

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **25 April 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

**Prosecution's Response to Yekatom Defence Request for Leave to Appeal the
'Twelfth Decision on the Prosecution Requests for Formal Submission of Prior
Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1704,
P-1528, and P-0314' (ICC-01/14-01/18-1364-Conf)**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the YEKATOM Defence’s request for leave to appeal the “Twelfth Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-1704, P-1528, and P-0314” (“Request”).¹ The Request neither establishes an appealable issue, nor meets the cumulative requirements of article 82(1)(d). Further, there is no basis upon which to postpone the testimony of P-1704 pending the disposition of the Request.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this document is filed as “confidential”, as it responds to a filing of the same designation.

III. SUBMISSIONS

A. The Request fails to identify an appealable issue

3. The sole issue advanced in the Request does not constitute an appealable issue under article 82(1)(d). Rather, the purported ‘issue’ merely disagrees with the Decision, namely:

“[w]hether Trial Chamber V’s decision to allow the introduction into evidence of the prior recorded testimony of P-1704 via Rule 68(3) was so unfair or so unreasonable so as to constitute an abuse of its discretion, in that the Chamber placed undue weight on the two hours of anticipated in-court time that would be saved.”²

4. The Defence’s assessment of the weight of its own arguments opposing the Prosecution’s Request regarding P-1704,³ or its *opinion* about how the Chamber

¹ ICC-01/14-01/18-1374 ; ICC-01/14-01/18-1364-Conf (“Decision”).

² ICC-01/14-01/18-1374, para. 2.

³ ICC-01/14-01/18-1176-Conf.

exercised its discretion, do not thereby amount to an “appealable issue.”⁴ Moreover, the arguments advanced by the Defence suggesting that the Chamber abused its discretion are not legally tenable. The Request fails to substantiate any ostensible error or departure from the established norms regarding the Chamber’s exercise of its broad discretion under rule 68(3) of the Rules of Procedure and Evidence (“Rules”).

5. Although a Chamber must carry out a “cautious item-by-item analysis”⁵, contrary to the Request, there is simply no indication that it failed to do so in rendering the Decision. More specifically, the Request does not establish that, by provisionally permitting the introduction of P-1704’s prior testimony under rule 68(3), the Chamber “failed to exercise its discretion judiciously.”⁶ Contrary to the Defence’s assertions,⁷ the Chamber considered and addressed the objections advanced by the Defence regarding P-1704’s proposed prior testimony in detail.⁸

6. In this respect, the Decision correctly (citing the Chamber’s previous Decisions) recalled that rule 68(3) “does not preclude the introduction of evidence that is central to core issues of the case”⁹, and that “references to the accused’s acts and conduct do not per se constitute an obstacle to the introduction of a prior recorded testimony pursuant to this provision.”¹⁰ Neither with respect to these well-established and key tenets of the application of rule 68(3), nor regarding any other dispositive finding in the Decision regarding P-1704, does the Request establish any inconsistency in the approach taken by the Chamber, or conflict with respect to the jurisprudence applied in the Decision.

⁴ ICC-01/04-168 OA3, para. 9. *See also* ICC-01/04-01/10-443, p. 4; ICC-01/09-02/11-275, para. 11; ICC-01/09-02/11-211, para. 12; ICC-01/04-01/10-288, p. 6.

⁵ Bemba Appeals Judgment, para. 78.

⁶ ICC-01/14-01/18-1374, para. 18 (citations omitted).

⁷ ICC-01/14-01/18-1374, para. 14, 16.

⁸ *See* ICC-01/14-01/18-1364-Red, paras. 13-19.

⁹ ICC-01/14-01/18-907-Red, para. 14.

¹⁰ ICC-01/14-01/18-1317-Conf, para. 26; ICC-01/14-01/18-1226-Conf, para. 9.

7. There is no plausible substance to the YEKATOM Defence's conclusory assertion that the Decision was "so unfair and so unreasonable" in its disposition of YEKATOM's express objections to the submission of P-1704's prior testimony. Here, rather than setting out cognisable grounds to contest the procedure or law applied by the Chamber, the Request instead seeks to counter the Chamber's proper exercise of discretion by rehashing exactly the same arguments YEKATOM advanced in response to the Prosecution Request.¹¹

8. The Request thus only underscores that the true basis of the purported issue is in fact YEKATOM's mere disagreement with the outcome of the Chamber's reasoned assessment of the factors relevant to determining a rule 68(3) request within the proper bounds of its discretion. The Chamber should therefore dismiss the Request for failure to identify an appealable issue.

B. The Request fails to meet the remaining article 82(1)(d) criteria

9. Even assuming *arguendo* that the purported issue constitutes an appealable issue — which it does not — the Request fails to meet the cumulative requirements of article 82(1)(d).

10. The issue, as framed, does not significantly affect the fair or expeditious conduct of the proceedings, or the outcome of the case. Nor, is the Appeals Chamber's immediate intervention required.

11. *First* – the Decision does not result in any unfairness. Nor, does it affect the expeditious conduct of the proceedings. To the contrary, the introduction of P-1704's evidence pursuant to rule 68(3) has precisely the opposite effect, by reducing the time

¹¹ See ICC-01/14-01/18-1203-Conf, para. 31 (asserting 'core' evidence regarding the Yamwara School incident; ostensible inconsistencies with other evidence; the Accused's alleged alibi; and the interests of justice); see *Decision contra* ICC-01/14-01/18-1364-Red, paras. 13 (core issues), 16 (alibi), 17 (inconsistencies), 19 (finding that the prior testimony is not prejudicial to or inconsistent with the rights of the accused).

necessary for the presentation of such evidence¹² – which the Defence appears to oppose.¹³ Contrary to the Defence's contentions, P-1704's prior testimony in no way impedes any preparative measure of the Defence, or its ability to effectively examine the witness in Court when they appear as rule 68(3) requires.

12. *Second* – the Defence's contentions regarding the submission of P-1704's prior testimony are illusory. Irrespective of the mode of submission, the Defence would normatively need to address the same substantive issues arising from the witness's testimony if led *viva voce*.¹⁴ To suggest that the mode of testimony affects the Defence's ability to address the substance of a rule 68(3) witness's evidence is at best unexplained in the Request, and in any event, it is wholly unavailing.

13. Additionally, contrary to the Request, it is indeed speculative to suggest that the Decision impacts the Defence's determination whether to "bring[] a defence case in support of YEKATOM's anticipated alibi defence",¹⁵ or "the necessity of leading a defence case or [calling] defence witnesses"¹⁶ in any way differently than if the witness's same evidence was received *viva voce*. Indeed, the materiality of the purported alibi concerning the YAMWARA School Incident is questionable in the first instance,¹⁷ given the modes of liability confirmed against YEKATOM, namely article

¹² ICC-01/14-01/18-1364-Red, para. 18 (noting specifically that the introduction of P-1704's Statement would "promot[e] the expeditiousness of the proceedings"); see also ICC-02/11-01/15-744, para. 61, 62; ICC-01/05-01/08-1386, 65 ("[...] expeditiousness is an important component of a fair trial [...]"); and ICC-01/09-01/11-1938-Anx-Red, 19 ("[...] the overall intendment of r 68 is to make trials simpler and shorter, not longer and more complicated").

¹³ See e.g., ICC-01/14-01/18-1374-Conf, para. 14.

¹⁴ See also ICC-02/11-01/15-744, para. 76; see also Prosecutor v. Mladić, IT-09-92-T, Decision with regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Documents, 3 July 2012 ("3 July 2012 Mladić Decision"), para. 5 ("[...] As a general rule, the opposing party should prepare for a witness's testimony assuming that the witness's full statement will be admitted into evidence") (emphasis added).

¹⁵ ICC-01/14-01/18-1374-Conf, para. 34.

¹⁶ ICC-01/14-01/18-1374-Conf, para. 34 and 47.

¹⁷ See e.g., ICC-01/14-01/18-1374-Conf, para. 35.

25(3)(a) (co-perpetration) and article 25(3)(b) (ordering)¹⁸ — neither of which is legally dependent on the Accused presence at the scene.

14. *Third*, YEKATOM's arguments concerning the effect of the Decision on the fairness of the proceedings or outcome of a trial are in fact speculative, conclusory, or unsubstantiated. The Defence's contention that "[i]f the Chamber were to decide to exclude evidence integral to the Prosecution case, such as that of P-1704, and therefore compromise the Prosecution's ability to prove said case, it would be reasonable to argue that such a decision would significantly affect the outcome of the proceedings for the purposes of Article 82(1)(d)"¹⁹, betrays a fundamental misapprehension of the relevant standard. Moreover, the analogy drawn to the introduction of a witness's evidence which does not eclipse or diminish the right of examination²⁰ is inapposite. This is even clearer, given the analysis and weighing of the relevant factors in the Chamber's determination.

15. *Fourth*, the Defence's claim that immediate appellate intervention may materially advance the proceedings is also speculative. Contrary to the Request,²¹ the Chamber will have a full opportunity to assess the *viva voce* account of the witness, observe their demeanour, and assess the credibility of their testimony. This is the crux of rule 68(3). The Defence's position concerning the necessity to expend time and resources to counter allegations contained in P-1704's statement rest entirely on the unsubstantiated premise that somehow P-1704's fully *viva voce* evidence would materially differ with respect to the contested allegations than the prior testimony. This is clear and unfounded speculation. Simply asserting in different ways the

¹⁸ ICC-01/14-01/18-403-Red-Corr, p. 103.

¹⁹ ICC-01/14-01/18-1374-Conf, para. 44.

²⁰ See Rule 68(3) of the Rules (requiring that "the witness who gave the previously recorded testimony is present before the Trial Chamber"); see also Megan A. Fairlie, "The Abiding Problem of Witness Statements in International Criminal Trials", *International Law and Politics*, Vol. 50:75 ("Fairlie"), p. 124 (noting that the ICTY's Rule 92 *ter* (i.e., rule 68(3)) offers greater protection to the accused because it provides for cross-examination as a matter of right).

²¹ See ICC-01/14-01/18-1374-Conf, para. 47.

remaining criteria under article 82(1)(d) without substantiating how or why they are met as the Request does, cannot reasonably satisfy the requisite legal threshold for leave to appeal.

16. Nothing in the Request establishes that the Decision will inevitably, or even reasonably, affect the fairness or the outcome of the trial. To the contrary, the Decision seeks to ensure it, within the appropriate exercise of the Chamber's discretion. Appellate intervention would not advance the proceedings or promote their expeditious conduct, but would instead delay them unnecessarily.

17. For the same reasons as set out above, there is no substantiated basis upon which to postpone P-1704's testimony pending the disposition of the Request.

IV. CONCLUSION

18. For the above reasons, the Prosecution requests the Chamber deny the Request in all respects.



Karim A. A. Khan QC, Prosecutor

Dated this 25th day of April 2022
At The Hague, The Netherlands