

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

**Cour
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**International
Criminal
Court**

Original: English

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Date: 19 October 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 consolidated response to the Defence requests for leave to appeal the 'Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules' and the 'Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules'

Source: Office of the Prosecutor

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I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject Ngaïssona's request for leave to appeal¹ the "Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules"² and Ngaïssona's request for leave to appeal³ the "Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules."⁴

2. The two Requests raise nine Issues; six in relation to the Rule 68(2)(d) Decision and three in relation to the Rule 68(2)(c) Decision, respectively.⁵

3. Regardless of whether any of these Issues amount to 'appealable issues' arising from the Decisions, none meets the criteria for certification under article 82(1)(d). The Trial Chamber has yet to decide on the reliability and probative weight of each of the admitted items of evidence as part of its judgment under article 74. Thus, Ngaïssona's arguments that the Issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that an immediate resolution by the Appeals Chamber of the Issues would materially advance the proceedings are speculative and premature. Referring these Issues to the Appeals Chamber on this basis would only delay, not expedite, the proceedings.

4. The Prosecution presents this consolidated response to the two Requests, as they raise similar matters that are best addressed jointly.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this filing is classified as confidential, as it responds to the Requests that are subject to the same

¹ ICC-01/14-01/18-2145-Conf ("Request Against the Rule 68(2)(d) Decision").

² ICC-01/14-01/18-2126-Conf ("Rule 68(2)(d) Decision").

³ ICC-01/14-01/18-2146-Conf ("Requests Against the Rule 68(2)(c) Decision").

⁴ ICC-01/14-01/18-2126-Conf ("Rule 68(2)(c) Decision").

⁵ All nine issues are collectively referred to as the "Issues".

classification. The Prosecution does not object to the reclassification of this filing as public.

III. SUBMISSIONS

6. As noted, the Requests raise nine Issues. Some of these focus on the Chamber's legal findings in relation to the interpretation of rules 68(2)(c) and 68(2)(d).⁶ Others challenge the Chamber's factual assessments⁷ or disagree with its determination that the admission of the Prior Recorded Testimony has no unfair prejudicial impact.⁸

7. Even if, *arguendo*, any of the Issues were appealable issues arising from either of the Decisions, the Chamber should reject the Requests because none meets the criteria for leave to appeal under article 82(1)(d). In particular, they do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and the Appeals Chamber's immediate resolution of any one of them would not materially advance the proceedings.

8. In its Rule 68(2)(d) Decision, the Chamber held that, as a matter of law:

“[w]here a prior recorded testimony is introduced pursuant to Rule 68(2)(d) 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.”⁹

The Chamber reiterated this principle when applying the law to the facts and when admitting the Prior Recorded Testimony, in concluding that:

“[i]n any event, in the context of its deliberations on the judgment pursuant to Article 74 of the Statute, the Chamber will weigh the probative value and reliability of the Prior Recorded Testimony, considering the nature of the

⁶ See *e.g.* Request Against the Rule 68(2)(d) Decision, First Issue (paras. 8, 10); Second Issue (paras. 8, 11-12); Request Against the Rule 68(2)(c) Decision, First Issue (paras. 22-29); Second Issue (paras. 30-32); Third Issue (paras. 33-35).

⁷ See *e.g.* Request Against the Rule 68(2)(d) Decision, Fourth Issue (paras. 8, 16-19); Fifth Issue (paras. 8, 20); Request Against the Rule 68(2)(c) Decision, First Issue (paras. 22-29).

⁸ See *e.g.* Request Against the Rule 68(2)(d) Decision, Third Issue (paras. 8, 13-15); Sixth Issue (paras. 8, 21).

⁹ Rule 68(2)(d) Decision, para. 7.

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evidence provided by the Witness, any references to the acts and conduct of the accused, and whether the evidence contained in the Prior Recorded Testimony is corroborated by any other evidence submitted before the Chamber.”¹⁰

9. Similarly, in its Rule 68(2)(c) Decision, the Chamber recalled the applicable law¹¹ as previously set out in its Initial Directions on the Conduct of the Proceedings,¹² according to which it adopted the ‘Submission Approach’. Consequently, it held that it will assess the standard evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgment pursuant to article 74(2).¹³ Consistent with this approach, when recognising the formal submission of the Prior Recorded Testimony, the Chamber deferred its assessment of its weight and probative value.¹⁴

10. Because the Chamber has yet to determine what weight and probative value to give to the Prior Recorded Testimony, Ngaïssona’s arguments that any of the issues arising from the Decisions admitting the Prior Recorded Testimony into evidence pursuant to rules 68(2)(d) or (c) affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that an immediate resolution by the Appeals Chamber of the Issues would materially advance the proceedings are speculative and premature. According to the consistent practice of the Court, abstract speculation that the impugned Decision causes unfair prejudice to an Accused’s rights cannot substantiate that the fairness of the proceedings are affected.¹⁵ It does not suffice for an issue to have merely a hypothetical impact on the fairness or expeditiousness of proceedings.¹⁶ Nor, is it sufficient to provide unsubstantiated

¹⁰ Rule 68(2)(d) Decision, para. 104.

¹¹ Rule 68(2)(c) Decision, para. 17.

¹² ICC-01/14-01/18-631 (“Initial Guidance”).

¹³ Initial Guidance, para. 53.

¹⁴ See e.g. Rule 68(2)(c) Decision, paras. 36, 58.

¹⁵ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211, paras. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para. 22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

¹⁶ ICC-01/04-01/07-1958, para. 20. See also: ICC-02/04-01/05-367, paras. 21-22.

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arguments.¹⁷ A purely general complaint does not suffice.¹⁸ Given the balanced approach taken by the Chamber when recognising the formal submission of the evidence, it correctly exercised its discretion in determining that its introduction is not unfairly prejudicial to or inconsistent with the rights of the Accused.¹⁹

11. Any issues arising from the Decision would not materially affect the expeditious conduct of the proceedings. Ngaïssona remains free to address the weight and probative value or prejudicial effect of the Prior Recorded Testimony in his closing submissions and brief. As noted, referring the Issues to the Appeals Chamber at this stage would only delay, not expedite, the proceedings.

12. The Issues also do not affect the outcome of the trial because, as noted above, the Trial Chamber has yet to decide what weight and probative value, if any, to accord to the Prior Recorded Testimony. Speculative arguments do not suffice to substantiate a claimed impact on the outcome of trial.²⁰

13. Similarly, speculative arguments may not justify the necessity for the Appeals Chamber to immediately resolve an issue. Here, the immediate resolution of any of the Issues raised in the Requests would not materially advance the proceedings.²¹

14. Moreover, as noted above the Requests are premature. Ngaïssona has additional avenues to pursue – namely the closing submissions and brief – wherein he may raise any claimed unfair prejudice. Thus, resolution of the Issues by the Appeals Chamber at this stage is not likely to provide significant guidance or assist the proceedings to

¹⁷ ICC-01/09-01/11-1154, para 26.

¹⁸ ICC-01/04-01/06-2463, para. 31.

¹⁹ Rule 68(2)(d) Decision, para. 105.

²⁰ ICC-01/04-01/07-1958, para. 20; ICC-01/09-02/11-406, paras. 42-43.

²¹ ICC-01/04-01/06-2109, para. 22; ICC-01/09-01/11-1154, para. 28.

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"move forward".²² Rather, it will only cause an unnecessary delay. Further, Ngaïssona may also raise any Issues in a final appeal.²³

IV. CONCLUSION

15. For the reasons above, the Chamber should reject the Requests.



Karim A. A. Khan KC, Prosecutor

Dated this 19th day of October 2023

At The Hague, The Netherlands

²² ICC-01/04-168, paras. 14-15,18.

²³ "[I]t is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order materially to advance the proceedings." ICC-01/04-01/06-1557, para. 25; ICC-01/04-01/06-1191, para. 12; ICC-01/05-01/08-1169, para. 25.