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No. ICC-01/14-01/18

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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
NGAISSONA

Public

Decision on the Second Prosecution Submission Request from the Bar Table
(P-0889)

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 Articles 64(2) and (9), 69 and 74(2) of the Rome Statute (the ‘Statute’) and Rules 63 and 64 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Second Prosecution Submission Request from the Bar Table (P-0889)’.

I. Procedural history and submissions

1. On 17 February 2022, the Office of Prosecutor (the ‘Prosecution’) filed a request seeking the Chamber’s leave to add 21 items to its List of Evidence (the ‘List of Evidence Request’) and recognise those items as formally submitted (the ‘Submission Request’ and, jointly, the ‘Request’).¹ On the same day, the Prosecution provided the Yekatom Defence and Ngaïssona Defence (jointly, the ‘Defence’) with an annex listing the items subject to the Request to inquire as to their positions regarding the items’ submission.²
2. On 17 February 2022, noting that P-0889 was scheduled to start testifying on 8 March 2022, the Single Judge directed the participants to file responses to the Request, if any, by 24 February 2022.³
3. On 18 February 2022, following the requests from the Defence,⁴ the Single Judge suspended the response deadline to the Submission Request ‘until further notice’, noting that a ruling on the Submission Request will depend on the outcome of its decision on the List of Evidence Request.⁵
4. On 1 March 2022, the Single Judge, by email decision, *inter alia*, (i) rejected the List of Evidence Request with the exception of eight items (the ‘Added Items’),⁶

¹ Request for leave to add 21 Items to the List of Evidence and their Submission from the Bar Table, and to extend the estimated examination time for P-0889, ICC-01/14-01/18-1285-Conf (with one confidential annex, ICC-01/14-01/18-1285-Conf-Anx) (public redacted version notified on 11 March 2022, ICC-01/14-01/18-1285-Red).

² Request, ICC-01/14-01/18-1285-Red, para. 12.

³ Email from the Chamber, 17 February 2022, at 17:57.

⁴ See email from the Ngaïssona Defence, 17 February 2022, at 18:13; email from the Yekatom Defence, 17 February 2022, at 19:40. See also email from the Prosecution, 18 February 2022, at 11:04.

⁵ Email from the Chamber, 18 February 2022, at 13:41.

⁶ CAR-OTP-2131-1012; CAR-OTP-2131-5154; CAR-OTP-2131-6832; CAR-OTP-2132-7226; CAR-OTP-2132-7764; CAR-OTP-2133-2735; CAR-OTP-2133-2741; and CAR-OTP-2133-8109.

(ii) authorised the inclusion of the Added Items in the Prosecution’s list of materials for the examination of P-0889, and (iii) instructed the participants to file responses to the Submission Request with respect to the Added Items by 31 March 2022.⁷ The fully reasoned decision was issued on 4 March 2022.⁸

5. On 31 March 2022, the Yekatom Defence filed its response to the Submission Request. It withdraws its previous request to dismiss the Request *in limine*⁹ and requests that the Chamber directs ‘the Prosecution to initiate *inter partes* consultations sufficiently ahead of filing bar table applications in future’.¹⁰ It takes no position on item CAR-OTP-2131-1012 and requests that the Chamber denies specific parts of the other Added Items.¹¹
6. On the same day, the Ngaïssona Defence filed its response. It does not object to item CAR-OTP-2131-1012 and requests ‘the Chamber to accord no probative value’ to the other Added Items ‘when the Chamber conducts its holistic assessment of the evidence when deliberating its judgment’.¹²

II. Analysis

7. The Chamber notes the Defence’s argument that the Prosecution violated paragraph 62 of the ‘Initial Directions on the Conduct of the Proceedings’ (the ‘Initial Directions’)¹³ by not providing the Defence with sufficient time to review the Submission Request and give its opinion before its filing.¹⁴

⁷ Email from the Chamber, 1 March 2022, at 18:21.

⁸ Decision on the Prosecution Request to add 21 Items to its List of Evidence and Extend Examination Time for P-0889, ICC-01/14-01/18-1301-Conf (the ‘Decision on the List of Evidence Request’).

⁹ Email from Yekatom Defence, 17 February 2022, at 19:40.

¹⁰ Yekatom Defence Response to Prosecution’s Bar Table Motion of 17 February 2022, ICC-01/14-01/18-1341-Conf (with one confidential annex, ICC-01/14-01/18-1341-Conf-Anx) (the ‘Yekatom Defence Response’), paras 9, 19-20, 58.

¹¹ Yekatom Defence Response, ICC-01/14-01/18-1341-Conf, paras 2-3, 58.

¹² Defence Response to the Prosecution’s ‘Request for leave to add 21 Items to the List of Evidence and their Submission from the Bar Table, and to extend the estimated examination time for P-0889’ (ICC-01/14-01/18-1285-Conf), ICC-01/14-01/18-1342-Conf (with confidential Annex A, ICC-01/14-01/18-1342-Conf-AnxA) (public redacted version notified on 22 April 2022, ICC-01/14-01/18-1342-Red) (the ‘Ngaïssona Defence Response’), paras 6, 12-13.

¹³ Initial Directions, 26 August 2020, ICC-01/14-01/18-631.

¹⁴ Yekatom Defence Response, ICC-01/14-01/18-1341-Conf, paras 6, 20; Ngaïssona Defence Response, ICC-01/14-01/18-1342-Conf, para. 4.

8. While the Single Judge found that the Defence had sufficient time to review the Added Items for the purpose of responding to the List of Evidence Request,¹⁵ the Chamber is concerned by the Prosecution seeking to obtain the Defence's positions 'contemporaneously' with filing its Submission Request.¹⁶
9. In the Initial Directions, the Presiding Judge set out 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'.¹⁷
10. The Chamber finds 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 tendering participant should consider and provide adequate time when inquiring about the position.
11. The Chamber thus grants the request by the Yekatom Defence and directs the Prosecution to initiate the *inter partes* consultations on intended 'bar table' applications sufficiently in advance before filing such requests before the Chamber.
12. Turning to the Submission Request, the Chamber recalls the applicable law for submission of evidence from the bar table, as set out in its previous decision.¹⁸
13. The Chamber notes the participants' arguments on the relevance and probative value of the Added Items subject to the Submission Request,¹⁹ and defers its

¹⁵ Decision on the List of Evidence Request, ICC-01/14-01/18-1301-Conf, para. 15.

¹⁶ See Request, ICC-01/14-01/18-1285-Red, para. 12.

¹⁷ Initial Directions, ICC-01/14-01/18-631, para. 62.

¹⁸ Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), 12 April 2022, ICC-01/14-01/18-1359 (the 'Decision on the First Prosecution Submission Request'), paras 10-12.

¹⁹ See Yekatom Defence Response, ICC-01/14-01/18-1341-Conf; Annex to Yekatom Defence Response, ICC-1/14-01/18-1341-Conf-Anx; Annex to Ngaïssona Defence Response, ICC-01/14-01/18-1342-Conf-AnxA.

consideration of these arguments to its deliberation of the judgment pursuant to Article 74(2) of the Statute.²⁰

14. With regard to the objections to the submission of specific parts of the Added Items, the Yekatom Defence argues that the Prosecution did not establish the relevance of the Added Items in their entirety and their admission as such would prejudice Mr Yekatom's fair trial rights.²¹ It further asserts that the Facebook messages contained in the Added Items that were not put to P-0889 during his testimony are not admissible from the bar table.²²
15. The Chamber notes in this regard that it appears that the Prosecution did make submissions as to the purported relevance of each item, in its entirety, with specific examples pointed out within each message thread.²³ The Chamber considers that no 'de facto reversal of the evidentiary burden' has taken place in this context, as argued by the Yekatom Defence,²⁴ since the Prosecution has given its arguments in relation to each of the Added Items. The Defence has thereby been put on notice thereof, and has been able to provide its own arguments in response. In addition, the Chamber recalls that '[t]here is no requirement that evidence be tested with a witness in order for it to be submitted'.²⁵ Therefore, not every single Facebook message within the message threads has to have been discussed specifically with the witness for the Chamber to be in a position to assess the messages' probative value and relevance in the context of P-0889's testimony.²⁶
16. As set out in the Initial Directions and the Decision on the First Prosecution Submission Request, the Chamber, at this stage, will only consider the admissibility of items in the context of statutory exclusionary rules.²⁷ To the

²⁰ Initial Directions, ICC-01/14-01/18-631, para. 53; Decision on the First Prosecution Submission Request, ICC-01/14-01/18-1359, para. 11.

²¹ Yekatom Defence Response, ICC-01/14-01/18-1341-Conf, paras 26-34.

²² Yekatom Defence Response, ICC-01/14-01/18-1341-Conf, paras 35-55.

²³ See Annex to Request, ICC-01/14-01/18-1285-Conf-Anx, pp. 2-3, 6-8.

²⁴ See Yekatom Defence Response, ICC-01/14-01/18-1341-Conf, para. 34.

²⁵ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution's Request to Submit 1006 Items of Evidence, 28 March 2017, ICC-02/04-01/15-795, para. 15.

²⁶ *Contra* Yekatom Defence Response, ICC-01/14-01/18-1341-Conf, paras 35-55.

²⁷ Initial Directions, ICC-01/14-01/18-631, para. 54; Decision on the First Prosecution Submission Request, ICC-01/14-01/18-1359, para. 12.

extent that the Yekatom Defence's arguments relate to the relevance, probative value, and potential prejudice of the submitted evidence, the Chamber takes note of these arguments and will assess them further as part of its holistic assessment when deliberating its judgment. Thus, the Chamber rejects the Yekatom Defence's request to deny the submission of specific parts of the Added Items.

17. Having reviewed the Submission Request, there appear to be no procedural bars to the submission of the Added Items. The Chamber therefore recognises the Added Items as submitted.

FOR THESE REASONS, THE CHAMBER HEREBY

DIRECTS the Prosecution to inquire on the opposing participants' positions regarding a bar table motion sufficiently in advance before filing such a request before the Chamber;

REJECTS the request by the Yekatom Defence to deny the submission of specific parts of the Added Items;

RECOGNISES as submitted items CAR-OTP-2131-1012, CAR-OTP-2131-5154, CAR-OTP-2131-6832, CAR-OTP-2132-7226, CAR-OTP-2132-7764, CAR-OTP-2133-2735, CAR-OTP-2133-2741, CAR-OTP-2133-8109;


ORDERS the Registry to reflect that these items have been so recognised in the JEM code; and

ORDERS the Yekatom Defence to file a public redacted version of filing ICC-01/14-01/18-1341-Conf within one week of notification of this decision.

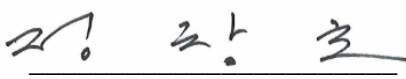
Done in both English and French, the English version being authoritative.



Judge Péter Kovács



Judge Bertram Schmitt
Presiding Judge



Judge Chang-ho Chung

Dated 24 May 2022

At The Hague, The Netherlands