

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **22 February 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-0287 pursuant to Rule 68(3)” and the “Prosecution’s Request for  
the Formal Submission of the Prior Recorded Testimony of P-0627 pursuant to  
Rule 68(3)”, 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:**

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**Applicants**

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**Detention Section**

**Victims Participation and Reparations  
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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-0287 pursuant to Rule 68(3)” and the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-0627 pursuant to Rule 68(3)” (“Requests”).<sup>1</sup>
2. The Defence defers to the Chamber’s discretion as to whether the Prosecution’s Requests to formally submit the prior recorded testimonies and associated exhibits of Witnesses P-0287 and P-0627 are compatible with Mr Ngaïssona’s fair trial rights. Should the Chamber grant the Prosecution’s Requests, the Defence requests, however, that certain safeguards be imposed with respect to the live testimony of Witnesses P-0287 and P-0627.

## **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**

4. Article 67(1)(e) of the Rome Statute (“Statute”) provides the minimum fair trial guarantee that accused persons are entitled “[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her (...)”.

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<sup>1</sup> ICC-01/14-01/18-879-Conf, along with Annexes A and B; ICC-01/14-01/18-877-Conf, along with Annexes A, B and C.

5. Article 69(2) of the Statute provides that “[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence” and that “[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused”.
6. Rule 68(1) of the Rules provides that the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally.<sup>2</sup> Rule 68(3) of the Rules provides:

3. If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

#### IV. Submissions

##### A. The Defence should not be limited in the time allocated to cross-examine Witnesses P-0287 and P-0627

7. In its Initial Directions on the Conduct of the Proceedings, the Presiding Judge allocated a maximum of 400 hours to the Prosecution in order to present its case and noted the Court’s practice that the non-calling party would require the same amount of time as the calling party to question a witness.<sup>3</sup> However, the

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<sup>2</sup> See *Prosecutor v. Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, ICC-01/05-01/08-1386, 3 May 2011, para. 78; *Prosecutor v. Gbagbo and Blé Goudé*, Decision on the “Prosecution’s application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)”, ICC-02/11-01/15-870, 7 April 2017, para. 7; *Prosecutor v. Ntaganda*, Public redacted version of ‘Preliminary ruling on Prosecution request for admission under Rule 68(3) of the prior recorded testimony and associated material of Witness P- 0761’, ICC-01/04-02/06-1640-Red, 27 February 2017, para. 7; *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, ICC-02/04-01/15-621, 5 December 2016, para. 6; *Prosecutor v. Al Hassan*, Public redacted version of the Decision on Prosecution’s requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, ICC-01/12-01/18-987-Red, 5 August 2020, paras 9-10.

<sup>3</sup> ICC-01/14-01/18-631, paras 22-24.

Chamber later found that the Prosecution’s extensive reliance on rule 68 may impact the time allocated for examination by the participants.<sup>4</sup> The Chamber recalled that when resorting to rule 68(3), the calling participant is “expected to streamline its questioning considerably” and that the Prosecution is therefore “expected to only conduct a limited and focused supplementary examination”.<sup>5</sup> As the non-calling party, the Defence is not bound by this principle. In *Prosecution v Ongwen*, Trial Chamber IX held that “[w]hile the Prosecution is granted the opportunity to conduct a limited focused supplementary examination of the witnesses, the Defence is not constrained to the amount of time used by the Prosecution and will be granted a reasonable amount of time to examine each witness.”<sup>6</sup>

8. Thus, the Defence respectfully reiterates its previous request to the Chamber, that it not be limited in the time allocated to cross-examine the Prosecution witnesses called pursuant to rule 68(3), in order to safeguard Mr Ngaïssona’s fair trial rights.<sup>7</sup>

#### **B. The Prosecution’s Request [REDACTED]**

9. The Prosecution requests the Chamber to issue an order which would [REDACTED].<sup>8</sup> [REDACTED].<sup>9</sup>

<sup>4</sup> ICC-01/14-01/18-685, paras 35-38.

<sup>5</sup> Ibid, para. 36.

<sup>6</sup> Emphasis added. *Prosecutor v. Ongwen*, Decision on Prosecution’s Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, ICC-02/04-01/15-621, 5 December 2016, para. 32.

<sup>7</sup> See above, paras 4-6; *Prosecutor v. Gbagbo and Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, ICC-02/11-01/15-744, 1 November 2016, paras 62-63; *Prosecutor v. Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, para. 78; *Prosecutor v. Bemba et al.*, Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-Red-Corr, 12 November 2015, para. 51.

<sup>8</sup> Prosecution’s Request, paras 21-24.

<sup>9</sup> ICC-01/14-01/18-877-Conf-AnxC.

10. Without prejudice to any objection the Defence may raise at a later stage, and should the Chamber grant the Prosecution's Request in relation to Witness P-0287, the Defence defers to the Chamber's discretion in [REDACTED], provided that the Chamber order that safeguards be put in place to protect Mr Ngaissona's fair trial rights.
11. *First*, the Defence requests that the Chamber ensure generally that Mr Ngaissona's right to cross-examine Witness P-0287 shall not be infringed [REDACTED]. The Chamber should preserve its judicial discretion on whether to authorise [REDACTED], and where the rights of Mr Ngaissona to cross-examine the Witness may be infringed.<sup>10</sup> The Defence recalls that it is bound by the same deontology and duty to respect the confidentiality of any information as the members of the Prosecution or the Chamber.<sup>11</sup> Thus, the Defence requests that the Chamber order minimum guarantees, including that [REDACTED] i),<sup>12</sup> ii) [REDACTED], iii) [REDACTED],<sup>13</sup> and iv) [REDACTED].<sup>14</sup>
12. *Second*, the Defence requests the Chamber to [REDACTED]. [REDACTED].<sup>15</sup>

## V. Relief Sought

13. Should the Chamber grant the Prosecution's Requests, the Defence respectfully requests that:
- a. the Defence not be limited in the time allocated to cross-examine Witnesses P-0287 and P-0627;

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<sup>10</sup> [REDACTED].

<sup>11</sup> Article 8, ICC-ASP/4/Res.1.

<sup>12</sup> [REDACTED].

<sup>13</sup> *Ibid.*

<sup>14</sup> [REDACTED].

<sup>15</sup> [REDACTED].

- b. the Chamber put in place safeguards in order to protect the rights of Mr Ngaissona, as described in paragraphs 9-12, above, in relation to the live testimony of Witness P-0287.

Respectfully submitted,



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Mr Knoop, Lead Counsel for Patrice-Edouard Ngaissona

Dated this 22 February 2021

At The Hague, the Netherlands.