

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 23 February 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 the “Ngaïssona Defence Response to the  
‘Prosecution’s Request for the Formal Submission of the Prior Recorded  
Testimony of P-1962 pursuant to Rule 68(3)’, ICC-01/14-01/18-750-Conf”, 17  
December 2020**

**Source:** Defence of Patrice-Edouard Ngaïssona

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

**Counsel for the Defence of Mr Ngaïssona**

Mr Geert-Jan Alexander Knoops

Me Richard Omissé-Namkeamaï

Ms Chiara Giudici

**Counsel for the Defence of Mr Yekatom**

Me Mylène Dimitri

Mr Thomas Hannis

**Legal Representatives of the Victims**

Mr Abdou Dangabo Moussa

Ms Elisabeth Rabesandratana

Mr Yaré Fall

Ms Marie-Edith Douzima-Lawson

Ms Paolina Massidda

Mr Dmytro Suprun

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented**

(Participation/Reparation)

**Applicants**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## I. INTRODUCTION

1. The Defence of Mr Patrice-Edouard Ngaïssona ("the Defence") hereby submits its response to the "Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-1962 pursuant to Rule 68(3)" ("the Request").<sup>1</sup> The Defence fully joins and supports the "Yekatom Defence Response to the 'Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-1962 pursuant to Rule 68(3)', 4 December 2020, ICC-01/14-01/18-750-Conf"<sup>2</sup> and the submissions made therein. Furthermore, the Defence presents its additional submissions concerning the relevance of P-1962's statements to the charges against Mr Ngaïssona, which weighs against their introduction pursuant to Rule 68(3). Finally, in the event Trial Chamber V ("the Chamber") grants the Request, the Defence respectfully requests that it be provided with sufficient time to conduct its examination of P-1962, and that P-1962's prior-recorded testimony be introduced in its entirety.

## II. CONFIDENTIALITY

2. The present response is filed confidentially pursuant to Regulation 23bis(2) of the Regulations as it responds to submissions bearing the same classification, and as it contains confidential information relating to Prosecution witnesses. The Defence will file a public redacted version of these submissions as soon as possible.

## III. SUBMISSIONS

---

<sup>1</sup> ICC-01/14-01/18-750-Conf.

<sup>2</sup> ICC-01/14-01/18-776-Conf.

**A. The introduction of P-1962's statements under Rule 68(3) would be prejudicial to the rights of Mr Ngaïssona**

3. The Defence submits that the introduction of P-1962's prior-recorded testimony under Rule 68(3) is not warranted. As already underscored by the Defence of Mr Yekatom, [REDACTED],<sup>3</sup> [REDACTED]. These alleged acts are materially in dispute and also relate to the confirmed charges against Mr Ngaïssona.<sup>4</sup>
4. [REDACTED].<sup>5</sup> [REDACTED].<sup>6</sup> This information contradicts the Prosecution's allegation that Mr Ngaïssona [REDACTED],<sup>7</sup> and is central to core issues in the case.
5. [REDACTED]. [REDACTED].<sup>8</sup> [REDACTED].<sup>9</sup> [REDACTED].<sup>10</sup> [REDACTED].<sup>11</sup>
6. Lastly, the importance of P-1962's anticipated evidence is underscored by the Pre-Trial Chamber's reliance on P-1962's statements in the Decision on the Confirmation of Charges. In particular, P-1962's first statement was relied upon by the Pre-Trial Chamber to establish that Mr Ngaïssona's alleged criminal responsibility for the crimes committed by Anti-Balaka elements in certain locations had not been established to the necessary threshold. For example, the

---

<sup>3</sup> [REDACTED].

<sup>4</sup> Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-403-Conf, paras 142-143.

<sup>5</sup> [REDACTED].

<sup>6</sup> [REDACTED].

<sup>7</sup> [REDACTED].

<sup>8</sup> [REDACTED].

<sup>9</sup> [REDACTED].

<sup>10</sup> ICC-01/14-01/18-723-Conf, para. 180.

<sup>11</sup> Ibid, para. 135.

Pre-Trial Chamber directly quoted P-1962's account of events with respect to: [REDACTED],<sup>12</sup> [REDACTED],<sup>13</sup> [REDACTED],<sup>14</sup> [REDACTED].<sup>15</sup>

7. The Defence avers that the alleged crimes committed [REDACTED] are not part of the confirmed charges. However, the Prosecution has not changed its case theory since the confirmation stage of the proceedings and continues to assert that "[REDACTED]."<sup>16</sup> Thus, the Prosecution submits that [REDACTED].<sup>17</sup> Therefore, the Defence is put in a position to rebut these allegations and intends to do so through this witness, who as [REDACTED]. Given this unique position of P-1962, the Chamber should hear the entirety of his testimony live since it potentially touches upon Mr Ngaissona's criminal responsibility.
8. In light of the above, the Defence submits that the importance of P-1962's anticipated testimony to core issues in the case weighs against its introduction pursuant to Rule 68(3).

**B. If the Request is granted, the Defence should be provided with sufficient time to examine P-1962**

9. In the event that the Request is granted, the Defence will have to question P-1962 on the content of his prior-recorded statements, as well as on P-1962's evidence that will be led by the Prosecution, for which the Prosecution anticipates needing three hours.<sup>18</sup> P-1962 is [REDACTED] whom the Prosecution intended to examine for six hours, and whose prior-recorded

---

<sup>12</sup> ICC-01/14-01/18-403-Conf, paras 172, 216.

<sup>13</sup> Ibid, paras 205, 218.

<sup>14</sup> Ibid, paras 176, 218.

<sup>15</sup> Ibid, para. 171.

<sup>16</sup> ICC-01/14-01/18-723-Conf, para 10, footnote 12.

<sup>17</sup> Ibid.

<sup>18</sup> Request, para. 24.

testimony is the result of a 30-hours interview with the Prosecution.<sup>19</sup> His testimony touches upon topics which are highly disputed and relevant to the charges against Mr Ngaïssona, such as: (1) [REDACTED]; (2) [REDACTED]; (3) [REDACTED]; and (5) [REDACTED].

10. In its Initial Directions on the Conduct of Proceedings, the Presiding Judge allocated a maximum of 400 hours to the Prosecution in order to present its case.<sup>20</sup> Noting the Court's practice that the non-calling party would require the same amount of time as the calling party to question a witness, the Presiding Judge allocated 200 hours to each Defence team for their questioning.<sup>21</sup> However, the Chamber later found that the Prosecution's intended large reliance on Rule 68 may impact on the time allocated to the participants.<sup>22</sup> If the Request is granted, the Defence respectfully submits that it should not be constrained by the amount of time used by the Prosecution to conduct its supplemental examination. On the contrary, the Defence should be allocated a reasonable amount of time to cross-examine P-1962.<sup>23</sup> Furthermore, the Defence submits that such time should not be subtracted from the maximum 200 hours which have been allocated to the Defence for the cross-examination of Prosecution witnesses.

**C. If the Request is granted, P-1962's prior-recorded statement should be introduced in its entirety**

---

<sup>19</sup> [REDACTED].

<sup>20</sup> Initial Directions on the Conduct of Proceedings, ICC-01/14-01/18-631, para. 22.

<sup>21</sup> Ibid, para. 24.

<sup>22</sup> Decision on the Prosecution Extension Requests and Initial Guidance on Rule 68 of the Rules, ICC-01/14-01/18-685, para. 35.

<sup>23</sup> *The Prosecutor v. 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, para. 32.

11. The text of Rule 68(3) does not exclude the possibility for the calling party to submit certain passages of a statement to the exclusion of others in a Rule 68(3) application. Indeed, certain chambers of this Court specify in their conduct of proceedings protocols that the calling party must identify the passages that it wishes to introduce via Rule 68.<sup>24</sup> However, the Chamber's directions on the conduct of proceedings do not contain a provision ordering that specific passages of the statement be identified in Rule 68(3) applications.<sup>25</sup> The Defence submits that unless the introduction of certain passages would be prejudicial to the accused, or to the fairness of the trial generally, Chambers should favor the introduction of the prior recorded statement in its entirety. Such a practice would eliminate the artificial reading of a statement, where the Chamber and the parties have to ignore certain parts of the statement that are either potentially exonerating or highly relevant and thus necessary for the determination of the truth in general and for assessing the reliability and credibility of a particular witness.<sup>26</sup>

12. Thus, in the event that the Request is granted, the Defence respectfully requests that P-1962's prior-recorded statement be introduced in its entirety. *First*, the Prosecution's argument that it has identified specific portions to submit in order to reduce the volume of Rule 68 material in the case record is without merit. Indeed, the excluded paragraphs are so few,<sup>27</sup> that their exclusion would

---

<sup>24</sup> *The Prosecutor v. Gbagbo and Blé Goudé*, Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings, ICC-02/11-01/15-498-AnxA, para. 51; *The Prosecutor v. Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 42.

<sup>25</sup> ICC-01/14-01/18-631, paras 32-35; *The Prosecutor v. Ongwen*, Initial Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497, paras 16-18.

<sup>26</sup> See *The 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, Para. 14.

<sup>27</sup> The excluded excerpts roughly amount to 14% of P-1962's prior-recorded statement.

not considerably streamline P-1962's anticipated evidence. *Second*, paragraphs which the Prosecution seeks to exclude from the Rule 68(3) application are either potentially exonerating or relevant to the adjudication of core disputed matters. As a way of example, the Prosecution seeks to exclude paragraphs which provide important information concerning [REDACTED].<sup>28</sup> Moreover, the Prosecution seeks to exclude paragraphs relating to the role of [REDACTED].<sup>29</sup> The Defence submits that these paragraphs are relevant to the proper adjudication of core issues of the case, [REDACTED]. This purported evidence is directly relevant to whether there was a criminal policy under Article 7 as alleged by the Prosecution.

13. Furthermore, the Defence notes that the Prosecution seeks to exclude paragraphs which relate to [REDACTED], and on which the Prosecution has relied upon in its Trial Brief.<sup>30</sup> The issue of [REDACTED], which is central to the proper adjudication of core issues of the case. Hence, the Defence respectfully requests that, in the event that the Request is granted, P-1962's prior-recorded statement be introduced in its entirety.

#### IV. RELIEF SOUGHT

14. The Defence respectfully requests the Chamber to:

–**REJECT** the Prosecution's Request to introduce P-1962's prior-recorded statement pursuant to Rule 68(3);

15. In the alternative, to:

---

<sup>28</sup> ICC-01714-01/18-750-Conf-AnxA, page 1, seeking to exclude [REDACTED].

<sup>29</sup> Ibid., seeking to exclude [REDACTED].

<sup>30</sup> Ibid., seeking to exclude [REDACTED]; ICC-01/14-01/18-723-Conf, para.138.



–**ORDER** the introduction of P-1962's prior-recorded statement in its entirety;  
and

–**PROVIDE** the Defence with sufficient *additional* time to conduct its  
examination of P-1962.

Respectfully submitted,



---

Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 23 February 2021,

At The Hague, the Netherlands