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**International
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Court**

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Date: 17 February 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 Response to the 'Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-2658 pursuant to Rule 68(3)', ICC-01/14-01/18-1273-Conf, 7 February 2022

Source: Defence of Patrice-Edouard Ngaïssona

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 response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2658 pursuant to Rule 68(3)” dated 21 January 2022 (“Request”).¹
2. The Defence opposes the Request. As will be demonstrated below, P-2658’s prior statement (i) is central to core issues in the Prosecution’s case against Mr Ngaïssona, (ii) refers to the alleged acts and conduct of Mr Ngaïssona and (iii) is not corroborated by other witnesses who are expected to offer full in-court testimony on several issues relevant to the charges, including the organization and structure of the Gobéré group and Mr Ngaïssona’s alleged contributions in relation to that group. Also, the importance of the events in Gobéré to this case and the fact that none of the other witnesses who are expected to offer full oral testimony have spent time in Gobéré militate in favour of the rejection of the Request and the fully *viva voce* testimony of P-2658 before the Chamber. This is particularly warranted in light of the numerous manifest inconsistencies between P-2658’s prior statement and other witness statements/testimonies. For these reasons, the formal submission of P-2658’s prior testimony under rule 68(3) would cause undue prejudice to the fair trial rights of Mr Ngaïssona while no time can realistically be saved for this particular witness’ testimony.

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 shortly.

III. APPLICABLE LAW

¹ ICC-01/14-01/18-1228-Conf, along with confidential Annexes A and B.

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

5. The importance of the evidence intended to be presented by P-2658 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 prior statement, P-2658 provides first-hand information on, *inter alia*, (i) [REDACTED], including [REDACTED] their alleged training in Gobéré, their alleged division into groups, the alleged military-like organisation of Dédane and other alleged key Anti Balaka leaders including Rodrigue Ngaïbona, Thierry Lébéné and Théophile Dangba; (ii) Mr Ngaïssona's alleged communication with Dédane through intermediaries in 2013, and his alleged role in sending the Anti-Balaka ammunition and equipment; (iii) the Anti-Balaka's alleged planning of attacks on Bossangoa, Bouca and Bowai; (iv) the alleged attempted attack of Bossangoa on 17 September 2013; (v) the alleged Anti-Balaka attack of Bossangoa on 5 December 2013; and (vi) the alleged displacement of Bossangoa's Muslim population to the *Ecole de la Liberté* from 5 December 2013 onwards, and their alleged subsequent evacuation to Chad.

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.

7. Many of the issues discussed by this witness, that are core issues in this case, are materially in dispute, in particular those relating to (i) Mr Ngaïssona's alleged role in financing and arming the Anti-Balaka in 2013, (ii) the organization and planning of the Anti-Balaka in Gobéré and (iii) the alleged Bossangoa attack. The latter is an important subject of this case, linked to twelve different Counts, all of which are brought against Mr Ngaïssona. P-2658's prior statement relates directly to charged crimes in the context of this alleged attack, including Counts 31-32 and 37-39. While the Defence will have the opportunity to examine the witness on all these issues in court, much of the witness' account is uncorroborated, as elaborated below, and will impose an unreasonable burden on the Defence to investigate and refute.
8. Moreover, the Prosecution fails to adequately substantiate how precisely P-2658's proposed evidence is corroborated by the evidence of the witnesses cited by the Prosecution as allegedly corroborative. The Prosecution does not provide any witness statement references in support of its arguments. Having reviewed the content of the statements and testimonies of the witnesses cited by the Prosecution, the Defence has the following observations.
9. First, out of the 6 witnesses the Prosecution is citing as allegedly corroborative for the structure and organisation of the Gobéré group, only P-2269 and P-1521 were expected to offer full in-court testimony. Meanwhile, [REDACTED], and P-1521, who already testified, clearly denied having spent any time in Gobéré. P-1521 even had to remind the Prosecution during its questioning that having not been present in Gobéré, he was not in a position to answer its questions about the organisation or structure of the Gobéré group.⁵ Therefore, [REDACTED], P-2658's proposed evidence on the structure and organisation

⁵ See, e.g., P-1521 : ICC-01/14-01/18-T-081-CONF-ENG ET 30-11-2021, at 12, lines 19-25, at 13 and at 14, lines 1-19; ICC-01/14-01/18-T-084-CONF-ENG ET 06-12-2021, at 39, lines 16-25 and at 40, lines 1-25.

of the Gobéré group will not be corroborated by any witnesses expected to offer full in-court testimony.⁶ On this ground alone, the Request should be rejected as the Chamber will not have a fully developed account of the events, and thus adequately perform its truth-seeking function, without hearing, *viva voce*, the accounts of multiple witnesses on Gobéré, where the Anti-Balaka allegedly originated, trained and planned the different alleged attacks. The question of Mr Ngaïssona's alleged contribution in this regard is also directly at stake.

10. Secondly, having compared P-2658's prior statement on this issue with the prior statements of P-0966, P-2602, P-2269, P-2251, and P-0975, none of which again, did or will offer full in-court testimony, the Defence submits that P-2658's prior statement is manifestly inconsistent with these other witness statements or testimonies.

11. For instance, regarding training, P-2269 states that [REDACTED] only trained their men on how to shoot a gun.⁷ In the same vein, P-0975 states that training merely consisted of self-defence techniques and the use of assembling weapons for those who had one.⁸ P-2658 is the only one to refer to military-like training, including having allegedly [REDACTED].⁹ Thus, while P-2269 and P-0975 only make mention of rudimentary training, P-2658 alleges [REDACTED] military-like training.

12. As to the type of weapons, P-2658 states that the former soldiers had automatic weapons while the others only had hunting rifles.¹⁰ This is inconsistent with P-

⁶ See e.g. ICC-01/14-01/18-1114-Conf-Corr, para. 14; ICC-01/14-01/18-1186-Conf, para. 20.

⁷ P-2269: CAR-OTP-2111-0336-R01, at 0343, para 53.

⁸ P-0975 : CAR-OTP-2033-7885, at 7889, paras 28-29.

⁹ P-2658 : CAR-OTP-2126-0012-R01, at 0027, para 96.

¹⁰ P-2658: CAR-OTP-2126-0012-R01, at 0025, para 82 and at 0027, para 95.

2251 and P-0975's statements who state having only seen hunting rifles and machetes as opposed to military-type weapons.¹¹

13. While P-2658 describes Dédane as the overall chief in charge of Gobéré,¹² P-2269 suggests that Dédane was only a fighter among others and P-2251 believes the overall leader was Konaté.¹³ [REDACTED]. [REDACTED],¹⁴ [REDACTED].¹⁵

14. Similar inconsistencies can be observed in respect of numerous topics materially in dispute, including the alleged overall number of elements in Gobéré,¹⁶ the alleged number of groups the elements were divided into,¹⁷ the number of locations where attacks were allegedly planned,¹⁸ whether Anti-Balaka elements in Gobéré were encouraged to take any private belongings by force,¹⁹ and whether these Anti-Balaka elements equated Muslims with Seleka.²⁰ With respect to this last point, P-2602 indeed explains that the Anti-Balaka did not want to kill Muslims but they were merely aiming at driving the Seleka mercenaries, coming from Chad, Sudan, and Mali, away as they came to the towns of Central African Republic to murder and harm the population.²¹ [REDACTED].²²

¹¹ P-2251 : CAR-OTP-2093-0045-R01, at 0052, para 45 and ICC-01/14-01/18-T-043-CONF-ENG CT 07-06-2021, at 20, lines 9-16. P-0975: CAR-OTP-2033-7885, at 7889, para 28.

¹² P-2658 : CAR-OTP-2126-0012-R01, at 0020, paras 46-49, at 0025 para 87, at 0026, para 92 at 0027, para 96.

¹³ P-2251 : ICC-01/14-01/18-T-043-CONF-ENG CT 07-06-2021, at 14, lines 15-20. P-2269 : CAR-OTP-2111-0336-R01, at 0346, para 76.

¹⁴ P-2658 : CAR-OTP-2126-0012-R01, at 0019, para 45.

¹⁵ P-2251: CAR-OTP-2093-0045-R01, at 0077, para 210.

¹⁶ Compare P-2658 : CAR-OTP-2126-0012-R01, at 0024-0025, para 78 with P-0966: CAR-OTP-2031-0241-R03, at 0246, para 29 and at 0248 para 39.

¹⁷ Compare P-2658 : CAR-OTP-2126-0012-R01, at 0025-0026, paras 92, 97 with P-0966 : CAR-OTP-2031-0241-R03, at 0247, 0249, paras 29, 43; P-2269 : CAR-OTP-2111-0336-R01, at 0346, para 77 and P-2602: CAR-OTP-2118-9617-R01, at 9618-9620.

¹⁸ Compare P-2658 : CAR-OTP-2126-0012-R01, at 0028, para 105 with P-0966: CAR-OTP-2031-0241-R03, at 0248, para 42.

¹⁹ Compare P-2658 : CAR-OTP-2126-0012-R01, page 0026, para 90 with P-2602 : CAR-OTP-2118-9525-R01, at 9537.

²⁰ Compare P-2658 : CAR-OTP-2126-0012-R01, at 0028, para 104 with P-2251 : CAR-OTP-2093-0045-R01, at 0052, para 46 and P-2602: CAR-OTP-2118-9641-R01 at 9651-9652.

²¹ P-2602: CAR-OTP-2118-9641-R01 at 9651-9652.

²² P-2251 : CAR-OTP-2093-0045-R01, at 0052, para 46.

15. Therefore, it would be prejudicial to the fair trial rights of Mr Ngaïssona to have admitted into evidence a statement containing such an extensive number of incriminating allegations in relation to events in Gobéré, considering that (i) none of the witnesses alleging having spent time in Gobéré are expected to offer full in-court testimony, and that (ii) most rule 68(3) witnesses having spent some time in Gobéré seem to be contradicting the incriminating evidence proposed by P-2658.
16. Moreover, several issues discussed by P-2658, including some that are central to Mr Ngaïssona's case, are not discussed, nor confirmed, by any of them. For instance, so far as the Defence is aware, none of the witnesses allegedly present in Gobéré provide information regarding (i) alleged contacts between Dédane and Mr Ngaïssona through three intermediaries, (ii) Mr Ngaïssona's alleged message in relation to ammunition and equipment being sent to Gobéré,²³ (iii) the alleged role attributed to women and children in Gobéré, [REDACTED],²⁴ and (iv) [REDACTED].²⁵
17. Regarding the alleged 5 December attack on Bossangoa, several inconsistencies can also be identified between P-2658's account of events and that of other alleged crime-based witnesses. [REDACTED].²⁶ [REDACTED].²⁷
18. In light of the above, the Defence contests the credibility of P-2658 and submits that testimony given under oath in its entirety, under the 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

²³ P-2658 : CAR-OTP-2126-0012-R01, at 0037, para 164.

²⁴ P-2658 : CAR-OTP-2126-0012-R01, at 0025-0026, paras 86-89.

²⁵ P-2658 : CAR-OTP-2126-0012-R01, at 0017, para 24.

²⁶ Compare P-2658: CAR-OTP-2126-0012-R01, at 0033, para 132 with P-2200 : CAR-OTP-2088-2146-R03, at 2155, para 44 and P-2049 : CAR-OTP-2088-2173-R03, at 2188, para 77. As to P-2657, [REDACTED].

²⁷ P-2658: CAR-OTP-2126-0012-R01, at 0033, para 132.

reactions, demeanour and composure, and to immediately seek clarifications”.²⁸

19. Also, the fact that P-2658 is the source of certain pieces of information provided by several crime-based witnesses in relation to the Bossangoa events, including for instance P-2453 and P-2049, further militates against the introduction of P-2658’s prior statement pursuant to rule 68(3) of the Rules.²⁹

20. Finally, the time-saving as announced by the Prosecution is not persuasive.³⁰ The Prosecution would only be saving two hours based on the four-hour estimate initially given for P-2658 in its Final Witness List.³¹ Furthermore, given the density of information contained in P-2628’s prior statement, including the multitude of issues that are central to the Prosecution’s case against Mr Ngaïssona, and given the lack of credibility of this witness as illustrated *inter alia* by the many uncorroborated and inconsistent elements found in his prior statement, introducing P-2568’s prior recorded testimony under rule 68(3) would impose an unreasonable burden on the Defence in preparing for and conducting the cross-examination. Obliging the Defence to question the witness on almost every single written allegation would unreasonably prolong the overall duration of P-2658’s testimony and not lead to saving court time which is the *raison d’être* of Rule 68(3). Therefore, the Defence strongly contests the Prosecution’s argument that the expeditiousness of the proceedings would be promoted by introducing P-2658’s prior testimony under rule 68(3).³² Moreover, this Chamber has already rejected former requests when the announced time saved was much more considerable.³³ Therefore, the Defence

²⁸ ICC-01/14-01/18-964-Conf, para. 19.

²⁹ P-2453 : CAR-OTP-2111-0415-R02, para. 55 and P-2049 : CAR-OTP-2088-2173-R02, para. 67.

³⁰ Request, paras 13-16.

³¹ ICC-01/14-01/18-724-Conf-AnxA, p. 30.

³² Request, paras 16-17.

³³ See ICC-01/14-01/18-964-Conf, para. 20.

does not believe that two to four hours being saved on the Prosecution's questioning should be considered a definitive factor.

21. In light of the above, the Defence submits that it is necessary for Witness P-2658'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-2658's prior-recorded testimony and associated exhibits pursuant to Rule 68(3).

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 17 February 2022

At The Hague, the Netherlands.