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**International
Criminal
Court**

Original: English

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

Date: 25 January 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 PROSECUTOR *v.* ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA**

Confidential

**Prosecution's Response to the Ngaïssona Defence's Forth Defence Request for the
Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b) of the
Rules**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") opposes the Ngaissona Defence's request to introduce P-4953's prior statement pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules").¹ P-4953's prior statement, dated 9 January 2024, ("Statement") goes to the acts or conduct of the Accused and involves core issues that are materially in dispute. As such, the Statement may not be received pursuant to Rule 68(2)(b). Instead, P-4953 should testify entirely *viva voce* or at a minimum under Rule 68(3), so that the veracity and reliability of his claims can be tested through cross-examination under oath before Trial Chamber V ("Chamber").

2. In the alternative, if the Chamber is minded to receive the Statement pursuant to Rule 68(2), the offending portions found at paragraphs 20, 21, 33, 35, 36, and 38 should be excluded.²

II. CONFIDENTIALITY

3. Pursuant to regulation 23bis(2) of the Regulations of the Court ("RoC"), this document is filed as "Confidential" because it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. Applicable Law

4. The Prosecution refers to the applicable law on the introduction of prior recorded testimonies pursuant to rule 68(2)(b) previously set out by the Chamber,³

¹ ICC-01/14-01/18-2301-Conf. ("Request")

² In addition to the above, the Prosecution considers that the P-4953's statement regarding the persons listed in paragraphs 41-47 contradicts witness testimonies heard before the Chamber, such as P-2049, and is materially in dispute.

³ ICC-01/14-01/18-1833-Conf-Corr, ICC-01/14-01/18-1907-Conf.

including that "Prior recorded testimony can only be introduced pursuant to Rule 68(2)(b) if it goes to proof of a matter other than the acts and conduct of the Accused."⁴ Further, the term 'acts and conduct of the accused' refers to "the personal actions and omissions of the accused" and more specifically, to "those actions of the accused described in the confirmation charges or which are otherwise relied upon by the Prosecution to establish their criminal responsibility for the crimes charged."⁵ In subscribing to the same definition, Trial Chamber X in the *Al Hassan* case further clarified that "[p]rior recorded testimony that *disprove* the acts and conduct of the accused are equally inadmissible under this provision."⁶

B. P-4953's Testimony goes to the Accused's Acts and Conduct

5. The Statement violates Rule 68(2)(b), which excludes the introduction of evidence pertinent to acts and conduct of the accused through this manner. Contrary to the Request, the Witness's assertions regarding NGAISSONA's role within the Anti-Balaka are not "limited, peripheral references to the accused."⁷ Rather they go directly to his role within the context of his involvement. For instance, at paragraph 38 of the Statement, P-4953 asserts:

"38. Après les évènements, comme les Balaka faisaient des pillages, Monsieur NGAÏSSONA s'était levé pour demander d'arrêter de piller les populations, que les objectifs des Balaka avaient déjà été atteints ... »

6. It is clear from the Decision on the Confirmation of Charges, the culpable contributions underpinning the Accused's responsibility for crimes charged under articles 7 and 8, include *inter alia* that NGAISSONA:

⁴ ICC-01/14-01/18-1833-Conf-Corr, para 26.

⁵ See ICC-01/14-01/18-1833-Conf-Corr, para 28.

⁶ ICC-01/12-01/18-2288, para. 7.

⁷ ICC-01/14-01/18-1833-Conf-Corr, para. 29.

“specifically (i) took steps to structure the Anti-Balaka; (ii) financed the Anti-Balaka, including for the purchase of weapons; (iii) issued instructions to Anti-Balaka members”⁸

7. Thus, to the extent that the Statement bears on directions or instructions NGAISSONA issued in respect of the Anti-Balaka’s activities, it clearly bears on his alleged culpable conduct. As such, it may not be submitted under Rule 68(2).

C. The Witness’ Statement involves core issues that are materially in dispute

8. In his Statement the Witness delves into core issues that are materially in dispute further militating against its formal submission under Rule 68(2):

9. Paragraph 38 of the Statement touches upon NGAISSONA’s knowledge of the criminal activities of the Anti-Balaka and its objectives.

10. Paragraphs 20 and 33 of the Statement assert the following with regard to the formation and finances of the Anti-Balaka:

« 20. Les Anti-Balaka sont formés dans un lieu aride appelé GOBERE. Ils avaient seulement des armes traditionnelles. Je n’ai vu ni entendu parler d’une autorité ou d’une aide quelconque qu’ils auraient reçu. »⁹

« 33. Pour être soigné par le marabout JEANNOT, il fallait verser une certaine somme. C’est cette somme qu’ils utilisaient pour se préparer. Je crois c’est ainsi que les Balaka étaient financés, il n’y avait pas d’autre source de financement. »¹⁰

11. P-4953’s claims regarding the formation, arming, and financing of the Anti-Balaka manifestly involves core issues in the case which militate against the submission of the Statement absent cross-examination. The fact that the Statement

⁸ ICC-01/14-01/18-403-Conf-Corr, paras. 101, 112

⁹ CAR-D30-0026-0001-R01, at 003.

¹⁰ CAR-D30-0026-0001-R01, at 004.

provides largely anecdotal evidence and conjecture on these points also militates in favour of having P-4953 testifying before the Chamber.

D. References to the Accused's Acts and Conduct may be Excluded

12. Should the Chamber determine that it can reasonably parse the proposed testimony and exclude the offending portions going to acts and conduct and core issues that are in dispute , *i.e.*, Paragraphs 20, 21, 33, 35, 36 and 38, the Prosecution would have no objection to the submission of the remainder of P-4953's evidence pursuant to Rule 68(2)(b).

13. With that said, it should be noted that the remainder of the Statement is of such marginal probative value and relevance that its introduction would not serve the interest of justice or advance the Chamber's truth-seeking function in any event.

IV. CONCLUSION

14. For the foregoing reasons, the Chamber should: (i) reject the Defence's request to introduce P-4953's Statement pursuant to Rule 68(2)(b), and direct that P-4953 testify *viva voce*, or at minimum under Rule 68(3), or (ii) in the alternative, exclude proof of the Accused's acts and conduct and matters relating to core issues materially in dispute from the Statement, contained in paragraphs 20, 21, 33, 35, 36, and 38¹¹.



Karim A. A. Khan KC, Prosecutor

Dated this 25th day of January 2024
At The Hague, The Netherlands

¹¹ See footnote 2.