

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 17 February 2022

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 leave to add Six Items to the List of Evidence, (ICC-01/14-01/18-1238-Conf-Corr) (ICC-01/14-01/18-1239-Conf)’”, ICC-01/14-01/18-1249-Conf, 17 January 2022

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 Consolidated Request for Leave to Reply to the YEKATOM and NGAISSONA Defence’s Responses to the Prosecution’s Request for leave to add Six Items to the List of Evidence, (ICC-01/14-01/18-1238-Conf-Corr) (ICC-01/14-01/18-1239-Conf)” (‘Prosecution Request’).¹
2. *First*, the issues raised in the Prosecution Request are either not new and could have been anticipated by the Prosecution, or they do not arise from the Defence’s underlying response. *Second*, allowing further submissions on the issues raised in the Prosecution Request will not assist the Chamber in adjudicating the Prosecution’s request to add six items to its list of evidence.

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-01/14-01/18-1248-Conf

IV. Submissions

5. In its Request, the Prosecution argues that a reply to the Defence's response would assist "the Chamber in its resolution of the Request by clarifying the facts and applicable law, as well as the determinative factors regarding the disposition of such applications going forward."²
6. The Defence fundamentally disagrees. The Prosecution Request amounts to an impermissible attempt to supplement its underlying request to add items to its list of evidence and is a mere disagreement with the Defence submissions.³ It should therefore be rejected.
7. *First*, as a preliminary matter, the Prosecution did not substantiate how the issues it raises are novel and how it could not have anticipated them in its original request.⁴ This is a basis to reject the Prosecution Request.
8. *Second*, the three issues could have all been reasonably anticipated by the Prosecution in its original request, and further submissions will not assist the Chamber in adjudicating the underlying request. The first issue, which relates to the scope and the assessment of the relevant factors when determining undue prejudice cannot be classified as new. Whether there is undue prejudice arising from a request to add items to a list of evidence, is the basic issue that the Chamber must answer every time it renders a decision on whether to grant leave to add items to the list of evidence.⁵ This is the sixth decision the Chamber will render, and therefore it is well placed to determine the scope and the

² Prosecution Request, para. 3.

³ The Prosecution states in the Request that it "would additionally seek briefly to address Defence assertions, which it considers mischaracterise its positions as concerns [REDACTED]". Prosecution Request, para. 6.

⁴ Prosecution Request, para. 5.

⁵ ICC-01/14-01/18-989-Conf, para. 5.

relevant factors to consider when determining whether undue prejudice arises from this current request.

9. The second issue, while one that has not arisen in previous requests, is one that could have been clearly anticipated by the Prosecution. The Prosecution is well-aware that one of the factors the Chamber considers is “the intended purpose of the Prosecution’s requested reliance on the material”.⁶ The Prosecution’s failure to specify how it intended to rely on the prospective items cannot now be remedied through supplemental submissions. Further, the type of factors used to determine an application to add items to the list of evidence has been well-established since the Chamber’s first decision on the topic,⁷ and thus no further submissions are needed.
10. The third issue, does not constitute an issue that arises from the Defence’s Response. Indeed, the Prosecution has constructed a straw man argument. Of course, the Prosecution is permitted to continue its investigations into the CARIIB situation. The Prosecution is well-aware that the issue is that the Prosecution is continuing to actively investigate the Ngaïssona case with a view to use the items obtained through these recent investigations in this trial, which commenced nearly a year ago. Therefore, receiving supplemental submissions on the general issue of the Prosecution’s continued investigations in a given situation does not arise from the Defence Response and will not assist the Chamber in adjudicating the underlying Prosecution request. Such submissions would constitute a waste of judicial resources.
11. In conclusion, the Prosecution 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

⁶ ICC-01/14-01/18-989-Conf, para. 5.

⁷ Ibid.

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.⁸

V. Relief sought

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

Respectfully submitted,



Mr Geert-Jan Alexander Knoops
Lead Counsel for Mr. Patrice-Edouard Ngaïssona

The Hague, 17 February 2022

⁸ *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.