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**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/18
Date: 22 December 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 PROSECUTOR *v.* ALFRED YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA**

Confidential

Prosecution Response to the 'Second Ngaïssona Defence request to introduce prior recorded testimonies of Defence Witnesses P-4680 and P-4777 pursuant to Rule 68(2)(b)' (ICC-01/14-01/18-2259-Conf)

Source: Office of the Prosecutor

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 KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamai
Ms Marie-Hélène Proulx
Ms Despoina Eleftheriou

Legal Representatives of Victims

Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massida

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") defers to Trial Chamber V in respect of the disposition of the 'Second Ngaïssona Defence request to introduce prior recorded testimonies of Defence Witnesses P-4680 and P-4777 pursuant to Rule 68(2)(b)'.¹ However, as the Prosecution observes below, it appears that the proposed testimony of P-4777 presents evidence of a partial alibi defence, notwithstanding the lack of notice required by rule 79(1)(a) of the Rules of Procedure and Evidence ("Rules"). Moreover, as such, the proposed testimony may bear on the Accused's acts or conduct to an extent potentially fatal to the Request.

II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(2) of the Regulations of the Court ("RoC"), this document is filed as "Confidential" because it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. The Proposed Testimony Presents Alibi Evidence

3. The proposed testimony of P-4777 presents evidence of a partial alibi, for which rule 79(1)(a) requires advance notice. The witness's evidence principally goes to proof of NGAISSONA's whereabouts in 2013 during the relevant period, namely DOUALA, CAMEROON. The proposed testimony appears to be intended to address evidence establishing NGAISSONA's attendance of key meetings in YAOUNDE, CAMEROON, including with former President Francois BOZIZE and members of his inner circle, wherein their plan to reclaim power in the Central African Republic ("CAR") was elaborated and implemented.

¹ ICC-01/14-01/18-2259-Conf ("Request").

4. Notably, the NGAISSONA Defence twice indicated that it does not intend to present an alibi defence — in June 2020² and September 2023.³ However, in proffering P-4777's proposed testimony, the Defence seems to have revisited their prior position.

5. It is well-understood that an alibi “does not constitute a defence in its proper sense. Where an accused raises an alibi he is merely denying that he was in a *position to commit the crime* with which he was charged.”⁴ Insofar as the ‘commission’ of a crime entails both subjective and objective elements, an alibi defence may obtain as regards any single element impacted by evidence of an accused whereabouts. Thus, where culpable conduct may be predicated on an accused's physical presence and participation at meetings during which a crime is planned, evidence rebutting his whereabouts is properly characterised as an ‘alibi’.

6. Significantly, criminal responsibility may attach through contributions to the ‘commission’ of a crime made “not only at the execution stage of the crime, but also, depending on the circumstances, at its *planning* or *preparation* stage, including when the common plan is *conceived*.”⁵ Thus, where any aspect of such criminal responsibility may be linked to the whereabouts of an accused based upon a normative assessment of their role in the specific circumstances, evidence going to negate their whereabouts — whether complete or partial — is subject to the notice requirements under rule 79(1)(a). The NGAISSONA Defence has not complied with this provision.

² See Email from Ngaissona Defence to the Prosecution, dated 23 June 2020, at 10:17.

³ See Email from Ngaissona Defence to the Prosecution, dated 29 September 2023, at 14:30.

⁴ See *Prosecutor v. Popović, et al*, Case No. IT-05-88-A, Judgement, 30 January 2015, para. 343; see *Zigiranyirazo v. Prosecutor*, Case No. ICTR-01-73-A, Judgement, para. 17; *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Judgement, 16 January 2007, para. 66, citing *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54-A Judgement, 19 September 2005, para. 167. See also *Prosecutor v. Čelebići*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 581.

⁵ ICC-01/05-01/13-2275-Red, para. 810, 819 (reflecting ‘contributions’ in relation to article 25(3)(a)) (emphasis added); see also ICC-01/04-01/06-3121-Red, para. 469.

B. The Proposed Testimony Presents Evidence of Acts and Conduct

7. As noted, insofar as P-4777's proposed testimony effectively comprises alibi evidence, it also implicates NGAISSONA's acts and conduct. Nevertheless, the Prosecution defers to the Chamber's discretion in assessing whether the proposed testimony's contravention of rule 68(2)(b) is fatal to its submission, and otherwise whether its introduction at this stage — absent rule 79(1)(a) and (2) notice — materially prejudices the Chamber's article 64(2) duty to ensure that the trial is fair.⁶

IV. CONCLUSION

8. For the foregoing reasons, the Prosecution defers to the Chamber in the disposition of the Request, subject to the above observations.



Karim A. A. Khan KC, Prosecutor

Dated this 22nd day of December 2023
At The Hague, The Netherlands

⁶ ICC-01/04-02/12-271-AnxA, paras. 6, 11. (Dis. Op. Judges Trendafilova and Tarfuser) (noting a Trial Chamber's "duty to ensure a fair trial *vis-à-vis* both parties" and "obligation ... to safeguard the rights of the accused and *equally* the procedural rights of the Prosecutor, acting in public interest) (emphasis supplied).