

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No: *ICC-01/14-01/18*  
Date: **2 February 2021**

**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***

**Public with Confidential Annex 1**

**Public Redacted Version of “Defence Motion to strike Witness P-2843 from the Prosecution’s Final List of Witnesses”, 11 January 2021, ICC-01/14-01/18-809-Conf**

**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**

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

**Counsel for the Defence of Mr Ngaïssona**

Mr Geert-Jan Alexander Knoop

Ms Antonina Dyk

**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 Other  
Section**

## I. Introduction

1. On 10 November 2020, the Defence for Mr Patrice-Edouard Ngaïssona (“the Defence”) received the Prosecution’s Final List of Witnesses.<sup>1</sup> This was the third list of witnesses the Defence had received from the Prosecution,<sup>2</sup> and it contained several new witnesses, which are expected to provide specific information related to Mr Ngaïssona’s alleged criminal responsibility.<sup>3</sup> Much to the Defence’s surprise, the Prosecution did not disclose any statement or investigative notes for Witness P-2843 by the 10 November deadline.
2. Following *inter partes* discussions with the Prosecution, the Defence gleaned the following information: (1) the Prosecution did not have a statement for Witness P-2843 in its possession or any disclosable form of notes for this witness, (2) Witness P-2843 had given his consent to testify, and (3) the Prosecution was in possession of certain logistical and security information for Witness P-2843, which it considered were not subject to its disclosure obligations.<sup>4</sup>
3. On the basis of the information provided by the Prosecution, the Defence respectfully requests Trial Chamber V (“the Chamber”) to strike Witness P-2843 from the Prosecution’s Final Witness List. In failing to secure any form of statement or notes, which are material to the Defence’s preparation the Prosecution failed to meet its investigatory obligations under Article 54(1) of the Rome Statute, which has resulted in substantial prejudice to Mr Ngaïssona’s rights to be informed promptly of the content of the charges against him under

---

<sup>1</sup> ICC-01/14-01/18-724-Conf-AnxA.

<sup>2</sup> The Prosecution filed a preliminary list on 15 June 2020. ICC-01/14-01/18-528. The Prosecution’s Provisional Witness List was filed on 31 August 2020. ICC-01/14-01/18-642-Conf-AnxA.

<sup>3</sup> Witnesses such as P-2673, Witness P-2841, and Witness P-2843 were added to the Prosecution’s Final Witness List. ICC-01/14-01/18-724-Conf-AnxA.

<sup>4</sup> Annex 1.

Article 67(1)(a) and to have adequate time and facilities to prepare his defence under Article 67(1)(b).

4. In order to ensure that Mr Ngaïssona is not unduly prejudiced by this failure of the Prosecution to meet its statutory obligations, the Defence respectfully submits that it is necessary to strike Witness P-2843 from the Prosecution's List of Witnesses.

## **II. Confidentiality**

5. In accordance with Regulation 23*bis*(1) of the Regulations, this response is filed confidentially as it contains information related to the Prosecution's witnesses that have yet to be disclosed to the public. A public redacted version shall be filed in due course.

## **III. Procedural History**

6. On 22 May 2020, the Single Judge ordered the Prosecution to file by 15 June 2020 a preliminary list of witnesses that was to indicate *inter alia* which witnesses it was certain will testify in the present proceedings.<sup>5</sup> The Single Judge found that filing the preliminary list was necessary to assist the parties and participants, particularly the Defence, in preparation for trial and to mitigate any delays caused by the COVID-19 pandemic.<sup>6</sup>
7. On 15 June 2020, the Prosecution filed its Preliminary List of Witnesses; neither P-2843, nor P-2841, the only other witness the Defence has been able to locate that knows P-2843, were on the list.<sup>7</sup>

---

<sup>5</sup> ICC-01/14-01/18-528.

<sup>6</sup> Ibid., paras 3-4.

<sup>7</sup> ICC-01/14-01/18-553; ICC-01/14-01/18-553AnxA.

8. On 16 July 2020, the Chamber issued its Decision on the Commencement Date of Trial in which it ordered the Prosecution to file by 31 August 2020 a Provisional Witness List with anticipated witness testimony summaries.<sup>8</sup> The Chamber rejected the Prosecution's preference to file the provisional list with summaries after the disclosure deadline since it considered that provision of the list prior to the final disclosure deadline would facilitate the Defence's preparation for trial.<sup>9</sup>
9. On 31 August 2020, the Prosecution filed its Provisional List of Witnesses and anticipated testimony summaries; neither P-2843, nor P-2841, the only other witness the Defence has been able to locate that knows P-2843, were on the list.<sup>10</sup>
10. Between October and November 2020, the Prosecution disclosed evidence and material, which was related to witness P-2843.<sup>11</sup> The most important material, namely the evidence cited in the Trial Brief and Witness P-2841's statement, which is the only statement which provides any information about Witness P-2843, were disclosed at the end of October 2020 and 9 November 2020 respectively.<sup>12</sup>
11. On 10 November 2020, the Defence was notified of the Prosecution's Trial Brief and Final List of Witnesses, which contained information such as the relevance of each witness' testimony and summary of their expected testimony. It was only on this date that the Defence was apprised of the existence of Witness P-2843. However, the Prosecution did not disclose any interview notes or statement related to the witness.

---

<sup>8</sup> ICC-01/14-01/18-589.

<sup>9</sup> Ibid., para. 6.

<sup>10</sup> ICC-01/14-01/18-642; ICC-01/14-01/18-642-Conf-AnxA.

<sup>11</sup> [REDACTED].

<sup>12</sup> [REDACTED].

12. Upon request for clarification by the Defence, the Prosecution, on 24 November 2020, informed the Defence that it was not in possession of a statement or disclosable form of notes for Witness P-2843.<sup>13</sup>

#### **IV. Applicable Law**

13. Article 54(1)(a) of the Rome Statute requires that the Prosecution “in order to establish the truth, 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.”
14. Article 67(2) of the Rome Statute makes it incumbent on the Prosecution to “as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.”
15. Rule 77 of the Rules of Procedure and Evidence generally provides that not only is the Prosecution required to disclose evidence it intends to use for the purposes of trial, but also “any books, documents, photographs or other tangible objects,...which are material to the preparation of the defence.”
16. Article 67 of the Rome Statute outlines the fair trial rights of the accused. Article 67(1)(a) and (b) ensure that the accused is informed of the charges against him or her, and that he or she have adequate time and facilities for the preparation of the defence. Article 67(1)(g) guarantees the right to remain silent.

---

<sup>13</sup> Annex 1.

## V. Submissions

17. Despite the Defence not having in its possession a statement for Witness P-2843 and only having received purported evidence underlying his anticipated testimony just months before the start of trial, Witness P-2843 is currently scheduled to testify as the [REDACTED] witness in the instant case.<sup>14</sup> His testimony is expected to be relevant to a breadth of central issues in the case, namely the background of the conflict, the incident at [REDACTED], and lastly Mr Ngaïssona's alleged contributions.<sup>15</sup>

18. While the Defence is mindful of it being a party's prerogative to decide the evidence presentation of its case, which includes which witnesses it will call to testify, this prerogative is not free from judicial oversight.<sup>16</sup> The Chamber can and will interfere with a party's presentation of evidence where, for example, potential prejudice arises to the Defence.<sup>17</sup>

19. The Defence requests the Chamber's interference with the Prosecution's presentation of evidence by striking Witness P-2843 from the Prosecution's Final Witness List because (1) the Prosecution did not meet its statutory investigative obligations under Article 54(1) and (2) the prejudice caused by such a breach would be substantial if Witness P-2843 is permitted to testify.

### **A. The Prosecution breached its investigative obligations under Article 54(1)(a) by not securing a statement or any form of disclosable notes for Witness P-2843**

20. By not being in possession of any statement or any form of disclosable notes for Witness P-2843 despite the Witness' consent to testify, the Prosecution has

---

<sup>14</sup> ICC-01/14-01/18-724-Conf-AnxB.

<sup>15</sup> ICC-01/14-01/18-724-Conf-AnxA, page 47.

<sup>16</sup> ICC-01/14-01/18-685, para. 23.

<sup>17</sup> Ibid., para. 24.

breached its investigative obligations under Article 54(1)(a). In the *Prosecutor v. Bemba et al.*, the Prosecution did not provide the Defence with witness statements for two of its fourteen witnesses, and as a result, the Defence requested the trial chamber to strike the two witnesses from the Prosecution's witness list.<sup>18</sup> In disposing of the request, the Chamber found that the Prosecution was under no obligation to produce a witness statement under rule 76 of the Rules of Procedure and Evidence,<sup>19</sup> but that a failure to take a statement could constitute a violation of Article 54(1) of the Statute since "this provision obligates the Prosecution to make sufficient efforts to question witnesses about their knowledge of the case in the course of its investigation."<sup>20</sup>

21. From the limited information that has been provided to the Defence from *inter partes* discussions with the Prosecution, it appears that the Prosecution has not made sufficient efforts to question Witness P-2843 about his knowledge of the case in the course of its investigation since it did not produce any statement or investigative notes subject to disclosure despite obtaining Witness P-2843's consent to testify. In order to obtain his consent to testify and other information related to logistics surrounding testimony, the Prosecution had to be in direct contact with a cooperative witness. Yet, apparently, no effort was made to question the witness about his knowledge of the case. The Defence draws this conclusion on the basis of the Prosecution's disclosure obligations. Had the Prosecution made such an effort to question Witness P-2843, there surely would have been a record of such efforts, and they would have been disclosed to the Defence under the Prosecution's disclosure obligations under Rule 77.

---

<sup>18</sup> ICC-01/05-01/13-1202.

<sup>19</sup> *Ibid.*, para. 11.

<sup>20</sup> *Ibid.*, para. 12.



22. Rule 77 must be interpreted broadly, and “should be understood as referring to all objects that are relevant for the preparation of the defence.”<sup>21</sup> Pre-Trial Chamber II in the instant case defined “material to the preparation of the defence” under Rule 77 to refer “to all objects that are relevant for the preparation of the defence; *including those that are not directly linked to exonerating or incriminating evidence (emphasis added)*.”<sup>22</sup> Therefore, had the Prosecution made an effort to question Witness P-2843, a record indicating such efforts would have been disclosed to the Defence either in its entirety or in a redacted version if necessary. The inability to question a witness on his or her knowledge of the case is material to the Defence even if it is not directly linked to the alleged incriminating testimony since it has a direct bearing on the Defence’s ability to prepare its examination of the witness, which includes investigations related to the witness. Given the Prosecution affirmatively stated that it does not have any material on the substance of P-2843’s testimony or any disclosable form of notes,<sup>23</sup> the only conclusion the Defence can draw from the information before it is that the Prosecution made no effort to question the witness.

23. The Defence notes on the basis of Witness P-2841’s statement, that P-2843 [REDACTED].<sup>24</sup> However, were this to be the case, the Defence submits that such information would have been disclosed under Rule 77 [REDACTED].

**B. As a result of the Prosecution not meeting its investigatory obligations, Mr Ngaïssona has been unduly prejudiced**

24. By not making any effort to question Witness P-2843 on the substance of his expected testimony, the Prosecution has caused Mr Ngaïssona undue prejudice

---

<sup>21</sup> ICC-01/04-01/06-1433, para. 77.

<sup>22</sup> ICC-01/14-01/18-315, para. 67.

<sup>23</sup> Annex 1.

<sup>24</sup> [REDACTED].

since he is unable to adequately prepare for the examination of P-2843 and also has not been sufficiently informed of the substance of his anticipated testimony.

25. In *Bemba et al.*, the trial chamber found that even if the Prosecutor had failed to meet its investigatory obligations by not making a sufficient effort to take statements from the two witnesses, it resulted in minimum prejudice to the accused.<sup>25</sup> Thus, the trial chamber rejected the Defence's request to strike the two witnesses from the Prosecution's Witness List.<sup>26</sup> Trial Chamber VII found the prejudice was minimal for the following five reasons:

- a.) The Defence had been aware of the witnesses' identity and the details of the underlying testimony for quite some time, even as early as the document containing the charges;
- b.) The accused had personal interactions with these two witnesses as defence witnesses in the Main Case;
- c.) Much of the evidence the Prosecution intends to rely on is intercepted communications with the accused;
- d.) The accused have been given timely access to the testimony of the two witnesses in the Main Case;
- e.) The Defence can contact the two witnesses, who are adverse to the Prosecution, through the existing protocol on contacting witnesses of the opposing party.<sup>27</sup>

26. The instant case is clearly distinguishable from *Bemba et al.*

---

<sup>25</sup> ICC-01/05-01/13-1202, para. 14.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., para. 14.

27. First, unlike in *Bemba et al.*, where the Defence was aware of the underlying evidence as early as pre-confirmation, Mr Ngaïssona only became aware of the existence of this witness and his underlying evidence a couple of months ago, a considerable time after the confirmation of charges hearing, in an advanced stage of the Prosecution's disclosure of its evidence against Mr Ngaïssona.

28. Secondly, whereas the case in *Bemba et al.* was strictly circumscribed to the false testimony of a few Defence witnesses in the Main Case, the instant case, as has been repeated frequently by the Prosecution is one of the most complex in terms of volume and case theory before the Court.<sup>28</sup> Therefore, while the Prosecution met the 11 November disclosure deadline for disclosing Witness P-2843's underlying incriminating evidence, the Defence was not really apprised of the Witness' upcoming testimony until the issuance of the Trial Brief since almost the integrality of Witness P-2843's evidence was not disclosed until the end of October 2020. In a case consisting of [REDACTED] Prosecution fact witnesses,<sup>29</sup> and a Prosecution list of evidence consisting of [REDACTED],<sup>30</sup> the Defence submits that it is understandable that it did not become aware of Witness P-2843's underlying evidence until the issuance of the trial brief. This resulted in the Defence having to rush to prepare for Witness P-2843's anticipated testimony and try to adapt its strategy with respect to other Prosecution witnesses since Witness P-2843 is scheduled to testify very close to the start of trial. This has been a highly burdensome task since the Defence has no document in which the Witness provides an account of his knowledge of the allegations.

---

<sup>28</sup> ICC-01/14-01/18-474, para 23; ICC-01/14-01/18-652, para. 6.

<sup>29</sup> ICC-01/14-01/18-724, para 4.

<sup>30</sup> ICC-01/14-01/18-724-Conf-AnxC

29. Third, while it is true that some of the evidence the Prosecution intends to rely on is alleged intercepted emails between Mr Ngaïssona and Witness P-2843, the alleged communications between the two which are cited in the Trial Brief, are sparse and just span a few days.<sup>31</sup> In sustaining its allegations regarding Mr Ngaïssona the Prosecution connects these exchanges with other evidence which does not consist of communications between Mr Ngaïssona and Witness P-2843.<sup>32</sup> Thus, unlike in *Bemba et al.*, the Defence is limited in its preparations since the evidence underlying Witness P-2843 is not strictly limited to alleged communications with Mr Ngaïssona. Therefore, the Defence is completely unprepared for the Witness' version of allegations, which do not concern just alleged communications with Mr Ngaïssona. The Prosecution itself admits that P-2843's anticipated evidence is broader in scope by affirming that he is not only expected to testify on Mr Ngaïssona's alleged contributions but also on topics such as the background of the conflict, the incidents and [REDACTED].

30. Fourth, while in *Bemba et al.*, it was an undisputed fact that the two witnesses the defence sought to exclude were Defence witnesses in the Main Case, here, the nature and contours of the relationship between Mr Ngaïssona and Witness P-2843 need to be proved by the Prosecution. Therefore, it cannot be assumed by the Chamber that the Defence is well apprised of the content of Witness P-2843's anticipated testimony on the basis of their pre-existing relationship, as was the case in *Bemba et al.* Similarly, it cannot be expected of the Defence to enter into contact with Witness P-2843 under the Protocol on the Handling of Confidential Information During Investigations and Contact between a Party or

---

<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

Participant and Witnesses of the Opposing Party or a Participant.<sup>33</sup> Mr Ngaïssona contests the allegation that [REDACTED].<sup>34</sup> Mr Ngaïssona should not be expected to enter into contact with Witness P-2843 in such a situation where such contact would be contrary to Mr Ngaïssona's right to remain silent under Article 67(1)(g). Further, if the Prosecution's constraints in interviewing Witness P-2843 arise from [REDACTED], then the same constraints would apply to the Defence.

31. For the aforementioned reasons, the Defence submits that permitting Witness P-2843 to testify would result in substantial prejudice to Mr Ngaïssona's right to be notified of the content of the charges against him and to have sufficient time and facilities to prepare his defence under Article 67. Striking Witness P-2843 from the Prosecution's Witness List would strike an appropriate balance between the Prosecution's prerogative to present its case, and Mr Ngaïssona's right to a fair trial. The Defence's request is strictly circumscribed to striking Witness P-2843 from the Prosecution's Witness List containing [REDACTED] fact witnesses, among which figures Witness P-2841 who is expected to testify on the nature of the relationship between Mr Ngaïssona and Witness P-2843. The Prosecution is also not excluded from requesting to introduce the alleged exchanges between Witness P-2843 and Mr Ngaïssona through a bar table motion. Therefore, no prejudice would result for the Prosecution.

## VI. Relief Sought

32. The Defence respectfully requests the Chamber to:

- i. **STRIKE** Witness P-2843 out of the Final Witness List.

---

<sup>33</sup> ICC-01/14-01/18-677-Anx5.

<sup>34</sup> Trial Brief, para 79.

Respectfully submitted,



---

Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 2 February 2021,

At The Hague, the Netherlands.