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**International  
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Court**

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

Date: 29 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's Response to the 'Ngaïssona Request for the Submission of Expert Report and Associated Material pursuant to Rule 68(3)' (ICC-01/14-01/18-2323-Conf)"**

**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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29 January 2024

**The Office of the Prosecutor**

Mr Karim A.A. Khan KC  
 Mr Mame Mandiaye Niang  
 Mr Kweku Vanderpuye

**Counsel for the Defence of Mr Ngaissona**

Mr Geert-Jan Alexander Knoops  
 Mr Richard Omissé-Namkeamaï  
 Ms Marie-Hélène Proulx  
 Mr Michael Rowse  
 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 Yaré Fall  
 Ms Marie Edith Douzima Lawson  
 Ms Paolina Massidda  
 Mr Abdou Dangabo Moussa  
 Ms Elisabeth Rabesandratana  
 Mr Dmytro Suprun

**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****Detention Section****Victims Participation and Reparations  
Section****Other**

## I. INTRODUCTION

1. The Defence seeks leave to reply to the 'Prosecution's Response to the Ngaiisona Request for the Submission of Expert Report and Associated Material pursuant to Rule 68(3)'<sup>1</sup> ("Response") pursuant to Regulation 24(5) of the Regulations of the Court ("RoC") ("Request").
2. The Defence seeks leave to reply to the Prosecution observations that "appropriate mechanism for formal submission of D30-P-4864's report and its associated material ("Report") is introduction under rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules")."<sup>2</sup> As elaborated below, the Defence could neither anticipate such submissions, nor would it be in the interests of justice for the Chamber to contemplate such submissions absent a Defence reply.
3. The present Request is filed as CONFIDENTIAL pursuant to Regulation 23(1)*bis* of the RoC since the Response is classified confidential. The Defence considers that the present request can be reclassified public at the conclusion of the litigation.

## II. PROCEDURAL HISTORY

4. On 25 August 2023, the Defence filed its "Notice of intent to present evidence pursuant to Trial Chamber V's 'Further Directions on the Conduct of the Proceedings' (ICC-01/14-01/18-1892)"<sup>3</sup> and provided its Preliminary List of Witnesses, thereby informing the Chamber, the parties and the participants its intention to call, *inter alia*, D30-P-4864.<sup>4</sup>

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<sup>1</sup> ICC-01/14-01/18-2323-Conf.

<sup>2</sup> *Ibid.*, para. 1.

<sup>3</sup> ICC-01/14-01/18-2055-Conf.

<sup>4</sup> ICC-01/14-01/18-2055-Conf-Anx1, a corrected version of which was filed on 31 October 2023: ICC-01/14-01/18-2055-Conf-Anx1-Corr., entry #3.

5. On 14 September 2023, the Prosecution sought to interview several Defence witnesses indicated on the Preliminary List of Witnesses, including D30-P-4864, pursuant to paragraph 31 of the Contact Protocol.<sup>5</sup>
6. On 22 September 2023, the Defence requested the Chamber to deviate from the Contact Protocol, specifically seeking the postponement of the Prosecution's interviews with Defence witnesses until after the Defence files its Final List of Witnesses.<sup>6</sup> On 1 November 2023, the Chamber granted the request.<sup>7</sup>
7. On 17 November 2023, the Defence submitted its Final List of Witnesses, thereby confirming to the Chamber, the parties and the participants its intention to call, *inter alia*, D30-P-4864.<sup>8</sup>
8. On 15 December 2023, the Prosecution reiterated its wish to interview, *inter alia*, D30-P-4864.<sup>9</sup> On 20 December 2023, the Defence informed the Prosecution that D30-P-4864 has agreed to be interviewed by the Prosecution.<sup>10</sup>
9. On 18 January 2024, the Defence filed its "Request for the Submission of [D30-P-4864's] Report and Associated Material pursuant to Rule 68(3)".<sup>11</sup> The Prosecution filed its response thereto on 24 January 2024, arguing that Rule 68(2)(b) would be a more "appropriate mechanism for formal submission of D30-P-4864's report" as it is allegedly "already complete and fully comprehensible".<sup>12</sup>

### III. SUBMISSIONS

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<sup>5</sup> ICC-01/14-01/18-156-AnxA, para. 31; Prosecution email to the Defence dated 14 September 2023, at 09:17.

<sup>6</sup> ICC-01/14-01/18-2108-Conf.

<sup>7</sup> ICC-01/14-01/18-2180-Conf.

<sup>8</sup> ICC-01/14-01/18-2215-Conf-Anx1., a corrected version of which was filed on 1 December 2023 : ICC-01/14-01/18-2215-Conf-Anx1-Corr., entry #2.

<sup>9</sup> Prosecution email to the Defence dated 15 December 2023, at 16:39.

<sup>10</sup> Defence email to the Prosecution dated 20 December 2023, at 21:24.

<sup>11</sup> ICC-01/14-01/18-2310-Conf.

<sup>12</sup> ICC-01/14-01/18-2323-Conf., paras 1 and 3.

10. Although the Prosecution frames its Response as 'observations' and defers to the Chamber, it implicitly makes a request, including arguments, that the Chamber should reject the Defence Rule 68(3) request and (a) not permit D30-P-4864 to testify *viva voce* and (b) receive his report pursuant to Rule 68(2)(b).
11. The Defence could not have reasonably anticipated the implicit request in this Response, and this warrants the Chamber granting the Defence a reply should it contemplate following the Prosecution request.
12. A reply is merited because, *firstly*, making a Rule 68(2)(b) request in a response against the opposing party's request is surprising and at worst procedurally incorrect. Thus, the Defence could not reasonably have anticipated the Response arguments, and this fulfils the criteria for the Chamber to consider granting the Defence a reply pursuant to Regulation 24(5).
13. *Secondly*, as detailed above, the Prosecution sought to interview D30-P-4864 at the time the Defence filed its Preliminary List of Witnesses, and reiterated its intention to do so after the Defence filed its Final List of Witnesses. The opportunity to interview a witness pursuant to the Contact Protocol can be similar to the parties' right to question a witness during his or her testimony during the trial proceedings.<sup>13</sup> Thus, the continued interest of Prosecution to interview D30-P-4864 belies its Response suggesting that no further testimonial evidence is deemed necessary. Again, under these circumstances, the argument raised by the Prosecution in its response could not have been anticipated at the date of filing the request. It is further in the interests of justice to hear Defence arguments on the Response's implicit request.
14. A reply is in the interests of justice for the reasons elaborated below.

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<sup>13</sup> *Prosecutor v. Ongwen*, Decision on Defence Request to Submit the Prior Recorded Testimony of D-0036 and related documents pursuant to Rule 68(2)(a) of the Rules, 13 November 2019, ICC-02/04-01/15-1665, para. 8.

15. *Firstly*, the Prosecution did not bring an expert on call data records ('CDR') despite the voluminous amount of CDR related materials disclosed and relied upon by the Prosecution throughout the proceedings. P-2973, who ultimately testified, cannot be characterised as an expert, nor was he categorised as such by the Prosecution.<sup>14</sup> For reasons that will be developed if the sought reply is granted, it would not be in the interests of justice to prevent the Defence from calling D30-P-4864 *viva voce*. A live testimony would be beneficial and greatly assist the Chamber in its truth seeking mission, given the complexity of CDR evidence.
16. *Secondly*, the Response impacts upon Mr Ngaïssona's Article 67(1)(e) right "[t]o [...] obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him". While the unfolding of the proceedings is always subject to the oversight of the Chamber, unilaterally abridging the Defence presentation of its case concerning call-data records without first hearing a reply from the Defence would lead to an injustice.
17. *Thirdly*, the Prosecution argues that the "Request does not sufficiently explain the need for introduction of the Report under the mechanism of rule 68(3), entailing additional *viva voce* evidence".<sup>15</sup> In the interests of justice, the Chamber should grant the present request for a reply if it considers that (a) setting out the need for *viva voce* testimony is a criterion of Rule 68(3) and (b) the Defence did not sufficiently explain this. The Prosecution argument suggests that the Defence must detail much of its examination plan of testimony in detail in any Rule 68(3) request. This was not a practice of the Prosecution in relation its Rule 68(3) requests and the Defence should not be held to a separate standard.
18. *Fourthly*, the Chamber should receive a reply *contra* the Prosecution's suggestion that to receive D30-P-4864's report in place of testimony would be beneficial as it would

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<sup>14</sup> ICC-01/14-01/18-724-Conf-AnxA., p. 8, entry #38.

<sup>15</sup> ICC-01/14-01/18-2323-Conf., para. 3.

narrow "the scope of contested issues between the parties". One party unilaterally declaring that a party should not present relevant testimony to limit the scope of contested issues is not a fair basis upon which to advance proceedings or to reach a determination on the truth.

19. *Fifthly*, accepting the Prosecution argument that granting its request would lead to more expeditious proceedings without permitting a reply would be unjust. The Prosecution case involved extensive delays well after the main impact of COVID-19. The Prosecution's argument that avoiding three to four days of testimony would allow the proceedings to be more expeditious lacks perspective and warrants a reply. Moreover, D30-P-4864's testimony at this stage may in fact simplify elements of the Defence the written arguments later which may also assist deliberations. Therefore, granting a reply as to why Rule 68(2)(b) is not the correct procedural avenue would be in the interests of justice .

#### IV. RELIEF SOUGHT

For the reasons above, the Defence respectfully requests the Chamber to **GRANT** the present Leave to reply.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 29 January 2024

At The Hague, the Netherlands.