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**International
Criminal
Court**

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Date: **25 October 2022**

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 Request under Articles 64(6)(b) and 93 of
the Rome Statute for Further Measures to Compel the Attendance of a Witness”,
ICC-01/14-01/18-1519-Conf-Exp, 19 July 2022**

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. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber V (“Chamber”) to request the assistance of any State Party, on whose territory P-2625 may be found, to take all necessary measures to compel the witness’s testimony before the Court, including to locate, summons, and/or provisionally detain him, as necessary to ensure his prompt appearance via video-link, pursuant to articles 64 and 93(1)(b),(e), and (l).

2. P-2625’s testimony is material to the confirmed charges and highly probative of the Accused’s criminal responsibility, particularly NGAISSONA. Without it the Prosecution will be deprived of important evidence going to the heart of the charged crimes. Moreover, the witness’s testimony is important to the Chamber’s overriding statutory duty to determine the truth.

3. To date, the witness has evaded the summons issued further to the Chamber’s 8 January 2021 Decision compelling his appearance.¹ He has persistently failed to [REDACTED] with the [REDACTED] authorities. His whereabouts are presently unknown as a result of his conduct, which has frustrated (if not all but extinguished) the domestic judicial process to implement the Chamber’s summons.

4. Given that over a year and a half has passed without its execution, it is clear that the summons alone is not an effective means to secure the witness’s appearance in this trial. More effective means of compulsion are necessary. Barring this, the witness will remain unavailable in these proceedings.

¹ ICC-01/14-01/18-804-Conf.

II. CONFIDENTIALITY

5. Pursuant to regulation 23bis(1) of the Regulations of the Court (“RoC”), this Request is filed as “Confidential, ex parte - only available to the Prosecution and the VWU”, as it concerns confidential cooperation issues, and involves previous filings of the same classification. A confidential redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. Further judicial measures are warranted to compel P-2625’s attendance

i. P-2625 is uncooperative and continues to evade the judicial process

6. P-2625 has a history of non-cooperation with the Court. After having initially been interviewed by the Prosecution in November 2019,² the witness later withdrew his cooperation. This led to the Prosecution’s 24 November 2020 Request under articles 64(6)(b) and 93 to compel P-2625’s³ attendance (“24 November 2020 Request”).

7. The Chamber granted the 24 November 2020 Request, issuing its 8 January 2021 Decision ordering, *inter alia*, that a summons for P-2625 be transmitted forthwith for his appearance via video link. On 16 February 2021, the Registry transmitted the related request for assistance to the [REDACTED] authorities toward implementing the Chamber’s summons.⁴ Further to that, the [REDACTED] authorities [REDACTED] to determine whether a domestic summons implementing the Chamber’s 8 January 2021 Decision could be issued under domestic law. As a result, the Prosecution’s intention to call the witness in May 2021 had to be postponed to July 2021.

² CAR-OTP-2123-0377.

³ ICC-01/14-01/18-739-Conf-Red, paras. 26-28 (incorporated herein by reference).

⁴ [REDACTED].

8. In the interim, the Registry transmitted a second request on 2 July 2021 providing the [REDACTED] authorities with the Chamber's summons, and requiring the witness's appearance on 14 July.⁵ Because the domestic [REDACTED] had not been completed by then, the Registry communicated a third request to secure the witness's appearance for the adjourned dates of 23-26 August 2021.

9. On completing [REDACTED], the [REDACTED] authorities informed the Prosecution on 12 August 2021, that a domestic summons had been issued toward implementing the 8 January 2021 Decision. However, although the [REDACTED] authorities had previously communicated with the witness [REDACTED], they were unable to execute the required personal service of the domestic summons due to the witness's absence.

10. On further information provided by the [REDACTED] authorities, it appears that the witness left [REDACTED] at some point in July 2021. The authorities subsequently advised the Prosecution that the witness could not be found in any known place in [REDACTED], and that law enforcement officers had been informed [REDACTED] that he had left the country.

11. Although [REDACTED] law does not provide for alternative means of service of a summons other than 'personal service' (unlike many jurisdictions), the authorities were able to make contact with the witness. On 17 August 2021, they informed him directly via email of the court order for his video-link testimony before the ICC, scheduled for 23 through 26 August 2021. Significantly, the witness responded to law enforcement personnel, stating that: (a) he was out of the country; and (b) had *no intention to cooperate with the ICC or to return to [REDACTED] anytime soon*.⁶ His

⁵ ICC-01/14-01/18-1044-Conf. Although the Summons to Appear was filed on 1 July 2021, a copy thereof was transmitted to the [REDACTED] authorities by the Registry the following day.

⁶ All relevant correspondence can be made available to the Chamber upon request.

awareness that his testimony had been sought before the Court, indeed ordered, is thus clearly established, as is his refusal to attend the proceedings.

12. Subsequent efforts to locate the witness through the latter part of 2021 also proved unfruitful. The [REDACTED] authorities advised the Prosecution that their efforts undertaken to find the witness were unsuccessful, and that there was no evidence of his presence in [REDACTED]. In particular, the authorities confirmed in mid-November 2021 that the witness was not found to be at his residence and did not respond to the intercom or to his door. A further inquiry by law enforcement officials [REDACTED] revealed that, not only had the witness failed to give any prior notice of his intention to vacate the premises, but he had also not paid his rent and legal proceedings had been commenced.

13. Law enforcement officials also confirmed that the witness's telephone number was no longer valid and that he did not respond to a further email message from the officer assigned to the matter. Although the [REDACTED] authorities were able to speak with P-2625 on the phone in early December 2021 and to confirm his presence in [REDACTED] at that time, the witness told the authorities that he was scheduled to leave for [REDACTED] and would return after ten days. Subsequent attempts to contact him after that period were not successful. In the interim, the August 2021 domestic summons expired.

14. In late April 2022, the [REDACTED] authorities advised the Prosecution that they had again made contact with the witness. At that time, P-2625 unequivocally conveyed that he was not willing to testify before the Court. The [REDACTED] authorities further indicated that they were [REDACTED], until such time as a new domestic summons could be obtained. The Prosecution thus requested that 3 June 2022 be designated for P-2625's appearance before the [REDACTED] courts to

facilitate his video-link appearance before the Chamber, and further underscored the continued validity of the Chamber's 8 January 2021 Decision.

15. On 16 May 2022, [REDACTED] the [REDACTED] authorities had informed [REDACTED] that P-2625's whereabouts were unknown and, as such, a renewed domestic summons could not be obtained.

16. The Prosecution subsequently met with the [REDACTED] cooperation focal point, who confirmed the status of the procedure on 17 May 2022. The Prosecution was further advised that the [REDACTED] authorities did not consider that a new summons could be obtained without any indication of the witness's present whereabouts, of which they had no knowledge, nor any apparent means of determining (e.g., through employment records, taxes, travel records, or such).

17. On 24 May 2022, having carried out further searches for the witness, the [REDACTED] authorities informed the Prosecution that P-2625 could not be located, including at his former residence, which they confirmed was empty. They further noted that all efforts by law enforcement to contact the witness had proven unsuccessful.

18. P-2625's prolonged and intentional absences from [REDACTED] in the knowledge of the ICC summons, and his avoidance of the [REDACTED] authorities' repeated attempts to secure his attendance regarding these proceedings, not only evades, but effectively *extinguishes* any reasonable possibility of timely implementing the Chamber's 8 January 2021 Decision.

- ii. P-2625's conduct requires proportional and effective means to compel his attendance

19. To date, P-2625's refusal to cooperate with the Court persists. As noted, his deliberate absence(s) from [REDACTED] continues to frustrate the domestic authorities' implementation of the Chamber's 8 January 2021 Decision and summons. Moreover, his evasion of the execution of the domestic summons (now expired), as well as, his undermining of the ability of the [REDACTED] authorities to obtain a *new* domestic summons through his non-responsiveness and avoidance of detection, have defeated present measures to compel his attendance.

20. P-2625's protracted unavailability to [REDACTED] law enforcement officials demonstrates that his continuing absence and unresponsiveness are calculated and designed to avoid the judicial process to secure his testimony before this Court. They further substantiate his clearly stated intention not to cooperate in these proceedings, and further to defy the Chamber's 8 January 2021 Decision.

21. It is crystal clear that P-2625 will not testify in this trial unless and until more effective means of compelling his attendance are brought to bear. All necessary measures to that end should be undertaken, including the Chamber's further request for the assistance of any State Party to facilitate his prompt appearance *via* video link through all appropriate and permissible means consistent with article 93(1)(l), including his provisional detention, as may be necessary. The witness's continued defiance of the judicial process leaves little choice.

22. By issuing a standing request for assistance to compel P-2625's attendance via video-link,⁷ including through his location, summonsing, and/or provisional

⁷ See, e.g. ICC-02/05-01/07-74-Red, p. 13. The order can also specify that it be communicated, or its existence revealed, as needed to any State Party or international organisation for the purposes of its execution. See, e.g. ICC-01/14-01/18-1-Red, p. 21-22; ICC-01/14-01/18-89-Red, p. 38-39; ICC-01/14-01/21-2-Red2, p. 22.

detention if necessary, the Registry will be in a position to transmit the same to any State Party where the witness may be located almost *immediately*. The alternative — presenting an application to the Chamber only *after* the witness has been definitively located on the territory of a specific State Party — would inevitably result in substantial delay. This would defeat any possibility of effectively securing his attendance, particularly given his demonstrated and continued adverse posture towards the Court.

- iii. The Chamber may request a State Party to take all necessary and reasonable measures to compel a witness's appearance

23. A Chamber has the authority to direct the use of physical means to compel a witness's appearance. The Appeals Chamber has confirmed the Court's power to compel a witness's appearance under article 64(6)(b),⁸ and the legal obligation of States Parties to, *inter alia*, compel witnesses to appear in domestic courts to give testimony before a Trial Chamber *in situ* or via video-link, pursuant to article 93(1)(b).⁹ In this respect, the Chamber's discretion in what it may request of a State Party is broad.

24. Thus, with regard to P-0954 for instance, this Chamber ordered the witness's compelled appearance as follows:

"The Chamber sees no other option than to compel the witness to testify pursuant to Article 64(6)(b) of the Statute. The Chamber is of the view that the tripartite requirements are satisfied, notably relevance, specificity, and necessity. In this regard, the Chamber notes in particular that *the witness's anticipated testimony is potentially necessary for the determination of the truth and there are no other options available to secure the witness's testimony*. The Prosecution's request is therefore granted. The Chamber further requests *the assistance of the CAR*

⁸ ICC-01/09-01/11-1598, paras. 107, 113.

⁹ ICC-01/09-01/11-1598, paras. 128, 132; *see also* para. 123.

*government in ensuring the appearance of Witness P-0954 and directs the Registry to liaise with the CAR authorities as necessary.”*¹⁰

25. Given that P-0954 was [REDACTED] at the time of the Chamber’s order and therefore unable to produce himself before the Court, the Chamber’s request implicitly required the CAR authorities to physically “ensure” the witness’s presence.

26. Even if *arguendo*, requiring a material witness’s provisional detention to ensure their appearance *via* video link were to fall outside the scope of article 93(1)(b), it may nevertheless be effected pursuant to article 93(1)(l) — as long as it is not in conflict with the domestic laws of the State Party concerned.

B. The requirements for further judicial intervention are met

27. As the Prosecution’s 24 November 2020 Request shows, the cumulative requirements for the Chamber’s intervention, namely: (i) relevance, (ii) specificity, and (iii) necessity, are satisfied.¹¹ They remain so, and justify further measures to compel the witness’s attendance in these proceedings. Given the failure of the summons previously issued, and the witness’s deliberate undermining of the judicial process described above, a more effective means of compulsion is warranted to secure P-2625’s prompt attendance.

28. P-2625 is a material witness — his evidence is important to the determination of the truth. The Prosecution incorporates by reference its previous assertions concerning the significance of the witness’s evidence in its 24 November 2020 Request.¹² Indeed, there is a clear and legitimate interest in securing P-2625’s testimony in this case, in

¹⁰ See ICC-01/14-01/18-T.112, p. 13, ln. 6-23 (emphasis added); *see also* ICC-01/14-01/18-T.114, p. 40, ln. 11-p. 41, ln. 9.

¹¹ ICC-01/14-01/18-804-Conf, para. 15-20; ICC-01/05-01/13-1343-Conf, para. 18 (referring to ICC-01/09-01/11-1274-Corr2, para. 181); ICC-01/09-02/11-908, para. 100, fn. 216; ICC-02/05-03/09-504-Red, para. 4; *see* ICC-01/14-01/18-739-Conf-Red, paras. 8-24, 26-28 (setting out the relevance and necessity of P-2625’s testimony).

¹² ICC-01/14-01/18-739-Conf-Red, paras. 8-24.

particular, regarding NGAISSONA's criminal responsibility as charged for "the most serious crimes of concern to the international community as a whole."¹³

29. Certain aspects of P-2625's evidence are unique and *highly* important to the proceedings, and the Chamber has already determined that it is necessary that his appearance be compelled.¹⁴

30. Nevertheless, because the Chamber's summons (as such) has been ineffective in *timely* producing the witness in this trial, the Chamber's further intervention to request the assistance of any State Party to facilitate P-2625's prompt appearance *via* video link through any and all appropriate means is fully consistent with the Statute and warranted.

31. *First*, the only objective here is to secure the witness's evidence before the Chamber in the present proceedings. There is no investigative intent or ulterior motivation. As noted, the Prosecution has already obtained a 34-page statement from P-2625, the contents of which the Chamber is fully apprised.

32. *Second*, a further request for assistance by the Chamber under Part 9 of the Statute subject to the domestic law of the relevant State Party(ies), which may reasonably include the witness's provisional detention as may be necessary, is appropriate. When strictly limited to securing P-2625's *prompt* appearance before the Chamber via video-link consistent with article 93, it is entirely commensurate with and proportional to the prevailing circumstances, and the importance of the witness's prospective testimony.

33. *Third*, adequate safeguards exist within the statutory framework to ensure that any request which may involve a witness's physical compulsion before a Chamber, is

¹³ Rome Statute, Preamble.

¹⁴ See ICC-01/14-01/18-804-Conf, p. 9.

not overreaching or pretextual, but rather that it is legally justified and regulated both before the Court *and* at the national level.

- i. P-2625's compelled attendance may be feasibly achieved through further measures

34. As noted, requesting all necessary measures to be taken in compelling a witness's attendance before the Court, including physical means, is not inconsistent with the statutory framework. The issue ultimately devolves on a fact-specific inquiry. Thus, such action may be the only foreseeably feasible means to ensure the testimony of a witness. In terms of the feasibility of such measures, notably, several common law and civil law jurisdictions permit the provisional detention of material witnesses in serious criminal trials when other means of securing their testimony are inadequate.

35. For instance, in Canada,¹⁵ the Central African Republic,¹⁶ France,¹⁷ Germany,¹⁸ the United Kingdom,¹⁹ the United States,²⁰ and the Republic of the Congo,²¹ domestic law permits authorities to detain an uncooperative witness for purposes of testifying in a criminal trial in a number of circumstances. These include when:

- a witness fails to respond to a summons;
- a witness is deemed unlikely to comply with a summons;²²
- a witness is evading service of a summons;²³ or

¹⁵ See Criminal Code, RSC 1985 (hereafter "Canadian Criminal Code"), articles 698 (formerly, article 626), and 705.

¹⁶ *Loi n°10.002 du 6 janvier 2010, code de procédure pénale centrafricain, articles 65-66, 222, 225.*

¹⁷ *Code de procédure pénale, France, articles 101, 109, and 110.*

¹⁸ Code of Criminal Procedure (*Strafprozeßordnung – StPO*) as published on 7 April 1987 (Federal Law Gazette I, p. 1074, 1319), as last amended by Article 3 of the Act of 11 July 2019 (Federal Law Gazette I, p. 1066), sections 51(1) and 70(1).

¹⁹ United Kingdom Criminal Procedure Act 1965, sections 2-4.

²⁰ 18 U.S.C § 3144.

²¹ *République du Congo, Loi n° 1-63 du 13 janvier 1963 portant code de procédure pénal, articles 86(1), 92-93, 112(3), 277(1).*

²² Canadian Criminal Code, article 698(2)(a); United Kingdom Criminal Procedure Act 1965, section 4.

²³ Canadian Criminal Code, article 698(2)(b); *U.S. v. Black Elk Energy Offshore Operations LLC*, 2016 WL 164928, (E.D. Louisiana 2016).

- it may become impracticable to secure their presence through a summons alone.²⁴

36. Demonstrating the impracticability of securing a witness's presence is fact-specific, and may entail an analysis of the above factors.²⁵ Other factors to consider are whether:

- attempts to serve the summons were not successful;²⁶
- the witness has stated a refusal to cooperate with law enforcement;²⁷
- the witness absconded from probation supervision;²⁸
- the witness is a foreign national and would be outside the subpoena power of the domestic court if they fled the country.²⁹

37. In some jurisdictions, if a witness was served a summons and either failed to provide testimony, or was about to abscond, a domestic judge may order the arrest of the witness to secure their compliance.³⁰

38. Several of the factual circumstances described above apply to P-2625. As such, it is at least reasonably probable that a Chamber request to State Parties for assistance to facilitate more effective means to compel the witness's attendance, can be successfully implemented in accordance with article 93.

39. Lastly, in the circumstances described above, a request for further measures to be taken by State Parties toward securing the witness's attendance, including physical means if necessary, is the only option. While securing the witness's timely testimony in this case has long passed, given the lapse since the Prosecution's 24 November 2020

²⁴ 18 U.S.C. § 3144.

²⁵ U.S. v. Black Elk Energy Offshore Operations LLC, 2016 WL 164928, (E.D. Louisiana 2016) (notably, whether a material witness evades service of a subpoena, disobeys a subpoena, or exhibits an unwillingness to cooperate with the government).

²⁶ U.S. v. Feingold, 416 F. Supp. 627 at 628-629 (E.D. New York 1976); U.S. v. Coldwell, 496 F. Supp. 305 (E.D. Oklahoma 1979).

²⁷ U.S. v. Coldwell, 496 F. Supp. 305 (E.D. Oklahoma 1979).

²⁸ U.S. v. Coldwell, 496 F. Supp. 305 (E.D. Oklahoma 1979).

²⁹ U.S. v. Ionia Management, S.A., 2007 WL 2325199 (D. Conn. Aug. 9, 2007).

³⁰ See e.g., Canadian Criminal Code, article 698 and 704; Mutual Legal Assistance in Criminal Matters Act, RSC 1985, article 23(1).

Request and the Chamber's responsive 8 January 2021 Decision, further measures of compulsion are necessary to avert his unavailability altogether.

40. Failing the Chamber's request for such assistance, it is virtually certain that the witness will remain unavailable,³¹ adversely impacting the proceedings.

IV. RELIEF SOUGHT

41. For the above reasons, the Prosecution requests the Chamber to request the assistance of any State Party, on whose territory P-2625 may be found, to take all necessary measures to compel the witness's testimony before the Court, including to locate, summons, and/or provisionally detain him, as necessary to ensure his prompt appearance via video-link, pursuant to articles 64 and 93(1)(b),(e), and (l).



Karim A. A. Khan KC, Prosecutor

Dated this 25th day of October 2022
At The Hague, The Netherlands

³¹ See e.g., Rule 68(2)(c) of the Rules of Procedure and Evidence ("Rules").