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**International
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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 Response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0306 pursuant to Rule 68(3)”, ICC-01/14-01/18-1081-Conf, 30 July 2021

Source: Defence of Patrice-Edouard Ngaißsona

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

The Office of the Prosecutor

Mr Karim A. A. Khan QC
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamaï
Ms Marie-Hélène Proulx
Ms Lauriane Vandeler
Ms Chiara Giudici

Counsel for the Defence of Mr Yekatom

Ms 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 Applicants
(Participation/Reparation)**

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
Section**

I. INTRODUCTION

1. The Defence hereby provides its response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0306 pursuant to Rule 68(3)” (“Request”).¹
2. The Defence opposes the Request. As will be demonstrated below, P-0306’s transcribed statements and associated exhibits (i) are 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 central issues by other witnesses expected to offer full in-court testimony. Furthermore, the Defence strongly contests P-0306’s credibility and notes numerous manifest inconsistencies within his statements as well as with other witness testimonies. For these reasons, any time saving in the questioning of this witness will be outweighed by the prejudice that the formal submission of its prior testimony 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 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

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

¹ ICC-01/14-01/18-1057-Conf.

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

5. The importance of the evidence intended to be presented by P-0306 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-0306, who is alleged to be a [REDACTED] Anti-Balaka insider,⁵ discusses, *inter alia*, (i) Mr Ngaïssona's alleged [REDACTED] the alleged 5 December 2013 attack on Bangui and Mr Ngaïssona's alleged [REDACTED], (ii) the steps taken in preparation for this attack and the alleged role of Mr Ngaïssona in its organization, (iii) the unfolding of events and details of the execution of this alleged attack on Bangui, (iv) the timeframe of the alleged fights in Bangui, (v) his alleged [REDACTED] (vi) [REDACTED], (vii) Mr Ngaïssona's alleged numerous orders to [REDACTED] to commit crimes, including [REDACTED] (viii) Mr Ngaïssona and P-0306's relationship and [REDACTED], (ix) Mr Ngaïssona's alleged role in [REDACTED], (x) the leadership of the Anti-Balaka and in particular, the alleged role, authority and activities of Mr Ngaïssona as the Anti-Balaka's national coordinator, (xi) Mr Ngaïssona's alleged knowledge of

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.

⁵ Request, paras 2, 14.

the Anti-Balaka' commission of crimes, (xii) the alleged attack on [REDACTED], and (xiii) more generally, the alleged contextual elements of the crimes.

7. The Prosecution relies, *inter alia*, on P-0306's statement to support its allegation that Mr Ngaïssona and other key leaders planned and coordinated a military response that would galvanise, exploit, and coordinate pre-existing self-defence groups.⁶
8. The vast majority of the evidence proposed in P-0306's statement, which is far from being limited, relates to the alleged acts and conduct of Mr Ngaïssona and/or the charged crimes and is central to the core issues in dispute.⁷ 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.⁸ Similarly, in the prior recorded testimony of P-0306, 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".⁹
9. Furthermore, the reliability of the information provided by P-0306 in its prior statements is vitiated by the overall lack of credibility of this witness combined with the myriad of manifest inconsistencies, be it in his 2018 and 2019 statements or between the latter and other witness testimonies.
10. As a preliminary remark, P-0306 is [REDACTED]. [REDACTED].¹⁰
[REDACTED].¹¹

⁶ Trial Brief, para. 66.

⁷ Request, para. 15.

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

⁹ ICC-01/04-02/06-2124, para. 8.

¹⁰ CAR-OTP-2118-0446-R02, at 452-453.

11. Secondly, manifest contradictions (i) between P-0306's 2018 and 2019 interviews and (ii) in the evidence proposed within the 2019 interview, make his prior recorded testimony unreliable.
12. First, P-0306's 2018 and 2019 prior statements plainly contradict each other. During his 2018 interview, P-0306 explains that [REDACTED]. During his 2019 interview however, P-0306 speaks extensively about Mr Ngaïssona's acts and conduct as well as alleged key Anti-Balaka leaders', [REDACTED], and generally provides information in direct contradiction with the information provided in 2018.
13. Secondly, the Defence notes many internal inconsistencies within P-0306's 2019 prior statement. From one interview day to the next, his version of events changes dramatically. For instance, he contradicts himself several times in relation to the alleged [REDACTED].¹² In relation to the alleged Bangui attack, the witness first states that the first person he spoke face to face to, [REDACTED]¹³ and that [REDACTED].¹⁴ He further states that [REDACTED].¹⁵ In relation to that alleged [REDACTED], he first states that it is during a [REDACTED] while on the last day of his interview, he explains that it was [REDACTED].¹⁶ Lastly, the witness specifies that one of the annexes was written a long time ago [REDACTED].¹⁷ These are just a few examples but there are many more.

¹¹ [REDACTED], retrieved on 29 July 2021; CAR-OTP-2118-0504-R03, at 0526-0527, lns 685-690.

¹² [REDACTED].

¹³ Compare CAR-OTP-2118-4943-R03, at 4948, ln 150 and CAR-OTP-2118-4943-R03, at 4945, lns 43-48.

¹⁴ CAR-OTP-2118-4980-R01, at 4985-4987, lns 168-219.

¹⁵ Compare CAR-OTP-2118-4980-R04, at 4999-5000, lns 629-670 with CAR-OTP-2118-5002, at 5003, lns 26-34.

¹⁶ Compare CAR-OTP-2118-4861-R04, at 4868-4872, lns 231-309 with CAR-OTP-2118-5002, at 5003,5004, lns 26-64.

¹⁷ Compare CAR-OTP-2118-4791-R04, at 4806-4807, lns 537-569 with CAR-OTP-2120-0599.

14. On this ground alone,¹⁸ the Request should be rejected, as it is not possible to rely on one information and its opposite at the same time. The Defence would have to go back on every single account of events to understand which existing or new scenario the witness feels like proposing at the time of testimony.

15. It is clear from P-0306's prior statements that he holds a grudge against Mr Ngaïssona whom he considers responsible for [REDACTED]– which would be due to [REDACTED]¹⁹ - and who [REDACTED].²⁰ It is also very clear that P-0306 attempts to [REDACTED]. For instance, speaking about Mr Ngaïssona, the witness states: [REDACTED].²¹ [REDACTED].²² Also, he alleges that if he did not [REDACTED] during his 2018 interview, it was because [REDACTED].²³

16. Thirdly, P-0306's prior statement is manifestly inconsistent with other witness statements. Just to name a few, while P-0306 alleges that he [REDACTED], the vast majority of witnesses testify to [REDACTED].²⁴ P-0306 denies knowing [REDACTED]²⁵ whereas P-1521 reports that by [REDACTED].²⁶ P-1521 also states that [REDACTED]²⁷ whereas P-0306 states that [REDACTED].²⁸ In general, P-1521 depicts Mr Ngaïssona's acts as national coordinator as

¹⁸ See the present response, paras 12-13.

¹⁹ P-0306: CAR-OTP-2118-4848-R04, at 4854-4856, lns 205-268.

²⁰ P-0306: CAR-OTP-2118-4791-R04, at 4793, lns 60-62; CAR-OTP-2118-5024-R03, at 5031, lns 238-242; CAR-OTP-2118-4791-R04, at 4801, lns 352-353.

²¹ P-0306: CAR-OTP-2118-4791-R04, at 4801, lns 344, 349-350. See also CAR-OTP-2120-0601.

²² P-0306: CAR-OTP-2118-4791-R04, at 4802, lns 370-371.

²³ P-0306: CAR-OTP-2118-4956-R02, at 4957-4958, lns 16-105.

²⁴ See e.g. P-0314: CAR-OTP-2008-1188-R01, at 1212-1213; P-0487: CAR-OTP-2076-0146-R01, at 0161-0162; P-0808: CAR-OTP-2093-0010-R01, at 0019, para. 48; P-0965: CAR-OTP-2046-0195-R01, at 0210-0211.

²⁵ P-0306: CAR-OTP-2118-0664-R01, at 0677, lns 381-403.

²⁶ P-1521: CAR-OTP-2102-0131-R01, at 0138, para. 31.

²⁷ P-1521: CAR-OTP-2102-0131-R01, at 0142, paras 51-52.

²⁸ P-0306: CAR-OTP-2118-4943-R01, at 4953, lns 312-343.

political and peace oriented, which is in clear contradiction with P-0306's statement.

17. Moreover, contrary to the Prosecution's submissions, P-0889 and P-0801 do not corroborate P-0306's prior recorded testimony in relation to [REDACTED].²⁹ P-0306 alleges that [REDACTED]. Mr Ngaïssona would have [REDACTED]. Given that P-0306 would have [REDACTED].³⁰ In his testimony however, P-0801 makes no specific mention of [REDACTED].³¹ As to P-0889, he refers to a [REDACTED].³² Moreover, with respect to [REDACTED], contrary to P-0306's statement, P-0889 stated that [REDACTED].³³ Lastly, P-0808 recounts that it was because P-0306 thought it was [REDACTED], when in reality it was [REDACTED].³⁴

18. While corroboration can always be found on some levels, for instance in relation to part of Mr Ngaïssona's role as National Coordinator, many central issues discussed by P-0306 are not corroborated by any other witnesses expected to offer full in-court testimony. For instance, so far as the Defence is aware, none of the insider witnesses having offered or expected to offer full in-court testimony provide information regarding (i) [REDACTED], (ii) Mr Ngaïssona's alleged presence in Bangui in [REDACTED] 2013, (iii) [REDACTED]. Also, as opposed to P-0306's evidence, withdrawn witness P-1951 does not confirm [REDACTED].

19. In light of the above, the Defence strongly contests the credibility of P-0306 and submits that a testimony given under oath in its entirety, under the

²⁹ Request, para. 16.

³⁰ P-0306: CAR-OTP-2118-4791-R04, at 4798-4799, lns 239-291. *See also* CAR-OTP-2118-4836-R03, at 4845-4846, lns 279-328. Regarding [REDACTED]: CAR-OTP-2118-4791-R04, at 4803, lns 440-445.

³¹ Transcript of 31 May 2021, T-038-CONF-ENG ET, pp. 68-69, 74-75.

³² P-0889 : CAR-OTP-2027-2290, at 2304, para. 88.

³³ P-0889 : CAR-OTP-2122-7962-R01, at 7987, lns 908-922.

³⁴ P-0808 : CAR-OTP-2093-0010-R01, paras 141-151.

Chamber's oversight, is warranted in the present circumstances. As recalled by this Chamber, it would further enable "the Chamber and the accused to hear a natural and spontaneous account from the witness, to directly and closely observe his reactions, demeanour and composure, and to immediately seek clarifications".³⁵

20. Finally, while the time-saving as announced by the Prosecution appears significant,³⁶ given the multitude of issues contained in P-0306's transcribed statement that are central to the Prosecution's case against Mr Ngaïssona, and given the manifest lack of credibility of this witness as illustrated *inter alia* by the many inconsistencies found in his prior statements, introducing P-0306's prior recorded testimony under rule 68(3) would impose an unreasonable burden on the Defence in preparing for and conducting the cross-examination, especially since the [REDACTED] was disclosed only recently, and would ultimately limit any time-saving. Furthermore, as previously ruled with respect to P-0801, the Prosecution could streamline the questioning of P-0306 and further reduce the estimated time needed for its examination.³⁷ Indeed, while P-0306's combined prior statements contain 460 pages, not all of them are relevant. Moreover, many topics are addressed both in the 2018 and 2019 prior statements. The Prosecution's examination could be much more streamlined than the interview, especially since the 2018 prior statement will presumably only be used, if at all, to highlight inconsistencies with P-0306's subsequent 2019 statement. Therefore, on balance, the prejudice to the fair trial rights of Mr Ngaïssona preventing him from hearing P-0306's full in-court testimony outweighs any potential and limited promotion of the expeditiousness of the proceedings.

³⁵ ICC-01/14-01/18-964-Conf, para. 19.

³⁶ Request, paras 21-22.

³⁷ ICC-01/14-01/18-964-Conf, para. 20.

21. In light of the above, the Defence submits that it is necessary for Witness P-0306's testimony to be presented orally in its entirety.

V. RELIEF SOUGHT

22. The Defence respectfully requests the Chamber to **REJECT** the Prosecution's Request to introduce P-0306's prior-recorded testimony and associated exhibits pursuant to Rule 68(3).

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 27 September 2021

At The Hague, the Netherlands.