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**International
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Court**

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Date: 18 November 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAÏSSONA***

Public

Public Redacted Version of “Defence Response to the ‘Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0487 pursuant to Rule 68(3)’”, ICC-01/14-01/18-1620-Conf, 17 October 2022

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 hereby responds to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0487 pursuant to Rule 68(3)” (“Request”).¹
2. The Defence opposes the Request because, as will be demonstrated below, P-0487’s prior statement (i) extensively refers to the alleged acts and conduct of Mr Ngaïssona, (ii) is central to core issues in the Prosecution’s case against Mr Ngaïssona, and (iii) is not, as far as references to Mr Ngaïssona’s acts and conduct are concerned, corroborated by any other witnesses expected to offer full in-court testimony. Furthermore, the Defence strongly contests P-0487’s credibility and notes numerous manifest inconsistencies within his statements as well as with other witness testimonies. For these reasons, any time-saving in the questioning of the witness will be outweighed by the prejudice that the formal submission of the prior testimony would cause to the fair trial rights of Mr Ngaïssona.

II. CONFIDENTIALITY

3. In accordance with regulation 23 *bis* (1) of the Regulations of the Court, this response is filed confidentially as it responds to documents of the same classification. A public redacted version will be filed as soon as practicable.

III. APPLICABLE LAW

4. The Defence incorporates by reference its summary of the applicable law set out in paragraphs 4 to 6 of its consolidated response to the Prosecution’s requests for the formal submission of the prior recorded testimonies of P-0287

¹ ICC-01/14-01/18-1595-Conf, together with Confidential Annexes A and B.

and P-0627 under rule 68(3),² and its submissions in its response to the Prosecution's request for the formal submission of the prior recorded testimony of P-0801 under rule 68(3).³

IV. SUBMISSIONS

5. The importance of the evidence intended to be presented by P-0487 in light of (i) the charges relating to Mr Ngaïssona and (ii) the evidence of the case as a whole is such that a full in-court testimony is necessary and any other approach would be prejudicial to the rights of the accused or inconsistent with the fairness of the trial generally.⁴
6. In his transcribed statement, P-0487 discusses, *inter alia*, (i) Mr Ngaïssona's alleged role in structuring the Anti-Balaka,⁵ (ii) Mr Ngaïssona's alleged financial contribution to the Anti-Balaka before and after 5 December 2013, including for their recruitment and their move to Bangui in the context of the 5 December attack;⁶ (iii) Mr Ngaïssona's alleged closeness to François and Francis Bozizé;⁷ (iv) Mr Ngaïssona's alleged command and control over alleged Anti-Balaka leaders such as Mr Yekatom, Andjilo, Mr Ngremangou, 12 Puissances, Mr Beorofei and Mr Konaté and their alleged crimes;⁸ (v) Mr Ngaïssona's

² ICC-01/14-01/18-888-Conf, paras 4-6.

³ ICC-01/14-01/18-920-Conf, paras 3-5.

⁴ ICC-02/11-01/15-744, para. 71.

⁵ CAR-OTP-2076-0146-R02, at 0148, lines 36-45; CAR-OTP-2076-0130-R01, at 0140, lines 348-371 ; CAR-OTP-2076-0146-R02, at 0166, lines 709-713.

⁶ CAR-OTP-2076-0168-R01, at 0174, lines 216-218. *See also* CAR-OTP-2076-0168-R01, at 0171, lines 89-96; 109-118; at 0172, lns 138-145. Regarding food, *see* CAR-OTP-2076-0272, at 0285, lines 470-480.

⁷ CAR-OTP-2076-0146, at 0158-0159, lines 439-448, at 0163, lines 615-617.

⁸ CAR-OTP-2076-0146, at 0158-0159, lines 439-448, at 0159-0160, lines 479-486, at 0163, lines 615-617 (Yekatom); CAR-OTP-2076-0146-R02, at 0166, lines 714-717 (Ngremangou); CAR-OTP-2076-0120, at 0125-0126, lines 193-212; CAR-OTP-2076-0146, at 0161-0162 lines 538-573 (Andjilo); CAR-OTP-2076-0120, at 0126, lines 212-228; CAR-OTP-2076-0146, at 0162, lines 575-590 (Lébéné); CAR-OTP-2076-0146, at 0165, lines 686-696; CAR-OTP-2076-0272, at 0285, lines 470-473 (Beorofei); CAR-OTP-2076-0549-R01, at 0554-0555, lines 154-173 (Konaté).

alleged intent to have François Bozizé return to power and the [REDACTED];⁹ (vi) Mr Ngaïssona's allegedly encouraging the Anti-Balaka to keep up with the fight to the effect of having Mr Bozizé, "his parent", return to power;¹⁰ (vii) the alleged storage of looted items, including motorcycles, at Mr Ngaïssona's residence;¹¹ (viii) Mr Ngaïssona's alleged opposition to the reintegration of the "Anti-Balaka FACA";¹² (ix) the Anti-Balakas's alleged responsibility for many crimes against the Muslim population, including on those living in the alleged PK5 enclave¹³ and the abduction of Minister Sayo;¹⁴ and, last but not least, (x) Mr Ngaïssona's alleged involvement, on several occasions, in [REDACTED].¹⁵

7. The Prosecution, which presents P-0487 as (i) [REDACTED],¹⁶ and (ii) [REDACTED],¹⁷ relies, *inter alia*, on P-0487's transcribed statement to support its allegations that:

- Mr Yekatom's group allegedly operated under Mr Ngaïssona's authority, who therefore had knowledge of the crimes allegedly committed;¹⁸
- Mr Yekatom's group was allegedly responsible for the abduction and detention of relatives of General Mamour at Yamwara school, which alleged events are directly linked to counts 11-16;¹⁹
- certain Comzones would kill their elements;²⁰

⁹ CAR-OTP-2076-0348-R02, at 0364-0365.

¹⁰ CAR-OTP-2076-0146-R02, at 0159, lines 454-458.

¹¹ CAR-OTP-2076-0212-R01, at 0220, lines 273-282.

¹² CAR-OTP-2076-0241-R01, at 0250, lines 354-355.

¹³ CAR-OTP-2076-0168-R01, at 0169, lines 20-35.

¹⁴ CAR-OTP-2076-0168-R01, at 0170, lines 74-80.

¹⁵ CAR-OTP-2076-0516-R03, at 0547, lines 1120-1124.

¹⁶ Prosecution's Trial Brief, paras [REDACTED].

¹⁷ Prosecution's Trial Brief, para. [REDACTED].

¹⁸ Prosecution's Trial Brief, para. 480, footnote 1209.

¹⁹ Prosecution's Trial Brief, para. 460, footnote 1160.

²⁰ Prosecution's Trial Brief, para. 132, footnote 318.

- Mr Ngaïssona did not impede, condemn or report Anti-Balaka perpetrators, which in turn also encouraged them to continue committing crimes.²¹
8. An extensive part of the evidence proposed in P-0487's transcribed statement relates to the alleged acts and conduct of, respectively, Mr Ngaïssona and Mr Yekatom and/or the charged crimes, and is central to core issues in dispute. The summary of P-0487's transcribed statement completed by the Prosecution in its annex ICC-01/14-01/18-724-Conf-AnxA is, as far as references to Mr Ngaïssona's alleged contributions are concerned, misleading. Indeed, the relevant summary does not accurately reflect the extent to which P-0487's allegations relate to Mr Ngaïssona's acts and conduct, as detailed above.²² By contrast, the summary of P-0487's prior statements prepared by the Prosecution specifically for the purpose of the Request, and so as to "more easily identify their relevance and probative value", makes specific references to Mr Ngaïssona thirty-nine (39) times.²³ Although these allegations from P-0487 are for the most part unfounded, they are certainly not of limited nature. In the *Ntaganda* case, the "centrality" of the evidence of a particular witness to the accused's case was a key factor for the Chamber to reject the Prosecution's application pursuant to rule 68(3) of the Rules.²⁴ Similarly, in the prior recorded testimony of P-0487, the accused's "alleged actions are frequently referred to in the Statement, including in relation to his whereabouts at particular times, orders he allegedly gave, and his general conduct".²⁵
9. Furthermore, the reliability of the information provided by P-0487 in his prior statement is vitiated by the overall lack of credibility of this witness due to the myriad of manifest inconsistencies, be it in his 2016 and 2018 prior statements,

²¹ Prosecution's Trial Brief, para. 181, footnote 496.

²² See ICC-01/14-01/18-724-Conf-AnxA, pages 15-16.

²³ See Request, para. 6 referring to Annex B to the Request.

²⁴ ICC-01/04-02/06-2124, para. 8; ICC-01/04-02/06-988, para. 11.

²⁵ ICC-01/04-02/06-2124, para. 8.

or between the latter and other witness testimonies. The inconsistencies are so extensive that P-0487's transcribed statement is *prima facie* unsuitable for admission under rule 68(3).

10. *First*, manifest contradictions (i) between P-0487's 2016 and 2018 interviews and (ii) in the evidence proposed within the 2016 interview, make his prior recorded testimony unreliable.

11. For instance, P-0487 alleges [REDACTED].²⁶ [REDACTED].²⁷ In another part of his interview, he alleges that it was following the [REDACTED], that [REDACTED].²⁸ Similarly, he first alleged having stayed at the base until [REDACTED], to then retract himself and say this was not correct.²⁹ Also, while asserting having never met Mr Ngaïssona,³⁰ he alleges having attended a [REDACTED], and during which Mr Ngaïssona would have expressed, [REDACTED].³¹ P-0487's unfolding and sequencing of events does not make the slightest sense and relying on P-0487's statement in relation to these unfounded and extensive accusations would be prejudicial to the rights of Mr Ngaïssona.

12. Moreover, while P-0487 alleges that he had no specific leadership position, that he was [REDACTED],³² that he was not taking any decision and had joined the movement after 5 December 2013,³³ [REDACTED],³⁴ numerous documentary evidence shown by the investigators to P-0487 indicates that these allegations

²⁶ CAR-OTP-2076-0130-R01, at 0141-0143.

²⁷ CAR-OTP-2076-0516-R03, at 0547-0548, lines 1112-1146.

²⁸ CAR-OTP-2076-0203-R01, at 207-210. *See also* CAR-OTP-2076-0024-R01, at 0026, lines 56-61 and CAR-OTP-2076-0212-R01, at 0221, lines 309-311.

²⁹ *Compare* CAR-OTP-2076-0331-R01, at 0346, lines 518-540 *with* CAR-OTP-2076-0348-R02, at 0364-0366.

³⁰ CAR-OTP-2076-0348-R02, at 0367-0368, lines 653-680.

³¹ CAR-OTP-2076-0203-R01, at 0206-0207, lines 75-134.

³² CAR-OTP-2076-0146-R01, at 0149, lines 81-105 to CAR-OTP-2076-130-R01, at 0138, lines 287-307.

³³ CAR-OTP-2076-0408-R02, at 0420-0422.

³⁴ CAR-OTP-2076-0212-R01, at 0222-0223, lines 380-388. *See also* CAR-OTP-2076-0227-R01, at 229-232.

do not reflect the reality of that period. This documentary evidence shows that he joined the Anti-Balaka [REDACTED]³⁵ that he participated in the 5 December attack, and that P-0487 had [REDACTED].³⁶ For instance, in the [REDACTED] that he then qualified in his prior statement as “a little whimsical” to justify its obvious contradictions with his statement to the investigators,³⁷ he said that [REDACTED], his goal was to join the Anti-Balaka, which he did and then took part in the 5 December attack. He added that even if there were groups that allowed themselves to be manipulated by François Bozizé’s supporters, [REDACTED]. The statements he made during the relevant period, suggesting P-0487’s [REDACTED], are in total contradiction with the account of events he gave the investigators in 2016 and 2018. Also, it is noteworthy that [REDACTED].³⁸ The fact that [REDACTED] tends to indicate that P-0487 was more involved in the Anti-Balaka than he alleges he was.

13. Regarding P-0487’s phone number(s), in his interview dated 2016, he had mentioned only one phone number to the investigators while admitting during his 2018 interview that a second number belonged to him. When confronted during his 2018 interview with the use of this second phone number and when asked when he had started to use it, P-0487 confirmed using it in 2014 but was not able to confirm the same for 2013.³⁹ Shortly thereafter, he contradicts himself in admitting indirectly that he was using this second number already before [REDACTED] in 2013. He indeed explains that [REDACTED].⁴⁰

³⁵ CAR-OTP-2076-0331-R01, at 0335-0336.

³⁶ See e.g. CAR-OTP-2027-0191; CAR-OTP-2001-3825; CAR-OTP-2001-4998; CAR-OTP-2001-4700. See also P-0889, ICC-01/14-01/18-T-109-CONF-ENG ET, pages 31, 36, 59, 67-68.

³⁷ CAR-OTP-2076-0227-R02, at 0231-0232.

³⁸ CAR-OTP-2070-0302-R01.

³⁹ CAR-OTP-2076-0348-R01, at 0370-0373, lines 753-849

⁴⁰ CAR-OTP-2076-0408-R02, at 0410-0412, lines 58-127.

14. The above examples are only the tip of the iceberg – as they are many more – to illustrate how systematically vague, inconsistent, contradictory and therefore unreliable P-0487's prior statement is. P-0487's version of events changes dramatically from one interview day to the next, even sometimes within the same day. On this ground alone, the Request should be rejected, as it is not possible to rely on one information and its opposite at the same time. The Defence would have to go back on every single account of events to understand which existing or new scenario the witness feels like proposing at the time of testimony.

15. *Second*, P-0487's prior statement is manifestly inconsistent with other witness statements and testimonies, in particular regarding P-0487's role during the relevant period, but also on Mr Ngaïssona's *mens rea*. For instance, contrary to P-0487's statements, several witnesses testify to his participation [REDACTED] in the 5 December attack in Bangui.⁴¹ P-0974 presents P-0487 as [REDACTED].⁴² P-0446 states that [REDACTED],⁴³ while P-0889 explains that [REDACTED].⁴⁴ P-0888 testifies to [REDACTED] when Mr Djotodia had already resigned and when Mr Ngendet was handling the transition, *i.e.* after end of December 2013.⁴⁵ As to Mr Ngaïssona's encouraging the Anti-Balaka to continue the fight in 2014 so François Bozizé could return to power, the overwhelming majority of insider witnesses have testified to the exact opposite.⁴⁶ These are only a few

⁴¹ For instance, P-0884, ICC-01/14-01/18-T-057-CONF-ENG ET, page 71 ; P-1074, CAR-OTP-2094-0228-R02, at 0239, para. 61.

⁴² P-0974, CAR-OTP-2058-0165-R01, at 0175, para. 67.

⁴³ P-0446, CAR-OTP-2059-1672, at 1684.

⁴⁴ See P-0889, ICC-01/14-01/18-T-109-CONF-ENG ET, page 67, ln 14 to page 68, ln 2.

⁴⁵ P-0888, ICC-01/14-01/18-T-121-FRA ET, pages 75-76.

⁴⁶ See, for instance, P-0889, ICC-01/14-01/18-T-109-CONF-ENG ET, pages 40-41, 57-58, 65-66, 72 ; P-0808, T-070-ENG-ET, pages 42, 45-46, 53, 56-61, 65-72, 76 and T-071-ENG-CT, pages 10-14, 16-17, 19, 25, 36-45, 49-5-54, 70-74 ; P-1193, 01/14-01/18-T-125-CONF-ENG ET, page 53, page 8, lines 1-4, page 38, lines 10-14, pages 52-53 ; ICC-01/14-01/18-T-124-CONF-ENG ET, pages 75-76 ; P-0888, ICC-01/14-01/18-T-121-ENG ET, pages 77-78 ; ICC-01/14-01/18-T-123-ENG ET, page 9.

of the most obvious examples of the inconsistencies between P-0487's statement and that of other witnesses.

16. *Third*, the investigators themselves, faced with the number of inconsistencies contained in P-0487's first 2016 statement, concluded to the manifest unreliability of P-0487's prior statement, as it clearly emerges from the exchange between them and P-0487 during his second interview in 2018.⁴⁷ It is also noteworthy that the Prosecution in its Trial Brief makes allegations in direct contradiction with P-0487's prior statement, based on the evidence proposed by other witnesses. For instance, the Prosecution alleges that [REDACTED].⁴⁸ In direct contradiction with that allegation, P-0487 denies [REDACTED], as reflected in the Prosecution's Annex B summary.⁴⁹ The Prosecution cannot seek to introduce into evidence a statement it indirectly concedes is unreliable on so many core aspects. The Request of the Prosecution is therefore unreasonable and irreconcilable with advancing the truth-seeking function of the Chamber and preserving the fair trial rights of the accused.

17. *Fourth*, P-0487's prior statement contains numerous indications that P-0487 has strong views against Mr Ngaïssona, including assertions that Mr Ngaïssona would be responsible for [REDACTED].⁵⁰ P-0487's strong bias against Mr Ngaïssona is not speculative but arises from objective factors based on both P-0487 and other witnesses' statements or testimonies. It is apparent from P-0487's prior statement that he had some [REDACTED].⁵¹ This is corroborated

⁴⁷ See e.g. CAR-OTP-2076-0325-R01, at 0327-0328, lines 70-91 ; CAR-OTP-2076-0331-R01, at 0333-0334; CAR-OTP-2076-0408-R02, at 0427, lines 649-664.

⁴⁸ Prosecution's Trial Brief, para. [REDACTED].

⁴⁹ CAR-OTP-2076-0408-R02, at 0420-422 referred to in Annex B to Request, page 18.

⁵⁰ CAR-OTP-2076-0516-R03, at 0547-548.

⁵¹ CAR-OTP-2076-0130-R01, at 0138, lines 287-301; CAR-OTP-2076-0130-R01, at 0138, lines 301-307; CAR-OTP-2076-0130-R01, at 0140, lines 348-373.

by the evidence of (i) P-0446 who states that P-0487 [REDACTED]⁵² and (ii) P-0889 who explains that [REDACTED].⁵³ Moreover, P-0884 explained how P-0487 was among the people dissatisfied by [REDACTED], and how P-0487 and others decided to [REDACTED].⁵⁴ It is also very clear, as elaborated above, that P-0487 attempts, *a posteriori*, to deflect his own responsibility while inflating Mr Ngaïssona's. Despite admitting having never personally met Mr Ngaïssona⁵⁵ and never attended any coordination meetings,⁵⁶ P-0487 makes detailed accusations against Mr Ngaïssona, alleging that he was part of the "authorities" responsible for the structuring and financing of the Anti-Balaka, that he was the one encouraging the Anti-Balaka to keep fighting to have François Bozizé return to power and that he was responsible for all the alleged crimes committed by the Anti-Balaka elements, all of whom were under his direct command and authority.⁵⁷

18. *Fifth*, the Prosecution fails to cite one single witness whose evidence would corroborate P-0487's proposed evidence with respect to Mr Ngaïssona's alleged criminal responsibility.⁵⁸ The evidence cited as allegedly corroborative of P-0487's prior statement only relates to Mr Yekatom or the contextual elements of the alleged crimes. The absence of any corroborative references on the part of the Prosecution is not surprising since, to the Defence's knowledge, none of the issues central to Mr Ngaïssona's case and discussed by P-0487 are corroborated by other witnesses expected to offer full in-court testimony. For instance, and this list is far from being exhaustive, so far as the Defence is aware, none of the insider witnesses having offered or expected to offer full in-

⁵² P-0446, CAR-OTP-2059-1672, at 1684.

⁵³ See P-0889, ICC-01/14-01/18-T-109-CONF-ENG ET, page 67, ln 14 to page 68, ln 2.

⁵⁴ P-0884, ICC-01/14-01/18-T-056-CONF-ENG CT, page 66.

⁵⁵ CAR-OTP-2076-0348-R02, at 0368, lines 678-680.

⁵⁶ CAR-OTP-2076-0146-R02, at 0159, lines 460-464.

⁵⁷ CAR-OTP-2076-0146-R02, at 0159, lines 454-458.

⁵⁸ Request, para. 13.

court testimony provide direct information regarding (i) Mr Ngaïssona's alleged orders to [REDACTED]; (ii) Mr Ngaïssona's alleged rejection of [REDACTED]; and (iii) Mr Ngaïssona's allegedly encouraging the Anti-Balaka to continue to fight to the effect of having François Bozizé return to power. These allegations are not only not corroborated by other witnesses but are contradicted by them. For instance, P-0954 suggests that it was [REDACTED], without mentioning Mr Ngaïssona. Regarding Mr Ngaïssona's alleged intent to have François Bozizé return to power, many witnesses testified to the fact that Mr Ngaïssona was not supporting François Bozizé's return, contrary to Maxime Mokom, which ultimately led to the split of the movement.⁵⁹

19. In light of the above, the Defence strongly contests the credibility of P-0487 and submits that a testimony given under oath in its entirety, under the Chamber's oversight, is warranted in the present circumstances. As recalled by this Chamber, it would further enable "*the Chamber and the accused to hear a natural and spontaneous account from the witness, to directly and closely observe his reactions, demeanour and composure, and to immediately seek clarifications*".⁶⁰

20. Finally, while the time-saving as announced by the Prosecution appears significant,⁶¹ given the multitude of issues contained in P-0487's transcribed statements that are central to the Prosecution's case against Mr Ngaïssona and Mr Yekatom, and given the manifest lack of credibility of this witness as illustrated *inter alia* by the many inconsistencies found in his prior statements and between his prior statements and other witnesses' testimonies, introducing P-0487's prior recorded testimony under rule 68(3) would impose an unreasonable burden on the Defence in preparing for and conducting the cross-

⁵⁹ See, for instance, P-0889, ICC-01/14-01/18-T-109-CONF-ENG ET, pages 40-41, 57-58, 65-66, 72 ; P-0808, ICC-01/14-01/18-T-070-ENG CT, pages 45-46.

⁶⁰ ICC-01/14-01/18-964-Conf, para. 19.

⁶¹ Request, paras 16-19.

examination, and would ultimately limit any time-saving. Furthermore, as previously ruled with respect to P-0801, the Prosecution could streamline the questioning of P-0487 and further reduce the estimated time needed for its examination.⁶² Indeed, while P-0487's combined prior statements comprise 565 pages, not all of them are relevant. Moreover, many topics are addressed both in the 2016 and 2018 prior statements. The Prosecution's examination could be much more streamlined than the interview, which was most of the time rather disjointed. Therefore, on balance, the prejudice to the fair trial rights of Mr Ngaïssona preventing him from hearing P-0487's full in-court testimony outweighs any potential and limited promotion of the expeditiousness of the proceedings.

21. In light of the above, the Defence submits that a full in-court testimony of the evidence proposed by P-0487 is necessary and any other approach would be prejudicial to the rights of the accused or inconsistent with the fairness of the trial generally.⁶³

V. RELIEF SOUGHT

22. The Defence respectfully requests the Chamber to **REJECT** the Prosecution's Request to introduce P-0487's prior-recorded testimony and associated exhibits pursuant to Rule 68(3).

Respectfully submitted,

⁶² ICC-01/14-01/18-964-Conf, para. 20.

⁶³ ICC-02/11-01/15/744, para. 71.

A handwritten signature in black ink, appearing to be a stylized 'N' or similar character.

Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 18 November 2022

At The Hague, the Netherlands.