

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 29 January 2021

TRIAL CHAMBER V

Before: Judge 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 Expert Reports and Associated Materials of P-0925, P-2193, P-2926, and P-2927 pursuant to rule 68(3) and article 69(4)”, 29 January 2021

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 Expert Reports and Associated Materials of P-0925, P-2193, P-2926, and P-2927 pursuant to rule 68(3) and article 69(4)” (“Request”), whereby the Prosecution requests (1) the formal submission pursuant to rule 68(3) of the Rules and Procedure and Evidence (“Rules”) of the expert reports and associated materials of Witnesses P-0925, P-2193, P-2926 and P-2927, and (2) that the Chamber give effect to the conditions [REDACTED].¹
2. The Defence defers to the Chamber’s discretion in relation to the Prosecution’s request for the submission of the report and associated exhibits of Witnesses P-2193 and P-2926, and defers to the Defence for Mr Yekatom’s position with respect to the submission of the reports and associated materials for Witnesses P-0925 and P-2927.
3. With respect to the Prosecution’s request that the Chamber give effect to the conditions [REDACTED], the Defence requests that the Chamber order that adequate safeguards be put in place to ensure the respect of Mr Ngaïssona’s fair trial rights.

II. Confidentiality

4. In accordance with regulation 23*bis*(1) of the Regulations of the Court (“Regulations”), the response is filed confidentially as it responds to a document of the same classification. A public redacted version will be filed contemporaneously.

III. Applicable Law

¹ ICC-01/14-01/18-834-Conf (“Prosecution’s Request”).

5. Article 67(1)(e) of the Rome Statute provides the minimum fair trial guarantee that accused persons are entitled “[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her (...)”.
6. Article 69(2) of the Statute provides that “[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence” and that “[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused”.
7. Rule 68(1) of the Rules provides that the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally.² Rule 68(3) of the Rules provides:
 3. If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

IV. Submissions

² See *Prosecutor v. Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, ICC-01/05-01/08-1386, 3 May 20011, para. 78; *Prosecutor v. Gbagbo and Blé Goudé*, Decision on the “Prosecution’s application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)”, ICC-02/11-01/15-870, 7 April 2017, para. 7; *Prosecutor v. Ntaganda*, Public redacted version of ‘Preliminary ruling on Prosecution request for admission under Rule 68(3) of the prior recorded testimony and associated material of Witness P- 0761’, ICC-01/04-02/06-1640-Red, 27 February 2017, para. 7; *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, ICC-02/04-01/15-621, 5 December 2016, para. 6; *Prosecutor v. Al Hassan*, Public redacted version of the Decision on Prosecution’s requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, ICC-01/12-01/18-987-Red, 5 August 2020, paras 9-10.

**A. The Prosecution's Request for the formal submission of the reports
and associated materials of witnesses P-0925, P-2193, P-2927 and
2926**

8. In its Initial Directions on the Conduct of the Proceedings, the Chamber held that "[s]ubmitted expert reports must satisfy the procedural requisites of Rule 68 of the Rules unless no such objections to the submissions are raised".³

9. This Court has held that rule 68(3) constitutes an exception to the principle of the primacy of orality,⁴ and that a "cautious, case-by-case assessment is therefore required, and the impact of any such request on the rights of an accused and the fairness of the proceedings more generally should be considered".⁵ The Appeals Chambers has emphasized that the admission of prior recorded testimony pursuant to rule 68(3) must not be prejudicial to or inconsistent with the rights of the accused.⁶ It has held that "where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally" and that "[t]his must be the Chamber's overriding concern (...)".⁷

³ ICC-01/14-01/18-631, para. 67.

⁴ See Article 69(2), Rome Statute.

⁵ *Prosecutor v. Ntaganda*, Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, ICC-01/04-02/06-845, 21 September 2015, para. 6; *Prosecutor v. Al Hassan*, Public redacted version of the Decision on Prosecution's requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, ICC-01/12-01/18-987-Red, 21 October 2020, para. 10.

⁶ *Prosecutor v. Gbagbo and Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", ICC-02/11-01/15-744, 1 November 2016, paras 62-63; *Prosecutor v. Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", para. 78; *Prosecutor v. Bemba et al.*, Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-Red-Corr, 12 November 2015, para. 51.

⁷ *Prosecutor v. Gbagbo and Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application

10. The Defence defers to the Chamber's discretion in assessing whether the formal submission of the report and associated materials for witness P-2193 is not prejudicial to or inconsistent with the rights of Mr Ngaïssona.⁸ The Defence defers to the Defence for Mr Yekatom's position with respect to the Prosecution's requests for the formal submission of the reports and materials of Witnesses P-0925 and P-2927, insofar as they may relate to the charges of alleged conscription, enlistment and use of child soldiers.⁹
11. With respect to Witness P-2926, the Defence recalls its previous opposition to Witness P-2926 testifying before the Court, by joining the Defence team of Mr Yekatom's "Request to exclude the proposed Prosecution background expert P-2926 and his report", on 18 December 2020.¹⁰ It was requested that Witness P-2926 and his report be excluded. It was demonstrated, *inter alia*, that (1) Witness P-2926's testimony is clearly redundant,¹¹ and (ii) excluding his testimony is in the interest of justice and would expedite proceedings.¹²
12. This request to exclude the testimony of Witness P-2926 and his report is under examination by the Chamber and has yet to be adjudicated. The Chamber's decision will be determinative on whether the Defence will file a challenge to the scope of Witness P-2926's testimony. Thus, for the limited purpose of this response, the Defence defers to the Chamber's discretion on whether it is appropriate to introduce Witness P-2926's report and associated materials through rule 68(3) of the Rules.

to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", ICC-02/11-01/15-744, 1 November 2016, para. 69.

⁸ See ICC-01/14-01/18-834-Conf-AnxA, pages 1-7.

⁹ See ICC-01/14-01/18-834-Conf-AnxA, pages 1, 8.

¹⁰ ICC-01/14-01/18-780-Conf, para. 38. The Defence fully joined the request by email: Email from the Defence team or Mr Ngaïssona to the Trial Chamber V, 18 December 2020, at 15:26. [REDACTED].

¹¹ ICC-01/14-01/18-780-Conf, paras 14-29; See Email from the Defence team or Mr Ngaïssona to the Trial Chamber V and parties, 18 December 2020, at 15:26

¹² ICC-01/14-01/18-780-Conf, paras 30-36; See Email from the Defence team or Mr Ngaïssona to the Trial Chamber V and parties, 18 December 2020, at 15:26.

13. The Defence's deference to the Chamber's discretion with respect to the potential mode of testimony of Witness P-2926 should therefore not be construed as an agreement with: (i) this witness remaining on the Prosecution's Final Witness List, (ii) P-2926's qualification as an expert, (iii) his report¹³ and associated materials¹⁴ being entered as evidence, (iv) the scope of his report, namely in light of the ultimate issue rule, as it relates to Mr Ngaïssona; (v) P-2926's impartiality and independence. The Defence's present response is therefore without prejudice to any potential challenge to any aspect of P-2926's anticipated testimony.

B. The Prosecution's Request for the Chamber to give effect to the conditions [REDACTED]

14. The Prosecution requests the Chamber to [REDACTED].¹⁵

15. Without prejudice to any objections the Defence may raise in relation to [REDACTED], provided that the Chamber order that safeguards be put in place in order to protect Mr Ngaïssona's fair trial rights.

16. *First*, the Defence requests the Chamber to ensure that Mr Ngaïssona's right to [REDACTED] shall not be infringed by [REDACTED].¹⁶ The Defence is bound by the Code of Professional Conduct for Counsel, including the duties to respect confidentiality of any information.¹⁷ Therefore, the Defence requests that the Chamber [REDACTED].¹⁸

¹³ CAR-OTP-2127-4289; ICC-01/14-01/18-834-Conf-AnxA, page 7.

¹⁴ CAR-OTP-2122-8978; CAR-OTP-2127-4327; CAR-OTP-2122-9529; ICC-01/14-01/18-834-Conf-AnxA, page 7.

¹⁵ Prosecution's Request, paras 41-44; ICC-01/14-01/18-834-Conf-AnxB.

¹⁶ Prosecution's Request, paras 41-44.

¹⁷ Article 8, ICC-ASP/4/Res.1.

¹⁸ [REDACTED], Prosecution's Request, para. 43.

17. *Second*, the Defence requests the Chamber to [REDACTED]. [REDACTED].¹⁹

V. Relief Sought

18. Should the Chamber grant the Prosecution's request to [REDACTED], the Defence respectfully requests the Chamber to order that safeguards be put in place in order to protect the fair trial rights of Mr Ngaïssona, as described in paragraphs 15-17, above.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 29 January 2021

At The Hague, the Netherlands.

¹⁹ [REDACTED].