

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **15 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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Yekatom Defence response to the Ngaïssona
“Defence Motion to strike Witness P-2843 from the Prosecution’s Final List of
Witnesses”, ICC-01/14-01/18-809-Conf, 11 January 2021”, ICC-01-14-01/18-842-
Conf, 20 January 2021**

Source: Defence for Mr. Alfred Rombhot Yekatom

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 Mr. Yekatom

Me Mylène Dimitri

Mr. Thomas Hannis

Counsel for Mr. Ngaïssona

Me Geert-Jan Alexander Knoops

Mr. Richard Omissé-Namkeamaï

Legal Representatives of Victims

Mr. Dmytro Suprun

Mr. Abdou Dangabo Moussa

Ms. Elisabeth Rabesandratana

Mr. Yaré Fall

Ms. Marie-Edith Douzima-Lawson

Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

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

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION / OVERVIEW

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) support the Ngaïssona “Defence Motion to strike Witness P-2843 from the Prosecution’s Final List of Witnesses” (“Motion”).¹ The Defence fully concurs with the relief sought and respectfully requests the Chamber to exclude Witness P-2843 from the Final Witness List.
2. The Defence contends that the Prosecution has not met its statutory investigative obligations pursuant to Article 54 of the Rome Statute, therefore causing significant prejudice to Mr. Yekatom as the witness is expected to testify on a central issue, [REDACTED].

PROCEDURAL BACKGROUND

3. On 22 May 2020, the Prosecution was ordered by the Single Judge to file, by 15 June 2020, a preliminary list of witnesses indicating, *inter alia*, which witnesses the Prosecution was ‘already certain’ would testify. The Single Judge found this list necessary to assist the parties, particularly the Defence, in their preparation for trial and to assure the expeditiousness of the proceedings.²
4. On 15 June 2020, the Prosecution filed its Preliminary List of Witnesses, in which Witness P-2843 did not appear.³
5. On 16 July 2020, the Chamber issued its Decision Setting the Commencement Date of Trial and ordered the Prosecution to file, by 31 August 2020, a Provisional Witness List with anticipated testimony summaries. The Chamber recalled that this procedure was in accordance with the practice of the Court and that it would facilitate the preparation of the Defence for trial.⁴

¹ [ICC-01/14-01/18-809-Conf.](#)

² [ICC-01/14-01/18-528](#), paras 3-4.

³ [ICC-01/14-01/18-553](#); [ICC-01/14-01/18-553-Conf-AnxA.](#)

⁴ [ICC-01/14-01/18-589](#), para. 6.

6. On 31 August 2020, the Prosecution filed its Provisional List of Witnesses, in which Witness P-2843 still did not appear.⁵
7. On 19 and 26 October 2020, the Prosecution disclosed evidence, which although not identified as such, was related to Witness P-2843.⁶
8. On 10 November 2020, the Prosecution filed its Trial Brief, in which the aforementioned evidence related to P-2843 was cited. Apart from a brief reference to [REDACTED],⁷ the Trial Brief contains no direct reference to P-2843 or any statement he may have given. On the same day, the Prosecution also filed its Final Witness List, in which P-2843 is cited for the first time.⁸
9. On 24 November 2020, during *inter partes* communications, the Defence of Mr. Ngaïssona requested the Prosecution to clarify whether or not it was in possession of a statement or any other form of notes related to P-2843. On 24 and 30 November 2020, the Prosecution replied that it was not in possession of any material regarding the substance of P-2843's expected testimony.⁹

APPLICABLE LAW

10. According to Article 54(1)(a) of the Rome Statute "the Prosecutor shall, 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. "

⁵ [ICC-01/14-01/18-642-Conf](#), [ICC-01/14-01/18-642-Conf-AnxA](#).

⁶ [ICC-01/14-01/18-691-Conf-Anx](#); [ICC-01/14-01/18-699-Conf-Anx](#); [CAR-OTP-2102-3799](#); [CAR-OTP-2124-0890](#); [CAR-OTP-2124-0891](#); [CAR-OTP-2124-0892](#); [CAR-OTP-2124-0894](#); [CAR-OTP-2124-0895](#); [CAR-OTP-2124-0896](#); [CAR-OTP-2124-0899](#); [CAR-OTP-2124-0900](#); [CAR-OTP-2124-0901](#); [CAR-OTP-2124-0903](#); [CAR-OTP-2124-0985](#).

⁷ [ICC-01/14-01/18-723-Conf](#), paras. 79, 183, 278.

⁸ [ICC-01/14-01/18-724-Conf-AnxA](#), page 47, Witness n° 96.

⁹ Emails exchanged between OTP and the Ngaïssona team between 24 November 2020 and 30 November 2020 and produced in [ICC-01/14-01/18-809-Conf-Anx1](#).

11. According to Article 67(1) (b) of the Rome Statute the accused shall be entitled “to have adequate time and facilities for the preparation of the defence”.

SUBMISSIONS

12. The Yekatom Defence supports the arguments presented by the Ngaïssona Defence in its Motion.
13. In the Prosecution Trial Brief, although evidence related to Witness P-2843 is cited, no direct reference to P-2843 or any statement he may have given can be found. It is only through the Final Witness List, filed on 10 November 2020, that the Defence was officially made aware that Witness P-2843 would be testifying in the course of the trial.¹⁰
14. The only reference regarding the substance of P-2843’s expected testimony is contained in the Prosecution’s Final Witness List. The summary therein indicates that P-2843 will testify on [REDACTED].¹¹ P-2843 is also expected to testify on [REDACTED], in which no direct reference is made to [REDACTED].¹² It is therefore unknown to the Defence to what extent the witness will testify on [REDACTED], impeding the Defence’s ability to carry out meaningful preparation for this witness’s testimony at trial. It is also unclear for the Defence how exactly the Prosecution became aware that P-2843 will be testifying/ is in a position to testify about “[REDACTED]” without having done any investigative activities.
15. While the Defence concedes that the Prosecution’s failure to take a statement from P-2843 does not of itself comprise a disclosure violation, it nonetheless submits that the Prosecution’s conduct in this regard falls short of the

¹⁰ [ICC-01/14-01/18-723-Conf](#), fns.180, 188, 502, [ICC-01/14-01/18-724-Conf-AnxA](#), p.47.

¹¹ [ICC-01/14-01/18-724-Conf-AnxA](#), page 47, Witness n° 96.

¹² See above fn.5.

standard set out in Article 54(1)(a) and causes substantial prejudice to Defence preparation.¹³

16. While the Ngaïssona Defence has clearly demonstrated that the instant circumstances are distinguishable from those of *Bemba and al.*, the Defence further submits that the absence of any reference to Mr. Yekatom in [REDACTED] comprises a specific additional distinguishing factor in relation to Mr. Yekatom. Not only is there no reference to Mr. Yekatom in [REDACTED] cited, there is no [REDACTED] that could assist the Defence in foreseeing the expected testimony of the latter. Finally, the [REDACTED] contain no reference to specific crime base relevant to Mr. Yekatom's charges. Unlike *Bemba and al.*, the Defence is unaware of the details of the underlying evidence against Mr. Yekatom and the Defence is not privy to any prior statement or testimony P-2843 may have given against Mr. Yekatom or in relation to crime base relevant to Mr. Yekatom's charges.
17. In addition, the scope of what a witness may address during his testimony in contempt charge cases is far much narrow than in core crimes cases.
18. The Defence is unaware of the substance of the information that will be provided by the witness [REDACTED], although these locations are of central importance and relevant to core issues in this case. [REDACTED] are encompassed in many of the charges:¹⁴

[REDACTED].
19. The Defence is unable to assess whether or not P-2843 will testify on the [REDACTED] attack and the alleged presence of Mr. Yekatom and/or his

¹³ *Prosecution v. Bemba et al.*, [Decision on Joint Request to Strike Prosecution Witnesses P-198 and P-201 from the Witness List](#), ICC-01/05-01/13-1202, 31 August 2015, para 11; cf. paras 14-15. As argued by the Ngaïssona Defence, the instant circumstances are clearly distinguishable from those of the *Bemba et al.* case; see, [ICC-01/14-01/18-809-Conf](#), paras. 24-30.

¹⁴ [REDACTED].

participation in advance planning for that event. The Defence is also unaware if the witness will testify on [REDACTED]. Given the lack of any detail as regards the substance of his evidence, the Defence is unable to conduct meaningful investigation in preparation for his testimony. Indeed, should new and prejudicial details emerge during the evidence of P-2843, the Defence may be obliged to seek an adjournment of his testimony so as to conduct investigations into these new details, thereby causing avoidable delays, contrary to Mr. Yekatom's right to expeditious proceedings.

20. According to the Prosecution's Order of Witnesses, P-2843 will be the twelfth witness to testify and the sixth out of eight in the section entitled [REDACTED].¹⁵ Presumably, these witnesses preceding P-2843 will testify to broadly similar matters as him and more importantly, prior to him. As an example both P-2843 and P-2625, scheduled to appear first in the aforementioned section, will testify [REDACTED];¹⁶ and P-2843 and P-1847, second in the section, will both testify [REDACTED].¹⁷
21. The prejudicial effect of the lack of a statement from P-2843 is not limited to Defence preparation regarding that witness alone. Without a witness statement, the Defence cannot know whether and to what extent the evidence of P-2843 will corroborate or be inconsistent with the evidence of the preceding witnesses. The Defence is therefore put at an unfair disadvantage as regards cross-examination of these preceding witnesses and in fact, any other witnesses who might testify on matters discussed by P-2843. Again, in the event that new details emerge during the evidence of P-2843, which would have been beneficial for the purposes of cross-examination of the preceding

¹⁵ [ICC-01/14-01/18-724-Conf-AnxB](#), p.1.

¹⁶ [ICC-01/14-01/18-724-Conf-AnxA](#), page 47, Witness n° 96 : "He [P-2843] is expected to testify [REDACTED]" ; page 45, Witness n°90 : "He [P-2625] is expected to testify about : [...] [REDACTED]".

¹⁷ [ICC-01/14-01/18-724-Conf-AnxA](#), page 47, Witness n°96 : "He [P-2843] is expected to [REDACTED]" ; page 41, Witness n°80 : "He [P-1847] is expected to testify about : [REDACTED]".

witnesses, the Defence may be obliged to request that these witnesses be recalled, risking further trial delays.

22. Contrary to the Prosecution Response, at issue is not whether the Defence has the ability to obtain a statement or if there is any legal impediment thereto; on the contrary,¹⁸ the question is whether the Defence is prejudiced by the absence of any indicia as to the subject matter of the witness's testimony on [REDACTED].
23. Moreover, the suggestion of the Prosecution – in sum, that if the Defence seeks notice of the substance of a Prosecution witness's anticipated evidence, then it bears the responsibility of obtaining it – is untenable. Not only would this comprise an unacceptable reversal of the Prosecution's duty to provide notice, it also runs the incommensurable risk of gathering evidence from a witness hostile to the Defence and, given that the Protocol states that any such statements must be recorded and provided to the Prosecution, is fundamentally at odds with Mr. Yekatom's right against self-incrimination.
24. Second, the Defence cannot strategically decide to interview a witness in the dark, as it were, without any statement as a guideline to seek clarifications or to serve as an assessment of the witness' credibility or reliability. On the contrary, statements are a necessity when interviewing witnesses, either for the purposes of clarifying aspects of their proposed evidence, or to use as a secure boundary if the witness goes outside their expected evidence during the interview.
25. In any event, and noting that portions of the Prosecution response remain redacted and inaccessible to the Defence, the Prosecution's argument that there is a statutory impediment preventing it from interviewing P-2843¹⁹

¹⁸ [ICC-01/14-01/18-831-Conf-Red](#), para. 7.

¹⁹ [ICC-01/14-01/18-831-Conf-Red](#), para.6.

nonetheless appear unconvincing. *First*, the Prosecution's exchange with P-2843 about his willingness to testify in this case [REDACTED]. The Prosecution could have obtained a statement during that same communication. *Second*, if the evidence of this witness were truly critical to the Prosecution case, [REDACTED]. Even if the Prosecution were without fault as regards its inability to obtain a statement from P-2843, it remains contrary to the fairness of these proceedings that the prejudice falls squarely on the shoulders of Mr. Yekatom having to conduct cross-examination of P-2843 and related witnesses without sufficient preparation.

26. For the aforementioned reasons, the Defence contends that permitting Witness P-2843 to testify would result in undue prejudice to Mr. Yekatom's rights to have adequate time and facilities for the preparation of his defence; and carries the real risk of occasioning undue delay in these proceedings.

CONFIDENTIALITY

27. The present response is filed on a confidential basis corresponding to the classification of the Ngaïssona "Defence Motion to Strike Witness P-2843 from the Prosecution's Final List of Witnesses". A public redacted version will be filed shortly.

RELIEF SOUGHT

28. In light of the above, the Defence joins the Defence for Mr. Ngaïssona in respectfully requesting the Chamber to:

EXCLUDE Witness P-2843 from the Final Witness List.

RESPECTFULLY SUBMITTED ON THIS 15th DAY OF FEBRUARY 2021²⁰

²⁰ The assistance of Audrey Gagné Breton, Legal Intern, in the research for this motion is gratefully acknowledged.



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Mr. Thomas Hannis
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands