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**International
Criminal
Court**



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Date: 18 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

**Public Redacted Version of “Defence Motion to strike [REDACTED] from the
Final List of Witnesses and for the Exclusion of his Anticipated Evidence”, 11
January 2021, ICC-01/14-01/18-807-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 Knoops
Mr Richard Omissé-Namkeamaï
Ms Lauriane Vandeler

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
Section**

Other

I. Introduction

1. While the issue at hand, when considering whether [REDACTED] should be allowed to testify, is not one of illegally obtained evidence, it is not one of mere credibility either. In the [REDACTED].¹
2. More specifically, based on the evidence presented by the Prosecution, [REDACTED],² [REDACTED],³ [REDACTED],⁴ [REDACTED],⁵ and [REDACTED].⁶
3. In light of the above, and as will be developed below, allowing witness [REDACTED] to testify in the case before this Chamber would cast substantial doubts on the reliability of the evidence and the introduction of [REDACTED] anticipated evidence would be antithetical to, and would seriously damage, the integrity of the proceedings.
4. Therefore, bearing in mind the ICC judges' broad discretion on deciding whether and when to exclude (testimonial) evidence,⁷ the Defence for Mr Ngaïssona ("the Defence") respectfully requests the Chamber to strike [REDACTED] out of the Final List of Witnesses and exclude his anticipated evidence from the case record (the "Request").

II. Procedural History

5. On 29 August 2019, the Defence for Mr Yekatom filed its "Motion for Finding of Disclosure Violation and for Remedial Measures" (i) submitting that the Prosecution had violated its obligation to disclose exculpatory evidence [REDACTED] and (ii) requesting, *inter alia*, the Chamber to order the immediate disclosure of the relevant

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

⁷ See, for instance, article 69(4) of the Rome Statute.

material.⁸ On 30 August 2019, the Defence joined the Defence for Mr Yekatom's request.⁹

6. On 2 September 2019, the Prosecution filed the "Prosecution's Response to the Yekatom Defence's "Motion for Finding a Disclosure Violation and for Remedial Measures".¹⁰
7. On 4 September 2019, Pre-Trial Chamber II ordered the Prosecution to disclose any information pertaining to Witness [REDACTED] to the Defence.¹¹
8. On 10 September 2019, the Prosecution filed its "Prosecution's Notification Regarding the Order of Pre-Trial Chamber II in the Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions", indicating, *inter alia*, that it was not in a position to disclose the material relating to [REDACTED].¹²
9. On 17 September 2019, the Defence for Mr Yekatom filed its "Response to Prosecution Notification Refusing to Disclose Exculpatory Material", reiterating its request that the Pre-Trial Chamber either (i) order the disclosure of evidence concerning Witness [REDACTED] before the conclusion of the Confirmation Hearing, or (ii) exclude the evidence relating to this witness in the event of non-disclosure by that time.¹³
10. In its "Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona" dated 11 December 2019 ("Confirmation Decision"), the Pre-Trial Chamber reiterated that the Prosecution had failed to discharge its disclosure obligations in relation to this witness. However, in light, *inter alia*, of the 'limited scope and purpose of the confirmation proceedings' the Pre-Trial Chamber decided it would be disproportionate to exclude all of the material related to witness [REDACTED] from the confirmation of charges but decided nonetheless to only refer

⁸ ICC-01/14-01/18-301-Conf.

⁹ ICC-01/14-01/18-303-Conf.

¹⁰ ICC-01/14-01/18-311-Conf.

¹¹ ICC-01/14-01/18-315-Conf.

¹² ICC-01/14-01/18-330-Conf.

¹³ ICC-01/04-01/18-349-Conf.

to [REDACTED] evidence for the purpose of corroborating findings otherwise established to the relevant standards.”¹⁴

11. On 17 December 2019, the Defence for Mr Yekatom requested the Pre-Trial Chamber to order the variation of the protective measures currently applicable in [REDACTED] to allow the Prosecution to disclose the redacted versions of the Exculpatory Material concerning [REDACTED] (the “Variation Application”).¹⁵ On 24 December 2019, the Prosecution responded to the Variation Application.¹⁶
12. On 22 January 2020, the Pre-Trial Chamber found that it had ‘fulfilled its first and foremost function in respect of this case’ with the conclusion of the confirmation proceedings. Thus, in considering, *inter alia*, that a matter which essentially revolved around the relevance of the evidence at stake would be ‘best left to the consideration of the Trial Chamber’, the Pre-Trial Chamber dismissed the Variation Application *in limine*.¹⁷
13. On 4 May 2020, the Defence for Mr Yekatom filed its “Motion for Disclosure of Prior Statement of Witness [REDACTED]” (“Motion for Disclosure”).¹⁸ On 11 May 2020, the Defence joined the Motion for Disclosure.¹⁹ On 13 May 2020, the Prosecution responded to the Motion for Disclosure.²⁰
14. On 15 June 2020, the Chamber granted the Motion for Disclosure and instructed the Prosecution to the Defence redacted versions of [REDACTED] witness statement and, if any, of other exculpatory material relating to [REDACTED] credibility.²¹
15. Certain information pertaining to [REDACTED].²²

¹⁴ ICC-01/14-01/18-403-Conf-Corr, para. 34.

¹⁵ ICC-01/14-01/18-407-Conf, paras 1, 24.

¹⁶ ICC-01/14-01/18-415-Conf.

¹⁷ ICC-01/14-01/18-422-Conf, para. 6, p. 6.

¹⁸ ICC-01/14-01/18-506-Conf.

¹⁹ See email from the Defence to the Chamber, 11 May 2020, at 16:01.

²⁰ ICC-01/14-01/18-513-Conf.

²¹ ICC-01/14-01/18-551-Conf.

²² [REDACTED].

III. Confidentiality

16. In accordance with regulation 23bis(1) of the Regulations of the Court (“Regulations”), the Request is filed confidentially as it refers to confidential information. A public redacted version of the Request will be filed shortly.

IV. Applicable Law

17. Rule 63(2) of the Rules of Procedure and Evidence (“Rules”) provides that “[a] Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69”.

18. According to article 64(2) of the Rome Statute (“Statute”), the Trial Chamber “shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused”. Also, pursuant to article 64(6)(e) of the Statute, the Chamber may as necessary “[p]rovide for the protection of the accused”.

19. Furthermore, article 69(4) of the Statute provides “the primary guidance on factors to be considered when making general admissibility assessments”,²³ stating that the chamber “may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence *and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness*” (emphasis added).

V. Submissions

20. The Defence recalls Trial Chamber VII’s holding in the *Bemba and al.* case that “although parties are entitled to a degree of deference in the selection and presentation of their evidence, their discretion is not unlimited” and that “the Chamber may intervene in these matters [to] ensure the fair and expeditious conduct of the trial”.²⁴

²³ *Prosecutor v. Ruto and Sang*, Decision on the Prosecution’s Request for Admission of Documentary Evidence, ICC-01/09-01/11-1353, 10 June 2014, para. 14.

²⁴ ICC-01/05-01/13-1600, para. 6.

A. [REDACTED] credibility is impugned to such an extent that the exclusion of his proposed evidence is required

21. In the *Ngudjolo* case, where the Trial Chamber was unable to rely on the testimony of a witness because this witness could not have been simultaneously a militia member (under the status of which he testified) and a student in another locality (which the other evidence showed), the Appeals Chamber considered that

[...] a Trial Chamber may indeed rely on certain aspects of a witness's evidence and consider other aspects unreliable. The Appeals Chamber further finds that the evidence of a witness in relation to whose credibility the Trial Chamber has some reservations may be relied upon to the extent that it is corroborated by other reliable evidence. However, the Appeals Chamber also finds that *there may be witnesses whose credibility is impugned to such an extent that he or she cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony.* (footnotes omitted) (emphasis added)²⁵

22. The Appeals Chamber further held

even though parts of witness P-250's testimony appear to have been corroborated by other evidence, this would not [...] "re-imbue" his credibility or the reliability of his evidence.²⁶

Here, like in *Ngudjolo*, the credibility of [REDACTED] has been impugned to such an extent that his proposed evidence cannot be relied upon even if other evidence would appear to corroborate parts of his anticipated testimony. In the instant case, the Chamber and the parties and participants are not merely confronted with the issue of the expected evidence of someone of doubtful moral character or driven by possible political or personal motives. The serious concerns regarding [REDACTED] credibility are brought to a wholly different level in light of the fact that [REDACTED].

23. [REDACTED].²⁷ [REDACTED]²⁸

24. [REDACTED] :

²⁵ ICC-01/04-02/12-271-Corr, para. 168.

²⁶ *Ibid.*, para. 170.

²⁷ [REDACTED].

²⁸ [REDACTED].

[REDACTED].²⁹

And that

[REDACTED].³⁰

And that

[REDACTED].³¹

25. [REDACTED].

26. [REDACTED].³² [REDACTED].³³

27. [REDACTED] is an unscrupulous individual, who did not hesitate to [REDACTED]³⁴ [REDACTED]. Allowing such an individual to testify before this Court could seriously affect the integrity of the proceedings, which is one of the most fundamental evidentiary principles of this Court.

28. [REDACTED].³⁵ [REDACTED].³⁶

29. [REDACTED].³⁷ [REDACTED].

30. In the ICTR *Nahimana and al.* case, the Appeals Chamber held that the mere *suspicion* of a witness having been paid to testify against the accused was sufficient to bind the Trial Chamber to find that these matters cast serious doubt on this witness' credibility and, like any reasonable trier of fact, to either disregard his testimony, or at least require that it be corroborated by other credible evidence.³⁸ The case of [REDACTED] is not a case of mere suspicion; it goes far beyond. [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ ICC-01/05-01/13-1905-Red, para. 141.

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ ICTR, Appeals Chamber, *Nahimana and al. v. The Prosecutor*, "Judgement", ICTR-99-52-A, 28 November 2007, para. 545.

31. Therefore, in light of the above, the Defence submits that [REDACTED] that his testimony could considerably pervert the course of justice, that the exclusion of his proposed evidence in relation to Mr Ngaïssona's case is required.

B. The prejudice that allowing [REDACTED] to testify would cause the Defence outweighs the probative value of [REDACTED] proposed evidence

32. In the *Ruto and Sang* case, while in the context of admission of documentary evidence, the Chamber nonetheless articulated general principles relating to article 69(4) of the Statute and how to consider prejudice:

16. The general rule is, as noted above, subject to the Chamber's power to exclude evidence, which may include for reasons of fairness, expeditiousness and public policy. Therefore, relevant evidence that may prejudice the fairness of the trial, including the rights of the accused or the fair evaluation of testimony or other evidence, may be excluded on that basis. With respect to prejudice, the assessment will be done through comparing any identified prejudice against the probative value, including reliability, of the item in question. Evidence may be excluded where its prejudice factor is great and its probative value is comparatively slim. As has been observed by other Chambers of the Court, it is a fact specific enquiry and it is neither possible nor useful to attempt to exhaustively list the circumstances in which such prejudice may be found to exist.³⁹

33. A review of the jurisprudence of the other international criminal tribunals also shows that the criteria of prejudice to the accused and violations of the accused' fundamental rights are dispositive when determining whether witness evidence should be excluded.

34. For instance, in the ICTR case *Prosecutor v Gatete*, after the close of the Prosecution case, the Defence sought to exclude portions of the Prosecution's evidence. The Chamber partly granted the Defence's motion and declared portions of the Prosecution's evidence inadmissible. The Chamber held:

A Trial Chamber can exclude relevant evidence if it is determined that its probative value is substantially outweighed by the prejudicial effect of admitting it.⁴⁰

³⁹ ICC-01/09-01/11-1353, para. 16.

⁴⁰ ICTR, *Prosecutor v. Gatete*, Decision on defence motion for exclusion of evidence and delineation of the defence case, No. ICTR-2000-61-T, 26 March 2010, para 9, <https://www.legal-tools.org/doc/833ad3/pdf>, relying on *Prosecutor v. Zoran Kupreskic, Mirijan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan*

35. The Pre-Trial Chamber in the present case limited its reliance on [REDACTED] statement with respect to three main allegations.⁴¹ Comparatively and by contrast, the Prosecution relies on [REDACTED] alleged evidence [REDACTED] times in the Trial Brief, the great majority of which directly relates to Mr Ngaïssona's alleged acts and conduct. These references are used to support allegations going to Mr Ngaïssona's alleged responsibility such as [REDACTED],⁴² [REDACTED]⁴³ and [REDACTED].⁴⁴

36. Furthermore, some of [REDACTED] allegations relied upon by the Prosecution to demonstrate points as crucial to Mr Ngaïssona's responsibility as alleged intent, or an alleged [REDACTED], are not even corroborated.⁴⁵ Also, certain of [REDACTED] most serious allegations are allegedly corroborated by the direct evidence of only one witness, such as that of [REDACTED].⁴⁶ [REDACTED].⁴⁷ [REDACTED].⁴⁸

37. The Prosecution submitted in May 2020 that the final decision to call [REDACTED] to testify would depend on the availability of "other prospective evidence, including other witnesses".⁴⁹ The suggestion that [REDACTED] would be called if the Prosecution could not obtain better evidence is striking. This 'for want of anything

Papie and Vladimir Santie, Case No. IT-95-16-A, Judgement (AC), 23 October 200 I, para. 31; *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR 98-42-T, Decision on Alphonse Nteziryayo's Motion for Exclusion of Evidence, 25 February 2009, para. 26; *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor Andre Guichaoua; Defence Motion to Exclude the Witness's Testimony; Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua, 20 April 2006, para. 8; *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor Andre Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. II; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua (TC), 20 April 2006, para. 8; *Karemera et al.*, Decision on the Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions against the Prosecution and Exclusion of Evidence outside the Scope of the Indictment (TC), 19 October 2006, para. 6. See also *Prosecutor v. Karemera et al.*, No ICTR-98-44-T, 15 June 2007, paras 3-5; *Prosecutor v. Keremera et al.*, Decision on Defence motion for exclusion of witness GK's testimony or for request for cooperation from Government of Rwanda, No. ICTR-98-44-T, 27 November 2006, para. 15.

⁴¹ Confirmation Decision, paras 62, 79, 82, 169.

⁴² Trial Brief, para. 83.

⁴³ Trial Brief, paras 96-97.

⁴⁴ Trial Brief, para. 138.

⁴⁵ Trial Brief, paras 311 (footnote 813), 68 (footnote 157), 266 (footnote 725).

⁴⁶ Trial Brief, paras 67 (footnotes 151 and 152), 101 (footnote 239). See also Trial Brief, paras 262 (footnote 698), 266 (footnote 724).

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ ICC-01/14-01/18-513-Conf, para. 6.

better' reasoning should not be permitted in this case and is highly prejudicial to the Defence, while seriously affecting the integrity of the proceedings, [REDACTED].

38. Not only does the Prosecution intend to rely on [REDACTED] prospective evidence, but the Prosecution intends to have him testify [REDACTED]. Should the Chamber grant such an application, each of [REDACTED] transcripts, including [REDACTED], etc., would be submitted on the record of the case.

39. Allowing these items of evidence into the case record, knowing from the outset that they cannot be relied on, and/or allowing [REDACTED] oral testimony, knowing his words cannot be trusted, would not only unduly prejudice the fair trial rights of Mr Ngaïssona who is entitled to face, and defend himself against, accusations supported by *prima facie* credible evidence, but also would considerably pervert the course of justice. It would also unduly affect the limited resources of his Defence team in that it would need to put time and energy in the preparation of an examination of a witness that is false from the outset. Thus, striking [REDACTED] from the witness list would have a positive impact on the expeditiousness of the proceedings by eliminating hours of examination of a witness whose credibility has been so impugned that his testimony is devoid of any probative value. Finally, allowing [REDACTED] to testify will also prejudice the fair evaluation of other evidence, when assessing his testimony in conjunction with the other evidence submitted in the case.

C. The exclusion of [REDACTED] proposed evidence at this stage of the proceedings is in the interest of justice and guarantees due process

40. In the *Lubanga* case, which was plagued by false testimony and witness inducement made by Prosecution intermediaries, the Defence had argued that the proceedings should be stayed because they had been “irremediably vitiated by serious breaches of the fundamental principles of justice [and] the norms of a fair trial”.⁵⁰ The Trial Chamber in that case ultimately found that the evidence of certain witnesses could not be relied on as to the substance of the charges.⁵¹ Given that this issue was discovered

⁵⁰ ICC-01/04-01/06-2657-tENG-Red, para. 5.

⁵¹ ICC-01/04-01/06-2842, 14 March 2012, paras 374, 406, 429, 441.

in the course of trial, the above exclusion of evidence was made at the final deliberation stage. Similar timing was observed in the *Ngudjolo* case because, as elaborated above, the lack of credibility of the witness in question was determined at the moment of testimony.⁵² However, in the present case, [REDACTED].

41. The question of his credibility has in fact been affecting these proceedings since the start and has even led the Pre-Trial Chamber to refrain from entering findings based entirely on Witness [REDACTED] in the Confirmation Decision.⁵³ The Pre-Trial Chamber, in deciding not to exclude all the material related to [REDACTED] at that stage recalled the “limited scope and purpose of the confirmation proceedings” and its preliminary view that “his evidence was not per se determinative of the suspects’ responsibility”.⁵⁴ Given that the proceedings have now reached the trial stage, that [REDACTED] contribution as a trial witness is no longer prospective, and that [REDACTED] proposed evidence, as developed above, is heavily relied on in relation to Mr Ngaïssona’s alleged criminal responsibility, the issuance of a decision on the exclusion of his evidence is now ripe.
42. The prejudice factor is particularly present as [REDACTED] prospective evidence directly relates to the alleged criminal responsibility of Mr Ngaïssona, including, *inter alia*, Mr Ngaïssona’s actions in [REDACTED]. Comparatively, the probative value of [REDACTED] prospective evidence, that is practically nonexistent given his lack of credibility, is substantially outweighed by the prejudicial effect of admitting it.
43. [REDACTED].⁵⁵ This Prosecution remark justifies the exclusion of [REDACTED] from the Final Witness List.
44. Permitting [REDACTED] to testify will cause an irreparable prejudice to the accused and impact the integrity of the proceedings. Therefore, the circumstances require an immediate removal of that witness’ evidence from the pool of evidence rather than an assessment at the final phase of the proceedings. The Defence respectfully requests the Chamber to ensure the integrity of the proceedings and the fairness of this trial by not permitting Witness [REDACTED] to testify since [REDACTED].

⁵² See *supra*, para. 21.

⁵³ Confirmation Decision, para. 34.

⁵⁴ Confirmation Decision, paras 33-34.

⁵⁵ [REDACTED].

VI. Relief Sought

45. The Defence respectfully requests the Chamber to:

- i. **STRIKE** Witness [REDACTED] out of the Final Witness List;
- ii. **EXCLUDE** Witness [REDACTED] prospective evidence from the evidence of this case.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 18 February 2021,
At The Hague, the Netherlands.