

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **20 November 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

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 'Ngaïssona Defence request to submit additional
evidence on sentencing through Rule 68(2)(b) – D30-4321', ICC-01/14-01/18-2713-
Conf, 1 October 2024**

Source: Defence of Patrice-Edouard Ngaïssona

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

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REGISTRY	
Registrar Mr Osvaldo Zavala Giler	Counsel Support Section
Victims and Witnesses Unit Mr Nigel Verrill	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 statement of Witness D30-4321¹ pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules') ('Request').
2. The prior recorded statement is relevant to matters that the Trial Chamber is required to consider under Rule 145(2) of the Rules, notably Mr Ngaïssona's conduct after the alleged crimes, which includes genuine and concrete effort to promote peace and reconciliation. Indeed, the witness's proposed evidence relates to Mr Ngaïssona's assistance to the Muslim population and his state of mind when he created his political party during the Relevant Period.²
3. The prior recorded statement was prepared in a reliable manner and meets the requirements of Rule 68(2)(b) of the Rules. The prior recorded statement goes to proof of a matter other than the acts and conduct of Mr Ngaïssona. It is also cumulative or corroborative of evidence on the record. Granting the present Request will also serve the interests of justice in that it will enhance the expeditiousness of the proceedings.
4. The Defence reiterates its previous submissions in relation to dispensing of the requirement to have a member of the Registry to witness accompanying declarations of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules at the sentencing stage to assist in the expeditiousness of the proceedings.³
5. The Defence wishes to inform the Chamber that D30-4321 will be the only witness for whom the Defence will seek to introduce prior recorded testimony through Rule 68(2)(b) by the 1 October 2024 deadline. As the Chamber is aware, the Defence has faced significant unforeseen obstacles in conducting investigations in Central African Republic, which prevented the Defence from securing additional evidence.⁴

¹ CAR-D30-0029-0009.

² ICC-01/14-01/18-403-Red-Corr, pp. 103, 106.

³ ICC-01/14-01/18-2676-Conf-Exp, paras 38-40.

⁴ ICC-01/14-01/18-2676-Conf-Red.

II. CONFIDENTIALITY

6. In accordance with regulation 23 *bis* (1) of the Regulations of the Court, the Request and its accompanying Annexes A are filed confidentially because they contain confidential information that identifies the witness. A public redacted version will be filed as soon as practicable.

III. APPLICABLE LAW

7. The Defence incorporates by reference its previous submissions with respect to the applicable law regarding the adjudication of Rule 68(2)(b) requests.⁵
8. In addition, a Trial Chamber has, under Article 76 of the Statute which governs the sentencing phase, a wide discretion to hear additional evidence deemed relevant for the sentencing.⁶
9. Rule 68(2)(b) prior recorded statement in the context of sentencing need not to meet the same requirements that have to be met at trial.⁷ Trial Chambers have adopted a more flexible approach in the sentencing phase, and focusing mostly on procedural bar to the introduction of prior recorded testimonies.⁸

IV. SUBMISSIONS

8. The Defence requests the Chamber to exercise its discretion by introducing D30-4321's proposed evidence under Rule 68(2)(b) for the following four reasons: (1) the proposed evidence constitutes a prior recorded testimony; (2) it does not relate to the acts and conduct of Mr Ngaissona; (3) a consideration of the relevant factors that the Chamber must take into account favours introducing the witnesses' proposed evidence and (4) no prejudice would result from granting the Defence's request.

⁵ ICC-01/14-01/18-2238-Conf, paras 4-6.

⁶ CAR-D30-0029-0009.

⁷ *The Prosecutor v Bemba et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, ICC-01/05-01/13-2025, para. 6.

⁸ *The Prosecutor v Bemba et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, ICC-01/05-01/13-2025, paras 6-7; *The Prosecutor v Dominic Ongwen*, Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence', ICC-02/04-01/15-1801, 19 March 2021, para. 12; *The Prosecutor v Al Hassan*, First decision on Defence requests for the introduction of sentencing evidence, ICC-01/12-01/18-2629, para. 13.

A. D30-4321's proposed evidence

9. D30-4321 is a [REDACTED] based in [REDACTED]. He was the right-hand of [REDACTED], who was one of the leaders of [REDACTED] during and after the crisis of 2012-2013. His proposed evidence provides important details about the role and purpose of the [REDACTED] and the role religious leaders had during and after the conflict.⁹

10. In his capacity as member of the [REDACTED], D30-4321 participated in the constitutive assembly of Mr Ngaïssona's political party, the *Parti centrafricain pour l'unité et le développement* ('PCUD'), [REDACTED], in his capacity of [REDACTED].¹⁰ His proposed evidence also describes Mr Ngaïssona's actions to assist the Muslim civilian population. The witness's proposed evidence thus seeks to establish that:

- The PCUD was a political party created to favour disarmament and was an inclusive political party;¹¹
- Mr Ngaïssona made a genuine and concrete contribution to the reconciliation of communities in Bangui during the Relevant Period.¹²

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

12. The Defence incorporates by reference its submissions regarding the criteria a written statement must meet in order to be considered prior recorded testimony under Rule 68(2)(b) of the Rules.¹³ 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

⁹ CAR-D30-0029-0009, at 0012, lines 93 to 117.

¹⁰ CAR-D30-0029-0009, at 0015, lines 203-212 (the Defence has sought to introduce this item in its request to present additional evidence for potential sentencing). ICC-01/14-01/18-2676-Conf-Red, para. 2.

¹¹ CAR-D30-0029-0009, at 0015, lines 203 to 212.

¹² CAR-D30-0029-0009, at 0014, lines 198 to 202, at 0015, lines 226 to 227, lines 233 to 235, lines 238 to 241, at 0016, 244 to 249, lines 253 to 264, lines 270 to 273.

¹³ ICC-01/14-01/18-2238-Conf, para. 11.

recorded testimony” includes statements and transcripts of interviews taken pursuant to Rules 111 and 112 of the Rules.¹⁴

13. In the case at hand, D30-4321 provided his statement to the Defence and was questioned in his capacity as witness in the present proceedings.¹⁵ D30-4321 knew that he was providing information that may be relied upon in the context of the present proceedings, since the Defence informed the witness that the Defence was seeking information relevant to the potential determination of the appropriate sentence for Mr Ngaïssona, and that it sought to question him because he held information that would assist the Chamber in establishing the truth. Moreover, the witness was informed that any information he would provide to the Defence, including his identity and statements, could be provided to the Prosecution, the victims representatives, and the Chamber.¹⁶

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

14. The Defence incorporates by reference its submissions on the judicial interpretation of the phrase “acts and conduct of the accused”.¹⁷ Furthermore, the Defence submits that evidence regarding the accused’s “good character does not constitute the ‘acts and conduct of the accused’ for purposes of the procedural bar set by Rule 68(2)(b) of the Rules”,¹⁸ since the rule “excludes submission of evidence relating only to the acts and conduct of the accused as alleged in the confirmed charges”.¹⁹ The same applies to the witness’s impression of the defendant, as held by Trial Chamber IX in *Ongwen*.²⁰ More recently, Trial Chamber X granted a request to introduce the statement of a witness describing Mr Al Hassan’s character, his interaction with religious faiths other than his own, in addition to his position on music and celebration of wedding.²¹ The Chamber considered that the proposed evidence was contextual, and was not going to “Mr Al Hassan’s acts and conduct in the sense of his *mens rea*, such to prevent submission of

¹⁴ ICC-01/14-01/18-1833-Corr-Red, para. 23.

¹⁵ CAR-D30-0029-0009, at 0011, lines 52 to 57, lines 62 to 63, at 0016, lines 281 to 290.

¹⁶ CAR-D30-0029-0009, at 0017, lines 287 to 290.

¹⁷ ICC-01/14-01/18-2238-Conf, para. 14.

¹⁸ *The Prosecutor v. Bemba et al.*, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, ICC-01/05-01/13-1600, 4 February 2016, para. 16.

¹⁹ *Ibid.*

²⁰ *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the rules of Procedure and Evidence, ICC-02/04-01/15-1294, 02 July 2018, para. 9.

²¹ *The Prosecutor v Al Hassan*, Decision, ICC-01/12-01/18-2629, paras 18, 22, fn. 54.

the evidence through Rule 68(2)(b) of the Rules” for the purpose of sentencing and purported to a period outside of the charges.

15. D30-4321’s proposed evidence provides relevant information regarding Mr Ngaïssona’s creation of the PCUD and humanitarian actions towards the Muslim population of Bangui after the conflict, but does not fall within the ambit of the case against Mr Ngaïssona. The information contained in the prior recorded statement provides information that is relevant to the Trial Chamber in determining the sentence that is fit to Mr Ngaïssona, including his contribution to reconciliation and positive potential for reintegration of his community.
16. As such, P-4321’s proposed evidence is essentially contextual, and goes to his genuine efforts to bring peace in CAR, and thus falls outside the scope of his alleged “acts and conduct”.
17. Moreover, were the Chamber to find that the statement does go to proof of Mr Ngaïssona's acts and conduct, this should not preclude the introduction of the statement. In *The Prosecutor v. Bemba et al.*, Trial Chamber VII “did not consider it necessary for the parties to meet the procedural pre-requisites of Rule 68 in order to submit post-conviction witness statements in writing for sentencing.”²² Indeed, when the Chamber rejected the Prosecution’s request to submit a witness prior recorded statement relating to Mr Arido’s attempt to obstruct justice in the case, it did not do so because it referred to the acts and conduct of Mr Arido. Rather, the Chamber reasoned that given the seriousness of the allegations against Mr Arido, it considered that procedural fairness demanded that the witness appear to give his testimony.²³ Here, procedural fairness does not demand that the witness appear. As will be demonstrated below, the statement does not relate to facts that are materially in dispute, it is corroborated by or cumulative of other evidence, and the interests of justice would be served by its introduction.

²² ICC-01/05-01/13-2025, para 7.

²³ *Ibid*, para. 16.

D. The introduction of the proposed evidence is warranted

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

18. D30-4321's proposed testimony does not touch upon 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."²⁴

19. D30-4321 provides evidence that is of contextual and background nature. Mr Ngaïssona's willingness to assist Muslims and integrate them within his political party and bring communities together after the alleged crimes with which he is charged is not determinative of the Chamber's disposition of the charges against Mr Ngaïssona, and is not at the heart of a dispute between the parties, nor crucial for the determination of Mr Ngaïssona's guilt. It is informative of Mr Ngaïssona's personality and *ex post facto* state of mind.

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

20. D30-4321's proposed evidence is cumulative of or corroborated by other evidence or submissions relating to the same or similar facts. In particular:

- D30-4680, who described Mr Ngaïssona as someone who does not discriminate on the basis of the religion and who is inclusive and open-minded towards the Muslim population;²⁵
- Mr Ngaïssona's unsworn statement which details his motivation to create his political party, the PCUD,²⁶ as well as the organization of football matches to promote peace and reconciliation²⁷ and the assistance to Muslim civilians;²⁸

²⁴ *The Prosecutor v Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, para. 15.

²⁵ CAR-D30-0016-0001, at 0005, paras. 22-24.

²⁶ ICC-01/14-01/18-T-305-CONF-ENG, p. 9, l. 18 – p. 10, l. 17.

²⁷ ICC-01/14-01/18-T-305-CONF-ENG, p. 10, l. 22-25.

²⁸ ICC-01/14-01/18-T-305-CONF-ENG, p. 24, l. 13-23.

- P-0808's account that Mr Ngaïssona made concrete efforts to help the Muslim community of Km 5 by improving their living conditions, as well as broadcasting a message of reconciliation between communities in Bangui during the Relevant Period;²⁹
- P-0889's³⁰ and P-0888's³¹ accounts of Mr Ngaïssona's peace and reconciliation messages centered around the creation of the PCUD;
- P-0446's account of the efforts Mr Ngaïssona put in place to concretely promote social cohesion between communities and with the Muslim population in Bangui.³²

iii. *The proposed evidence is relevant to the factors trial chambers take into account when imposing a sentence*

21. The proposed evidence relates to Mr Ngaïssona's peace and reconciliation efforts, which is relevant to the determination of an appropriate sentence.

22. D30-4321 explains how Mr Ngaïssona went out of his way to integrate the Muslim community within his political party and with the organisation of social events, in an attempt to bridge differences and promote reconciliation, and brought humanitarian assistance to the Muslim people.

23. In *Al Mahdi*, Trial Chamber VIII discussed the purpose of a proportionate sentence in "promot[ing] the restoration of peace and reconciliation".³³ Factors facilitating reintegration were similarly considered by the *Katanga* Trial Chamber, which also emphasised the importance of genuine efforts at peace and reconciliation, without the need for result, in the sentencing phase.³⁴ The *Ntaganda* Trial Chamber also underscored the importance of peace and reconciliation, indicating that genuine and concrete efforts to the promotion thereof are legitimate mitigating factors.³⁵ In order to

²⁹ ICC-01/14-01/18-T-071-ENG, p. 39, l. 4-19.

³⁰ ICC-01/14-01/18-T-109-CONF-ENG, p. 72, l. 5-22.

³¹ ICC-01/14-01/18-T-123-ENG, p. 82, l. 2-22.

³² ICC-01/14-01/18-T-098-ENG, p. 25, l. 16 – p. 28, l. 2.

³³ *The Prosecutor v Al Mahdi*, Judgment and sentence, ICC-01/12-01/15-171, para. 67.

³⁴ *The Prosecutor v Germain Katanga*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-tENG, paras 38, 91.

³⁵ *The Prosecutor v Bosco Ntaganda*, Sentencing Judgment, ICC-01/04-02/06-2442, para. 218.

decide on an individualized sentence, the Chamber should rely on any relevant information relating to Mr Ngaïssona's character and acts after the charged crimes.³⁶

24. Therefore, the issues raised by D30-4321 are directly relevant to the factors the Trial Chamber have to take into consideration in the determination of the appropriate sentence.

iv. *Introducing the proposed evidence through Rule 68(2)(b) would serve the interests of justice*

25. Introducing Witness D30-4321's proposed evidence under Rule 68(2)(b) would serve the objectives set out by the Chamber in its first Rule 68(2)(b) Decision, *inter alia*: "(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 for other purposes and/or avoid witnesses having to travel in order to appear in court; and (vi) best serve the victims' interests".³⁷ The witness's proposed evidence does not relate to the core of the charges against Mr Ngaïssona, and is sought to be introduced only for the purposes of sentencing. The interests of justice are therefore served, without calling this witness to testify *viva voce*.

iv. *The proposed evidence has sufficient indicia of reliability*

26. D30-4321's statement fulfils the formal requirements determined by the Chamber as important factors to consider when conducting a *prima facie* analysis of whether the prior recorded testimony presents sufficient indicia of reliability.³⁸

27. D30-4321's proposed evidence was prepared in a reliable manner. The Defence obtained the statement in the ordinary course of the Defence's investigations and explained to the witness its role as representatives of Mr Ngaïssona in the current proceedings. The Defence also explained the significance of D30-4321's statements for the proceedings, and that they may play a role in the Chamber's determination of the

³⁶The Prosecutor v Zejnil Delalić et al., Judgement, Appeals Chamber, 20 February 2001, IT-96-21-A, para. 787.

³⁷ ICC-01/14-01/18-1833-Conf-Corr, para. 41; ICC-01/14-01/18-2238-Conf, para. 20.

³⁸ ICC-01/14-01/18-2238-Conf, para. 22.

truth as well as the determination of the appropriate and fitting sentence for Mr Ngaïssona.³⁹ Before the final read-back of the statement, Witness D30-4321 read it and verified that information contained therein was accurate and reflected his interviews with the Defence.⁴⁰ The statement was prepared in French, a language that the witness understands and speaks perfectly. The statement was read back to the witness on the phone, a procedure authorized by the Chamber in the past, since the Defence did not have any presence in Bangui to secure a physical signature of the statement. A transcript was prepared on the basis of the audio of the read-back. For these reasons, the statement presents sufficient indications of reliability.

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

28. The Defence incorporates by reference its analysis on the object and purpose of Rule 68(1), i.e. to protect the accused from prejudice caused by the introduction of a prior recorded testimony pursuant to Rule 68(2)(b).⁴¹ The Defence submits that when the Defence seeks to submit evidence pursuant to Rule 68(2)(b) considerations of prejudice do not apply.

V. RELIEF SOUGHT

The Defence respectfully requests the Chamber to **GRANT** the present Rule 68(2)(b) Request to introduce D30-4321's proposed evidence.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 20 November 2024

At The Hague, the Netherlands.

³⁹ CAR-D30-0029-0009, at 0011, lines 49 to 60, at 0017, lines 285 to 290.

⁴⁰ CAR-D30-0029-0009, at 0017, lines 285 to 295.

⁴¹ ICC-01/14-01/18-2238-Conf, para. 24.