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**International  
Criminal  
Court**

Original: **English**

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

Date: **24 July 2023**

**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***

**Confidential**

**Prosecution's Response to the "Yekatom Defence Request for Leave  
to Appeal the 'First Decision on the Prosecution Requests for Formal Submission of Prior  
Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules',  
ICC-01/14-01/18-1975-Conf" (ICC-01/14-01/18-1990-Conf)**

**Source:** Office of the Prosecutor

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

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## I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the YEKATOM Defence's request<sup>1</sup> for leave to appeal the "First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules."<sup>2</sup> The Request fails to meet the criteria for certification under article 82(1)(d).

2. All of the proposed issues are premised on mere disagreements with the Impugned Decision, and do not constitute appealable issues within the meaning of article 82(1)(d). Even if they may be considered properly appealable, the Request otherwise fails to satisfy the provision's remaining cumulative criteria.

## II. CONFIDENTIALITY

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

## III. SUBMISSIONS

4. The Request seeks leave to appeal the Impugned Decision in relation to three issues:

- The First Issue is "whether the Chamber erred in finding that the Statement has sufficient indicia of reliability, thereby failing to respect the precondition set out by rule 68(2)(c)(i) of the Rules."<sup>3</sup>
- The Second Issue is "whether the Chamber erred in finding that introduction of the Statement caused no prejudice to the accused, thereby failing to respect the precondition within rule 68(1) of the Rules."<sup>4</sup>
- The Third Issue is "whether the Chamber in introducing into evidence P-1654's Statement via rule 68(2)(c) gave weight to extraneous or irrelevant considerations and

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<sup>1</sup> ICC-01/14-01/18-1990-Conf ("Request").

<sup>2</sup> ICC-01/14-01/18-1975-Conf ("Impugned Decision").

<sup>3</sup> See ICC-01/14-01/18-1990-Conf, para. 2 (together, the "Three Issues").

<sup>4</sup> See ICC-01/14-01/18-1990-Conf, para. 2 (together, the "Three Issues").

failed to give weight or sufficient weight to relevant considerations in exercising its discretion.”<sup>5</sup>

#### **A. No appealable issue arises from the Impugned Decision**

5. None of the Three Issues the Defence identifies is ‘appealable’ within the meaning of article 82(1)(d). The Appeals Chamber has held that, “[t]here may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable issue.”<sup>6</sup> The Request advances nothing more.

6. As described below, each of the Three Issues merely disagrees with the Chamber’s view regarding the exercise of its discretion in adjudicating the Prosecution’s rule 68(2)(c) application concerning P-1654.<sup>7</sup>

##### *i) The First Issue is not appealable*

7. In respect of the First Issue, the Defence’s contention that the Chamber “limited its assessment to the Formal Requirements deriving from the jurisprudence relating to Rule 68(2)(b)” (a) misunderstands the Impugned Decision; and (b) merely disagrees with the Chamber’s exercise of its discretion under the established law.

8. Importantly, rule 68(2)(c) does not impose any specific pre-condition that the underlying statement or testimony be affirmed. The Chamber’s interpretation and non-exhaustive application of the ‘indicia of reliability’ criteria under rule 68(2)(c)(i) is, in these circumstances, in line with the operation of the Court’s regime governing the admission of prior recorded testimony in the absence of a witness under rule 68 generally.<sup>8</sup>

9. Contrary to the Defence’s analysis, the application of this criteria is consonant with the Court’s jurisprudence.<sup>9</sup> By requiring an objective measure of reliability as a threshold subject to further consideration, the Impugned Decision moreover promotes the integrity of the

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<sup>5</sup> See ICC-01/14-01/18-1990-Conf, para. 2 (together, the “Three Issues”).

<sup>6</sup> Appeals Chamber, *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 9.

<sup>7</sup> ICC-01/14-01/18-1169-Conf.

<sup>8</sup> See ICC-01/09-01/11-1938-Corr-Red2, para. 32; see ICC-01/14-01/18-1975-Conf, para. 34; see also ICC-01/14-01/21-506-Red, para. 16; ICC-01/09-01/20-235-Red, para. 20.

<sup>9</sup> See ICC-01/04-02/06-1029, para. 12; ICC-01/05-01/13-1481-Red, para. 20; ICC-01/09-01/11-1938-Corr-Red2, para. 65.

proceedings in accordance with the Chamber's statutory duty, including safeguarding the Accused's rights. Thus, the Impugned Decision states:

“Where the prior recorded testimony is introduced pursuant to Rule 68(2)(c) of the Rules, *full consideration of the standard evidentiary criteria*, particularly in terms of its relevance and probative value, *is deferred* to the Chamber's eventual deliberation of its judgment.”<sup>10</sup>

10. The Impugned Decision does not state that the Chamber's assessment of the reliability of the underlying statement is limited, as the Defence asserts.<sup>11</sup> Rather, the Impugned Decision clarifies that:

“no single indicator is, in and of itself, conclusive or mandatory to establish the presence of ‘sufficient indicia of reliability’, but their presence may militate in favour of the introduction of a prior recorded testimony.”<sup>12</sup>

11. The Request clearly misunderstands the Impugned Decision, as well as the Chamber's application of the Court's established jurisprudence. That jurisprudence permits Chambers to consider issues going to the probative value, weight, and reliability in assessing the prior recorded testimony in an eventual article 74 decision.<sup>13</sup> The Appeals Chamber has held that, for the purposes of the admissibility of prior testimony, the assessment of indicia of reliability:

“can be more cursory in nature so that, even if some factors, such as the witness's competence to testify about the facts, the internal consistency of the statement and potential inconsistencies with other evidence in the record, are not taken into account during this assessment, *they may still be considered when assessing the probative value of the evidence.*”<sup>14</sup>

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<sup>10</sup> ICC-01/14-01/18-1975-Conf, para. 16 (emphasis added), and para. 56.

<sup>11</sup> ICC-01/14-01/18-1990-Conf, para. 13.

<sup>12</sup> ICC-01/14-01/18-1975-Conf, para. 33.

<sup>13</sup> See e.g. ICC-01/09-01/11-1938-Corr-Red2, para. 60.

<sup>14</sup> ICC-02/11-01/15-744, para. 104.

12. The Impugned Decision abides by this standard. And, the fact that a Chamber may go beyond the 'Formal Requirements'<sup>15</sup> in assessing indicia of reliability,<sup>16</sup> does not mandate that it do so in the exercise of its discretion.<sup>17</sup>

13. The Defence's contention that the Chamber did not go far enough in assessing the reliability of P-1654's prior statement at this stage — rather than deferring its consideration of the standard evidentiary criteria — constitutes a mere disagreement.<sup>18</sup> As such, the First Issue is not an appealable issue.

*ii) The Second Issue is not appealable*

14. The Second Issue, alleging that the Chamber erred in finding that recognising the formal submission of the prior statement was neither prejudicial nor inconsistent with the Accused rights,<sup>19</sup> purely disagrees with the Impugned Decision.

15. The Chamber's assessment of the degree of prejudice caused by the submission of the underlying statement is squarely within its broad discretion to determine. Nothing in the Impugned Decision suggests that the Chamber failed to consider the Defence's allegations claiming that the witness "is at the centre of a circle of multiple contaminated witnesses."<sup>20</sup> To the contrary, the Impugned Decision makes specific mention of the Defence's claims, noting that it considered that the allegations went to the *weight* that the Chamber may attach to the statement, rather than its reliability.<sup>21</sup> In this respect, the Chamber further recalled — in line with the appellate jurisprudence cited above — that, "it will assess the ultimate reliability of the evidence in its deliberations of the judgement."<sup>22</sup>

16. The contention that the Impugned Decision fails to implement "the precondition of Rule 68(1) ... in relation to the submission of P-1654's Statement"<sup>23</sup> merely disagrees with the Chamber's exercise of its discretion. As such, the Second Issue is not an appealable issue.

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<sup>15</sup> ICC-01/14-01/18-1975-Conf, para. 33.

<sup>16</sup> See e.g. ICC-02/11-01/15-744, para. 105.

<sup>17</sup> See ICC-01/09-01/20-235-Red, para. 20 citing ICC-01/05-01/13-1481-Red, para. 19 (noting that, "the assessment of reliability is preliminary at this stage of the proceedings"); see also ICC-02/11-01/15-744 OA 8 ICC-02/11-01/15-744, paras. 3, 72, 104.

<sup>18</sup> See ICC-01/14-01/18-1990-Conf, paras. 18-19.

<sup>19</sup> See ICC-01/14-01/18-1990-Conf, para. 21.

<sup>20</sup> ICC-01/14-01/18-1990-Conf, para. 25.

<sup>21</sup> ICC-01/14-01/18-1975-Conf, para. 53.

<sup>22</sup> ICC-01/14-01/18-1975-Conf, para. 53; see ICC-02/11-01/15-744, para. 104.

<sup>23</sup> ICC-01/14-01/18-1990-Conf, para. 26.

iii) *The Third Issue is not appealable*

17. The Third Issue similarly fails. The allegation that the Impugned Decision “giv[es] weight to extraneous or irrelevant considerations, and fail[s] to give weight or sufficient weight to relevant considerations”<sup>24</sup> is untenable, upon even a cursory reading.

18. The assertion that the Chamber “placed undue weight on the possibility for the Defence to question other witnesses on the content of P-1654’s Statement”, is conclusory and unfounded. Not only does the Impugned Decision contain a detailed analysis of the substance of P-1654’s statement,<sup>25</sup> it identifies specific witnesses questioned by the Defence on the relevant subject matter.<sup>26</sup> In reality, the Defence questioned several more witnesses on the Yamwara School Base incident than those listed in the Impugned Decision, including P-0487, P-0884, P-0954, and P-1339.

19. Contrary to the Request,<sup>27</sup> the Chamber’s assessment of the impact of the submission of the underlying statement is well within the appropriate exercise of its discretion. Moreover, the suggestion that the Chamber placed too much weight on the submission of the statement in advancing its truth-finding obligation is insupportable. *First*, it is based on a distorted reading of the Impugned Decision. *Second*, while “the determination of the truth, [...] is a factor absent from the text of both rule 68(2)(c) and its chapeau rule 68(1)” as the Defence argues,<sup>28</sup> the Chamber’s statutory mandate to search for the truth is in any case overarching.

20. The Appeals Chamber has recognised the Chamber’s broad discretion in this respect:

“The establishment of the truth is one of the principal objectives of the Statute, to which the Trial Chamber must actively contribute. In this context, the Appeals Chamber notes that article 69(3) of the Statute gives the Court the power “to request the submission of all evidence that it considers necessary for the determination of the truth.”<sup>29</sup>

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<sup>24</sup> ICC-01/14-01/18-1990-Conf, para. 28.

<sup>25</sup> ICC-01/14-01/18-1975-Conf, paras. 48-51.

<sup>26</sup> ICC-01/14-01/18-1975-Conf, para. 55.

<sup>27</sup> ICC-01/14-01/18-1990-Conf, para. 33.

<sup>28</sup> ICC-01/14-01/18-1990-Conf, para. 34.

<sup>29</sup> ICC-01/04-02/12-271-Corr, para. 256.

21. The Defence's submission that the Chamber accorded "too much weight"<sup>30</sup> to the submission of the underlying statement in determining the truth misreads the Impugn Decision. It moreover merely disagrees with the Chamber's exercise of its statutory discretion. Like the First and Second Issues, the Third Issue does not constitute an appealable issue.

22. Given the Request's failure to articulate any appealable issues, it should be rejected on that basis alone. Nevertheless, even assuming *arguendo* that the Request demonstrates at least one appealable issue, it nevertheless fails to satisfy the remaining criteria under article 82(1)(d).

#### **B. The remaining article 82(1)(d) criteria are not met**

23. Article 82(1)(d) criteria are cumulative. A failure to fulfil any criteria inevitably requires the rejection of an application for leave to appeal. The Request fails to demonstrate that the two remaining criteria are met, namely that the Impugned Decision: (a) involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (b) warrants the immediate resolution by the Appeals Chamber as this may materially advance the proceedings.

24. As framed, the Three Issues do not affect the fair and expeditious conduct of the proceedings. The Defence's argument that because the Three Issues relate to prior recorded testimony "by their very nature they significantly affect the fair conduct of the proceedings" is at best circular, and unpersuasive in any case.

25. The Request misunderstands the circumstances of the *Al Hassan* Decision to which it refers.<sup>31</sup> Unlike the present circumstances, Trial Chamber X's decision to certify the identified issues for appeal arose from its underlying decision to *exclude* the proposed evidence.<sup>32</sup> The exclusion of evidence (which is a narrow exception to the Statute's permissive approach) has the potential to irreversibly affect what evidence a Chamber can ultimately consider in its search for the truth. Whereas the inclusion of evidence — in accordance with the legislative objective behind rule 68<sup>33</sup> — comes with the safeguard that a Chamber may yet further assess

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<sup>30</sup> ICC-01/14-01/18-1990-Conf, para. 34.

<sup>31</sup> ICC-01/14-01/18-1990-Conf, para. 40; *citing* ICC-01/12-01/18-2034, para. 8.

<sup>32</sup> ICC-01/12-01/18-2034, para. 8, at footnote 10 ("here the matter concerns *exclusion* of the evidence of P-0113 from the Chamber's ultimate consideration") (emphasis added).

<sup>33</sup> *See for instance* Working Group of Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), Annex II.A, para. 8: "The proposed amendment is intended to reduce the length of ICC proceedings and to streamline evidence presentation [...]".



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the weight to accord it at a later stage. This distinction is dispositive here. The Request thus fails to demonstrate that any of the Three Issues significantly affects the fair and expeditious conduct of the proceedings.

26. It goes without saying that the Three Issues are also not outcome determinative. There is ample evidence already in the trial record — independent of the Defence's claims of "contamination" — which may found the Accused's criminal responsibility for the crimes charged in the Yamwara School incident.<sup>34</sup> An appeal of any of the identified issues would have no impact.

27. Additionally, the Impugned Decision provides that:

"the Yekatom Defence remains at liberty to make further submissions on the Yamwara School incident, including P-1654's evidence and how it relates to other evidence on the record, at other stages of the proceedings."<sup>35</sup>

28. As such, the immediate intervention of the Appeals Chamber is neither necessary, nor would it materially advance the proceedings — particularly, considering their present stage.

#### **IV. CONCLUSION**

29. For the reasons above, the Prosecution requests that the Chamber reject the Request.



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

Dated this 24<sup>th</sup> day of July 2023  
At The Hague, The Netherlands

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<sup>34</sup> See Counts 11-16.

<sup>35</sup> ICC-01/14-01/18-1975-Conf, para. 47.