

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 01 March 2021

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 Consolidated Request for Leave to Reply to the YEKATOM and NGAISSONA Defence’s Responses to the Prosecution’s Fourth and Fifth Request for the Formal Submissions of Prior Recorded Testimony pursuant to Rule 68(2)(b), (ICC-01/14-01/18-823-Conf) (ICC-01/14-01/18-826-Conf)’”, 21 January 2021

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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**Unrepresented
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I. Introduction

1. Trial Chamber V (“Chamber”) should reject the “Prosecution’s Consolidated Request for Leave to Reply to the YEKATOM and NGAISSONA Defence’s Responses to the Prosecution’s Fourth and Fifth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b), (ICC-01/14-01/18-823-Conf) (ICC-01/14-01/18-826-Conf)” (“Request”).¹
2. *First*, contrary to regulations 24(5) and 23(1)(d) of the Regulations of the Court (“Regulations”), the Prosecution fails to substantiate its Request, namely in relation to the novelty of the purported issues and reasons why the issues 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 issues identified in the Request are 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 Fourth and Fifth Requests.

II. Procedural History

3. On 22 December 2020, the Prosecution filed its Fourth and Fifth Requests for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b), requesting the formal submission of the prior recorded testimony of a total of 16 witnesses and their associated exhibits.²
4. On the same day, the Chamber ordered that any responses to the Prosecution’s Fourth and Fifth Requests shall be filed by 15 January 2021.³

¹ ICC-01/14-01/18-836-Conf (“Prosecution’s Request”).

² ICC-01/14-01/18-794-Conf and ICC-01/14-01/18-795-Conf.

³ Email from Trial Chamber V to parties and participants, 22 December 2020, at 13:55.

5. The Defence for Mr Ngaïssona filed its consolidated response to the Fourth and Fifth Requests on 15 January 2021 (“Defence Response”).⁴ The Defence for Mr Yekatom filed its consolidated response to the Fourth and Fifth Requests on the same day.⁵
6. On 19 January 2021, the Prosecution filed its Request.⁶

III. Confidentiality

7. In accordance with regulation 23*bis*(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

8. 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]
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”.

V. Submissions

10. The granting of leave to reply is a discretionary decision. As recently held by the Appeals Chamber:

⁴ ICC-01/14-01/18-826-Conf.

⁵ ICC-01/14-01/18-823-Conf.

⁶ ICC-01/14-01/18-836-Conf.

The Appeals Chamber notes that the granting of leave to reply is a discretionary decision. Regulation 24(5) of the Regulations of the Court provides that '[u]nless 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, the Appeals Chamber would consider granting a request for leave to reply if these conditions are met, unless it considers that a reply would otherwise be necessary for the adjudication of the appeal.⁷

11. *First*, the Prosecution provides virtually no substantiation in support of the criteria found in regulation 24(5) of the Regulations, namely, to support the (1) novelty of the purported issues,⁸ and (2) reasons why the purported issues could not have been anticipated by the Prosecution.⁹ The Prosecution does not even evoke regulation 24(5) in its Request, contrary to regulation 23(1)(d) of the Regulations.

12. Based on this lack of substantiation alone, the Prosecution's Request should be rejected *in limine* as unfounded.¹⁰

13. *Second*, in any event, the requirements of regulation 24(5) have not been met. *First*, the purported issues identified by the Prosecution¹¹ are not "new" and they could have been anticipated by the Prosecution; they all relate to the criteria for submitting prior recorded witness testimony pursuant to rule 68(2)(b), which are settled in the jurisprudence of the Court. Moreover, they

⁷ ICC-01/14-01/18-799, para. 8.

⁸ See for instance *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.

⁹ *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 *Prosecutor v. 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.", *Prosecutor v. Ntaganda*, Decision on Mr Ntaganda's request for leave to reply, ICC-01/04-02/06-1813, 3 March 2017, para. 12.

¹¹ [REDACTED], Prosecution Request, para. 5.

could have been anticipated by the Prosecution. Granting leave to reply to the Prosecution in the present circumstances would only give it one more chance to supplement its previous submissions, which are already thorough. In addition, good cause does not exist which may warrant the granting of the Prosecution's Request.¹²

14. *Third*, further submissions on the Prosecution's part are not necessary to assist the Chamber in its determination of the Prosecution's requests to submit prior recorded testimony.¹³ The Chamber is well positioned to decide on the Prosecution's Fourth and Fifth Requests, as well as the Prosecution's other rule 68(2)(b) requests, having received detailed submissions from the Prosecution and from both Defence teams.

VI. Relief Sought

15. The Defence respectfully requests the Chamber to:

- a. **REJECT** the Prosecution's Request.

Respectfully submitted,



¹² *Prosecutor v. Ongwen*, Decision on the "Prosecution application under regulation 24(5) for leave to reply", ICC-02/04-01/15-252, 17 June 2015, page 3.

¹³ See *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Decision sur la demande de mise en liberte provisoire de Thomas Lubanga Dyilo, ICC-01/04-01/06-824, 13 February 2007, para. 67.

Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 01 March 2021,

At The Hague, the Netherlands.