

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: **ICC-01/14-01/18**

Date: **28 April 2020**

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

**Mr Ngaïssona's Defence Response to the "Prosecution's Request to Designate a Person
Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and
Evidence", ICC-01/14-01/18-489**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. On 22 April 2020, the Prosecution submitted the “Prosecution’s Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence” (“the Request”) and requested the Trial Chamber V (“the Chamber”) to designate a person authorised to witness a declaration under rule 68(2)(b) of the Rules of Procedure and Evidence (“the Rules”). The Prosecution anticipates that in light of the prevailing circumstances and with an objective of streamlining of the proceedings it may increase its reliance on rule 68 evidence in comparison with its previous practice¹. The Defence for Mr Patrice-Edouard Ngaïssona (“the Defence”) hereby presents its response to the Request.
2. While not opposing the Prosecutor’s request, the Defence respectfully requests that the appointed authorised person be a Legal Officer of the Chamber. The Defence also wishes to put on record its concern regarding the Prosecution’s announcement of its intention to heavily rely on Rule 68(2)(b) of the rules in light of the principle of the primacy of orality and Mr Ngaïssona’s fundamental right to examine the witnesses against him. The streamlining of the proceeding cannot be to the detriment of the rights of Mr Ngaïssona. This response is without prejudice to the right of the Defence to be heard when the Prosecution submits its actual Rule 68 applications.²

II. Submissions

a. The Authorised Person should be a Legal Officer of the Chamber

3. The Defence acknowledges that under Rule 68(2)(b)(iii) of the Rules, the person authorised to witness a declaration under Rule 68(2)(b) of the Rules could be an authorised person under national laws and procedures to witness declarations and that the Prosecution considers that the Chamber’s separate designation of such an individual will promote efficiency³. The Defence requests for the authorised person designated by the Chamber to be a Legal Officer of the Chamber as this choice would best serve the

¹ Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, Prosecution’s Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-01/14-01/18-489, para 6.

² Rule 68(1) of the Rules.

³ Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, Prosecution’s Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-01/14-01/18-489, para 6.

interests of unity and procedural economy of the Chamber when exercising its judicial oversight or supervision pertaining to the execution of Rule 68(2).

- b. The primacy of Articles 67(1)(e) and 69(2) of the Rome Statute of the International Criminal Court (“the Rome Statute”) over reliance on Rule 68(2) of the Rules should be observed in the proceedings**
4. The Defence takes note that the Request makes no mention of the witnesses for which it anticipates making requests to introduce prior recorded testimony under Rule 68(2)(b) of the Rules, but anticipates that the prevailing circumstances may entail a greater reliance on rule 68 evidence than in the ordinary course of events⁴.
5. The Defence recalls that reliance on evidence under Rule 68(2)(b) of the Rules should be weighed against the principle of the “primacy of orality” provided for in Article 69(2) of the Rome Statute and the guarantees of the accused foreseen in Article 67(1)(e), asserting that Mr Ngaïssona has the right to confront the witness against him. Relevant case law indicates that both the principle of the primacy of orality and the guarantees of the accused must take precedence over reliance on Rule 68(2) of the rules⁵. Importantly, this cognizance is notwithstanding the observance of Rule 68(1) of the Rules⁶.
6. For the above reasons, the Defence requests the Chamber to limit the Prosecution’s reliance on evidence under Rule 68(2)(b) of the Rules to what is strictly in conformity

⁴ *Id.*

⁵ See, Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, ICC-02/11-01/15-744 , para 65: “[i]n deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony, a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally”. See also Prosecutor v. Dominic Ongwen, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, para 5: “[a]s generally required in all instances of introduction of prior recorded testimony under Rule 68 of the Rules, this introduction must also not be prejudicial to or inconsistent with the rights of the accused”.

⁶ Rule 68(1) of the Rules. See also Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, ICC-02/11-01/15-744, para 66: “[w]itness statements may only be introduced under rule 68 of the Rules of Procedure and Evidence if the strict conditions of that rule are met”. See also Prosecutor v. Dominic Ongwen, Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red, para 12: “[t]he Chamber recalls that the introduction of a prior recorded testimony is not permitted if it is prejudicial to or inconsistent with the rights of the accused as mandated by Rule 68(1) of the Rules”.

to the standards of Rule 68 of the Rules and by being mindful of Mr Ngaïssona's rights under Articles 67(1)(e) and 69(2) of the Rome Statute.

c. The streamlining of the proceedings should not supersede the above-mentioned rights of the accused

7. The Defence takes note of the Prosecution's intention to streamline the presentation of its case by introducing prior statements and testimonies of certain witnesses at trial.⁷ The Defence recalls, however, that in considering whether to admit prior recorded testimony under Rule 68(2)(b) of the Rules, the swift administration of justice is not a decisive factor that the Chamber is to consider.⁸ Moreover, in its adjudication of any Rule 68 application, the Court will not allow the introduction of such testimony if it is contrary to the rights of the accused.
8. The Defence also notes that the Prosecution anticipates that the use of recorded testimony under Rule 68(2)(b) of the Rules might serve as an alternative in light of the constraints that the COVID-19 pandemic imposes on the procedure.⁹ However, as much as the Defence acknowledges the impact of the COVID-19 pandemic on the work of the Court, a solution to mitigate such impact cannot affect Mr Ngaïssona's fundamental right to a fair trial. In any case, as the level of disruption of the proceedings cannot yet be anticipated, the Defence asserts that the anticipation of a "greater reliance" on Rule 68(2)(b) by the Prosecution is premature. Given the Prosecution has announced that it would not be ready to start trial for at least the upcoming year, it is simply too early to tell to what extent the examination of witnesses will be affected by the COVID-19 pandemic. Moreover, any solutions adopted by the Chamber to overcome obstacles posed by the current pandemic should be done in conformity with the Core Texts of the Court.

⁷ Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, Prosecution's Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-01/14-01/18-489, para 1.

⁸ Rule 68(2)(b)(i) of the Rules.

⁹ Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, Prosecution's Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-01/14-01/18-489, para 6.

III. Relief Sought

9. The Defence thereby requests the Chamber to:
- i. Designate a Legal Officer of the Chamber as the person authorised to witness a declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 28 April 2020,
At The Hague, the Netherlands.