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**Cour
Pénale
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**International
Criminal
Court**

Original: English

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

Date: **10 January 2024**

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***

CONFIDENTIAL

Ngaïssona Defence Request for Leave to Reply to the "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)" (ICC-01/14-01/18-2284-Conf)

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 Asad Ahmad Khan
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
Ms Marie-Hélène Proulx
Mr Richard Omissé-Namkeamaï
Mr Alexandre Desevedavy

Counsel for the Defence of Mr Yekatom

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

Legal Representatives of the Victims

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

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

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. CONFIDENTIALITY

1. In accordance with regulation 23*bis*(1) of the Regulations of the Court (the "RoC"), the present leave is filed as confidential as it relates to written submissions filed by the Office of the Prosecutor (the "Prosecution") under the same confidentiality level.

II. SUBMISSIONS

2. The Defence for Mr Ngaïssona (the "Defence") hereby seeks leave to reply to the "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)" (the "Response"),¹ pursuant to Regulation 24(5) of the RoC.
3. The Defence could not have reasonably anticipated one issue from the Response, thus warranting a succinct reply thereto. Said reply would be necessary for the determination 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)" (the "Request").²
4. The issue stems from the misinterpretation of the scope of Rule 79(1)(a) of the Rules of the Procedure and Evidence (the "Rules") as put forward by the Prosecution (the "Issue"). Rule 79 of the Rules expressly states that "the notification shall specify the place or places at which the accused claims to have been present at the time of the *alleged crime* [...]" (emphasis added).³ The jurisprudence of the Court does not support an interpretation of Rule 79(1)(a) that extends to the place or

¹ ICC-01/14-01/18-2284-Conf (the "Response").

² ICC-01/14-01/18-2259-Conf (the "Request").

³ Rule 79(1)(a) of the Rules of Procedure and Evidence ("1. The defence shall notify the Prosecutor of its intent to: (a) Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; [...]").

places at which the accused claims to have been present at the time of the *alleged contributions* to the charged crime – should the evidence presented by the Prosecution even allows one to identify precisely the conduct constituting such contributions, or the specific date(s) of the alleged contributions. This is supported by Trial Chamber IX's judgment in the *Ongwen* case, where it was found that "[r]aising an alibi argues for the physical impossibility of an accused's guilt by placing him/her in a location other than the *scene of the crime*" (emphasis added).⁴ The jurisprudence of the Appeals Chamber of the ICTY, which upheld that "[w]here an accused raises an alibi he is merely denying that he was in a position to commit the *crime with which he was charged*" (emphasis added),⁵ also militates in favour of the Defence's interpretation.

5. *First*, the Defence could not have reasonably anticipated the Issue as it considered it resolved upon the Defence's latest communication with the Prosecution on that matter, as precisely noted by the Prosecution.⁶ The Defence already conveyed its position:

"[...] none of the witnesses listed in the Defence's provisional witness list relate to the location of Mr Ngaïssona at the alleged crime scenes. Indeed, it is not contested between the parties that Mr Ngaïssona was not present at the crime scenes. Further, the Prosecution's has itself qualified Mr Ngaïssona's alleged contributions to the crimes as remote. See ICC-01/14-01/18-T-012-ENG ET, page 33, lines 11-15."⁷

Given that P-4777's proposed evidence does not relate to the location of Mr Ngaïssona at the alleged crime scenes, the Defence, by maintaining its position and

⁴ *The Prosecutor V. Dominic Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red., para. 2449.

⁵ ICTY, Appeals Chamber, *Prosecutor v. Vujadin Popović et al.*, Judgement, 30 January 2015, IT-05-88-A, para. 343; ICTR, Appeals Chamber, *Protais Zigiranyirazo v. The Prosecutor*, Judgement, 16 November 2009, ICTR-01-73-A, paras 17-19; ICTY, Appeals Chamber, *Prosecutor v. Zejnil Delalić et al.*, Judgement, 20 February 2001, IT-96-21-A, para. 581.

⁶ Response, para. 4.

⁷ See Email from Ngaïssona Defence to the Prosecution, dated 29 September 2023, at 14:30.

not revisiting it, could not have reasonably anticipated the Prosecution's Response on *partial alibi*.

6. *Second*, the Defence could not have reasonably anticipated the Prosecution to raise such an argument obliquely, in written submissions that pertain to the separate issue of formally introducing prior recorded testimonies, when "the statutory texts only reference the possibility of an 'alibi' in the context of the Defence's disclosure obligations".⁸

III. RELIEF SOUGHT

7. For the foregoing reasons, the Defence respectfully requests Trial Chamber V to **GRANT** the present leave to reply to the Response.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 10 January 2024

At The Hague, the Netherlands.

⁸ *The Prosecutor V. Dominic Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red., para. 2449.