



Original: English

**No. ICC-01/14-01/18
Date: 11 February 2021**

TRIAL CHAMBER V

**Before: 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***

Public redacted version of

**Decision on the Ngaißsona Defence Motion to Strike P-2843 from the Final
Witness List**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoop
Richard Omissé-Namkeamaï

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2), 67, and 69 of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Ngaïssona Defence Motion to Strike P-2843 from the Final Witness List’.

I. Procedural history and submissions

1. On 9 November 2020, the Office of the Prosecutor (the ‘Prosecution’) filed its Final Witness List, which includes witness P-2843, who is scheduled to testify *via* video-link as the twelfth Prosecution witness.¹ P-2843 is expected to testify, *inter alia*, on the background of the conflict, the incident at [REDACTED] and Mr Ngaïssona’s alleged contributions.²
2. On 11 January 2021, the Ngaïssona Defence (the ‘Defence’) requested the Chamber to strike P-2843 from the Prosecution’s Final Witness List (the ‘Request’).³ The Defence submits that the Prosecution did not disclose any statement or investigative notes in relation to P-2843, or make ‘sufficient effort’ to question him.⁴
3. According to the Defence, it was first apprised of the existence of P-2843 on 10 November 2020, when it was notified of the Prosecution’s Trial Brief and Final Witness List.⁵ The Defence further submits that the only available material concerning P-2843 was ‘not disclosed [by the Prosecution] until the end of October’,⁶ and is limited to (i) the ‘evidence cited in the [Prosecution’s] Trial Brief’, and (ii) witness P-2841’s statement, which includes information on P-2843.⁷ Therefore, the Defence argues that the Prosecution failed to meet its obligations under Article 54(1) of the Statute, resulting in ‘substantial prejudice

¹ See Final Witness List, Annex A to the Prosecution’s List of Witnesses and Evidence, ICC-01/14-01/18-724-AnxA (notified on 10 November 2020), p. 47; Order of Prosecution Witnesses, Annex B to the Prosecution’s List of Witnesses and Evidence, ICC-01/14-01/18-714-Conf-AnxB, p. 1.

² See Final Witness List, ICC-01/14-01/18-724-AnxA, p. 47.

³ Defence Motion to strike Witness P-2843 from the Prosecution’s Final List of Witnesses, ICC-01/14-01/18-809-Conf (with confidential Annex 1, ICC-01/14-01/18-809-Conf-Anx1), para. 32.

⁴ Request, ICC-01/14-01/18-809-Conf, paras 1-2, 17, 21.

⁵ Request, ICC-01/14-01/18-809-Conf, para. 11; *see also* Prosecution’s Trial Brief, ICC-01/14-01/18-723-Conf (with confidential Annexes A- E).

⁶ Request, ICC-01/14-01/18-809-Conf, paras 10, 28.

⁷ Request, ICC-01/14-01/18-809-Conf, paras 10, 29.

to Mr Ngaïssona's rights to be informed properly of the content of the charges against him under Article 67(1)(a) and to have adequate time and facilities to prepare his defence under Article 67(1)(b)'.⁸ The Defence further stresses that its Request 'is strictly circumscribed to striking [...] P-2843 from the Prosecution's [Final] Witness List' and that no prejudice would result for the Prosecution, as it can introduce the material related to P-2843 through a bar table motion.⁹

4. Between 24 and 30 November 2020, in the context of *inter partes* communications on the matter, the Prosecution informed the Defence that it 'does not possess any material regarding the substance of P-2843's expected testimony', with the exception of logistical and security information that the Prosecution does not consider to fall within the scope of Article 67(2) of the Statute or Rules 76 and 77 of the Rules.¹⁰
5. On 18 January 2021, the Prosecution responded to the Request (the 'Response').¹¹ The Prosecution submits that it cannot obtain a statement from P-2843, [REDACTED], due to [REDACTED].¹² The Prosecution further submits that [REDACTED].¹³
6. Accordingly, the Prosecution argues that it has not breached its statutory obligations. Further, the Prosecution submits that the absence of a statement does not cause any prejudice to the Defence, as the Defence (i) has access to the same relevant documents as the Prosecution, and (ii) cannot 'reasonably' claim prejudice if it was the Defence's own strategic decision not to obtain a statement from P-2843.¹⁴

⁸ Request, ICC-01/14-01/18-809-Conf, para. 3.

⁹ Request, ICC-01/14-01/18-809-Conf, para. 31.

¹⁰ Annex 1 to the Request, ICC-01/14-01/18-809-Conf-Anx1, p. 1; Request, ICC-01/14-01/18-809-Conf, paras 2, 12.

¹¹ Prosecution's Response to Ngaïssona Defence Motion to strike Witness P-2843 from the Prosecution's Final List of Witnesses (ICC-01/14-01/18-809-Conf), ICC-01/14-01/18-831-Conf-Exp, confidential *ex parte*, available only to the Prosecution and the Registry (confidential redacted version notified the same day, ICC-01/14-01/18-831-Conf-Red).

¹² Response, ICC-01/14-01/18-831-Conf, paras 2, 6.

¹³ Response, ICC-01/14-01/18-831-Conf-Exp, para. 6.

¹⁴ Response, ICC-01/14-01/18-831-Conf, paras 2-3, 7.

II. Analysis

7. The Chamber first notes that there is no statutory provision prohibiting the Prosecution from calling witnesses who have not provided a prior statement.¹⁵
8. However, pursuant to Article 54(1)(a) of the Statute, the Prosecution shall ‘extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally’. Therefore, failing to take statements may constitute a violation of the Prosecution’s investigative obligations under this provision, if the Prosecution does not make sufficient efforts to question witnesses about their knowledge of the case in the course of its investigation.¹⁶
9. In this instance, the Chamber finds that the Prosecution’s reasons for not obtaining a witness statement are plausible. It further considers that, on the basis of the information available, these reasons were beyond the Prosecution’s control and notes that the Defence has access to essentially the same material in relation to P-2843 as the Prosecution.
10. Accordingly, the Chamber finds that the Prosecution has not violated its obligations under Article 54(1)(a) of the Statute. As a consequence, no remedy is warranted at this stage.
11. Nonetheless, the Chamber is mindful of the Defence’s concerns regarding the impact of lacking witness statements on the Defence’s ability to prepare its examination of P-2843.¹⁷ In this regard, the Chamber notes that it will be amenable to requests by the Defence for additional time to prepare its examination, if appropriate, after the Prosecution has concluded questioning the witness.

¹⁵ For a similar finding, see Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the Witness List, 1 September 2015, ICC-01/05-01/13-1202 (the ‘*Bemba et al.* Decision’), para. 11.

¹⁶ See *Bemba et al.* Decision, ICC-01/05-01/13-1202, paras 11-12.

¹⁷ See Request, ICC-01/14-01/18-809-Conf, paras 22, 24.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the parties to file public redacted versions of the Request and the Response within one week of notification of the present decision.

Done in both English and French, the English version being authoritative.



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 11 February 2021

At The Hague, The Netherlands