

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **02 July 2024**

TRIAL CHAMBER V

Before: Judge Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

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 “Motion for Finding of Disclosure Violation in
relation to CAR-OTP-2114-0229”, ICC-01/14-01/18-2479-Conf, 3 May 2024**

Source: Defence of Patrice-Edouard Ngaißsona

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 of Mr Patrice-Edouard Ngaïssona (“Defence”) hereby requests Trial Chamber V (“Chamber”) to find that the Office of the Prosecutor (“Prosecution”) violated its disclosure obligations under Article 67(2) of the Rome Statute (“Statute”) and Rule 77 of the Rules of Procedure and Evidence (“Rules”), by failing to timely disclose the statement CAR-OTP-2114-0229 (“Statement”) belonging to [REDACTED].
2. The Statement contains important information related to central issues in the Prosecution’s case such as the financing of the Anti-Balaka in BOSSANGO and the organization of an alleged attack on BOSSANGO but also contains material that affects the credibility of the Prosecution’s evidence. To remedy this violation, the Defence requests that the Chamber: i) find that the Prosecution violated its disclosure obligations, and ii) order the Prosecution to review the evidence in its possession and confirm that it has disclosed all information relating to the alleged organisation and financing of the 5 December BOSSANGO attack.

II. CONFIDENTIALITY

3. Pursuant to regulation 23bis(1) of the Regulations of the Court, this request is filed as confidential, since it contains references to confidential information. The Defence will file a public redacted version in due course.

III. PROCEDURAL HISTORY

4. From 8 February 2018 to 13 February 2018 and between 18 July 2019 and 19 July 2019, Prosecution investigators met with [REDACTED], who signed a statement at the end of his interview.¹

¹ CAR-OTP-2114-0229.

5. On 16 July 2020, the Chamber set the deadline to 9 November 2020 for the Prosecution to “review all the materials in its possession and disclose all materials falling under its disclosure obligations”.²
6. On 7 December 2021, the Chamber found that the Prosecution had violated its disclosure obligations and therefore ordered the Prosecution to review the material in its possession and disclose immediately any relevant material. The Chamber expressed its concern regarding the “number of times the Prosecution has so far breached its disclosure obligations”.³
7. On 21 December 2021, the Prosecution submitted its “Request for the Formal Submission of the Prior Recorded Testimony of P-2658 pursuant to Rule 68(3)” (“P-2658 Rule 68(3) Request”)⁴ which mentioned [REDACTED] and alleged links between the latter and Mr Ngaïssona, on matters related to the core of its case.⁵ The Chamber recognized the prior-recorded testimony as submitted on 15 February 2022.⁶
8. Between 20 June 2022 and 22 June 2022, P-2658 testified before the Court, mentioning [REDACTED] several times.
9. On 28 March 2024, nearly two years after P-2658’s testimony, and after multiple emails from the Defence asking for confirmation regarding Rule 77 disclosures,⁷ the Prosecution disclosed a courtesy copy of the Statement.⁸

IV. APPLICABLE LAW

² ICC-01/14-01/18-589, para. 10.

³ ICC-01/14-01/18-1202, para. 23.

⁴ ICC-01/14-01/18-1228.

⁵ ICC-01/14-01/18-1228, para. 10.

⁶ ICC-01/14-01/18-1282.

⁷ Email from the Defence to the Prosecution sent on 21 February 2024 at 17:59, Email from the Defence to the Prosecution sent on 4 March 2024 at 10:15, Email from the Defence to the Prosecution sent on 6 March 2024 at 12:19, Email from the Defence to the Prosecution sent on 28 March 2024 at 12:08.

⁸ Email from the Prosecution to the Defence sent on 28 March 2024, at 18:32.

10. Article 67(2) of the Statute provides that:

“In addition to any other disclosure provided for in this Statute, 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.”

11. Rule 77 of the Rules states that:

“The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, **which are material to the preparation of the defence** or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.”

12. It is well established that the duty of the Prosecution to disclose exculpatory material is necessary to guarantee the right of the accused to a fair trial.⁹ Therefore, the Prosecution's violation of its disclosure obligations may affect the fairness of the proceedings.

V. SUBMISSIONS

13. The Defence is dismayed by the extremely belated disclosure of [REDACTED]'s statement, as this statement affects the credibility of Prosecution evidence and should have therefore been disclosed pursuant to Article 67(2). It is further material to the preparation of the Defence pursuant

⁹ ICC-01/14-01/18-551-Conf, para. 25.

to Rule 77 as it refutes the allegations of, at least, three Prosecution witnesses and goes to issues that are central to the Prosecution case, such as the financing of the Anti-Balaka in BOSSANGO and the organization of the BOSSANGO attack.

14. The Statement was only disclosed in March 2024 pursuant to Rule 77 because [REDACTED] mentioned a Defence witness, D30-P-4551. The Defence finds the timing of disclosure troubling. First, the Prosecution was aware that D30-P-4551 was a Defence witness since 17 November 2023.¹⁰ Second, the Statement should have been found to be relevant and disclosed much earlier, given that [REDACTED] was alleged to [REDACTED] between Mr Ngaïssona and Anti-Balaka elements in BOSSANGO according to Prosecution witness P-2658 (a) and the Statement addresses core issues in the present case (b). The late disclosure prejudiced the Defence since it was deprived of the possibility of exploiting the information in the Statement with Prosecution and Defence witnesses (c).

a. The Statement was crucial for the assessment of P-2658's testimony

15. [REDACTED] was mentioned by P-2658, who made a direct link between him and Mr Ngaïssona in his statement, on an issue that went to the core of the charges.¹¹ Indeed, P-2658 stated:

“[REDACTED].”¹²

16. P-2658 directly implicated Mr Ngaïssona with [REDACTED], stating [REDACTED] was [REDACTED] to Danboy DEDANE. This goes to the core of the Prosecution's case that Mr Ngaïssona allegedly frequently liaised with

¹⁰ ICC-01/14-01/18-2215-Conf-Anx1.

¹¹ CAR-OTP-2126-0012, para. 164.

¹² CAR-OTP-2126-0012, para. 164.

Anti-Balaka elements located in the area of BOSSANGOA including DEDANE.¹³ The statement of [REDACTED] was obviously relevant to these allegations and should have been disclosed several years ago and in advance of the filing of the P-2658 Rule 68(3) Request, as well as P-2658's testimony, as information contained in it refutes P-2658's allegations and affects the credibility of his narrative.

17. Article 67(2) requires the Prosecution to disclose material "as soon as practicable". A diligent Prosecution would have reviewed the Statement— at the latest – during its preparation of P-2658's testimony and should have identified it fell under its disclosure obligations pursuant to Article 67(2) and Rule 77. The Prosecution sought to rely on P-2658's allegations concerning [REDACTED] between Mr Ngaïssona and DEDANE. It even gave specific resonance to this allegation when arguing the P-2658 Rule 68(3) Request. Indeed, the Prosecution stated:

"P-2658 describes DEDANE's planning of the 17 September 2013 attack on BOSSANGOA, including communications of DEDANE [REDACTED], and DEDANE's attempts to procure ammunition and weapons. **According to the witness, DEDANE was in communication with three persons called KOMAS, YONGO, and CHARLY, who would pass on NGAISSONA's messages to DEDANE, including that he (NGAISSONA) would send ammunition and equipment for the battle.** The witness did not see the Anti-Balaka receive any equipment, but knew that DEDANE brought ammunition back from BOSSANGOA."¹⁴

¹³ Prosecution's Trial Brief (ICC-01/14-01/18-723-Conf), para. 76.

¹⁴ ICC-01/14-01/18-1228-Conf, para. 11.

18. Against this backdrop, the Defence is deeply concerned that the Statement was withheld for so long. While it avers that the prejudice was ultimately limited by P-2658 correcting his Rule 68(3) statement prior to his testimony and changing the name [REDACTED] to [REDACTED],¹⁵ this circumstance doesn't diminish the Prosecution's utter lack of diligence with respect to the failed disclosure of the Statement in advance of P-2658's testimony. Moreover, having information at its disposal refuting the witness' original account may have informed Defence questioning concerning the witness' sudden change of [REDACTED] to [REDACTED].

b. Information contained in the Statement is relevant to core issues in the present case

19. The Prosecution alleges that Mr Ngaïssona contributed to the BOSSANGOYA attack, by liaising, financing, arming and even visiting Anti-Balaka members who led it.¹⁶ It follows that any material relating to the leadership, organization and financing of the Anti-Balaka in or around BOSSANGOYA, as well as alleged preparation of the BOSSANGOYA attack, is relevant to the preparation of the Defence. P-2658¹⁷ and P-2453¹⁸ both mention [REDACTED] as responsible for financing or giving instructions to the Anti-Balaka - notably to DEDANE - in the lead up to the BOSSANGOYA attack. P-2453 further states that [REDACTED] was travelling back and forth from BANGUI to deliver

¹⁵ CAR-OTP-2135-3476-R01, para. 164.

¹⁶ Prosecution's Trial Brief, para. 76.

¹⁷ CAR-OTP-2126-0012-R02, para. 72. Note that P-2658 did not correct the name to [REDACTED] in this paragraph of his statement.

¹⁸ CAR-OTP-2111-0415-R04, para. 77. The Statement was recognised as formally submitted pursuant to Rule 68(3), ICC-01/14-01/18-1282.

ammunitions to the Anti-Balaka.¹⁹ P-2200 also alleged that [REDACTED] was an Anti-Balaka leader in BOSSANGOA.²⁰

20. Yet, information in the Statement of [REDACTED] refutes his involvement in the Anti-Balaka, as well as in the planning of the BOSSANGOA attack. First, he did not concede to any involvement in the Anti-Balaka but rather explained that he "[REDACTED]"²¹ of their actions. Second, he explained that the Seleka "[REDACTED]"²² in March 2013, which arguably made it difficult for him to finance the Anti-Balaka. Third, [REDACTED] explained [REDACTED]²³ and [REDACTED]²⁴ and [REDACTED],²⁵ and then [REDACTED].²⁶ This information not only provides background as to why rumours circulated about his involvement with Anti-Balaka, but also tends to refute that he would have been involved in orchestrating an attack on BOSSANGOA in the lead up to 5 December, or travelling back and forth from BANGUI to provide ammunitions to the Anti-Balaka. Lastly, given the location of [REDACTED], it is easy to conclude that [REDACTED] barely spent time in Bossangoa during the months prior to the BOSSANGOA attack. The Defence was deprived of the opportunity to use these pieces of information to examine BOSSANGOA witnesses, as well as to make informed submissions in its responses to the Prosecution's requests to seek the introduction of prior-recorded statements that alleged [REDACTED] had a role within the BOSSANGOA Anti-Balaka.

¹⁹ CAR-OTP-2111-0415-R04, para. 77. The statement was recognised as formally submitted pursuant to Rule 68(3), ICC-01/14-01/18-1282.

²⁰ CAR-OTP-2088-2146, para 85. The statement was recognised as formally submitted pursuant to Rule 68(2)(c), ICC-01/14-01/18-2127.

²¹ CAR-OTP-2114-0229, para. 109.

²² CAR-TOP-2114-0229, para. 16.

²³ CAR-OTP-2114-0229, para. 17.

²⁴ CAR-OTP-2114-0229, para. 35.

²⁵ CAR-OTP-2114-0229, para. 102.

²⁶ CAR-OTP-2114-0229, para. 104.

21. The Prosecution alleges that Mr Ngaïssona aided the Anti-Balaka who led the BOSSANGOA attack, notably by liaising with them as well as by providing them with money, weapons and ammunitions. It follows that information relating to the financing, arming and instructing of the Anti-Balaka in BOSSANGOA is core to the case. The Defence should not have been deprived of this information in conducting its investigations and examinations of witnesses.

22. The Defence wishes to underscore that it is not the first time that it has suffered a prejudice due to untimely disclosure of information crucial to its examination of Prosecution witnesses who testified on the events in BOSSANGOA. In this regard, it recalls its “Ngaïssona Defence request to exclude evidence or, alternatively, to recall Prosecution witness P-2657”,²⁷ which adjudication is currently pending before the Chamber.

c. The disclosure violation has caused an irreparable prejudice to Mr Ngaïssona

23. Having been deprived of the opportunity to question witnesses about [REDACTED], as well as to carry out more detailed investigations with full knowledge of the allegations, the Defence has suffered irreparable prejudice. In a number of occasions, the Chamber found that while the Prosecution had violated its disclosure obligations, prejudice was mitigated by the Defence having opportunities “to examine further Prosecution witnesses (...), as well as to call its own witnesses”²⁸ on specific events. This is not the case at the current stage of the proceedings. Since all the Prosecution’s witnesses have testified and there are no Defence live witnesses who can meaningfully

²⁷ ICC-01/14-01/18-2300-Conf.

²⁸ ICC-01/14-01/18-1309, para. 6.

comment on these events, the Defence is left with no opportunity to put the information contained in the Statement to relevant witnesses.

24. Finally, it is important to emphasize that the Defence sought to interview [REDACTED] as part of its investigations but was unable to conduct an interview with him. The fact that the Defence sought to meet him is a further confirmation that the evidence pointed to him being a person of relevance to the case, whose Statement should not have been withheld. Receiving [REDACTED]'s statement would have facilitated Defence investigations on issues which are core to the Prosecution case.

25. Once again, Mr Ngaïssona's right to a fair trial has been jeopardised by the Prosecution's failure to meet its disclosure obligations. It is simply inadmissible for such crucial information in the Prosecution's possession and control to remain undisclosed so late in the proceedings. To avoid further prejudice, the Defence respectfully requests the Chamber to order the Prosecution to conduct a thorough analysis of the material in its possession, in order to assess whether it has indeed met its disclosure obligations concerning the financing and organization of the BOSSANGO attack.

VI. RELIEF SOUGHT

26. In light of the above, The Defence respectfully requests the Chamber to:

- **FIND** that the Prosecution has violated its disclosure obligations; and
- **ORDER** the Prosecution to review the evidence in its possession and confirm that it has disclosed all information which relates to the organisation and financing of the 5 December BOSSANGO attack.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized name or set of initials.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 02 July 2024

At The Hague, the Netherlands.