

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **29 April 2021**

TRIAL CHAMBER V

Before:

Judge Bertrand 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 ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Public redacted version of “Defence Response to the Prosecution Request for the
Formal Submission of the Prior Recorded Testimony of P-0801 Pursuant to Rule 68
(3)”, 18 March 2021, ICC-01/14-01/18-920-Conf**

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**

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I. Introduction

1. The Defence of Mr Ngaïssona (“the Defence”) opposes the Prosecution’s request for the formal submission of the prior recorded testimony of witness P-0801 and its associated exhibits (“the Request”).¹ This is on the basis of the fact that P-0801’s statement is central to core issues in the Prosecution’s case against Mr Ngaïssona as will be demonstrated below. The witness also refers to the alleged acts and conducts of Mr Ngaïssona and some of the allegations he makes are not corroborated by other witnesses in the case. Furthermore, the Defence strongly contests this witness’ credibility because he is a person of a dubious character [REDACTED].² For these reasons, formal submission of the prior recorded testimony of P-0801 under Rule 68(3) would cause prejudice to the Defence. It is necessary for the evidence of this witness to be presented *viva voce* to enable the Chamber to assess his credibility and to protect the fair trial rights of Mr Ngaïssona.

II. Confidentiality

2. In accordance with regulation 23bis(1) of the Regulations, this response is filed confidentially as it responds to a document of the same classification and contains information which may lead to the identification of a witness. The Defence will file a public redacted version of this document as soon as possible.

III. Applicable Law

3. Rule 68 (3) permits Chambers to allow the introduction of prior recorded statements so long as the witness does not object to it and the Defence will

¹ ICC-01/14-01/18-900-Conf.

² See the arguments the defence made on this issue in ICC-01/14-01/18-807-Conf.

have the opportunity to question the witness. The Chamber's decision in this regard is discretionary and requires a case-by-case assessment. The Chamber may consider factors such as whether the evidence relates to matters materially in dispute, whether the evidence is core to the issues in the case or whether it is corroborative of other evidence. The Chamber is however not bound by these factors and is allowed wide discretionary powers with regard to Rule 68 (3) decisions.³

4. Some Chambers have exercised this discretion to reject the request to submit statements under Rule 68 (3) when such statements were central to the case in question. This is especially if such centrality is coupled with references to the acts and conducts of the accused. For example, in *Ntaganda*, Trial Chamber VI held that:

"In making its case-by-case assessment as to whether to use Rule 68(3) in this instance, the Chamber notes the stated importance of hearing the Witness's evidence viva voce, and of the centrality of his evidence to the accused's case. In this regard, *the Chamber observes that Mr Ntaganda'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.... coupled with its numerous references to the acts and conduct of the accused, and to related issues in dispute, militates against its admission under Rule 68(3) of the Rule.*"⁴

5. The Appeals Chamber also stated that a Trial Chamber must analyse the importance of the witness in relation to the evidence already presented or which will be presented. The Appeals Chamber held that:

³ ICC-01/14-01/18-907-Conf, para. 12.

⁴ See ICC-01/04-02/06-2124, para. 8. See also ICC-01/04-02/06-988.

"In carrying out this individual assessment, the Trial Chamber must also necessarily analyse the 'importance' of each witness statement in light of the charges and the evidence already presented or intended to be presented before it. In the Appeals Chamber's view, this assessment is part and parcel of the analysis a Chamber must undertake in determining whether it is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally, to allow for the evidence in question to be introduced under rule 68 (3) of the Rules. Indeed, the more important the Chamber assesses the evidence in question to be, the more likely it is that the Chamber will have to reject any application under this provision."⁵

IV. Submissions

6. The Defence submits that the witness statement of P-0801 concerns matters which are central to core issues in the Prosecution's case against Mr Ngaïssona. Furthermore, the statement refers to the alleged acts and conduct of Mr Ngaïssona and some of the information P-0801 provides is not corroborated by other OTP witnesses. P-0801 is an important witness in relation to the Prosecution's case theory. The Defence hereby presents some examples of parts of the witness statement which go to the core of the Prosecution's theory:

7. The witness statement concerns [REDACTED].⁶ The witness also [REDACTED].⁷ According to the witness, [REDACTED].⁸ [REDACTED].⁹

⁵ ICC-02/11-01/15-744, para 71.

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

8. The witness speaks [REDACTED].¹⁰ The witness also [REDACTED]. According to the witness, [REDACTED]. The witness [REDACTED].¹¹
9. The witness also speaks [REDACTED]. The witness said [REDACTED].¹² According to the witness, [REDACTED].¹³
10. The witness [REDACTED]. He says that [REDACTED].¹⁴ The witness said [REDACTED].¹⁵ According to the witness, [REDACTED].¹⁶
11. Another issue which the witness speaks about relates to the question whether Mr Ngaïssona allegedly took any measures against the Anti-Balaka who committed crimes. The witness states that [REDACTED].¹⁷
12. The witness also asserts that [REDACTED]. In this regard, the witness says [REDACTED]. [REDACTED]. [REDACTED]. In addition, [REDACTED]. The witness states that [REDACTED].¹⁸ The witness states [REDACTED].
13. Furthermore, the witness states that Mr Ngaïssona funded the Anti-Balaka and solved all their problems.¹⁹ According to the witness, the ComZones always met Mr Ngaïssona expecting money from him because they were used to receiving money from him.²⁰ In the same vein, the witness said [REDACTED].²¹

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ Ibid, [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ CAR-OTP -2074-2335-R 01, at 2361, lns 862-867.

²⁰ CAR-OTP -2074-2369-R 01, at 2382, lns 426-443.

²¹ [REDACTED].

14. From the above, the witness statement relates to [REDACTED]. All these allegations made by the witness relate to the acts and conduct of Mr Ngaïssona and are central to the Prosecution's case against him. Formal submission of the witness statement under Rule 68(3) would be highly prejudicial to the Defence. Therefore, the Defence requests the Chamber to follow the ruling in *Ntaganda* above in exercising its discretion and to reject the Request.
15. Furthermore, the Defence submits that the witness statement is not corroborative because there are instances where the Prosecution relies only on this witness to prove certain allegations in the Trial Brief. For example, the allegations that [REDACTED]²² and that [REDACTED].²³ For this reason too the Defence requests the Chamber not to allow the submission of these statements through Rule 68 (3).
16. Lastly, the Defence strongly contests the credibility of this witness [REDACTED]. This is an additional reason as to why formally submitting the 770 pages of P-0801's prior recorded statement would unduly affect the fair trial rights of Mr Ngaïssona. In this regard, the Defence incorporates herein the arguments to this effect in a previous filing.²⁴ The Defence acknowledges that the Chamber held that issues of credibility are to be decided at the end of evidence presentation to enable the Chamber to assess the witness' credibility, the Defence submits that it is necessary for the witness to present the allegations against Mr Ngaïssona entirely *viva voce*. This would enable the Judges, as the trier of facts, to observe his demeanour which is one of the ways in which a witness' credibility can be ascertained.²⁵

²² [REDACTED]

²³ [REDACTED]

²⁴ See ICC-01/14-01/18-807-Conf.

²⁵ See James P. Timony, Demeanor Credibility, 49 (2000) Catholic University Law Review 903.

V. Relief sought

The Defence requests the Chamber to reject the request of the Prosecution to introduce the previously recorded testimony of P-0801 and its associated exhibits under rule 68 (3).

Respectfully submitted,



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Ngaïssona

Available at: <https://scholarship.law.edu/lawreview/vol49/iss4/2> (accessed 17 March 2021). At page 904, he argues inter alia that “to fully judge the witness's testimony, the factfinder must see and hear the witness's demeanor.”