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No. ICC-01/14-01/18

Date: 24 March 2022

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 Yekatom Defence Motion for Partial Reconsideration of the
Eleventh Rule 68(3) Decision**

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 Articles 64(2), 67(1) and 69 of the Rome Statute (the ‘Statute’), and Rules 64(2), 68(1) and (3) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Motion for Partial Reconsideration of the Eleventh Rule 68(3) Decision’.

I. Procedural history

1. On 18 March 2022, the Chamber issued the ‘Eleventh Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0954, P-1811, and P-0966’ (the ‘Rule 68(3) Decision’), whereby it *inter alia* decided that, subject to the fulfilment of the legal requirements of Rule 68(3) of the Rules, the prior recorded testimony of P-0954 is introduced into evidence.¹
2. On 22 March 2022, the Yekatom Defence requested the Chamber to partially reconsider its Rule 68(3) Decision with respect to P-0954 (the ‘Reconsideration Request’).² The Yekatom Defence submits that reconsideration is warranted as the Rule 68(3) Decision contains clear errors of reasoning and is necessary to prevent an injustice.³
3. On 22 March 2022,⁴ the Common Legal Representative (the ‘CLR’) of the Victims of the Other Crimes and the CLR of the Former Child Soldiers indicated that they would not file a response.⁵

¹ Rule 68(3) Decision, ICC-01/14-01/18-1317-Conf, para. 20, p. 14.

² Yekatom Defence Motion for Partial Reconsideration of ‘Eleventh Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0954, P-1811, and P-0966’ (ICC-01/14-01/18-1317-Conf), ICC-01/14-01/18-1321-Conf, paras 1, 51.

³ Reconsideration Request, ICC-01/14-01/18-1321-Conf, paras 2, 19, 45-49.

⁴ Since P-0954 was scheduled to commence his testimony on 28 March 2022, the Single Judge instructed the participants to file responses, if any, by 23 March 2022 (*see* email from the Chamber, 22 March 2022, at 10:35).

⁵ Email from the CLR of Victims of Other Crimes, 22 March 2022, at 11:01; email from the CLR of Former Child Soldiers, 22 March 2022, at 12:12.

4. On 23 March 2022, the Ngaïssona Defence informed the Chamber that it does not intend to file a response to the Reconsideration Request.⁶
5. On the same day, the Prosecution responded to the Reconsideration Request, requesting that it be dismissed (the ‘Response’).⁷

II. Analysis

6. The Chamber recalls the applicable law as set out in its first decision under Rule 68(3) of the Rules.⁸ As the Chamber has consistently held, the factors upon which it may rely in its assessment – including, whether the evidence relates to issues that are not materially in dispute, whether it is not central to core issues in the case, or whether it is corroborative of other evidence, among others – are not requirements under Rule 68(3) of the Rules.⁹ In this regard, the Chamber highlights that these factors have been explicitly provided for as guiding the Chamber’s discretion with regard to the introduction of prior recorded testimonies under Rule 68(2)(b) of the Rules, but not under Rule 68(3) of the Rules. As previously stated, the Chamber considers that this implies that greater discretion is afforded in respect of applying Rule 68(3) of the Rules.¹⁰
7. In the Reconsideration Request, the Yekatom Defence argues (i) that the Chamber ‘improperly imposed the burden of disproving the admissibility of [P-0954’s statement] under Rule 68(3) [of the Rules] on the Defence’ in reasoning that the

⁶ Email from the Ngaïssona Defence, 23 March 2022, at 12:17.

⁷ Prosecution’s response to “Yekatom Defence Motion for Partial Reconsideration of ‘Eleventh Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0954, P-1811, and P-0966’ (ICC-01/14-01/18-1317-Conf)”, ICC-01/14-01/18-1325-Conf, paras 1, 9.

⁸ Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1962, P-0925, P-2193, P-2926, P-2927, P-1577 and P-0287, and the Ngaïssona Defence Motion to Limit the Scope of P-2926’s Evidence, 10 March 2021 ICC-01/14-01/18-907-Conf (public redacted version notified on 1 April 2021, ICC-01/14-01/18-907-Red) (the ‘First Rule 68(3) Decision’).

⁹ See *e.g.* Tenth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1595, P-2658 and P-2453, 15 February 2022, ICC-01/14-01/18-1282-Conf (public redacted version notified the same day, ICC-01/14-01/18-1282-Red), paras 12, 21; Ninth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0992, P-0446, P-0888, P-0889 and P-1416, 21 December 2021, ICC-01/14-01/18-1226-Conf, para. 10.

¹⁰ First Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 14.

material factors outweighed the anticipated time-saving;¹¹ (ii) that the Chamber placed undue significance on the expeditiousness of the proceedings, and thereby abused its discretion;¹² and (iii) that the lack of any express mention of a phone call to P-0954 in which Mr Yekatom allegedly ‘confessed’ regarding the killing of Saint Cyr Lapo N’Gomat indicates that insufficient consideration was afforded to it, which itself comprises a clear error of reasoning.¹³

8. When deciding to authorise the introduction of P-0954’s prior recorded testimony, subject to the requirements of Rule 68(3) of the Rules being fulfilled, the Chamber exercised its discretion under this provision, finding that the introduction is not prejudicial to or inconsistent with the rights of the accused.¹⁴ In reaching its discretionary determination, the Chamber does not necessarily have to explicitly address every argument presented by the parties in detail. Notwithstanding, the Chamber clarifies that no reversal of the burden of proof, as alleged by the Yekatom Defence, has taken place. Rather, the Chamber has reached its conclusion on the basis of its own assessment of all relevant factors, including the alleged ‘confession’¹⁵ raised by the Defence in the Reconsideration Request,¹⁶ and giving due consideration to all submissions received.¹⁷ The Chamber considers that no clear error of reasoning has been demonstrated which would warrant reconsideration of its decision.
9. Furthermore, the Chamber considers that no injustice will result from the introduction of P-0954’s prior recorded testimony as the Defence will be in a position to fully question the witness, and other witnesses, as appropriate, on any matters contained in the prior recorded testimony.
10. Finally, the Chamber notes that the Defence has also not presented any new facts or arguments which would militate in favour of reconsidering the Chamber’s decision.

¹¹ Reconsideration Request, ICC-01/14-01/18-1321-Conf, paras 20-28.

¹² Reconsideration Request, ICC-01/14-01/18-1321-Conf, para. 29-39.

¹³ Reconsideration Request, ICC-01/14-01/18-1321-Conf, paras 40-44.

¹⁴ Rule 68(3) Decision, ICC-01/14-01/18-1317-Conf, paras 14-19.

¹⁵ Rule 68(3) Decision, ICC-01/14-01/18-1317-Conf, para. 15.

¹⁶ Reconsideration Request, ICC-01/14-01/18-1321-Conf, para. 15.

¹⁷ Rule 68(3) Decision, ICC-01/14-01/18-1317-Conf, paras 11-13, 16-18.

11. Considering all these factors, the Chamber finds that reconsideration of the Rule 68(3) Decision in relation to P-0954 is not warranted.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Reconsideration Request;

ORDERS the Registry to reclassify the Reconsideration Request to public; and

ORDERS the Prosecution to file a public redacted version of the Response.

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 24 March 2022

At The Hague, The Netherlands