

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Pursuant to Trial Chamber V's instruction dated 01.11.2023, this document is reclassified as Public

Original: English

**No. ICC-01/14-01/18
Date: 13 September 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Confidential

Decision on the Mode of Testimony of the Chamber Witness

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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 Ngaïssona*, having regard to Articles 64(2), 64(6)(b), (d), 67 and 69 of the Rome Statute, Rules 68(3) and 140 of the Rules of Procedure and Evidence (the 'Rules') and Regulation 43 of the Regulations of the Court, issues this 'Decision on the Mode of Testimony of the Chamber Witness'.

I. Procedural history

1. On 31 January 2023, the Chamber decided that it would hear one witness as Chamber witness (the 'Witness').¹ In the same decision, the Chamber requested the participants to submit, by 10 March 2023, views on whether the Witness's previously recorded testimony should be introduced pursuant to Rule 68(3) of the Rules.²
2. On 7 March 2023, the Yekatom Defence provided its observations.³
3. On 10 March 2023, the Prosecution⁴ and the Ngaïssona Defence,⁵ respectively, provided their observations.

II. Analysis

4. The Chamber incorporates by reference the applicable law in relation to Rule 68(3) of the Rules as previously set out.⁶ In particular, the Chamber recalls

¹ Order regarding the Remainder of the Prosecution's Presentation of Evidence and Order pursuant to Article 64(6)(d) of the Statute, ICC-01/14-01/18-1739-Conf (public redacted version notified the same day, ICC-01/14-01/18-1739-Red) (the '31 January 2023 Order'), para. 12.

² 31 January 2023 Order, ICC-01/14-01/18-1739-Red, para. 15.

³ Yekatom Defence Observations pursuant to the Chamber's "Order regarding the Remainder of the Prosecution's Presentation of Evidence and Order pursuant to Article 64(6)(d) of the Statute", ICC-01/14-01/18-1739-Conf, 31 January 2023, ICC-01/14-01/18-1788-Conf (the 'Yekatom Defence Observations').

⁴ Prosecution's Observations pursuant to the Chamber's "Order regarding the Remainder of the Prosecution's Presentation of Evidence and Order pursuant to Article 64(6)(d) of the Statute", ICC-01/14-01/18-1739-Conf, 31 January 2023, ICC-01/14-01/18-1791-Conf (the 'Prosecution Observations') (with one confidential annex, ICC-01/14-01/18-1791-Conf-Anx).

⁵ Defence Observations in relation to the potential introduction of P-0952's prior written statement under rule 68(3) of the Rules, ICC-01/14-01/18-1792-Conf (the 'Ngaïssona Defence Observations').

⁶ Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926's Evidence, 10 March 2021, ICC-01/14-01/18-907-Conf (public redacted version notified on 1 April 2021, ICC-01/14-01/18-907-Red) (the 'First Rule 68(3) Decision'), paras 8-16.

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that, subject to the fulfilment of the requirements under Rule 68(3) of the Rules, its determination to allow the introduction of prior recorded testimonies is discretionary and requires a case-by-case assessment. Factors which a Chamber may consider, depending on the relevant circumstances, include, *inter alia*, whether the evidence relates to issues that are not materially in dispute or whether the evidence is not central to core issues in the case.⁷

1. *Submissions*

5. While the Prosecution defers to the Chamber's exercise of its broad discretion, it indicates that introduction of the previously recorded testimony of the Witness would (i) contribute to the expedition and streamlining of the proceedings; and (ii) not unfairly prejudice the Defence teams, as the witness will be fully available for cross-examination and any inquiry by the Chamber and the participants.⁸
6. In contrast, the Yekatom Defence argues that it would not be in the interests of justice for the Witness's prior recorded testimony to be submitted under Rule 68(3) of the Rules 'in light of its content and of the unique position the witness held during the events'.⁹ It also submits that the allegations against Mr Yekatom contained in the Witness's prior recorded testimony militate in favour of a fully *viva voce* testimony.¹⁰
7. Similarly, the Ngaïssona Defence 'strongly objects' to the Witness's previously recorded testimony being introduced under Rule 68(3) of the Rules, as 'any timesaving in the questioning of the witness will be outweighed by the prejudice that the formal submission of the prior testimony would cause to the fair trial rights of Mr Ngaïssona'.¹¹ The Ngaïssona Defence argues that it would not be in a position to adequately prepare its questioning if the Witness were to appear pursuant to Rule 68(3) of the Rules, as the Witness was always envisaged to testify fully *viva voce* and it planned accordingly.¹² It further submits that the

⁷ See First Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 14 *with further references*.

⁸ Prosecution Observations, ICC-01/14-01/18-1791-Conf, paras 2, 10-12.

⁹ Yekatom Defence Observations, ICC-01/14-01/18-1788-Conf, paras 2, 8, 11, 13.

¹⁰ Yekatom Defence Observations, ICC-01/14-01/18-1788-Conf, para. 14.

¹¹ Ngaïssona Defence Observations, ICC-01/14-01/18-1792-Conf, para. 2.

¹² Ngaïssona Defence Observations, ICC-01/14-01/18-1792-Conf, paras 5-11.

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Witness 'is a high-profile witness expected to provide a unique perspective on Mr Ngaïssona's alleged acts and conduct and on core issues in dispute',¹³ and that the testimony 'is by definition deemed at the centre of this case and should as a result be heard live'.¹⁴

2. *The Chamber's determination*

8. Having considered the above, including the Defence's objections, and bearing in mind the topics on which the Chamber would be interested in hearing the Witness's testimony,¹⁵ the Chamber is of the view that, in the particular circumstances of the case, it would not be in the interests of justice to introduce the previously recorded testimony of the Witness pursuant to Rule 68(3) of the Rules. The Witness will therefore appear, and be questioned, as a fully *viva voce* witness.
9. The Chamber will provide a list of material it intends to use during its questioning of the Witness, if any, within the same time limit as applicable to participants when calling witnesses.¹⁶

¹³ Ngaïssona Defence Observations, ICC-01/14-01/18-1792-Conf, para. 16.

¹⁴ Ngaïssona Defence Observations, ICC-01/14-01/18-1792-Conf, para. 20.

¹⁵ See also 31 January 2023 Order, ICC-01/14-01/18-1739-Conf, para. 10.

¹⁶ See Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, para. 41.

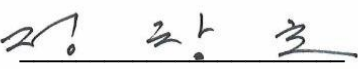
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FOR THESE REASONS, THE CHAMBER HEREBY

DECIDES to hear the Witness fully live; and

ORDERS the Yekatom Defence, the Prosecution and the Ngaïssona Defence to file public redacted versions, or request their reclassification to public, of the Yekatom Defence Observations, ICC-01/14-01/18-1788-Conf, the Prosecution Observations, ICC-01/14-01/18-1791-Conf, and the Ngaïssona Defence Observations, ICC-01/14-01/18-1792-Conf, respectively, within one week of the conclusion of the Witness's testimony.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 13 September 2023

At The Hague, The Netherlands