

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: **16 December 2020**

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***

Confidential

**Defence Response to the "Confidential redacted version of 'Prosecution's Request
under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness, 24
November 2020, ICC-01/14-01/18-739-Conf-Exp'"**

Source: Defence of Patrice-Edouard Ngaißsona

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 Knoop

Ms Sara Pedroso

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri

Mr Thomas Hannis

Legal Representatives of the Victims

Mr Abdou Dangabo Moussa

Ms Elisabeth Rabesandratana

Mr Yaré Fall

Ms Marie-Edith Douzima-Lawson

Ms Paolina Massidda

Mr Dmytro Suprun

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented****(Participation/Reparation)****Applicants****The Office of Public Counsel for 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****Victims Participation and Reparations
Section Other**

I. Introduction

1. On 24 November 2020, the Prosecution filed its "Prosecution Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness" ("Request") *ex parte*, requesting that Trial Chamber V ("Chamber") compel the testimony of Witness P-2625 pursuant to article 64(6)(b) of the Rome Statute ("Statute").¹ The Prosecution also requested the Chamber to direct the Registrar to transmit a request for assistance to the Canadian authorities to serve a summons on Witness P-2625 and to compel and ensure his appearance to give testimony before the Court *in situ* or *via* video conference pursuant to articles 93(1)(b), 93(1)(d) and 99(1) of the Statute.²
2. The Defence defers to the Chamber's discretion whether to compel Witness P-2625's testimony and to request the Canadian authorities' cooperation in this regard. However, should the Chamber find that the Request has merit, the Defence opposes the use of video-link for this particular witness' testimony, to preserve Mr Ngaïssona's fair trial rights. Moreover, the Defence requests the Chamber to order the lifting of redactions applied to documents CAR-OTP-2127-6432-R01 and CAR-OTP-2127-4444-R01 so that the Defence may be apprised of the circumstances surrounding P-2625's refusal to cooperate with the Prosecution, as this evidence is material to the Defence.

II. Relevant Procedural History

3. Witness P-2625 is a Central African journalist and former Minister of Communications in the Central African Republic.³ The Prosecution interviewed Witness P-2625 from 21 to 25 November 2019, after the

¹ ICC-01/14-01/18-739-Conf ("Request").

² Ibid.

³ CAR-OTP-2123-0377-R01.

confirmation of charges hearings. The Prosecution disclosed P-2625's written statement to the Defence on 13 July 2020.⁴

4. Witness P-2625 was expected to testify for the Prosecution *via* video-link as a fully *viva voce* witness.⁵ However, on 20 and 21 October 2020, the Prosecution was formally informed that Witness P-2625 no longer wished to cooperate with the Prosecution or receive correspondence from the Court.⁶ The reasons for this change in the Witness' willingness to cooperate with the Prosecution are unknown to the Defence, as this information has been redacted.
5. On 24 November 2020, the Prosecution filed its Request *ex parte*, only available to the Prosecution and VWU.⁷ On 4 December 2020, the Defence was notified of the confidential redacted version of the Request.⁸
6. On 8 December 2020, the Defence for Mr Alfred Yekatom informed the Chamber, parties and participants that it did not intend to file a response to the Request.⁹
7. The following day, the Common Legal Representative for Victims informed the Chamber, parties and participants that it did not intend to file a response.¹⁰

III. Confidentiality

8. In accordance with regulation 23*bis*(1) of the Regulations of the Court ("Regulations"), the response is filed confidentially as it responds to a document of the same classification.

⁴ ICC-01/14-01/1-586-Conf-Anx.

⁵ ICC-01/14-01/18-724-Conf-AnxA.

⁶ Request, paras 26-28 ; CAR-OTP-2127-6432-R01 ; CAR-OTP-2127-4444-R01.

⁷ Request, para. 4.

⁸ ICC-01/14-01/18-739-Conf-Red.

⁹ Email from the Defence team of Mr Yekatom to the Chamber, parties and participants, 8 December 2020, at 15:05.

¹⁰ Email from the CLRV to the Chamber, parties and participants, 9 December 2020, at 14:31.

IV. Applicable Law

9. Pursuant to article 64(6)(b) of the Statute, a trial chamber may, as necessary “require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States”.¹¹ To this end, a trial chamber may also, pursuant to articles 93(1)(b) and (d) of the Statute, request a State Party to cooperate in serving the summon upon a witness and in compelling a witness to appear before the Court whether *in situ* or by way of video-link.¹² Any cooperation request to a State Party must satisfy the tripartite principles of (i) relevance, (ii) specificity and (iii) necessity.¹³ In evaluating necessity, the Chamber will consider both (i) whether the anticipated testimony of the witness is potentially necessary for the determination of the truth and (ii) whether a summons, as a compulsory measure, is necessary to obtain the testimony of the witness.¹⁴
10. Article 67(1)(e) of the Statute guarantees the fair trial right of accused persons to examine witnesses who testify against them. Article 69(2) of the Statute provides that “the testimony of a witness at trial shall be given in person”. It

¹¹ *Prosecutor v Ruto and Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1598, 9 October 2014, paras 107 and 113; *Prosecutor v. Bemba et al.*, Decision on the ‘Prosecution’s Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses’, ICC-01/05-01/13-1343-Red, 3 December 2015, para. 17.

¹² *Prosecutor v Ruto and Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1598, 9 October 2014, ICC-01/09-01/11-1598, paras 128 and 132.

¹³ *Prosecutor v Ruto and Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 181; *Prosecutor v Kenyatta*, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, 31 March 2014, para. 100, fn 216; *Prosecutor v Banda and Jerbo*, Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013, ICC-02/05-03/09-504-Red, para. 4; *Prosecutor v. Bemba et al.*, Public redacted version of Decision on the ‘Prosecution’s Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses’, ICC-01/05-01/13-1343-Red, 3 December 2015, para. 18.

¹⁴ *Prosecutor v. Bemba et al.*, Public redacted version of Decision on the ‘Prosecution’s Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses’, ICC-01/05-01/13-1343-Red, 3 December 2015, ICC-01/05-01/13-1343-Red, para. 18; *Prosecutor v Ruto and Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11- 1274-Corr2, 17 April 2014, para. 181.

also provides that the Court may permit *viva voce* testimony by means of video or audio technology, but that such measures “shall not be prejudicial to or inconsistent with the rights of the accused”. Rule 67(1) of the Rules of Procedure and Evidence (“Rules”) is also relevant in that it provides that a Chamber may allow a witness to give *viva voce* testimony by means of audio or video technology. According to rule 67(3), the Chamber, with the assistance of the Registry “shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness”.

V. Submissions

A. Relevance, specificity and necessity

11. The Defence defers to the Chamber’s discretion in evaluating whether the Prosecution has met the aforementioned criteria of specificity, relevance and necessity for compelling Witness P-2625’s testimony.

B. In-person testimony

12. Although the Court’s legal texts provide for the possibility of testimony *via* video-link as an alternative to in-person testimony, Mr Ngaïssona’s fair trial guarantees – in particular Mr Ngaïssona’s right to examine the witnesses against him – may only be fully guaranteed by having Witness P-2625 testify in person rather than by video-link, should he be summoned before the Court.¹⁵ In-person testimony is warranted given the specific nature of Witness P-2625’s anticipated testimony, that is testimony which is provided by a compelled witness who is expected to provide alleged ‘insider’ – and at times,

¹⁵ Article 67(1)(e), Rome Statute.

uncorroborated – information with respect to the charges against Mr Ngaïssona.

13. The Chamber has recognised in its *Initial Directions on the Conduct of the Proceedings* that it may need to “reassess the mode of testimony chosen by the calling participant and to decide otherwise” in the presence of “countervailing considerations”, in light of the Chamber’s “overarching obligation to ensure a fair and expeditious trial”.¹⁶ Given the unique circumstances of P-2625’s potential testimony, such considerations are present here and justify the Chamber’s intervention.

14. A witness’ credibility is not only assessed by the content of their oral testimony, but also by the non-verbal aspects of their testimony, as observed by those present in the courtroom. The Defence is mindful that this Chamber has established that a witness’ demeanour can be meaningfully observed *via* video-link;¹⁷ however, in this particular instance, which could be very delicate, the non-verbal aspects of Witness P-2625’s demeanour and body language which may not be perceptible on-screen are especially important for the Defence’s assessment and challenge of Witness P-2625’s credibility, given the unique circumstances of his testimony as a potentially compelled witness. Although the reasons for Witness P-2625’s sudden unwillingness to cooperate with the Prosecution have been withheld from the Defence, those circumstances may have a direct bearing on his credibility and are very likely to be a subject of examination by the Defence.

15. In addition to the obstacles posed to the Defence’s assessment of the Witness’ demeanour and credibility, in some circumstances, the mode of testimony via video-link rather than in-person can influence a witness’ spontaneity and their

¹⁶ ICC-01/14-01/18-631, para. 31.

¹⁷ ICC-01/14-01/18-631, paras 29-31.

own perception of their testimony. Factors such as the courtroom's decorum, and the parties' ability to make eye contact with a witness, may be lost, and negatively impact a witness' testimony and the Defence's assessment thereof.¹⁸ In the present case, Witness P-2625's unwillingness to testify on behalf of the Prosecution creates a unique and delicate situation, whereby the witness could become hostile. His in-person testimony would favour a more spontaneous account of events, and in turn, be more conducive to the determination of the truth.

16. Moreover, the Prosecution itself emphasises the importance of Witness P-2625's anticipated testimony to support its case theory: it affirms that Witness P-2625's anticipated testimony is "material", "necessary" and "unique" given his alleged "direct knowledge of the personal involvement of [Mr] NGAÏSSONA and his ability to authenticate contemporaneous and highly probative evidence which can assist the Chamber in its determination of the truth".¹⁹ Witness P-2625 is relied upon by the Prosecution extensively in its Trial Brief and is often the only source for certain Prosecution allegations.²⁰

17. Therefore, the fact that Witness P-2625's expected testimony is often uncorroborated only exacerbates the need for him to testify in-person, as opposed to video-link, should the Chamber compel his testimony, in order to preserve Mr Ngaïssona's fair trial rights. This is particularly the case given the Defence also has significant doubts as to Witness P-2625's reliability and credibility.²¹

¹⁸ See Defence submissions: ICC-01/14-01/18-473-Conf, para. 15.

¹⁹ Request, paras 1, 2 20, 29.

²⁰ See Prosecution Trial Brief, ICC-01/14-01/18-723-Conf, para. 51, footnote 116; para. 67, footnote 153 ; para. 69, footnote 160; para. 101, footnotes 236-238; para. 106, footnote 251; para. 108, footnote 255; par. 217, footnote 598 ; para. 266, footnote 723 ; para. 299, footnotes 778-779 ;

²¹ For instance, a significant portion of Witness P-2625's statement is based on indirect evidence, including hearsay, speculation and mere impressions or opinion. To give but two examples: 1) the allegations that Mr Ngaïssona would have distributed machetes in Bangui is entirely based on hearsay; 2) The same can be said about

18. In conclusion, should the Chamber summon Witness P-2625 before the Court, his testimony *via* video-link would negatively impact Mr Ngaïssona's fair trial guarantee to "examine (...) the witnesses against him", as enshrined in article 67(1)(e) of the Statute, warranting the Chamber's intervention in modifying his mode of testimony, as substantiated above.

C. Lifting of redactions

19. The Prosecution has provided very little information to the Defence justifying the reasons for Witness P-2625's sudden refusal to testify on behalf of the Prosecution. The Defence was provided with email correspondence showing: (1) that the Witness had requested the Prosecution's assistance with his refugee application before the Canadian Refugee Protection Division;²² (2) that on 21 October 2020, the Prosecution was formally informed that Witness P-2625 no longer wished to cooperate with the Prosecution or receive correspondence from the Court; and (3) that Witness P-2625's decision to no longer cooperate with the Prosecution was not related to any threats.²³ The context and actual reasons for Witness P-2625's decision to no longer cooperate with the Prosecution have been redacted.

20. However, this evidence relating to the circumstances of Witness P-2625's unwillingness to cooperate with the Prosecution is material and relevant to the Defence's preparations for trial, and therefore disclosable pursuant to rule 77 of the Rules, which encompasses "all objects that are relevant for the preparation of the defence".²⁴ In addition, this evidence is disclosable to the Defence insofar as it is relevant to the Defence preparation but also that it "may

the Witness' assertion that Mr Ngaïssona would have been "compensated" by Mr Bozizé by giving him a ministerial position – this is entirely speculative and lacks reliability, see Request, paras 8-9.

²² CAR-OTP-2123-0599-R01.

²³ CAR-OTP-2127-6432-R01, at 6433.

²⁴ *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, para. 77.

affect the credibility of the prosecution evidence", as provided in the text of article 67(2) of the Statute.

21. The Defence therefore respectfully requests the Chamber to order the Prosecution to lift redactions applied to the documents which provide the context and reasons for Witness P-2625's refusal to cooperate with the Prosecution, namely to: CAR-OTP-2127-6432-R01; CAR-OTP-2127-4444-R01.

VI. Relief Sought

22. Should the Chamber grant the Prosecution's Request to compel Witness P-2625's *viva voce* testimony, the Defence respectfully requests the Chamber to:

- **ORDER** Witness P-2625 to testify in-person before the Court rather than *via* video-link;
- **ORDER** the Prosecution to lift redactions to the evidence providing for the reasons and context for Witness P-2625's refusal to testify for the Prosecution in CAR-OTP-2127-6432-R01 and CAR-OTP-2127-4444-R01 and to disclose any other evidence which relates to Witness P-2625's anticipated testimony.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 16 December 2020,

At The Hague, the Netherlands.