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**International
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Date: **7 April 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 Consolidated Response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2673 pursuant to Rule 68(3)”, the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2841 pursuant to Rule 68(3)”, the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2027 pursuant to Rule 68(3)” and the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2251 pursuant to Rule 68(3)”, (ICC-01/14-01/18-937-Conf), 29 March 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 provides its consolidated response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2673 pursuant to Rule 68(3)”, the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2841 pursuant to Rule 68(3)”, the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2027 pursuant to Rule 68(3)” and the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2251 pursuant to Rule 68(3) (“Requests”).¹
2. The Defence opposes the Prosecution’s Requests concerning Witnesses P-2673 and P-2841. As will be demonstrated below, both P-2673 and P-2841’s prior statements are (i) central to core issues in the Prosecution’s case against Mr Ngaïssona, (ii) extensively refer to the alleged acts and conduct of Mr Ngaïssona and (iii) are not corroborated on many issues by any other witnesses expected to offer full in-court testimony. For these reasons, any time saving in the questioning of both witnesses will be outweighed by the prejudice that the formal submission of their prior testimonies would cause to the fair trial rights of Mr Ngaïssona.
3. As to the Prosecution’s request to formally submit the prior recorded testimony and associated exhibits of Witnesses P-2027 and P-2251, the Defence defers to the Chamber’s discretion as to whether it is compatible with Mr Ngaïssona’s fair trial rights. Should the Chamber grant the Requests concerning Witnesses

¹ ICC-01/14-01/18-917-Conf, along with Annexes A and B (“Request concerning P-2673”); ICC-01/14-01/18-919-Conf, along with Annexes A and B (“Request concerning P-2841”); ICC-01/14-01/18-918-Conf, along with Annexes A and B (“Request concerning P-2027”); ICC-01/14-01/18-923-Conf, along with Annexes A and B (“Request concerning P-2251”).

P-2027 and P-2251, the Defence asks, however, that it not be constrained in time in order to conduct the cross-examination of both witnesses.

II. CONFIDENTIALITY

4. In accordance with regulation 23*bis*(1) of the Regulations of the Court, this consolidated response is filed confidentially as it responds to documents of the same classification. A public redacted version will be filed as soon as practicable.

III. APPLICABLE LAW

5. The Defence incorporates by reference its summary of the applicable law set out in paragraphs 4 to 6 of its consolidated response to the Prosecution's requests for the formal submission of the prior recorded testimonies of P-0627 and P-0287 under rule 68(3),² and its submissions in its response to the Prosecution's request for the formal submission of the prior recorded testimony of P-0801 under rule 68(3).³

IV. SUBMISSIONS

A. P-2673

6. While the evidence proposed by P-2673 is primarily based on hearsay,⁴ the importance of the evidence intended to be presented by P-2673 in light of (i) the charges relating to Mr Ngaïssona and (ii) the evidence of the case as a whole is such that a full in-court testimony is necessary and any other approach would

² ICC-01/04-01/18-888-Conf ("Response to the Rule 68(3) Requests concerning P-0287 and P-0627"), paras 4-6.

³ ICC-01/04-01/18-920-Conf, paras 3-5.

⁴ ICC-02/11-01/15-744, para. 72: "[...] This assessment, which includes an analysis of the relative importance of the evidence, is without prejudice to the weight that the Trial Chamber will ultimately attach to a witness's evidence, which indeed can only be determined once the Trial Chamber has heard all of the evidence."

be prejudicial to the rights of the accused or inconsistent with the fairness of the trial generally.⁵

7. In his statement, P-2673 discusses, *inter alia*, hearing about (i) meetings allegedly attended by Mr Ngaïssona, Bernard Mokom and others in Cameroon, (ii) Mr Ngaïssona's alleged role in financing elements, giving them instructions, sending money, ammunition and Thurayas to different locations, planning attacks, (iii) Mr Ngaïssona allegedly [REDACTED], (iv) Mr Ngaïssona's alleged contacts with the Anti-Balaka in the field in 2013, and (v) the alleged coordination of the 5 December 2013 attack on Bangui. P-2673 also provides unique comments on [REDACTED].
8. It is noteworthy that the vast majority of the points listed by the Prosecution in its summary of P-2673's statement relates to proposed evidence on the acts and conduct of Mr Ngaïssona and is central to the core issues in dispute.⁶ In the *Ntaganda* case, the "centrality" of the evidence of a particular witness to the accused's case was a key factor for the Chamber to reject the Prosecution's application pursuant to rule 68(3) of the Rules.⁷ Similarly, in the prior recorded testimony of P-2673, Mr Ngaïssona's "alleged actions are frequently referred to in the Statement, including in relation to his whereabouts at particular times, orders he allegedly gave, and his general conduct".⁸
9. The information provided by P-2673 on the aforementioned key issues⁹ is not, contrary to other witnesses, limited. Furthermore, there are several key issues on which no other witnesses are expected to offer full in-court testimony.

⁵ ICC-02/11-01/15-744, para. 71.

⁶ Request concerning P-2673, para. 13.

⁷ ICC-01/04-02/06-2124, para. 8, ICC-01/04-02/06-988, para. 11.

⁸ ICC-01/04-02/06-2124, para. 8.

⁹ See paragraph 7 above.

10. Indeed, the Prosecution fails to adequately substantiate as to how precisely P-2673's proposed evidence is corroborated by the evidence of the 12 witnesses cited by the Prosecution as allegedly corroborative.¹⁰ The Prosecution does not provide any witness statement reference in support of its argument. While corroboration can always be found on some levels (such as the presence of Mr Ngaïssona in Cameroon over a certain period in 2013), it cannot be alleged that several other witnesses are expected to offer full in-court testimony on *many* of the same issues as P-2673.
11. First, out of the 12 witnesses the Prosecution is citing as corroborative, only 5 might be offering full in-court testimony (assuming all rule 68(3) requests relating to the 7 other witnesses are granted).¹¹
12. Second, except for P-1847, these witnesses expected to offer full in-court testimony are expected to provide very little information, and far less detailed than P-2673's anticipated testimony, on the Cameroon events and Mr Ngaïssona's alleged contributions during this period, while these events are at the core of P-2673's testimony. For instance, the statements of Witnesses P-2232, P-2328, and P-0884 mostly focus on events that occurred after Mr Ngaïssona's nomination as National Coordinator. P-2232 mentions [REDACTED] but with no further precision.¹² [REDACTED].¹³ Similarly, P-2328 briefly mentions [REDACTED] but without providing any details in relation to this second hand information.¹⁴ The information provided by P-0884 and P-1719 on the issues discussed in P-2673's statement is, compared to the information provided by P-2673, also very limited.

¹⁰ Request concerning P-2673, para. 14.

¹¹ P-0884, P-1719, P-1847, P-2323 and P-2328.

¹² CAR-OTP-2100-2569-R01, at 2572, para. 13; CAR-OTP-2100-2569-R01, at 2573, para. 16.

¹³ CAR-OTP-2100-2569-R01, at 2573, para. 20; CAR-OTP-2100-2569-R01, at 2574, paras 21 and 22.

¹⁴ CAR-OTP-2099-0165-R02, at 0192, para. 140.

13. Given the purported uniqueness and degree of details of P-2673's statement on the alleged contribution of Mr Ngaïssona in Cameroon prior to 5 December 2013, compared to the aforementioned four witnesses' statements, the Prosecution cannot allege that the full in-court testimonies of these four witnesses can in any way counter-balance the lack of full in-court testimony of P-2673.

14. On the other hand, P-2673's statement contains incriminating allegations against Mr Ngaïssona that are not corroborated by any other witnesses. For instance, P-2673 heard that Mr Ngaïssona and Bernard Mokom allegedly sent Thurayas to the field and provides unprecedented details in relation to these Thurayas.¹⁵ [REDACTED].¹⁶ P-2673 also presents uncorroborated allegations in relation to Frocca [REDACTED],¹⁷ Mr Ngaïssona's alleged contacts with *all* the Anti-Balaka chiefs, and the means of transportation of the FACA to Bouar.¹⁸ Furthermore, the alleged meetings P-2673 is giving details about do not seem to be the same alleged meetings P-1847 is referring to, [REDACTED],¹⁹ [REDACTED].²⁰ Also, P-2673's statement is the only proposed evidence in support of paragraph 72 of the Prosecution's Pre-Trial Brief.

15. Finally, while the time-saving as announced by the Prosecution appears significant,²¹ given the multitude of issues contained in P-2673's statement that are central to the Prosecution's case against Mr Ngaïssona, and given the apparent lack of credibility of this witness,²² introducing P-2673's prior

¹⁵ P-2673, CAR-OTP-2127-6435, paras 118-119, 175, 180-190.

¹⁶ P-1847, CAR-OTP-2122-8251-R01, paras 94-95.

¹⁷ P-2673, CAR-OTP-2127-6435, paras 98-99, 103.

¹⁸ P-2673, CAR-OTP-2127-6435, paras 132, 134, 112-113, 168-169.

¹⁹ P-1847, CAR-OTP-2061-1534-R01, paras 31, 34, 83-87. *See also* Transcript of 29 March 2021, ICC-01/14-01/18-T-023-ENG-RT.

²⁰ P-2673, CAR-OTP-2127-6435, paras 43, 44, 46-49, 52-53, 134.

²¹ Request concerning P-2673, para. 20.

²² [REDACTED] *See for instance*, P-2673, CAR-OTP-2127-6435, paras 106, 111, 115-116, 118, 141, 179. *See also* ICC-01/14-01/18-685, para. 33.

recorded testimony under rule 68(3) would impose a heavier burden on the Defence in preparing for and conducting the cross-examination, which would ultimately limit any time-saving. Therefore, on balance, the prejudice to the fair trial rights of Mr Ngaïssona preventing him from hearing P-2673's full in-court testimony outweighs any potential and limited promotion of the expeditiousness of the proceedings.

16. In light of the above, the Defence submits that it is necessary for Witness P-2673's testimony to be presented orally in its entirety.

B. P-2841

17. For similar reasons, it is necessary for Witness P-2841's testimony to be presented orally in its entirety.

18. In his statement, P-2841 discusses in detail, *inter alia*, (i) Mr Ngaïssona's alleged role in the coordination and funding of the Anti-Balaka from Cameroon and his alleged motivation for allegedly supporting the Anti-Balaka during the relevant period, (ii) the alleged Anti-Balaka's military operations in 2013, including their preparation, up to 5 December 2013, and (iii) a number of alleged relevant actors, [REDACTED]. P-2841 further makes unique comments on (i) Facebook messages he received [REDACTED], (ii) Facebook messages he received [REDACTED], and (iii) [REDACTED].

19. Again, the majority of the points listed by the Prosecution in its summary of P-2841's statement relates to proposed evidence on the acts and conduct of Mr Ngaïssona and/or is central to the core issues in dispute.²³

20. Out of the 15 witnesses the Prosecution cites as corroborative, only 7 might be offering full in-court testimony.²⁴ The general remarks made above on

²³ Request, para. 11.

²⁴ P-1719, P-1847, P-2625, P-0458, P-0884, P-2232 and P-2328.

corroboration, as well as the Defence's observations on the absence or limited corroboration between P-2673's statement and those of P-2232, P-2328, P-0884, and P-1719 can be similarly made in relation to P-2841's statement.²⁵ As to P-0458's statement, it provides very little information, and far less than P-2841's statement, on Mr Ngaïssona's alleged acts and conduct during the period prior to 5 December 2013.²⁶

21. In addition, P-2841's statement is uncorroborated and quite unique on several key points addressed. For instance, P-2841 is the only witness the Prosecution relies on to support its allegations that (i) Mr Ngaïssona and Bernard Mokom would have ordered the attack in Bouar prematurely²⁷ and that (ii) for that alleged attack, the Anti-Balaka would have integrated the Bouar archers,²⁸ and that (iii) the money and food sent allegedly by Mr Ngaïssona to the men in Zongo had been diverted to Mokom and Ngaikosset.²⁹ More generally, P-2841 is the only witness in a position to potentially comment his Facebook exchanges with [REDACTED]. [REDACTED].³⁰ The uncertainty as to whether [REDACTED] will come testify militates even further against the introduction of P-2841's prior testimony under rule 68(3).

22. Finally, while the time-saving announced by the Prosecution for P-2841's examination in chief also appears very significant,³¹ given the multitude of issues contained in P-2841's statements and the Facebook communications and [REDACTED], that are put by the Prosecution as central to the case against Mr Ngaïssona, cross-examination would have to be so much prolonged if P-2841's

²⁵ See para. 12 above.

²⁶ P-0458, CAR-OTP-2118-5081-R02, at 5090, lines 286, 313; CAR-OTP-2118-2341-R02, at 2362, lines 726-728.

²⁷ Pre-Trial Brief, para. 74, footnote 176.

²⁸ Pre-Trial Brief, para. 74, footnote 178.

²⁹ Pre-Trial Brief, para. 75, footnote 180. See also Pre-Trial Brief, footnotes 241, 246, 772.

³⁰ See e.g. P-2841, CAR-OTP-2127-4238, paras 95-97, 149. The Defence is at this point in no way conceding to [REDACTED] which will be determined in due course.

³¹ Request, para. 20.

proposed evidence is introduced via Rule 68(3) that any time-saving might ultimately be limited.

C. The Defence should not be limited in time allocated to cross-examine Witnesses P-2027 and P-2251

23. The Defence incorporates by reference its submissions in paragraphs 7 and 8 of its Response to the Rule 68(3) Requests concerning P-0287 and P-0627.³² In line with the Ongwen jurisprudence³³ and the Chamber's recent "Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926's Evidence",³⁴ the Defence respectfully reiterates its previous request to the Chamber, that the time for its cross-examination of Witnesses P-2027 and P-2251 not be constrained by the amount of time used by the Prosecution to examine them, in order to safeguard Mr Ngaïssona's fair trial rights.

V. RELIEF SOUGHT

24. The Defence respectfully requests the Chamber to:

–**REJECT** the Prosecution's Request to introduce P-2673 and P-2841's prior-recorded testimonies and associated exhibits pursuant to Rule 68(3);

³² ICC-01/04-01/18-888-Conf, paras 7-8.

³³ *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, 5 December 2016, para. 32.

³⁴ ICC-01/14-01/18-907-Conf, paras 24, 86.

25. Should the Chamber grant the Requests concerning P-2027 and P-2251, or any of the other Requests, the Defence respectfully requests that the Defence not be constrained by the amount of time used by the Prosecution.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 7 April 2021

At The Hague, the Netherlands.