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

Date: **1 March 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***

Public

Public redacted version of “Prosecution’s Response to the “First Ngaïssona Defence request to introduce prior recorded testimony pursuant to Rule 68(2)(b)” (ICC-01/14-01/18-2238-Conf)”, ICC-01/14-01/18-2265-Conf, 14 December 2023

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the NGAISSONA Defence’s request (“Request”)¹ to introduce P-4957’s prior recorded testimony (“Statement”) pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”). The Statement does not meet the criteria of rule 68(2)(a). Paragraph 24 of the Statement goes to proof of the acts and conduct of NGAISSONA in the relevant time period. Moreover, the remainder of the Statement is of such marginal probative value and relevance that its introduction is not warranted.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(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

3. The Prosecution refers to the applicable law on the introduction of prior recorded testimonies pursuant to rule 68(2)(b), as previously set out by the Chamber,² including the Chamber’s finding 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’”.³ The Chamber also considered that 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 confirmed charges or which are otherwise relied upon by the Prosecution to establish their criminal responsibility for the crimes charged”.⁴ While subscribing to the same definition, Trial

¹ ICC-01/14-01/18-2238-Conf.

² ICC-01/14-01/18-1833-Conf-Corr, ICC-01/14-01/18-1907-Conf.

³ ICC-01/14-01/18-1833-Conf-Corr, para. 26.

⁴ ICC-01/14-01/18-1833-Conf-Corr, para. 28.

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”.⁵

4. Although the Chamber did not preclude the introduction of a prior recorded statement containing “limited, peripheral references to the accused” pursuant to Rule 68(2)(b), it subjected this possibility to situations where “(i) the calling party indicates that it does not intend to rely on that reference and (ii) this reference is not significant to the case or is, in any event, of limited importance and does not constitute the core of the testimony”.⁶

5. The introduction of P-4957’s Statement does not meet the requirements of rule 68(2)(b), as it goes to NGAISSONA’s acts and conduct. 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.

B. P-4957’s Statement goes to NGAISSONA’s acts and conduct

6. Contrary to the Defence’s assertion,⁷ P-4957’s evidence goes to the acts and conduct of NGAISSONA, as construed by the Court’s jurisprudence.

7. As noted, paragraph 24 of the Statement alleges, *inter alia*, that in 2013-2014, NGAISSONA organised reconciliation matches between Christians and Muslims for social cohesion (“*organisait des matchs de réconciliation entre chrétiens et musulmans pour la cohésion sociale*”) and that he did not incite the Christians towards hatred against the Muslims (“*n’incitait pas les chrétiens à la haine contre les musulmans*”).⁸ These references are not “of limited importance”, as they are intended to undermine the evidence in the record of NGAISSONA’s criminal responsibility, including the material allegation

⁵ ICC-01/12-01/18-2288, para. 7.

⁶ ICC-01/14-01/18-1833-Conf-Corr, para. 29.

⁷ ICC-01/14-01/18-2238-Conf, para. 14.

⁸ CAR-D30-0015-0001, at 0005, para. 24.

that NGAISSONA intentionally contributed to the commission of crimes by the Anti-Balaka, who violently targeted the Muslim civilian population in Western CAR.⁹ As such, the Statement may not be formally submitted under rule 68(2)(b). Furthermore, the Prosecution should be afforded the opportunity to test the veracity of P-4957's evidence, if the Chamber is to consider his prior recorded testimony at all.

8. Despite the Defence's claim that the reference in paragraph 24 to NGAISSONA is "wholly unrelated to the purposes for which the Defence seeks to submit the prior recorded testimony",¹⁰ and that it "mainly seeks to rely on P-4957 to impugn the credibility of Witness P-0965",¹¹ the Defence does not expressly exclude consideration of this paragraph for such purposes from the Request. However, given the content of paragraph 24, its introduction pursuant to rule 68(2)(b) would be prejudicial to the Prosecution. Consequently, should the Chamber authorise the introduction of P-4957's Statement pursuant to rule 68(2)(b) nevertheless, it must exclude the evidence of NGAISSONA's acts and conduct contained in paragraph 24.

C. The remainder of P-4957's Statement is of marginal value

9. The introduction of the remainder of P-4957's Statement under Rule 68(2)(b) is unwarranted. It is of marginal relevance and probative value, and its introduction would not serve the interest of justice.

10. *First*, the Statement is contradictory on its main point, namely whether containers and/or weapons could have been placed at the NDRESS cemetery. Whilst P-4957 first alleges that the road was '*impracticable*' and that '*aucun véhicule ne pouvait l'emprunter*',¹² he then alleges that individuals could take motorcycles, cars, busses, or pick-ups to bury their death at the cemetery.¹³

⁹ ICC-01/14-01/18-723-Conf, paras. 250-252.

¹⁰ ICC-01/14-01/18-2238-Conf, para. 15.

¹¹ ICC-01/14-01/18-2238-Conf, para. 15.

¹² CAR-D30-0015-0001, at 0002, para. 15.

¹³ CAR-D30-0015-0001, at 0002, paras. 19-21.

11. *Second*, P-4957's basis of knowledge on the existence of containers and/or weapons at the cemetery is not established. In his Statement, P-4957 states [REDACTED].¹⁴ The Statement provides no information regarding [REDACTED], or even the frequency of [REDACTED].

12. *Finally*, absent any indication of the witness's [REDACTED],¹⁵ it is impossible from the Statement to ascertain whether P-4957 was in a position to attest to the presence of containers and/or weapons at the cemetery before 5 December 2013, nor whether any weapon distribution would have taken place there. Even if P-4957 would not have seen any container and/or weapons at the cemetery, this would not reasonably inform the Chamber regarding the existence thereof.

13. Should the Chamber nevertheless grant the Request, in view of its marginal probative value, the remainder of the Statement should be given only very limited weight, if any.

¹⁴ CAR-D30-0015-0001, at 0002, para. 12.

¹⁵ CAR-D30-0015-0001, at 0004, paras. 18-21. *See also* ICC-01/14-01/18-2238-Conf, para. 10.

IV. CONCLUSION

14. For the foregoing reasons, the Prosecution: (i) opposes the NGAISSONA Defence Request, or (ii) requests the Chamber to exclude the evidence of NGAISSONA's acts and conduct contained in paragraph 24 of P-4957's Statement.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 1st day of March 2024

At The Hague, The Netherlands