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**International
Criminal
Court**

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

Date: **12 June 2024**

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 with Confidential Annex 1

Public Redacted Version of “Ngaïssona Defence request to exclude evidence or, alternatively, to recall Prosecution witness P-2657” (ICC-01/14-01/18-2300-Conf), 15 January 2024

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. The Defence for Mr Patrice-Edouard Ngaïssona ('the Defence') hereby requests pursuant to Article 64(2) and (6) the exclusion of portions of evidence related to the [REDACTED] of Prosecution witness P-2657, as contained in Annex 1 to the present Request. Alternatively, the Defence requests to re-call P-2657.
2. The exclusion and/or the recall are essential to preserve the fairness of the proceedings as regards the [REDACTED]. New exculpatory information has been uncovered, which casts serious doubts as to the veracity of claims put forward by several [REDACTED] witnesses who testified during the Prosecution case. The Chamber's duty to determine the truth means that this exculpatory evidence must be considered and lead the Chamber to take measures to safeguard the rights of Mr Ngaïssona to a fair trial.

II. CONFIDENTIALITY

3. Pursuant to regulation 23bis(1) of the Regulations of the Court ("RoC"), this request and its Annexes are filed as confidential, since they contain confidential information about protected witnesses. The Defence will file a public redacted version in due course.

III. BACKGROUND

4. On 3 and 4 March 2022, the Prosecution called witness P-2657. The witness testified on events that allegedly took place in, [REDACTED] in 2013-2014. Notably, the witness alleged that on 5 December 2013, [REDACTED].¹
5. On 17 November 2023, the Prosecution disclosed the witness statement of an individual named [REDACTED]. The statement, [REDACTED], also pertains to events that allegedly took place in [REDACTED]. At paragraph 34, the statement reads:

[REDACTED].² (the 'New Information')

6. On 23 November, the Defence sought the assistance of the Prosecution to obtain the contact details of [REDACTED] in order for the Defence to interview him. Moreover, the Defence requested the disclosure of any other evidentiary items pertaining to the death of

¹ [REDACTED].

² CAR-OTP-00001982, para. 34.

[REDACTED], including, but not limited to, investigator's notes and/or reports, screening notes, statements and their associated materials.³

7. The Prosecution responded to the request on 8 December 2023, informing the Defence that [REDACTED] did not want to have his contact information disclosed or to meet with the Defence. The Prosecution added that they had "no further evidentiary items regarding [REDACTED]".⁴

IV. APPLICABLE LAW

8. Article 54(1) of the Statute places a duty on the Prosecution to "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" in order to establish the truth.
9. Article 64(2) of the Statute requires trial chambers to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused".
10. Pursuant to Article 64(6), "the Trial Chamber may, as necessary: (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11; (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute; (c) Provide for the protection of confidential information; (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties; (e) Provide for the protection of the accused, witnesses and victims; and (f) Rule on any other relevant matters.

V. SUBMISSIONS

A. The New Information is exculpatory and directly undermines allegations related to a charged crime

11. P-2657's [REDACTED] is not charged in the present case. Although the Prosecution mentions it as an underlying act of persecution under , [REDACTED],⁵ this is not reflective

³ Email from the Defence to OTP CAR II B, 23 November 2023 at 13:04.

⁴ Email from OTP CARII B, 8 December 2023 at 10:45.

⁵ [REDACTED].

of the Decision on the Confirmation of Charges, which limits the alleged acts of persecution to those acts charged under specific counts.⁶ Nonetheless, the Prosecution thoroughly questioned P-2657 on her [REDACTED], and attempted to obtain corroboration through several other [REDACTED] witnesses. The Prosecution also referred to P-2657's evidence in the Pre-Trial Brief, in support of its argument that [REDACTED] was part of the alleged common plan.⁷ As such, it an important allegation against Mr Ngaïssona, which the Defence strongly contests.

12. The New Information clearly and directly contradicts the evidence given by P-2657. It also contradicts similar, although indirect evidence given by P-[REDACTED],⁸ P-[REDACTED]⁹ and P-[REDACTED]¹⁰ on the same alleged [REDACTED]. However, the New Information is not on the record of the case, and as will be developed below, there is no legal avenue available to the Defence, to put it on the record.
13. The [REDACTED] on [REDACTED] is a fact of such nature that had the Defence been able to put it on the record in its examination of P-2657, it would have been highly likely to raise a reasonable doubt in the Judges' minds as to the veracity of [REDACTED]. It would have also affected the overall credibility of the witness.
14. Given the potential significance of the New Information for the disposition by the Chamber on the crimes charged against Mr Ngaïssona, the Chamber must intervene to avoid causing irreparable prejudice to the Defence.

B. The Defence was prevented from fully examining witness P-2657

15. The Defence was deprived of the right to examine P-2657 on a fundamental aspect of her evidence because of the Prosecution's failure under Article 54(1) of the Statute to fully investigate her claims in time for trial. Had the Prosecution thoroughly investigated ahead of the trial and disclosed exculpatory evidence in time, the Defence would have been able to challenge the witness's claim by confronting her with the New Information when she

⁶ [REDACTED].

⁷ [REDACTED].

⁸ See Annex 1, p. 15.

⁹ See Annex 1, p. 16-18.

¹⁰ See Annex 1, p. 18-20.

appeared before the Court. The Prosecution's untimeliness in investigating¹¹ and disclosing crucial information means that the Defence was unable to do so.

16. At the time of the Defence's examination of P-2657, there was no indication whatsoever, and no evidence available to suggest that [REDACTED], the alleged perpetrator, had [REDACTED]. The Defence could therefore not have anticipated the relevance of questioning the witness on whether the alleged perpetrator was alive or not. In fact, it would have been outlandish for the Defence to adopt a line of examination completely devoid of basis in the available evidence.
17. The Defence does not dispute that the Prosecution was entitled to investigate during the trial, and separately, as part of the *Mokom* proceedings. However, the Defence should not be prejudiced by the prosecutorial choice or strategy to investigate charged events long after relevant witnesses in the present proceedings have testified. Therefore, the Chamber is now called upon to prevent an injustice and take measures to mitigate the prejudice caused by the untimely discovery of exculpatory material.

C. Exclusion or recall are the only avenues available to avoid an injustice

18. At this advanced stage of the proceedings, and considering that the New Information, contained in a witness statement, is testimonial in nature, the exclusion of the relevant parts of the evidence given live in court by P-[REDACTED], P-[REDACTED], P-[REDACTED] and P-[REDACTED], or the recall of P-2657 are the only viable options to avoid an injustice.
19. First, the Defence is procedurally barred from requesting the submission of the full statement of [REDACTED], as it is testimonial in nature. Because [REDACTED] has rejected a Defence request to contact him, there is also no possibility to call him to testify in relation to the [REDACTED].
20. Similarly, there is no sound procedural avenue that would allow the Defence to tender only the one paragraph in the statement that contains the New Information.

¹¹ According to the dates mentioned in [REDACTED] statement, the interviews took place from [REDACTED] P-2657's testimony before the Chamber.

21. Finally, the lateness of the disclosure of the statement, i.e. on the day that the Defence had to file its final list of witnesses and evidence, also means that it is now too late and would be too resource-intensive for the Defence to try and engage in extensive investigations in order to try and secure the same information from another source.

Exclusion of evidence

22. The Defence requests as a principal relief the exclusion of the evidence on the [REDACTED] of P-2657, as contained in Annex 1, as this is the most appropriate relief in the present circumstances. The New Information casts serious doubts as to the veracity of P-2657's claim, and affects her credibility as a whole. Because the Defence is unable to submit New Information on the record for the Chamber to consider during its Article 74 deliberations, the remedy must be to exclude the evidence related to the [REDACTED]. This includes the relevant parts of P-2657's testimony, and the mentions made by other witnesses of the same [REDACTED].

23. The Defence does not allege that the evidence was "obtained by means of a violation of the Statute or internationally recognised human right", justifying its exclusion under Article 69(7) of the Statute. However, the Defence calls upon the Chamber's general duty pursuant to Article 64(2), to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused". As found by Trial Chamber V(A) in *Ruto & Sang*,

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.¹²

24. Additionally, the Defence respectfully requests that the Chamber hold the Prosecution to account for not complying with its duty under Article 54(1) to investigate incriminating and exonerating circumstances equally.

25. The powers of the Chamber under Article 64(2) are broad, and must be interpreted to include the power to exclude evidence. These powers can also be exercised even where no

¹² *Prosecutor v. Ruto & Sang*, Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353, para. 16.

misconduct, or negligence is alleged against the opposing party.¹³ The Chamber has an uncontested power to intervene where it finds that a set of circumstances affect the fairness of the trial and/or the other rights of the Accused. Such circumstances exist here.

Recalling of witness P-2657

26. Alternatively, should the Chamber not find that exclusion is appropriate, the Defence requests that P-2657 be recalled for further examination by the Defence. While not ideal at this advanced stage of the proceedings where the Defence is about to call its first witness, recalling P-2657 is the only manner in which the Defence can put the New Information on the record of the case and ensure that it is part of the Chamber's deliberation pursuant to Article 74.

27. A witness can only be recalled where good cause is shown by the requesting party.¹⁴ Such good cause exists here. Indeed, due to the New Information only being disclosed to the Defence on 17 November 2023, it was not possible for the Defence to examine P-2657 on the [REDACTED] when she testified in March 2022. The New Information not only is exculpatory, it also makes the commission of the crime impossible and severely impeaches the credibility of the witness.

28. In *Al Hassan*, Trial Chamber X found that “‘judicial economy demands that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature’.”¹⁵ Here, as set out above, the Defence was prevented from fully examining the witness, since it was not in possession of the New

¹³ *Prosecutor v. Al Hassan*, Public redacted version of Defence application to exclude the evidence of or recall Witness MLI-OTP-P-0547, 15 August 2022, ICC-01/12-01/18-2295-Red, para. 17, referring to SCSL, *Brima et al.*, SCSL-04-16-PT, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process Due to Serious Infringement of Principles of Nullem Crimen Sine Lege and Non-Retroactivity as to Several Counts, 31 March 2004, para. 26, fn. 32.

¹⁴ *Prosecutor v. Al Hassan*, Decision on Defence application to exclude the evidence of or recall P-0547, ICC-01/12-01/18-2344-Red, para. 34, referring to *Prosecutor v. Ntaganda*, Public redacted version of Decision on Defence request for recall of Witness P-0290, 17 February 2017, ICC-01/04-02/06-1791-Red, para. 10; *Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of 'Decision on "Defence request for recall of Witness P-178"', 11 December 2014, ICC-01/05-01/08-3186-Red, para. 18; *Prosecutor v. Jean-Pierre Bemba Gombo*, Second Redacted version of 'Decision on "Prosecution's Information to Trial Chamber III on issues involving witness CAR-OTP-PPPP-0169"' (ICC-01/05-01/ 08-3138-Conf-Red) and "Defence Urgent Submissions on the 5 August Letter (ICC-01/05-01/ 08-3139-Conf)" of 2 October 2014', 11 December 2014, ICC-01/05-01/ 08-3154-Red2, para. 27; *Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of Decision on "Defence Motion concerning 'Information on contacts [of] Witnesses 169 and 178 with other witnesses'", 11 December 2014, ICC-01/05-01/08-2924-Red, para. 35.

¹⁵ *Prosecutor v. Al Hassan*, Decision on Defence application to exclude the evidence of or recall P-0547, ICC-01/12-01/18-2344-Red, para. 34.

Information at the time of her testimony. In addition, the Defence does not have any other avenues available to test P-2657's evidence, due to the lateness of the disclosure of the New Information. The New Information was not available in any form at the time of the Defence's examination. While in *Al Hassan*, a request for recall was rejected because the defence team was seeking to "rethread grounds it either already explored during [the witness's] testimony or had the information to investigate in the first instance",¹⁶ the instant case differs in these two aspects. The Defence did not explore the [REDACTED], and had no information that would have indicated that this was an evidentiary lead worth investigating at the time of its examination.

29. In the *Orić* case before the ICTY, the Chamber found that where information relevant to a case is not disclosed in a timely manner, and prior to a witness's testimony, said witness can be recalled to be examined on issues related to the belatedly-disclosed information.¹⁷ This is indeed the case here. For these reasons, good cause to recall P-2657 has been shown.

¹⁶ *Prosecutor v. Al Hassan*, Decision on Defence application to exclude the evidence of or recall P-0547, ICC-01/12-01/18-2344-Red, para. 37.

¹⁷ ICTY, *Orić*, IT-03-68-T, Decision on Defence Motion to Recall a Witness, 30 November 2004, p. 2-3.

VI. RELIEF SOUGHT

The Defence respectfully requests the Chamber to:

- **GRANT** the present request and exclude the evidence related [REDACTED] of P-2657, as included in Annex 1;
- Or alternatively,**
- **ORDER** the recall of P-2657.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 12 June 2024

At The Hague, the Netherlands