



Original: English

No.: ICC-01/14-01/18
Date: 16 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Prosecution’s Response to Ngaïssona Defence Motion
to strike Witness [REDACTED] from the Prosecution’s Final List of Witnesses
(ICC-01/14-01/18-809-Conf)” 18 January 2021**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the NGAISSONA Defence’s Motion to strike Witness [REDACTED] from the Prosecution’s List of Final Witnesses (“Motion”).¹ The Motion lacks any legal basis under the Court’s procedural framework, and is further unfounded.

2. *First*, the Office of the Prosecutor (“Prosecution”) has not breached its investigative duties under article 54(1), given the statutory impediments preventing it from obtaining a statement from [REDACTED].

3. *Secondly*, the absence of a statement from [REDACTED] causes no unfair prejudice to the Defence. Moreover, given that no statutory impediments prevent the Defence from obtaining a statement from the witness, NGAISSONA’s strategic decision not to do so cannot reasonably justify such a claim.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“Regulations”), this Response is classified as *Ex Parte*, only available to the Prosecution, because it reveals personal circumstances of a witness that are not material to Defence preparation. It is otherwise further classified as Confidential, pursuant to regulation 23*bis*(2) of the Regulations of the Court, because it responds to a motion filed with the same classification, and because it contains information that may reveal the identity and expected testimony of a witness. The Prosecution will file a public redacted version upon order of the Chamber.

¹ ICC-01/14-01/18-809-Conf.

III. SUBMISSIONS

5. The Prosecution is under no general obligation to obtain a statement from each witness it intends to call at trial.² The Prosecution is however required under article 54(1)(a) of the Statute to “extend the investigation to cover all [relevant] facts and evidence” and “in doing so, investigate incriminating and exonerating circumstances equally”, a provision interpreted by Trial Chamber VII as obligating the Prosecution to “make sufficient efforts to question witnesses about their knowledge of the case in the course of its investigation”.³

6. The Prosecution has not breached its obligations under article 54(1)(a), [REDACTED]⁴ [REDACTED]⁵ [REDACTED], [REDACTED].

7. The Defence is in no way unfairly prejudiced by the Prosecution’s calling [REDACTED] without obtaining a prior statement. *First*, the Defence has access to the same relevant documents⁶ as the Prosecution, and can therefore anticipate his testimony and (cross)examine him on equal footing with the Prosecution.⁷ *Second*, the Defence cannot reasonably claim prejudice when it has strategically determined not to take any steps to obtain a statement from the witness, absent any logistical or legal impediment. [REDACTED],⁸ [REDACTED].⁹

8. While the Defence cannot be expected to undertake investigative steps where it is unable to do so, it cannot abdicate all responsibility and claim “unfair prejudice” when for strategic reasons it has chosen not to take action on the basis of evidence

² See ICC-01/05-01-13-1202, para. 11.

³ See ICC-01/05-01-13-1202, para. 12 (notably, the Chamber’s concern expressed in respect of article 54(1) arose from its failure to appreciate that the Prosecution’s admonition of the witness from delving into substantive matters was *required* due to the witness’s Suspect status and absence of Counsel (see para. 13).

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

⁷ [REDACTED].

⁸ See Motion, para. 30.

⁹ [REDACTED].

available to it.¹⁰ While incriminating evidence is prejudicial by definition, this does not in any way make its use unfair. Nor, can the Defence's avoidance of obtaining a potentially unfavourable statement from [REDACTED] regarding [REDACTED], substantiate a claim of prejudice here.

IV. RELIEF SOUGHT

9. For the above reasons, the Prosecution requests the Chamber to reject the Motion.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive, flowing style.

James Stewart, Deputy Prosecutor

Dated this 16th of February 2021
At The Hague, The Netherlands

¹⁰ [REDACTED]. Mr Ngaïssona should not be expected to enter into contact with Witness [REDACTED] in such a situation where such contact would be contrary to Mr Ngaïssona's right to remain silent under Article 67(1)(g)."