

**Cour
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**International
Criminal
Court**



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

Date: **20 April 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

Confidential

Defence Response to the “Prosecution’s Request for Leave to Reply to the Defence Response to the Prosecution’s Request to Amend Charges pursuant to Article 61(9) (ICC-01/14-01/18- 468-Conf) (ICC-01/14-01/18-477-Conf)” (ICC-01/14-01/18-480-Conf)

Source: Defence of Patrice-Edouard Ngaiissona

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's Request for Leave to Reply to the Defence Response to the Prosecution's Request to Amend Charges pursuant to Article 61(9) (ICC-01/14-01/18- 468-Conf) (ICC-01/14-01/18-477-Conf)" dated 16 April 2020 (the "Request") for two reasons.¹ First, allowing further submissions on the issues would not assist the Chamber in determining whether the Prosecution should be given permission to amend the charges against Mr Ngaïssona. Rather, allowing such submissions would be inconsistent with principles of judicial economy, since the Chamber is already well placed to decide on the "Prosecution's Request to Amend Charges pursuant to Article 61(9)" ("Request to Amend Charges").² Second, some of the issues developed in the Request merely consist of the Prosecution's attempt to "get a second bite of the apple" by requesting to make further submissions on points which have already been raised in its original Request to Amend Charges. Since all issues upon which the Prosecution seeks leave to reply fall outside the permissible scope of a reply under regulation 24(4) and 24(5) of the Regulations of the Court, Pre-Trial Chamber II (the "Chamber") should reject the Request.

II. Confidentiality

2. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the Defence files its response "confidential" as it responds to a request, which has been classified as confidential.

¹ ICC-01/14-01/18-480-Conf.

² ICC-01/14-01/18-468-Conf. A public redacted version is also available, see ICC-01/14-01/18-468-Red.

III. Applicable Law

3. In the interests of judicial economy, regulation 24(5) of the Regulations of the Court limits the submissions a party may make with respect to a certain matter under judicial scrutiny. It requires leave of the Chamber for a participant to reply to a response, and “unless otherwise permitted by the Chamber” limits the scope of a reply to “new issues raised in the response, which the replying participant could not reasonably have anticipated.”³ While the Regulation does not define the factors that the Chamber should consider, the Court’s jurisprudence shows that leave to reply should be granted in cases where further submissions are necessary for the adjudication of the matter under scrutiny.⁴

IV. Submissions

A. The further submissions the Prosecution seeks to make are not necessary for the Chamber to make its decision

4. The Defence submits that for all issues raised by the Prosecution, the Chamber is well placed to assess for itself whether the Defence has in fact raised any unreasonable legal or factual arguments since the Defence’s submissions are not made on the basis of any undisclosed information.
5. The Chamber, by simply referring to the previous ICC jurisprudence, can verify whether according to it, the Defence’s legal position is incorrect as the Prosecution submits. Contrary to the Prosecution’s submissions, the ICC jurisprudence is well settled. While there have been only three ICC decisions relating to the specific question of the amendment of the charges pursuant to article 61(9) of the Rome Statute, the decisions were (i) all consistent with one

³ Regulation 24(5) of the Regulations of the Court.

⁴ See ICC-01/04-02/06-1813.

another on the obligation for the Prosecution to properly support and justify any request to amend charges and (ii) specifically referred to each other on this point.⁵ Thus, the question of “the scope and assessment of relevant factors which a Chamber may reasonably consider in determining article 61(9) applications” will constitute the general essence of the determination of the Chamber, which may rely on the available jurisprudence for its determination of the matter.⁶ Similarly, “the circumstances attendant to the practicalities and feasibility of obtaining remote evidence in the course of a complex international investigation” will necessarily be part of the Chamber’s assessment.⁷ Consequently, the issues raised can be adjudicated by the Chamber without further submissions.

6. More specifically, submissions as to whether the “acquisition of incriminatory evidence during the period of postponement of the Confirmation Hearing [...] renders the material obtained and its use “unjustifiable” or unfairly prejudicial” are not necessary to the Chamber for the adjudication of the matter under scrutiny.⁸ Moreover, the specific question of the prejudice of the accused was addressed by the Defence in relation to incriminatory evidence obtained *after* the confirmation of the charges and not during the period of postponement.⁹ Therefore, submissions on this issue would be totally irrelevant.
7. Submissions as to “[w]hether the Chamber may consider the impact of crimes in which the Accused’s participation has been confirmed on the accessibility of evidence” will not assist the Chamber in determining why the Prosecution was

⁵ See ICC-01/12-01/18-608-Red, paras 52-54.

⁶ Request, para. 2.

⁷ *Ibid.*

⁸ Request, para. 4(1)(a).

⁹ ICC-01/14-01/18-477-Conf (“Response”), para. 34-37. A public redacted version is also available, see ICC-01/14-01/18-477-Red.

not able to obtain the relevant statement before confirmation.¹⁰ The issue at stake will remain unanswered regardless of whether the crimes confirmed have indeed had an impact on the accessibility of the information under consideration or not. Therefore, allowing the Prosecution to make submissions in this respect would not support judicial economy.

8. Finally, the Chamber is very well placed to assess for itself “[w]hether Ngaïssona’s claim of prejudice as a result of the Prosecution’s prospective application to amend the charges against the Accused Yekatom is premature” given that it is in the Chamber’s power to, first, grant the Prosecution’s prospective application against Mr Yekatom and, second, remedy the possible related prejudice by deciding the severance of the two cases.¹¹ In any event, the Prosecution’s specific submissions, as formulated in its Request, would not assist in resolving the whole issue of prejudice raised by the Defence, as the Defence’s claim of prejudice is broader than the Prosecution seems to suggest, including also the scenario where the Prosecution’s prospective application would *not* be granted.¹²

B. Issues (1)(b), 1(c) and (2) are not novel and should have been addressed in the initial Request to Amend Charges

9. The Prosecution’s submissions regarding issues (1)(b), (1)(c) and (2) are attempts to supplement its earlier submissions by raising arguments that should have been raised in the Prosecution’s initial Request to Amend Charges. The Prosecution fails to demonstrate why these further submissions have not been raised at the time.

¹⁰ Request, para. 4(1)(b).

¹¹ Request, para. 4(1)(d).

¹² Response, para. 38.

10. The impact of confirmed crimes on the accessibility of new evidence has been already specifically addressed in the Prosecution's Request to Amend Charges.¹³ Therefore, further submissions on how this impact should be considered in balancing the Parties' relative interests in an article 61(9) determination could have been raised in the Prosecution's previous application, which the Prosecution chose not to do.
11. Moreover, the Prosecution already made submissions as to "whether the prior inclusion of the same incident in the Document Containing the Charges [...] sufficiently attenuates the Defence's claim of unfair prejudice" (footnotes omitted).¹⁴ The Defence responded to the Prosecution's argument in this respect in its Response.¹⁵ Therefore this issue is not novel, it has already been addressed. It seems to the Defence that the Prosecution merely disagrees with the Defence's submissions without providing any submissions as to why further information is necessary for the Chamber to adjudicate the issues. Mere disagreement with an opposing party's arguments is not sufficient to warrant a leave to reply.¹⁶
12. The last issue of the Request concerns "the circumstances attendant to the practicalities and feasibility of obtaining remote evidence".¹⁷ This constitutes the general essence of the Prosecution's reasoning, in its initial Request to Amend Charges, to justify an amendment of the charges.¹⁸ Therefore, further submissions related to the extent as to which constraints, such as logistical ones, may be taken into account in determining diligence could have been raised in the Prosecution's previous application, which the Prosecution chose not to do.

¹³ ICC-01/14-01/18-468-Conf, paras 7-8.

¹⁴ ICC-01/14-01/18-468-Conf, para. 10.

¹⁵ Response, para. 34.

¹⁶ See ICC-01/04-02/06-1994, para. 13.

¹⁷ Request, para. 4(2)(a).

¹⁸ ICC-01/14-01/18-468-Conf, para. 8.

13. In conclusion, leave to reply on the issues presented in this sub-section would be tantamount to giving the Prosecution a second chance to enter into substantive discussions.

14. As a final remark, the Defence regrets to note that the Prosecution has failed to adhere to the strict requirements of regulation 24(5) by providing substantive submissions in requesting leave to reply to the second issue.¹⁹ Reference to new jurisprudence in relation to the question of the Prosecution's diligence is a substantive submission, and the Chamber should disregard it in coming to its determination of whether leave to reply should be granted.

RELIEF SOUGHT

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

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

Respectfully submitted,



Mr. Knoops, Lead Counsel

Dated this
20 April 2020
At The Hague, the Netherlands

¹⁹ See Request, footnote 9.