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**International
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Date: **24 September 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-0876 pursuant to Rule 68(3)” and the “Prosecution’s Request for
the Formal Submission of the Prior Recorded Testimony of P-0808 pursuant to
Rule 68(3)”, (ICC-01/14-01/18-1096-Conf), 26 August 2021**

Source: Defence of Patrice-Edouard Ngaißsona

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-0876 pursuant to Rule 68(3)” and the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0808 pursuant to Rule 68(3) (“Requests”).¹
2. The Defence opposes the Requests. As will be demonstrated below, both P-0876 and P-0808’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. Furthermore, the Defence contests P-0876’s credibility due to his clear bias against Mr Ngaïssona. 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.

II. CONFIDENTIALITY

3. 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

¹ ICC-01/14-01/18-1082-Conf, together with Annexes A and B (“Request concerning P-0876”); ICC-01/14-01/18-1087-Conf, along together Annexes A and B (“Request concerning P-0808”).

4. 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-0876

5. The importance of the evidence intended to be presented by P-0876 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 be prejudicial to the rights of the accused or inconsistent with the fairness of the trial generally.⁴
6. In his transcribed statement, P-0876 provides information, *inter alia*, about (i) Bozizé and Bozizé's supporters' alleged anti-Muslim propaganda prior to the Seleka coup, (ii) the alleged closeness between Bozizé and Mr Ngaïssona, (iii) the alleged planning and organisation of the Anti-Balaka attack on Bangui on 5 December 2013, (iv) Mr Ngaïssona's alleged contribution in this alleged planning, *inter alia*, in providing ammunitions and giving instructions prior to the alleged attack, (v) alleged crimes committed in execution of the alleged attack, (vi) the existence of two separate Anti-Balaka branches, only one of which Mr Ngaïssona was allegedly the leader, (vii) Mr Ngaïssona's alleged control over the Anti-Balaka structure and certain Anti-Balaka elements

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. 71.

[REDACTED], (viii) the alleged commission of charged crimes, (ix) Mr Ngaïssona's alleged role as a "financier", (x) Mr Ngaïssona's alleged role in the appointment of Comzones or elements in charge of the Anti-Balaka military police, (xi) Mr Ngaïssona's alleged commission of crimes, [REDACTED] (xii) Mr Ngaïssona's alleged intent, (xiii) an alleged meeting between [REDACTED], (xiv) the circumstances of [REDACTED], (xv) [REDACTED].

7. As non-exhaustively listed in the paragraph above, the evidence proposed by P-0876 in his prior statement includes a significant number of references to the acts and conduct of Mr Ngaïssona and to the charged crimes and is central to the core issues in dispute.⁵ Also, the information provided by P-0876 on the aforementioned key issues is not, contrary to other witnesses, limited.
8. Moreover, the Defence notes that P-0876's transcribed statement and other documents (i) associated with or (ii) mentioning P-0876 contain a number of indications suggesting that the witness has strong views about Mr Ngaïssona.⁶ P-0876 says it himself, from the outset till the day of the interview, [REDACTED].⁷ P-0876 refers to Mr Ngaïssona as a criminal and accuses him on many occasions of having committed criminal acts. It also appears from the evidence that he holds a [REDACTED] for [REDACTED]. Indeed, P-0876 was allegedly never considered as [REDACTED].⁸ Also, he expressed his strong dissatisfaction in [REDACTED].⁹ [REDACTED].¹⁰ Finally,

⁵ ICC-01/04-02/06-2124, para. 8, ICC-01/04-02/06-988, para. 11 ; ICC-01/04-02/06-2124, para. 8.

⁶ [REDACTED]. *See also* [REDACTED].

⁷ P-0876: CAR-OTP-2046-0285, at 0318; CAR-OTP-2046-0500, at 0527, lns 941-942.

⁸ *See, e.g.*, P-0876, CAR-OTP-2046-0285, at 0313-315; CAR-OTP-2035-0061; P-0884 : CAR-OTP-2080-1601, at 1621-1622 ; P-0287 : CAR-OTP-2115-0239-R01, at 257. *See also* P-0876: CAR-OTP-2046-0249, at 2064-2065.

⁹ CAR-OTP-2035-0064; P-0876: CAR-OTP-2046-0530-R01, at 543-544.

¹⁰ CAR-OTP-2101-3621. *See also* [REDACTED]: CAR-OTP-2046-0473, at 0477, lns 143 et s.; CAR-OTP-2046-0500, at 0524-0528.

in an email to [REDACTED], P-0876 still expresses frustration to what he perceives as [REDACTED], whom he clearly includes in his reference to the 'Boy Rabe criminals'.¹¹

9. In light of the above, the Defence submits that P-0876 is biased. Therefore, the Defence challenges the witness' credibility and submits that his testimony should be given under oath in its entirety, under the Chamber's supervision.¹²
10. Regarding corroboration, the Prosecution limited its analysis to a couple of aspects forming part of the contextual elements of the crimes, while failing to substantiate as to how P-0876's proposed evidence in relation to the *acts and conduct* of Mr Ngaïssona and the *charged crimes* is corroborated by the evidence of other witnesses testifying live.¹³ While corroboration can always be found on some levels, and save for a vague attempt to substantiate corroboration on Mr Ngaïssona's alleged role as a financier, relying exclusively on rule 68(3) witnesses, the Prosecution fails to substantiate how several other witnesses are expected to offer full in-court testimony on *many* of the same issues as P-0876 that are materially in dispute, especially as it concerns Mr Ngaïssona.
11. Finally, while the time-saving as announced by the Prosecution appears significant,¹⁴ given the multitude of issues contained in P-0876's prior statement that are central to the Prosecution's case against Mr Ngaïssona, and given the clear signs of bias against Mr Ngaïssona this witness has been showing, introducing P-0876's prior 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-

¹¹ CAR-OTP-2099-0265-R01 at 0266-0267.

¹² ICC-01/14-01/18-1088-Conf, para. 16.

¹³ Request concerning P-0876, para. 13.

¹⁴ Request concerning P-0876, paras 17-19.

saving. Furthermore, as previously ruled with respect to P-0801 and P-0306, the Prosecution could streamline the questioning of P-0876 and further reduce the estimated time needed for its examination.¹⁵ Indeed, while P-0876's prior statement contain 332 pages, not all of them are relevant.

12. Therefore, on balance, the prejudice to the fair trial rights of Mr Ngaïssona preventing him from hearing P-0876's full in-court testimony outweighs any potential and limited promotion of the expeditiousness of the proceedings.
13. In light of the above, the Defence submits that it is necessary for Witness P-0876's testimony to be presented orally in its entirety.

B. P-0808

14. For similar reasons, it is necessary for Witness P-0808's testimony to be presented orally in its entirety.
15. In his statements, P-0808, who was a [REDACTED] and allegedly [REDACTED] during the relevant period, discusses in detail, *inter alia*, (i) Bozizé and Mr Ngaïssona's relationship, (ii) [REDACTED], (iii) P-0808 and Mr Ngaïssona's contacts prior to 5 December 2013 and related [REDACTED] (iv) Mr Ngaïssona's alleged contact from Cameroon with senior military commanders based in Bangui, (v) the alleged planning of the Anti-Balaka attack on Bangui on 5 December 2013 and its execution, (vi) the creation and structure of the Anti-Balaka, including its alleged reporting system, (vii) the structure, functioning and goals of the national coordination as well as [REDACTED], (viii) alleged meetings [REDACTED], (ix) the alleged authority of Mr Ngaïssona over the Comzones and the operations coordinator, (x) Mr

¹⁵ ICC-01/14-01/18-964-Conf, para. 20 ; ICC-01/14-01/18-1088-Conf, para. 17.

Ngaïssona's alleged orders to execute missions or operations, (xi) Mr Ngaïssona's alleged capacity to discipline and punish, (xx) Mr Ngaïssona's alleged moral character, (xii) the alleged financing of the Anti-Balaka including by Mr Ngaïssona, (xiii) the creation and role of the so-called military police, (xiv) the alleged crimes committed by [REDACTED], (xv) Mr Ngaïssona's alleged intent, (xvi) the Anti-Balaka's alleged anti-Muslim animus and how it was allegedly promoted by the leadership.

16. The vast majority of P-0808's prior statements relates to proposed evidence on the acts and conduct of Mr Ngaïssona and/or the charged crimes and is central to the core issues in dispute.¹⁶ The Defence recalls the Chamber's decision that "references to the accused's acts and conduct do not per se constitute an obstacle to the introduction of prior recorded testimony".¹⁷ However, in the specific case of P-0808, as listed in the paragraph above, his prior statements contain a significant number of extensive references to Mr Ngaïssona's acts and conduct. Moreover, this witness is cited [REDACTED] times in the Prosecution's Trial Brief, in support of allegations more than half of which directly or indirectly relate to the alleged acts and conduct of Mr Ngaïssona.¹⁸ Given that P-0808 had a [REDACTED], the extensiveness of the references to Mr Ngaïssona militates even further in favour of his testimony being presented orally in entirety.

17. Moreover, the Prosecution fails to adequately substantiate how several other witnesses are expected to offer full in-court testimony on *many* of the same central issues that P-0808 addresses. While the Prosecution attempts to identify corroboration on certain pieces of evidence that form part of the

¹⁶ Request, para. 11.

¹⁷ ICC-01/14-01/18-1088-Conf, para. 14.

¹⁸ See, for instance, ICC-01/14-01/18-723-Conf ("Prosecution's Trial Brief"), footnotes 146, 185, 186, 227, 309, 312, 323, 331, 340, 344, 364, 482, 591, 592, 687, 691, 695, 697, 700, 703, 704, 706, 709, 711, 713, 719, 731, 740, 783, 1061, 1109, 1124, 1128, 1211, 1239.

alleged contextual elements of the crimes or the alleged charged crimes, it fails to address how the evidence proposed by P-0808 in relation to the acts and conduct of Mr Ngaïssona, which, as elaborated above, is particularly extensive, is corroborated by other witnesses expected to offer full in-court testimony.

18. Regarding [REDACTED], the two witnesses the Prosecution cites as corroborative are (i) [REDACTED], and (ii) [REDACTED], who is not expected to offer full in-court testimony.¹⁹ In fact, [REDACTED]. [REDACTED],²⁰ P-0808 states that [REDACTED].²¹ Also, as pointed out by the Pre-Trial Chamber in the Confirmation Decision, [REDACTED].²²

19. Turning now to the Prosecution's vague reference to the alleged Bangui operations in October 2014, corroboration, if any, would relate to events outside the temporal scope of the charges, which should not be the focus of the Prosecution when attempting to substantiate corroboration for the purpose of a rule 68(3) request. In the same vein, "the structure and leadership of the Anti-Balaka, including Ngaïssona's role as National Coordinator" is a very vast topic and corroboration could always be found on some level. Yet, the Prosecution only identifies three (3) alleged corroborative witnesses expected to offer full oral testimonies, one of which is P-0306.²³

20. P-0808's prior statements are uncorroborated and quite unique on several key points addressed. For instance, P-0808 is the only witness the Prosecution

¹⁹ P-1719, P-1847, P-2625, P-0458, P-0884, P-2232 and P-2328.

²⁰ P-0306: CAR-OTP-2118-4791-R04, at 4802, lns 406-409.

²¹ P-0808: CAR-OTP-2093-0010-R02, at 0026, para. 89 and at 0031, para. 119.

²² Compare P-0808: CAR-OTP-2093-0010-R02, at 0026, para. 88 with P-1858: CAR-OTP-2063-0050-R01, at 0068, para.112. *See also* Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, para. 217.

²³ Out of the 9 witnesses cited as corroborative for this specific topic, only P-0306, P-0884 and P-1521 have testified or are expected to testify live. *See* Request concerning P-0808, para. 14.

relies on to support its allegations that (i) “[f]rom Cameroon, Ngaïssona continued to mobilise the youth in BANGUI”,²⁴ and that (ii) [REDACTED].²⁵

21. While the time-saving announced by the Prosecution for P-0808’s examination in chief also appears very significant,²⁶ given the multitude of issues contained in P-0808’s prior statement that are central to the Prosecution’s case against Mr Ngaïssona, cross-examination would have to be so much prolonged if P-0808’s proposed evidence is introduced via Rule 68(3) that any time-saving might ultimately be limited.

22. Finally, after careful review, the Defence submits that document [REDACTED] should not be considered as an exhibit associated to P-0808’s prior testimony.²⁷ While this document was shown to the witness, the latter did not comment on it as it was the first time he was seeing or hearing about such a document. Therefore, it does not form an integral part of the testimony itself.²⁸ Therefore, should the Chamber grant the Request concerning P-0808, the Defence opposes the formal submission of the aforementioned document as associated exhibit to P-0808’s prior testimony.

V. RELIEF SOUGHT

23. The Defence respectfully requests the Chamber to:

–**REJECT** the Prosecution's Requests to introduce P-0876 and P-0808's prior-recorded testimonies and associated exhibits pursuant to Rule 68(3).

²⁴ Prosecution’s Trial Brief, para. 78.

²⁵ Prosecution’s Trial Brief, para. [REDACTED].

²⁶ Request, paras 18-20.

²⁷ See Request concerning P-0808, Annex A, page 4.

²⁸ ICC-01/14-01/18-907-Red, para. 13.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized 'N' or 'G' followed by a horizontal line.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 24 September 2021

At The Hague, the Netherlands.