

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 31 January 2023

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

Public Redacted Version of the "Defence Response to the "Confidential 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-Red)", ICC-01/14-01/18-1534-Conf, 1 August 2022

Source: Defence of Patrice-Edouard Ngaissona

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

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I. Introduction

1. On 21 July 2022, the Prosecution filed the “Confidential 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’” (“Request”) on an *ex parte* basis. It requested that Trial Chamber V (“Chamber”) request the assistance of “any State Party, on whose territory P-2625 may be found” to take all necessary measures to locate, summons and/or provisionally detain him to ensure his appearance before the Court pursuant to articles 64 and 93(1)(b),(e), and (l) of the Rome Statute (“Statute”).¹
2. The Defence for Mr Ngaïssona (“Defence”) defers to the Chamber’s discretion with respect to requesting the assistance of States Parties to ensure P-2625’s appearance before the Court. The Defence wishes, however, to provide observations for the Chamber’s consideration with respect to the overly broad scope of the Request.² Moreover, the Defence requests the Chamber to order the Prosecution to disclose any material relating to P-2625’s non-cooperation with the Court, pursuant to rule 77 of the Rules of Procedure and Evidence (“Rules”). The circumstances surrounding P-2625’s persistent non-cooperation are material to the preparation of the Defence.

II. Relevant Procedural History

3. Witness P-2625 is a Central African journalist and former Minister of Communications in the Central African Republic³ who was expected to testify as a fully *viva voce* witness.⁴ However, on 20 and 21 October 2020, the

¹ ICC-01/14-01/18-1519-Conf-Red (“Request”).

² See ICC-01/14-01/18-774-Conf, para. 9.

³ CAR-OTP-2123-0377-R01. The Prosecution interviewed Witness P-2625 from 21 to 25 November 2019, after the confirmation of charges hearings and disclosed P-2625’s written statement to the Defence on 13 July 2020, ICC-01/14-01/18-586-Conf-Anx.

⁴ ICC-01/14-01/18-724-Conf-AnxA.

Prosecution was formally informed that Witness P-2625 no longer wished to cooperate with the Prosecution or receive correspondence from the Court.⁵

4. On 4 December 2020, the Prosecution filed the confidential redacted version of the “Prosecution’s Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness”.⁶
5. On 16 December 2020, the Defence filed a response to the Prosecution’s 4 December 2020 request, deferring to the Chamber’s discretion with respect to the issuance of a summons, but opposed the mode of testimony via video-link. The Defence also requested the disclosure of information which had been redacted from the Defence surrounding the circumstances of P-2625’s non-cooperation.⁷
6. On 8 January 2021, the Chamber issued the “Decision on the Prosecution Request to Summon a Witness” granting the summons, and directing the Prosecution to lift certain redactions applied to documents relating to P-2625’s non-cooperation.⁸
7. On 29 June 2021, the Registry provided an update on the implementation of the Chamber’s 8 January Decision by way of email.⁹ Further updates were communicated to the Chamber on 14 and 15 July 2021 and 2 August 2021.¹⁰
8. Since the Chamber’s decision, the Defence has sent the Prosecution several requests for disclosure and updates in relation to the scheduling of P-2625’s testimony.¹¹ On 18 July 2022, in response to an email from the Defence

⁵ ICC-01/14-01/18-739-Conf-Red, paras 26-28; CAR-OTP-2127-6432-R01; CAR-OTP-2127-4444-R01.

⁶ ICC-01/14-01/18-739-Conf-Red.

⁷ ICC-01/14-01/18-774-Conf.

⁸ ICC-01/14-01/18-804-Conf.

⁹ Email from the Registry to the Chamber, parties and participants, 29 June 2021, at 16:43.

¹⁰ Emails from VWS to the Chamber on 14 July 2021, at 13:18 and from 15 July 2021, at 9:31, and 2 August 2021, at 16:41.

¹¹ For instance: Emails from the Defence to the Prosecution, 17 June 2021, at 15:34; on 9 August 2021, at 16:25; on 27 May 2022, at 15:12; on 20 June 2022, at 14:57. On 30 June 2022, at 10:59.

requesting “any further information and communications between the OTP and P-2625, if any, relating to his cooperation with the Court (for instance, further emails such as CAR-OTP-2127-4444 or investigative reports, such as CAR-OTP-2127-6432-R01)”, the Prosecution informed the Defence that it did not “consider that the either logistical or cooperation efforts in that respect comprise information that is ‘material’ within the scope of Rule 77, even to the extent that it may be known to the Prosecution”.¹²

9. On 21 July 2022, the Prosecution filed the Request.

III. Confidentiality

10. In accordance with regulation 23bis(1) of the Regulations of the Court (“Regulations”), the response is filed confidentially as it responds to a confidential document.

IV. Applicable Law

11. Pursuant to article 64(6)(b) of the Statute, a trial chamber may, as necessary “require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States”.¹³ To this end, a trial chamber may also, pursuant to article 93 of the Statute request a State Party to cooperate, for instance in compelling a witness to appear before the Court whether *in situ* or by way of video-link.¹⁴ Any

¹² Email from the Prosecution to the Defence, 18 July 2022, at 10:58 in response to a Defence request dated 27 May 2022, at 15:12.

¹³ *Prosecutor v Ruto and Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, ICC-01/09-01/11-1598, 9 October 2014, paras 107 and 113; *Prosecutor v Bemba et al.*, Decision on the ‘Prosecution’s Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses’, ICC-01/05-01/13-1343-Red, 3 December 2015, para. 17.

¹⁴ *Prosecutor v Ruto and Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, ICC-01/09-01/11-1598, 9 October 2014, ICC-01/09-01/11-1598, paras 128 and 132.

cooperation request to a State Party must satisfy the tripartite principles of (i) relevance, (ii) specificity and (iii) necessity.¹⁵ Specificity relates both to the identity of a witness, as well as the location or jurisdiction in which they find themselves.¹⁶

12. According to rule 77 of the Rules, the Prosecution shall permit the inspection of any document which is material to the preparation of the Defence. The Appeals Chamber has held that the term “material to the preparation of the defence” must “be construed broadly, referring to all objects relevant for the preparation of the defence”.¹⁷

13. Article 67(2) of the Statute provides that “the Prosecutor shall, 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. In case of doubt as to the application of this paragraph, the Court shall decide.”

V. Submissions

14. The Defence defers to the Chamber's discretion in evaluating whether the Prosecution has met the aforementioned criteria of specificity, relevance and necessity for securing Witness P-2625's testimony before the Court. The

¹⁵ ICC-01/14-01/18-804-Conf, para. 15; See also *Prosecutor v Ruto and Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09-01/11-1274-Corr2, 17 April 2014, para. 181; *Prosecutor v Kenyatta*, Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, 31 March 2014, para. 100, fn 216; *Prosecutor v Banda and Jerbo*, Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 September 2013, ICC-02/05-03/09-504-Red, para. 4; *Prosecutor v Bemba et al.*, Public redacted version of Decision on the ‘Prosecution's Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses’, ICC-01/05-01/13-1343-Red, 3 December 2015, para. 18.

¹⁶ ICC-01/14-01/18-804-Conf, para. 5; *Prosecutor v Bemba et al.*, Public redacted version of Decision on the ‘Prosecution's Requests under Articles 64(6)(b) and 93 of the Rome Statute to Summon Witnesses’, ICC-01/05-01/13-1343-Red, 3 December 2015, ICC-01/05-01/13-1343-Red, para. 22.

¹⁷ *Prosecutor v Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, para. 77.

Defence wishes, however, to provide observations to assist the Chamber in its determination. It also requests disclosure of any evidence which is material to the Defence preparations in relation to P-2625's testimony.

a. The Request does not meet the requirement of specificity

15. *First*, the Request, which covers 123 States Parties, is exceptionally broad and does not meet the criterion of specificity. In its previous 8 January 2021 ruling, the Chamber considered that the 'specificity' prong of the tripartite test had been met given the Prosecution had clearly identified P-2625's identity and location.¹⁸ This is no longer the case. The fact that the Prosecution does not know P-2625's precise location does not absolve it from its obligation to meet the specificity requirement pursuant to article 93 of the Statute.

b. Request for disclosure

16. *Second*, the Defence requests the Chamber to order the Prosecution to disclose any document which is material to the preparation of the Defence pursuant to article 67(2) of the Statute and to rule 77 of the Rules. Any information which may affect the credibility of Prosecution evidence, including the testimony of a witness on the stand, is material to the preparation of the Defence.¹⁹

17. In 2020 and 2021, the Prosecution disclosed an investigator's report, several email exchanges relating to P-2625's non-cooperation to the Court, and documents relating to P-2625's [REDACTED], to the Defence.²⁰ The documents showed *inter alia* that P-2625 had requested the Prosecution's assistance with [REDACTED],²¹ and that on 21 October 2020 the Prosecution was formally

¹⁸ ICC-01/14-01/18-804-Conf, para. 18.

¹⁹ Article 67(2), Rome statute.

²⁰ CAR-OTP-2127-6432-R01; CAR-OTP-2123-0599-R01; CAR-OTP-2123-0584-R01; CAR-OTP-2134-0248-R01; CAR-OTP-2134-0218; CAR-OTP-2134-0227; CAR-OTP-2134-0219; CAR-OTP-2134-0179-R01; CAR-OTP-2127-4444.

²¹ CAR-OTP-2123-0599-R01.

informed that Witness P-2625 no longer wished to cooperate with the Prosecution or receive correspondence from the Court.²² Upon ruling on a Defence request to lift redactions applied to documents CAR-OTP-2127-6432-R01 and CAR-OTP-2127-4444-R01, the Chamber granted the lifting of a redaction in document CAR-OTP-2127-6432, concluding that “the reasons provided by P-2625 for his decision not to cooperate with the Prosecution” were material to the preparation of the Defence and, as such, disclosable under rule 77 of the Rules.²³

18. Thus, the disclosure of any further correspondence or investigative report relating to the reasons for Witness P-2625’s non-cooperation with the Court, and information in the Prosecution’s possession relating to P-2625’ [REDACTED], must be disclosed to the Defence. The circumstances of Witness P-2625’s unwillingness to cooperate with the Prosecution, and P-2625’s expectation that the Prosecution would be in a position to [REDACTED],²⁴ have a direct bearing on his credibility and are most likely to be a subject of examination by the Defence, should P-2625 ultimately testify.

19. The Prosecution itself emphasises the importance of Witness P-2625’s anticipated testimony to support its case. The Prosecution affirms that Witness P-2625’s anticipated testimony is “material”, “necessary” and “unique” given his alleged “direct knowledge of the personal involvement of [Mr] NGAÏSSONA and his ability to authenticate contemporaneous and highly probative evidence which can assist the Chamber in its determination of the truth”.²⁵ Witness P-2625 is relied upon by the Prosecution extensively in its Trial

²² CAR-OTP-2127-4444.

²³ ICC-01/14-01/18-804-Conf, para. 25.

²⁴ CAR-OTP-2123-0599-R01.

²⁵ ICC-01/14-01/18-739-Conf-Red, paras 1, 2 20, 29.

Brief.²⁶ The materiality of evidence which may bear on P-2625's credibility is therefore shown.²⁷

c. The Witness is not "unavailable"

20. *Third*, the Defence notes that Witness P-2625 is clearly unwilling to testify. His non-cooperation cannot be labelled as "unavailability".²⁸ As acknowledged by the Prosecution, "P-2625's refusal to cooperate with the Court persists"²⁹ and "his continuing absence and unresponsiveness are calculated and designed to avoid the judicial process to secure his testimony before this Court".³⁰ This substantiates "his clearly stated intention not to cooperate in these proceedings, and further to defy the Chamber's 8 January 2021 Decision".³¹

VI. Relief Sought

21. The Defence requests the Chamber to ORDER the Prosecution to disclose any communication, investigative report, or any other information in its possession which may affect P-2625's credibility.³²

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaissona

²⁶ See Prosecution Trial Brief, ICC-01/14-01/18-723-Conf, para. 51, footnote 116; para. 67, footnote 153 ; para. 69, footnote 160; para. 101, footnotes 236-238; para. 106, footnote 251; para. 108, footnote 255; par. 217, footnote 598 ; para. 266, footnote 723 ; para. 299, footnotes 778-779 ;

²⁷ Article 67(2), Rome Statute.

²⁸ See Request, paras 4, 25, 39-40 and Email from the Prosecution to the Chamber and parties, 18 June 2021, at 13:27.

²⁹ Request, para. 19.

³⁰ Request, para. 20.

³¹ Ibid.

³² See above, paras 19-22.

Dated this 31 January 2023,
At The Hague, the Netherlands.