

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **16 April 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 *PROSECUTOR v. ALFRED YEKATOM AND  
PATRICE-EDOUARD NGAÏSSONA***

**Public**

**Public redacted version of “Prosecution’s Response to the Ngaïssona Defence Request for the Formal Submission of the Prior Recorded Testimony of D30-P-4914 pursuant to Rule 68(3)(ICC-01/14-01/18-2350-Conf)”, (ICC-01/14-01/18-2363-Conf), 15 February 2024**

**Source:** Office of the Prosecutor

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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## I. INTRODUCTION

1. The Prosecution opposes the Ngaïssona Defence Request for the Submission of the Prior Recorded Testimony of D30-P-4914 pursuant to Rule 68(3) of the Rules of Procedure and Evidence (“Rules”)<sup>1</sup> (“Request”). The Witness should be heard *viva voce*.

2. *First*, the read-back transcript does not amount to a ‘prior recorded testimony’ within the meaning of Rule 68 of the Rules. The record fails to comply with the standard criteria set out in Rules 111 of the Rules and the Chamber’s authorisation to depart from these does not amount to a blanket validation of all the Defence’s failures in properly recording this statement. The Defence further fails to explain why such departure was necessary and could not have been anticipated by signing the statements upon physically meeting D30-4914 twice before the Chamber’s first deadline to disclose such prior recorded testimonies on 17 November 2023.

3. *Second*, should the Chamber consider that the read-back transcript falls within the meaning of a ‘prior recorded testimony’, it does not present sufficient indicia of reliability. There is insufficient information confirming the identity of the interlocutor and the transcript reads as if information was simply suggested to a confirming interlocutor. Further, the read-back procedure of the draft statement was done months after the first interview with the Witness and the content similarly lacks indicia of reliability.

4. *Third*, while the Chamber may admit acts and conducts of the Accused under Rule 68(3) of the Rules, the read-back transcript contains a significant number of references to NGAISSONA, including in relation to his contributions before and after

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<sup>1</sup> ICC-01/14-01/18-2350-Conf (“Request”).

the 5 December 2013 attack on BANGUI, and his role and authority within the Anti-Balaka.

5. *Finally*, introducing the evidence under Rule 68(3) of the Rules will not necessarily expedite the proceedings, as the Defence announced a further six hours for the examination in chief if the evidence is introduced under Rule 68(3) of the Rules, and only four hours more, if D30-4914's testimony is heard entirely *viva voce*.

## II. CONFIDENTIALITY

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

## III. SUBMISSIONS

7. The Prosecution refers to the applicable law on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, as previously set out by the Chamber.<sup>2</sup>

*a. The read-back transcript does not amount to a 'prior recorded testimony'*

8. *First*, the read-back transcript submitted by the Defence for D30-4914<sup>3</sup> cannot be considered as 'prior recorded testimony' because it does not satisfy the basic requirements of Rule 111 of the Rules.<sup>4</sup>

9. 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. A note should also be made when someone has not signed the record as well as the reasons thereof. In this case,

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<sup>2</sup> ICC-01/14-01/18-907- Red, paras 8-16, *see also* ICC-01/14-01/18-1383, paras. 4-17.

<sup>3</sup> CAR-D30-0024-0001.

<sup>4</sup> ICC-01/14-01/18-907- Red, para. 11.

neither the read-back transcript nor any draft statement contains the signatures of the multiple individuals who conducted the questioning, namely [REDACTED] over the period of six months,<sup>5</sup> nor does it provide an explanation for this. Further, neither the initial questioning nor the Witness's answers were audio-recorded.

10. *Second*, the Chamber's authorisation regarding "the proposed course of action to take the statements of these witnesses"<sup>6</sup> did not amount to a blanket authorisation allowing for evidence to be collected in any manner without due consideration for the basic requirements of a prior recorded testimony.

11. *Third*, while the NGAISSONA Defence held multiple interviews with D30-4914, two of which were conducted in his presence on 7-8 June [REDACTED] and 5 November 2023 [REDACTED]<sup>7</sup> and while it was fully aware of the 17 November 2023 Chamber imposed deadline to disclose the statements they seek to introduce under Rule 68(3) of the Rules,<sup>8</sup> no explanation was given as to why they were unable to formalise a first or second statement with D30-4914 on those dates, especially given the Witness's signature of other documents<sup>9</sup> and their awareness of his imminent return to a 'remote location'.<sup>10</sup>

*b. In the alternative, the prior recorded testimony does not present sufficient indicia of reliability*

12. Should the Chamber consider that the read-back transcript constitutes a 'prior recorded testimony' within the meaning of Rule 68 of the Rules, the Prosecution submits that it does not present sufficient indicia of reliability.

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<sup>5</sup> CAR-D30-0024-0001, at 0002, l. 29-36.

<sup>6</sup> Trial Chamber V, email decision, 12 December 2023, at 11:13am.

<sup>7</sup> CAR-D30-0024-0001, at 0002, l. 28-32.

<sup>8</sup> See Chamber's decision of 29 May 2023, ICC-01/14-01/18-1892, para. 21.

<sup>9</sup> CAR-D30-0024-0001, at 0003, l. 66-68.

<sup>10</sup> See NGAISSONA Defence email of 4 December 2023, at 16:27, shared with the Prosecution on 7 December 2023, at 16:36.

13. *First*, there is no sufficient confirmation as to the identity of the interlocutor of the NGAISSONA Defence. Without confirming the identity of the person on the telephone line, the Defence team member proceeded to the introduction and the read-back:

*[00:00:00. Début de l'enregistrement]*

*2 Personne entendue : Allo.... allo?*

*3 Intervieweur 1 : Oui bonjour ...*

*4 Personne entendue :... Allo ?*

*5 Intervieweur 1 :... [REDACTED]...*

*6 Personne entendue :... Bonjour.*

*7 Intervieweur 1: Nous sommes le 14 décembre 2023, il est 08h54 du matin. Je suis donc membre de l'équipe de défense de Monsieur Patrice-Edouard NGAISSONA (...)*<sup>11</sup>

14. In fact, there is no indication in D30-4914's read-back transcript that the NGAISSONA Defence took *any* steps during the read-back to properly verify that the person on the other end of the line was indeed D30-4914.

15. *Second*, the transcript reads as if information was simply being suggested to the interlocutor, who in turn was agreeing to it. In fact, the transcript, as it stands, fails to provide the full portrait of the questioning that preceded the assertions that were put to him and therefore impedes the Chamber from assessing the extent to which suggestive or leading questions may have impacted D30-4914's accounts. For example, there is a glaring lack of information regarding the questions that preceded the Witness's confirmation of serious allegations regarding three protected Prosecution witnesses<sup>12</sup>: [REDACTED];<sup>13</sup> b) [REDACTED];<sup>14</sup> and c) [REDACTED].<sup>15</sup>

<sup>11</sup> CAR-D30-0024-0001, at 0002, l. 1-8.

<sup>12</sup> ICC-01/14-01/18-906, p. 44.

<sup>13</sup> CAR-D30-0024-0001, at 0025, l. 997-1000.

<sup>14</sup> CAR-D30-0024-0001, at 0023, l. 905-916.

<sup>15</sup> CAR-D30-0024-0001, at 0022, l. 872-887.

16. *Third*, the Chamber, citing to *Niyitegeka Appeals Judgement*, previously referred to the read-back procedure as having to occur “*as soon as possible after the interview has been given*”.<sup>16</sup> However, the read-back for D30-4914’s draft statement was conducted more than six months after the first record of his interview and a week after his last telephone interview.<sup>17</sup>

17. *Fourth*, the content of the prior recorded testimony also shows its unreliability. D30-4914 claims that: (a) [REDACTED];<sup>18</sup> and (b) [REDACTED].<sup>19</sup> The information contained in the read-back transcript is also inconsistent with the testimony of witnesses P-1719, P-2673, P-1847, and with documentary evidence, including Facebook material.

*c. The content relates to the acts and conducts of NGAISSONA, central issues in the case*

18. *First*, the Defence concedes that the statement relates to core issues of the case, including “the alleged contribution of Mr NGAISSONA and other alleged Anti-Balaka leaders in structuring, instructing, and financing the Anti-Balaka located at the border with Cameroon”.<sup>20</sup> More specifically, the Request submits that “D30-4914 attests to Mr NGAISSONA’s lack of contribution in structuring, instructing, and financing the Anti-Balaka allegedly located at the border prior to and after 5 December 2013” and that false allegations were made against Mr NGAISSONA by individuals, including Prosecution witnesses, to further their personal ambitions.<sup>21</sup>

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<sup>16</sup> ICC-01/14-01/18-539, para. 21, citing to ICTR, Appeals Chamber, *The Prosecutor v. Eliézer Niyitegeka*, Judgement, 9 July 2004, ICTR-96-14-A, para. 32.

<sup>17</sup> CAR-D30-0024-0001, at 0002, l. 28-32, indicating that the first interview occurred on 7-8 June 2023 and that the last interview occurred on 6 December 2023. The read-back procedure was performed on 14 December 2023.

<sup>18</sup> CAR-D30-0024-0001, at 0010, l. 358-359.

<sup>19</sup> See CAR-D30-0020-0001.

<sup>20</sup> ICC-01/14-01/18-2350-Conf, para. 9.

<sup>21</sup> ICC-01/14-01/18-2350-Conf, para. 10(j)(k).

19. *Second*, a prior recorded testimony that *disproves* the acts and conduct of the Accused equally qualifies as going to their acts and conducts under Rule 68 of the Rules.<sup>22</sup> In this case, D30-4914 makes over 50 references to NGAISSONA throughout the transcript and addresses a number of matters which are materially in dispute, *inter alia*:

- [REDACTED];<sup>23</sup>
- [REDACTED];<sup>24</sup>
- [REDACTED]<sup>25</sup> [REDACTED];<sup>26</sup>
- [REDACTED];<sup>27</sup>
- [REDACTED];<sup>28</sup>
- [REDACTED];<sup>29</sup>
- [REDACTED];<sup>30</sup>
- [REDACTED];<sup>31</sup>
- [REDACTED];<sup>32</sup>
- [REDACTED];<sup>33</sup>
- [REDACTED];<sup>34</sup>
- [REDACTED];<sup>35</sup>
- [REDACTED];<sup>36</sup>
- [REDACTED];<sup>37</sup>
- [REDACTED];<sup>38</sup>

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<sup>22</sup> ICC-01/12-01/18-2288, para. 7.

<sup>23</sup> CAR-D30-0024-0001, at 0012, l. 460-462.

<sup>24</sup> CAR-D30-0024-0001, at 0013, l. 488-492.

<sup>25</sup> CAR-D30-0024-0001, at 0014, l. 553-556.

<sup>26</sup> CAR-D30-0024-0001, at 0015, l. 577-579.

<sup>27</sup> CAR-D30-0024-0001, at 0017, l. 675-677.

<sup>28</sup> CAR-D30-0024-0001, at 0018, l. 685-691.

<sup>29</sup> CAR-D30-0024-0001, at 0019, l. 732-743.

<sup>30</sup> CAR-D30-0024-0001, at 0020, l. 780-800.

<sup>31</sup> CAR-D30-0024-0001, at 0025, l. 997-1000.

<sup>32</sup> CAR-D30-0024-0001, at 0029, l. 1160-1168.

<sup>33</sup> CAR-D30-0024-0001, at 0028, l. 1136-1139.

<sup>34</sup> CAR-D30-0024-0001, at 0012, l. 445-449.

<sup>35</sup> CAR-D30-0024-0001, at 0012, l. 463-467.

<sup>36</sup> CAR-D30-0024-0001, at 0012, l. 468-469.

<sup>37</sup> CAR-D30-0024-0001, at 0013, l. 474-478.

<sup>38</sup> CAR-D30-0024-0001, at 0015, l. 575-576.



- [REDACTED],<sup>39</sup>
- [REDACTED],<sup>40</sup> and
- [REDACTED].<sup>41</sup>

*d. Introducing the evidence under Rule 68(3) of the Rules will not necessarily expedite the proceedings*

20. The Request indicates that six further hours will be necessary to elicit information from D30-4914 should the information be introduced in evidence pursuant to Rule 68(3) of the Rules. This is clearly not a focused supplementary examination of the Witness and it further does not substantially expedite the proceedings. A *viva voce* examination would be conducted with only four hours more and would additionally guarantee the fairness of the proceedings.

#### IV CONCLUSION

21. For the foregoing reasons, the Prosecution requests the Chamber to dismiss the Rule 68(3) Request regarding D30-4914's read-back transcript and associated item and decide that he should testify *viva voce*.



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**Karim A. A. Khan KC, Prosecutor**

Dated this 16<sup>th</sup> day of April 2024  
At The Hague, The Netherlands

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<sup>39</sup> CAR-D30-0024-0001, at 0017, l. 648-649.

<sup>40</sup> CAR-D30-0024-0001, at 0016, l. 638-640.

<sup>41</sup> CAR-D30-0024-0001, at 0027, l. 1098-1104.