

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

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

Date: 26 February 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 ROMBHOT YEKATOM AND PATRICE-  
EDOUARD NGAÏSSONA***

**CONFIDENTIAL**

**Defence's Response to the 'Prosecution's Response to the Ngaïssona Request for  
the submission of Expert Report pursuant to Rule 68(3)' (ICC-01/14-01/18-2361-  
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**

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## I. INTRODUCTION

1. The Defence for Mr Ngaïssona ('Defence') respectfully requests Trial Chamber V ('Chamber') to reject the Prosecution's request to introduce its interview with D30-P-4885 ('P-4885') pursuant to Rule 68(3) of the Rules of Procedure and Evidence ('RPE' or 'Rules') ('Request'), as formulated in the "Prosecution's Response to the Ngaïssona Request for the submission of Expert Report pursuant to Rule 68(3)" ('Prosecution Response').<sup>1</sup>
2. The Prosecution Request should be rejected, as: (1) the Prosecution has not disclosed a transcript of the Interview with P-4885, which is a prerequisite for seeking the submission of an audio-visual document; and (2) the Prosecution failed to substantiate how its Request fulfils the requirements of Rule 68(3) of the Rules.

## II. PROCEDURAL HISTORY

3. On 20 December 2023, the Defence disclosed P-4885's expert report and associated exhibits to the Chamber and to the parties and participants.
4. On 29 January 2024, the Prosecution conducted an interview with Defence witness P-4885 pursuant to the Contact Protocol ('Interview').
5. On 8 February 2024, the Defence submitted its "Request for the Submission of Expert Report pursuant to Rule 68(3)" ('Defence Request').<sup>2</sup>
6. On 15 February 2024, the Prosecution filed the Prosecution Response, deferring to the Chamber's discretion on the Defence Request, and requested that the prior recorded testimony of P-4885, ensuing from the Interview conducted by the

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<sup>1</sup> ICC-01/14-01/18-2361-Conf.

<sup>2</sup> ICC-01/14-01/18-2351-Conf.

Prosecution on 29 January 2024, be equally introduced in evidence pursuant to Rule 68(3) of the Rules.

7. On 19 February 2024, the Chamber considered that the “Ngaïssona Defence should be afforded the opportunity to respond to the request contained in the Prosecution’s Response” and instructed the Defence to file the present Response by 26 February 2024.<sup>3</sup>

### III. CONFIDENTIALY

8. Pursuant to Regulation 23*bis*(2), this document is filed as “Confidential”, as it responds to a document filed as confidential. The Defence will file a public redacted version in due course.

### IV. APPLICABLE LAW

9. As an exception to the principle of orality, Article 69(2) of the Statute provides that the Chamber may allow the introduction of recorded testimonies of witnesses, as well as documents or written transcripts, in accordance with the Rules.
10. Rule 68(3) of the Rules provides for the introduction of prior recorded testimonies of witnesses who are present before the Chamber, under the condition that the witness 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.
11. Additionally, the Chamber may allow the introduction of a previously recorded testimony provided that it would not be prejudicial to or inconsistent with the rights of the accused, as per Rule 68(1) of the Rules.

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<sup>3</sup> See email Decision on the Defence Request for 10-day time limit to Respond to ICC-01/14-01/18-2361-Conf, dated 29 February 2024 at 14 :21.

## V. SUBMISSIONS

### A. The Request should be rejected as the Prosecution failed to prepare and disclose transcripts of the Interview

12. The Prosecution Request should be rejected, as the Prosecution has not disclosed a transcript of the Interview with P-4885, which is a prerequisite for seeking the submission of an audio-visual document.

13. As previously ruled by the Chamber, although

“[i]t may not be strictly necessary for items to be accompanied by transcripts and/or translations at the time of filing of the list of evidence, however, *it becomes necessary when such items are requested for submission, and if the submitting party intends to rely on spoken word contained therein*” [emphasis added].<sup>4</sup>

14. The Prosecution has failed to prepare and disclose a transcript of the Interview with P-4885 in advance of its Request. This mere fact warrants the rejection of the Prosecution Request.

15. The Defence notes that the Prosecution attempts to dispense of its obligation to transcribe and disclose its own Interview of P-4885, by placing this burden onto the Defence. Yet, neither the Contact Protocol nor any other provision within the Court's legal framework burdens the Defence with the obligation to transcribe and summarise an Interview that it did not take and on which it does not intend to rely. The Prosecution's reference to the Chamber's "Further Directions on the Conduct of the Proceedings" ("Further Directions") in this regard is unavailing. It is the Prosecution who requested, conducted and recorded the Interview. While it provided the Defence with the audio recording of the Interview, as the Contact Protocol requires, the burden to transcribe an audio-recording for which it sought submission remains on the Prosecution. Any other approach would risk

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<sup>4</sup> ICC-01/14-01/18-2160, para. 23.

overburdening the Defence with an obligation to transcribe and disclose a potentially large amount of material, on which it may not even intend to rely on at trial.

**B. The Request fails to substantiate the fulfilment of the legal requirements of Rule 68(3)**

16. The Request fails to elaborate on the fulfilment of the legal requirements of Rule 68 of the Rules. First, the Request did not substantiate how the Interview constitutes prior recorded testimony within the meaning of Rule 111 of the Rules. The Defence recalls that Under Rule 111 of the Rules, the record containing the formal statement of a questioned person needs to be signed by: a) the person who records and conducts the questioning; as well as b) the person who is questioned. In the case at hand, the Prosecution provided no draft statement containing the signatures of the multiple individuals who conducted the interview.
17. Second, Article 69(2) of the Statute and Rule 68(1) of the Rules provide that the introduction of prior recorded testimony shall not be prejudicial to or inconsistent with the rights of the accused. As upheld in *Gbagbo and Blé Goudé*, the Chamber “must ensure that [receiving into evidence a prior recorded witness testimony] is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally”.<sup>5</sup> Yet, the Prosecution does not even attempt to show compliance with this requirement, remaining silent on this overarching precondition of Rule 68 of the Rules.

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<sup>5</sup> ICC-02/11-01/15-744, para. 65, referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision 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”, 3 May 2011, ICC-01/05-01/08-1386, para. 78.

## VI. RELIEF SOUGHT

18. For the reasons above, the Defence requests the Chamber to **REJECT** the Prosecution's request to introduce P-4885's interview conducted by the Prosecution under the Contact Protocol.

Respectfully submitted on 26 February 2024,



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Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

At The Hague, the Netherlands.