

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 18 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC with CONFIDENTIAL ANNEX A

Public Redacted Version of “Ngaiissona Defence Request for Formal Submission of Prior Recorded Testimony of Defence Witness D30-P-4197 pursuant to Rule 68(3) of the Rules” (ICC-01/14-01/18-2368-Conf), filed on 16 February 2024

Source: Defence of Patrice-Edouard Ngaiissona

No. ICC-01/14-01/18

1/12

18 April 2024

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

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I. INTRODUCTION

1. Pursuant to Rule 68(3) of the Rules of Procedure and Evidence (the “Rules”), the Defence of Mr Ngaissona (the “Defence”) hereby requests Trial Chamber V (the “Chamber”) to introduce the prior recorded testimony of D30-P-4197 (“D30-P-4197’s Proposed Evidence”) (the “Request”).
2. D30-P-4197’s Proposed Evidence is relevant and cumulative of other evidence on the record on certain aspects, evidence submitted by the Prosecution as well as the Defence, and satisfies the remaining requirements of Rule 68(3).
3. Were the Chamber to grant the Request, the Defence estimates that it will require 4 hours with witness D30-P-4197 from the originally estimate of 8 hours, thus reducing by half the number of hours of in-court direct examination.

II. CONFIDENTIALITY

4. The Request and its annex are classified as “confidential” as they relate to evidence disclosed confidentially and proposed by D30-P-4197 whose identity needs to remain confidential. A public redacted version of the Request will be filed in due course.

III. PROCEDURAL HISTORY

5. On 16 October 2020, the Chamber issued its “Decision on the Prosecution Extension Requests and Initial Guidance on Rule 68 of the Rules”,¹ wherein it provided general guidance on the recourse to Rule 68(3) of the Rules and ordered, *inter alia*, the Prosecution “to submit its Rules 68(3) applications latest 45 days before the scheduled date of a witness’s testimony”.²

¹ ICC-01/14-01/18-685.

² *Ibid.*, para. 19.

6. On 10 March 2021, the Chamber issued its “Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P 0287 [...]”³ (the “First Decision”) wherein it set out the applicable law under Rule 68(3) of the Rules.⁴
7. On 29 May 2023, the Chamber issued its “Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence)”,⁵ whereby it set the deadline for the Defence to file its applications pursuant to Rule 68(2) and (3) of the Rules to 17 November 2023.⁶
8. On 1 November 2023, the Chamber partly granted the Defence Request for Extension of Time,⁷ and instructed, *inter alia*, the Defence to disclose the statements of its witnesses and file their corresponding applications pursuant to Rule 68(2) and (3) of the Rules until no later than 15 December 2023.⁸
9. On 17 November 2023, the Defence submitted its Final Witness List, indicating that it intended to have D30-P-4197 testify under Rule 68(3) of the Rules.⁹
10. On 12 December 2023, the Defence filed an “Urgent Consolidated Ngaïssona Defence request to extend the time limit for the submission of Rule 68(3) applications [...]”, requesting to submit its Rule 68(3) applications not less than 45 days before the witnesses are scheduled to appear.¹⁰

³ ICC-01/14-01/18-907-Red.

⁴ *Ibid.*, paras. 8-16.

⁵ ICC-01/14-01/18-1892.

⁶ *Ibid.*, para. 21.

⁷ Defence Request pursuant to Regulation 35 to vary the time limit, ICC-01/14-01/18-2157-Conf-Exp, confidential ex parte, only available to the Ngaïssona Defence (confidential redacted version notified the same day, ICC-01/14-01/18-2157-Conf-Red) (with one confidential annex); Decision on the Ngaïssona Defence Request for Extension of Time, ICC-01/14-01/18-2181.

⁸ ICC-01/14-01/18-2181, paras 8-9.

⁹ ICC-01/14-01/18-2215-Conf-Anx1, p. 10, entry 11.

¹⁰ ICC-01/14-01/18-2256-Conf.

11. On the same day, the Chamber authorized the Defence to conduct the taking of the prior recorded testimony of D30-P-4197 in a fully remote manner, by completing and disclosing a transcript of the read back of the witness's statement.¹¹
12. On 14 December 2023, the Chamber granted the extension request filed by the Defence on 12 December 2023.¹²
13. On 11 January 2024, the Defence informed the Chamber that the prior recorded testimony of D30-P-4197 had been disclosed to the parties and participants.¹³

IV. APPLICABLE LAW

14. The Defence incorporates by reference the applicable law set out by the Chamber in its First Decision.
15. Further, Trial Chamber X in the *Al Hassan* case stated that a “[...] prior recorded testimony may still be introduced even if it relates to issues that are materially in dispute, central to core issues of the case, or are uncorroborated. However, the Chamber will take into account, on a case-by-case basis, that the introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of trial generally.”¹⁴
16. The Appeals Chamber further decided in the *Gbagbo and Blé Goudé* case that: “[w]hile no one factor is, as a matter of principle, determinative, the Appeals Chamber considers, in particular, that where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony

¹¹ Email from Trial Chamber V Communications, 12 December 2023 at 11:13, to the parties and participants.

¹² ICC-01/14-01/18-2264.

¹³ Email from D30, 11 January 2024 at 18:18, to the Trial Chamber V, parties and participants.

¹⁴ *The Prosecutor v Al Hassan*, ICC-01/12-01/18-987-Red, para. 10 (footnotes omitted). See also *The Prosecutor v Gbagbo and Blé Goudé*, Appeals Judgment, ICC-02/11-01/15-744, paras 2, 67, 69. See also *The Prosecutor v Ongwen*, Decision on Prosecution's Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, ICC-02/04-01/15-621, para. 7.

in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally [...]” and that this prejudice could be mitigated by the fact that the witness will undergo in-court examination by the Parties and the Chamber, if necessary.¹⁵ The Appeals Chamber thus confirmed that a witness prior recorded testimony relating to core and uncorroborated issues in the case does not preclude the introduction of this prior recorded statement under Rule 68(3) of the Rules.

17. In relation to witness statements taken in a fully remote manner, Trial Chamber X has already admitted Defence evidence submitted pursuant to Rule 68(2)(b) of the Rules in the form of a statement that was taken completely remotely.¹⁶ The Trial Chamber found that the read back of the statement was sufficient to control the identity of the witness, combined, *inter alia*, with the fact that the witness had provided an identification card and the Defence was accustomed with the witness.¹⁷

V. SUBMISSIONS

A. D30-P-4197’s Proposed Evidence fulfils the requirements set out under Rule 68(3) of the Rules

18. The Defence submits that the Chamber should grant the Defence’s Request for the reasons substantiated below.

¹⁵ *Gbagbo and Blé Goudé* Appeals Judgment, ICC-02/11-01/15-744, paras 67, 69.

¹⁶ *The Prosecutor v Al Hassan*, Decision on the introduction into evidence of the prior recorded testimony of D-0544, D-0611, D-0093 and D-0240 pursuant to Rule 68(2)(b) and (3) of the Rules, ICC-01/12-01/18-2288, para. 15.

¹⁷ *Ibid*, See also the Public redacted version of Defence reply to “Prosecution response to “Defence Rule 68(2)(b) and Rule 68(3) applications” (ICC-01/12-01/18-2276-Conf)” (ICC-01/12- 01/18-2280-Conf), ICC-01/12-01/18-2287-Conf-Exp, 20 July 2022.

19. The Defence seeks the introduction of D30-P-4197's prior recorded testimony in the form of a transcript of a read back of his statement, which took place [REDACTED]. D30-P-4197's transcribed statement is 13-page long and was confirmed by the witness as being in conformity with the information that was provided to the Defence team of Mr Ngaïssona [REDACTED].¹⁸ Nevertheless, the witness will attest to its accuracy and will be available for in-court examination by the Prosecution, the Defence for Mr Yekatom, the participants and the Chamber. The witness will be available to confirm that it was him who was on the phone with the read back. Were the Chamber to grant the Request, the Defence estimates that it will take approximately 4 hours to examine the witness.

20. D30-P-4197 is a fact witness, whose prior recorded testimony establishes, *inter alia*, the following:

- D30-P-4197 discusses his interactions [REDACTED] with Mr Ngaïssona who was a member of parliament at the National Assembly at the time, notably how Mr Ngaïssona would sponsor activities carried out by the youth;¹⁹
- D30-P-4197 recounts the circumstances around the arrest of Mr Ngaïssona, including, *inter alia*, how he came across information about Mr Ngaïssona's arrest before it occurred, how he informed Mr Ngaïssona and the latter's reaction;²⁰
- D30-P-4197 discusses the political and family links between different actors in the government who were involved in the rumours around the

¹⁸ CAR-D30-0027-0001.

¹⁹ CAR-D30-0027-0001, lines 73-100.

²⁰ CAR-D30-0027-0001, lines 119-301.

arrest of Mr Ngaïssona, as well as the corruption problems within the government of CAR;²¹

- D30-P-4197 explains that [REDACTED], that he refused to do so, but heard that other political personalities did. D30-P-4197 explains the impact of those events on him and on his career;²²
- D30-P-4197 explains how Mr Ngaïssona was the top choice for the position of Prime minister, due to his popularity, especially amongst the youth, and how his arrest was designed to prevent such an appointment;²³
- D30-P-4197 explains that he has direct knowledge of efforts to corrupt people in exchange of false testimonies against Mr Ngaïssona.²⁴

21. *First*, all the requirements of Rule 68(3) of the Rules are met. D30-P-4197 understood that his prior recorded testimony could be used in the context of these legal proceedings.²⁵ The witness also understood that he could be called to testify in this case and agreed to it.²⁶ The witness was screened by Defence team members on [REDACTED] and thoroughly interviewed by other Defence team members on [REDACTED] in French, a language that the witness speaks and understands perfectly. His statement was read back to him on [REDACTED], and he confirmed that this statement reflected accurately what he told the Defence in [REDACTED], with minor corrections that are reflected in the transcribed statement disclosed to the parties and participants. The witness will be available to confirm his agreement to the introduction of his statement pursuant to Rule 68(3) and to confirm that it accurately reflects what he said to the Defence team of Mr Ngaïssona on

²¹ CAR-D30-0027-0001, lines 312-322; 371-428;

²² CAR-D30-0027-0001, lines 153-163; 360-369.

²³ CAR-D30-0027-0001, lines 135-144; 312-317.

²⁴ CAR-D30-0027-0001, lines 333-358.

²⁵ CAR-D30-0027-0001, lines 453-462.

²⁶ CAR-D30-0027-0001, lines 453-462.

[REDACTED]. The method used to obtain the prior statement of the witness was agreed upon by the Trial Chamber ahead of the read back, the Trial Chamber being very well aware of the reasons the Defence could not sign the statement in person and meet the deadline set to disclosed it.²⁷ Also, one of the Defence team member on the call was also present during the in-person interview conducted in [REDACTED]. At the beginning of the call, the witness was asked to confirm his name and confirmed that the personal identification information (date of birth, passport number) read by the Defence were correct.²⁸ The Defence thus sufficiently confirmed the identity of the person on the phone [REDACTED].

22. *Second*, the Defence recalls that documents can be associated with the witness statement, as long as those documents form an integral part of the testimony of the witness.²⁹ The Defence included two extracts of an excel spreadsheet reflecting text messages that the witness sent to Mr Ngaïssona, as presented to and discussed with the witness during his interview.³⁰ As such, those messages form an integral part of D30-P-4197's prior recorded testimony.

23. *Third*, the proposed statement is relevant and probative. D30-P-4197's Proposed Evidence goes to the credibility of Prosecution witnesses who testified against Mr Ngaïssona³¹ and to the political context surrounding his arrest. This is relevant for the Trial Chamber to assess the credibility of witnesses that have testified against the Mr Ngaïssona.

24. Further, parts of D30-P-4197's prior recorded testimony are corroborated by and/or cumulative to the evidence proposed by other witnesses, such as P-2673 being a

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ ICC-01/14-01/18-907-Red, para. 13.

³⁰ CAR-OTP-2098-0199, 28 November 2018 : rows 161 and 164; 10 December 2018 : rows 28 and 30.

³¹ P-1847; P-2673; P-0884; P-0801.

intelligence agent³² [REDACTED].³³ Besides, as per previous decisions of this Court, corroboration is a factor a Chamber may take into consideration, without being determinative of the admissibility of a statement. Indeed, the absence of corroboration on some core aspects of the statement does not preclude the admission of evidence through Rule 68(3) of the Rules. Hence, the fact that some key aspects of the proposed evidence by witness D30-P-4197 does not find corroboration of the record is not fatal. The relevance and probative value of the information provided by the witness, combined with the fact that the parties and participants, as well as the Chamber, will have the opportunity to challenge the witness' prior recorded testimony in-court, compensate for the lack of corroboration on certain issues. It is also noteworthy that no prejudice will be caused to the parties and participants, as will be elaborated further in the section below. This should not preclude the admission of the witness's prior recorded statement.

B. The introduction of D30-P-4197's Proposed Evidence is not prejudicial

25. The Prosecution cannot be prejudiced by the introduction of a testimony pursuant to Rule 68(3) of the Rules, as long as the requirements stipulated therein are met, since the provision provides fair trial guarantees to the sole benefit of the accused.³⁴

³² ICC-01/14-01/18-T-042-CONF-ENG, p. 62, lines 12-16, p. 63, lines 17-19.

³³ [REDACTED].

³⁴ Rule 68(1) of the Rules of Procedure and Evidence (“*When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.*”) (emphasis added).

26. The Defence recalls that the formal submission of a Rule 68(3) statement “[...] aims at reducing the amount of time devoted to hearing oral testimony in court”³⁵ all the while complementing it.³⁶ Granting the Request will cause no prejudice to the parties and participants or on the fairness of the trial generally. The prior recorded statement is sought to be introduced by the Defence, and not the Prosecution. Therefore, the resulting prejudice for the Prosecution is inexistent or mitigated by the possibility to examine the witness in court, especially since the Prosecution has announced that they estimate they will require 6 hours to examine the witness. Although D30-P-4197 discusses core issues, his declaration is fairly short and addresses very discrete events which can easily be dealt by the Prosecution in 6 hours.
27. Considering that some aspects of D30-P-4197's prior recorded statement are corroborated, the introduction of his prior recorded testimony would allow the Defence to focus its examination on the unique aspects of its proposed evidence, namely the circumstances of the arrest of Mr Ngaïssona and the corruption efforts to fabricate evidence. Further, the witness will be available in court for the examination by the Prosecution, the participants, the Chamber and the Defence for Mr Yekatom should there be any aspect of his statement for which it is judged that further examination is needed.
28. The submission of D30-P-4197's proposed evidence would therefore be in the interest of the expeditiousness of the proceedings and of justice.

³⁵ *Prosecutor v. Gbagbo & Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 1 November 2016, ICC-02/11-01/15-744, para. 61.

³⁶ ICC-01/14-01/18-907-Red., para. 14, citing *Gbagbo and Blé Goudé Appeals Judgment*, ICC-02/11-01/15-744, para. 79. See also *Ongwen Rule 68(3) Decision*, ICC-02/04-01/15-621, para. 6.

VI.RELIEF SOUGHT

The Defence respectfully requests the Chamber to **GRANT** the Request to introduce D30-P-4197's Proposed Evidence pursuant to Rule 68(3), subject to the fulfilment of the further conditions of Rule 68(3).

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaissona

Dated this 18 April 2024

At The Hague, the Netherlands.