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**No. ICC-01/14-01/18  
Date: 29 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  
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD  
NGAISSONA***

**Public**

**Decision on the Yekatom Defence Request for Leave to Appeal the Twelfth  
Rule 68(3) Decision regarding P-1704**

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 Article 82(1)(d) of the Rome Statute (the ‘Statute’) and Rule 68(3) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Request for Leave to Appeal the Twelfth Rule 68(3) Decision regarding P-1704’.

## **I. Procedural history and submissions**

1. On 14 April 2022, the Chamber granted the Prosecution’s request<sup>1</sup> to introduce, *inter alia*, P-1704’s statement and associated documents pursuant to Rule 68(3) of the Rules, which had been opposed by the Yekatom Defence (the ‘Defence’)<sup>2</sup> (the ‘Decision’).<sup>3</sup>
2. On 25 April 2022, the Chamber received the Defence’s request for leave to appeal the Decision with regard to P-1704 (the ‘Request’).<sup>4</sup> Specifically, it seeks leave to appeal the issue ‘whether 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’ (the ‘Issue’).<sup>5</sup> In the event that leave to appeal is granted, it

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<sup>1</sup> Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1704 pursuant to Rule 68(3), 16 November 2021, ICC-01/14-01/18-1176-Conf (with confidential Annexes A and B) (public redacted version notified on 23 November 2021).

<sup>2</sup> Yekatom Defence Response to the “Prosecution’s Request for the Formal Submission of the Prior Recorded Testimony of P-1704 pursuant to Rule 68(3)”, ICC-01/14-01/18-1176-Conf, 16 November 2021, 7 December 2021, ICC-01/14-01/18-1203-Conf (public redacted version notified the same day, ICC-01/14-01/18-1203-Red) (the ‘Objection to the Rule 68(3) Request’). The Ngaïssona Defence indicated that it fully joined and supported the Objection to the Rule 68(3) Request, *see* email from the Ngaïssona Defence, 7 December 2021, at 14:35.

<sup>3</sup> 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 (public redacted version notified the same day, ICC-01/14-01/18-1364-Red).

<sup>4</sup> 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), ICC-01/14-01/18-1374-Conf (public redacted version notified the same day, ICC-01/14-01/18-1374-Red). The Chamber notes that a courtesy copy of the Request was provided to all participants on 22 April 2022 (*see* email from the Yekatom Defence, 22 April 2022, at 19:32).

<sup>5</sup> Request, ICC-01/14-01/18-1374-Red, para. 2.

requests that P-1704 be barred from testifying before the Request and any ensuing appeal are resolved.<sup>6</sup>

3. On 26 April 2022, as instructed by the Chamber,<sup>7</sup> the Prosecution responded to the Request.<sup>8</sup> It asks the Chamber to deny the Request and submits that there is no basis to postpone P-1704's testimony.<sup>9</sup>

## II. Analysis

4. The Chamber recalls the applicable law governing requests for leave to appeal under Article 82(1)(d) of the Statute,<sup>10</sup> as well as regarding the introduction of prior recorded testimony under Rule 68(3) of the Rules.<sup>11</sup>
5. The Chamber considers that the Issue is not an appealable issue.
6. As acknowledged by the Defence,<sup>12</sup> the Chamber's determination as to whether a prior recorded testimony is introduced pursuant to Rule 68(3) of the Rules is entirely discretionary, subject to the fulfilment of the requirements set out under this provision.<sup>13</sup>
7. According to the Appeals Chamber, 'an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously"'.<sup>14</sup> In this determination, it assesses

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<sup>6</sup> Request, ICC-01/14-01/18-1374-Red, paras 3, 51.

<sup>7</sup> Noting that P-1704 is scheduled to testify from 5-6 May 2022, and that the participants had already received a courtesy copy of the Request on 22 April 2022, the Single Judge instructed the participants to file any responses by 26 April 2022 (*see* email from the Chamber, 25 April 2022, at 10:40).

<sup>8</sup> 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), ICC-01/14-01/18-1380-Conf (the 'Response').

<sup>9</sup> Response, ICC-01/14-01/18-1380-Conf, paras 1, 18.

<sup>10</sup> Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525, paras 15-21.

<sup>11</sup> 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 the same day, ICC-01/14-01/18-907-Red) (the 'First Rule 68(3) Decision'), paras 8-16.

<sup>12</sup> Request, ICC-01/14-01/18-1374-Red, para. 12.

<sup>13</sup> First Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 14.

<sup>14</sup> Appeals Chamber, *The Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance

whether a chamber gave weight to ‘extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion’.<sup>15</sup>

8. The Defence essentially argues that the Chamber placed undue weight on the anticipated in court time saving of two hours, a factor which cannot outweigh the prejudicial effects of introducing P-1704’s statement. By doing so, it submits, the Chamber exercised its discretion in a manner ‘so unfair and so unreasonable so as to constitute an abuse of its discretion’, thus ‘justif[ying] appellate intervention’.<sup>16</sup> The Defence particularly takes issue with the introduction of P-1704’s prior recorded testimony because of (i) the ‘extensive, specific references to Mr Yekatom’s alleged acts and conduct’; (ii) the allegations contained therein, which are ‘materially and fundamentally disputed’ and contradicted or inconsistent with other Prosecution evidence; and (iii) the central importance of the testimony to the Prosecution case with respect to the Yamwara School incident.<sup>17</sup>
9. The Chamber recalls that a determination under Rule 68(3) of the Rules is made on a case-by-case basis. While different factors may guide the Chamber, none of these are determinative,<sup>18</sup> or even mandatory to the Chamber’s assessment. In this

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under Article 87(7) of the Statute”, 19 August 2015, ICC-01/09-02/11-1032 (the ‘*Kenyatta Appeals Decision*’), para. 25; Appeals Chamber, *The Prosecutor v. Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Conf (public redacted version notified the same day, ICC-01/05-01/13-2275-Red) (the ‘*Bemba et al. Appeals Decision*’), para. 101. See further Trial Chamber VI, *Prosecutor v. Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, ICC-01/04-02/06-2666-Conf, 30 March 2021 (public redacted version notified the same day, ICC-01/04-02/06-2666-Red) (the ‘*Ntaganda Decision*’), para. 46.

<sup>15</sup> *Kenyatta Appeals Decision*, ICC-01/09-02/11-1032, para. 25; *Bemba et al. Appeals Decision*, ICC-01/05-01/13-2275-Red, para. 101. See further *Ntaganda Decision*, ICC-01/04-02/06-2666-Red, para. 46.

<sup>16</sup> Request, ICC-01/14-01/18-1374-Red, paras 16-18, with reference to the *Ntaganda Decision*, ICC-01/04-02/06-2666-Red, para. 46, and the jurisprudence referenced therein.

<sup>17</sup> Request, ICC-01/14-01/18-1374-Red, paras 26-29. The Chamber notes that the same arguments were already advanced in the Defence’s Objection to the Rule 68(3) Request, ICC-01/14-01/18-1203-Red.

<sup>18</sup> See First Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 14, with reference, *inter alia*, to the Appeals Chamber, *The 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)”, 1 November 2016, ICC-02/11-01/15-744, paras 67, 69 (the ‘*Gbagbo Appeals Decision*’).

regard, Rule 68(3) stands in contrast to Rule 68(2)(b) of the Rules, which explicitly lists factors guiding the Chamber's discretion. From this comparison, it becomes evident that greater discretion is afforded to chambers in applying Rule 68(3) of the Rules.<sup>19</sup> This is also systematically coherent, given that witnesses called pursuant to Rule 68(3) of the Rules appear before the Chamber and are therefore available for examination by the participants and the Chamber.<sup>20</sup>

10. The Chamber is cognisant of the Appeals Chamber's jurisprudence that 'where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated', chambers should be 'extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally'.<sup>21</sup> However, it also recalls that the Appeals Chamber has previously held that '[t]he fact that the evidence in question may have been materially in dispute, related to facts central to the case and may have been uncorroborated does not necessarily require rejection of [a] request [under Rule 68(3) of the Rules]'.<sup>22</sup> Correspondingly, there is no jurisprudence at this Court precluding the introduction of prior recorded testimony that refers to the acts and conduct of the accused. Furthermore, the Chamber notes that the Appeals Chamber did not even exclude the possibility of introducing the evidence of a 'key witness' pursuant to Rule 68(3) of the Rules,<sup>23</sup> which is further instructive as regards the degree of discretion afforded to chambers under this provision.
11. Moreover, the Chamber recalls that the Appeals Chamber acknowledged 'good trial management' and 'considerations of expeditiousness and streamlining of the presentation of evidence' as relevant factors to an assessment under Rule 68(3) of the Rules, as they ultimately contribute to a fair trial.<sup>24</sup> Likewise, it held that it was 'not surprising to conclude that expeditiousness is a factor relevant to the implementation of rule 68 (3) of the Rules, since its use in principle aims at

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<sup>19</sup> *Gbagbo* Appeals Decision, ICC-02/11-01/15-744, paras 68-69.

<sup>20</sup> *See also* First Rule 68(3) Decision, ICC-01/14-01/18-907-Red, para. 14.

<sup>21</sup> *Gbagbo* Appeals Decision, ICC-02/11-01/15-744, para. 69.

<sup>22</sup> *Gbagbo* Appeals Decision, ICC-02/11-01/15-744, para. 81. *See also* para. 73.

<sup>23</sup> *Gbagbo* Appeals Decision, ICC-02/11-01/15-744, para. 80.

<sup>24</sup> *Gbagbo* Appeals Decision, ICC-02/11-01/15-744, paras 59-62, with further references.

reducing the amount of time devoted to hearing oral testimony in court'.<sup>25</sup> While the Appeals Chamber did not provide guidance as to how much weight may be given to time-saving considerations, it also did not set any limitations in this regard. In this context, the Chamber further recalls that expediting the proceedings was the very reason for the drafters to introduce Rule 68 of the Rules to the Court's legal framework and expand its applicability.<sup>26</sup>

12. In its case-specific assessment of whether P-1704's prior recorded testimony should be introduced, the Chamber considered several factors, including (i) the substance of P-1704's prior recorded testimony;<sup>27</sup> (ii) the Defence's submissions that the substance matter was materially in dispute, central to core issues in the case and uncorroborated;<sup>28</sup> (iii) the fact that the Defence would be able to question the witness in court;<sup>29</sup> (iv) that there are other witnesses that have already testified or are expected to provide evidence of the matters discussed in the statement of P-1704;<sup>30</sup> as well as (v) the fact that two thirds of questioning time by the Prosecution could be saved.<sup>31</sup> In balancing these factors, it considered that the introduction of P-1704's prior recorded testimony was not prejudicial to or inconsistent with the rights of the accused.<sup>32</sup> Insofar as the Defence is thus of the view that the time-saving element was the 'sole factor' leading to the introduction of P-1704's prior recorded testimony,<sup>33</sup> it misapprehends the Decision.

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<sup>25</sup> *Gbagbo Appeals Decision*, ICC-02/11-01/15-744, paras 60-61.

<sup>26</sup> *See, for example*, the discussion in the context of the latest amendment to Rule 68 of the Rules, Report of the Working Group of Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, IV, para. 11 and Annex II.A thereto, containing the 'Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony)'; Report of the Working Group on Amendments, 24 October 2013, ICC-ASP/12/44, paras 8-10

<sup>27</sup> Decision, ICC-01/14-01/18-1364-Red, paras 10-12.

<sup>28</sup> Decision, ICC-01/14-01/18-1364-Red, paras 13-16.

<sup>29</sup> Decision, ICC-01/14-01/18-1364-Red, paras 15-16.

<sup>30</sup> Decision, ICC-01/14-01/18-1364-Red, para. 15.

<sup>31</sup> Decision, ICC-01/14-01/18-1364-Red, para. 18.

<sup>32</sup> Decision, ICC-01/14-01/18-1364-Red, para. 19. The Chamber also recalls that it set out the legal requirements of Rule 68(1) and 3 of the Rules, including that the introduction must not be prejudicial to or inconsistent with the rights of the accused, *see* Decision, ICC-01/14-01/18-1364-Red, para. 6 *with reference to* First Rule 68(3) Decision, ICC-01/14-01/18-907-Red, paras 8-16. In this regard *see also* *Gbagbo Appeals Decision*, ICC-02/11-01/15-744, paras 58, 63.

<sup>33</sup> Request, ICC-01/14-01/18-1374-Red, para. 14.

13. Contrary to the Defence's submission,<sup>34</sup> the Chamber also fails to see the relevance of the Decision to the Defence's determination whether to present a Defence case. Similarly, it rejects the Defence's argument that the onus to elicit the witness's account would rest on the Defence if P-1704's prior recorded testimony is introduced under Rule 68(3) of the Rules.<sup>35</sup> Both arguments seem to be based on the assumptions that the witness would not confirm his account regarding Mr Yekatom if called fully *viva voce*, and that P-1704's prior recorded testimony is thus not truthful or credible. In this respect, the Chamber reiterates that the Defence will have the opportunity to examine the witness in court and challenge his credibility, as required by Rule 68(3) of the Rules, and that the Chamber will then assess any probative value of his testimony in the context of its deliberations on the judgment.
14. Additionally, it notes the numerous procedural safeguards under the Court's legal framework which aim at securing accurate and truthful witness evidence, before introducing a prior recorded testimony under Rule 68(3) of the Rules. Notably, it recalls that witnesses are informed that they shall tell the truth already during their interview. Prior to their testimony at the Court, they then have the opportunity to re-read their prior recorded testimony and to make corrections thereto. Once they appear before the Chamber, they take an oath to tell the truth and are informed about offences against the administration of justice under Article 70 of the Rome Statute.<sup>36</sup> Finally, witnesses who are called pursuant to Rule 68(3) of the Rules, are explicitly asked whether they object to the introduction of their prior recorded testimony as evidence in the case. The Chamber stresses that the latter is a requirement under Rule 68(3) of the Rules. In other words: A witness's objection to the introduction of his prior recorded testimony is fatal to the use of this provision.
15. In light of the above, the Chamber fails to see any departure from the established legal framework and jurisprudence in exercising its discretion under Rule 68(3) of the Rules. Rather, the Chamber considers that the Defence merely disagrees

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<sup>34</sup> Request, ICC-01/14-01/18-1374-Red, paras 34, 37.

<sup>35</sup> Request, ICC-01/14-01/18-1374-Red, para. 31.

<sup>36</sup> Rule 66(1) and (2) of the Rules.



with its case-specific assessment and determination to allow the introduction of P-1704's prior recorded testimony.

16. Having found that the Issue does not constitute an appealable issue, the Chamber will not address the remaining requirements of Article 82(1)(d) of the Statute.
17. As a result, the Chamber also sees no reason to postpone P-1704's testimony.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request; and

**ORDERS** the Prosecution to file a public redacted version of the Response within one week of notification of this decision.

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




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**Judge Péter Kovács**




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**Judge Bertram Schmitt**

**Presiding Judge**




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**Judge Chang-ho Chung**

Dated 29 April 2022

At The Hague, The Netherlands