:** Defence of Patrice-Edouard Ngaiissona

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

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**Applicants**

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## I. INTRODUCTION

1. On 17 May 2023, the Prosecution filed the “Prosecution’s Seventh Application for Submission of Facebook Evidence from the Bar Table”, (‘Bar Table Application’) consisting of 682 Facebook conversations, spanning no less than 24 484 pages.<sup>1</sup> In doing so, the Prosecution violated once again<sup>2</sup> the “Initial Directions on the conduct of proceedings”(‘Initial Directions’)<sup>3</sup> whose express terms require that the Prosecution obtain first the opposing party’s position as to whether it consents to or opposes the information included in the bar table before submitting it before Trial Chamber V (‘the Chamber’).
2. Despite the Defence for Patrice-Edouard Ngaïssona’s (‘the Defence’) sincere efforts to engage constructively with the Prosecution, the Prosecution filed the Bar Table Application before obtaining the Defence’s views. The Defence informed the Prosecution that it would provide its views on the annex to the Bar Table Application by 26 May 2023.<sup>4</sup> Rather than waiting just a few more days, the Prosecution violated the Chamber’s Initial Directions and filed the Bar Table Application, resulting in this parallel litigation which unnecessarily takes up the Chamber and the Defence’s limited and stretched resources, and is in direct violation of the principle of judicial economy.
3. Given this is the second time the Prosecution has clearly disregarded the Chamber’s direction in this manner, coupled with the significant amount of outstanding bar table applications yet to be filed at this crucial juncture of the case, the Defence respectfully requests the Chamber to: (1) dismiss the Prosecution’s Bar Table Application *in limine* without prejudice, (2) suspend the

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<sup>1</sup> ICC-01/14-01/18-1874-Conf.

<sup>2</sup> ICC-01/14-01/18-1429.

<sup>3</sup> ICC-01/14-01/18-631, para 62.

<sup>4</sup> Email, “review of the 230317 Facebook Bar Table Annex” from : the Defence to: The Prosecution dated 20 April 2023 20:19. The Defence stands ready to provide the Chamber with the email exchange if the Chamber deems it necessary to adjudicate the present request.

deadline for the Defence to respond until the Prosecution files the Bar Table Application in accordance with the Chamber's Initial Directions, and (3) order the Prosecution to inform the Chamber, the parties and participants how many outstanding bar tables it has to file before the close of its case and their volume. Such an order would ensure the fair and expeditious conduct of the proceedings pursuant to Article 64(3)(a) of the Rome Statute, by providing the Chamber and the parties and participants with sufficient information to organize their resources to address the significant amount of bar tables that appear to be outstanding before the Prosecution can close its case.

4. The Defence files the present request urgently since the current deadline to respond to the Bar Table Application is 29 May 2023. Given this date is fast approaching, the Defence respectfully requests the Chamber to rule on the present request urgently, and to immediately suspend the deadline to respond to the Bar Table Application during the period it takes the Chamber to adjudicate the present request.

## II. APPLICABLE LAW

5. Paragraph 62 of the Initial Directions states in relevant part that, “[b]efore submitting the [bar table] application, the tendering participant *shall inquire* whether the opposing participant consents or objects and *include this information in the table*” (*emphasis added*).<sup>5</sup>
6. In its “Decision on the Second Prosecution Submission Request from the Bar Table (P-0889)”,<sup>6</sup> the Chamber reasoned that the requirement for *inter partes* consultations pursuant to paragraph 62 of the Initial Directions requires that the “tendering party should consider and provide adequate time when inquiring

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<sup>5</sup> ICC-01/14-01/18-631, para. 62.

<sup>6</sup> ICC-01/14-01/18-1429.

about the position” of the opposing party.<sup>7</sup> The Chamber further specified that the time needed for the opposing party may vary according to each request.<sup>8</sup> Moreover, the Chamber expressly directed the Prosecution to “initiate the *inter partes* consultations on intended ‘bar table’ applications sufficiently in advance before filing such requests before the Chamber”.<sup>9</sup>

### III. SUBMISSIONS

7. The Prosecution not only failed to meet the procedural requirement of paragraph 62 of the Initial Directions by filing the Bar Table Application without first obtaining the Defence’s position on the items it wishes to tender, but also directly violated the Chamber’s direction to provide adequate time for the Defence to review the annex to the Bar Table Application. This overt violation of the Chamber’s instructions constitutes a sufficient basis for the Bar Table Application to be dismissed *in limine* without prejudice to the Prosecution to file it again in full accordance with the Chamber’s Initial Directions.
8. The Defence has noted with growing concern the increasing number of bar table annexes that it has been receiving from the Prosecution in its *inter partes* exchanges. Since March of this year, the Prosecution has sent the Defence four bar table annexes,<sup>10</sup> in addition to adding and modifying a bar table annex

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<sup>7</sup> Ibid, para 10.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, para. 11.

<sup>10</sup> Email “OTP - 230308 - Annex - Bar Table Motion” from: The Prosecution to: the Defence, dated 8 March 2023 15:45; Email, “OTP -17032023- Facebook Bar Table – Annex” from: the Prosecution to: the Defence, dated 17 March 2023 at 16:40; Email “OTP - 230324 -Facebook Bar Table 2 – Annex, from: the Prosecution to: the Defence dated 24 March 2023 at 17:46; Email, “Annex of photographs to be submitted through the Bar Table”, from: the Prosecution to: the Defence dated 1 May 2023 at 9:42. The Defence stands ready to provide the Chamber with the email exchange if the Chamber deems it necessary to adjudicate the present request.

previously sent at the end of 2022.<sup>11</sup> This translates to the Prosecution filing only five bar tables in the first two years of its case,<sup>12</sup> and then asking the Defence for its position on four voluminous bar table annexes in just 10 weeks. This exponential increase in bar table requests comes precisely at a moment where the Defence is ramping up its investigative work and fine tuning its case theory in preparation of the most work intensive period, which will be the Defence's potential presentation of evidence. These bar tables span several thousand pages, and the Defence's limited resources are becoming increasingly diverted to provide its position on these annexes and/or respond to them, such that the Defence is unable to put sufficient resources into preparing the next stage of the proceedings. Therefore, the Defence requests the Chamber pursuant to Article 64(3)(a) to order the Prosecution to indicate how many more outstanding bar tables it will send to the Defence before the close of its case.

**A. The Prosecution's Bar Table Application should be dismissed *in limine* without prejudice for failure to comply with the Chamber's Initial Directions**

9. Despite the Chamber directing the Prosecution to provide the Defence with adequate time to review the prospective bar table annex, the Prosecution chose to violate this direction. This violation comprises two elements: the absence of adequate time to review the material, and proceeding with the filing without the input of the Defence.<sup>13</sup> In the Bar Table Application, the Prosecution barely

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<sup>11</sup> Email exchange, "221003 - Annex of Audio-Videos to be submitted through the Bar Table" between the Prosecution and Defence spanning from 3 October 2022 at 14:42 when the Prosecution sent its initial bar table annex to the Defence's response on 25 November 2022 at 18:00, to the Prosecution's follow up almost 5 months later on 18 April 2023 at 11:26. The Defence stands ready to provide the Chamber with the email exchange if the Chamber deems it necessary to adjudicate the present request.

<sup>12</sup> ICC-01/14-01/18-1233 dated 4 January 2022 (SGBV); ICC-01/14-01/18-1285-Conf dated 17 February 2022 (P-0889); ICC-01/14-01/18-1296 dated 1 March 2022 (CDRs); ICC-01/14-01/18-1346 dated 1 April 2022, and ICC-01/14-01/18-1450-Conf dated 9 June 2022 (Yahoo).

<sup>13</sup> See ICC-01/14-01/18-1874-Conf-Anx, where the "Defence position" column is left blank by the Prosecution.

touches upon its failure to obtain the Defence's position and suggests that the Defence refused to provide an answer to the Prosecution within eight weeks.<sup>14</sup> The Prosecution's submissions omitted several relevant facts necessary for the determination of whether such a time frame was adequate.

10. First, the items subject to the Bar Table Application are exceptionally voluminous. The 682 Facebook conversations come to a total of 24 484 pages, which if divided by the 55 days the Prosecution gave the Defence to respond, would equal 445 pages to review per day. This 55-day limitation, which was unilaterally imposed by the Prosecution, can hardly qualify as giving the Defence adequate time.
11. Second, the Prosecution omitted from its Bar Table Application to specify that the Defence had agreed in good faith to provide its views to the Prosecution despite the voluminous nature of its request by 26 May 2023.<sup>15</sup> The Prosecution does not substantiate in the slightest why it could not wait to file the Bar Table Application on 26 May 2023, after the Defence would have provided its views.
12. Third, the Prosecution equally omitted to mention that it has sent the Defence four bar table annexes<sup>16</sup> since 8 March 2023, including the bar table annex subject to the Bar Table Application. This comes to a total of 957 items to review,

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<sup>14</sup> Bar Table Application, para. 8.

<sup>15</sup> Email exchange, "review of the 230317 Facebook Bar Table Annex" from: the Defence to: the Prosecution dated 20 April 2023 at 20:19 and subsequently 5 May 2023 at 18:45. The Defence stands ready to provide the Chamber with the email exchange if the Chamber deems it necessary to adjudicate the present request.

<sup>16</sup> Email "OTP - 230308 - Annex - Bar Table Motion" from: The Prosecution to: the Defence, dated 8 March 2023 15:45; Email, "OTP -17032023- Facebook Bar Table – Annex" from: the Prosecution to: the Defence, dated 17 March 2023 at 16:40; Email "OTP - 230324 -Facebook Bar Table 2 – Annex", from: the Prosecution to: the Defence dated 24 March 2023 at 17:46; Email, "Annex of photographs to be submitted through the Bar Table", from: the Prosecution to: the Defence dated 1 May 2023 at 9:42. The Defence stands ready to provide the Chamber with the email exchange if the Chamber deems it necessary to adjudicate the present request.

totalling, according to the Defence's calculation, 26 342 pages. These 957 items do not include the 271 items subject to the "Prosecution's Sixth Application for the Submission of Evidence from the Bar Table"<sup>17</sup> which it filed before the Chamber on 15 May 2023, and to which the Defence provided its views as early as June 2022 for one of the annexes, more than one year ago.<sup>18</sup> The significant time lag between the Defence providing its views and the Prosecution subsequently filing before the Chamber requires the Defence to review the documents again. Also not included in these items, is the bar table annex, containing a total of 157 items the Prosecution sent to the Defence related to audio video evidence in the case, to which the Defence responded on 25 November 2022, and to which the Prosecution ultimately responded with its final position on 18 April 2023.<sup>19</sup> Given that the Prosecution very recently requested a page-limit extension for the submission of an 'argumentative' annex regarding a forthcoming application concerning evidence related to audio-video material,<sup>20</sup> the Defence assumes that a corresponding Bar Table application is soon to be filed which will further divert its limited resources.

13. In response to this constant stream of bar table annexes being sent by the Prosecution, the Defence, in good faith, allocated its resources to respond to them in due time. It even moved up the initial deadline it had proposed to the

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<sup>17</sup> ICC-01/14-01/18-1868-Conf.

<sup>18</sup> Email 220530 - Origins Annex, from: the Defence to : the Prosecution dated 17 June 2022 at 20:59. The Defence stands ready to provide the Chamber with the email exchange if the Chamber deems it necessary to adjudicate the present request.

<sup>19</sup> Email exchange, "221003 - Annex of Audio-Videos to be submitted through the Bar Table" between the Prosecution and Defence spanning from 3 October 2022 at 14:42 when the Prosecution sent its initial bar table annex to the Defence's response on 25 November 2022 at 18:00, to the Prosecution's follow up almost 5 months later on 18 April 2023 at 11:26. The Defence stands ready to provide the Chamber with the email exchange if the Chamber deems it necessary to adjudicate the present request

<sup>20</sup> Email from the Prosecution to the Chamber dated 8 May 2023, at 20:07. This email also included a request for a page-limit extension for the submission of an 'argumentative' annex regarding the Bar Table Application, which the Defence did not oppose. However, the Defence's decision not to oppose was based on the assumption that the Bar Table Application would be filed after the Defence would provide its position on the related annex, pursuant to paragraph 62 of the Initial Directions. Any alternative interpretation in relation thereto would be unfounded and should be disregarded.



Prosecution to responding to bar table annex related to the United Nations by one month.<sup>21</sup> The Prosecution is aware of all the aforementioned factors, namely the volume and amount of bar tables the Defence is now facing, and of its good faith efforts to diligently review all the annexes the Prosecution sends. No reasonable Prosecution under these circumstances would determine that the 8-week deadline was adequate and that the Defence's failure to comply with it by a matter of mere days would justify violating paragraph 62 of the Initial Directions. Therefore, the Defence kindly requests the Chamber to dismiss the Prosecution's Bar Table Application *in limine* without prejudice to the Prosecution submitting it once it has obtained the Defence's views. Additionally, the Defence asks the Chamber to suspend the deadline to respond to the Bar Table Application until it has adjudicated the present Defence request.

**B. The Defence requests the Chamber for orders regarding the remainder of the Prosecution's bar table applications to be filed before the close of its case**

14. Before the month of May 2023, the Prosecution filed only five bar table applications in the span of two years.<sup>22</sup> Now that the Prosecution is gearing towards the end of examining all its witnesses, it must file all the outstanding bar table motions in order to be able to close its case against Mr Ngaïssona. The Defence is surprised by the Prosecution expecting the Defence to bear the negative consequences of the Prosecution's strategic decision to file a majority of its bar table applications near the end of its case. The Prosecution should have known that in sending numerous bar table annexes in just two months at

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<sup>21</sup> Email, "OTP - 230308 - Annex - Bar Table Motion" from: the Defence to: the Prosecution dated 20 April 2023 at 20:18.

<sup>22</sup> ICC-01/14-01/18-1233 dated 4 January 2022 (SGBV); ICC-01/14-01/18-1285-Conf dated 17 February 2022 (P-0889); ICC-01/14-01/18-1296 dated 1 March 2022 (CDRs); ICC-01/14-01/18-1346 dated 1 April 2022, and ICC-01/14-01/18-1450-Conf date 9 June 2022 (Yahoo).

this critical juncture of the proceedings, the Defence would need more time to assess them, than had the Prosecution decided to space out its bar table applications over the course of the trial.

15. Nothing precluded the Prosecution from sending the annex to the Bar Table Application to the Defence earlier. Indeed, all the Facebook conversations subject to the application were duly disclosed in the last quarter of 2020. With respect to Facebook conversations specifically, the Chamber indicated as early as 1 April 2022 that unless the portions of the Facebook conversations were discussed with relevant witnesses, they should be submitted via bar table.<sup>23</sup> Thus the Prosecution knew that it would only be able to submit these conversations via bar table.

16. More generally, all the bar table annexes that the Defence has received since March 2023, could have been filed much earlier since all the items were disclosed before the start of trial, with the great majority being disclosed as early as 2020. The Defence avers that the Prosecution was under no obligation to make such applications earlier, however, it would be unfair now to put an unrealistic time constraint on the Defence to review such a large volume of documents at once because of the Prosecution's strategic choice.

17. By disregarding the Defence's position to provide its views by 26 May 2023 and filing the Bar Table Application without them, the Prosecution has demonstrated that it is unwilling to provide the Defence adequate time to respond to these numerous bar tables at this critical juncture of the near close of the Prosecution case.

18. Pursuant to Article 64(3) of the Rome Statute, the Defence respectfully requests the Chamber to intervene in this matter in order to ensure the fair and

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<sup>23</sup> Email from: the Chamber, dated 01/04/2022 at 12:19pm, Decision on Submitted Materials for P-2843.

expeditious conduct of proceedings by ordering the Prosecution to indicate how many bar table applications it intends to send the Defence, and to specify their volume. This will allow the Defence to make an assessment as to the scale of the extension it may need to respond to all of them, and to effectively plan which and how many team members will be needed to prepare all the responses.

19. Mr Ngaïssona has been in pre-trial detention for almost four and a half years, under severe restrictions, of which one and a half years were spent in almost complete isolation as a result of the COVID-19 pandemic. The Prosecution's approach, such that it overwhelms the Defence with several bar table motions at the very end of its case, hampers the Defence in its evidence review and its preparation of its potential defence case, which can prolong the length of the trial and therefore pre-trial detention. Therefore, the Defence makes this request for orders concerning bar table applications in order to ensure that it can review all the outstanding bar table applications annexes such that they do not cause any delays in the preparation of the Defence's case.

#### IV. RELIEF SOUGHT

20. The Defence respectfully requests the Chamber to:

- **DISMISS** *in limine* the Prosecution's Bar Table Application;
- **SUSPEND** the time limit to respond to the Prosecution's Bar Table Application until the Chamber has adjudicated the present request;
- **ORDER** the Prosecution to file a list of all the remaining bar tables it intends to send to the Defence and indicate their volume.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized name or set of initials.

Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 19 May 2023

At The Hague, the Netherlands.