

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 January 2022

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 Fourth and Fifth Requests for the formal submission of prior recorded testimony pursuant to Rule 68(2)(b) (ICC-01/14-01/18-794-Conf and ICC-01/14-01/18-795-Conf)”, 15 January 2021

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

Mr Karim A. A. Khan QC

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops

Ms Marie-Hélène Proulx

Mr Richard Omissé-Namkeamaï

Ms Sara Pedroso

Counsel for the Defence of Mr Yekatom

Ms Mylène Dimitri

Mr Thomas Hannis

Ms Anta Guissé

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
(Participation/Reparation)**

Applicants

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**

Other

I. Introduction

1. On 22 December 2020, the Prosecution filed both the “Prosecution’s Fourth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)”¹ (“Fourth Request”) and the “Prosecution’s Fifth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)” (“Fifth Request”),² requesting the formal submission of the prior recorded testimony of a total of 16 witnesses and their associated exhibits.
2. On the same day, Trial Chamber V (“Chamber”) granted the Defence’s request for an extension of time pursuant to regulation 35(2) of the Regulations of the Court (“Regulations”) and ordered that any responses to the Prosecution’s Fourth and Fifth Request shall be filed by 15 January 2021.³
3. After careful examination of each individual application for the introduction of the prior recorded testimonies and associated exhibits subject to the two Fourth and Fifth Requests, the Defence provides the following consolidated response.

II. Confidentiality

4. In accordance with regulation 23*bis*(1) of the Regulations, this response is filed confidentially as it responds to a document of the same classification. The Defence will present a reclassification request or file a redacted version of its consolidated response upon receipt of the public redacted versions of the Prosecution’s Fourth and Fifth Requests.

¹ ICC-01/14-01/18-794-Conf (“Fourth Request”).

² ICC-01/14-01/18-795-Conf (“Fifth Request”).

³ Email from Trial Chamber V to parties and participants, 22 December, at 13:55.

III. Submissions

5. The Defence recalls its previous submission that the Prosecution's extensive projected use of Rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules") is disproportionate.⁴ More importantly, the Defence's decision to not contest the introduction of certain statements pursuant to this rule should not be construed as an agreement to the Prosecution's interpretation of the witnesses' prospective evidence. At the appropriate moment, the Defence will contest the relevance, reliability, authenticity and probative value of these statements and their associated annexes.⁵

A. The Defence defers to the Chamber's discretion with respect to the introduction of the statements and associated exhibits of Witnesses P-0460, P-0461, P-1143, P-0473, P-0520, P-1676, P-1865, P-2377 and P-0589

6. With respect to the statements and associated exhibits of Witnesses P-0460, P-0461,⁶ P-1143, P-0473, P-0520, P-1676, P-1865, P-2377 and P-0589⁷ the Defence defers to the Chamber's discretion in evaluating whether their introduction under rule 68(2)(b) is not prejudicial or inconsistent with the rights of Mr Ngaïssona.
7. In the event that the Chamber grants the Prosecution's requests in relation to Witnesses P-0460, P-0461, P-1143, P-0520, P-1676, P-1865 and P-2377 the Defence requests that the statements be tendered in their entirety, rather than the selection made by the Prosecution, insofar as the excluded paragraphs do

⁴ ICC-01/14-01/18-785-Conf, para. 6.

⁵ Ibid.

⁶ It appears that an error was made with respect to the ERN of one of the exhibits the Prosecution seeks to tender pursuant to rule 68(2)(b), that is: CAR-OTP-2058-0531, which the Defence believes should be CAR-OTP-2031-0205, see ICC-01/14-01/18-794-Conf-AnxA, page 2.

⁷ The Prosecution's requests for the introduction of the prior recorded testimony and associated exhibits for Witnesses P-0460, P-0461, P-1143, P-0473 and P-0589 are found in the Fourth Request, whereas the Prosecution's requests for Witnesses P-0520, P-1676, P-1865 and P-2377 are found in the Prosecution's Fifth Request.

not go to the “acts and conducts” of Mr Ngaïssona, provide valuable background information about the Witness’ knowledge, and in some cases, provide potentially exonerating information. In the *Prosecutor v. Ongwen case*, the Trial Chamber agreed with the Defence submission that “‘statements cannot be submitted piecemeal’ as this approach ‘would lead to an artificial exercise’ and possibly ‘absurdity and re-litigation of the Rule 68 admission’”.⁸ The Trial Chamber held that it “must conduct its determination of whether a prior recorded testimony can be introduced under Rule 68(2)(b) of the Rules upon consideration of the whole testimony and, in turn, the whole testimony would be introduced under that provision.”⁹ The Trial Chamber concluded that in any event, any reference to an accused person in a witness statement introduced via rule 68(2)(b) would “not be considered by the Chamber to establish the acts and conduct of the accused for the purposes of its final judgment”.¹⁰

8. Introducing the statements of Witnesses P-0460, P-0461, P-1143, P-0520, P-1676, P-1865 and P-2377 in their entirety would give the parties and the Chamber a full appreciation of their statements, which is especially important in the context of the application of rule 68(2)(b) where witnesses are not heard *viva voce*. Given that the Defence would not be able to question the witnesses, the paragraphs the Prosecution seeks to exclude from those eight witness’ statements should be included as part of the witnesses’ prior recorded testimony in the event the Chamber determines that the statements should be introduced under rule 68(2)(b) of the Rules. Avoiding a piecemeal approach, in particular for those portions of a witness’ statement which do not relate to issues that are materially in dispute and do not relate to the alleged acts and

⁸ *Prosecutor v. Ongwen*, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rules 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, 18 November 2016, para.13.

⁹ *Ibid.*

¹⁰ *Ibid.*

conduct of an accused person, is particularly warranted in the present case, where the Prosecution seeks to exclude paragraphs containing potentially exonerating information.¹¹

9. With respect to Witnesses P-0589 and P-0473, although the Defence defers to the Chamber's discretion with respect to the introduction of their statement and associated exhibits, the Prosecution's proposed exclusion of certain paragraphs is warranted. With respect to Witness P-0589's prior recorded testimony, the exclusion of paragraphs 68-69 of his statement, as requested by the Prosecution, is warranted given that they contain information directly related to the alleged "acts and conduct" of Mr Ngaïssona.¹² In the event the Chamber grants the introduction of Witness P-0589's statement and exhibits pursuant to rule 68(2)(b), the Defence requests that paragraph 68 be excluded in its entirety, and that paragraph 74 also be excluded. Similarly, Witness P-0473 testifies as to the alleged "acts and conduct" of Mr Ngaïssona in the paragraphs the Prosecution seeks to exclude.¹³ Those exclusions are warranted, as these paragraphs explicitly relate to the alleged "acts and conducts" of Mr Ngaïssona and to matters that are materially in dispute, namely, Mr Ngaïssona's alleged role as national coordinator and alleged contributions. Therefore, introducing these specific paragraphs, without the Defence being availed of the opportunity to question the witness, would be unduly prejudicial to Mr Ngaïssona's fair trial rights.

¹¹ The Prosecution seeks to exclude paras 31-49, 53-69 of P-1143's statement, which are however, redacted, and appear to [REDACTED]; the Prosecution seeks to exclude paragraphs 16-20 of Witness P-0520's statement [REDACTED]; the Prosecution seeks to exclude paras 91 to 94 and 98 to 105 of his statement, whereas they provide valuable information about the witness' knowledge and do not relate to the acts and conducts of the accused or issues that are materially in dispute and may be potentially exculpatory [REDACTED]; the Prosecution seeks to exclude paras 34-35, 37 to 40, 50 to 56 and 65-67 of Witness P-2377's statement, whereas these provide valuable background information about the witness' knowledge and do not relate to the acts and conducts of the accused nor to issues that are materially in dispute and may be potentially exculpatory [REDACTED].

¹² ICC-01/14-01/18-795-Conf-AnxA, page 3.

¹³ CAR-OTP-2124-0224, paras 52-54. Similarly, the Prosecution seeks to exclude paragraphs 70-71 which relate to Mr Yekatom. The Defence defers to the position of the Defence of Mr Yekatom for paragraphs 70-71.

B. The Defence defers to the position of the Defence team for Mr Yekatom with respect to the introduction of the statements and associated exhibits of Witnesses P-1721, P-2472, P-2698, P-1990 and P-1584

10. With respect to the introduction of the statements and associated exhibits of Witnesses P-1721, P-2472, P-2698, P-1990 and P-1584,¹⁴ the Defence defers to the Defence for Mr Yekatom's position to the extent the witnesses mention or provide information with respect to Mr Yekatom.

C. The Defence opposes the introduction of the prior recorded testimony and associated exhibits in relation to witnesses P-1172 and P-0974 as the requirements of rule 68(2)(b) of the Rules are not met

11. The Defence opposes the introduction of the statements and associated documents of Witnesses P-1172 and P-0974, as either they do not meet the requirements of rules 68(2)(b) of the Rules or would be prejudicial to the rights of Mr Ngaïssona. Contrary to the Prosecution's assertion, these witnesses do not provide "quintessentially 'crime-base' evidence going broadly to the contextual elements"¹⁵ and are not limited to providing "evidence concerning the nature and extent of the widespread Anti-Balaka attack carried out between September 2013 and December 2014 in the western Central African Republic".¹⁶ Rather, they provide extensive evidence which (1) relates to the alleged "acts and conducts" of Mr Ngaïssona; (2) relates to issues that are materially in dispute. The Defence should thus be availed of the opportunity to cross-examine these witnesses.

¹⁴ The Prosecution's requests for the introduction of the prior recorded testimony and associated exhibits for Witnesses P-1721, P-2472, P-2698 and P-1990 are found in the Fourth Request, whereas the Prosecution's request in relation to Witness P-1584 is found in the Fifth Request.

¹⁵ Fourth Request, para. 11; Fifth Request, para. 11.

¹⁶ Fourth Request, para. 2; Fifth Request, para. 2.

12. First, Witness P-1172¹⁷ is a [REDACTED]. He provides information *inter alia* about the Anti-Balaka leadership and structure. For instance, according to Witness P-1172, [REDACTED] Maxime Mokom, one of the main protagonists in the Prosecution's case, who would have implemented the alleged "Criminal Policy" and "Common Purpose".¹⁸ Witness P-1172 would have learned from Maxime Mokom directly that he was in contact with other Anti-Balaka leaders at the time and that Mokom was looking for contacts of military persons in Bangui willing to join the Anti-Balaka, including [REDACTED] Konaté [REDACTED].¹⁹ Witness P-1172 [REDACTED].²⁰ Significantly, Witness P-1172 provides testimony about Mr Ngaïssona's alleged "acts and conduct". For instance, Witness P-1172 says that [REDACTED].²¹ He further provides information as to [REDACTED], which is potentially exonerating, and which, again, is related to the charges against Mr Ngaïssona and his alleged individual criminal responsibility pursuant to articles 25(3) (c) and (d) of the Rome Statute.²² Witness P-1172 provides further information which is materially in dispute by testifying about [REDACTED].²³ The Witness also testifies about his knowledge of [REDACTED].²⁴

13. It is clear that Witness P-1172's prior recorded testimony goes well beyond providing mere "crime base" or contextual elements.²⁵ The introduction of Witness P-1172's prior recorded testimony would be prejudicial to the fairness of the proceedings, as it would deprive Mr Ngaïssona of his right to confront

¹⁷ Fifth Request, paras 17-20.

¹⁸ For instance, see Prosecution Trial Brief, paras 4-6; ICC-01/14-01/18-403-Conf, para. 101.

¹⁹ CAR-OTP-2082-1058-R03, para. 33.

²⁰ CAR-OTP-2082-1058-R03, paras 28-36.

²¹ CAR-OTP-2082-1058-R03, para. 40. Although the Prosecution has excluded from the scope of its request paragraphs 40 and 42 of Witness P-1172's statement, paragraph 41 remains included, despite being related to those excluded paragraphs.

²² For instance, the Witness testifies about how [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ Fourth Request; paras 9, 11; Fifth Request, paras 9, 11.

and examine a witness making direct allegations against him and to elicit potentially exonerating evidence from this witness during examination by the Defence. This is particularly the case given that the Prosecution seeks to introduce only one out of two statements given by the Witness to the Prosecution.²⁶ Granting the introduction of the Witness' second statement would deprive the Defence of the opportunity to potentially confront Witness P-1172 [REDACTED], which are on the Prosecution's List of Evidence.²⁷ The introduction of his prior recorded testimony pursuant to rule 68(2)(b) would therefore not be in the interests of justice.

14. *Second*, the proposed introduction of Witness P-0974's statement along with two associated exhibits does not meet the requirements of rule 68(2)(b) of the Rules. [REDACTED].²⁸ Witness P-0974 provides evidence with respect to the alleged Anti-Balaka leadership, structure and coordination, in particular, [REDACTED].²⁹ Significantly, Witness P-0974 provides (hearsay) evidence about [REDACTED].³⁰ He testifies about how Mr Ngaïssona [REDACTED], a statement which is potentially exculpatory in nature.³¹ Witness P-0974 provides evidence that he heard that Mr Ngaïssona gave money to the Anti-Balaka leaders.³² The Witness further provides evidence of [REDACTED].³³ Although the Defence acknowledges that the Prosecution seeks to excluded certain paragraphs where the witness speaks about Mr Ngaïssona, some paragraphs are not excluded.³⁴

²⁶ Witness P-1172 gave a first statement, which is not subject to the Prosecution's request pursuant to rule 68(2)(b) [REDACTED].

²⁷ [REDACTED]. For instance, the Witness explains.

²⁸ [REDACTED].

²⁹ See [REDACTED].

³⁰ [REDACTED].

³¹ Ibid.

³² [REDACTED].

³³ [REDACTED].

³⁴ The Prosecution seeks to exclude paragraphs 81, 91, 94-96, ICC-01/14-01/18-794-Conf-AnxA, pages 8-9.

15. It is clear that Witness P-0974's prior recorded testimony goes well beyond providing mere "crime base" or contextual elements;³⁵ he does not make mere "peripheral discrete references to the accused."³⁶ In light of the fact that he provides evidence against Mr Ngaïssona, and given [REDACTED], it would be unduly prejudicial to the Defence to not be availed of the opportunity to examine Witness P-0974. Introducing Witness P-0974's prior recorded testimony through rule 68(2)(b) would deprive Mr Ngaïssona of his right to not only confront and examine a witness making direct allegations against him, but also to elicit potentially exonerating evidence from this witness during questioning.

IV. Relief Sought

16. The Defence respectfully requests the Chamber to:

- a. **REJECT** the Prosecution's requests to introduce the prior recorded testimonies and associated exhibits of Witnesses P-1172 and P-0974;

17. In the event the Chamber would grant the introduction of the remaining rule 68(2)(b) applications, the Defence respectfully requests the Chamber to:

- a. **ORDER** the introduction of the prior recorded testimonies of Witnesses P-0460, P-0461, P-1143, P-0520, P-1676, P-1865, P-2377 in their entirety, insofar as they do not directly relate to Mr Ngaïssona's alleged "acts and conduct" or to matters that are materially in dispute, as submitted in paragraphs 7-8, above, and;

³⁵ Fourth Request; para. 4; Fifth Request, para. 4.

³⁶ *Prosecutor v. Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rules 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, 18 November 2016, para.13.

- b. **ORDER** the exclusion of paragraphs 68, 69 and 74 from Witness P-0589's statement in their entirety, as well as paragraphs 52-54, 70-71 from Witness P-0473's statement, as submitted in paragraph 9, above.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 20 January 2022,

At The Hague, the Netherlands.