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TRIAL CHAMBER V

Before:

**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 ‘Defence Response to “Prosecution’s Request for the
Submission of Rebuttal Evidence”’, ICC-01/14-01/18-2670-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 for Mr Patrice-Édouard Ngaïssona (‘Defence’) hereby responds to the “Prosecution’s Request for the Submission of Rebuttal Evidence”, ICC-01/14-01/18-2657-Conf, dated 27 August 2024 (‘Request’).¹
2. The Request should be rejected in its entirety. The Request is a transparent attempt to distract the Chamber from the paucity of the evidence against Mr Ngaïssona by conducting a smear campaign against his Defence team. The Prosecution does not even attempt to meet the criteria for rebuttal evidence and fails to show that any alleged interference had an impact on the proceedings. The Prosecution’s unseemly tactics are regrettable and a waste of the Court’s time and resources. The Chamber should not entertain them any further.

II. CONFIDENTIALITY

3. In accordance with Regulation 23bis(1) of the Regulations of the Court, the present Request is filed as “confidential” as it contains information related to filings that have the same classification.

III. SUBMISSIONS

A. The Prosecution fails to meet the threshold for rebuttal evidence

4. In its email dated 7 February 2024, the Chamber informed the parties and participants that leave to present rebuttal evidence would only be granted if “the proposed evidence is of significance vis-à-vis the legal issues to be determined in this case, particularly in light of the evidence already on the record”.² The Chamber specifically referenced the “Decision on Prosecution request to present evidence in rebuttal” dated 19 December 2019 in the *Ongwen* case, as a relevant precedent for determining the present matter.³ By setting such high standards, the Chamber implicitly underscored the exceptional nature of rebuttal proceedings.⁴

¹ Prosecution’s Request for the Submission of Rebuttal Evidence, ICC-01/14-01/18-2657-Conf, 27 August 2024.

² Email decisions from the Chamber dated 7 February 2024 at 15:10 clarified on 9 August 2024, at 21:21.

³ ICC-02/04-01/15-1600.

⁴ ICC-02/04-01/15-1073, para. 19.

5. To evaluate the significance of the proposed rebuttal evidence, Trial Chamber IX first examined its context to decide which issue it pertained to and how specific this issue was. It concluded that the very limited and specific factual issue at stake, along with the broader legal issue it might relate to, were not new to the case. The Trial Chamber consequently did not consider that the evidence was necessary or appropriate.⁵
6. In the current case, the Proposed Evidence is not significant concerning the legal issues to be determined. The Proposed Evidence has been gathered in the context of the Prosecution's investigations into alleged Article 70 offences, the goal of which is precisely to establish whether improper conduct occurred and might have affected the credibility of certain witnesses in the present case. Therefore, the Proposed Evidence pertains to legal issues that are to be determined in a separate case, and which are contingent upon the Prosecution demonstrating reasonable grounds to believe these alleged offences occurred. Contrary to the Prosecution's unsupported assertion, it is far from "axiomatic" that allegations of tainted evidence at the centre of separate proceedings, which have not even progressed beyond the procedural stage of investigation, should be addressed in rebuttal.⁶ This is on the contrary not in the interest of justice and inappropriate for this Chamber to concurrently litigate these questions, which are not central to the charges in the present case but may be central to the charges before Pre-Trial Chamber II, assuming *arguendo* charges are brought.⁷ As the Prosecution acknowledged before this Chamber at the outset of the discussions on the Article 70 proceedings in June 2021, the Proposed Evidence "does not go to substantive issues and has minimal material value in the case being tried before the

⁵ ICC-02/04-01/15-1600, paras 7-8.

⁶ Request, para. 17. If anything, these submissions indicate the Prosecution's concession to the inadmissibility of the Proposed Evidence. Also, the citation in paragraph 17 of the Request found in Trial Chamber I's decision ICC-01/04-01/06-2727-Red, para. 40, is a summary of a broader excerpt from Trial Chamber II's decision ICC-01/04-01-07-T-222-Red2 and which confirms the need to show new circumstances to admit rebuttal evidence. See full text at ICC-01/04-01-07-T-222-Red2, p. 76, lines 12-24, which states: "The Chamber submits that the appearance of these unforeseen questions is an inherent phenomena to criminal cases and in exceptional circumstances, however, neither an objection made during the cross-examination of a Prosecution witness nor during the re-examination of that same witness could enable the Prosecutor to answer effectively to new issues raised by the Defence or to incriminating evidence or exculpatory evidence arising through the cross examination. In such a case, it's up to the Prosecutor to file a specific application and a justified application requesting the production of new evidence, that is, to address new circumstances. The Chamber, however, considers that the question which the Prosecutor has raised in his application is not new and that exceptional measures to address such concerns are already in existence". Trial Chamber I further recalled that: "that the mere fact that a Prosecutor could not foresee a given Defence question does not, in itself, constitute an exceptional circumstance". See also the three-part legal test, ICC-01/04-01-06-2727-Red, paras 42-43.

⁷ ICC-01/05-01/08-3029, para. 26.

Chamber”.⁸ This was reiterated for the portion of the Proposed Evidence further collected in July 2022.⁹

7. In its “Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules” dated 6 October 2023 (“Rule 68(2)(d) Decision”), and consistent with its prior lack of intervention, the Chamber decided not to “address the alleged conduct or activities of any individuals previously or currently associated with either of the Defence teams” despite various submissions on this matter.¹⁰ Consequently, though the Proposed Evidence’s underlying issue was clearly identified from the outset, it was determined that it would not be addressed before the Chamber. This decision is appropriate, as the Chamber is fully capable of evaluating the evidence of the Prosecution witnesses supposedly affected by [REDACTED] alleged misconduct (“Targeted Witnesses”) considering all the evidence submitted during trial. *First*, the Targeted Witnesses were all examined and cross-examined in court and, except for P-2843, their prior recorded testimonies are available for review by the Chamber.¹¹ *Second*, the Chamber has received plenty of other evidence relating to the matters discussed by the Targeted Witnesses, including in relation to the parts of their testimonies discussing the alleged acts and conduct of Mr Ngaïssona. *Third*, any alleged violation of the Protocol on the Handling of Confidential Information (“Protocol”)¹² without a demonstration of interference and/or influence pursuant to Article 70 cannot impact the credibility of the Targeted Witnesses or would be so minimal that it would not meet the standard set by the Chamber for the presentation of evidence in rebuttal. For each of the Targeted Witnesses, the Defence will elaborate below as to how the Prosecution failed to demonstrate the impact of the Proposed Evidence on their credibility.
8. The Request does not indicate when the Defence would have introduced the Proposed Evidence during its direct case.¹³ The Prosecution makes such an allegation without citing any specific instances. The Defence could not have possibly done so regarding alleged

⁸ ICC-01/14-01/18-1016-Conf, para. 9.

⁹ ICC-01/14-01/18-1588-Conf-Red, para. 11.

¹⁰ ICC-01/14-01/18-2126-Conf, para. 83. *See ibid.*, para. 20.

¹¹ ICC-01/14-01/18-2126-Conf, paras 27, 84.

¹² Public Annex A: Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a participant, ICC-01/14-01/18-156-AnxA.

¹³ *See* Request, para. 2, alleging that Defence’s challenges would have arisen “from material disclosed pursuant to the Prosecution’s article 70 investigations”.

contacts between [REDACTED] and P-0888, P-1193 and P-0992 since the related CDRs and CSTs have not been disclosed until 22 August 2024, *i.e.* after the last Defence witness testimony. If it did, the Defence only addressed it because the Prosecution persistently cast doubt on the integrity of the Defence team through its materials and during cross-examination of Defence witnesses, which the Defence was compelled to dispel. Thus, the Prosecution fails to demonstrate that the Defence's alleged use of the Proposed Evidence would introduce any new issues apart from those already introduced by the Prosecution itself. For instance, the Prosecution had information regarding alleged threats against P-2673 since at least October 2021 and raised this issue with the Chamber at that time.¹⁴ It recorded the related information in an investigation report in July 2022 and continually requested that it was not disclosed to the Defence, including as recently as 6 February 2024, despite having effectively received all information related to the 21 October 2022 Request For Assistance ("RFA") on 9 January 2024.¹⁵ It was only on 18 June 2024, on the eve of D30-4848's testimony, that the Prosecution decided its disclosure would not harm its investigations after all, and included this report in the list of materials it intended to use during D30-4848's cross-examination.¹⁶ Initially, the Defence had no intention of addressing this aspect during D30-4848's examination, as demonstrated by the lack of any reference to it in the summary of D30-4848's anticipated testimony.¹⁷ [REDACTED]¹⁸ [REDACTED].¹⁹ Also, the Prosecution was able to fully cross-examine D30-4848 on this topic.²⁰

9. Regarding the Defence's use of the alleged affected statements and testimonies for credibility purposes,²¹ which should be distinguished from the use of the Proposed Evidence itself, the Prosecution again fails to specify any instances. Moreover, it was entirely predictable that the Defence would attempt to counter incriminating evidence presented by Prosecution witnesses during its case. The fact that certain Prosecution

¹⁴ ICC-01/14-01/18-1139-Conf-Exp-Corr, para. 12.

¹⁵ CAR-OTP-2135-4203 (part of the Proposed Evidence). *See* ICC-01/14-01/18-1588-Conf-Red, para. 7, ii); ICC-01/14-01/18-2348-Conf-Red, paras 2, 4, 6.

¹⁶ ICC-01/14-01/18-1139-Conf-Exp-Corr, para. 12. *See also* email from the Prosecution dated 18 June 2024, at 10:28 containing courtesy copies of documents CAR-OTP-2135-4203 (part of the Proposed Evidence) and CAR-OTP-00036589-0001.

¹⁷ ICC-01/14-01/18-2473-Conf-AnxA.

¹⁸ CAR-OTP-00036589-0001.

¹⁹ [REDACTED].

²⁰ ICC-01/14-01/18-T-298-CONF-ENG ET, pp. 8-12.

²¹ Request, paras 2, 17.

witnesses were insider witnesses allegedly connected to Mr Ngaïssona is irrelevant.²² The Prosecution's call of insider witnesses, whose evidence, including its reliability, is then challenged by the Defence, is fundamentally how a trial operates within this court's procedural framework. In the *Bemba* case, the Trial Chamber denied the Prosecution's request to submit new evidence concerning the credibility of certain Defence witnesses, considering that the Prosecution had already had the opportunity to question them.²³ In this case, the Prosecution not only had ample opportunity to question the Targeted Witnesses, whom it interviewed, obtained statements from and called, but also, being in charge of the Article 70 investigation, it was fully aware of the potential importance of verifying with each witness that they had not been influenced in any way.

10. The Proposed Evidence did not emerge "surreptitiously" during the presentation of the Prosecution's case and the Prosecution's argument that the issue could not have been anticipated is unfounded.²⁴ The Article 70 investigation began in [REDACTED], [REDACTED] after the Prosecution's case started. [REDACTED].²⁵ By 19 October 2021, the Prosecution had reported alleged efforts to interfere with P-2673 to the Chamber.²⁶ On 28 September 2022, 12 additional documents in relation to allegations involving all above cited Prosecution witnesses, including P-2673, and received in July 2022, were provided to the Chamber.²⁷ [REDACTED].²⁸ The recent CDRs disclosed on 22 August 2024 could have been obtained during the presentation of the Prosecution's case had it not waited until 3 June 2024 to send the related RFA.²⁹ It was clearly a strategic decision by the Prosecution not to consistently raise its interference concerns with every Prosecution witness, including the Targeted Witnesses, as it later did with each Defence witness.

11. The Prosecution's claim that addressing the issue during its case would have undermined its Article 70 investigation is likewise unsupported. Most of the Proposed Evidence, *i.e.* 80 out of the 98 items, including allegations involving witnesses P-1847, P-2673, P-2841, P-2843 and P-0888,³⁰ were disclosed to the Defence while the Prosecution's case was still

²² Request, para. 17.

²³ ICC-01/05-01/08-3029, para. 30.

²⁴ Request, paras 2, 16. See ICC-01/05-01/08-3154-Red, para. 26; ICC-01/04-02/06-2246, para. 30.

²⁵ [REDACTED].

²⁶ ICC-01/14-01/18-1139-Conf-Corr-Red, para.12.

²⁷ ICC-01/14-01/18-1588-Conf-Red, paras 1, 3.

²⁸ [REDACTED].

²⁹ CAR-OTP-00036888.

³⁰ Regarding P-0888, see CAR-OTP-00001430 disclosed to the Defence on 7 July 2023.

ongoing, 70 percent of which was disclosed by May 2022.³¹ Moreover, routinely addressing its well-known concerns during its direct case could have been done while still withholding sensitive information if necessary.

12. Therefore, considering the above, the Prosecution failed to meet the threshold required to present rebuttal evidence and the Request should be denied. Incidentally, several documents of the Proposed Evidence are not related to any interference allegations and lack *prima facie* relevance.³² Other documents are not even in a working language of the Court.³³ Since the Prosecution fails to demonstrate that the Proposed Evidence significantly impacts the legal issues in this case, particularly considering the evidence already on the record, and due to a lack of time, the Defence will not comment on the admissibility of each proposed item. However, the Defence reserves its right to challenge the admissibility of any items should the Chamber grant all or part of the Request.

B. The evidence does not show interference with witnesses

13. The Prosecution fails to demonstrate that the alleged contacts between [REDACTED] on the one hand, and P-0888, P-0992 and P-1193 on the other, constitute interference. It also fails to point to any evidence supporting its claim of alleged influence exerted, or interference with witnesses P-2841, P-2673 and P-2843 that could have impacted on their evidence.³⁴
14. The Defence concedes that the CDRs show that contacts appear to have occurred between [REDACTED] and Prosecution witnesses, against the terms of the Protocol. These alleged contacts should have been reported. The Defence deeply regrets these apparent violations of the Protocol and has taken immediate measures regarding [REDACTED] relationship with the Ngaïssona Defence team, which has been terminated.
15. However, the Prosecution does not even attempt to show that the allegedly inappropriate contacts were related to the trial proceedings, and that they led to the contamination of the evidence. Notably, any contact taking place after a witness's testimony cannot, by

³¹ See Rule 77 disclosure packages 78 and 79.

³² See for instance CAR-OTP-00036442, CAR-OTP-00036443, CAR-OTP-2134-1917, CAR-OTP-2134-1918, CAR-OTP-00036817. See also footnote 34 below.

³³ CAR-OTP-2135-2286; CAR-OTP-2135-2290; CAR-OTP-2135-2292; CAR-OTP-2135-2294; CAR-OTP-2135-2296; CAR-OTP-2135-2893.

³⁴ The alleged interference with witness P-1847 has already been disposed of by the Chamber and is addressed in section C, below.

definition, impact the evidence presented in the courtroom or the credibility of such testimony.

16. As the Prosecution is well aware, [REDACTED], while several Prosecution witnesses, including P-0888, P-0992, P-1193 are [REDACTED]. Throughout the trial, [REDACTED] with whom P-2841 was associated.³⁵ Being at the centre of [REDACTED] in CAR, [REDACTED] is naturally in contact [REDACTED], including these Prosecution witnesses. It is strictly in this context that the contacts occurred and as such, they did not lead to any sort of interference. The alleged contacts between third parties and P-2843 or P-2673 similarly did not have any impact on their evidence before the Chamber. The Defence will address the six witnesses in turn, below.³⁶

1) P-0888

17. The Prosecution fails to demonstrate that the Defence interfered with, or influenced the testimony of P-0888.³⁷ The 2016 pre-recorded statement of P-0888, admitted in evidence pursuant to Rule 68(3), was already painting a favourable portrait of Mr Ngaïssona and his actions,³⁸ distancing him from Maxime Mokom³⁹ and praising the work of the Anti-balaka national coordination.⁴⁰ His second statement signed in 2019,⁴¹ was not focused on Mr Ngaïssona and only contains a passing remark about him,⁴² while the corrections made by P-0888 to his statements contained no mention of Mr Ngaïssona.⁴³ P-0888 entered the [REDACTED].⁴⁴ Nonetheless, the Prosecution decided to call P-0888 as an incriminating witness in full knowledge that he had a high opinion of Mr Ngaïssona and his political vision, and that he would not support the Prosecution's case theory. The Prosecution

³⁵ [REDACTED].

³⁶ The Defence notes that some of the material tendered in rebuttal concerns witnesses other than the seven identified in the Request. Insofar as no arguments were made in relation to these witnesses, and no explanation was offered regarding the relevance of the tendered material, the present response does not address it.

³⁷ While some of the phone data recently disclosed contain indications that a number of contacts took place between [REDACTED] and P-0888 over the course of the trial, the Request points to a single phone call between the witness and [REDACTED] that took place three days *after* the testimony of P-0888. *See* Request, para. 12. In addition, the Defence notes that while the Annex to the Request indicate that document CAR-OTP-00036800 is relevant to establishing calls with P-0888, this document does not contain any reference to the number attributed to him by the Prosecution.

³⁸ *See* for example: CAR-OTP-2031-0217, [REDACTED].

³⁹ CAR-OTP-2031-0217, para. 62.

⁴⁰ CAR-OTP-2031-0217, paras 40-42, 44.

⁴¹ Also admitted under Rule 68(3).

⁴² CAR-OTP-2108-0333.

⁴³ CAR-OTP-2135-2580. This means that any alleged contact between the signing of the statements and the appearance in court did not lead the witness to modify his prior-recorded statements to favour Mr Ngaïssona.

⁴⁴ [REDACTED].

cannot now allege interference to selectively disregard the evidence he (and other witnesses) gave in favour of Mr Ngaïssona.⁴⁵

18. P-0888 unequivocally stated, under oath, that no one approached him regarding his testimony and cooperation with the Court.⁴⁶ In addition, the in-court testimony of P-0888 was aligned with his statements. The Prosecution fails to demonstrate that the alleged calls between [REDACTED] and P-0888 made any material difference in the latter's evidence.

2) P-1193

19. The Prosecution also fails to show that the Defence influenced P-1193 and had any impact on the content of his testimony. While it is regrettable that [REDACTED] seemingly contacted P-1193 after the first day of the latter's testimony, the Prosecution does not even attempt to demonstrate any consequence on the content of his testimony.

20. P-1193 gave a statement to the Prosecution in 2016,⁴⁷ in which he already painted a positive image of Mr Ngaïssona.⁴⁸ He made no corrections related to Mr Ngaïssona during his familiarisation.⁴⁹ P-1193 is [REDACTED].⁵⁰

21. On the first day of his examination, before the alleged call with [REDACTED], P-1193 spoke highly of Mr Ngaïssona, calling him a 'man of peace', and confirmed parts of his statement in relation to Mr Ngaïssona's actions in favour of peace, as well as the separation between the 'North' and the 'South' prior to June 2014.⁵¹ He also contradicted the Prosecution's position on several other aspects of the case, including the National Coordination's alleged control over Anti-balaka comzones,⁵² and the lack of actual hierarchy between Mr Ngaïssona and Maxime Mokom.⁵³

⁴⁵ Request, paras 3 and 17 (alleging that the alleged interference should bear on the Chamber's assessment of the witnesses' testimony, in particular "in respect of any evidence they provide favourable to the Accused").

⁴⁶ ICC-01/14-01/18-T-120-CONF-ENG CT2, p. 6, lns 14-21.

⁴⁷ CAR-OTP-2045-0048, admitted in evidence pursuant to Rule 68(3).

⁴⁸ CAR-OTP-2045-0048, [REDACTED].

⁴⁹ CAR-OTP-2135-2773.

⁵⁰ [REDACTED].

⁵¹ ICC-01/14-01/18-T-124-CONF-ENG CT3, p. 32, lns 4-7; p. 56, lns 6-17; p. 57, ln. 11; p. 63, ln. 24 to p. 64 ln. 5; p. 64, lns 20-25; p. 65, lns 11-15; p. 66 ln. 24 to p. 67, ln. 2; p. 67, lns 21-24; p. 68, lns 8-19 (see, in particular, lns 13-19: "So all these efforts against the -- all these efforts when the coordination was unified, Mr Ngaïssona and the -- it was then I started to understand that he was a man of peace. He spoke about peace, he spoke about the demobilisation. If ever the elections were to come to an end, the funding of combatants -- and there was no decision on Ngaïssona's part to apply anything else apart from the various provisions included in the document on the cessation of hostilities and the various articles herein."); p. 69, lns 17-22; p. 70, lns 1-10; p. 77, ln. 21 to p. 78 ln. 10.

⁵² [REDACTED] ICC-01/14-01/18-T-124-CONF-ENG CT3, p. 77, lns 5-12.

⁵³ [REDACTED].

22. While the witness naturally spoke more in-depth of Mr Ngaïssona while responding to the Defence's examination questions, there is no indication whatsoever that his position changed, or became more favourable to Mr Ngaïssona between the examination of the Prosecution and that of the Defence. The Prosecution attempts to portray as interference what is actually a poor prosecutorial decision to call a witness that they knew had a view of the crisis that did not align with their theory of the case.

3) P-0992

23. P-0992 testified before the Chamber between 31 January and 7 February 2022. The recently disclosed phone records only appear to show phone contacts between the witness and [REDACTED] taking place in [REDACTED],⁵⁴ namely [REDACTED] after the completion of P-0992's testimony. The Prosecution fails to submit any other material pertaining to alleged interference with P-0992. While the calls may well have been against the letter of the Protocol, there can be no suggestion that a witness's evidence was compromised by phone calls that took place several months after this evidence was heard in court. To suggest otherwise does not comport with common sense.

24. In addition, the Prosecution was aware that P-0992 was a member of the [REDACTED]⁵⁵ and had a view of the 2013-2014 conflict that was diametrically opposed to the Prosecution theory, but they nonetheless selected him as an incriminating witness. The Prosecution cannot now try to diminish the weight of its own witness's evidence by making up interference that is not supported by any evidence.

4) P-2841

25. The Prosecution fails to bring forward any argument in relation to the alleged interference with witness P-2841 in its Request. This is because there is nothing in the evidence that would suggest he was indeed influenced in any way prior to giving his testimony in court, in May 2021.

26. When the Prosecution called P-2841 in Block 2, it was already aware of the witness's allegations regarding the alleged conduct of [REDACTED] and [REDACTED].⁵⁶ The Prosecution was also aware that P-2841 and [REDACTED] were in touch through phone

⁵⁴ CAR-OTP-00036843, lns 23, 28, 29, 32.

⁵⁵ [REDACTED].

⁵⁶ CAR-OTP-2130-4051.

calls.⁵⁷ Yet, the Prosecution seemingly did not raise it with the witness nor with the Chamber, and proceeded to call P-2841 in May 2021, which goes to demonstrate that the Prosecution did not believe that P-2841 had been interfered with.

27. This is confirmed by the absence of any mention of potential interference with P-2841 in the additional statement he provided to the Prosecution between 17 and 19 May 2021, following the end of his in-court testimony.⁵⁸ It appears that this topic was not even broached with the witness.⁵⁹ This contrasts with the manner in which Prosecution investigators questioned P-1847 in the aftermath of his testimony, making it clear that they suspected he had been interfered with.

28. Finally, the lack of interference with P-2841 is further shown by the fact that the witness's prior recorded statement of October 2020,⁶⁰ was adopted in full during testimony,⁶¹ with only minor corrections,⁶² and that the witness's in-court testimony was largely consistent with his statement.

5) P-2843

29. The Request fails to bring forward any evidence regarding alleged interference with witness P-2843 and fails to show that his in-court testimony was influenced by external pressure. The Prosecution merely references a Facebook conversation in which P-2843 alleges having been thanked by 'someone in Bangui' *after* his testimony.⁶³ It is not known who the 'person in Bangui' was, and if anything else was said, other than thanking the witness. But even if said person was part of the Ngaïssona Defence, as argued above, a contact between a Defence team member taking place after a witness's testimony, while not allowed by the Protocol, cannot be said to impact the evidence already given in the courtroom, nor does it constitute interference or pressure.

6) P-2673

⁵⁷ See for example, CAR-OTP-2127-8340, [REDACTED].

⁵⁸ CAR-OTP-2134-0072.

⁵⁹ The witness candidly stated that the only person who knew of his cooperation with the Court was [REDACTED]. The witness did not suggest that [REDACTED] tried to interfere or influence him in any way. See CAR-OTP-2134-0072, paras 40-41.

⁶⁰ CAR-OTP-2127-4238.

⁶¹ ICC-01/14-01/18-T-029-CONF-ENG CT, p. 6, lns 8-10.

⁶² CAR-OTP-2130-4475.

⁶³ Request, fn. 14.

30. The Prosecution fails to show that P-2673 was pressured in a way that influenced and impacted his in-court testimony on 3 and 4 June 2021.
31. The Prosecution misleads the Chamber by suggesting that it was calls from [REDACTED] that led [REDACTED] to allegedly [REDACTED].⁶⁴ In fact, the CDRs attributed to [REDACTED] only show contacts with [REDACTED] a year after P-2673's testimony at a time when the Defence was legitimately trying to reach them in the preparation of its case.⁶⁵ To suggest that it was improper for the Defence to contact these individuals, whose Facebook conversations are at the centre of the Prosecution's theory of the case, is utterly wrong.
32. In addition, all the [REDACTED] referred to by the Prosecution in the Request took place *after* P-2673's testimony before the Court, including the [REDACTED] to the witness.⁶⁶ As such, there is nothing to suggest that P-2673's evidence could have been affected by interference or external pressure.
33. The Prosecution conveniently omits to note the fact that P-2673's cooperation with the Court was already widely rumoured in Bangui at the time of his testimony.⁶⁷ D30-4848 was thoroughly questioned on this issue during his testimony and categorically denied that [REDACTED] was the source of his knowledge.⁶⁸
34. In any event, during his testimony P-2673 confirmed the veracity of his October 2020 prior recorded statement⁶⁹ to which he made no corrections.⁷⁰ His in-court evidence was largely consistent with his Rule 68(3) statement, thereby negating the possibility that he may have been tampered with in any way.

C. The part of the Request that relates to P-1847 amounts to a reconsideration request without meeting the required standard

35. The Prosecution essentially requests that the Chamber reconsider its Rule 68(2)(d) Decision while no error of reasoning or the necessity of reconsideration to prevent an

⁶⁴ [REDACTED].

⁶⁵ The alleged call received from [REDACTED], as mentioned in a Facebook message dated 21 June 2021 (see CAR-OTP-00000079, at 34) is not reflected in the phone records disclosed. In any event, even if it took place, it was over two weeks after the end of P-2673's in-court testimony.

⁶⁶ CAR-OTP-00000077; CAR-OTP-00000079; CAR-OTP-00000084.

⁶⁷ [REDACTED].

⁶⁸ ICC-01/14-01/18-T-298-CONF-ENG ET, p. 8, lns 3-5.

⁶⁹ CAR-OTP-2127-6435.

⁷⁰ ICC-01/14-01/18-T-041-CONF-ENG ET, p. 5, ln 25 to p. 6 lns 1-2.

injustice has been demonstrated.⁷¹ The Prosecution merely incorporates by reference its previous Rule 68(2)(d) submissions and therefore fails to bring forward any new arguments weighing in favour of reconsideration.⁷² These prior submissions have already been adjudicated. As noted above, while the Chamber concluded based on certain items of the Proposed Evidence that witness P-1847 had been materially influenced by improper interference, it decided to not address any submissions regarding the alleged conduct of any individuals associated with the Defence.⁷³ The Chamber further determined that the application of rule 68(2)(d) was the appropriate reactive measure to protect the integrity of the proceedings against such interference.⁷⁴ Therefore, the issue of interference was already addressed and remedied by introducing P-1847's prior recorded testimony into evidence. The Proposed Evidence already relied upon for the purpose of the Prosecution's rule 68(2)(d) request, which the Prosecution could have submitted through a bar table motion at the time or by the deadline to submit evidence in writing set by the Chamber on 25 August 2023,⁷⁵ will not add any value, and is therefore not of significance to the legal issues yet to be determined in this case. It should therefore be rejected.

D. The Prosecution failed to properly investigate the alleged interference

36. The Prosecution failed to properly investigate the alleged interference with six of the seven Targeted Witnesses. It brings forward incomplete and unconvincing evidence, having neglected to fulfil its obligations under Article 54 of the Statute to "extend the investigation to cover all facts and evidence relevant" and to "investigate incriminating and exonerating circumstances equally".
37. The Prosecution's blanket allegation that six of the seven witnesses⁷⁶ have been interfered with is unsupported in part due to the Prosecution's apparent failure to secure the requisite evidence. The Prosecution did not collect additional statements from the six witnesses to try and ascertain whether they had indeed been pressured or interfered with in any way. This stands in sharp contrast with the situation of P-1847, whom the Prosecution questioned at length about potential interference. The Prosecution's failure to take that crucial step means that the Chamber is left without any direct evidence and is requested to

⁷¹ ICC-01/14-01/18-2126-Conf.

⁷² Request, para. 15.

⁷³ ICC-01/14-01/18-2126-Conf, paras 57-72, 83.

⁷⁴ ICC-01/14-01/18-2126-Conf, paras 27, 84.

⁷⁵ ICC-01/14-01/18-1892, para. 5.

⁷⁶ P-0888, P-1193, P-0992, P-2841, P-2843, P-2673.

make a finding of interference based on circumstantial evidence, assumptions and speculations contained in the Request.

38. In addition, the Prosecution is also heavily relying on CDR evidence, without benefiting from any insights as to the contents of the alleged phone conversations. The Prosecution could have sought to clarify the contents of the allegedly improper conversations by questioning the interlocutors, or by providing recordings of the calls. It chose not to do so. The failure to properly investigate means that the Chamber is now requested to make consequential findings in the dark, without any direct evidence. While the Prosecution speculates that any calls between [REDACTED] and Prosecution witnesses, before or after their testimony, must have constituted interference, there is a more credible, or at least an equal alternative explanation, namely that these contacts were made in the context of [REDACTED], in which P-0888, P-1193, P-0992 and P-2841 are involved alongside [REDACTED].⁷⁷ In cases such as this one where a proposed factual finding is merely based on an inference drawn from circumstantial evidence, the finding can only be established if it was the only reasonable conclusion that could be drawn from the evidence.⁷⁸ In the absence of proper investigations, the Request fails to meet this threshold.

E. The Prosecution's unsupported and vague accusations are contrary to its obligations of objective truth-seeking, courtesy and professionalism

39. The Request is riddled with insinuations, and unsubstantiated allegations of nefarious behaviour aiming to paint the Ngaïssona Defence as guilty of, or complicit in Article 70 offences. The Request constitutes a transparent attempt by the Prosecution to smear the Defence and obfuscate the complete dearth of evidence susceptible of leading to the conviction of Mr Ngaïssona. In doing so, the Prosecution fails to comply with its obligation of objective truth-seeking, and scorns collegiality and basic professional courtesy. Instead, it shows that it is only motivated by conviction, at all costs.

⁷⁷ See above, para. 16.

⁷⁸ *Bemba et al*, Appeal Judgment, ICC-01/05-01/13-2275-Red, para. 868 (“Where a factual finding is based on an inference drawn from circumstantial evidence, the finding is only established beyond reasonable doubt if it was the only reasonable conclusion that could be drawn from the evidence. It is indeed well established that it is not sufficient that a conclusion reached by a trial chamber is merely a reasonable conclusion available from that evidence; the conclusion pointing to the guilt of the accused must be the only reasonable conclusion available. If there is another conclusion reasonably open from the evidence, and which is consistent with the innocence of the accused, he or she must be acquitted.”).

40. *First*, the Prosecution makes unfounded insinuations related to the extent to which the proceedings would have allegedly been tainted. While it only brings forward flawed evidence in respect to the Targeted Witnesses as discussed above, it attempts to cast a doubt as to the reliability of several more, without specifying which witness, or how and when they would have been tampered with. The Prosecution has been investigating potential Article 70 offences in this case for nearly three and a half years. Yet, the Request resorts to making up a fictitious bogeyman and gratuitously alleging that the so-called ‘pattern of improper conduct’ may taint a much wider portion of the proceedings, including the Defence case.⁷⁹
41. The issue of alleged improper behaviour by the Defence has been raised with nearly every Defence witness during cross-examination by the Prosecution. This line of questioning went nowhere, and the Presiding Judge even implied that these allegations had no traction with the Chamber.⁸⁰ Yet, the Prosecution is relentlessly pursuing this line of attack despite its complete lack of foundation. This choice is not innocent. The Prosecution is trying to influence how the Chamber will receive any testimonial evidence favourable to Mr Ngaïssona by implying that it was obtained fraudulently through pressure and intimidation, instead of admitting its own failure at securing incriminating evidence and countering the Defence narrative.
42. *Second*, the Prosecution inappropriately suggests that several persons “linked” to the Defence or to Mr Ngaïssona,⁸¹ would have participated in the alleged improper conduct. In doing so, they paint broad brush and point fingers, without any evidence, at several categories of persons, and even at Mr Ngaïssona himself.
43. The Prosecution is transparently trying to smear a large number of persons rightly or wrongly associated with Mr Ngaïssona, and as a result, convince the Chamber that he too must be guilty. The Prosecution says as much, when it states that “insofar as the impropriety may be imputable to the Accused directly, or indirectly through his Defence or persons linked to him or his cause, the Proposed Evidence may properly demonstrate

⁷⁹ See for example Request, paras 2 (“... although it is not clear that it is so confined [to the Prosecution case]”); 8 (“It is not known whether the pattern of improper conduct is limited to the Targeted Witnesses, or if it may extend to other Prosecution (or even Defence) witnesses”); 17 (... the conduct (known so far) occurred during the presentation of the Prosecution’s case”).

⁸⁰ See for example, ICC-01/14-01/18-T-281-CONF-ENG ET, p. 53, lns 20-25; p. 54, lns 3-5; ICC-01/14-01/18-T-282-CONF-ENG ET, p. 51, lns 3-5; ICC-01/14-01/18-T-290-ENG ET WT, p. 10, lns 18-21; ICC-01/14-01/18-T-298-ENG ET, p. 7, lns 22-24.

⁸¹ See for example, Request, paras 2, 7, 10, 15, 17, 21.

‘consciousness of guilt’⁸². The Prosecution is not so subtly inviting the Chamber to disregard the presumption of innocence, and draw unfair conclusions based on prejudice rather than evidence.

44. In fact, there is not a shred of evidence that Mr Ngaïssona had anything to do with the so-called pattern of improper contacts. The Prosecution’s reliance on a Facebook communication in which [REDACTED] asserts that Mr Ngaïssona called him from The Hague to let him know about [REDACTED]⁸³ is absurd. As the Prosecution is very well aware, Mr Ngaïssona was, since his transfer to the Detention Centre and for the entirety of the Prosecution case, under active monitoring of his non-privileged communications. Such phone call could not have happened.⁸⁴ The only value to the Prosecution’s use of this Facebook conversation is to show once again, the unreliability of most of the information contained in similar conversations submitted in the record of the case.

45. In addition, it is unclear who the Prosecution is targeting when pointing at ‘persons linked to the Accused’. On the one hand, the Request alleges that such persons include [REDACTED],⁸⁵ but completely fails to demonstrate this alleged ‘association’. The fact that both individuals may be KNK members is irrelevant, since it is well established that Mr Ngaïssona is not,⁸⁶ and has had his own political party, the PCUD, since November 2014. The fact that [REDACTED] was briefly listed as a potential Defence witness on a preliminary list filed in August 2023 does not create an “association” between [REDACTED] and Mr Ngaïssona.

46. On the other hand, the Request alleges that the rebuttal evidence is necessary for the assessment of the credibility of Prosecution witnesses, “many of whom are insider witnesses linked to the Accused”.⁸⁷ The Request fails to specify which Prosecution witnesses are concerned by this statement. The vagueness of the allegation seems designed to instil a doubt in the Judges’ minds as to the credibility of any witness who may have had a favourable opinion of Mr Ngaïssona and denied his culpability for the crimes he is charged with. Yet, as argued above, it was the Prosecution’s sole decision to call witnesses when knew very well that their prior-recorded statements were not incriminating Mr

⁸² Request, para. 10.

⁸³ Request, para. 14.

⁸⁴ [REDACTED].

⁸⁵ Request, para. 7.

⁸⁶ ICC-01/14-01/18-T-279-CONF-ENG ET, p. 18, lns 8-15.

⁸⁷ Request, para. 17.

Ngaïssona. The Prosecution cannot now request the Chamber to disregard evidence it finds inconvenient, without any factual foundation or sound legal argument.

47. The Request finally makes disturbing allegations relating to the Ngaïssona Defence team ethics and professionalism. While the only individual specifically identified in the Request is [REDACTED], the Prosecution directly accuses the Defence as a whole for the alleged improper conduct.⁸⁸ These inflammatory accusations are baseless and should not be tolerated.
48. The Request's only evidence of improper contact engaging the Defence team of Mr Ngaïssona concerns the behaviour of [REDACTED]. In this regard, the Defence recalls, as detailed above,⁸⁹ that while seemingly improper, the alleged contacts with Prosecution witnesses did not lead to any contamination of the evidence and that the Defence took measures against [REDACTED] by removing [REDACTED] from the team.
49. The Prosecution claims that the Defence's "course of conduct",⁹⁰ and the fact that the Defence took into account the evidence that the Prosecution now impugns during the course of the Defence's presentation of evidence,⁹¹ somewhat constitutes blameworthy conduct and demonstrate its role in the alleged interference. This is entirely unsupported. Accusations of such serious nature should not be made lightly, as they are potentially career-ending or at least highly damaging for Counsel and support staff alike. While the Request is currently classified as confidential, it may eventually be made public and the Defence will have to bear the professional and personal consequences of having been unfairly and baselessly attacked by the Prosecution. Yet, the Prosecution casually suggests misconduct of Counsel without a shred of evidence that any Defence team members, [REDACTED], comported themselves in any other way than in full respect of their obligation under the Code of conduct for Counsel. The Defence strongly contests any suggestion of impropriety by current team members and requests that the Chamber orders the Prosecution to refrain from making unfounded and contemptible accusations against the Defence in the future.

⁸⁸ See Request, para. 7, where the Prosecution specifically attributes the responsibility of improper conduct to "the Defence and individuals associated with the Accused, including Defence [REDACTED]". This language clearly targets the 'Defence' and [REDACTED] as separate entities, sharing equal blame.

⁸⁹ See above, para. 14.

⁹⁰ Request, para. 21.

⁹¹ Request, paras 2, 21 ("the Defence has affirmatively addressed aspects of this evidence in its case-in-chief").

50. Conversely, the negligence of the Prosecution as exhibited in the lack of foundation for the Request and the gravity of the baseless allegations contained therein may violate its own Code of Conduct, and in particular its obligation related to objective truth-seeking,⁹² evidence-based and impartial judgment-making,⁹³ and to conduct themselves professionally, impartially and conscientiously, including in their relationship with Counsel.⁹⁴

F. The Request will prolong the proceedings and is threatening the fairness of the proceedings

51. Over six months ago, the Chamber clarified that the Prosecution could seek leave for a rebuttal as soon as practicable, and no later than five days after the end of the last Defence witness testimony.⁹⁵ Considering that the Prosecution had most of the Proposed Evidence at the time of the Chamber's clarification, many items for several years, and given the advanced stage of the proceedings, submitting the Proposed Evidence in rebuttal now would compromise the fairness and efficiency of the trial. It would also violate the rights of Mr Ngaïssona.⁹⁶ In the *Ongwen* case, the Trial Chamber chose to discuss rebuttal evidence even though no formal application was filed and the Defence had not yet finished presenting its evidence. This decision was made for two main reasons: (i) the significance of the evidence was already foreseeable and (ii) delaying the discussion could cause greater complications and delays.⁹⁷ If the Proposed Evidence had been truly significant in this case, it would have been foreseeable much earlier. Introducing such evidence at this stage would now be unfair.

52. Also, if a rebuttal were permitted, the Defence would be entitled to the final word and could present rejoinder evidence, such as testimonial evidence of the Targeted Witnesses, causing further delay in the ongoing case.⁹⁸ Yet, the Defence would probably have no

⁹² Code of Conduct for the Office of the Prosecutor ("CoCOP"), Art. 49: "(b) consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the prosecution;" and "(c) ensure that all necessary and reasonable enquiries are made and the results disclosed in accordance with the requirements of a fair trial, whether they point to the guilt or the innocence of the suspect."

⁹³ CoCOP, Art. 51(a) ("act with competence and diligence, make impartial judgments based on the evidence and consider foremost the interests of justice in determining whether or not to proceed").

⁹⁴ CoCOP, Art. 20(a). See also Art. 26 ("(c) dignified and courteous conduct towards the persons under investigation or the accused" and "(e) dignified and courteous conduct towards counsel and their team members"); Art. 70-71.

⁹⁵ Email from the Chamber dated 7 February 2024, at 15:10.

⁹⁶ ICC-02/04-01/15-1600, para. 11.

⁹⁷ ICC-02/04-01/15-1623, para. 13.

⁹⁸ ICC-02/04-01/15-1623, para. 17.

choice but to present such evidence. As detailed above, only a thorough investigation of the alleged interference, which the Prosecution failed to conduct,⁹⁹ can properly assess whether the Targeted Witnesses' evidence was tainted.

53. The Defence has repeatedly expressed concerns about the Prosecution's unfair conduct, specifically withholding information related to Article 70 investigations as a strategic tool to probe the Defence's preparations and case presentation, to then ultimately use that information in the main case.¹⁰⁰ This prejudice has now materialized, resulting in a trial by ambush, smearing reputations, and attempting to unduly influence perceptions of the Defence team members and Mr Ngaïssona as unethical individuals.

G. The alternative relief pursuant to Articles 64(6)(d) and 69(3) is not justified

54. As noted above, the Proposed Evidence concerns issues under consideration by a Pre-Trial Chamber. Submitting the Proposed Evidence would require the Chamber to make findings on central matters of which the Pre-Trial Chamber is seized. As held in the *Bemba* case, it would be premature for the Chamber to consider the Proposed Evidence as necessary for determining the truth in this case before the competent Pre-Trial Chamber makes any relevant findings.¹⁰¹ Moreover, the Proposed Evidence specifically – although not exclusively – pertains to the credibility of certain Prosecution witnesses. The Prosecution had the opportunity to question each of these witnesses at the time they testified, including regarding any alleged improper conduct by the Defence towards them or others. The Prosecution was aware from the start of its case that such conduct was under investigation, as it had initiated the investigation itself, and that this could have potentially affected any of the Prosecution witnesses.¹⁰² As further elaborated above, the Prosecution failed to demonstrate a material change in the evidence due to any alleged improper contact. Therefore, for these reasons and the reasons already elaborated above in the context of the rebuttal submission request,¹⁰³ the Alternative Relief should also be denied.¹⁰⁴

⁹⁹ Request, para. 20.

¹⁰⁰ ICC-01/14-01/18-1881-Conf, paras 34, 37, 38, 41-42; ICC-01/14-01/18-2100-Conf, paras 10-11, 13; ICC-01/14-01/18-2372-Conf, paras 2, 13-17.

¹⁰¹ ICC-01/05-01/08-3029, para. 31.

¹⁰² See ICC-01/05-01/08-3029, para. 30.

¹⁰³ See, in particular, Sections A and F of the present response.

¹⁰⁴ For the range of appropriate factors the Chamber may have regard to in determining whether certain additional evidence may be necessary for the determination of the truth pursuant to Article 69(3), see ICC-01/004-01/07-T-222-Red2, p. 77; ICC-01/05-01/08-3029, para. 29.

55. For the above reasons, the submission of the Proposed Evidence in rebuttal or under Articles 64(6)(d) and 69(3) of the Statute is inappropriate, unnecessary to preserve the integrity of the proceedings, and prejudicial. Interference with the integrity of the proceedings before this Court is indeed not a right to be protected under the Statute but the Prosecution's negative tactics against the Defence to cover up its own shortcomings is not either.¹⁰⁵

IV. RELIEF SOUGHT

56. For the reasons presented above, the Defence respectfully requests the Chamber to **REJECT** the Request in its entirety.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 2 October 2024

At The Hague, the Netherlands.

¹⁰⁵ Request, para. 25.