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**International  
Criminal  
Court**

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

Date: 16 January 2023

**TRIAL CHAMBER V**

**Before:** 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 the "Defence Response to the 'Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-2625 pursuant to Rule 68(3)", ICC-01/14-01/18-1640-Conf, 28 October 2022**

**Source:** Defence of Patrice-Edouard Ngaissona

**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 responds to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-2625 pursuant to Rule 68(3)” dated 17 October 2022 (“Request”).<sup>1</sup>
2. The Defence opposes the Request. Any time-saving in the questioning of the witness will be outweighed by the irreparable prejudice that the formal submission of the prior testimony would cause to the fair trial rights of Mr Ngaïssona. As elaborated below, not only is this late attempt to introduce P-2625’s prior statement into evidence made out of despair and with total disregard for the Chamber’s initial directions on the conduct of the proceedings, but this prior statement, which goes to the heart of the charges against Mr Ngaïssona, is vitiated to such extent that it would impact the integrity of the proceedings to allow it on the case record.

## II. CONFIDENTIALITY

3. In accordance with regulation 23 *bis* (1) and (2) of the Regulations of the Court, this response is filed *ex parte* available only to the Defence and to the Defence for Mr Alfred Yekatom as it refers to part of the Defence strategy. A confidential redacted version is filed simultaneously and 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 requests for the formal submission of the prior recorded testimonies of P-0287

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<sup>1</sup> ICC-01/14-01/18-1621-Conf, together with Confidential Annexes A and B.

and P-0627 under rule 68(3),<sup>2</sup> 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).<sup>3</sup>

#### IV. SUBMISSIONS

##### *A. Preliminary observations*

5. As a preliminary remark, the Defence notes that in its "Initial Directions on the Conduct of the Proceedings" dated 26 August 2020, the Chamber held that any relief sought under rule 68 of the Rules of Procedure and Evidence ("the Rules") for a specific witness "*must* be made clear from the Final Witness List provided to the other participants and the Chamber" (emphasis added).<sup>4</sup> Pursuant to the Chamber's "Decision Setting the Commencement Date of the Trial" dated 16 July 2020,<sup>5</sup> the Prosecution provided on 10 November 2020 its final witness list in which it was specified that P-2625 would testify as a live witness.<sup>6</sup> While the Prosecution was given the possibility to make any required changes between the provisional and final lists of witnesses' deadlines, the Prosecution confirmed in its final witness list what was already indicated at the time its provisional witness list was filed, *i.e.* that it did not intend to file any rule 68(3) application for witness P-2625.<sup>7</sup> The Prosecution even conceded that its witnesses under rule 68(3) had now been "designated".<sup>8</sup> In the Prosecution's most recent anticipated upcoming witness order dated 3 October 2022, P-2625 was still referred as a live witness.<sup>9</sup>

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<sup>2</sup> ICC-01/14-01/18-888-Conf, paras 4-6.

<sup>3</sup> ICC-01/14-01/18-920-Conf, paras 3-5.

<sup>4</sup> ICC-01/14-01/18-631, para. 32.

<sup>5</sup> ICC-01/14-01/18-589.

<sup>6</sup> ICC-01/14-01/18-724-Conf-AnxA, page 46.

<sup>7</sup> ICC-01/14-01/18-642-Conf-AnxA, page 28.

<sup>8</sup> ICC-01/14-01/18-589, para. 7.

<sup>9</sup> Email from Prosecution to the Chamber dated 3 October 2022, at 17:14.

6. The Prosecution is now seeking to introduce P-2625's prior statement pursuant to rule 68(3) of the Rules without any advance notice, in contradiction with the information contained in its final witness list and with complete disregard for the Chamber's aforementioned instructions. The fact that the Chamber, at the Prosecution's request, granted an extension of the rule 68(3) applications deadline to 45 days prior to the relevant witness' testimony in no way justifies that the Prosecution can suddenly seek to introduce prior statements under rule 68(3) of the Rules for which no intention to do so was indicated in the Prosecution's final witness list.<sup>10</sup> The Chamber's initial deadline set on 9 November 2020 for the Prosecution's filing of *all* rule 68 applications is an additional indication that the possibility to proceed with last-minute changes to a witness' mode of testimony was never envisaged.
7. In addition, P-2625's testimony was scheduled, and subsequently postponed, on several occasions since the very beginning of trial.<sup>11</sup> The Prosecution therefore had countless opportunities, in the past two years, to notify the parties of its intention to change P-2625's mode of testimony, to seek leave to do so, or even to file the Request. The fact that since 9 November 2020 the Prosecution abstained from taking either of these measures, albeit having perfect knowledge of its own evidence, and having even scheduled P-2625 to testify in so many witness blocks, is indicative of its tacit acknowledgment of the unsuitability of the submission of P-2625's statement pursuant to rule 68(3).
8. As recalled by the Chamber, the Prosecution's extensive use of rule 68(3) in this trial is already unprecedented.<sup>12</sup> The Chamber also recalled that rule 68 of the Rules requires that its application is not prejudicial to or inconsistent with the

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<sup>10</sup> See ICC-01/14-01/18-685, para. 38.

<sup>11</sup>[REDACTED].

<sup>12</sup> ICC-01/14-01/18-685, paras 4, 13, 21.

rights of the accused and considered that “there are inherent limits to its use”.<sup>13</sup> The Defence submits that the limits to its use have been reached with this last-minute attempt by the Prosecution to circumvent the instructions of the Chamber in order to put on the record yet another prior statement from a witness whose cooperation with the Prosecution is no longer guaranteed. In light of the above and for the reasons elaborated below, granting the Request in these circumstances would be prejudicial to the Defence preparation for trial, which the Chamber’s instructions were meant to facilitate, and to the rights of the accused to a fair trial. Therefore, the Defence respectfully requests the Chamber to dismiss the Request *in limine*.

### ***B. Response on the merits of the Request***

9. In the alternative, should the Chamber decide to dismiss the above procedural point and consider the Request, the Defence now turns to the lack of merits of the Request.

(i) P-2625’s proposed evidence is as central to the case as it can get

10. In his prior statement, P-2625 discusses, *inter alia*, (i) the background of the conflict, including the role of the KNK political party, presented as [REDACTED];<sup>14</sup> (ii) the Bozizé regime’s alleged anti-Muslim propaganda from late 2012 onwards;<sup>15</sup> (iii) COCORA and COAC; the alleged distribution of machetes to these so-called militias by the Bozizé regime, including allegedly by NGAISSONA, prior to the Seleka coup;<sup>16</sup> (iv) the alleged closeness of Mr Ngaiissona with Messrs François Bozizé, Yakété and Yambété; (v) Mr

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<sup>13</sup> ICC-01/14-01/18-685, para. 27.

<sup>14</sup> CAR-OTP-2123-0377, at 0381, paras 24-25.

<sup>15</sup> CAR-OTP-2123-0377, at 0382-0384.

<sup>16</sup> CAR-OTP-2123-0377, at 0383.

Ngaïssona's alleged criminal past;<sup>17</sup> (vi) [REDACTED],<sup>18</sup> (vii) the alleged presence and activities of Messrs Ngaïssona, Yakété, Kokaté and other alleged Bozizé supporters in Cameroon in 2013;<sup>19</sup> (viii) the creation of FROCCA [REDACTED];<sup>20</sup> (ix) [REDACTED];<sup>21</sup> (x) NGAÏSSONA's alleged involvement in the Anti-Balaka's military operations in 2013, including funding;<sup>22</sup> (xi) [REDACTED];<sup>23</sup> (xii) Mr Ngaïssona's appointment and activities as the General Coordinator of the Anti-Balaka; including his alleged knowledge of the alleged crimes committed by the Anti-Balaka<sup>24</sup> (xiii) [REDACTED];<sup>25</sup> and (xiv) documentary evidence allegedly substantiating the above allegations.<sup>26</sup>

11. What is immediately and undoubtedly apparent from the mere overview of P-2625' prior statement is the centrality of the evidence intended to be presented by P-2625 in light of (i) the charges relating to Mr Ngaïssona and (ii) the evidence of the case as a whole.
  
12. The central nature of P-2625's proposed evidence to the Prosecution's case is confirmed by an analysis of the Prosecution's Trial Brief in which P-2625 is cited thirty-three times in support of allegations as central to Mr Ngaïssona's case as (i) his alleged involvement in the funding and arming of both COCORA and COAC,<sup>27</sup> (ii) his alleged [REDACTED] the purpose was to prepare François Bozizé's return to power at all costs, including through anti-Muslim

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<sup>17</sup> CAR-OTP-2123-0377, at 0384, paras 37-38 and at 0402, para. 149.

<sup>18</sup> CAR-OTP-2123-0377, at 0388-0390.

<sup>19</sup> CAR-OTP-2123-0377, at 0390-0391.

<sup>20</sup> CAR-OTP-2123-0377, at 0391-0394.

<sup>21</sup> CAR-OTP-2123-0377, at 0398, paras 125-127.

<sup>22</sup> CAR-OTP-2123-0377, at 0401-0402, paras. 143-144, 147.

<sup>23</sup> CAR-OTP-2123-0377, at 0401-0402, para. 144.

<sup>24</sup> CAR-OTP-2123-0377, at 0402-0403, paras 148-149, 152-154 and at 0404, paras 157-159.

<sup>25</sup> *See for instance* CAR-OTP-2123-0377, paras 71, 98.

<sup>26</sup> CAR-OTP-2123-0377, at 0380, paras 19-21.

<sup>27</sup> Prosecution's Trial Brief, paras 53, 56.

propaganda and a military solution,<sup>28</sup> and his alleged further planning and coordination, with François Bozizé's alleged inner circle, of a strategic military option that would ultimately galvanise, exploit, and coordinate pre-existing self-defence groups.<sup>29</sup>

13. For many of the incriminating allegations put forward by the Prosecution, P-2625 is cited as the sole source.<sup>30</sup> For instance, the Prosecution claims that [REDACTED] on the basis of P-2625's prior statement alone.<sup>31</sup> P-2625 is also the only one who purports to have details as to several [REDACTED] to advance "the strategic plan" and during which Mr Ngaïssona's military involvement in the field would have been apparent.<sup>32</sup> In the same vein, his claim that anti-Muslim rhetoric was expressed [REDACTED] is not corroborated either.<sup>33</sup> Again, his prior statement is the only piece of proposed evidence cited in support of the allegation that Mr Ngaïssona shared with the so-called Bozizé's inner circle key information about Anti-Balaka operations such as the date of the Bangui attack.<sup>34</sup> These above allegations go to the heart of the charges and are key factors to proving the alleged criminal responsibility of Mr Ngaïssona.

14. As conceded by the Prosecution itself, without P-2625's proposed evidence many of the core allegations included in the Trial Brief would no longer stand, for lack of corroboration. This was the reason why the Prosecution requested the Chamber to compel the attendance of P-2625 in the first place and is now why the Prosecution is suddenly seeking to introduce P-2625's prior statement pursuant to rule 68(3) of the Rules.

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<sup>28</sup> Prosecution's Trial Brief, para. 67.

<sup>29</sup> Prosecution's Trial Brief, para. 66.

<sup>30</sup> Prosecution's Trial Brief, paras 44, 51, 67, 69, 101,103-105, 108, 217, 266, 299.

<sup>31</sup> Prosecution's Trial Brief, para. 69, footnote 160.

<sup>32</sup> Prosecution's Trial Brief, page 45 and paras 101, 103-104.

<sup>33</sup> Prosecution's Trial Brief, paras 105-106.

<sup>34</sup> Prosecution's Trial Brief, para. 299.



15. Indeed, as a justification for its Request for further measures to compel the attendance of P-2625, the Prosecution emphasized that without P-2625's testimony, the Prosecution "*would be deprived of important evidence going to the heart of the charged crimes*" and highly probative of Mr Ngaïssona's alleged criminal responsibility.<sup>35</sup> The Prosecution further pointed out that not only was P-2625's testimony material for its theory but certain aspects of P-2625's evidence were supposedly *unique* and critical to the determination of the truth. The Prosecution also recalled that this was one of the criteria relied upon by the Chamber to decide to compel P-2625's attendance from the outset.<sup>36</sup>

16. Also, certain of P-2625's most serious allegations are allegedly corroborated by the evidence of P-0801, whose proposed evidence the Defence strongly contested in previous submissions and whose rule 68(3) application has been rejected by the Chamber on credibility issues.<sup>37</sup> P-2625 confirms in his statement having had [REDACTED].<sup>38</sup> [REDACTED].<sup>39</sup>

17. The centrality to the charges against Mr Ngaïssona of P-2625's proposed evidence is well summed up by the Prosecution as follows:

17. [REDACTED].

18. [REDACTED]

20. [REDACTED]<sup>40</sup>

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<sup>35</sup> ICC-01/14-01/18-1519-Conf-Red, para. 2.

<sup>36</sup> ICC-01/14-01/18-1519-Conf-Red, paras 28-29. *See also* ICC-01/14-01/18-739-Conf-Red, paras 8-24.

<sup>37</sup> Trial Brief, paras 67 (footnotes 151 and 152), 101 (footnote 239). *See also* Trial Brief, paras 262 (footnote 698), 266 (footnote 724). ICC-01/14-01/18-807-Conf; CC-01/14-01/18-920-Conf. *See also* Decision ICC-01/14-01/18-964-Conf, para. 19.

<sup>38</sup> CAR-OTP-2123-0377, para. 16.

<sup>39</sup> CAR-OTP-0094-0035, at 0078-0083, lines 1447-1606.

<sup>40</sup> ICC-01/14-01/18-739-Conf-Red, paras 17-18, 20.

18. The overwhelming majority of the allegations put forward by P-2625 in his prior statement relates to the alleged acts and conduct of Mr Ngaissona and/or the charged crimes, and is central to core issues in dispute. The centrality of the evidence was a key factor for the chamber in the *Ntaganda* case to reject the Prosecution's application pursuant to rule 68(3) of the Rules, and P-2625's proposed evidence is as central as evidence can get.<sup>41</sup>

(ii) The reliability of P-2625' proposed evidence is vitiated by his overall lack of credibility

19. The reliability of the information provided by P-2625 in his prior statement is vitiated by the overall lack of credibility of this witness, which is impugned to such an extent that P-2625's prior statement is *prima facie* unsuitable for admission under rule 68(3).

20. *First*, based on the available information, P-2625 turns out to be an unscrupulous individual, [REDACTED].<sup>42</sup> [REDACTED]<sup>43</sup> [REDACTED].<sup>44</sup> [REDACTED].<sup>45</sup> [REDACTED].<sup>46</sup>

21. Finally, [REDACTED].<sup>47</sup> [REDACTED].

22. What is even more alarming is that, from the email communication between P-2625 and the Prosecution's investigators, it is apparent that P-2625 expected [REDACTED]. Also, the investigators appear to have implied that P-2625's

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<sup>41</sup> ICC-01/04-02/06-2124, para. 8; ICC-01/04-02/06-988, para. 11.

<sup>42</sup> [REDACTED].

<sup>43</sup> [REDACTED].

<sup>44</sup> [REDACTED].

<sup>45</sup> [REDACTED].

<sup>46</sup> [REDACTED].

<sup>47</sup> [REDACTED].

cooperation in assisting the Prosecution to retrieve P-2625's [REDACTED].<sup>48</sup>  
[REDACTED].<sup>49</sup> [REDACTED].<sup>50</sup>

23. In October 2020, P-2625 abruptly decided to cease his collaboration with the Prosecution and, according to certain recent pieces of information disclosed by VWU to the Chamber, this sudden decision seems to be related to the fact that the Prosecution [REDACTED].<sup>51</sup> The Defence notes that it has received to date no disclosure or information relating to the [REDACTED]. The Prosecution has so far erroneously denied the materiality of this information and has refused to disclose it.

24. Moreover, P-2625's position relating to his security concerns fluctuates and appears inconsistent. Based on a very recent investigation report dated 21 October 2022 and disclosed to the Defence a few days ago, P-2625 apparently raised, in April 2021, concerns over [REDACTED] in CAR,<sup>52</sup> which was not previously mentioned in P-2625's statement of November 2019, nor in any of the recent updates relating to P-2625's security concerns.<sup>53</sup> Indeed, assuming [REDACTED] in CAR should have been an existing valid argument in April 2021, it was even more so at the time of P-2625's prior statement in November 2019.<sup>54</sup> If authentic, this alleged security issue would have been raised as a justification for his refusal to cooperate long before April 2021, and regularly within the last three years.

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<sup>48</sup> CAR-OTP-2122-7139-R01, at 7143. [REDACTED].

<sup>49</sup> CAR-OTP-2123-0599-R01, CAR-OTP-2122-7139-R01, CAR-OTP-2127-4444-R01.

<sup>50</sup> CAR-OTP-00000422-R01.

<sup>51</sup> CAR-OTP-2127-4444-R01, at 4449. Email from VWU to the parties and participants dated 25 October 2022, at 15:16.

<sup>52</sup> CAR-OTP-00000422-R01, pages 1-2.

<sup>53</sup> See email from VWU of 25 October 2022, at 15:16 and Letter dated 7 October 2022 from P-2625 to the Court's Registry relating to the assignment of [REDACTED], communicated by the Prosecution to the Defence by email on 25 October 2022, at 15:55.

<sup>54</sup> CAR-OTP-00000422-R01, pages 1-2.

25. It is in this context of manipulations, mistrust, and lies that (i) P-2625's prior statement has been obtained and (ii) the Prosecution now wants this prior statement to be submitted on the record of the case, showing total disregard for the integrity of the proceedings and the rights of Mr Ngaïssona.
26. *Second*, P-2625's prior statement is manifestly inconsistent with other witness statements and testimonies. For instance, while P-2625 claims that Mr Ngaïssona's appointment as Minister of Youth came as a reward for his involvement with COCORA and COAC,<sup>55</sup> other witnesses have provided very different testimonies on this topic. All witnesses being asked the question whether Mr Ngaïssona was involved with COCORA or COAC responded that they had never heard of it or that they never saw him on the ground.<sup>56</sup> Similarly, no other witnesses have alleged that Mr Ngaïssona had distributed machetes on behalf of these so-called militias and some witnesses contest that any such distribution was even organised.<sup>57</sup> P-0884 in his live testimony indicated that COCORA was led solely by Levy Yakété and no one else.<sup>58</sup> As to the reason of Mr Ngaïssona's appointment as Minister in the government of national union, none of witnesses having been examined on this topic referred to a reward for his involvement in armed militias. They rather point out to Mr Ngaïssona's popularity due to his football activities.<sup>59</sup> The Prosecution's allegation in the Trial Brief on this particular topic actually comes uncorroborated.<sup>60</sup> Similarly,

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<sup>55</sup> CAR-OTP-2123-0377-R01, at 038, para. 35.

<sup>56</sup> P-2926: ICC-01/14-01/18-T-032-CONF-ENG CT2, page 83, lines 13-18; P-2232: ICC-01/14-01/18-T-075-CONF-ENG ET, page 16, lines 6-16; P-0291: ICC-01/14-01/18-T-051-CONF-ENG ET, page 25 lines 10-14. *See also* P-0876: ICC-01/14-01/18-T-085-CONF-ENG ET, pages 15-16, lines 17-25 and 1-14.

<sup>57</sup> P-1847: ICC-01/14-01/18-T-023-CONF-ENG, pages 7-8, lines 6-25 and 1-8; P-0291: ICC-01/14-01/18-T-051-CONF-ENG ET, pages 13-14, lines 17-25 and 1-25.

<sup>58</sup> P-0884, ICC-01/14-01/18-T-054-CONF-ENG ET, pages 33-34.

<sup>59</sup> *See e.g.* P-2232: ICC-01/14-01/18-T-075-CONF-ENG ET, pages 20-21, lines 13-25 and 1-6.

<sup>60</sup> Prosecution's Trial Brief, para. 217.

and contrary to P-2625's statement, certain witnesses confirmed that Messrs Ngaïssona and Yambété were not particularly close.<sup>61</sup>

27. Moreover, in his oral testimony, P-0801 vehemently denies having ever participated in a FROCCA meeting. He claimed knowing nothing about FROCCA nor having held any position within it.<sup>62</sup> Similarly, [REDACTED] (P-2869) states that he has never heard of FROCCA, that he did not know Mr Ngaïssona formally, and that he has no recollection of ever having [REDACTED].<sup>63</sup>

28. Also, importantly, [REDACTED].<sup>64</sup>

29. *Third*, none of the witnesses cited as corroborating P-2625's allegations regarding Mr Ngaïssona's alleged "financing of the Anti-Balaka",<sup>65</sup> provided information during their testimony in relation to Mr Ngaïssona's alleged funding of the military operations in 2013. P-0992 explains that decisions to distribute money could be made in 2014 by a specific committee within the coordination and exclusively related to food and health requirements, not weapons.<sup>66</sup> P-0954 contested having heard about any financing of the movement by Mr Ngaïssona prior to the 5 December attack and specified that the money Mr Ngaïssona provided after June 2014 was not for weapons or ammunitions but simply for food and travel expenses.<sup>67</sup> P-0884 made similar statements during his testimony.<sup>68</sup> P-2673 alleged he and other officers received

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<sup>61</sup> See CAR-OTP-2123-0377-R01, at 0384, para. 37. See for instance P-1847: ICC-01/14-01/18-T-023-CONF-ENG CT, page 13, lines 7-18.

<sup>62</sup> P-0801, ICC-01/14-01/18-T-035-CONF-ENG CT, page 21.

<sup>63</sup> P-2869, CAR-OTP-2122-6455-R01, at 6457.

<sup>64</sup> [REDACTED].

<sup>65</sup> Request, para. 11.

<sup>66</sup> P-0992, ICC-01/14-01/18-T-093-CONF-ENG ET, pages 38-39.

<sup>67</sup> P-0954, ICC-01/14-01/18-T-169-CONF-ENG RT, pages 27, 57-58.

<sup>68</sup> P-0884, ICC-01/14-01/18-T-058-CONF-FRA CT, page 63.

money from Bernard Mokom, not from Mr Ngaïssona, and P-2673 did not specify what this money was meant for.<sup>69</sup>

30. In light of the above, there are objective indicia for the lack of credibility of P-2625, and accordingly a testimony given under oath in its entirety, under the Chamber's oversight, is warranted in the present circumstances.

31. Finally, while the time-saving as announced by the Prosecution appears significant,<sup>70</sup> given the multitude of issues contained in P-2625's prior 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 circumstances around which his prior statement was obtained, introducing P-2625's prior recorded testimony under rule 68(3) would impose an unreasonable burden on the Defence in preparing for and conducting the cross-examination, and would ultimately limit any time-saving. Therefore, on balance, the prejudice to the fair trial rights of Mr Ngaïssona preventing him from hearing P-2625's full in-court testimony outweighs any potential and limited promotion of the expeditiousness of the proceedings.

32. In light of the above, allowing witness P-2625's prior statement to be introduced into evidence pursuant to rule 68(3) of the Rules would cast substantial doubts on the reliability of the evidence and would be antithetical to, and would seriously damage, the integrity of the proceedings. It is therefore in the interest of justice to hear the full testimony of P-2625 live.

## V. RELIEF SOUGHT

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<sup>69</sup> P-2673, ICC-01/14-01/18-T-041-CONF-ENG ET, pages 18-20.

<sup>70</sup> Request, paras 15-17.

33. The Defence respectfully requests the Chamber to **REJECT** the Prosecution's Request to introduce P-2625's prior-recorded testimony and associated exhibits pursuant to Rule 68(3).

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Mr. Knoop', written in a cursive style.

Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 16 January 2023

At The Hague, the Netherlands.