

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **21 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
NGAÏSSONA***

PUBLIC

Public Redacted Version of “Defence Consolidated Response to the Prosecution Sixth, Seventh and Eighth Requests for the formal submission of prior recorded testimony pursuant to Rule 68(2)(b) (ICC-01/14-01/18-802-Conf, ICC-01/14-01/18-808-Conf, ICC-01/14-01/18-812)”, 22 February 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-Namkeamai

Ms Antonina Dyk

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 11 January 2021, the Prosecution filed three requests, namely the “Prosecution’s Sixth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)”¹ (“Sixth Request”), the “Prosecution’s Seventh Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)” (“Seventh Request”),² and the “Prosecution’s Eighth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)” (“Eighth Request”)³ requesting the formal submission of the prior recorded testimony of a total of 19 witnesses and their associated exhibits under rule 68(2)(b).
2. The next day, on 12 January 2021, the Defence for Patrice-Edouard Ngaïssona (“the Defence”) requested that the deadline to respond to the three requests be extended to 22 February 2021.⁴ On 15 January 2021, 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”).⁵
3. After careful examination of each individual application for the introduction of the prior recorded testimonies and associated exhibits subject to the Sixth, Seventh and Eight 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

¹ ICC-01/14-01/18-802-Conf (“Sixth Request”).

² ICC-01/14-01/18-808-Conf (“Seventh Request”).

³ ICC-01/14-01/18-812-Conf (“Eighth Request”).

⁴ ICC-01/14-01/18-815-Conf.

⁵ Email from Trial Chamber V to parties and participants, 15 January, at 10:38.

consolidated response upon receipt of the public redacted versions of the Prosecution's Sixth, Seventh, and Eighth Requests.

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.⁶ 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.

A. The Defence defers fully to the Chamber's discretion with respect to the introduction of the statements and associated exhibits of Witnesses P-0505, P-2133, P-0567, P-1739, P-2467 and P-2652 and equally defers to the Chamber's discretion with respect to Witnesses P-0342, P-2432 P-1576, and P-1530 if certain conditions are met

6. With respect to the statements and associated exhibits of Witnesses P-0505, P-2133, P-0567, P-1739, P-2467 and P-2652⁷ 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.

⁶ ICC-01/14-01/18-785-Conf, para. 6.

⁷ The Prosecution's requests for the introduction of the prior recorded testimony and associated exhibits for Witnesses P-0505, P-2133, P-0567 are found in the Sixth Request. The statements and associated exhibits for Witness 1739 are found in the Seventh Request, whereas the Prosecution's application for Witnesses P-2467 and P-2652 are found in the Prosecution's Eighth Request.

7. With respect to the statements and associated exhibits of Witnesses P-1576, P-1530, P-0342 and P-2432,⁸ the Defence defers to the Chamber's discretion to grant the applications if certain conditions are met. These conditions are the following: first, that for the rule 68(2)(b) application regarding Witness P-0342, the Chamber order the inclusion of certain excluded paragraphs from the Prosecution's application and second, for Witnesses P-1576, P-1530 and P-2432 certain passages be excluded if the Prosecution's request is granted since they refer to the acts and conduct of Mr Ngaïssona.
8. The Defence first observes that the two statements for Witness P-0342 contain many references to documents to which the Defence does not have access. Therefore, it is not in a position to fully appreciate the totality of Witness P-0342's statements.⁹ Second, if the Chamber does grant the Prosecution's request the Defence requests that paragraphs 52-53 of Witness P-0342's first statement, [REDACTED] be also introduced as prior recorded testimony.
9. As previously submitted by the Defence, albeit in a different context of a Prosecution request to maintain non-standard redactions to these very same paragraphs of Witness P-0342's statement, [REDACTED].¹⁰ In his decision on non-standard redactions, the Single Judge agreed that the information was relevant to the Defence and therefore rejected the Prosecution's request to redact paragraphs 52-53 [REDACTED].¹¹
10. Given the relevance of these paragraphs to live issues in the case and their potentially exonerating nature, the Defence would examine Witness P-0342 on these paragraphs were he to testify *via voce*. Since through the application of

⁸ The Prosecution's requests for the introduction of the prior recorded testimony and associated exhibits for Witnesses P-1530 and P-1576 are found in the Seventh Request whereas the Prosecution's application for Witnesses P-0342 and P-2432 are found in the Prosecution's Eighth Request.

⁹ See ICC-01/14-01/18-845-Conf, para 9; ICC-01/14-01/18-850, para. 4.

¹⁰ ICC-01/14-01/18-737-conf paras. 9-10.

¹¹ ICC-01/14-01/18-767-Conf-Red, para 47.

rule 68(2)(b), the Prosecution is asking the Court to not allow for the examination of this witness by the parties, the Defence requests that the paragraphs be included in the event that the Chamber allows the introduction of the statement via rule 68(2)(b) such that it is not prejudiced by its inability to question Witness P-0342 [REDACTED].

11. For Witnesses P-1576, P-1530, and P-2432, the Defence submits that the Prosecution's rule 68(2)(b) request should not be granted unless the Chamber excludes certain paragraphs, which refer to the acts and conduct of Mr Ngaïssona. The limitations of a party's use of Rule 68(2)(b) are clear. The provision only allows for the introduction of a statement when the prior recorded testimony "goes to proof of a matter other than the acts and conduct of the accused." "Acts and conduct of the accused" is understood to refer to "those actions of the accused which are described in the charges brought against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charges."¹²
12. It is the position of the Defence that were the Chamber to allow the introduction of Witness P-1576's statement under rule 68(2)(b) then paragraph 41 of the statement should be excluded since it does refer to the alleged "acts and conduct" of Mr Ngaïssona. In the relevant paragraph, Witness P-1576 states that [REDACTED], and further states that Mr Ngaïssona was close to Francois Bozizé.¹³ The wording of the statement is unclear as to whether the witness obtained this information [REDACTED].
13. The purported closeness that Mr Ngaïssona had with Francois Bozizé is relied upon by the Prosecution to establish that Mr Ngaïssona took steps to structure

¹² *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.12.

¹³ [REDACTED].

the Anti-Balaka as part of a strategy to return Francois Bozizé to power.¹⁴ Given that structuring the Anti-Balaka is alleged to be one of Mr Ngaïssona's alleged contributions to the crimes, this paragraph 41 in which [REDACTED] and Mr Ngaïssona's alleged closeness to Francois Bozizé is evoked should be excluded.

14. Similarly, the Defence requests that for Witness P-1530, the following sentences be excluded from paragraph 55 since the passage relates to the acts and conduct of Mr Ngaïssona: [REDACTED].¹⁵

15. Mr Ngaïssona's contacts and relationship with certain Comzones such as 12 Puissances whom the Prosecution characterizes as "notoriously violent against Muslims" is used by the Prosecution to try to establish that Mr Ngaïssona allegedly supported and promoted the Anti-Balaka's criminal policy and common purpose.¹⁶ Therefore, this passage, regardless of whether it is qualified as a rumor, in which the witness states that [REDACTED]. Therefore, it should be excluded from the application.

16. The application for Witness P-2432 also contains passages that relate directly to the alleged acts and conduct of Mr Ngaïssona. In the relevant passages, the witness describes [REDACTED].¹⁷ These passages should be excluded if the Chamber were to grant the Prosecution's request to introduce P-2432's statement via rule 68(2)(b). P-2432 states that [REDACTED].¹⁸ These types of statements go to the heart of the charges, namely the role Mr Ngaïssona had as the National Coordinator, and whether he had any control over the organization. [REDACTED]. [REDACTED],¹⁹ [REDACTED].

¹⁴ Prosecution's Trial brief, para 253.

¹⁵ [REDACTED].

¹⁶ Prosecution's Trial Brief, paras 135-137.

¹⁷ [REDACTED]. [REDACTED].

¹⁸ [REDACTED]

¹⁹ [REDACTED].

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-0365, P-2671 and P-1503

17. With respect to the introduction of the statements and associated exhibits of Witnesses P-0365, P-2671, P-1503,²⁰ the Defence defers to the Defence for Mr Yekatom's position to the extent the witnesses provide information with respect to Mr Yekatom or charges with which Mr Ngaïssona is not charged.

C. The Defence opposes the introduction of the prior recorded testimony and associated exhibits in relation to witnesses P-1442, P-2973, P-1932, P-1921, P-2050 and P-2138 as their introduction would be prejudicial to the rights of Mr Ngaïssona

18. The Defence opposes the introduction of the statements and associated documents of Witnesses P-1442, P-2973, P-1932, P-1921, P-2050 and P-2138, as their introduction would be inconsistent and prejudicial to the rights of Mr Ngaïssona under Rule 68(2)(b) of the Rules. Since the statements provide extensive evidence which relates to live issues in the case that are materially in dispute, the Defence should be availed of the opportunity to examine these witnesses.

19. With respect to the rule 68(2)(b) applications for Witnesses P-1442, P-2973 and P-1932, the Defence fully joins and supports the arguments raised by the Yekatom Defence consolidated response to the Prosecutions Sixth, Seventh and Eighth Requests.²¹

²⁰ The Prosecution's requests for the introduction of the prior recorded testimony and associated exhibits for Witness 1442 is found in the Sixth Request whereas the Prosecution's request in relation to Witnesses P-2973 and P-1932 is found in the Seventh Request. Lastly, the prior recorded testimony and associated exhibits in relation to Witnesses P-1921, P-2050, P-2138 are found in the Eighth Request.

²¹ ICC-01/14-01/18-845-Conf, paras 30-39, 60-65. For witness P-1442 the Defence submits that in addition to the bias indicated by the Yekatom Defence, the witness exhibits a personal bias against Mr Ngaïssona

20. The Defence additionally opposes the introduction of the prior recorded testimony of Witnesses P-1921, P-2050 and Witness P-2138 under rule 68(2)(b) as it would be prejudicial to the rights of Mr Ngaïssona.
21. While Witness P-1921 and P-2050 [REDACTED]. One of the factors that the Chamber must consider when evaluating whether to introduce testimony under rule 68(2)(b) is whether the evidence relates to issues that are materially in dispute. In considering this factor the Chamber “shall consider whether the prior recorded testimony relates to matters which are soundly and conceivably disputed between the parties, and are crucial, or of at least sufficient significance for the Chamber’s eventual determination of the charges against the accused in its judgment under Article 74 of the Statute.”²²
22. The significance of this evidence is made clear by the Prosecution’s Trial Brief, in which it cites Witnesses P-1921’s and P-2050’s statements to establish that Mr Ngaïssona “allowed Anti-Balaka leaders notorious for their crimes...to use his Boy-Rabe home as a base,”²³ and to advance the argument that Mr Ngaïssona’s alleged contributions encompassed allegedly taking steps to structure the Anti-Balaka post-January 2014 by placing his residence at the disposal of the National Coordination where prisoners were detained.²⁴
23. The Defence has contested Mr Ngaïssona’s control over his properties in Boy-Rabe following the Seleka coup in previous submissions to the Chamber,²⁵ [REDACTED]. [REDACTED] especially since the Prosecution cites their testimony to attempt to establish Mr Ngaïssona’s alleged individual criminal

by referring to [REDACTED]. The statement in this regard is anecdotal and is so lacking in any detail and credibility that it amounts to a conspiracy-based rumor.

²² ICC-02/04-01/15-596-Red, para. 15.

²³ Prosecution’s Trial Brief, para 181.

²⁴ Prosecution’s Trial brief, para 270.

²⁵ ICC-01/14-01/18-737-conf paras. 9-10.

responsibility. Given the discrete issues upon which the Defence would examine P-2050 and P-1921, the Defence submits that the expediency of the proceedings would not be affected if the witnesses were to testify *viva voce*. The Defence would merely request to be granted sufficient time to question the witnesses as to: (1) [REDACTED], (2) [REDACTED] and (3) [REDACTED].²⁶

24. Lastly, the Defence strongly opposes the introduction of Witness P-2138 under rule 68(2)(b). Contrary to the Prosecution's assertions Witness P-2138's evidence does not go primarily to the proof of the crime base.²⁷ Rather, Witness P-2138 prospective evidence [REDACTED]. [REDACTED]. [REDACTED] prospective evidence goes to the heart of core issues in dispute in this case, namely whether the Anti-Balaka could be considered an organization under Article 7 and whether the National Coordination and specifically Mr Ngaïssona had any power over the Anti-Balaka in the provinces.

25. [REDACTED]. [REDACTED].²⁸ [REDACTED].²⁹ [REDACTED].³⁰ [REDACTED].³¹ [REDACTED].³²

26. The aforementioned examples are of paramount importance since such evidence could have an impact in the Chamber's determination of Mr Ngaïssona's alleged criminal responsibility. Therefore, his testimony should be heard *viva voce* before the Chamber.

IV. Relief Sought

²⁶ [REDACTED]. [REDACTED].

²⁷ ICC-01/14-01/18-812-Conf, para 9.

²⁸ [REDACTED]

²⁹ [REDACTED].

³⁰ [REDACTED]; [REDACTED].

³¹ [REDACTED]

³² [REDACTED]

27. 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-1442, P-2973, P-1932, P-1921, P-2050 and P-2138

28. 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 testimony of Witness P-0342 including paragraphs 52-53 of statement [REDACTED], as submitted in paragraphs 8-10 above
- b. **ORDER** the exclusion of:
 - i. paragraph 41 of Witness P-1576's statement as submitted in paragraphs 12-13 above ;
 - ii. paragraph 55 of Witness P-1530's statement as submitted in paragraphs 14-15 above;
 - iii. paragraphs 23-39, and 44 of Witness P-2432's statement as submitted in paragraph 16 above.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 21 January 2022,
At The Hague, the Netherlands.