

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 March 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***

Public with Confidential Annex A

Public Redacted Version of the "Fourth Ngaißsona Defence request to introduce the prior recorded testimony of Defence Witness P-4953 pursuant to Rule 68(2)(b) of the Rules" (ICC-01/14-01/18-2301-Conf), filed on 15 January 2024

Source: Defence of Patrice-Edouard Ngaißsona

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 the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamaï
Ms Marie-Hélène Proulx
Ms Despoina Eleftheriou
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 for Mr Patrice-Edouard Ngaïssona ('the Defence') hereby requests the formal submission of the prior recorded testimony of Witness CAR-D30-P-4953 ('P-4953's proposed evidence') pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules') (altogether, the 'Request').¹ P-4953's prior recorded testimony satisfies the criteria set under Rule 68(2)(b) of the Rules. Certification of the said statement has already taken place on [REDACTED] and the accompanying declaration will be provided to the Chamber, parties and participants in due course.
2. On 12 January 2023, the Defence sought leave to add P-4953's prior recorded testimony to its List of Evidence.²

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(1) of the Regulations of the Court ('RoC'), this request and its Annexes are filed as confidential, since they contain confidential information that identifies the witness. The Defence will file a public redacted version in due course.

III. PROCEDURAL HISTORY

4. On 29 May 2023, the Chamber issued the 'Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence)'.³
5. On 11 September 2023, the Prosecution filed the 'Prosecution's Notice of the Close of its Case-in-Chief'.⁴

¹ The proposed evidence consists of one witness statement, which is contained in Annex A of the present request.

² ICC-01/14-01/18-2297.

6. On 17 November 2023, the Defence filed the 'Defence Submission of its Final List of Witnesses and its List of Evidence'.⁵
7. On 14 December 2023, the Defence submitted via email an 'Urgent Regulation 35(2) request regarding Witness D30-P-4953' ('Regulation 35 Request'), explaining that, despite its best efforts, the Defence was unable to contact the witness in order to obtain his prior recorded testimony as scheduled.³ For that reason, the Defence requested that the disclosure of P-4953's written statement and the submission of the corresponding application pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence be postponed until the contact with the witness be restored.⁴
8. On 15 December 2023, the Prosecution responded to the Defence's Regulation 35 Request, objecting to it.⁵
9. On 15 December 2023, the Single Judge granted the Defence's Regulation 35 Request. The Single Judge further instructed the Defence to provide monthly updates on the status of disclosure of P-4953's prior recorded testimony, and to disclose it and file the respective Rule 68(2)(b) application within one week of obtaining the prior recorded testimony.⁶
10. On [REDACTED], the Defence met with P-4953 for the read-back and signing of his statement, in the presence of a Court interpreter.⁷
11. On [REDACTED], the certification of P-4953's prior recorded testimony took place in the presence of a Registry representative.

³ See email to the Chamber on 14 December 2023, at 19:47.

⁴ *Idem*.

⁵ See email from the Prosecution on 15 December 2023, at 11:48.

⁶ See email from the Chamber on 15 December 2023, at 13:43.

⁷ CAR-D30-0026-0001-R01.

12. On 11 January 2024, P-4953's prior recorded testimony was disclosed to the parties and participants.⁸

IV. APPLICABLE LAW

13. The Defence incorporates by reference the applicable law it previously set out in the "First Ngaissona Defence request to introduce prior recorded testimony pursuant to Rule 68(2)(b)".⁹

V. SUBMISSIONS

A. Analysis

1. Overview of P-4953's proposed evidence

14. P-4953 is a [REDACTED] born in [REDACTED], and who lived in BENZAMBE during the Relevant Period. His proposed evidence covers the arrival of the Seleka in BENZAMBE, the crimes committed by the Seleka against the Christian population, the creation of self-defence groups, and the alleged attack of September 2013 in BENZAMBE.

15. P-4953's proposed evidence notably establishes that:

-) Upon arrival in BENZAMBE and in the surrounding areas, Seleka forces committed crimes against the local Christian population, such as arson, pillaging and murder. [REDACTED];
-) The Seleka were heavily armed with AK-47, high-calibre weapons affixed on pick-up trucks, and rockets. Meanwhile, the Anti-Balaka only had sticks and machetes;

⁸ See 'Trial D30 Evidence Package 57 11 January 2024'.

⁹ ICC-01/14-01/18-2238-Conf, paras 4-6.

- J There were many Seleka elements in BENZAMBE; they took Francis BOZIZÉ's house, the townhall and a school, and set up a checkpoint at the roundabout;
- J The Seleka did not harass the Muslim civilian population, only the Christians, while Muslims were favoured for important positions;
- J Muslim civilians assisted the Seleka by providing them food and by pointing at Christians who had goods to loot;
- J The Anti-Balaka were created as a reaction to Seleka crimes; they gathered at a place called GOBERE and JEANNOT, a traditional healer, was their leader;
- J They were financed by the fee that needed to be paid for JEANNOT's services as a healer;
- J The reason for the BENZAMBE attack is that the Anti-Balaka had heard that the Seleka were planning to lock Christians in their homes and set fire to them;
- J The Anti-Balaka only wanted to free the town from the grip of the Seleka, not to have BOZIZÉ come back to power;
- J Muslim civilians, including ZAKARIA, had taken on weapons and participated in the attack alongside Seleka forces;
- J After the attack, the Anti-Balaka left in the direction of BOSSANGOA;
- J [REDACTED] KHIRESS, [REDACTED] ZAKARIA, [REDACTED] ADEY, [REDACTED] DJITO, [REDACTED] ADAMOU, [REDACTED] IDRISSE, [REDACTED] DOUKA, DOLÉ, and [REDACTED] DERÉ did not die during the BENZAMBE attack.

B. The proposed evidence constitutes "prior recorded testimony" under Rule 68(2)(b) of the Rules

16. In the "First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules" ("First Rule 68(2)(b)

Decision'), the Chamber recalled that the term "previously recorded testimony" includes statements and transcripts of interviews taken pursuant to Rules 111 and 112 of the Rules.¹⁰ The Chamber further reasoned that the notion of prior recorded testimony involves the person understanding that "when providing their statement, that 'he or she is providing information, which may be relied upon in the context of legal proceedings'. This is the case when the person is questioned in the capacity of a witness in the context of, or in anticipation of legal proceedings."¹¹

17. At the time of the interviews with the witness, the Defence explained its mandate, that it was conducting investigations in the context of the proceedings against Mr Ngaïssona before the International Criminal Court ('ICC') and that it believed the witness held information that would assist the Chamber in the determination of the truth.¹² As clearly acknowledged by the witness, he understood that the information provided in the statements may be relied upon in the current legal proceedings and that his identity and statement could be provided to the Prosecution, victim representatives and the Chamber.¹³

C. The prior recorded testimony goes to proof of matters other than the acts and conduct of the Accused

18. In the First Rule 68(2)(b) Decision, the Chamber found that, in the case against Mr Ngaïssona, "the acts and conduct of the accused, must be interpreted in its plain and ordinary meaning, namely as referring to the personal actions and omissions of the accused".¹⁴ In particular, it refers to "those actions of the accused described in the confirmed charges, or which are otherwise relied upon by the Prosecution to establish their criminal responsibility."¹⁵ Limited, peripheral references to the

¹⁰ ICC-01/14-01/18-1833-Conf-Corr 1, para. 23.

¹¹ ICC-01/14-01/18-1833-Conf-Corr 1, para. 23.

¹² CAR-D30-0026-0001-R01, paras 2-3.

¹³ CAR-D30-0026-0001-R01, paras 4-5.

¹⁴ ICC-01/14-01/18-1833-Conf-Corr, para. 28.

¹⁵ *Ibid.*

accused do not preclude its introduction if the following conditions are met: (1) the calling party indicates that it does not intend to rely on the reference, and (2) this reference is not significant to the case or is, in any event, of limited importance and does not constitute the core of the testimony.¹⁶

19. P-4953's proposed evidence does not go to the acts and conduct of Mr Ngaïssona. P-4953 has never met Mr Ngaïssona and never saw him at the time of the events.¹⁷ While the witness knows of Mr Ngaïssona, this knowledge is peripheral at best, and not central to his evidence.¹⁸ P-4953's evidence mainly serves to support the Defence's other witnesses in relation to the events in the OUHAM region, and to disprove the allegations regarding alleged Muslim civilian deaths during the BENZAMBE attack in September 2013 made by Prosecution witnesses.

D. The introduction of the proposed evidence is warranted

1. The proposed evidence does not relate to facts that are materially in dispute

20. In determining this factor,

the Chamber shall consider whether the prior recorded testimony relates to matters which are soundly and conceivably disputed between the parties, and are crucial, or of at least sufficient significance for the Chamber's eventual determination of the charges against the accused in its judgment under Article 74 of the Statute. In doing so, the Chamber will objectively assess – irrespective of the parties' own assertions – the degree to which a prior recorded testimony potentially impacts on material matters actually contested in the proceedings.¹⁹

21. This interpretation was adopted by the Chamber in its "First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies

¹⁶ *Ibid.*, para. 29.

¹⁷ CAR-D30-0026-0001-R01, para. 37.

¹⁸ CAR-D30-0026-0001-R01, paras 36 and 38.

¹⁹ ICC-01/12-01/18-2241, para. 15.

pursuant to Rule 68(2)(b) of the Rules” (‘First Rule 68(2)(b) Decision’).²⁰ At the same occasion, the Chamber endorsed a broad interpretation of Rule 68(2)(b)(i) of the Rules by clarifying that the factor provided therein “should not be understood to provide either party with a unilateral ‘veto power’ over the introduction of a prior recorded testimony by indicating that the issues addressed in the testimony are materially in dispute.”²¹

22. The above is all the more justified given that, as per the determination of Trial Chamber X, “it is inherent to the Defence case to dispute the facts and circumstances as charged, as well as advance alternative narratives and evidence that supports its own case. This cannot, in and of itself, foreclose the Defence from submitting evidence according to Rule 68(2)(b) of the Rules. The Chamber must bear this in mind when conducting its assessment of the Rule 68(2)(b)(i) factors.”²²

23. An important distinction must be drawn between the intention of the Defence to challenge a Prosecution witness’s credibility on a disputed fact and a testimony relating to a disputed fact. Conflating the two would prevent the Defence from the possibility to present an alternative narrative on limited facts that supports its Defence case through Rule 68(2)(b).

a. P-4953’s proposed evidence does not relate to facts that are materially in dispute

24. P-4953’s proposed evidence relates to background information on the conflict, the Seleka and the Anti-Balaka in and around BENZAMBE. These events are not contained in the charges but have been introduced into evidence as contextual elements. While the said evidence provides an alternative narrative of the events in BENZAMBE and its surroundings to that alleged by Prosecution witnesses, it is inherent to the Defence’s role to call witnesses to rebut the Prosecution’s allegations or impugn the credibility of Prosecution witnesses. In any event,

²⁰ ICC-01/14-01/18-1833, para. 39.

²¹ *Ibid.*

²² ICC-01/12-01/18-2241, para. 11.

should there be parts of P-4953's testimony that touch upon facts that may be conceived as disputed at trial, it goes to matters that are not of sufficient significance for the Chamber's eventual determination of the charges against Mr Ngaissona.

25. In relation to P-4953's allegations that concern specifically the attack in BENZAMBE and the alleged Muslim civilian casualties, noting that these allegations are not part of the charges, the Defence only seeks to rely on these to challenge the reliability and credibility of the Prosecution witnesses who gave hearsay evidence on the same events, in particular, P-2049,²³ P-2453,²⁴ P-2462²⁵ and P-2200.²⁶

2. The proposed evidence is of a cumulative and corroborative nature in that other witnesses have given oral or written testimony on similar facts

26. P-4953's proposed evidence is also cumulative of, or corroborated by, several witnesses who have given or are expected to give oral or written testimony on the same or similar facts. In particular:

) P-4953's account of the different crimes committed by Seleka forces against the Christian civilian population in the OUHAM region is corroborated by the prospective testimonies of Defence witnesses P-4608,²⁷ P-4496,²⁸ and P-4514.²⁹

²³ See for example ICC-01/14-01/18-T-100-CONF-ENG CT, p. 35, lns 11-22, p. 41-42 and p. 47, lns 1-11; ICC-01/14-01/18-T-102-CONF-ENG ET, p. 45-47 and p. 47-48.

²⁴ CAR-OTP-2111-0415-R04, paras. 38, 39, 50, and 54.

²⁵ CAR-OTP-2111-0452-R02, para. 26.

²⁶ CAR-OTP-2088-2146-R04, para. 83.

²⁷ CAR-D30-0017-0001-R01, paras 14, 23, 28, and 35-38.

²⁸ CAR-D30-0022-0001-R01, paras 29, 32-38.

²⁹ CAR-D30-0025-0001-R01, lns 308-318, lns 376-387, lns 397-412, and lns 485-563.

- J P-4953's description of the attire and heavy weaponry of the Seleka is also corroborated by the prospective testimonies of Defence witnesses P-4608,³⁰ P-4496,³¹ and P-4514.³²
- J P-4953's evidence regarding the differentiated treatment of the Muslim and Christian population by the Seleka, the complicity of the former with the Seleka and their armament is confirmed by the accounts of Defence witnesses P-4608,³³ P-4496,³⁴ and P-4514.³⁵
- J P-4953's account regarding the spontaneous creation of the Anti-balaka, their objectives, the absence of clear hierarchy or sources of funding, and their arming with sticks and artisanal weapons is corroborated by Defence witnesses P-4608³⁶ and P-4514,³⁷ as well as several Prosecution witnesses.³⁸

3. The proposed evidence through Rule 68(2)(b) would serve the interests of justice

27. Within the specific context of Rule 68(2)(b), the Chamber determined in the First Rule 68(2)(b) Decision that the interests of justice are served by the introduction of the prior recorded testimony when such introduction allows to: "(i) safeguard the expeditiousness of the proceedings; (ii) streamline the presentation of evidence; (iii) focus live testimony on those topics of greatest relevance to the proceedings; (iv) minimise cumulative in-court testimony on aspects which are expected to also be addressed by other witnesses; (v) save resources which may instead be utilised

³⁰ CAR-D30-0017-0001-R01, paras 22, 40.

³¹ CAR-D30-0022-0001-R01, paras 17-19.

³² CAR-D30-0025-0001-R01, lns 332-347.

³³ CAR-D30-0017-0001-R01, paras 24-26, 39.

³⁴ CAR-D30-0022-0001-R01, paras 15-16, 21-24.

³⁵ CAR-D30-0025-0001-R01, lns 364-375, and lns 426-480.

³⁶ CAR-D30-0017-0001-R01, paras 52-54.

³⁷ CAR-D30-0025-0001-R01, lns 1127-1167.

³⁸ *See for example* on the spontaneity of the Anti-Balaka : P-0801, ICC-01/14-01/18-T-036-ENG CT, p. 75, lns 14-25 to p. 76, lns 1-14 ; P-0808, ICC-01/14-01/18-T-070-ENG CT, p. 30, lns 8-25 to p. 31, lns 1-18 and P-0952, ICC-01/14-01/18-T-251-ENG ET, p. 27 lns 11-21. On the objective of the Anti-Balaka *see for example* P-0808, ICC-01/14-01/18-T-070-ENG CT, p. 30, lns 8-25 to p. 31, lns 1-18 and P-0876, ICC-01/14-01/18-T-088-CONF-ENG ET, p. 14, lns 12-19. On the Anti-Balaka weapons *see for example* P-0446, ICC-01/14-01/18-T-099-ENG ET, p. 21, lns 3-14; P-1521, ICC-01/14-01/18-T-081-CONF-ENG ET, p. 42, lns 12-16; P-0952, ICC-01/14-01/18-T-249-ENG ET, p. 37, lns 16-25.

for other purposes and/or avoid witnesses having to travel in order to appear in court; and (vi) best serve the victims' interests."³⁹ Introducing Witness P-4953's proposed evidence under Rule 68(2)(b) would serve these objectives for the reasons that follow.

28. *First*, the interests of justice will be best served by expediting the proceedings and streamlining the presentation of the Defence evidence and focus on elements that are at the core of the case against Mr Ngaïssona. *Second*, it would avoid cumulative testimony since the core of the statement touches upon topics that have already been addressed by other witnesses. *Third*, it would save Court's resources; P-4953 is located in the provinces in CAR, so his travel and accommodation for in-court testimony would be costly for the Court.

4. The proposed evidence has sufficient indicia of reliability

29. In the First Rule 68(2)(b) Decision, the Chamber found that for the purposes of Rule 68(2)(b) it would conduct a *prima facie* analysis of whether the prior recorded testimony presents sufficient indicia of reliability. The Chamber determined that an important factor to consider in this determination is whether the statement fulfils the following formal requirements, in particular, whether the statement was: (1) was obtained in the ordinary course of its investigations; (2) was signed by the witness and the investigator(s) conducting the interview; (3) was given voluntarily; (4) was obtained in the presence of a qualified interpreter; (5) was verified by the witness at the time; and (6) includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement.⁴⁰

30. P-4953's statement has sufficient indicia of reliability for the purpose of its submission via Rule 68(2) : (i) the statement was obtained in the ordinary course

³⁹ ICC-01/14-01/18-1833-Conf-Corr, para. 41.

⁴⁰ ICC-01/14-01/18-1833-Conf-Corr, para. 43.

of the Defence's investigation, (ii) the statement was given voluntarily and declared to be accurate,⁴¹ (iii) the statement was taken by a person authorised to witness such a declaration, (iv) the statement was taken in a language that the witness understands and/or in the presence of a qualified interpreter,⁴² (v) was verified by the witness,⁴³ (vi) includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement.⁴⁴

E. Granting the Defence's request will not result in any prejudice to Mr Ngaïssona

31. Rule 68(1) does not mention the procedural rights of the Prosecution or victims, but rather limits the Chamber's consideration of prejudice specifically to the accused. Indeed, the preparatory works also explain that in amending Rule 68 to include more instances where prior recorded testimony could be introduced *in lieu* of live testimony, Rule 68(1) was included to safeguard the rights of the accused.⁴⁵ No mention was made of the other parties and participant's procedural rights. Therefore, when the Defence seeks to submit evidence pursuant to Rule 68(2)(b) considerations of prejudice do not apply. Mr Ngaïssona has decided to not examine the witness, since he has determined that his testimony well suited for introduction under Rule 68(2)(b). This will save precious court time and contribute to reducing the length of the proceedings, which have already spanned five years, during the entirety of which Mr Ngaïssona has been deprived of his liberty.

VI. RELIEF SOUGHT

The Defence respectfully requests the Chamber to:

⁴¹ CAR-D30-0026-0001-R01, p. 0007.

⁴² CAR-D30-0026-0001-R01, p. 0007.

⁴³ P-4953's statement was read to him on 9 January 2024, and he signed it in the presence of the Court's interpreter and the Defence's representative, *see* CAR-D30-0026-0001-R01, para. 1.

⁴⁴ CAR-D30-0026-0007-R01, paras 2-5.

⁴⁵ Working Group Report, ICC-ASP/12/37/Add.1, Annex II.A, para. 12.

- **GRANT** the present Request to introduce P-4953's prior recorded testimony into evidence pursuant to Rule 68(2)(b) of the Rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized name or set of initials, located below the text 'Respectfully submitted,'.

Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 13 March 2024

At The Hague, the Netherlands.