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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

**Decision on the Yekatom Defence Request for Leave to Appeal the First
Rule 68(2)(c) Decision**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaißona*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Yekatom Defence Request for Leave to Appeal the First Rule 68(2)(c) Decision’.

I. Procedural history and submissions

1. On 12 July 2023, the Chamber issued the ‘First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules’,¹ in which it authorised, *inter alia*, the introduction into evidence of the prior recorded testimony of P-1654 (the ‘Statement’) pursuant to Rule 68(2)(c) of the Rules (the ‘Impugned Decision’).
2. On 18 July 2023, the Yekatom Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’) on the following three issues:
 - ‘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’ (the ‘First Issue’);
 - ‘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’ (the ‘Second Issue’); and
 - ‘Whether the Chamber in introducing into evidence P-1654’s Statement via Rule 68(2)(c) gave weight to extraneous or irrelevant considerations and failed to give weight or sufficient weight to relevant considerations in exercising its discretion’ (the ‘Third Issue’).²

¹ ICC-01/14-01/18-1975-Conf (public redacted version notified the same day, ICC-01/14-01/18-1975-Red).

² 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, 18 July 2023, ICC-01/14-01/18-1990-Conf (public redacted version notified the next day, ICC-01/14-01/18-1990-Red), paras 1-2.

3. On 24 July 2023, the Office of the Prosecutor (the ‘Prosecution’) filed its response, opposing the Request (the ‘Response’).³ The Prosecution submits that none of the three issues are appealable issues arising from the Impugned Decision within the meaning of Article 82(1)(d) of the Statute.⁴ It further submits that, in any event, the Request fails to satisfy the remaining criteria under Article 82(1)(d) of the Statute.⁵

II. Analysis

4. The Chamber recalls the applicable law governing requests for leave to appeal under Article 82(1)(d) of the Statute, as previously set out by the Chamber.⁶
5. As regards the First Issue, the Defence argues that ‘the Chamber limited its assessment to the Formal Requirements deriving from the jurisprudence relating to Rule 68(2)(b) of the Rules’,⁷ although a ‘more stringent assessment by the Chamber of the reliability criteria’ is warranted for Rule 68(2)(c) of the Rules.⁸ It further argues that ‘the Impugned Decision rejected the Defence’s argument that P-1654’s Statement lacked reliability due to, *inter alia*, credible indicia of witness contamination’⁹ and failed ‘to respect the precondition set out by Rule 68(2)(c)(i) of the Rules’.¹⁰ The Prosecution, on the other hand, submits that the Defence ‘misunderstands the Impugned Decision’ and ‘merely disagrees with the Chamber’s exercise of its discretion’¹¹ and 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’.¹²

³ 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), ICC-01/14-01/18-2002-Conf.

⁴ Response, ICC-01/14-01/18-2002-Conf, paras 1-2, 5-6.

⁵ Response, ICC-01/14-01/18-2002-Conf, paras 1-2, 23.

⁶ Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, paras 15-21.

⁷ Request, ICC-01/14-01/18-1990-Red, para. 13.

⁸ Request, ICC-01/14-01/18-1990-Red, para. 17.

⁹ Request, ICC-01/14-01/18-1990-Red, para. 14.

¹⁰ Request, ICC-01/14-01/18-1990-Red, paras 11-13.

¹¹ Response, ICC-01/14-01/18-2002-Conf, para. 7.

¹² Response, ICC-01/14-01/18-2002-Conf, para. 11 *referring to* Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 28 August 2015, ICC-01/09-01/11-1938-Corr-Red2, para. 60.

6. The Chamber finds that the Defence's submissions amount to a mere disagreement with its findings and a misunderstanding of its approach. The Chamber notes that the Impugned Decision indeed recalled the jurisprudence concerning 'sufficient indicia of reliability' in respect of Rule 68(2)(b) of the Rules as set out in an earlier decision, which held, *inter alia*, that trial chambers retain the discretion to consider the factors that may be relevant to its determination on a case-by-case basis when assessing the indicia of reliability of a statement.¹³ The Impugned Decision clarified that while no single indicator is, in and of itself, conclusive or mandatory to establish the presence of 'sufficient indicia of reliability', their presence *may militate* in favour of the introduction of a prior recorded testimony.¹⁴ Furthermore, the Impugned Decision held that unless the Chamber identifies manifest issues as to the reliability of the information provided by the witness or if the Defence raises specific objections, it would limit its assessment to the formal requirements set out in the context of Rule 68(2)(b) of the Rules.¹⁵
7. The Chamber, however, notes that the Impugned Decision did go further than only assessing the formal requirements and addressed the Defence's specific objections concerning the Statement's reliability.¹⁶ It examined the Defence's arguments concerning the potential witness contamination and whether they applied to its assessment of the reliability criteria and arrived at a different conclusion than the one suggested by the Defence. Therefore, the Impugned Decision did not reject the Defence's arguments concerning potential witness contamination but found them, in this case, to relate to the weight that the Chamber may attach to the evidence, rather than the Statement's reliability *per*

¹³ Impugned Decision, ICC-01/14-01/18-1975-Red, para. 32 *referring to* Corrected version of First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) of the Rules, 6 April 2023, ICC-01/14-01/18-1833-Conf-Corr (corrected version notified on 17 April 2023) (public redacted version notified the same day), paras 42-47 and the jurisprudence referred to therein.

¹⁴ Impugned Decision, ICC-01/14-01/18-1975-Red, para. 33 (emphasis added).

¹⁵ Impugned Decision, ICC-01/14-01/18-1975-Red, para. 34 *referring to* Trial Chamber VI, *The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses, 26 October 2022, ICC-01/14-01/21-506-Red, para. 16, *further referring to* Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(c), 26 November 2021, ICC-01/09-01/20-235-Red, para. 20.

¹⁶ Request, ICC-01/14-01/18-1990-Red, para. 14.

*se.*¹⁷ Accordingly, the Chamber does not find the First Issue to be an appealable issue.

8. Turning to the Second Issue, the Defence contends that ‘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’.¹⁸ It submits that the Chamber did not ‘take into account the specific situation of P-1654’s Statement as it relates extensively to the acts and conducts of the accused’ and the fact that P-1654 ‘is at the centre of a circle of multiple contaminated witnesses’.¹⁹ The Prosecution argues that the Impugned Decision did not fail to consider the Defence’s allegations as it specifically mentions the Defence’s claims and ‘considered that the allegations went to the *weight* that the Chamber may attach to the statement’.²⁰
9. The Chamber notes the Defence’s argument that, having regard to the references to the acts and conduct in the Statement and its allegations of potential witness contamination, the Chamber should have found that its introduction was prejudicial to the accused. The Chamber finds that this is a plain disagreement with its conclusion. The Impugned Decision found that although large portions of the Statement concern acts and conduct of the accused, this was not an absolute bar on its introduction.²¹ Moreover, the Chamber noted that prior to the introduction of the Statement, the Defence had the opportunity to use the Statement in court in relation to other witnesses in order to test the various accounts surrounding an incident.²² The Chamber recalls that the Impugned Decision specifically considered the particular circumstances of the Statement, including the Defence’s allegations of the witness contamination, before concluding that its introduction was, nonetheless, not prejudicial to the accused. The Chamber thus considers the Second Issue to be a mere disagreement with the Impugned Decision and does not consider it to be an appealable issue.

¹⁷ Impugned Decision, ICC-01/14-01/18-1975-Red, para. 53.

¹⁸ Request, ICC-01/14-01/18-1990-Red, paras 2, 20-21.

¹⁹ Request, ICC-01/14-01/18-1990-Red, para. 24.

²⁰ Response, ICC-01/14-01/18-2002-Conf, para. 15 *referring to* the Impugned Decision, ICC-01/14-01/18-1975-Red, para. 53.

²¹ Impugned Decision, ICC-01/14-01/18-1975-Red, para. 54.

²² Impugned Decision, ICC-01/14-01/18-1975-Red, para. 55.

10. In relation to the Third Issue, the Defence submits that the Chamber erred by giving ‘weight to extraneous or irrelevant considerations and failed to give weight or sufficient weight to relevant considerations in exercising its discretion’.²³ It argues that ‘the Chamber placed undue weight on the possibility for the Defence to question other witnesses on the content of P-1654’s Statement’²⁴ and ‘the importance of P-1654’s Statement for the determination of the truth’.²⁵ The Prosecution submits that the Defence’s submission is based on a distorted reading of the Impugned Decision; further that, the Chamber’s assessment was well within the appropriate exercise of its discretion and that its statutory mandate to search for the truth is ‘in any case overarching’.²⁶
11. In the view of the Chamber, the Defence simply disagrees with how the Impugned Decision weighed the different considerations when exercising its discretion and fails to demonstrate abuse of discretion. First, the Impugned Decision considered that the Defence’s opportunity to question other witnesses in-court on the Statement was one of the relevant factors in determining the statutory requirements of Rule 68(1) of the Rules, namely whether the introduction of the Statement was prejudicial to or inconsistent with the accused’s rights. Second, the Impugned Decision considered the Chamber’s statutory obligation to determine the truth as an additional factor in support of the introduction of the Statement. The argument that these factors were extraneous or irrelevant merely disagrees with the Chamber’s assessment. As the Defence’s submissions amount to no more than a mere disagreement with the Chamber’s findings, the Chamber does not find the Third Issue to be an appealable issue.
12. Having found that neither of the three issues constitute appealable issues, it is not necessary to address the remainder of the cumulative criteria of Article 82(1)(d) of the Statute.

²³ Request, ICC-01/14-01/18-1990-Red, para. 28.

²⁴ Request, ICC-01/14-01/18-1990-Red, paras 32-33.

²⁵ Request, ICC-01/14-01/18-1990-Red, para. 34.

²⁶ Response, ICC-01/14-01/18-2002-Conf, para. 19.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the Prosecution to file a public redacted version or request reclassification to public of the Response, ICC-01/14-01/18-2002-Conf, within two weeks of notification of the present decision.

Done in both English and French, the English version being authoritative.




Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 22 August 2023

At The Hague, The Netherlands