

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **26 July 2023**

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

Public Redacted Version of 'Defence Response to the "Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-1172 pursuant to Rule 68(2)(c)", 4 December 2022, ICC-01/14-01/18-1687-Conf

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-1172 pursuant to Rule 68(2)(c)” (“Request”).¹
2. As elaborated below, the Defence opposes the Request in part, in so far as P-1172’s prior statement relates to the acts and conduct 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. Under rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”), the Chamber may, after having heard the parties, allow the introduction of previously recorded testimony coming from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally, provided that: i) the introduction is not prejudicial to or inconsistent with the rights of the accused;² ii) the necessity of measures under article 56 of the Rome Statute (“Statute”) could not be anticipated; and iii) the prior recorded testimony has sufficient indicia of reliability.

¹ ICC-01/14-01/18-1677-Conf, together with Confidential Annexes A and B.

² Rule 68(1) of the Rules and article 69(2) of the Statute.

5. Under rule 68(2)(c)(ii) of the Rules, *“the fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it”* (emphasis added).
6. Chambers consider that articles 69(2) and (4) of the Statute are relevant in this context and therefore that the relevance and probative value of the prior recorded testimonies vis-à-vis any prejudice that admission may cause to a fair trial or to a fair evaluation of the testimony of a witness should also be taken into consideration.³

IV. SUBMISSIONS

7. *First*, the Defence opposes the introduction of P-1172’s prior statement in full, because parts thereof go to acts and conduct of Mr Ngaïssona while they relate to issues that are central to the Prosecution’s case and materially in dispute.
8. Indeed, parts of P-1172’s proposed evidence relate to alleged meetings having taken place in Mr Ngaïssona’s compounds, involving Maxime Mokom and [REDACTED].⁴ While too little details are provided in P-1172’s prior statement to bring adequate clarity on these allegations, it further suggests that the Anti-Balaka leaders allegedly present in Mr Ngaïssona’s compounds were allegedly the same individuals P-1172 had been indirectly in contact with when in ZONGO and to whom he allegedly provided military advice.⁵
9. In the Defence’s view, allowing the relevant allegations to be admitted into evidence without any possibility for the Defence to question and challenge their author would be antithetical to Mr Ngaïssona’s rights to examine or have

³ See e.g. ICC-01/09-01/11-1938-Red-Corr, paras 65 and 150; ICC-01/04-02/06-1029, para. 15.

⁴ CAR-OTP-2082-1058-R03, at 1066-1067, paras 51-53.

⁵ CAR-OTP-2082-1058-R03, at 1066-1067, paras 50-51.

examined the witnesses against him, and would therefore cause him undue prejudice.

10. Therefore, for the reason elaborated above, the Defence opposes the introduction of paragraphs 50-53 of P-1172's prior statement.

11. *Secondly*, the Defence takes issue with and contests the Prosecution's characterisation of P-1172's proposed evidence to the extent that the Prosecution suggests it corroborates certain paragraphs of the Confirmation Decision.⁶

12. For instance, in paragraph 230 of the Confirmation Decision, Pre-Trial Chamber II explains that P-1858's testimony "*seems to signal a weakening of the link between Ngaïssona and Maxime Mokom as time wore on*" (emphasis added).⁷ P-1172's proposed evidence is very different, if not contradictory, from the alleged evidence presented in the Confirmation Decision. Indeed, in his prior statement P-1172 suggests that there were never any links between Mr Ngaïssona and Maxime Mokom, that prior to Mr Ngaïssona's appointment as coordinator, Maxime Mokom had coordinated the movement alone and that in light of Maxime Mokom's reaction to Mr Ngaïssona's appointment, the aforementioned 'fracture' existed from the outset.⁸

13. Also, contrary to paragraph 169 of the Confirmation Decision, while P-1172 mentions one meeting at the compound of Mr Ngaïssona's father, nothing is specified as to the frequency of the alleged meetings at this location nor as to alleged discussions about "the situation in the field". In the same vein, it does

⁶ Annex A to Request.

⁷ ICC-01/14-01/18-403-Corr-Red ("Confirmation Decision"), para. 230.

⁸ CAR-OTP-2082-1058-R03, at 1065, paras 40-42.

not provide any information whatsoever on (i) the alleged reporting procedure between the coordination and the Comzones or (ii) Messrs Ngaïssona and Mokom's alleged respective roles within the coordination.⁹

14. Last example but not least, contrary to the Prosecution's suggestion, P-1172's prior statement does not make Mr Ngaïssona's alleged responsibility in the alleged Bossangoa attack of 5 December 2013 relevant or probative.¹⁰ On the contrary, P-1172 stresses that while being in regular contact with Maxime Mokom prior to 5 December 2013, he never heard of Mr Ngaïssona before his appointment as coordinator.¹¹ This part of P-1172's proposed evidence in fact refutes the allegation that Mr Ngaïssona would have contributed to the alleged crimes by "*liaising with Anti-Balaka members exercising key functions, including Maxime Mokom*".¹² Also, while P-1172 refers in his statement to Maxime Mokom allegedly helping certain civilians after their ambush against the Seleka in Ouham-Bac,¹³ he does not make any mention of an attack in Bossangoa on 5 December, nor the involvement of Maxime Mokom therein, albeit referring to him in relation to the 5 December attack in Bangui.¹⁴

15. Therefore, when assessing P-1172's prior statement at the time of its final judgment, the Chamber should not attach any weight to any mischaracterisation of P-1172's proposed evidence by the Prosecution.

⁹ Compare Confirmation Decision, para. 169 with CAR-OTP-2082-1058-R03.

¹⁰ See Annex A to the Request, referring to paragraphs 111-112 of the Confirmation Decision.

¹¹ CAR-OTP-2082-1058-R03, at 1065, paras 40 and seq.

¹² Confirmation Decision, para. 112.

¹³ CAR-OTP-2082-1058-R03, at 1063, para. 29.

¹⁴ CAR-OTP-2082-1058-R03, at 1064, paras 36 and seq.

16. Finally, the Prosecution fails to adequately substantiate why the first statement of P-1172 taken on 5 February 2017 should be excluded from the Request.¹⁵ The fact that it relates for most parts to the Seleka in no way justifies its exclusion from the Request as (i) the crimes committed by the Seleka are directly relevant to the case and (ii) P-1172's prior recorded testimony necessarily includes all of his prior written statements which form a whole and are inseparable.¹⁶

V. RELIEF SOUGHT

17. The Defence respectfully requests the Chamber to:

- **REJECT** in part the Prosecution's Request to introduce P-1172's prior-recorded testimony pursuant to Rule 68(2)(c) in so far as it relates to paragraphs 50-53 of his statement; and
- **ORDER** the introduction of P-1172's first prior statement dated 5 February 2017 into evidence.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 26 July 2023

¹⁵ Request, para. 9.

¹⁶ See rule 111(1) of the Rules.

At The Hague, the Netherlands.