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**No. ICC-01/14-01/18
Date: 6 May 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

**Decision on 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**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Kweku Vanderpuye

Counsel for the Alfred Yekatom

Mylène Dimitri
Peter Robinson

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 67 and 69 of the Rome Statute (the ‘Statute’), and Rule 68(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on 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’.

1. On 22 April 2020, the Office of the Prosecutor (the ‘Prosecution’) submitted a request to designate a person authorised to witness declarations made under Rule 68(2)(b) of the Rules (the ‘Request’).¹ The Prosecution submits that, in view of its intention to introduce ‘prior recorded statement/testimony of several witnesses in whole or part, under rule 68(2)(b) of the Rules’,² the Chamber’s separate designation of such an individual, for example ‘a Legal Officer of the Chamber or Registry staff member, or local official’, will promote efficiency.³ The Prosecution adds that ‘in view of the prevailing circumstances which may entail a greater reliance on rule 68 evidence than ordinarily, doing so may be particularly important to ensure consistency within the case’.⁴ The Prosecution further requests that this relief be granted as ‘expeditiously as possible’, on account of the impact of the current global pandemic (the ‘Coronavirus Pandemic’) and on ‘the timing and contours of a prospective trial in this case, as well as the logistical arrangements necessary to obtaining [the] required declarations’.⁵
2. On 23 April 2020, the Yekatom Defence informed the Chamber that it does not oppose the Request.⁶ On 24 April 2020, the Common Legal Representatives of Victims for the Former Child Soldiers and the Common Legal Representatives

¹ 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.

² Request, ICC-01/14-01/18-489, para. 3; *see also* paras 4-5.

³ Request, ICC-01/14-01/18-489, para. 6.

⁴ Request, ICC-01/14-01/18-489, para. 6.

⁵ Request, ICC-01/14-01/18-489, para. 2.

⁶ Email from the Yekatom Defence to the Chamber, the Prosecution, the Registry, the CLRV and the Ngaïssona Defence, 23 April 2020, at 13:42.

of the Victims of Other Crimes (jointly, the ‘CLRv’) informed the Chamber that they also do not oppose the Request and will not file a response.⁷

3. On 29 April 2020, the Ngaïssona Defence (the ‘Defence’) responded that while it does not oppose the Request, it requests that the person authorised to witness declarations pursuant to Rule 68(2)(b) of the Rules be a Legal Officer of the Chamber as this would ‘best serve the interests of unity and procedural economy of the Chamber [...]’.⁸ Further, the Defence ‘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 the guarantees of the accused must take precedence over reliance on Rule 68(2)’.⁹ It further requests the Chamber to be mindful of Mr Ngaïssona’s rights under Articles 67(1)(e) and 69(2) of the Statute and limit the Prosecution’s reliance on evidence under Rule 68(2)(b) of the Rules to what is strictly in conformity to the standards of Rule 68 of the Rules.¹⁰ The Defence adds that the Prosecution’s anticipated use of Rule 68(2)(b) testimony as an alternative to overcome the constraints during the Coronavirus Pandemic ‘cannot affect Mr Ngaïssona’s fundamental right to a fair trial’.¹¹ The Defence notes that its response is ‘without prejudice to the rights of the Defence to be heard when the Prosecution submits its actual Rule 68 applications’.¹²
4. On 1 May 2020, upon instruction from the Chamber to provide its views on this matter, particularly in light of the Coronavirus Pandemic,¹³ the Registry filed its observations.¹⁴ The Registry submits that persons authorised to witness a Rule 68(2)(b) declaration may be (i) the Registry Senior Legal Advisor (the

⁷ Email from the CLRv to the Chamber, the Prosecution, the Ngaïssona Defence and the Yekatom Defence, 24 April 2020, at 08:52.

⁸ 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, ICC-01/14-01/18-497 (the ‘Response’), paras 2-3.

⁹ Response, ICC-01/14-01/18-497, para. 2; *see also* para. 5.

¹⁰ Response, ICC-01/14-01/18-497, para. 6.

¹¹ Response, ICC-01/14-01/18-497, para. 8; *see also* para. 7.

¹² Response, ICC-01/14-01/18-497, para. 2.

¹³ Email from the Chamber to the Registry, the Prosecution, the CLRv, the Yekatom Defence and the Ngaïssona Defence, 24 April 2020, at 13:18.

¹⁴ Registry Observations on Matters related to Rule 68(2)(b) Certifications in light of the Coronavirus Pandemic, ICC-01/14-01/18-504 (the ‘Registry Observations’).

‘SLA’) or anyone delegated by him,¹⁵ (ii) a Chamber’s Legal Officer,¹⁶ or (iii) a local official authorised in accordance with the law and procedure of the state.¹⁷

5. The Registry recalls that over the past five years, the established practice at the Court has been for Chambers to designate the Registry SLA, or anyone delegated by him, as the person authorised to witness declarations under Rule 68(2)(b)(ii) of the Rules.¹⁸ In this regard, and in response to the Defence request to designate a Legal Officer of the Chamber instead, the Registry notes that while this is possible under the existing legal framework, it has not been the practice at the Court.¹⁹ The Registry also makes recommendations to address the challenges presented during the Coronavirus Pandemic in respect of three possible scenarios depending on the location of the concerned witnesses, namely, (i) witnesses located in The Netherlands or in nearby countries;²⁰ (ii) witnesses located in a State where the Court has a Country Office;²¹ and (iii) witnesses located in a State where the Court has no Country Office.²²
6. Taking into account the statutory requirements of Rule 68(2) of the Rules and the Prosecution’s intention to introduce prior statements/testimony of certain witnesses, in whole or part, at trial, the Chamber considers that a designation of a person pursuant to Rule 68(2)(b)(iii) of the Rules is necessary. Further, noting

¹⁵ Registry Observations, ICC-01/14-01/18-504, paras 4-5.

¹⁶ Registry Observations, ICC-01/14-01/18-504, para. 6.

¹⁷ Registry Observations, ICC-01/14-01/18-504, paras 7-8.

¹⁸ Registry Observations, ICC-01/14-01/18-504, paras 2, 4.

¹⁹ Registry Observations, ICC-01/14-01/18-504, para. 6.

²⁰ Registry Observations, ICC-01/14-01/18-504, paras 10-16. The Registry submits that these certifications may be carried out by the Registry SLA or a person designated by him depending on the end date of the travel restrictions within Europe. In the alternative, these certifications may be conducted remotely. However, given the novelty and complexities of carrying this out remotely, the Registry recommends that a local official authorised in accordance with national law and procedure be appointed if there are prolonged travel restrictions within Europe.

²¹ Registry Observations, ICC-01/14-01/18-504, paras 17-20. The Registry submits that, for witnesses located in the Central African Republic (the ‘CAR’), the current internal travel restrictions affects the conduct of any certifications pursuant to Rule 68(2)(b) of the Rules regardless of who would conduct such certifications. For witnesses in Bangui, the Registry suggests the option of resorting to the staff in the CAR Country Office who, if qualified, could be trained and delegated by the Registry SLA to carry out these certifications. Alternatively, and particularly for witnesses outside Bangui, the Registry suggests the option for the calling party to request assistance of national authorities to identify locally a person duly authorised to certify a prior recorded testimony.

²² Registry Observations, ICC-01/14-01/18-504, para. 21. The Registry submits that, in the event of prolonged travel restrictions affecting the State in question, an authorised local official would likely be the best placed to conduct certifications under Rule 68(2)(b) of the Rules.

the established practice at the Court²³ and the neutral role of the Registry, the Chamber deems it appropriate to designate the Registry SLA, or anyone delegated by him, as the person authorised to witness declarations made pursuant to Rule 68(2)(b) of the Rules for the purposes of this case.

7. The Chamber further appreciates the Registry's proposal to use its human resources in the field offices.²⁴ The Registry SLA is thus encouraged to train and use the staff at the relevant field offices in order to expeditiously carry out the procedure provided for in Rules 68(2)(b)(ii) and (iii) of the Rules.
8. As regards the form of the declarations accompanying the prior recorded testimonies, the Chamber notes that, while the parties and the participants did not make submissions on this, the Registry stated that it has developed standardised forms of accompanying declarations.²⁵ The Chamber notes that the template for such declarations has been uniform across all cases to date before the Court (the 'Standard Declaration').²⁶ Therefore, the Chamber also adopts the Standard Declaration for the present case and instructs the Registry to file it on the record in the present case.
9. Lastly, the Chamber notes that the Prosecution has neither submitted a list of evidence, nor made concrete requests under Rule 68 of the Rules yet. Accordingly, the Chamber rejects the Prosecution's and the Defence's

²³ See for example Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules, 16 July 2015, ICC-01/04-02/06-729, para. 5; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on 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, 29 July 2015, ICC-01/05-01/13-1109, para. 6; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules, 21 October 2015, ICC-02/11-01/15-303, para. 8.

²⁴ See Registry Observations, ICC-01/14-01/18-504, para. 18.

²⁵ Registry Observations, ICC-01/14-01/18-504, para. 5.

²⁶ See Trial Chamber IX, *The Prosecutor vs. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Conf (public redacted version notified the same day), para. 222, referring to Annex B to the Prosecution's request for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules, 14 June 2016, ICC-02/04-01/15-465-AnxB.

submissions concerning the extent of reliance on evidence under Rule 68 of the Rules ‘in the prevailing circumstances’²⁷ as premature.

FOR THESE REASONS, THE CHAMBER HEREBY

DESIGNATES the Registry SLA, or anyone delegated by him, to witness declarations under Rule 68(2)(b) of the Rules for the purposes of the present case.

APPROVES the Standard Declaration under Rule 68(2)(b) of the Rules as set out in paragraph 8 above.

INSTRUCTS the Registry to file the Standard Declaration on the record.

Done in both English and French, the English version being authoritative.

 Judge Péter Kovács	 Judge Bertram Schmitt Presiding Judge	 Judge Chang-ho Chung
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Dated 6 May 2020

At The Hague, The Netherlands

²⁷ Request, ICC-01/14-01/18-489, para. 6; Response, ICC-01/14-01/18-497, paras 4-8.