

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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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 1

Public redacted Version of the "First Ngaißsona Defence request to introduce prior recorded testimony pursuant to Rule 68(2)(b)", ICC-01/14-01/18-2238-Conf, 4 December 2023

Source: Defence of Patrice-Edouard Ngaißsona

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

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## I. INTRODUCTION

1. The Defence for Mr Patrice-Edouard Ngaïssona ('the Defence') hereby requests the formal submission of the prior recorded statement and associated materials of Witness CAR-D30-P-4957 ('P-4957 's proposed evidence') pursuant to Rule 68(2)(b) of the Rules of Evidence and Procedure ("Rules").<sup>1</sup> P-4957's proposed evidence is relevant to the contextual elements of the charges against Mr Ngaïssona. It is well suited for introduction under Rule 68(2)(b) of the Rules, in that, it meets the rule's requirements. Specifically, P-4957's proposed evidence does not relate to Mr Ngaïssona's acts and conduct. Additionally, the weighing of the different discretionary factors that trial chambers must consider when assessing Rule 68(2) applications, favors introducing P-4957's proposed evidence under Rule 68(2)(b). P-4957's proposed evidence has been prepared in a reliable manner and is cumulative and corroborative of other witnesses who have testified on the same facts or similar facts. Granting the present request will also serve the interests of justice in that it will enhance the expeditiousness of the proceedings, obviate the unnecessary appearance of P-4957 whose prior recorded testimony consists of a precise and limited subject, and advance the Chamber's truth finding function.
2. The Defence has also already liaised with the Registry to obtain certification of P-4957's statement as required by Rule 68(2)(b)(ii) and (iii) of the Rules. Should the Chamber grant the Defence's request, it will ensure that such certification is completed reasonably close in time to the taking of P-4957's statement.

## II. CONFIDENTIALITY

3. Pursuant to regulation 23bis(1) of the Regulations of the Court ("RoC"), this request and its Annexes are filed as confidential, since they contain confidential

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<sup>1</sup> The Proposed evidence consists of one witness statement and 12 associated exhibits, which are contained in Annex 1 of the present request.

information that identifies the witness. The Defence will file a public redacted version in due course.

### III. APPLICABLE LAW

4. Rule 68(2)(b) of the Rules provides that trial chambers may allow the introduction of the prior recorded testimony of a witness who is not present before the Court when the following two requirements are met. First, the *chapeau* requirement of Rule 68(2)(b) specifies that the prior recorded testimony must not relate to the acts and conduct of the accused.<sup>2</sup> Second, the requirements of Rule 68(2)(b)(ii) and (iii) must also be satisfied. Specifically, under Rule 68(2)(b)(ii), the prior recorded testimony must be accompanied by a declaration from the witness, which certifies that the contents of the prior recorded testimony are true and correct. This declaration cannot contain new information and must be made reasonably close in time to the prior recorded testimony. Further, under Rule 68(2)(b)(iii) the accompanying declaration must be witnessed by a person authorized to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State.
5. If the prior recorded testimony does not relate to the acts and conduct of the accused, then trial chambers can make a discretionary determination on whether the prior recorded testimony should be introduced. In exercising this discretion, trial chambers must consider the non-exhaustive list of factors specified in Rule 68(2)(b)(i) namely, whether the prior recorded testimony : (1) relates to issues which are not materially in dispute ; (2) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (3) relates to background information; and (4) is such that the interests of justice are best served by its introduction; and (5) has sufficient indicia of reliability.

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<sup>2</sup> ICC-01/14-01/18-1833-Conf-Corr, para. 17.

6. Rule 68(1) further instructs trial chambers to consider as part of their assessment of applications falling under any of Rule 68's subrules whether the introduction of the prior recorded testimony would be prejudicial or inconsistent with the rights of the accused.

#### IV. SUBMISSIONS

7. P-4957's proposed evidence goes to the proof of the absence of any firearm stores in [REDACTED] in Bangui before alleged 5 December 2013 attack. It rebuts Witness P-0965's evidence who testified, albeit through an inconsistent account, that [REDACTED]<sup>3</sup> to inform them that [REDACTED] during the alleged 5 December 2013 attack.<sup>4</sup> P-0965 testified that [REDACTED].<sup>5</sup> This testimony is relevant to the issue of whether the Anti-Balaka were an organization under Article 7(2) and an organized armed group under Article 8(2)(f) of the Rome Statute. More specifically, it relates to the Prosecution's argument that the Anti-Balaka were allegedly structured, armed and financed by François Bozizé and his inner circle, which then gave them the capacity and the means to commit the crimes charged. Witness P-4957's proposed evidence impugns the credibility of P-0965 on this issue.
8. The Defence requests that Trial Chamber V ('the Chamber') exercise its discretion by introducing P-4957's proposed evidence under Rule 68(2)(b) for the following four reasons: (1) the proposed evidence constitutes prior recorded testimony, (2) it does not relate to the acts and conduct of Mr Ngaiissona; (3) a consideration of the relevant factors that the Chamber must take into account favors introducing P-

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<sup>3</sup> Compare P-0965: T-063-CONF-ENG, p. 4 with P-0965: T-061-ENG p. 25 and P-0965: T-063-CONF-ENG, p. 5.

<sup>4</sup> P-0965 : T-063-CONF-ENG CT, p. 4.

<sup>5</sup> Ibid., p. 5, 54.

4957's proposed evidence and (4) no prejudice would result from granting the Defence's request.

A. Analysis of P-4957's proposed evidence

9. P-4957 is a Central African citizen[REDACTED].<sup>6</sup> His proposed evidence provides important details regarding [REDACTED] before, during and after the Relevant Period.<sup>7</sup>

10. D30-P-4957's proposed evidence establishes that:

- [REDACTED] .<sup>8</sup> This impugns the credibility of P-0965's testimony on this alleged fact.
- During the Relevant Period, [REDACTED] was difficult to access because the roads were incredibly difficult to access due to poor maintenance.<sup>9</sup> The road which divides the [REDACTED] in two shows the lush vegetation surrounding both sides of the road, which P-4957 identifies as [REDACTED].<sup>10</sup> Given these circumstances, any goods would be damaged if transported within [REDACTED].<sup>11</sup> This also impugns the credibility of Witness P-0965's account of [REDACTED].
- During the Relevant Period, [REDACTED] was less frequented because of the reigning insecurity due to its location.<sup>12</sup> [REDACTED], which was a Seleka base during the Relevant Period. This adds to the implausibility of P-0965's account that hundreds of Anti-Balaka elements could have gone to

<sup>6</sup> CAR-D30-0015-0001, at 0003, para. 12.

<sup>7</sup> The Relevant Period in Central African Republic spans from December 2013 to December 2014. ICC-01/14-01/18-89, para. 2.

<sup>8</sup> Ibid., para. 15.

<sup>9</sup> CAR-D30-00015-0001, at 0003, para. 16, 0004, at paras 19-22.

<sup>10</sup> See Annex 12, CAR-OTP-D30-0015-0001, at 0004 at para. 16; CAR-D30-0015-0018.

<sup>11</sup> CAR-D30-0015-0001 at 0005, para. 23.

<sup>12</sup> CAR-D30-00015-0001 at 0004, para. 18.

[REDACTED] on the eve of the 5 December 2013 attack<sup>13</sup> without such an act putting them in peril of life or limb.

B. The proposed material constitutes “prior recorded testimony” under Rule 68(2)(b) of the Rules

11. 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.<sup>14</sup> 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.”<sup>15</sup> Additionally, the Chamber recalled that “‘prior recorded testimony’ includes any annex to witness statements, or item otherwise associated with it, as long as it is used or explained by the witness in their statement and thereby forms an integral part of the testimony itself.”<sup>16</sup>

12. Here, Witness P-4957 provided a statement to the Defence and was questioned in his capacity as a witness in the present proceedings.<sup>17</sup> He knew he was providing information that may be relied upon in the context of the present proceedings since the Defence informed the witness that they were investigating the events that occurred in the Central African Republic (‘CAR’) since 2012 and that it sought to question the witness because he held information that would assist the Chamber in establishing the truth.<sup>18</sup> Moreover, P-4957 was informed that any

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<sup>13</sup> P-0965 : T-063-CONF-ENG CT, p. 56.

<sup>14</sup> ICC-01/14-01/18-1833-Conf-Corr 1, para. 23.

<sup>15</sup> ICC-01/14-01/18-1833-Conf-Corr 1, para. 23.

<sup>16</sup> *Ibid.*, para. 24.

<sup>17</sup> CAR-D30-0015-0001-0002, at paras 1-4.

<sup>18</sup> *Ibid.*

information he would provide to the Defence including his identity and statement could be provided to the Prosecution, victims representatives, and the Chamber.<sup>19</sup> Therefore, there can be no doubt that Witness P-4957 understood that his statement and annexes could be relied upon in the context of legal proceedings.

13. Lastly, the associated exhibits annexed to P-4957's statement are also part of his prior-recorded testimony. P-4957 explained each exhibit individually in his statement. Thus, they form an integral part of his prior recorded testimony.<sup>20</sup>

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

14. The proposed evidence does not relate to the acts or conduct of Mr Ngaissona. In the First Rule 68(2)(b) Decision, the Chamber found that, in the case against Mr Ngaissona, "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".<sup>21</sup> 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."<sup>22</sup> Limited, peripheral references to the 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.<sup>23</sup>

15. Here, the only mention of Mr Ngaissona is limited to one paragraph of the statement, which has no significance to the case and does not constitute the core of P-4957's prior recorded testimony.<sup>24</sup> The references to Mr Ngaissona are limited to

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<sup>19</sup> Ibid., para. 7.

<sup>20</sup> Ibid., para. 16.

<sup>21</sup> ICC-01/14-01/18-1833-Conf-Corr, para. 28.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid., para. 29.

<sup>24</sup> CAR-D30-0015-0001, at 0005, para. 24.



the witness knowing who he is, and providing his opinion of his actions in CAR during the Relevant Period.<sup>25</sup> This is wholly unrelated to the purposes for which the Defence seeks to submit the prior recorded testimony. The Defence mainly seeks to rely on P-4957 to impugn the credibility of Witness P-0965 whose evidence did not mention Mr Ngaïssona being at all involved in [REDACTED]. Indeed, the Defence wishes to rely on P-4957's proposed evidence to show the weakness of the Prosecution's arguments regarding the alleged arming and structuring of the Anti-Balaka by François Bozizé and the alleged inner circle. This information relates to contextual elements of crimes namely, whether the crimes were organized under Article 7(2) and Article 8(2)(f) of the Rome Statute. Rule 68(2)(b) was intended to be used for exactly this type of evidence.<sup>26</sup>

D. The introduction of P-4957's proposed evidence is warranted

16. Since P-4957's proposed evidence does not relate to the acts and conduct of Mr Ngaïssona, the Defence requests the Chamber to consider that the discretionary factors listed in Rule 68(2)(b)(i) favour the introduction of his prior recorded testimony, and that such introduction will cause no prejudice to Mr Ngaïssona's rights.

i. *P-4957's proposed evidence does not relate to facts that are materially in dispute*

17. In determining whether the prior recorded testimony relates to issues which are materially in dispute, the Chamber should 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."<sup>27</sup>

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<sup>25</sup> Ibid.

<sup>26</sup> ICC-01/14-01/18-1833-Conf-Corr, para. 144.

<sup>27</sup> ICC-01/04-02/06-596-Red, para. 15.

[REDACTED],<sup>28</sup> its proximity to [REDACTED],<sup>29</sup> the insecurity which reigned in that area during the Relevant Period is not disputed by the parties. Moreover, whether [REDACTED] at the behest of Francois Bozize for Anti-Balaka elements to use in view of the 5 December 2013 attack has not been referred to by the Prosecution in its Pre-Trial Brief. The Prosecution also did not question Witness P-0306 on the matter despite P-0965 testifying that P-0306 [REDACTED].<sup>30</sup>

18. There is only one witness who has testified on the issue of [REDACTED], namely P-0965, whose testimony is wholly uncorroborated and contradicted by other evidence on record.<sup>31</sup> Therefore, this issue is not soundly and conceivably disputed by the parties. Moreover, given that this issue does not relate to any role Mr Ngaïssona would have played with [REDACTED] it is unlikely to play any significant role in the Chamber's eventual determination of the charges against Mr Ngaïssona.

ii. *P-4957's proposed evidence is of a cumulative and corroborative nature in that other witnesses have given oral or written testimony on similar facts*

19. P-4957 proposed evidence is cumulative of or corroborated by several witnesses who have given oral or written testimony on the same or similar facts. In particular:

- P-0446 corroborates P-4957's account that [REDACTED] during the Relevant Period, and specifically just before the 5 December 2013 alleged attack.<sup>32</sup> P-

<sup>28</sup> Witness P-0965, who is the source of the allegation of [REDACTED]. T-063-CONF-ENG, p. 56.

<sup>29</sup> Witness P-0965, who is the source of the allegation of [REDACTED], which was a Seleka base at the time. Ibid.

<sup>30</sup> Ibid., pp. 4-5.

<sup>31</sup> See subsection "*P-4957's proposed evidence is of a cumulative and corroborative nature in that other witnesses have given oral testimony on similar facts*" of the present request, specifically, para. 19.

<sup>32</sup> P-0446: T-097-CONF-ENG ET, p. 64.

0446, the former spokesperson of the Anti-Balaka, testified that he had never heard of Anti-Balaka elements going to [REDACTED].<sup>33</sup>

- P-1521 who allegedly participated in the 5 December attack also corroborates P-4957's proposed evidence. P-1521 even declared that the assertion that the Anti-Balaka, which includes Andjilo's group would have [REDACTED] was not true, and qualified this allegation as "pure lies."<sup>34</sup>
- P-0306, for whom P-0965 testified he was a secretary, and who according to P-0965 was ordered to go to [REDACTED]<sup>35</sup> corroborates P-4957's account. When examined on whether P-0306 ever went to [REDACTED], P-0306 testified that he would pass by it, but that he never went inside [REDACTED].<sup>36</sup>
- P-1143, whose prior recorded testimony the Chamber introduced under Rule 68(2)(b)<sup>37</sup> stated that it was too dangerous to [REDACTED] during the Relevant Period and so families would [REDACTED] in the neighborhoods.<sup>38</sup> This corroborates P-4957's prior recorded statement where he describes the same phenomenon.<sup>39</sup>

iii. *Introducing P-4957's proposed evidence through Rule 68(2)(b) would serve the interests of justice*

20. 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;

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<sup>33</sup> Ibid., pp 63-64.

<sup>34</sup> P-1521: T-082-CONF-ENG, p. 75.

<sup>35</sup> P-0965: T-063-CONF-ENG, p. 4.

<sup>36</sup> P-0306: T-068-CONF-ENG, p.68.

<sup>37</sup> ICC-01/14-01/18-1833-Conf-Corr, para. 279.

<sup>38</sup> CAR-OTP-2058-022, at 0241 para. 91.

<sup>39</sup> CAR-D30-00015-0001, at 0004, para. 18.

(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 for other purposes and/or avoid witnesses having to travel in order to appear in court; and (vi) best serve the victims' interests."<sup>40</sup> Introducing Witness P-4957's proposed evidence under Rule 68(2)(b) would serve these objectives for the reasons that follow.

21. First, the interests of justice would be served by expediting the proceedings. It would obviate the need to spend the Defence's limited court time on a witness whose evidence does not relate to the core of the charges against Mr Ngai'ssona. Second, it would streamline such presentation because the Defence would focus its examinations on witnesses whose testimony relates to the issues which are materially in dispute and at the heart of the case. Third, it would minimize cumulative testimony, since the topics to which P-4957's evidence relates have been addressed by other witnesses in these proceedings as submitted above. Fourth, resources would be saved by the Court not needing to spend its limited budget on the appearance of a witness whose testimony touches upon the contextual elements of crime on an issue that is not genuinely disputed by the parties. Lastly, the interests of victims are, at most, indirectly affected by Witness P-4957's proposed evidence, since said evidence mainly relates to [REDACTED] there before the 5 December attack.

iv. *P-4957's proposed evidence has sufficient indicia of reliability*

22. 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 fulfills

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<sup>40</sup> ICC-01/14-01/18-1833-Conf-Corr, para. 41.

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...".<sup>41</sup>

23. Witness P-4957's proposed evidence was prepared in a reliable manner. The Defence team members obtained the statement in the ordinary course of the Defence's investigations and explained to the witness their role as representatives of Mr Ngaissona in the current proceedings.<sup>42</sup> It also explained the significance of P-4957's statement for the proceedings, and that it may play a role in the Chamber's determination of the truth.<sup>43</sup> Witness P-4957 signed the statement and the associated annexes and was assisted by a qualified interpreter who also signed the statement.<sup>44</sup> This included a verification by P-4957 of whether the statement reflected accurately his interview with the Defence.<sup>45</sup> For these reasons, the statement presents sufficient indica of reliability under Rule 68(2)(b)(ii).

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

24. 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.<sup>46</sup>

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<sup>41</sup> ICC-01/14-01/18-1833-Conf-Corr, para. 43.

<sup>42</sup> CAR-D30-0015-0001, at 0001, paras. 1-3.

<sup>43</sup> *Ibid.*, para. 4.

<sup>44</sup> CAR-D30-0015-0001, at 0006.

<sup>45</sup> *Ibid.*

<sup>46</sup> Working Group Report, ICC-ASP/12/37/Add.1, Annex II.A, para. 12.

No mention was made of the other parties and participant's procedural rights. Therefore, the Defence submits that when the Defence seeks to submit evidence pursuant to Rule 68(2)(b) considerations of prejudice do not apply. Mr Ngaissona has decided to not examine Witness P-4957, since he has determined that his testimony is 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 Ngaissona has been deprived of his liberty.

#### V. RELIEF SOUGHT

The Defence respectfully requests the Chamber to:

GRANT the present Rule 68(2)(b) request to introduce P-4957's proposed evidence.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaissona

Dated this 13 March 2024

At The Hague, the Netherlands.