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**International
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Date: **21 July 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 “Prosecution’s request for leave to add P-2687 to its Final Witness List and for the formal submission of his prior recorded testimony pursuant to Rule 68(2)(b)””, ICC-01/14-01/18-1059-Conf, 12 July 2021

Source: Defence of Patrice-Edouard Ngaiissona

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. On 29 June 2021, the Prosecution filed a request seeking leave from the Trial Chamber V ("Chamber") to add Witness P-2687 to its Final Witness List and for the formal submission of P-2687's prior recorded testimony pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules"). The Prosecution further requests, should leave be granted, to withdraw P-1932 from its Final Witness List, as well as the associated rule 68(2)(b) request ("Additional Request").
2. The Prosecution's primary requests should be rejected. *First*, the Prosecution's request for leave to add P-2687 to its Final Witness List is untimely and lacks substantiation. *Second*, P-2687's *Déclaration Technique* ("Déclaration")¹ fails to meet even the most basic procedural and substantive requirements for submission of prior recorded testimony pursuant to rule 68(2)(b) of the Rules. As such, the Prosecution's request for the formal submission of P-2687's *Déclaration* and associated exhibits should be rejected. Should the Chamber, consider, in the alternative, that the Prosecution's request to add P-2687 to its Final Witness List is justified, P-2687's evidence should be elicited *viva voce* rather than through the mechanism of rule 68(2)(b). Such an approach would favour the determination of truth and would be more compatible with Mr Ngaïssona's fair trial rights protected under the Rome Statute ("Statute").
3. The Defence takes no position in relation to the Additional Request.

II. Confidentiality

4. This response is filed as confidential pursuant to Regulation 23 (1) *bis* of the Regulations of the Court (the "Regulations"), as it responds to a filing of the

¹ CAR-OTP-01/14-01/18-1043-Conf-AnxB (« Déclaration »).

same classification. A public redacted version will be filed as soon as practicable.

III. Procedural History

5. On 11 January 2021, the Prosecution filed its Seventh Request for the formal submission of prior recorded testimony pursuant to rule 68(2)(b) of the Rules (“Seventh Request”), seeking the submission, *inter alia*, of the prior recorded testimony of Witnesses P-1932 and P-2973.² Witnesses P-1932 is [REDACTED], whereas P-2973 is [REDACTED], [REDACTED], respectively.³
6. On 21 January 2021, the Defence for Mr Yekatom filed its Consolidated response to the Prosecution’s Sixth, Seventh and Eighth formal submission of rule 68(2) applications, opposing *inter alia* the introduction of P-1932 and P-2973’s prior recorded testimonies pursuant to rule 68(2)(b).⁴
7. On 22 February 2021, the Defence for Mr Ngaïssona (“Defence”) filed its Consolidated response to the Prosecution’s Sixth, Seventh and Eighth requests for the formal submission of prior recorded testimony pursuant to rule 68(2)(b).⁵ The Defence opposed the introduction of P-1932 and P-2973’s statements pursuant to rule 68(2)(b), arguing that their introduction would be inconsistent and prejudicial to the rights of Mr Ngaïssona.⁶ The Defence also fully joined the arguments raised by the Defence for Mr Yekatom in their response.⁷

² ICC-01/14-01/18-808-Conf.

³ ICC-01/14-01/18-808-Conf, paras 29-39.

⁴ ICC-01/14-01/18-845-Conf, paras 60-65; a corrected version was filed on 2 March 2021, ICC-01/14-01/18-845-Conf-Corr.

⁵ ICC-01/14-01/18-887-Conf.

⁶ ICC-01/14-01/18-887-Conf, para. 18.

⁷ ICC-01/14-01/18-887-Conf, para. 19.

IV. Applicable Law

8. Article 67(1)(b) of the Statute provides that an accused person has a right to have adequate time and facilities to prepare for trial. The addition of a witness or a document after the final disclosure deadline may only be effectuated with leave of the Chamber, when the legal criteria have been met, which include that such a request may not be inconsistent with the rights of the accused.⁸
9. Rule 68(2)(b) of the Rules permits, as an exception to the principle of orality enshrined in article 69(2) of the Statute, the introduction of previously recorded testimony in strictly circumscribed circumstances.⁹ Given the submission of testimonial evidence under rule 68(2)(b) deprives the Chamber of a witness' *viva voce* testimony, and the Defence of the opportunity to cross-examine a witness, the threshold for its application is very high. The Chamber may allow the introduction of a previously recorded testimony when "the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused".¹⁰ In addition, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question "relates to background information", "is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts" and "is such that the interests of justice are best served by its introduction".¹¹

⁸ ICC-01/14-01/18-589, para. 16; ICC-01/14-01/18-989-Conf, para. 5; *Prosecutor v. Dominic Ongwen* "Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence'" ICC-02/04-01/15-619, 2 December 2016, para. 7 (hereinafter "Ongwen Decision"), paras 5-6, 10; Chambers will consider whether "the late addition will not cause undue prejudice to the Defence in relation to the latter's right to have adequate time and facilities to prepare in accordance with article 67(1)(b) of the Statute », ICC-01/04-01/07-1590, para. 12.

⁹ *Prosecutor v Bemba et al.*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13-2275-Red, 8 March 2018, para. 305.

¹⁰ See *Prosecutor v. Ntaganda*, Public redacted version of 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68', ICC-01/04-02/06-1667-Red, 27 February 2017, para. 11.

¹¹ *Prosecutor v. Ntaganda*, Public redacted version of 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68', ICC-01/04-02/06-1667-Red, 27 February 2017, para. 8; Rule 68(2)(b)(i) of the Rules also provides that a Chamber shall consider *inter alia* whether the prior recorded testimony in question

10. Rule 68(2)(b)(ii) provides that prior recorded testimony “may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person’s knowledge and belief” and that “accompanying declarations must be witnessed by a person authorised to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State”.¹²

11. Rule 111(1) of the Rules further provides that:

A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefor.

12. The above preconditions act as procedural safeguards to preserve the rights of accused person and to promote the interests of justice.¹³

V. Submissions

13. Before addressing the Prosecution’s request pursuant to rule 68(2)(b), the Defence will first address the Prosecution’s request to add P-2687 to its Final Witness List.

A. The Prosecution’s request for leave to add Witness P-2687 to its Final Witness List should be rejected

“relates to issues that are not materially in dispute”, “relates to background information” and “has sufficient indicia of reliability”.

¹² *Prosecutor v Bemba et al.*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/13-2275-Red, 8 March 2018, para. 306.

¹³ Rule 68(2)(b)(i), Rules of Procedure and Evidence.

14. Factors to be considered by the Chamber in determining whether the Prosecution may amend its Final Witness List and its List of Evidence include “the extent to which the requested addition is opposed by the Defence, the time when the addition is sought, the nature and amount of the material concerned, the intended purpose for the Prosecution’s requested reliance on such material as well as its prospective significance in light of the charges brought against the accused and the rest of the available evidence.”¹⁴ Furthermore, it shall “determine *in concreto* whether reliance on the part of the Prosecution on items of evidence additional to those included in the original list of evidence causes an undue prejudice to the procedural rights of the Defence.”¹⁵ Based on those factors, the Prosecution’s request should be rejected.

15. *First*, the Prosecution’s request is untimely. The trial is well underway and CDR have already been extensively relied upon by the Prosecution in support of its case against Mr Ngaïssona.¹⁶ The Prosecution has to date disclosed at least [REDACTED] Call Data Records (“CDR”) classified as INCRIM, among which at least [REDACTED] CDR appear to have been retrieved from [REDACTED] alone.¹⁷ Some CDR have already been used during witness testimony and have been formally submitted onto the case record.¹⁸

16. *Second*, the Prosecution provides no persuasive justification for the delay. The Prosecution purports in vague terms that the delay is caused by P-1932’s refusal to sign his statement [REDACTED], and that this became apparent sometime after the 9 November 2020 disclosure deadline.¹⁹ At the time of the

¹⁴ *Ongwen Decision*, para. 10.

¹⁵ ICC-01/14-01/18-989-Conf, para. 5; *Ongwen Decision*, para. 10.

¹⁶ See Prosecution Trial brief, ICC-01/14-01/18-723-Conf.

¹⁷ These statistics are derived from a ringtail search by “type” and by “source identity” and does not necessarily reflect the totality of CDR disclosed by the Prosecution.

¹⁸ See for example [REDACTED] .

¹⁹ Request, para. 6.

Prosecution's filing of the Seventh Request on 11 January 2021, which was three months after P-1932's statement had been collected, P-1932's statement remained unsigned.²⁰ The Prosecution was therefore aware of P-1932's non-cooperation with the Prosecution on that date. Despite this, in the intervening time, no update or disclosure relating to communications between the Prosecution and P-1932 was provided. The Prosecution's request is silent both as to the steps taken by investigators to secure P-1932's signature or to address [REDACTED]. To the Defence's knowledge, the Prosecution has not disclosed any communication or investigative report relating to communications between Prosecution investigators and P-1932, as it relates to P-1932's cessation of cooperation with the Prosecution. It may therefore not be accepted that the Prosecution now seeks to add a new witness to its Final Witness List, *in lieu* of P-1932, via rule 68(2)(b), eight months after the final disclosure deadline, and six months after the Seventh Request was filed. The Defence recalls the Chamber's repeated findings that the Prosecution's investigations should have largely been completed at the confirmation stage.²¹

17. *Third*, the Prosecution's request to add a new witness to its Final Witness List at this stage of the proceedings is prejudicial to the fair trial rights of Mr Ngaïssona, as it denies the Defence proper notice and the opportunity to adequately prepare for trial, while the potential evidence of this witness cannot be introduced to witnesses who have already testified in this case. Contrary to the Prosecution's assertion as it concerns the "undue prejudice" to the Defence requirement, Witnesses P-1932 and P-2687 are not interchangeable.²² Witness P-1932 is [REDACTED], whereas P-2687 is

²⁰ CAR-OTP-2122-9950-R01, at 9950.

²¹ See e.g. Transcript of 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 12, lines 17-23; ICC-01/14-01/18-734, para. 11; see also *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, paras 120-121.

²² Request, para. 10.

[REDACTED].²³ Although P-1932's CV does not appear to have been disclosed to the Defence despite it having been mentioned as an annex to P-1932's statement,²⁴ it is apparent from the email exchanges from 2020 between P-1932 and Prosecution investigators that P-1932 might have held personal and detailed knowledge of [REDACTED], for instance as it concerns [REDACTED].²⁵ These emails, which spawn an entire year, provide necessary additional context to P-1932's witness statement. No such emails, exchanges or CV were provided with respect to P-2687. P-2687's personal level of experience and knowledge of the intricate and [REDACTED] is unknown, and therefore, contrary to P-1932's statement, the viability of P-2687's Déclaration is severely lacking. In the absence of concrete information as to P-2687's personal knowledge of [REDACTED], the Defence can only surmise, based on the contents of the Déclaration, which is a mere reproduction of P-1932's statement, and P-2687's [REDACTED], that P-2687 does not have the specialized knowledge required to speak to [REDACTED].²⁶

18. *Fourth*, the intended purpose for the Prosecution's requested reliance on P-2687's Déclaration, as well as this evidence's prospective significance in light of the charges,²⁷ favours the rejection of the Prosecution's request to add P-2687 to its Final Witness List. The Prosecution argues that the addition of P-2687 to its Final Witness List would be in the interests of justice and the Chamber's determination of the truth "as the Declaration would assist the Chamber, Parties, and Participants in their assessment of the CDR evidence tendered in the proceedings".²⁸ The Prosecution further argues that the Chamber "would otherwise be deprived of compelling evidence bringing to

²³ CAR-OTP-2122-9950.

²⁴ CAR-OTP-2122-9950-R01, para. 93.

²⁵ See CAR-OTP-2082-1023; CAR-OTP-2082-1021; CAR-OTP-2082-1009; CAR-OTP-2071-1112.

²⁶ In its Request, para. 8, the Prosecution submits that "P-2687 is in the best position to adopt these explanation [sic] and proffer them to the Chamber", without however offering any explanation of information in support of the assertion.

²⁷ *Ongwen Decision*, para 10.

²⁸ Request, para. 3.

light facts that may not otherwise be [sic] shown or demonstrable”.²⁹ However, given (i) the Déclaration is but a mere reproduction of P-1932’s unsworn statement;³⁰ (ii) the paucity of information relating to P-2687’s personal knowledge of [REDACTED] collection, storage, and processing of the CDR; and (iii) the fact that the Prosecution does not intend to elicit any *viva voce* evidence from P-2687, the prejudice of adding P-2687 to the Final Witness List significantly outweighs any added potential benefits.

19. It is striking that the Prosecution has not included on its Final Witness List, any *viva voce* witness who may provide [REDACTED] first-hand knowledge of the CDR acquired and disclosed by the Prosecution.³¹ Such an approach is in stark contrast with the Prosecution’s extensive reliance on CDR evidence in its case against Mr Ngaïssona.³² The CDR disclosed hitherto are voluminous and complex, necessitating [REDACTED] to interpret and analyse them. By seeking to add P-2687 to its Final Witness List, whose position within [REDACTED] is different than that of P-1932, and by proceeding solely through rule 68(2)(b) to introduce testimonial evidence relating to the extraction, storage and production of the CDR evidence, granting the Prosecution’s request would essentially deprive the Chamber, parties and participants of the opportunity to be apprised of a more in-depth understanding of the manner in which the CDR are acquired, extracted and stored.

20. In sum, the Prosecution has failed to provide a persuasive basis for its request to add P-2687 to its Final Witness List, well after the final disclosure deadline. As demonstrated above, and as will be further elaborated below, adding P-

²⁹ Request, para. 3.

³⁰ See below, para. 23.

³¹ P-1932, P-2973, P-2687, see ICC-01/14-01/18-724-Conf-AnxA, page 8 and Request.

³² See for instance the Prosecution’s Trial Brief, ICC-01/14-01/18-723-Conf, wherein the Prosecution relies on CDR significantly (see for instance footnotes 194, 206, 214, 269, 305, 1054, 1059, 1102, 1105, 1110, 1120, 1122).

2687 to the Prosecution's Final Witness List would be detrimental to the determination of the truth and would be inconsistent with Mr Ngaïssona's fair trial rights under the Statute.

B. The Prosecution's request for the formal submission of P-2687's Déclaration does not meet the basic procedural requirements of rule 68(2)(b)

21. Several grounds preclude the application of rule 68(2)(b) as it concerns the submission of P-2687's Déclaration and associated exhibits. *First*, the basic formal requirements of rule 68(2)(b) have not been met as it concerns P-2687's "Déclaration"; it fails to comply with the requirement provided in rule 68(2)(b)(ii) that "[p]rior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief". In other words, rule 68(2)(b) contains a sworn declaration requirement which has not, in the present circumstances, been met.³³ For this reason alone the Prosecution's request to formally submit the Déclaration should be rejected.

22. In addition, the requirements of rule 111(1) of the Rules have not been met. Rule 111(1) provides that "record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings" and that the "record shall be signed by the person who records and conducts the questioning and by the person who is questioned". Rule 111(1) further requires that the "record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when

³³ *Prosecutor v. Ruto and Sang*, Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2, 19 August 2015, para. 32; Public Redacted Version of Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony', ICC-01/09-01/11-1938-Anx-Red, paras 20-25. This requirement is a corollary of the requirement of Article 69 and Rule 66, which provide that before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

someone has not signed the record as well as the reasons therefor". Save for the fact that P-2687 signed the Déclaration and indicated the date of signature of the document, and there is a redacted block, which presumably is the Prosecution investigator(s)'s signature, the date, the elements such as the time and place of the questioning itself, or whether questioning was effectuated at all remain unclear.

23. *Second*, in addition to the above procedural deficiencies, the Déclaration is a near literal reproduction of P-1932's unsworn statement. The Prosecution attempts to circumvent the submission of prior recorded testimony regime under rule 68(2)(b) by seeking to submit into evidence P-1932's unsworn statement through another person, who holds an entirely different position within the organisation. In response to the Prosecution's assertions that the Déclaration "contains the same substantive information as P-1932's unsigned statement",³⁴ and that the "Declaration is subject to some appropriate adjustments", the Defence wishes to highlight that P-2687's Déclaration is a "copy-paste" of P-1932's unsworn statement, save that in some instances, rather than writing in the first person (ie. "*je remarque*"), P-2687 writes in the third person (ie. "[REDACTED] *a remarqué*").³⁵ This circumvention of the regulatory framework of the Court not only amounts to a violation of Mr Ngaiissona's fair trial rights, but also undermines the integrity of the proceedings.

24. *Third*, as noted above, contrary to the Prosecution's submission, P-2687 and P-1932 are not interchangeable.³⁶ As mentioned, Witness P-1932 is [REDACTED], whereas P-2687 is [REDACTED]. It can be assumed that P-2687 does not necessarily hold the same level [REDACTED] as P-1932, which can

³⁴ Request, para. 3.

³⁵ See also Prosecution submissions on this point, Request, para. 8.

³⁶ Request, para. 10.

be inferred by (i) the fact that P-2687 did not provide any personal first-hand knowledge as it concerns the CDR, but rather, merely reproduced the exact wording of P-1932's unsworn statement; (ii) P-2687's [REDACTED], which suggests that [REDACTED], by contrast to P-1932.³⁷ Thus, the reliability of P-2687's Déclaration is significantly lacking.

C. The Prosecution's request for the formal submission of P-2687's Déclaration does not meet the substantive requirements of rule 68(2)(b)

25. The Prosecution's request does not meet the further substantive requirements of rule 68(2)(b). *First*, given the Prosecution has not made specific submissions to support its rule 68(2)(b) request but rather, incorporates by reference its previous submissions in relation to the submission of P-1932's statement via rule 68(2)(b),³⁸ the Defence recalls its former objection to Witness P-1932's statement being introduced by way of a rule 68(2)(b) application.³⁹ As with P-1932's statement, the introduction of P-2687's Déclaration pursuant to rule 68(2)(b) would be prejudicial to the rights of Mr Ngaïssona. As argued above, the CDR disclosed hitherto are voluminous and complex, necessitating [REDACTED] to interpret and analyse them.

26. *Second*, the Prosecution's argument that P-1932's/P-2687's evidence is "cumulative to and corroborated by" other witness testimony is flawed, as the only other testimonial evidence relating to the processes for generating, preserving and producing CDR presented by the Prosecution is that of another rule 68(2)(b) witness, who works at a different telecommunications company ([REDACTED]).⁴⁰

³⁷ P-1932's [REDACTED] is evidence based on not only his statement provided, but also the email exchanges between P-1932 and the Prosecution investigators, CAR-OTP-2122-9950-R01; CAR-OTP-2082-1023; CAR-OTP-2082-1021; CAR-OTP-2082-1009; CAR-OTP-2071-1112.

³⁸ Request, para. 9.

³⁹ ICC-01/14-01/18-887-Conf, paras 18-19; see ICC-01/14-01/18-845-Conf-Corr, paras 20, 60-65.

⁴⁰ P-2973 is [REDACTED], ICC-01/14-01/18-808, paras 29-34, 37-38.

27. *Third*, should the Chamber permit the Prosecution to amend its Final Witness List to add P-2687, the only remedy to mitigate the prejudice to Mr Ngaïssona's fair trial rights would be for P-2687 to provide *viva voce* evidence. By proceeding solely through rule 68(2)(b) as it concerns testimonial evidence relating to the extraction, storage and production of the CDR evidence, the Prosecution essentially deprives the Chamber, parties and participants of the opportunity to be apprised of a more in-depth understanding of the manner in which the CDR are acquired, extracted and stored. Such a demonstration may only be achieved through *viva voce* testimony of a person who holds specialised knowledge of these processes. In other words, should the Chamber consider the Prosecution's request to add P-2687 to its Final Witness List to be justified, P-2687's evidence should be introduced *viva voce* rather than pursuant to rule 68. This approach would (i) serve to dispel any doubts as to P-2687's [REDACTED] and remediate the paucity of information as it concerns P-2687's [REDACTED]; and (ii) contribute to the determination of truth and increase fairness, as it would allow the evidence to be tested and developed through examination and cross-examination. It would not suffice for the Prosecution to remediate the procedural violations identified above by submitting a new sworn statement for P-2687.

28. Should P-2687 be added to the Prosecution's Final Witness List, it is paramount that the Defence be given the opportunity to question P-2687 on his potential evidence, in particular in order to clarify the errors and weaknesses identified in P-1932/P-2687's evidence as it concerns the CDR provided by [REDACTED]. Those errors and weaknesses are only briefly addressed in the Déclaration and raise more questions than answers.⁴¹ For instance, in the Déclaration, P-1932/P-2687 explain that the data in document CAR-OTP-2019-1364, Column C, is an error in the production of the CDR

⁴¹ See for instance Déclaration, [REDACTED].

without, however, further developing potential hypotheses as to how such errors may appear in the data and its impact on the CDR.⁴² Other errors identified relate *inter alia* to the expiry of telephone numbers and the manner in which numbers are put back onto the market following deactivation.⁴³ Significantly, P-1932/P-2687 noted that in 2013-2014 the rules surrounding the identification of cellular users had not been followed.⁴⁴ Other examples of information provided by P-1932/P-2687 warranting further live testimonial scrutiny relate to irregularities in the CDR extraction process leading to duplicate entries, and the existence of potential overlap between calls from the same users.⁴⁵ These are live issues which permeate the Prosecution's case against Mr Ngaïssona, and are likely to arise throughout trial.⁴⁶ Further elucidation on those topics would greatly assist the Chamber and parties in identifying and understanding potential attribution issues, including with respect to telephone numbers attributed to Mr Ngaïssona.

29. In the same vein, not granting the Defence the opportunity to cross-examine the Prosecution CDR witnesses by proceeding through rule 68(2)(b) would also deprive the Defence of the opportunity to objectively confront Prosecution CDR witnesses with other Prosecution evidence, such as [REDACTED], mentioned in the Opening Statement of the Defence, in which severe flaws in the CDR obtained by the Prosecution were noted.⁴⁷ Such flaws include problems with the quality of the data provided by the Prosecution, differences in formatting of the source data, numerous duplicates found, and ambiguous information as it concerns the localisation of the antennas.⁴⁸

⁴² Déclaration, para. 43.

⁴³ Déclaration, para. 68.

⁴⁴ Déclaration, paras 67-69.

⁴⁵ Déclaration, paras 72-73.

⁴⁶ See for instance, P-0884's statement, CAR-OTP-2080-1640, page 1671, line 1089 to page 1674, line 1193.

⁴⁷ CAR-OTP-2126-2529.

⁴⁸ CAR-OTP-2126-2529, at 2561.

30. *Fourth*, with regard to the seven “examples of CDRs” which the Prosecution seeks to introduce pursuant to 68(2)(b), given the Déclaration does not meet even the most basic requirements of rule 68(2)(b), the associated exhibits should not be introduced.⁴⁹ Even if the Déclaration were to be introduced pursuant to rule 68(2)(b), for the sake of argument, the submission of the annexes as “examples” is not justified, given the commentary provided in the Déclaration in relation to those examples are self-contained and are not referred to for their substance, but rather, for their exemplary nature.⁵⁰

31. In sum, the substantive and procedural requirements for the formal submission of P-2687’s Déclaration and associated exhibits are not met.

VI. Relief sought

32. The Defence respectfully requests the Chamber to:

- reject the Prosecution’s request to add P-2687 to its Final Witness List;
- reject the Prosecution’s request to formally submit P-2687’s Déclaration and associated exhibits pursuant to rule 68(2)(b) of the Rules.

Respectfully submitted,



Mr Geert-Jan Alexander Knoop
Lead Counsel for Mr. Patrice-Edouard Ngaïssona

The Hague, 21 July 2021

⁴⁹ ICC-01/14-01/180-Conf-Corr, para. 64.

⁵⁰ See the Defence for Mr Yekatom’s submission with respect to the seven examples, ICC-01/14-01/17-845-Conf, para. 64, with which the Defence for Mr Ngaïssona fully concur.