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**International
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Court**

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Date: **1 November 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
NGAÏSSONA***

Public

**Public Redacted Version of the
‘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-01/14-01/18-2145-Conf), filed 16 October 2023**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. On 6 October 2023, Trial Chamber V ('the Chamber') issued the "Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules" ('the Decision').¹ The Decision is the second time in the Court's history² that a Trial Chamber has interpreted and applied all the cumulative criteria for the introduction of a statement under Rule 68(2)(d) of the Rules of Procedure and Evidence ('Rules').³
2. The Decision comes a few weeks before the Defence for Patrice-Edouard Ngaïssona's ('the Defence's') 17 November 2023 deadline to submit *inter alia* its Final List of Witnesses and Evidence.⁴ Through the Decision, the Chamber has allowed the introduction of the entirety of P-1847's prior recorded statements onto the record of the case⁵; statements whose content P-1847 repudiated while on the stand.
3. The impact of the Decision on the present proceedings cannot be understated. As the Chamber acknowledged both in the Decision and during P-1847's testimony, one of reasons Mr Ngaïssona has been in detention for almost five years is because of P-1847's statements.⁶ Not only does the Decision have a considerable impact on the Defence preparing to meet the 17 November 2023 deadline, but also it has the

¹ ICC-01/14-01/18-2026-Conf.

² The Defence makes these submissions on the basis of filings which have been made publicly available.

³ *Prosecutor v. Ruto & Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Red-Corr; *Prosecutor v. Gicheru*, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(d) ICC-01/09-01/20-247-Red (finding that the Prosecution had not satisfied the first limb of Rule 68(2)(d) of the Rules by not using all reasonable measures to try to obtain the witness' attendance, and not making any judicial determinations as to the remaining criteria of Rule 68(2)(d).)

⁴ ICC-01/14-01/18-1892.

⁵ The Defence notes that the Chamber excluded certain paragraphs relating to Mr Yekatom's acts and conduct.

⁶ ICC-01/14-01/18-T-023-CONF-ENG CT, p. 41 lines 18-20. See Decision, para. 51.

potential to play a significant role in the Chamber's adjudication of Mr Ngaissona's alleged contributions, if any, to the charged crimes.

4. The Defence hereby requests leave to appeal the Decision on six issues which both arise from the Decision, and which meet the cumulative criteria specified in Article 82(1)(d) of the Rome Statute ('the Statute').

II. CONFIDENTIALITY

5. The Defence files the present request as confidential since it refers to filings with the same classification. A public redacted version will be filed in due course.

III. APPLICABLE LAW

6. Under Article 82(1)(d), a successful request for leave to appeal a decision must satisfy the following cumulative criteria:

- i. Whether the matter is an 'appealable issue'
- ii. Whether the issue at hand would significantly affect:
 - a) The fair and expeditious conduct of the proceedings or;
 - b) The outcome of the trial; and
- iii. Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁷

IV. SUBMISSIONS

7. The Defence requests leave to appeal the Decision on six issues. It submits that: (1) they affect both affect the fair and expeditious conduct of the proceedings and the

⁷ ICC-01/14-01/18-525-Conf, para. 19.

outcome of the trial; and (2) to materially advance the proceedings, an immediate resolution by the Appeals Chamber of the six issues is warranted.

A. The Six Issues

8. The Defence respectfully requests the Chamber to grant the Defence's request for leave to appeal on the following six issues:

First Issue: 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;

Second Issue: 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;

Third Issue: 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 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;

Fourth Issue: 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 interference on information which was obtained from the witness openly discussing with the Prosecution all the possible incidents that may have potentially affected their testimony;

Fifth Issue: 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

Sixth Issue: 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.

a. Each Issue constitutes an appealable issue pursuant to Article 82(1)(d)

9. For a request for leave to appeal to succeed, each issue must arise from the impugned decision. Additionally, the issues should not be a question over which there is a mere disagreement or conflicting opinion with the Chamber. Rather each issue must be “constituted by a subject the resolution of which is essential for the determinations of matters arising in the judicial cause under examination”⁸ As set out below, the six issues meet these requirements.
10. The First Issue arises from the Chamber’s interpretation of the first Rule 68(2)(d)(i) requirement that the Chamber must be satisfied that ‘the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony.’ In paragraph 15 of the Decision, the Chamber found that the requirement can be satisfied in situations where a person appears and testifies but recants material aspects of their prior recorded testimony. The Chamber’s rejection in paragraph 15 of the “more

⁸ Ibid., citing DRC Appeals Judgment, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 9.

limited understanding” of the rule amounts to rejecting the Defence’s primary argument based on rules of statutory interpretation that the terms found in the core legal texts of the Court should be interpreted according to their ordinary meaning.⁹ The Defence submits that this error was not a mere disagreement since this interpretation of the Rule was at the core of the Chamber’s determination that the first requirement of Rule 68(2)(d)(i) was met.

11. The Second Issue also arises from the Chamber’s interpretation of the requirements of Rule 68(2)(d)(i). In Section 1(v) of the Decision, namely “Requirements under Rule 68(2)(d) of the Rules, Interests of justice are best served by the introduction”, the Chamber provided its interpretation of what “interest of justice” means in the context of Rule 68(2)(d).¹⁰ The Chamber found in paragraph 27 that “the interests of justice” requirement in Rule 68(2)(d) relates to protecting the integrity of the proceedings. The interpretation of “the interests of justice” requirement in the context of Rule 68(2)(d) was essential to the Chamber’s determination that P-1847’s statement should be introduced since it found in paragraph 83 that “the introduction is appropriate and called for under the circumstances to preserve the integrity of the proceedings and is, at such in the interests of justice.”¹¹

12. Given this interpretation, the Chamber did not consider whether the introduction of the prior recorded statement would contribute to the expeditiousness of the proceedings. Had it done so, the Chamber would have weighed different interests in coming to its conclusions. The Chamber would have taken into consideration relevant factors such as the introduction of the prior recorded statement of P-1847 would cluttering the record with different versions of the witness’ evidence. It would have also considered whether it is against the interests of justice that the

⁹ Decision, para 46.

¹⁰ Decision, para.24.

¹¹ Decision, para. 83

Defence must now explore the incriminating evidence from Mr Ngaïssona's with its witnesses, which lengthens the proceedings.¹²

13. The Third Issue is a discrete question regarding the application of the Appeals Chamber precedent and is at the core of the Chamber's determination of undue prejudice in Mr Ngaïssona's case. The Chamber determined that in instances where, despite the witness denying the veracity of the material aspects of the prior recorded testimony, the Defence had a meaningful opportunity to examine the witness because it was aware of which material aspect the Prosecution was seeking to introduce on the record.
14. The Defence submits this is an error since another interpretation of the Appeals Chamber precedent and one that it put forward in its response was that the Prosecution's failed attempt to elicit criminal evidence resulted in the absence of incriminating information being put on the record¹³ Therefore, under this precedent, the Chamber should have concluded that Mr Ngaïssona did not have a meaningful opportunity to examine P-1847 on the content of his statements. The Chamber disagreed and conflated the separate requirement of Rule 68(2)(d)(i) namely that calling party must make "reasonable efforts to secure attendance or all material facts known to the witness"¹⁴ with the requirement that the introduction of the prior recorded statement must not be prejudicial to or inconsistent with the accused under Rule 68(1) of the Rules.
15. This interpretation of the Appeals Chamber precedent was crucial to the Chamber's determination that Mr Ngaïssona was not unduly prejudiced. This is

¹² Decision, para. 85.

¹³ ICC-01/14-01/18-2026, para. 65.

¹⁴ Decision, para. 77 (determining that the Prosecution's failure to exercise reasonable efforts to secure from the Witness all material facts known with respect to Mr Yekatom did not result in the rejection of the request due to the failure to meet this requirement but rather was to be assessed with respect to the prejudice to the accused)

evidenced by the Decision drawing a distinction between Mr Yekatom and Mr Ngaïssona with respect to undue prejudice to the accused.¹⁵ The Chamber determined that Mr Yekatom would be unduly prejudiced by the introduction of the prior recorded statement relating to his acts and conduct because the Prosecution did not attempt to elicit incriminating information from P-1847 and thus Mr Yekatom was not in a position to meaningfully examine the witness whereas the Chamber determined that Mr Ngaïssona would not be unduly prejudiced by introducing the parts of the statement relating to his acts and conduct because the Prosecution did attempt to elicit the incriminating information. Therefore, the Chamber's finding of prejudice and decision to introduce the portions of the statement relating to the acts and conduct of the accused turned on this question of interpreting the Appeals Chamber precedent.

16. The Fourth Issue also constitutes an appealable issue arising from the Decision. The Chamber found that despite P-1847 insisting on the external influences having no impact on the content of his testimony, the Witness was subject to improper interference. The Chamber's reasoning turned on the following assumption found in paragraph 66 namely that "assuming a witness was subject to improper interference, the likelihood of such a person openly admitting to such interference is close to nil."¹⁶

17. In the specific circumstances of P-1847's alleged interference, the Chamber demonstrated an error of reasoning and reached a conclusion that no reasonable person could reach. All the information regarding interference stemmed from P-1847 openly speaking with the Prosecution investigators. This shows that there are instances where a witness openly admits to events that could have influenced his testimony and is therefore contrary to the Chamber's assumption.

¹⁵ Decision, paras 102-103.

¹⁶ Decision, para. 66.

18. P-1847 openly discussed the effect of the two incidents referred to by the Chamber in the Decision, but ultimately, he stated that these two incidents played no role in the contradictory testimony he gave on the stand.¹⁷ The lack of influence of these two incidents is further supported by the following three factors argued by the Defence in its response and discounted by the Chamber as a result of the assumption it made regarding witnesses not admitting to being interfered with. First, P-1847 decided not to call Prosecution investigators regarding the incident with Mr Daouda because [REDACTED] convinced everyone that he was not a witness and [REDACTED] went quiet on the matter.¹⁸ Second, the [REDACTED] has absolutely no link to and is associated with [REDACTED] that is hostile to Mr Ngaïssona and would therefore have no vested interest in P-1847 deviating from the incriminating information found in his prior recorded statement.¹⁹ Third, the Chamber considered a Prosecution investigator's report, which even if assumed true, stated that Witness P-2841 never spoke with P-1847 about his testimony concerning Mr Ngaïssona.²⁰ Lastly, the Prosecution put Witness P-1847 under considerable pressure to state that his testimony was interfered with.²¹ Therefore, contrary to the Chamber's characterization, none of his responses were spontaneous, but rather a result of a Witness trying to give the Prosecution an answer that would satisfy it.²² These factors were either not considered at all or were not given any weight due to the erroneous assumption made by the Chamber.

19. Due to the Chamber's erroneous reasoning that a witness will almost never admit they have been subject to improper interference, it found in paragraph 65 that P-1847's explanations regarding the lack of interference did not alter its conclusion

¹⁷ Decision, paras 60, 62, 65.

¹⁸ ICC-01/14-01/18-2026-Conf, para. 24.

¹⁹ Ibid., para. 22.

²⁰ Ibid., para. 29.

²¹ Ibid., paras 26-28.

²² Decision, para. 61.

of improper interference. Therefore, the resolution of this issue is essential for the determination of the matter of whether P-1847 was subject to improper interference.

20. The Fifth Issue arises from the Decision, specifically from paragraphs 34-35 and paragraph 86 where in considering the independent factor listed in Rule 68(2)(d)(iv), the Chamber only considered that the drafters of Rule 68(2)(d) had greater flexibility in mind with respect to the acts and conduct of the accused for Rule 68(2)(d) than for Rule 68(2)(b). This was an error, and respectfully, constitutes an abuse of discretion by the Chamber. While there is greater flexibility in Rule 68(2)(d) than (b) in terms of allowing the introduction of a statement referring to the acts and conduct of the accused, it is still an independent limb of Rule 68(2)(d), and the Chamber did not properly apply and meaningfully consider this factor in the Decision. The Chamber did not give appropriate weight to the fact that the statement touches upon all the alleged contributions for which the Chamber confirmed the charges against Mr Ngaissona.²³ Resolution of the weight to be accorded to the application of the Rule 68(2)(d)(iv) requirement is essential to the matter raised by the Defence, and therefore the Fifth Issue is an appealable issue.

21. The Sixth Issue arises from the Decision, specifically paragraph 85 where the Chamber found that the Defence was not prejudiced by the timing of the Prosecution's request because the Defence would be able to explore aspects of the prior recorded testimony in the context of other submissions or during the questioning of its witnesses. This finding was essential for the Chamber's determination that the timing of the Prosecution request did not prejudice the Defence. However, the Chamber did not consider that at the time the Prosecution filed its request, over 70 witnesses had testified following P-1847's appearance. Since P-1847's statement was not on the record, the Defence did not explore the

²³ Decision, para. 51.

material aspects of P-1847's prior recorded statements with the remaining Prosecution witnesses. Had the Chamber considered this aspect of the untimeliness of the request, it would have found that the Defence was denied the opportunity to examine the material aspects of P-1847's prior recorded testimony with the remaining Prosecution witnesses. It would have therefore found that introduction of the prior recorded statements at this stage would be unduly prejudicial to the Defence.

B. The six issues at hand significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial

22. Under Article 82(1)(d) the issues at hand must either significantly affect the fair and expeditiousness conduct of the proceedings or the outcome of trial. Here, the issues raised by the Decision significantly affect both fair and expeditious conduct of the proceedings and the outcome of the trial.
23. The Defence has grouped all the issues together under its assessment of whether they significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial since the Chamber's resolution of each issue had an essential role in the Chamber finding that P-1847's prior recorded testimony could or should be introduced onto the record of the case. Introducing evidence which goes to the heart of Mr Ngaïssona's alleged criminal responsibility and yet which was completely disavowed by the witness who provided such evidence significantly affects the fairness and the length of the proceedings.
24. Specifically, the Defence must now: (1) revise its case strategy, specifically it will have to adapt it to the extensive evidence relating to Mr Ngaïssona's acts and conduct that was introduced by the Decision; (2) expand its investigations that take into account P-1847's statement, which prior to the Decision was never part of the record of the case and could not be relied on; (3) potentially call witnesses who will address the different versions of P-1847's evidence. These effects of the Decision

on the Defence's preparation will inevitably lengthen the trial. This impacts on the fairness of the trial since it ongoing for almost three years during which Mr Ngaïssona has been continuously detained. The Chamber indirectly affirmed that the Decision could lengthen the proceedings since it acknowledged that the Defence could choose to examine with its witnesses the recently introduced evidence, which will result in additional time spent questioning Defence witnesses.²⁴

25. The Third Issue is unique in its effect on the fair and expeditious conduct of the proceedings since it impacts particularly on an accused's right to remain silent under Article 67(1)(g) of the Statute and his right to examine the witnesses against him under Article 67(1)(e) of the Statute. By finding that the Defence has a meaningful opportunity to examine a witness when it is apprised of the attempt of the Prosecution to elicit incriminating information, but which has not been placed on the record, the Chamber placed the Defence in an impossible situation. The Defence must envisage possible scenarios where such material may be placed on the record and thus make a choice on whether to risk possibly eliciting incriminating information or being stripped of its opportunity to examine witnesses. Making the choice to put incriminating evidence onto the record would be against the code of conduct of most counsel to zealously represent their client, and indeed could result in malpractice. This undoubtedly impacts the fairness of the proceedings since it affects "the ability of party...to adequately make its case, with a view to influencing the outcome of the proceedings in its favour."²⁵ It impacts the expeditiousness of the proceedings since the Defence must take into account in presenting its evidence all the times where the Prosecution attempted

²⁴ Decision, para. 85.

²⁵ Situation in Uganda, Decision on Prosecutor's Application for leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04- 01/05-20-US-Exp, para. 30

to place material aspects of a prior recorded statement for a non-Rule 68 witness on the record but ultimately failed to do so.

26. Additionally, each of the six issues significantly affect the outcome of the trial under Article 82(1)(d). The Appeals Chamber has found that this prong of the Article 82(1)(d) requires the Chamber to “ponder the possible implications of a given issue being wrongly decided on the outcome of the case”.²⁶ All six issues concern the interpretation and application of Rule 68(2)(d). If the Chamber erred in its interpretation and application of Rule 68(2)(d), then P-1847 prior recorded statement cannot be relied upon for the purpose of the Chamber’s Article 74 judgment.

27. Given that the statement extensively refers to the acts and conduct of Mr Ngaïssona that were central to the Pre-Trial Chamber confirming the charges against Mr Ngaïssona²⁷, the erroneous introduction of this evidence will have a significant bearing on the outcome of the trial. The Third Issue presents the particularity of a statement being introduced in complete violation of an accused right to remain silent and to examine witnesses against him. Like for the other four issues, the reason the Third Issue significantly affects the outcome the trial is due to P-1847’s statement covering all the alleged contributions of Mr Ngaïssona to the crimes charged.

C. An immediate resolution of the six issues by the Appeals Chamber would materially advance the proceedings.

28. The Article 82(1)(d) requirement that the issue materially advance the proceedings through immediate resolution by the Appeals Chamber ensures that the proceedings follow the right course through an authoritative determination by the

²⁶ ICC-01/04-168, para. 13.

²⁷ Decision, paras 51, 99.

Appeals Chamber.²⁸ Such an authoritative determination removes doubts about the correctness of a decision or maps out a course of action along the right lines.²⁹

29. The evidenced introduced by the Chamber through the Decision concerns a linkage witness, who as stated by both the Prosecution and the Chamber,³⁰ is central to the case against Mr Ngaïssona. Given its importance, the inclusion of P-1847's statement on the record will impact every aspect of the trial proceedings against Mr Ngaïssona. It will be determinative of the witnesses the Defence chooses to call at Defence case, the evidence that will be addressed in the parties' final briefs, and most importantly the evidence which the Chamber may rely on to either acquit or convict Mr Ngaïssona. Appellate intervention at this stage is necessary to ensure that the proceedings follow the right course, and that the whole trial is not undermined due to one erroneous decision.

V. RELIEF SOUGHT

30. For the foregoing reasons, the Defence respectfully requests the Chamber to

-GRANT the Defence's request for leave to appeal the Decision on the six abovementioned issues pursuant to Article 82 (1)(d) of the Statute.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

²⁸ ICC-01/04-168, para 15

²⁹ Ibid.

³⁰ Decision, para. 51; ICC-01/14-01/18-2026-Conf, para. 61.

Dated this 1 November 2023

At The Hague, the Netherlands.