

**Cour
Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER V

Before: Judge Beti Hohler , Presiding Judge
Judge Joanna Korner
Judge Keebong Paek

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

***IN THE CASE OF THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public Document

**Public Redacted Version of the "Ngaïssona Defence's Response to the
'Confidential redacted version of "Prosecution's Submissions on the Article 70
Investigation" 6 September 2023', ICC-01/14-01/18-2077-Conf-Red", 18 September
2023, ICC-01/14-01/18-2100-Conf**

Source: Defence of Patrice-Edouard Ngaïssona

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I. INTRODUCTION

1. The Defence for Mr Ngaïssona ('Defence') hereby responds to the 'Confidential redacted version of "Prosecution's Submissions on the Article 70 Investigation"' ('Submissions'), filed on 6 September 2023.¹ The Defence submits that the prolongation of the Article 70 Investigation constitutes an abuse of the Article 70 procedure. The Defence requests Trial Chamber V ('Chamber') to order the Office of the Prosecutor ('Prosecution') to disclose the one remaining item and the RFAs sent to the [REDACTED], and to put an end to its investigation.

II. PROCEDURAL HISTORY

2. On 23 May 2023, the Defence filed its 'Motion for disclosure and lifting of redactions relating to the Article 70 Investigation' ('Motion').² The Defence requested the Chamber to order the Prosecution to (i) disclose all the materials relating to the Article 70 Investigation, implicating the Ngaïssona Defence or individuals associated with it; (ii) lift all redactions found in filings ICC-01/14-01/18-1310-Conf-Exp, ICC-01/14-01/18-1444-Conf-Exp and ICC-01/14-01/18-1819-Conf-Exp-Red; (iii) file confidential versions of any filings, classified *ex parte*, which relate to the Article 70 Investigation; and (iv) produce a list of all the items it has collected in the course of its Article 70 Investigation so that the Defence and the Chamber can ensure that the Prosecution is abiding by its disclosure obligations.³
3. On 2 June 2023, the Prosecution filed its response to the Defence's Motion, requesting the Chamber to dismiss it.⁴
4. On 23 August 2023, the Chamber issued its 'Decision on the Ngaïssona Defence Request for Disclosure and Lifting of Redactions Relating to the Article 70

¹ ICC-01/14-01/18-2077-Conf-Red.

² ICC-01/14-01/18-1881-Conf-Exp.

³ ICC-01/14-01/18-1881-Conf-Exp, para. 43.

⁴ ICC-01/14-01/18-1906-Conf-Exp.

Investigation’,⁵ partly granting the Motion and ordering the Prosecution to (i) file confidential redacted versions of filings ICC-01/14-01/18-1588-Conf-Exp and ICC-01/14-01/18-1819-Conf-Exp; (ii) review the Materials relating to the Prosecution’s request (‘[REDACTED] Request’) to submit [REDACTED] prior statements under Rule 68(2)(d) of the Rules of Procedure and Evidence (‘Rules’) and disclose to the Defence as necessary, or otherwise confirm that it has disclosed everything in this regard falling under its disclosure obligations; and (iii) provide an update on the Article 70 Investigation by 6 September 2023, including the disclosure status of any and all material collected in the context of this investigation so far, with redactions, if needed, as well as the date by which the Prosecution will have disclosed the material that has not yet been disclosed to the Defence (‘Order’).⁶

5. On 6 September 2023, the Prosecution filed its ‘Confidential redacted version of “Prosecution’s Submissions on the Article 70 Investigation”’.⁷ The Prosecution confirmed its disclosure of the material evidence in its possession regarding the Article 70 Investigation, but for one item. The Prosecution further submitted that “[a]ny material items received from the [REDACTED] pursuant to the pending RFAs, as well as the remaining undisclosed item, will be assessed and disclosed as soon as practicable”.⁸

III.CONFIDENTIALITY

6. In accordance with regulation 23*bis*(1) of the Regulations of the Court, the present motion is filed as “confidential”, as it responds to a filing of the same classification.

IV.APPLICABLE LAW

7. The Defence incorporates by reference its previous submissions with respect to the applicable law regarding the Prosecution’s disclosure obligations, the rights of the

⁵ ICC-01/14-01/18-2047-Conf-Exp.

⁶ ICC-01/14-01/18-2047-Conf-Exp, page 7 and paras 10 and 16.

⁷ ICC-01/14-01/18-2077-Conf-Red.

⁸ ICC-01/14-01/18-2077-Conf-Red, para. 11.

accused to a fair and expeditious trial, as well as the Chamber's duty to ensure that these rights are fully respected.⁹

V. SUBMISSIONS

a. The prolongation of the Article 70 Investigation constitutes an abuse of the Article 70 procedure

8. As held by the Single Judge in *Barasa*, "the provision of article 70 of the Statute appears aimed at preserving the integrity of judicial proceedings before the Court".¹⁰ In this case, it is to preserve the integrity of the proceedings against Mr Ngaïssona ('Main Case'). Having that in mind, the Single Judge cautioned the Prosecution that "he will not tolerate the Article 70 Investigation to continue indefinitely in a manner that could impact the proceedings in the present case" and advised the Prosecution to "conclude relevant portions of its investigation as promptly as possible, to continually assess the risk of prejudice, and to keep the Material under review with a view to disclosing it to the Defence as soon as possible".¹¹
9. Contrary to the above, the Article 70 investigation was opened nearly 2 ½ years ago, which is the quasi entirety to the trial proceedings so far. Further, not only does the Article 70 Investigation not appear to be reaching its end any time soon, given the pending materials, but the measures put in place to protect its integrity, i.e. the non-disclosure, affect the Main Case. For example, the [REDACTED] Request included information collected during the course of the Article 70 Investigation; the Defence did not get apprised of any of the materials underlying the [REDACTED] Request because they were subject to non-disclosure and was

⁹ ICC-01/14-01/18-1881-Conf-Exp, paras 22-26.

¹⁰ *The Prosecutor v. Walter Osapiri Barasa*, Warrant of arrest for Walter Osapiri Barasa, ICC-01/09-01/13-1-Red2, 2 August 2013, para. 20. See also *Prosecutor v. Slobodan Milošević*, Decision on Interlocutory Appeals on Kosta Bulatović Contempt Proceedings, Case No. IT-02-54-A-R77.4, 29 August 2005, para. 21.

¹¹ ICC-01/14-01/18-1063-Conf, para. 11. See also *The Prosecutor v. Bosco Ntaganda*, Decision on Defence request seeking certain material relating to review of restrictions placed on Mr Ntaganda's contacts, 3 June 2016, ICC-01/04-02/06-1364-Conf-Exp, ICC-01/04-02/06-1364-Red2, 21 November 2016, para. 22.

only made aware of those the day the [REDACTED] Request was filed.¹² This led the Chamber to partly grant the Motion and instruct the Prosecution “to review the Materials relating to the [REDACTED] Request and disclose to the Defence as necessary, or otherwise confirm that it has disclosed everything in this regard falling under its disclosure obligations”.¹³ Had the non-disclosure been necessary to safeguard the Article 70 Investigation, those materials would not have been made known to the Defence through the [REDACTED] Request and the Chamber would not have ordered their disclosure. Therefore, it appears that the non-disclosure was used by the Prosecution to retain crucial information from the Defence which was later used in the Main Case’s proceedings, i.e. the Prosecution’s request to submit [REDACTED] prior statement under Rule 68(2)(d) of the Rules.

10. Withholding information stemming from the Article 70 Investigation under the guise of non-disclosure, to then use it in the Main Case, constitutes an abuse of the Article 70 proceedings and a violation of the Prosecution’s disclosure obligations *vis-à-vis* the Defence. To this day, there are still items that have yet to be disclosed to the Defence;¹⁴ their disclosure will depend on the outcome of the Prosecution’s review¹⁵ and there is no guarantee as to whether and when they will be disclosed to the Defence. The Defence, however, is expected to present its case before the Chamber without knowing the full extent of the Article 70 Investigation, a scenario which, as argued in the Motion, will affect the defence case and consequently, Mr Ngaïssona’s fair trial rights under Article 67 of the Statute, especially at this juncture, where the Prosecution has been apprised of the Defence’s provisional witness list. If any of the individuals in the provisional witness list are mentioned or form part of the investigation, this will necessarily have an impact on the Defence’s preparation.

¹² The materials were disclosed on 7 July 2023, see Trial Rule 77 package 105 07 July 2023.

¹³ ICC-01/14-01/18-2047-Conf-Exp, para. 10.

¹⁴ According to the Prosecution’s assertion, there is one item left to be disclosed, as well as the items the Prosecution has not received yet from the [REDACTED].

¹⁵ ICC-01/14-01/18-2077-Conf-Red, paras 4 and 10.

11. At this stage, the continuation of the Article 70 investigation is a concrete impediment to the integrity of the Defence investigations and the preparation of the defence case. Allowing it to continue will lead to an infringement of Mr Ngaïssona's fundamental rights, and jeopardize the fairness of the trial against him.

b. The Prosecution should disclose the Investigator Report and the RFAs

12. According to the Chamber's Order, the Prosecution should have provided an update on the Article 70 Investigation by 6 September 2023, including the disclosure status of any and all material collected in the context of this investigation so far, with redactions, if needed, as well as the date by which the Prosecution will have disclosed the material that has not yet been disclosed to the Defence.¹⁶ In its Submissions, the Prosecution stated that there is still one undisclosed item, the Investigator Report regarding [REDACTED] ('Investigator Report'), alongside the two undischarged RFAs.¹⁷ Given the pending RFAs, the Prosecution did not provide a date for the disclosure of all these materials which will be subject to the Prosecution's review and assessment.

13. With respect to the Investigator Report that remains undisclosed, the Prosecution argued that the non-disclosure of the document was authorised by the Chamber on 28 October 2022¹⁸ and its continuation is warranted.¹⁹ Nevertheless, there is no justification available to the Defence as to why the non-disclosure granted almost a year ago is still warranted to this day,²⁰ especially since, based on the Prosecution's assertion, all other materials concerning [REDACTED] have been disclosed.²¹ As previously mentioned, the Prosecution has kept materials from the Defence to later use them in the proceedings in the Main Case. At this stage, there

¹⁶ ICC-01/14-01/18-2047-Conf-Exp, page 7 and para. 16.

¹⁷ ICC-01/14-01/18-2077-Conf-Red, paras 3-4.

¹⁸ ICC-01/14-01/18-1641-Conf, para. 5.

¹⁹ ICC-01/14-01/18-2077-Conf-Red, para. 9.

²⁰ Due to the redactions applied in paras. 9 of the Submissions, no information can be deducted as to the reasons for continuing the non-disclosure.

²¹ ICC-01/14-01/18-2077-Conf-Red, para. 3: "Second, as of 1 September 2023, the Prosecution has disclosed all material evidence that has been collected to date in the course of, or in relation to its investigation (...)"

is no guarantee that the Investigator Report indeed remains undisclosed for the purposes of the Article 70 Investigation or as a strategic tool to impede the preparation and presentation of the Defence case. Absent any justification from the Prosecution to the contrary, the Investigator Report should be disclosed to the Defence to prevent any effects on the Main Case and Mr Ngaïssona's fair trial rights.

14. As far as the materials related to the pending RFAs, it is still unknown how many items will be produced once these RFAs are executed, which means that there are more materials to come besides the Investigator Report. Since the Prosecution is seemingly in no position to determine the number of items that will be disclosed in the future, they should in the very least disclose to the Defence the RFAs sent to the [REDACTED], with the necessary redactions applied. This will allow the Defence to have some information on the pending materials, albeit limited, pending their receipt and disclosure by the Prosecution.

VI.RELIEF SOUGHT

15. The Defence respectfully requests the Chamber to **ORDER** the Prosecution to disclose the Investigator Report and the RFAs and to terminate its Article 70 investigation

Respectfully submitted,



G. J. Alexander Knoop
on behalf of
Patrice-Edouard Ngaïssona

Dated this 10 December 2025

At The Hague, the Netherlands