

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **10 November 2021**

TRIAL CHAMBER V

Before:

**Judge Bertrand 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 ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Public Redacted Version of “Defence Response to the Prosecution’s “Consolidated Request for Leave to Reply to the YEKATOM and NGAISSONA Defence’s Responses to the Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0954 pursuant to Rule 68(3), ICC-01/14-01/18-1145-Conf-Corr) (ICC-01/14-01/18-1146-Conf)”, ICC-01/14-01/18-1160-Conf, 1 November 2021

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Defence for Mr Ngaïssona (“Defence”) respectfully requests Trial Chamber V (“Chamber”) to reject the Prosecution’s request for leave to reply to the Defence’s response to the “Prosecution’s Consolidated Request for Leave to Reply to the YEKATOM and NGAISSONA Defence’s Responses to the Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0954 pursuant to Rule 68(3)” (“Request”).¹
2. *First*, the issues raised in the Request are not new and could have been anticipated by the Prosecution. *Second*, allowing further submissions on the issues raised in the Request would not assist the Chamber in adjudicating the Prosecution’s underlying rule 68(3) request, given that they have already been determined by the Chamber and the jurisprudence of the Court.

II. Confidentiality

3. This response is filed as confidential pursuant to Regulation 23(1)*bis* of the Regulations of the Court (“Regulations”), as it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. Applicable Law

4. 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.”

¹ ICC-01/14-01/18-1150-Conf.

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

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.²

IV. Submissions

6. In its Request, the Prosecution argues that a reply to the Defence response would assist the Chamber in determining the Prosecution's underlying rule 68(3) request, namely by "clarifying the facts and applicable law, as well as the determinative factors regarding the disposition of such applications going forward".³
7. The Defence fundamentally disagrees. The Prosecution's Request amounts to an impermissible attempt to supplement its underlying rule 68(3) request and translates into a mere disagreement with the Defence submissions.⁴ It should therefore be rejected.
8. *First*, the issues identified by the Prosecution in its Request fail to meet the criterion of novelty found in regulation 24(5) of the Regulations.⁵ As a preliminary matter, the Prosecution not only fails to present arguments in support of the alleged novelty of the issues raised in its Request, but also fails to evoke the legal basis of its Request, contrary to regulation 23(1)(d).

² ICC-01/14-01/18-799, para. 8.

³ Request, paras 2-3.

⁴ The Prosecution states in the Request that [REDACTED], Request, para. 5.

⁵ Request, para. 3.

9. In relation to the first issue raised in the Request relating to the “relevance of corroboration” in determining a rule 68(3) request,⁶ the Prosecution has already provided ample submissions with respect to the corroborative nature of prior recorded statements in several 68(3) requests, including the underlying rule 68(3) request.⁷ It is puzzling that the Prosecution now seeks to provide supplementary submissions on “whether” corroboration is a requirement at all, when it could have presented these submissions in previous rule 68(3) requests.⁸ This first “issue” could have clearly been anticipated by the Prosecution.
10. Likewise, the second and third issues identified by the Prosecution, which relate to the weight the Chamber may attribute to credibility issues between a prior recorded statement and other evidence, and to allegations which go to the “acts and conduct” of an accused, are clearly not new and could have been anticipated by the Prosecution.⁹ The Prosecution has had ample opportunities to present complete submissions on these two criteria, including in the underlying request relating to Witness P-0954. These issues could clearly have been anticipated.
11. *Second*, supplementary submissions by the Prosecution by means of a reply would not assist the Chamber in its determination of the underlying rule 68(3) request or future similar requests. Since the beginning of trial, the Chamber has made clear determinations on the “issues” raised by the Prosecution in its several rulings pertaining to rule 68(3), especially in its first rule 68(3) decision of March 2021, in which it set out the applicable law for rule 68(3) requests.¹⁰

⁶ Request, para. 5.

⁷ ICC-01/14-01/18-1137-Conf, paras 12, 19.

⁸ Request, para. 5 sub(1).

⁹ Request, para. 5.

¹⁰ ICC-01/14-01/18-907-Conf. The Chamber relied on authoritative jurisprudence of the Court: see for instance, Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled

12. The Chamber has already made determinations in relation to the first issue raised by the Prosecution, relating to corroboration,¹¹ and to the second issue, pertaining to the weight attached to credibility issues arising from a witness' prior recorded testimony and other evidence.¹² Similarly, the Chamber has made determinations with respect to the third issue raised by the Prosecution, namely pertaining to the weight afforded to core "acts and conduct" of an accused as alleged in a prior recorded testimony. For instance, the Chamber held that although "references to the accused's acts and conduct do not *per se* constitute an obstacle to the introduction of prior recorded testimony pursuant to Rule 68(3) of the Rules", in the specific case of [REDACTED], this was one of the factors which warranted hearing the witness' testimony *viva voce* in its entirety.¹³

13. In conclusion, the Request falls outside the permissible scope of a reply under regulation 24(5). Granting leave to reply to the Prosecution in the present circumstances would only give it one more chance to supplement its previous submissions, which is not in the interests of justice. In addition, good cause does not exist which may warrant the granting of the Prosecution's Request.¹⁴

V. Relief sought

14. In light of the above, the Defence respectfully requests the Chamber to **REJECT** the Request.

"Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, ICC-02/11-01/15-744, paras 67, 69; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution's Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, 5 December 2016, ICC-02/04-01/15-621, para. 7.

¹¹ See ICC-01/14-01/18-907-Conf, para. 14.

¹² ICC-01/14-01/18-1088-Conf, paras 15-16.

¹³ ICC-01/14-01/18-1088-Conf, para 14-16. See also ICC-01/14-01/18-1114-Conf, paras 14, 16.

¹⁴ *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.

Respectfully submitted,



Mr Geert-Jan Alexander Knoop

Lead Counsel for Mr. Patrice-Edouard Ngaïssona

The Hague, 10 November 2021