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**No. ICC-01/14-01/18
Date: 25 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Ngaißsona Defence Request for Leave to Appeal the
Third Decision on the Prosecution Requests for Formal Submission of Prior
Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules**

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 Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this ‘Decision on the Ngaïssona Defence Request for Leave to Appeal the Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules’.

1. On 6 October 2023, the Chamber decided to introduce into evidence the prior recorded testimony, *inter alia*, of witnesses P-2602 and P-2269 pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (the ‘Impugned Decision’).¹
2. On 16 October 2023, the Ngaïssona Defence (the ‘Defence’) requested leave to appeal the Impugned Decision (the ‘Request’),² raising three issues (collectively, the ‘Issues’):
 - (i) Whether the Chamber ‘erred in law and in fact when it misinterpreted the concept of “unavailable to testify”, in particular whether it ‘erred in law by interpreting that successfully withdrawing his collaboration to testify with the Court is an objective cause of unavailability to testify orally, or erred in fact by failing to consider the chain of causation between the unwillingness of the witnesses to testify and the inability of the Prosecution to locate them’;³
 - (ii) Whether the Chamber erred in law when it allowed the introduction of P-2269’s prior recorded testimony, in particular whether it ‘erred in fact when it failed to take into consideration that no witness can comment on [certain allegations made by P-2269 in his prior recorded testimony]’ and

¹ Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules, ICC-01/14-01/18-2127-Conf (public redacted version notified the same day, ICC-01/14-01/18-2127-Red).

² Defence Request for Leave to Appeal the “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”, ICC-01/14-01/18-2127-Conf, ICC-01/14-01/18-2146-Conf.

³ Request, ICC-01/14-01/18-2146-Conf, paras 22-29.

‘erred in law’ when it allowed the introduction of his prior recorded testimony ‘when it goes to the accused’s acts and conduct’;⁴ and

- (iii) Whether the Chamber erred in law when it allowed the introduction of P-2602’s prior recorded testimony, in particular, whether it erred in law by ‘relying on a potential Defence witness to bring evidence [...] in an adversarial setting to justify the introduction of P-2602’s prior recorded testimony in its totality’.⁵
3. The Defence argues that (i) each issue constitutes an appealable issue pursuant to Article 82(1)(d) of the Statute;⁶ (ii) the Issues significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial;⁷ and (iii) an immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings.⁸
 4. On 20 October 2023, the Office of the Prosecutor responded, submitting that the Request should be rejected.⁹
 5. 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.¹⁰
 6. The Chamber is satisfied that the Issues constitute appealable issues arising from the Impugned Decision. In particular, they are not mere disagreements with the Impugned Decision, but raise discrete questions. The Chamber’s findings underlying the Issues were at the heart of its determination to introduce the prior recorded testimonies at issue into evidence. Therefore, the resolution of the Issues

⁴ Request, ICC-01/14-01/18-2146-Conf, paras 30-32.

⁵ Request, ICC-01/14-01/18-2146-Conf, paras 33-35.

⁶ Request, ICC-01/14-01/18-2146-Conf, paras 21 *et seq.*

⁷ Request, ICC-01/14-01/18-2146-Conf, paras 36-40.

⁸ Request, ICC-01/14-01/18-2146-Conf, paras 41-44.

⁹ 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’, 19 October 2023 (notified on 20 October 2023), ICC-01/14-01/18-2152-Conf.

¹⁰ 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.

is essential for the determination of the matters raised by the Defence in the Request.

7. The Chamber is equally satisfied that the Issues significantly affect the fair and expeditious conduct of the proceedings, as well as the outcome of the trial, and that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request; and

ORDERS the Ngaïssona Defence to file a public redacted version, or request reclassification to public, of the Request, ICC-01/14-01/18-2146-Conf, within one week of notification of this 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 25 October 2023

At The Hague, The Netherlands