

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **12 November 2020**

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

**Public Redacted Version of “Defence Response to ‘Prosecution’s Request for
Summary Dismissal of the Nguissona Defence’s
Response to the Prosecution’s Submissions
on the Scope of the Charges (ICC-01/14-01/18-650-Conf)’ ICC-01/14-01/18-667-Conf,
25 September 2020”**

Source: Defence of Patrice-Edouard Nguissona

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
Ms Lauriane Vandeler

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis

Legal Representatives of the Victims

Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Paddy Craig

Victims Participation and Reparations Section Other

I. Introduction

1. The Defence for Mr Ngaïssona (“Defence”) hereby responds to the request (“Request”)¹ of the Office of the Prosecutor (“Prosecution”) to summarily dismiss the “Defence Response to “Prosecution’s Submissions on the ‘Scope of the Charges’, ICC-01/14-01/18-640”” (“Response”).²

II. Confidentiality

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), this Response is filed as “Confidential”, as it responds to a filing of the same classification.

III. Applicable Law

3. Pursuant to regulation 24(1) of the RoC, “[t]he Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber”.

IV. Submissions

4. The Response did not violate the 31 August 2020 deadline fixed by Trial Chamber V (“Chamber”) in the order it issued during the 9 July 2020 Status Conference,³ as the purpose of the Response was not to *raise* remaining issues

¹ ICC-01/14-01/18-654-Conf.

² ICC-01/14-01/18-650-Conf.

³ Transcript of 9 July 2020, ICC-01/14-01/18-T-012-ENG ET, page 63, lines 12-22 (“9 July 2020 Order”).

in relation to the charges but simply to *respond* to the issues that were raised in the “Prosecution’s Submissions on the ‘Scope of the Charges’” (“Prosecution’s Submissions”).⁴

5. The full 9 July 2020 Order reads as follows:

The Chamber will therefore defer to the PTC II's findings. Nonetheless, insofar as there are uncertainties, mere uncertainties as to the interpretation of the confirmation decision, the Chamber wants these matters to be settled as soon as possible, and certainly before trial starts, and does not want to be followed by this as a result -- as a recurring theme throughout the whole trial. It is of the utmost importance that the accused fully understands the scope of the charges and that all parties and participants can properly prepare for trial. It is therefore in the interests of everyone to resolve any uncertainties about the charges at this juncture, as far it is possible to do so for this Chamber. Consequently, the Chamber sets 31 August 2020 as the final deadline to raise any remaining issues in relation to the charges. Thereafter the Chamber will not hear any more motions on this matter.

6. The Defence understood this order as setting a deadline to the effect of raising any remaining issues in relation to the charges *in so far as* there remained any unraised uncertainties as to the interpretation of the confirmation decision, so the Chamber could make any necessary clarification ahead of the beginning of trial. In addition, while all parties could make submissions, the Defence understood this order to have been more specifically for the benefit of Mr Ngaïssona and Mr Yekatom in line with their right to fully understand the scope of the charges.

7. The Defence having raised all of its most important issues in relation to the scope of charges and the interpretation of the Confirmation Decision in former submissions, it took the view that the Chamber had a sufficiently good overview of the Defence’s position on this matter to be able to make all necessary clarifications as it deemed fit. The Defence therefore decided not to

⁴ ICC-01/14-01/18-640.

raise any additional issues in relation to the scope of the charges. Had the Defence felt the need to do so, it would have, without any need to “skirt” the 9 July 2020 Order as quite offensively and erroneously put by the Prosecution.⁵

8. It is noteworthy that the Prosecution, by contrast, decided to make submissions by the 31 August 2020 deadline, despite reaffirming in its Submissions, in its most assertive tone, and as early as its introductory paragraphs, that “[t]he confirmed charges against YEKATOM and NGAISSONA [were] sufficiently specific”, that “[t]he Confirmation Decision identifie[d] the factual allegations underlying the charges with sufficient clarity and detail” and that “[t]he Accused [were] adequately informed of the nature, cause, and content of the charges pursuant to article 67(1)(a)”.⁶ The Defence submits that if any party circumvented the 9 July 2020 Order, it is the Prosecution, by merely: (i) repeating the same arguments as it made in former submissions⁷ or (ii) responding to former Defence arguments,⁸ rather than raising any additional issues it wished to seek clarity on from the Chamber in relation to the charges, which it made clear was not necessary since in the Prosecution’s view, the interpretation of the Confirmation Decision was clear.
9. Independently of the possibility offered by the Chamber to the Defence (and other parties) to make additional submissions in relation to the scope of the charges by 31 August 2020, the Defence, as a party to this case, retained the right to respond to the Prosecution’s Submissions as it would to any document filed by any participant in the case, pursuant to regulation 24(1) of the RoC.

⁵ Request, para. 6.

⁶ Prosecution’s Submissions, para. 2.

⁷ See ICC-01/14-01/18-488-Conf, ICC-01/14-01/18-528, Transcript of 9 July 2020, ICC-01/14-01/18-T-012-ENG ET, pages 40-41.

⁸ See Prosecution’s Submissions, Sections B. and C.

10. The only reason the Response might appear to the Prosecution as a rehearsal or a continuation of previous submissions is that the Prosecution, in its Submissions, chose to raise once again many points that had been previously addressed, to which the Defence then responded to, as it is entitled to.⁹ The Prosecution made the choice of focusing its submissions for the most part on past debates that had already been discussed at length. The Defence should however not be precluded from responding to the Prosecution's Submissions simply because of the Prosecution's questionable choice of relitigating certain matters.

11. Contrary to the Prosecution's Submissions, the 9 July 2020 Order did not generally "preclude submissions on the scope of the charges beyond 31 August 2020",¹⁰ but informed the parties and participants that the Chamber would not thereafter hear any more *motions* on the matter.¹¹ The submissions of the Defence in the Response were undoubtedly responsive in nature. The Defence responded to literally all or almost all arguments addressed in the Prosecution's Submissions, as the numerous references to them in the Response demonstrate.¹² The presence of one occurrence of the word 'request' in a response does not automatically change the nature of the submissions, from a response to a motion.¹³ Since the core debate relates to the scope of the charges, and more specifically what should be included in it or excluded from it based on the Confirmation Decision, it is only logical that the Response

⁹ Request, paras 2, 6.

¹⁰ Request, III.A.i., page 3.

¹¹ 9 July 2020 Order.

¹² See the number of times in the Response the Defence cites paragraph numbers from the Prosecution's Submissions or the exact same jurisprudence cited in the Prosecution's Submissions.

¹³ Request, para. 9.

expresses the Defence's position as to that scope. It does not mean that the Response was a *de facto* motion or that it was hiding its true nature.¹⁴

12. The Defence finds it surprising and unreasonable that on the one hand the Prosecution argues that the Defence was not permitted to respond to its Submissions but that on the other hand, the Prosecution would have considered itself entitled to respond to any Defence's submissions on the scope of the charges, had the Defence decided to make any by 31 August 2020. Indeed, the Prosecution's Submissions specify at the outset that: "[g]iven the timing of the Parties' and Participant's prospective submissions as directed, the Prosecution reserves its right to respond to the Defence's submissions, insofar as this Submission may not fully anticipate the Defence's arguments".¹⁵

13. The Defence recalls a similar situation in the present case where the Chamber had invited all parties and participants to provide submissions by a certain date, without any mention that responses would be precluded. This was the Chamber's order dated 19 March 2020 scheduling the first status conference (as initially planned) and seeking submissions from the parties on the potential agenda items by 8 April 2020.¹⁶ Not only did the Prosecution make submissions on the matter on 8 April 2020 as did all the other parties and participants, but it also *responded*, on 20 April 2020, to the Defence's 8 April submissions, including on the question of the scope of the charges.¹⁷ If one were to follow the Prosecution's logic, the Prosecution did not have that right,

¹⁴ Request, paras 9-10.

¹⁵ Request, para. 6.

¹⁶ ICC-01/14-01/18-459.

¹⁷ ICC-01/14-01/18-488-Conf. The Defence also notes in passing the relief section of this 'response', *requesting* a specific relief from the Chamber. *See* ICC-01/14-01/18-488-Conf, para. 34.

as a specific deadline for all parties and participants had been set by the Chamber.¹⁸

14. The TC V [REDACTED] should be distinguished from the circumstances here.¹⁹ [REDACTED].²⁰ [REDACTED].²¹ The 9 July 2020 Order did not make such a specific mention. As the Prosecution concedes itself, “[n]o provision was made for the Parties’ and Participants’ responses”.²² There was no specific order from the Chamber preventing the Defence to respond, as it is generally its right, to any document filed by any participant in the case. The Defence submits that regulation 24(1) applies the same way as it did in the context of the 20 April 2020 response of the Prosecution to the Defence’s 8 April 2020 submissions.²³

15. As regards the challenges made by the Defence for Mr Ongwen concerning the formulation of the charges in the Confirmation Decision,²⁴ they have been dismissed *in limine* because the Defence had not given any reasonable explanations as to why it had raised these challenges over *two years* after the commencement of trial, in violation of rule 134(2) of the Rules of Procedure and Evidence. This analogy with the timeliness of the Defence’s Response notified within the required time limit of 10 days, is not reasonable and should be ignored.

16. In light of the above, the Defence opposes the Prosecution’s Request for summary dismissal of its Response.

¹⁸ See, for instance, Request, para. 12.

¹⁹ Request, footnote 13.

²⁰ [REDACTED].

²¹ [REDACTED].

²² Request, para. 4.

²³ See the Defence’s developments above.

²⁴ See Request, footnote 12, referring to ICC-02/04-01/15-1476, para. 24.

Respectfully submitted on 12 November 2020,

A handwritten signature in dark ink, appearing to be a stylized 'N' or similar character, located below the date of submission.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

At The Hague, the Netherlands.