

**Cour
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**International
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Court**



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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-ÉDOUARD NGAÏSSONA**

Confidential

Common Legal Representatives' Joint Response to the "Yekatom Defence Request for Leave to Reply to the 'Common Legal Representatives' Joint Response to the "Defence Request for Further Directions on the 'Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant' (ICC-01/14- 01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)""

Source: Common Legal Representatives of Victims

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

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I. INTRODUCTION

1. The Common Legal Representatives of the Victims of Other Crimes and the Common Legal Representative of the Victims Former Child Soldiers (together the "CLRV") hereby file their joint response to the "Yekatom Defence's Request for Leave to Reply (the "Request to Reply")¹ to the 'CLRV's Joint Response to the Ngaïssona Defence's Request for Further Directions on the Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant'" (the "Response").²

2. The CLRV submit that the Request to Reply should be dismissed *in limine*. The Defence for Mr Yekatom (the "Defence") - being one of the responding participants - is not entitled under regulation 24(5) of the Regulations of the Court (the "Regulations") to request leave to reply. Indeed, the purpose of said provision is to only allow the participant who originally filed an application to address new issues raised in a response which could not reasonably have anticipated. Allowing one of the responding participants to raise further contentions in a reply will harm the fair and ordinary conduct of the debates. It will in fact create a situation of imbalance in which the Defence is both responding and replying participant. The Defence would essentially be given a double opportunity to substantiate its arguments, while the other participants would be in fact deprived of any opportunity to address those new contentions.

¹ See the "Yekatom Defence Request for Leave to Reply to the 'Common Legal Representatives' Joint Response to the 'Defence Request for Further Directions on the 'Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant' (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)'" , [No. ICC-01/14-01/18-1654-Conf](#), 4 November 2022 (the "Request to Reply").

² See the "Common Legal Representatives' Joint Response to the 'Defence Request for Further Directions on the 'Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant' (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)'" , [No. ICC-01/14-01/18-1642-Conf](#), 31 October 2022 (the "Response").

3. Should the Chamber permit otherwise, the CLRV submit that the Request to Reply should be dismissed as the Defence does not demonstrate that the Response raises new issues which it could not reasonably have anticipated.

4. In fact, the issue identified in the Request to Reply pertains to *inter partes* communications about the Defence's contacts with victims represented by the CLRV. The latter did not refer to said communications in their response. The Defence was aware of the CLRV's position in this regard and had an opportunity to address the matter in its response, but failed to do so. The mere disagreement with the CLRV's position is insufficient to allow the Defence to remedy shortcomings in its previous submissions.

5. In any case, the only *inter partes* communications between the Defence and the CLRV concern contacts with potential and participating victims in the case. As such, they are not relevant to the request for further directions before the Chamber for contacts regulated by the Protocol on the Handling of Confidential Information and Contacts with Witnesses (the "Protocol").³ Said instances are indeed regulated by the Code of Professional Conduct for Counsel and by the Protocol on Dual Status Individuals.

6. In these circumstances, the Request to Reply should be dismissed. If, nevertheless, the Chamber were to grant it, as a matter of fairness, the CLRV respectfully request to be given an opportunity to present observations on the new arguments eventually raised by the Defence.

³ See the "Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses" (Pre-Trial Chamber II), [No. ICC-01/14-01/18-156](#) and No. [ICC-01/14-01/18-156-AnxA](#), 22 March 2019 (the "Protocol").

II. PROCEDURAL BACKGROUND

7. On 22 March 2019, Trial Chamber V (the "Chamber") issued the Protocol.⁴

8. On 8 October 2020, the Chamber issued, *inter alia*, the Protocol on Mechanisms for exchange of information on individuals enjoying dual status (the "Protocol on Dual Status Individuals").⁵

9. On 13 October 2022, the Ngaïssona Defence sought via an email the Chamber's guidance as to the scope of paragraph 27 of the Protocol.⁶ On 14 October 2022, the Chamber by e-mail instructed the Defence to submit its request by way of formal filing.⁷

10. On 19 October 2022, the Ngaïssona Defence filed the Request for Further Directions on the Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant (the "Ngaïssona's Request for Further Directions").⁸

11. On 31 October 2022, the CLRV filed Response.⁹

12. On 2 November 2022, the Yekatom Defence filed its response to the Ngaïssona's Request for Further Directions (the "Defence Response").¹⁰

⁴ *Ibid.*

⁵ See the "Decision on Protocols at Trial" (Trial Chamber IX), [No. ICC-01/14-01/18-677 – Anx2](#), 8 October 2022 (the "Protocol on Dual Status Individuals").

⁶ See the Email correspondence from the Defence to the Chamber dated 13 October 2022 at 11:03.

⁷ See the Email correspondence from the Chamber to the Defence dated 14 October 2022 at 16:38.

⁸ See the "Defence Request for Further Directions on the "Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant" (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677- Anx5)", [No. ICC-01/14-01/18-1623-Conf](#), 19 October 2022 (the "Ngaïssona's Request for Further Directions").

⁹ See the Response, *supra* note 2.

¹⁰ See the "Confidential Redacted Version of 'Yekatom Defence Response to Ngaïssona "Defence Request for Further Directions on the 'Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant' (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)";", [No. ICC-01/14-01/18-1643-Conf-Red](#), 2 November 2022 (the "Defence Response").

13. On 4 November 2022, the Yekatom Defence filed the Request to Reply.¹¹

III. LEVEL OF CLASSIFICATION

14. Pursuant to regulation 23bis (1) and (2) of the Regulations, the present submission is filed confidentially following the classification chosen by the Defence. However, the CLRV inform the Chamber that the submission can be reclassified as public.

IV. SUBMISSIONS

1. The Request to Reply should be dismissed *in limine*

15. At the outset, the CLRV submit that the Request to Reply should be dismissed *in limine*. In the litigation at hand, the Defence is one of the responding participants and as such it should not be entitled to request leave to reply under regulation 24(5) of the Regulations. In accordance with said provision, “[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”. Thus, regulation 24 provides that the participant who originally initiated a litigation may be allowed by the Chamber to provide additional arguments in the form of a reply, when the responding participant raises new issues which were unforeseeable at the time of the original submission.

16. In the present instance, the Defence is not the initiator of the litigation but one of the respondents. Allowing one responding participant to raise further contentions in the form of a reply, will create a situation of imbalance in which the Defence is both responding and replying participant. The Defence would essentially be given a double opportunity to substantiate its arguments, while the other participants would be in

¹¹ See the Request to Reply, *supra* note 1.

fact deprived of a chance to address those new contentions, thereby harming the fair and ordinary conduct of the debates.

17. Moreover, the Defence is seeking to present new arguments on a topic that was not addressed neither in the original Request from the Defence for Mr Ngaïssona nor in the CRLV Response thereto. Accordingly, by seeking leave to Reply, the Defence merely attempts to respond to the CLRV Response. Yet, regulation 24(4) of the Regulations clarifies that “[a] response referred to in sub-regulations 1 to 3 may not be filed to any document which is itself a response or reply”.

18. In any event, should the Chamber be minded to consider the merits of the Request to Reply, the CLRV submit the following arguments.

2. The Defence does not identify new issues raised in the CLRV Response

19. The CLRV submit that the Request to Reply should be dismissed as the Defence does not demonstrate that the Response raises new issues which it could not have reasonably anticipated. The CLRV underline that leave to reply should not be granted to a participant that merely points to issues arising from a response, without adequately demonstrating why such issues are new and could not reasonably have been anticipated.¹² In fact, failing to explain *why* a reply to the identified issues is otherwise warranted is not sufficient in itself for a participant to be granted leave.¹³ By the same token, a mere disagreement with a response does not warrant granting leave to reply.¹⁴

20. In the Request to Reply, the Defence argues that (i) it “*could not have reasonably anticipated that the CLRV would take a position which appears to be at odds to inter partes communications between the Defence and the CLRV regarding the modus operandi to be*

¹² See the “Decision on Mr Ntaganda’s request for leave to reply” (Appeals Chamber), [No. ICC-01/04-02/06-1994 OA6](#), 17 July 2017, para. 13.

¹³ *Idem*, para. 14.

¹⁴ *Idem*, para. 13.

adopted by the Defence in field investigations",¹⁵ and (ii) it "*would provide a limited argumentation based on inter partes communications and an annex including the relevant emails between the Defence and the CLRV on field investigations conducted by the Defence*".¹⁶

21. In this regard, the CLRV submit that the issue identified in the Request to Reply is not "*new*" within the meaning of regulation 24(5) of the Regulations. In their Response, the CLRV did not refer to any email exchanges. Similarly, the CLRV did not raise in their submissions a new and distinct issue of law or requested a relief outside the normal scope of a response.¹⁷ Even assuming *arguendo* that this is a "*new*" issue, the Defence could reasonably have anticipated it, since it relates to the Defence field investigations and arguably stems from *inter partes* communications and emails between the CLRV and the Defence.

22. In fact, the Defence already presented extensive submissions on its *modus operandi* in field investigations and referred in particular to several examples of its contact with potential Prosecution witnesses and subsequent *inter partes* communications.¹⁸ At that point in time, the Defence had an opportunity to also refer to any exchanges with the CLRV "*to highlight the vulnerable situation in which the Defence is placed*",¹⁹ but failed to do so. The mere disagreement with the CLRV's position is therefore insufficient to allow the Defence to remedy shortcomings in its previous submissions.

23. In any case, the communications to which the Defence is referring to are not relevant to the Ngaïssona's Request for Further Directions. In particular, the Defence seems to conflate the status of potential witnesses with the one of potential and or participating victims of the case. By doing so, the Defence tries admittedly to reinforce

¹⁵ See the Request to Reply, *supra* note 1, para. 4.

¹⁶ *Idem*, para. 5.

¹⁷ See the "Decision regarding confidential material in the Lubanga case" (Trial Chamber VI), [No. ICC-01/04-02/06-1063](#), 18 December 2015, para. 10.

¹⁸ See the Defence Response, *supra* note 10, paras. 9-22.

¹⁹ See the Request to Reply, *supra* note 1, para. 5.

her arguments challenging the Prosecution's approach to paragraph 27 of the Protocol.²⁰

24. Indeed, said communications concern contact by the Defence with victims who are represented or could be potentially represented by the CLRV. Said contacts are not regulated by paragraph 27 of the Protocol. Instead, the Defence's contact with potential participating victims is regulated by the Protocol on Dual Status Individuals,²¹ and its contact with participating victims – other than dual status ones – is regulated by article 28 of the Code of Professional Conduct for Counsel,²² regardless of whether any of them is intended to be called as witness.

25. In these circumstances, the CLRV posit that granting the Request to Reply would be unfair to the extent that the latter would not be able to respond to any new arguments eventually made by the Defence stemming from said email exchange.²³ At the time of filing its response to the Ngaïssona's Request for Further Directions, the Defence was aware of the CLRV's position concerning the Defence's contact with their clients. The Defence chose not to refer to said *inter partes* communications in its response. As a matter of fairness, the Defence should not have a second chance to do so now and eventually strengthen the arguments presented in its submissions.²⁴

26. If, nevertheless, the Chamber were to decide to grant the Request to Reply, the CLRV respectfully request to be given an opportunity to address the new arguments eventually raised by the Defence.

²⁰ *Ibid.*

²¹ See the Protocol on Dual Status Individuals, *supra* note 5, para. 5.a (“When a party wishes to contact an individual with dual status, it shall provide notice as soon as possible of this to the legal representative, when it is aware the person has legal representation”).

²² See the Code of Professional Conduct for counsel, [No. ICC-ASP/4/Res.1](#), article 28 (“Counsel shall not address directly the client of another counsel except through or with the permission of that counsel”).

²³ See regulation 24(4) of the Regulations of the Court.

²⁴ See the “Decision on the ‘Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of amici Lawyers for Justice in Libya and Redress Trust (filing 654)’, and other related matters” (Pre-Trial Chamber I), [No. ICC-01/11-01/11-659](#), 24 October 2018, para. 14.

V. CONCLUSIONS

27. For the foregoing reasons, the CLRV respectfully request the Chamber to dismiss the Request to Reply *in limine*.

28. Should the Chamber decide to entertain the Request to Reply, the CLRV respectfully request the Chamber to reject it on its merits. Should the Chamber grant the Request to Reply, the CLRV respectfully request to be authorised to file further observations on the new issues eventually raised by the Defence.

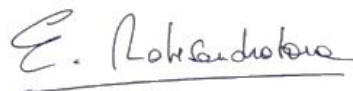


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Dated this 9th day of November 2022

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle (France) and Saint Louis (Senegal)