

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **22 September 2022**

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***

PUBLIC

Public Redacted Version of the “Defence Response to the “Prosecution’s Request for Leave to Reply to the NGAISSONA Defence’s Response to the ‘Request for leave to add 9 items to the List of Evidence collected from [REDACTED]’” (ICC-01/14-01/18-1417-Conf), 23 May 2022”, ICC-01/14-01/18-1433-Conf, 25 May 2022

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. Trial Chamber V (“Chamber”) should reject the “Prosecution’s Request for Leave to Reply to the NGAISSONA Defence’s Response to the ‘Request for leave to add 9 items to the List of Evidence collected from [REDACTED]’” (ICC-01/14-01/18-1417-Conf) (“Request for Leave to Reply”).¹
2. *First*, contrary to regulations 23(1)(d) and 24(5) of the Regulations of the Court (“Regulations”), the Prosecution fails to substantiate its Request for Leave to Reply, namely in relation to the novelty of the purported issue and reasons why the issue could not have been reasonably anticipated by the Prosecution. This in and of itself warrants the rejection of the Request *in limine*. In any event, the purported issue identified in the Request for Leave to Reply is not new and could have been reasonably anticipated by the Prosecution. *Second*, the receipt of further submissions from the Prosecution would not assist the Chamber in its determination of the Prosecution’s “Request for leave to add 9 items to the List of Evidence collected from [REDACTED]” (“Prosecution’s Request”).

II. Procedural History

3. [REDACTED].
4. On 22 April 2022, the Prosecution disclosed to the Defence items collected from [REDACTED]² following a [REDACTED].³
5. On 6 May 2022, the Prosecution filed the Prosecution’s Request.⁴

¹ ICC-01/14-01/18-1426-Conf (“Request for leave to Reply”).

² ICC-01/14-01/18-1375.

³ OTP/CAR2/CAF-297/TL/OEA-cd. See also ICC-01/14-01/18-1394-Conf, para. 6.

⁴ ICC-01/14-01/18-1394-Conf (“Prosecution’s Request”).

6. The Defence for Mr Ngaïssona filed its response to the Prosecution's Request on 19 May 2022 ("Defence Response").⁵
7. On 23 May 2022, the Prosecution filed its Request for Leave to Reply.⁶

III. Confidentiality

8. In accordance with regulation 23bis(1) of the Regulations, this response is filed confidentially as it responds to a document of the same classification. A public redacted version will be filed as soon as practicable.

IV. Applicable Law

9. Regulation 23(1)(d) of the Regulations provides that "any document filed with the Court shall, as far as practicable, state (...) (d) All relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon".
10. Regulation 24(5) of the Regulations provides that "[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to *new issues raised in the response* which the replying participant *could not reasonably have anticipated.*" [emphasis added]

V. Submissions

11. *First*, the Prosecution provides no substantiation in support of the criteria found in regulation 24(5) of the Regulations. The Prosecution fails to provide arguments as to both the (1) novelty of the purported issue,⁷ namely the

⁵ ICC-01/14-01/18-1417-Conf ("Defence Response").

⁶ ICC-01/14-01/18-1426-Conf.

⁷ See for instance *The Prosecutor v. Bemba*, Public redacted version of "Decision on 'Defence Request for Leave to Reply to the 'Prosecution's Response to 'Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure'", [ICC-01/05-01/08-3165-Red](#), 11 December 2014, para. 5.

timeliness of the Prosecution's Request,⁸ and (2) reasons why the purported issue could not have been anticipated by the Prosecution.⁹ The Prosecution does not even mention regulation 24(5) in its Request for Leave to Reply, contrary to regulation 23(1)(d) of the Regulations.

12. Based on this lack of substantiation alone, the Request for Leave to Reply should be rejected *in limine* as unfounded.¹⁰

13. *Second*, in any event, the requirements of regulation 24(5) are not met. The purported issue identified by the Prosecution¹¹ is not "new" and could have been anticipated by the Prosecution. The issue of timeliness is not a "new" issue raised by the Defence Response and has been raised recurrently by the Defence in relation to Prosecution's requests to add items to its list of evidence after the 9 November 2020 deadline.¹²

14. The issue of timeliness could, and should, have been anticipated in a case where the Chamber expressly identified the timing of a request as a factor to be considered when deciding whether to grant a request for leave to add items to the list of evidence.¹³ Despite timeliness being a factor to anticipate, the Prosecution failed to substantiate why it could not have issued an [REDACTED].¹⁴

⁸ ICC-01/14-01/18-1426-Conf, para. 5

⁹ *The Prosecutor v. Gbagbo and Blé Goudé*, Decision on Mr Laurent Gbagbo's request for leave to reply, [ICC-02/11-01/15-284](#), 9 October 2015, para. 11.

¹⁰ In *Ntaganda*, the Appeals Chamber rejected a Defence Request for leave to reply on the basis of lack of substantiation. It held: "The Appeals Chamber notes that the Request merely points to issues arising from the Response to the Document in Support of the Appeal without demonstrating why they are new and could not reasonably have been anticipated by him. Further, the Appeals Chamber cannot discern why a reply to the said issues is otherwise necessary for the adjudication of the appeal. Accordingly, the Appeals Chamber rejects the Request for being unfounded.", *The Prosecutor v. Ntaganda*, Decision on Mr Ntaganda's request for leave to reply, [ICC-01/04-02/06-1813](#), 3 March 2017, paras. 12-13.

¹¹ ICC-01/14-01/18-1426-Conf, para. 5.

¹² See for instance: [ICC-01/14-01/18-973-Red](#), para 7; [ICC-01/14-01/18-1239-Red](#), para 6; [ICC-01/14-01/18-1293-Red](#), para 12.

¹³ ICC-01/14-01/18-989-Conf, para. 6.

¹⁴ As explained in the Defence Response (para. 10), the Prosecution has been in possession of a [REDACTED].

15. *Third*, a reply is only permitted where the Chamber will benefit from additional submissions.¹⁵ In the case at hand, the Defence fails to see how addressing point (1) (a), namely “[REDACTED]”¹⁶ would assist the Chamber in its determination of the Prosecution Request.

16. Pursuant to article 93(1) (h), State parties, in this case [REDACTED], *shall* comply with requests, including [REDACTED],¹⁷ by the Court to conduct [REDACTED] and thus the [REDACTED] were bound to do so by virtue of the Statute.

17. In addition, addressing whether the [REDACTED] were bound to conduct [REDACTED] does not, in any event, preclude the Prosecution’s Request from being untimely. The matter raised by the Defence for Mr Ngaïssona in the Defence Response is rather that a [REDACTED] was not conducted *earlier*, while information regarding the [REDACTED] had become available in 2020.¹⁸

18. Thus, further submissions addressing point (1) (a) and point (1) (b), inherently linked to point (a), are purposeless and as such not necessary to assist the Chamber in its determination of the Prosecution’s Request. Indeed, the Chamber is well positioned to decide on the Prosecution’s Request, having received detailed submissions from the Prosecution and from both Defence teams.

¹⁵ *The Prosecution v. Gbagbo*, Decision on requests for leave to reply to Defence response ICC-02/11-01/11-765, [ICC-02/11-01/11-775](#), 20 February 2015, para. 7; *The Prosecution v. Bemba*, Decision on "Defence Request for a Hearing and for Leave to Reply to the Prosecution Response to Defence Request for Relief for Abuse of Process", [ICC-01/05-01/08-3233](#), 19 January 2015, para. 10

¹⁶ ICC-01/14-01/18-1426-Conf, para. 5 (1) (a).

¹⁷ *The Prosecutor v. Kenyatta*, Decision on Prosecution’s Applications for a Finding of Non-Compliance Pursuant to Article 87(7) and for Adjournment of the Provisional Trial Date, [ICC-01/09-02/11-908](#), 31 March 2014, at paras. 24 and 33.

¹⁸ As explained in the Defence Response (para. 10), the Prosecution has been in possession of a [REDACTED].

19. *Fourth*, a reply “may not be used to strengthen the arguments previously advanced”.¹⁹ Granting leave to reply to the Prosecution in the present circumstances would only give it another chance to supplement its defective Request.

VI. Relief Sought

20. The Defence respectfully requests the Chamber to:

- a. **REJECT** the Request for Leave to Reply.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 22 September 2022,
At The Hague, the Netherlands.

¹⁹ *The Prosecutor v. Ngudjolo*, Decision on the request by Counsel for Mathieu Ngudjolo for leave to reply, [ICC-01/04-02/12-296-tENG](#), paras. 6-7.