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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
Decision on the Prosecution Request for Formal Submission of Prior Recorded
Testimony pursuant to Rule 68(2)(d) 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 Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules’.

1. On 6 October 2023, the Chamber decided to introduce into evidence the prior recorded testimony of witness P-1847 pursuant to Rule 68(2)(d) of the Rules of Procedure and Evidence (the ‘Rules’ and the ‘Impugned Decision’, respectively).¹
2. On 16 October 2023, the Ngaïssona Defence (the ‘Defence’) requested leave to appeal the Impugned Decision (the ‘Request’),² raising six issues (the ‘Issues’):
 - (i) ‘Whether the Chamber erred in law by finding that the Rule 68(2)(d)(i) requirement that the witness must have “failed to give evidence with respect to a material aspect” may be fulfilled in situations where the witness does attend, but recants fundamental aspects of their prior recorded testimony’;
 - (ii) ‘Whether the Chamber erred in law in its interpretation of the Rule 68(2)(d)(i) “interest of justice” requirement by finding Rule 68(2)(d)’s purpose is the same as contempt proceedings namely to protect the integrity of the proceedings as a reactionary measure and not that the requirement is linked to the main purpose of Rule 68 of the Rules, which is to expedite trial proceedings’;
 - (iii) ‘Whether the Chamber erred in its assessment of prejudice under Rule 68(2)(d) when it found that Mr Ngaïssona’s right to examine P-1847 on his prior recorded statements was not violated through introducing the

¹ Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules, ICC-01/14-01/18-2126-Conf.

² Defence request 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, ICC-01/14-01/18-2126-Conf, ICC-01/14-01/18-2145-Conf.

statements onto the record of the case since the Defence was aware of which material aspects of the statement the Prosecution had attempted, but ultimately failed, to elicit from the witness’;

- (iv) ‘Whether the Chamber made an error in reasoning when it assumed that a witness is unlikely to ever admit they were subject to improper interference in a situation where the Chamber based all its conclusions regarding inter[ference] on information which was obtained from the witness openly discussing with the Prosecution all the possible incidents that may have potentially affected their testimony’;
 - (v) ‘Whether in a situation where the prior recorded testimony “makes extensive reference to the alleged acts and conduct” of an accused, the Chamber gave due consideration to Rule 68(2)(d)(iv) when it only considered that Rule 68(2)(d) has a less stringent standard than Rule 68(2)(b)’; and
 - (vi) ‘Whether the Chamber erred in its assessment of prejudice by failing to consider that the Defence never had the opportunity to address the material aspects of P-1847’s prior recorded statements with the over 70 Prosecution witnesses who testified after P-1847’s appearance’.³
3. The Defence argues that (i) each issue constitutes an appealable issue pursuant to Article 82(1)(d) of the Statute;⁴ (ii) the Issues significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial;⁵ and (iii) an immediate resolution of the Issues by the Appeals Chamber would materially advance the proceedings.⁶
4. On 20 October 2023, the Office of the Prosecutor (the ‘Prosecution’) responded, submitting that the Request should be rejected (the ‘Response’).⁷

³ Request, ICC-01/14-01/18-2145-Conf, para. 8.

⁴ Request, ICC-01/14-01/18-2145-Conf, paras 9-21.

⁵ Request, ICC-01/14-01/18-2145-Conf, paras 22-27.

⁶ Request, ICC-01/14-01/18-2145-Conf, paras 28-29.

⁷ 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

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.⁸
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 testimony at issue into evidence. Therefore, the resolution of the Issues 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.

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.

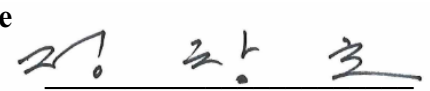
⁸ Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, paras 15-21.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request; and

ORDERS the Ngaïssona Defence and the Prosecution to file public redacted versions, or request reclassification to public, of the Request, ICC-01/14-01/18-2145-Conf, and the Response, ICC-01/14-01/18-2152-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