

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **1 June 2020**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Defence Response to the “Prosecution Request for Leave to Reply to “Defence Response to Prosecution’s ‘Request for Leave to Appeal the Decision on the Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges’” (ICC-01/14-01/18-534)

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. The Defence of Mr Ngaïssona (the “Defence”) opposes the “Prosecution Request for Leave to Reply to “Defence Response to Prosecution’s ‘Request for Leave to Appeal the Decision on the Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges’” dated 27 May 2020 (the “Request”).¹
2. Despite Pre-Trial Chamber II (“Chamber”) having very recently expressly reminded the Prosecution that regulation 24(5) of the Regulations of the Court (“Regulations”) does not allow for substantive submissions to be made in requests for leave to reply,² the Prosecution once again failed to comply with this regulation for both alleged issues presented.³ The Prosecution did in fact already reply without having waited for the Chamber’s authorisation. On this basis alone, the Request should be dismissed and the arguments advanced disregarded.
3. Secondly, allowing further submissions on the issues would not assist the Chamber in determining whether the Prosecution should be granted leave to appeal the decision on the Prosecution’s request to amend the charges against Mr Ngaïssona. Rather, it would create further inconsistencies with principles of judicial economy, in light of the overall time that the discussions on this discrete matter has already taken so far, due to the number of additional requests made by the Prosecution.⁴ Also, both issues developed in the Request

¹ ICC-01/14-01/18-534.

² ICC-01/14-01/18-517, para. 13.

³ See Request, paras 5-6.

⁴ ICC-01/14-01/18-480-Red-Corr; ICC-01/14-01/18-524; ICC-01/14-01/18-534.

merely consist of further submissions on points which have already been raised and that the Prosecution could have anticipated.

II. Submissions

4. The Prosecution's first issue is not a new issue raised in the Defence's response which the Prosecution could not have anticipated. In fact, it touches upon the very essence of the original matter at stake, *i.e.* whether the Prosecution provided sound justification for requesting an amendment / addition of the charges against Mr Ngaïssona after the confirmation of charges, which has already been debated at length and decided upon. In the decision on the Prosecution's request to amend charges (the "Decision"),⁵ the Chamber noted that "only when [the risk that the evidence would be found inadequate] materialized was the decision made to proceed with additional investigative steps which would allow the gathering of better evidence".⁶ This issue was therefore addressed in the Decision and is not new.
5. The Prosecution's current attempt to supplement the earlier submissions it made in its request to amend charges ("Original Request")⁷ by referring to this very general statement it made in June 2019 on the alleged continuation of investigations in relation to "the commission of sexual and gender-based crimes ("SGBC") in the provinces", without the slightest reference to any efforts made to interview the alleged victim of rape object of the Original Request, makes the lack of proper justification to add this new charge even more apparent. Also, it indirectly circumvents the decision of the Chamber not to allow any reply from the Prosecution on the response of the Defence to the Original Request.⁸

⁵ ICC-01/14-01/18-517.

⁶ Decision, para. 31.

⁷ ICC-01/14-01/18-468-Red.

⁸ Decision, para. 13.

6. Finally, the Defence wonders who could be better placed than the Chamber itself to determine whether it did or did not, *inter alia*, rely upon the timely conduct of the Prosecution's investigations to issue the Decision. In any case, the authorization of a reply on this issue would not assist the Chamber in determining whether the Prosecution raised any appealable questions.
7. The Prosecution's second issue is not a new issue raised by the Defence in its response either. The question of the applicability of article 61(8) was raised by the Prosecution in its request for leave to appeal the Decision ("Request for Leave to Appeal"), not by the Defence.⁹ The Prosecution argues that article 61(8) applies whereas the Defence argues in response that it does not. The Prosecution fails to substantiate why it could not have anticipated such a mirroring response from the Defence. It is again an attempt from the Prosecution to further develop initial submissions, this time in regard to those made in the Request for Leave to Appeal. It even seems that the Prosecution is not only elaborating on previous submissions but making totally different ones, suggesting that it is the Chamber's decision to requalify the relevant factual allegation as a new charge that triggered the applicability of article 61(8)¹⁰ while no such statement was made in the Request for Leave to Appeal. To the contrary, the Request for Leave to Appeal made it quite clear that the purported second issue related to the re-introduction of factual allegations "either as an amended or an additional charge" and that therefore article 61(8) would be applicable to any factual allegation sought to be re-introduced, whether as a mere amendment or as a new charge.¹¹
8. In any event, a reply on this alleged issue would not assist the Chamber in making a decision on the Request for Leave to Appeal. First, the Chamber is

⁹ ICC-01/14-01/18-524, paras 31-33.

¹⁰ Request, para. 6.

¹¹ Request for Leave to Appeal, para. 27. *See also* Request for Leave to Appeal, paras 31-33.

very well placed to assess for itself whether article 61(8) is applicable or not should it find the answer to this question relevant to determine whether or not the second question in the Request for Leave to Appeal constitutes an appealable issue. Second, it is already presuming that the Chamber, in its Decision, would have generally precluded the Prosecution from re-introducing non-confirmed factual allegations. As submitted by the Defence in its response, this does not arise out of the Decision. Therefore, a reply on this issue should be rejected.

9. As a side note, by stating that “[w]hile the Prosecution considered that a “charge” (and a “count”) may be based on more than a factual criminal allegation, the Chamber deemed the incident involving the second victim of rape to be a self-standing “charge””, the Prosecution confirms the Defence’s position that the Request for Leave to Appeal is motivated by a mere disagreement of the Prosecution on the legal findings of the Chamber.¹²
10. In conclusion, since both issues upon which the Prosecution seeks leave to reply fall outside the permissible scope of a reply under regulations 24(4) and 24(5) of the Regulations, the Chamber should reject the Request.

RELIEF SOUGHT

In light of the foregoing, the Defence respectfully requests the Chamber to:

- **REJECT** the Prosecution’s Request.

Respectfully submitted,

¹² Request, para. 6.



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this
1 June 2020
At The Hague, the Netherlands