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**International
Criminal
Court**

Original: **English**

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

Date: **19 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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public Redacted Version of 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, 18 July 2023

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Statute the Defence for Mr. Alfred Rombhot Yekatom (“Defence”) hereby respectfully requests leave to appeal, in part, the Chamber’s *“First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”*, notified on 12 July 2023;¹ specifically with respect to the Chamber’s decision to allow the introduction into evidence of the prior recorded testimony of P-1654 (“Statement”) via Rule 68(2)(c) of the Rules (“Impugned Decision”).²
2. The Defence seeks leave to appeal the Impugned Decision with respect to the following issues (collectively the “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 (“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 (“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 (“Third Issue”).

PROCEDURAL HISTORY

3. On 8 November 2021, the Prosecution’s Request for Submission of the Prior Recorded Testimony of P-1654 pursuant to Rule 68(2)(c) was filed (“Prosecution Request”).³

¹ ICC-01/14-01/18-1975-Conf.

² ICC-01/14-01/18-1975-Conf, paras 47-58.

³ ICC-01/14-01/18-1169-Conf.

4. On 19 November 2021, the Defence opposed the Prosecution's Request for Submission of the Prior Recorded Testimony of P-1654 pursuant to Rule 68(2)(c).⁴
5. On 12 July 2023, the Chamber issued the Impugned Decision.⁵

APPLICABLE LAW

6. Article 82(1)(d) of the Statute states that:

(1) Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. In order for a request for leave to appeal to be granted, the party seeking leave to appeal should identify specific 'issues' which were dealt with in the relevant decision and which constitute the appealable issue.⁶
8. With respect to the meaning of an 'appealable issue', the Appeals Chamber has stated:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.⁷

⁴ ICC-01/14-01/18-1181-Conf.

⁵ ICC-01/14-01/18-1975-Conf

⁶ [ICC-01/14-01/18-525](#), para. 16, citing *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 9.

⁷ [ICC-01/14-01/18-525](#), para. 17, citing *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 9.

SUBMISSIONS

9. The Defence will develop on the Three Issues identified and further demonstrate how they constitute appealable issues (A); the Defence will then argue that the Three Issues significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial (B); the Defence will then submit that an immediate resolution of the Three Issues would materially advance the proceedings (C).

A. The Three Issues are appealable

10. The Defence will address in turn the Three Issues mentioned in paragraph 2 above, and demonstrate how they constitute appealable issues pursuant to Article 82(1)(d) of the Statute.

i) On the First Issue

11. The Defence respectfully submits that following First Issue is appealable:

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.

12. In determining that P-1654's Statement showed sufficient indicia of reliability, the Chamber indicated that it fulfilled the so called "Formal Requirements",⁸ which are defined in paragraph 33 of the Impugned Decision :

whether the prior recorded testimony (i) was obtained by the Prosecution in the ordinary course of its investigations; (ii) was signed by the witness and the investigator(s) conducting the interview; (iii) was given voluntarily; (iv) was obtained in the presence of a qualified interpreter; (v) was verified by the witness at the time; and (vi) includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement to the Prosecution.

13. The Defence understands from this extract of the Impugned Decision, together with the authorities cited, that the Chamber limited its assessment to the Formal

⁸ ICC-01/14-01/18-1975-Conf, para. 53.

Requirements deriving from the jurisprudence relating to Rule 68(2)(b) of the Rules, and failed to look beyond those Formal Requirements for the purpose of the Prosecution's Request.⁹

14. Indeed, the Impugned Decision rejected the Defence's argument that P-1654's Statement lacked reliability due to, *inter alia*, credible indicia of witness contamination.¹⁰ The Chamber found that those submissions only relate to the weight of the evidence and will be taken into account during the deliberation of the judgement.¹¹
15. The First Issue arises from the Impugned Decision. The Chamber's erroneous conclusion as to whether the precondition of 'sufficient indicia of reliability' was met in respect of the Statement led to the Chamber granting its introduction into evidence in the Impugned Decision. In other words, given that 'sufficient indicia of reliability' is a nothing less than a precondition for introduction of the Statement, the Chamber's error was determinative in its ultimate decision to grant the Prosecution Request. The First Issue is thus an identifiable subject or topic arising from the Impugned Decision, the resolution of which is essential for the the determination of the admissibility via Rule 68(2)(c) of the Statement.¹²
16. The Appeals Chamber previously found that in relation to Rule 68 that "*a trial chamber should take into account the exceptional nature of that rule as a whole in the interpretation and application of the individual criteria in rule 68 of the Rules [...] Any rule derogating from these minimum fair trial guarantees warrants interpretation in a restrictive manner.*"¹³

⁹ ICC-01/14-01/18-1975-Conf, paras 32, 34.

¹⁰ See the Defence arguments at ICC-01/14-01/18-1181-Conf, paras 33-39, and the Impugned Decision at ICC-01/14-01/18-1975-Conf, para. 53.

¹¹ ICC-01/14-01/18-1975-Conf, para. 53.

¹² *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 9.

¹³ *Prosecutor v. Al Hassan*, Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules", 13 May 2022, [ICC-01/12-01/18-2222](#), para. 80.

17. Should leave to appeal be granted, the Defence intends to argue that the nature of Rule 68(2)(c) warrants a more stringent assessment by the Chamber of the reliability criteria than what is usually done for Rule 68(2)(b) submissions. This result from the more prejudicial nature for the accused of Rule 68(2)(c) which allows submission of prior recorded testimony that goes to the acts and conduct of the accused; contrary to Rule 68(2)(b) which places a procedural bar to the submission of prior recorded testimony that would contain such content.
18. In this respect the Appeals Chamber indication that a Trial Chamber was not obliged to look beyond the so called Formal Requirements in the context of Rule 68(2)(b);¹⁴ does not mean that the Chamber was not in error in this specific circumstances in light of the differences between Rule 68(2)(b) and Rule 68(2)(c) and the Chamber's overriding duty to ensure a fair trial set out in Article 64 of the Statute as well as Rule 68(1).
19. The Defence would argue that in the case of P-1654's Statement the Chamber reached an incorrect conclusion based on its erroneous application of the criteria regarding the "sufficient indicia of reliability" set out by Rule 68(2)(c)(i).

ii) On the Second Issue

20. The Defence respectfully submits that the following Second Issue is appealable:

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.

21. The Impugned Decision found that introduction of P-1654's Statement pursuant to Rule 68(2)(c) is not prejudicial or inconsistent with the accused's rights as :

the parties, including the Yekatom Defence, have already discussed significant parts of P-1654's prior recorded testimony, including those which go to the acts and conduct of the accused, with other witnesses in-court. Therefore, in view of the

¹⁴ ICC-01/14-01/18-1975-Conf, paras 32 and 34; *Prosecutor v. Said*, Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses, 26 October 2022, [ICC-01/14-01/18-506-Red](#), para. 14.

Chamber, the Yekatom Defence has had an opportunity to test P-1654's account against those provided by other witnesses, including as regards the alleged inconsistencies between the various accounts.¹⁵

22. The Chamber's finding in this regard was determinative of its decision to allow the introduction of the Statement, given that Rule 68(1) requires, as a precondition, that the introduction of prior recorded testimony under that rule 'not be prejudicial to or inconsistent with the rights of the accused'. The Second Issue thus is an identifiable subject or topic arising from the Impugned Decision, the resolution of which is essential for the determination of the admissibility via rule 68(2)(c) of the Statement.¹⁶
23. The Appeals Chamber held that "[g]iven the dangers inherent in admitting, without cross-examination, a written witness statement for the purpose of supporting a party's case (and particularly the case of the Prosecution), a Chamber must carefully assess the criteria in rule 68(2)(b) of the Rules as well as any other criteria that may be relevant to adequately mitigate the prejudice to the accused".¹⁷ It further held that "the important take-away is that the chamber's overarching duty to ensure compliance with an accused's procedural rights requires a careful analysis of all relevant factors for and against the admission of prior recorded testimony in the absence of a witness [emphasis added by the Defence]".¹⁸
24. Should leave to appeal be granted, the Defence intends to argue that the Chamber did not properly apply the criteria set out in Rule 68(1) to protect the accused against the submission of prior recorded testimony that would be prejudicial or inconsistent with his rights. More specifically, that the Chamber erred by failing to take into account the specific situation of P-1654's Statement

¹⁵ ICC-01/14-01/18-1975-Conf, para. 55.

¹⁶ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 9.

¹⁷ *Prosecutor v. Al Hassan*, Judgment on the appeal of the Prosecution against Trial Chamber X's "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules", 13 May 2022, [ICC-01/12-01/18-2222](#), para. 82.

¹⁸ *Ibid*, para. 83.

as it relates extensively to the acts and conducts of the accused, and that there are credible indicia that this individual is at the centre of a circle of multiple contaminated witnesses.

25. This contamination was so prevalent that [REDACTED], P-1705, indicated that he read documents prepared by P-1654 as it was his "[REDACTED]" during his testimony.¹⁹ The Presiding Judge further noted regarding P-1705 that "[REDACTED]".²⁰ Similarly, during the testimony of P-0967 it was discovered that she read a document in relation with the events prepared by P-1654 [REDACTED] before coming to the Court to testify.²¹
26. If the Second Issue is indeed certified by the Chamber, the Defence would argue that in the present circumstances the precondition of Rule 68(1) was not properly implemented by the Chamber in relation to the submission of P-1654's Statement pursuant to Rule 68(2)(c) of the Rules.

iii) On the Third Issue

27. The Defence respectfully submits that the following Third Issue is appealable:

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.

28. The Third Issue is an identifiable subject or topic arising from the Impugned Decision, which resolution "*is essential for the determination of matters arising in the judicial cause under examination*".²² The Chamber's giving weight to extraneous or irrelevant considerations, and failing to give weight or sufficient weight to relevant considerations, was determinative of the Impugned

¹⁹ P-1705 : ICC-01/14-01/18-T-212-CONF-ENG ET at [14:15:13].

²⁰ P-1705 : ICC-01/14-01/18-T-212-CONF-ENG ET at [12:21:22].

²¹ P-0967 : ICC-01/14-01/18-T-200-CONF-ENG ET at [11:56:33].

²² *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 9.

Decision, in that had the Chamber properly weighed the relevant factors, it would have found that the Statement was not suitable for admission under rule 68(2)(c).

29. Appeals Chamber consistently held regarding discretionary decisions of Trial Chambers that it : *“will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question”*.²³
30. Such interpretation was upheld in the context of an interlocutory appeal against a decision relating to Rule 68(2)(b) submission : *“the Appeals Chamber will interfere with the exercise of discretion where the appellant can demonstrate that a chamber gave weight to extraneous or irrelevant considerations, or failed to give weight or sufficient weight to relevant considerations. The degree of discretion afforded to a chamber may depend upon the nature of the decision in question”*.²⁴
31. The Impugned Decision severely impacts the accused fair trial rights as it granted the submission of the P-1654’s Statement, without any possibility to examine the witness, despite his Statement going to acts and conduct of Mr. Yekatom.
32. In light of the nature of the Impugned Decision, the Defence intends to argue that the Chamber placed undue weight on the possibility for the Defence to question other witnesses on the content of P-1654’s Statement to determine that its Rule 68(2)(c) submission would not cause prejudice.²⁵ Indeed, the compass of the Chamber should have been the absence of examination of P-1654 himself,

²³ *Prosecutor v. Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, [ICC-01/04-02/06-2666-Red](#), para. 46.

²⁴ *Prosecutor v. Al Hassan*, Judgment on the appeal of the Prosecution against Trial Chamber X’s “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules”, 13 May 2022, [ICC-01/12-01/18-2222](#), para. 20.

²⁵ ICC-01/14-01/18-1975-Conf, para. 55.

as well as the importance of its evidence, rather than the possibility of the Defence to test his *“account against those provided by other witnesses, including as regards the alleged inconsistencies between the various accounts.”*²⁶

33. Should it be allowed to present submission before the Appeals Chamber, the Defence will argue that this weight placed on the ability to test his evidence with other witnesses collides head on with the Chamber’s failing to give sufficient consideration to the serious allegations of witness’ contamination.²⁷ Indeed, the Chamber itself noted that P-1654’s evidence relates *“to that of other witnesses, namely, inter alia, P-1704, P-1705, P-1811, P-1839”*;²⁸ out of those four mentioned witnesses three (P-1704, P-1705 and P-1811) are/were part of [REDACTED] and subject to the alleged witness contamination. With such specific context, the Chamber’s ought to have taken into consideration those allegations when assessing that submission of P-1654’s Statement would not cause undue prejudice and grant the Prosecution’s request.
34. Moreover, should leave to appeal be granted, the Defence intends to argue that the Chamber mistakenly put too much weight on the importance of P-1654’s Statement for the determination of the truth,²⁹ which is a factor absent from the text of both Rule 68(2)(c) and its chapeau Rule 68(1). The Defence is of the view, and will submit to the Appeals Chamber, that this point was given too much weight by the Chamber *vis-à-vis* its duty to ensure the absence of prejudice of the Rule 68(2)(c) submission to Mr. Yekatom; the Chamber failed in complying with its duty to protect the fair trial rights of Mr. Yekatom which should be the overarching consideration of the Chamber.³⁰

²⁶ ICC-01/14-01/18-1975-Conf, para. 56.

²⁷ See paragraph 25 above.

²⁸ ICC-01/14-01/18-1975-Conf, para. 55.

²⁹ ICC-01/14-01/18-1975-Conf, para. 55.

³⁰ See paragraph 23 above.

35. In light of the above, the Defence respectfully submits that the Chamber both gave too much weight to certain considerations, as well as failed to sufficiently take into account relevant ones, which led to an abuse of its discretionary powers requiring adjudicated by the Appeals Chamber.

B. The three issues affect the fair and expeditious conduct of the proceedings or outcome of the trial

36. The Defence will in turn address the impact of the Three Issues on the fair and expeditious conduct of the proceedings (i), as well as their impact on the outcome of the trial (ii).

i) On the impact of the Three Issues on the fair and expeditious conduct of the proceedings

37. The Appeals Chamber held that the “[t]he term “fair” in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64 (2) and 67 (1)) and article 21 (3); making its interpretation and application subject to internationally recognized human rights.”³¹
38. The Appeals Chamber also recently held that “one of the fundamental fair trial guarantees in proceedings at this Court is the right to confront a witness about his or her testimony under article 67(1)(e) of the Statute”,³² and that “[i]n addition to article 67(1)(e) of the Statute, the opportunity for an accused to examine a witness in court is also derived from article 69(2) of the Statute, governing testimonial evidence [...] [t]his provision gives effect to the principle of orality and creates a general rule that evidence be given in court, orally from the witness”.³³

³¹ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 11.

³² *Prosecutor v. Al Hassan*, Judgment on the appeal of the Prosecution against Trial Chamber X's “Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules”, 13 May 2022, [ICC-01/12-01/18-2222](#), para. 75.

³³ *Ibid*, para. 76.

39. As Rule 68(2) allows the introduction of a prior recorded testimony in the absence of a witness it “*constitutes a limitation on the right to confront a witness as described above, substantially restricting an internationally recognised and fundamental fair trial right. In the view of the Appeals Chamber, if not applied with due care, rule 68 of the Rules may create tension with the right to confront a witness and the broader principle of equality of arms*”.³⁴
40. In the present situation the Three Issues relates to the introduction of prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, by their very nature they significantly affect the fair conduct of the proceedings in the meaning of Article 82(1)(d). Such finding was adopted by Trial Chamber X in relation to an issue affecting Rule 68(2)(b) of the Rules.³⁵
41. Impact of the Three Issues on the fairness of the proceedings is even more salient in the present situation as they relate to the submission of P-1654’s Statement. Indeed, this witness’ evidence is at the core of the Yamwara School Base incident which is subject to six different charges, Counts 11 to 16. In the spirit of judicial economy, the Defence refers to its previous submission on the content of P-1654’s Statement going to acts and conduct of Mr. Yekatom.³⁶ Importance of this Statement’s content also transpires from the Prosecution’s submissions³⁷ and from the Impugned Decision.³⁸
42. Finally, as regards the expeditious conduct of the proceedings,³⁹ the Defence submits that the Three Issues also impacts it as they ultimately relate to whether

³⁴ *Ibid*, para. 78.

³⁵ *Prosecutor v. Al Hassan*, Decision on Prosecution request for leave to appeal ‘Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules’, 6 December 2021, [ICC-01/12-01/18-2034](#), para. 8 : “*whether the Majority’s interpretation of Rule 68(2)(b) of the Rules, which lead it to conclude that P-0113’s evidence may not be relied upon during the present proceedings, was correct is a matter that affects the fair and expeditious conduct of the proceedings.*”

³⁶ ICC-01/14-01/18-1181-Conf, paras 22-32.

³⁷ ICC-01/14-01/18-1169-Conf, paras 7, 14-16.

³⁸ ICC-01/14-01/18-1975-Conf, paras 48-49.

³⁹ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-](#)

or not some evidence that will be part of the case file, and, consequently, against which the Defence will have to present its case and make submissions. In the context of a leave to appeal in relation to Rule 68(2)(b) of the Rules, Trial Chamber X found that in such circumstances the expeditiousness of the proceedings was indeed effected.⁴⁰

43. In light of the above, the Defence respectfully argues that the fair and expeditious conduct of the proceedings are affected by the Three Issues, thus fulfilling the criteria set out by Article 82(1)(d).

ii) On the impact of the Three Issues on the outcome of the trial

44. An intervention of the Appeals Chamber on the Three Issues would ultimately relate to whether or not P-1654's Statement will be assessed by the Chamber during its deliberation on Counts 11 to 16. Indeed, on its own the Statement contains allegations that underpins the elements of the crimes described in those counts and that these allegations would form part of the evidence against Mr. Yekatom. The Three Issues therefore impact the outcome of the trial.
45. In the context of Rule 68(3), Trial Chamber I found that this specific criteria was met in relation to similar leave to appeal issues, as their resolutions ultimately relate to relevant evidence for some of the charges of a case being introduced in writing rather than orally through examination from the Prosecutor.⁴¹
46. The Defence argues that a similar reasoning should be followed regarding the Three Issues as they relate to the introduction of written evidence pursuant to

[168](#), para. 11 provides the following definition : The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.

⁴⁰ *Prosecutor v. Al Hassan*, Decision on Prosecution request for leave to appeal 'Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules', 6 December 2021, [ICC-01/12-01/18-2034](#), para. 8 : "*whether the Majority's interpretation of Rule 68(2)(b) of the Rules, which lead it to conclude that P-0113's evidence may not be relied upon during the present proceedings, was correct is a matter that affects the fair and expeditious conduct of the proceedings.*"

⁴¹ *Prosecutor v. Gbagbo & Blé Goudé*, Decision on requests for leave to appeal the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and (68(3))", 8 July 2016, [ICC-02/11-01/15-612](#), para. 13.

Rule 68(2)(c). Consequently, as the Three Issues have an impact on the verdict that the Chamber will issue at the end of the case, the criteria set out in Article 82(1)(d) of the Statute is fulfilled.

C. Immediate resolution of the Three Issues would materially advance the proceedings

47. Trial Chamber X, in a decision on a request for leave to appeal of a decision relating to the introduction of evidence pursuant to Rule 68(2)(b) of the Rules, found that “[a]n immediate resolution by the Appeals Chamber at this stage would ensure that the ‘proceedings follow the right course’, by clarifying the scope of evidence the Chamber may consider in carrying out its truth seeking functions”.⁴²
48. The Defence takes note of Trial Chamber X’s indication that this reasoning differed from a previous decision it issued as, in the case cited above, the matter related to the exclusion of evidence following the rejection of a Rule 68(2)(b) submission.⁴³ The Defence however submits that Trial Chamber X’s reasoning regarding the positive advancement of the proceedings, when the “the scope of evidence the Chamber may consider” is clarified, applies in the present instance, irrespective as to whether it relates to the submission or exclusion of evidence.
49. Indeed, an Appeals Chamber ruling on the Three Issues will determine whether P-1654’s Statement will be part of the evidence the Chamber might take into consideration during its deliberation on Counts 11 to 16. Due to the potential impact of P-1654’s Statement on those multiple charges, as well as this witness being at the centre of allegations of witnesses contamination, determination of the scope of evidence that the Chamber will assess is crucial as it will impact

⁴² *Prosecutor v. Al Hassan*, Decision on Prosecution request for leave to appeal ‘Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules’, 6 December 2021, [ICC-01/12-01/18-2034](#), para. 8.

⁴³ *Ibid*, fn. 10.

both the Prosecution and Defence final briefs, as well as potentially on the Defence's presentation of evidence.

50. Moreover, the Defence notes that multiple Prosecution's requests for Rule 68(2)(c) submissions are actually pending adjudication,⁴⁴ and that the Defence might also be confronted with the need to use this avenue for its own witnesses in the future. An Appeals Chamber's intervention on the three issues will either support or reject the current Chamber's approach to Rule 68(2)(c) which will in turn streamline potential further litigations on this topic, as well as guide the parties on the use of this avenue during their cases.
51. Finally, due to the rights of the accused and fair conduct of the proceedings being at the core of the Three Issues, the Defence submits, as Trial Chamber I found in the *Gbagbo & Blé Goudé* case in relation to the requirements for Rule 68(3) submissions, that *"appellate intervention at this stage will be beneficial to the proceedings, as it will reduce the risk of invalidating this part of the trial proceedings should the Defence finally succeed in an eventual appeal under Article 81 of the Statute"*.⁴⁵
52. In light of the above, the Defence argues that intervention of the Appeals Chamber will directly have an impact on how the trial "moves forward" and ensure that the "proceedings follow the right course".⁴⁶ Consequently, the Defence respectfully requests the Chamber to find that the Three Issues meet the Article 82(1)(d) criteria and grant leave to appeal.

53.

⁴⁴ See as examples ICC-01/14-01/18-1965-Conf ; ICC-01/14-01/18-1967-Conf ; ICC-01/14-01/18-1968-Conf.

⁴⁵ *Prosecutor v. Gbagbo & Blé Goudé*, Decision on requests for leave to appeal the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and (68(3))", 8 July 2016, [ICC-02/11-01/15-612](#), para. 14.

⁴⁶ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, [ICC-01/04-168](#), para. 15.

CONFIDENTIALITY

54. The present request is filed on a confidential basis corresponding due to references to references to potential identifying information of [REDACTED].
A public redacted version will be filed forthwith.

RELIEF SOUGHT

55. In light of the above, the Defence respectfully requests Trial Chamber V to:
GRANT Leave to Appeal the First, Second and Third Issue.

RESPECTFULLY SUBMITTED ON THIS 19th DAY OF JULY 2023



Me Mylène Dimitri
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The Hague, the Netherlands