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THE APPEALS CHAMBER

Before: Judge Solomy Balungi Bossa, Presiding Judge
Judge Luz del Carmen Ibáñez Carranza
Judge Gocha Lordkipanidze
Judge Kimberly Prost
Judge Erdenebalsuren Damdin

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
THE PROSECUTOR *v.* ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA**

Public

Public Redacted Version of the “Victims’ Joint Response to the ‘Ngaïssona Defence Appeal against Trial Chamber V’s ‘Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules’, ICC-01/14-01/18-2127-Conf, issued on 6 October 2023’ (ICC-01/14-01/18-2207-Conf OA4)” (No. ICC-01/14-01/18-2244-Conf OA4, dated 6 December 2023)

Source: Common Legal Representatives of Victims

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Other Crimes and the Common Legal Representative of the Former Child Soldiers (jointly the “CLR/V”) herewith file their joint response to the appeal brought by the Defence of Mr Ngaiisona (the “Appeal”)¹ against the decision issued by Trial Chamber V (the “Chamber”) on 6 October 2023 (the “Impugned Decision”)² and submit that it must be dismissed in its entirety.

2. The CLR/V oppose in full the Appeal and contend that the Appellant fails to show that the Chamber committed any error of law or fact in the Impugned Decision. The Chamber correctly interpreted the law and reasonably assessed the specific circumstances of the case when it found that the prior recorded testimony of P-2269 and P-2602 (the “Witnesses”) could be introduced into evidence pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (the “Rules”).

3. In particular, the CLR/V submit that the Chamber correctly concluded that the Witnesses were unavailable to testify (the “First Ground of Appeal”). The Chamber also correctly interpreted and applied rule 68(2)(c) in allowing the introduction of P-2269's prior recorded testimony taking into consideration the nature and content of said evidence (the “Second Ground of Appeal”) and provided a reasoned opinion for its assessment of the evidence (the “Third Ground of Appeal”). Lastly, the Chamber acted reasonably and within the ambit of its discretion in considering a potential Defence witness as part of its prejudice assessment for the introduction of P-2602's prior recorded testimony (the “Fourth Ground of Appeal”).

¹ See the “Ngaiisona Defence Appeal against Trial Chamber V's ‘Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules’, ICC-01/14-01/18-2127-Conf, issued on 6 October 2023”, No. [ICC-01/14-01/18-2207-Conf](#), 15 November 2023 (the “Appeal”).

² See the “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”, No. [ICC-01/14-01/18-2127-Conf](#), 6 October 2023 (the “Impugned Decision”).

II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(2) of the Regulations of the Court, the present submission is classified as confidential, following the classification chosen by the Appellant. A public redacted version will be filed in due course.

III. PROCEDURAL BACKGROUND

5. On 6 October 2023, the Chamber granted the Prosecution's request for formal submission of prior recorded testimony pursuant to rule 68(2)(c) concerning, among others, the Witnesses.³

6. On 16 October 2023, the Ngaïssona Defence filed a request for leave to appeal the Impugned Decision,⁴ which was granted by the Chamber on 25 October 2023.⁵

7. On 15 November 2023, the Ngaïssona Defence filed its Appeal,⁶ after being granted an extension of page and time limit by the Appeals Chamber.⁷

³ *Ibid.*

⁴ See the "Defence Request for Leave to Appeal the "Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules", ICC-01/14-01/18-2127-Conf", No. [ICC-01/14-01/18-2146-Conf](#), 16 October 2023.

⁵ See the "Decision on the Ngaïssona Defence Request for Leave to Appeal the Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules", No. [ICC-01/14-01/18-2164](#), 25 October 2023.

⁶ See the Appeal, *supra* note 1.

⁷ See the "Decision on the consolidated application of Mr Patrice-Edouard Ngaïssona for an extension of the page and time limits", No. [ICC-01/14-01/18-2189](#), 3 November 2023. See also, the "Consolidated Defence Request for an Extension of Page and Time Limits", No. [ICC-01/14-01/18-2171-Conf](#), 30 October 2023; "Prosecution Response to 'Consolidated Defence Request for an Extension of Page and Time Limits'", No. [ICC-01/14-01/18-2176-Conf](#), 31 October 2023; "Joint response by the Common Legal Representatives of the Victims to the 'Consolidated Defence Request for an Extension of Page and Time Limits'", No. [ICC-01/14-01/18-2185-Conf](#), 1 November 2023.

IV. STANDARDS OF REVIEW

8. In exercising its powers under rule 158 of the Rules, the Appeals Chamber will only consider specific grounds of appeal alleging legal, factual or procedural errors that materially affect an impugned decision.⁸ The Appeals Chamber will intervene only where “*clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision*”,⁹ or if the findings of the relevant Chamber “*are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues*”.¹⁰

9. Regarding questions of law, the Appeals Chamber “[w]ill not defer to the relevant Chamber’s interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error

⁸ See the “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled ‘Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute’” (Appeals Chamber), [ICC-02/11-01/11-548-Red OA4](#), 29 October 2013, para. 18. See also, the “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings” (Appeals Chamber), [ICC-02/11-01/11-321 OA2](#), 12 December 2012, para. 44; and the Public Redacted Version of the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled ‘Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’” (Appeals Chamber), No. [ICC-01/05-01/08-2151-Red OA10](#), 5 March 2012, para. 29.

⁹ See the “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the ‘Defence Request for Interim Release’” (Appeals Chamber), No. [ICC-01/04-01/10-283 OA](#), 14 July 2011, para. 15; and the Public Redacted Version of the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (Appeals Chamber), No. [ICC-01/05-01/08-631-Red OA2](#), 2 December 2009, para. 62.

¹⁰ See the “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release” (Appeals Chamber), No. [ICC-01/04-01/07-572 OA4](#), 9 June 2008, para. 25. See also, the “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, *supra* note 9, para. 61.

*materially affected the decision impugned on appeal”.*¹¹ In this regard, “[a] decision is ‘materially affected by an error of law’ if the chamber ‘would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error’”.¹²

10. As regards errors based on a misappreciation of facts, the Appeals Chamber has clarified that it “[w]ill not disturb a trial chamber’s factual findings only because it would have come to a different conclusion. When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of a chamber. However, the Appeals Chamber may interfere where it is unable to discern objectively how a chamber’s conclusion could have reasonably been reached from the evidence on the record”.¹³

11. In relation to discretionary decisions, the Appeals Chamber has ruled that it will only “interfere with the exercise of discretion where the appellant can demonstrate that a chamber gave weight to extraneous or irrelevant considerations, or failed to give weight or sufficient weight to relevant considerations. The degree of discretion afforded to a chamber may depend upon the nature of the decision in question”.¹⁴ It further recalled that “the Appeals Chamber will not interfere with a chamber’s exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling”.¹⁵

¹¹ See the “Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I’s ‘Authorisation pursuant to article 18(2) of the Statute to resume the investigation’” (Appeals Chamber), No. [ICC-01/21-77 OA](#), 18 July 2023, paras. 35-36, and references contained therein (the “Philippines Appeal Judgement”). See also, the “Judgment on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled ‘Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence’” (Appeals Chamber), No. [ICC-01/09-01/20-107 OA](#), 8 March 2021, para. 47, and references contained therein.

¹² See the Philippines Appeal Judgement, *supra* note 11, para. 36.

¹³ *Idem*, para. 37.

¹⁴ See the “Judgment on the appeal of the Prosecution against Trial Chamber X’s ‘Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules’” (Appeals Chamber), No. [ICC-01/12-01/18-2222 OA4](#), 13 May 2022, para. 20 (the “Al Hassan Rule 68(2) Appeal Judgement”).

¹⁵ *Ibid.* See also, the “Public redacted version of the Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is

V. SUBMISSIONS ON THE GROUNDS OF APPEAL

1. **First Ground of Appeal: The Chamber correctly applied the law and reasonably concluded that the Witnesses were “unavailable to testify” within the meaning of rule 68(2)(c)**

12. The CLRV contend that the Chamber correctly applied the law and reasonably assessed the specific circumstances of the case in finding that the Witnesses were unavailable to testify.¹⁶

13. The Chamber’s assessment was based on its earlier interpretation of the criteria set in rule 68(2)(c) of the Rules, as recalled in the Impugned Decision.¹⁷ In this regard, the criterion of unavailability was reasonably analysed taking into account that the term “unavailable” has to be understood broadly,¹⁸ following a contextual interpretation of the provision and in light of its objective and purpose.¹⁹ In this regard, the Working Group on Lessons Learnt (the “WGLL”) commented that “*it was decided to replace the words “insurmountable obstacles” in the original proposal with the phrase ‘obstacles that cannot be overcome with reasonable diligence’ as “insurmountable obstacles’ may import too high a standard into the sub-rule”*.”²⁰ To achieve the intended purpose of

“Liable” (Appeals Chamber), No. [ICC-01/04-01/06-3466-Red A7 A8](#), 18 July 2019, para. 31; and the “Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’” (Appeals Chamber), No. [ICC-02/04-01/15-1562 OA4](#), 17 July 2019, paras. 46-47, and references contained therein.

¹⁶ See the Impugned Decision, *supra* note 2, paras. 32, 52. *Contra* the Appeal, *supra* note 1 paras. 24-31.

¹⁷ See the Impugned Decision, *supra* note 2, para. 17, referring to the “First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules” (Trial Chamber V), No. [ICC-01/14-01/18-1975-Red](#), 12 July 2023, paras. 17-39 (the “First Rule 68(2)(c) Decision”).

¹⁸ See the First Rule 68(2)(c) Decision, *supra* note 17, para. 27, and jurisprudence references contained therein.

¹⁹ See the [Vienna Convention on the Law of Treaties](#), 23 May 1969, article 31(1).

²⁰ See the Study Group on Governance: Working Group on Lessons Learnt: [Second report of the Court to the Assembly of States Parties](#), 31 October 2013, ICC-ASP/12/37/Add.1, para. 29 (the “WGLL Report”). See the “Public redacted version of ‘Decision on the Defence’s request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules’” (Trial Chamber X), No. [ICC-01/12-01/18-2445-Red](#), 16 December 2022, para. 21 (the “Al Hassan Rule 68(2)(c) Decision”). On the need to develop more flexible and efficient processes for the introduction of prior

the amended rule 68(2)(c), the drafters even went further in preferring the more flexible text in the provision than the analogous ICTY rule 92 *quater* on which it is based, as said rule “does not cover a number of situations that may arise”,²¹ such as when it would not be “possible to secure or to reach a witness, although that witness could, with reasonable diligence, be traced”.²² Moreover, the drafters intended that rule 68(2)(c) applies “to circumstances that could not be reasonably anticipated in the course of standard trial preparation”.²³ This is precisely the case *sub judice*.

14. A trial chamber has discretion in assessing a request related to the admission of prior recorded testimony.²⁴ Such assessment is based on a case-by-case analysis,²⁵ considering the circumstances before it and, particularly, provided that the prior recorded testimony meets the legal requirements set forth in rule 68. The Chamber considered all these factors and issued a reasoned decision.

15. Moreover, the Chamber based its assessment considering other instances in which the term was applied, including situations where (i) “a witness is in an area of high insecurity and the associated challenges cannot be overcome within a reasonable time without unduly delaying the trial proceedings”;²⁶ and (ii) “a witness cannot be located after numerous attempts and efforts”.²⁷ Noteworthy, the Chamber considered the Court’s practice regarding situations which do not fall within the meaning of “unavailable”, such as where (i) “a witness is simply unwilling to testify”;²⁸ and (ii) “the Prosecution is

recorded testimony pursuant to rule 68 of the Rules, see also the WGLL Report, p. 6, para. 6. In the same vein, ICTY rule 92 *quater* has been applied when the person is unable to appear “for reasons beyond control”, because “of uncontrollable circumstances” (see the ICTY, *Popović et al.*, Case No. IT-05-88-T, [Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 ter Exhibit List](#) (Trial Chamber II), 25 October 2007, para. 74).

²¹ See the WGLL Report, *supra* note 20, para. 29.

²² *Ibid.*

²³ *Idem*, p. 25, fn. 19.

²⁴ Article 69(3) of the Rome Statute. See also the MICT, *Popović et al.*, Case No. MICT-13-55-A, [Judgement](#) (Appeals Chamber), 20 March 2019, para. 198.

²⁵ See the Impugned Decision, *supra* note 2, para. 19.

²⁶ See the First Rule 68(2)(c) Decision, *supra* note 17, para. 27, and jurisprudence references contained therein.

²⁷ *Ibid.*

²⁸ *Idem*, para. 28, and jurisprudence references contained therein.

unable to locate the witness but further efforts to locate them can still be made".²⁹ In any event, the Chamber rightly stressed that its assessment was *"on a case-by-case basis and with due regard to the specific nature and content of each prior recorded testimony"*.³⁰

16. In the present instance, the Chamber took into account the information of the Witnesses' alleged death, but concluded that it was not in a position to assert said information.³¹ Nonetheless, the Chamber was satisfied that the Witnesses could not be located on the basis of (i) its earlier finding that the Prosecution had exhausted all avenues in trying to contact them;³² and (ii) the failure of the CAR authorities in tracing them.³³ As a result, it found that the Witnesses' unavailability stemmed from *"obstacles that cannot be reasonably overcome"*.³⁴ This finding, contrary to the Appellant's contention,³⁵ is the most important factor to consider in assessing the "unavailability" of a witness. With regard to P-2269, the Chamber further stated that *"it appears that he cannot be located and there is no further information available on his potential whereabouts"*.³⁶ As for P-2602, it noted the unlikelihood of the execution of the summons *"if the witness were in the bush [REDACTED] as reported by the Ngaissona Defence"*.³⁷ Accordingly, in reaching its conclusion of their unavailability, the Chamber considered all relevant facts regarding the Witnesses' whereabouts.³⁸

17. The CLRV further note that the Appellant misrepresents the Chamber's findings in arguing that it *"misconstrue[d] those withdrawals of cooperation as constitutive of 'mere reluctance' when they clearly illustrate the witnesses' unwillingness to testify for the*

²⁹ *Ibid.*

³⁰ See the Impugned Decision, *supra* note 2, para. 19.

³¹ *Idem*, paras. 31, 51.

³² *Idem*, para. 32, and jurisprudence references contained therein.

³³ *Idem*, paras. 32, 52-53. See also, the "Public redacted version of 'Decision on the introduction into evidence of the prior recorded testimony of P-0605 and P-0582 pursuant to Rule 68(2)(c) of the Rules'" (Trial Chamber X), No. [ICC-01/12-01/18-2114-Red](#), 17 March 2022, paras. 26, 28.

³⁴ See the Impugned Decision, *supra* note 2, paras. 32, 53.

³⁵ See the Appeal, *supra* note 1, para. 28.

³⁶ See the Impugned Decision, *supra* note 2, para. 32.

³⁷ *Idem*, para. 53.

³⁸ *Contra* the Appeal, *supra* note 1, paras. 28, 30-31.

Prosecution".³⁹ To the contrary and as discussed *supra*, the Chamber found that the Witnesses' unavailability did *not* stem from their mere reluctance to testify, but rather from obstacles which could not be reasonably overcome.⁴⁰ The Appellant's persistent submission on a necessary linkage between the Witnesses' withdrawal of cooperation and their unavailability⁴¹ is in fact a mere disagreement with the Impugned Decision.

18. The Defence misinterprets the law in arguing that - in assessing 'unavailability' - emphasis has to be placed on the unwillingness to testify.⁴² This approach is contrary to the literal and contextual interpretation of the provision.⁴³ Furthermore, the jurisprudence only recognises that a *simple* unwillingness to testify is insufficient to prove the unavailability of a witness.⁴⁴ It is self-evident that unwillingness to testify, when coupled with additional factors – such as a subsequent impossibility to locate a witness – can represent "*obstacles that cannot be overcome with reasonable diligence*" and satisfy the requirement of unavailability set in rule 68(2)(c) of the Rules. Relevantly, Trial Chamber VI in the *Ntaganda* case – quoted by the Appellant⁴⁵ – clearly stated that additional evidence which would change the circumstances in a way that would render an unwilling witness "*inaccessible or otherwise incapable of testifying orally*" would be relevant in the analysis of his "*unavailability*".⁴⁶

19. It is clear from the Chamber's assessment that the Witnesses were not *simply* unwilling to testify. The fact that they were initially unwilling to testify, and/or that

³⁹ See the Appeal, *supra* note 1, para. 29.

⁴⁰ See the Impugned Decision, *supra* note 2, paras. 32, 53.

⁴¹ See the Appeal, *supra* note 1, paras. 26-30.

⁴² *Idem*, paras. 28-30.

⁴³ See *supra* para. 13.

⁴⁴ See e.g. the "First Decision on the Prosecution Requests for Formal Submissions of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules" (Trial Chamber V), No. [ICC-01/14-01/18-1975-Red](#), 12 July 2023, para. 20 (the "First Decision pursuant to Rule 68(2)(c)"), para. 28; and the *Al Hassan* Rule 68(2)(c) Decision, *supra* note 20, para. 23.

⁴⁵ See the Appeal, *supra* note 1, para. 26 referring to the "Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039" (Trial Chamber VI), No. [ICC-01/04-02/06-1325](#), 19 May 2016, para. 9.

⁴⁶ See the "Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039", *supra* note 45, para. 9.

they are still unwilling, is irrelevant.⁴⁷ Indeed, additional information before the Chamber proved that the Witnesses' situation had changed in a way that rendered them inaccessible or otherwise incapable of testifying orally. Accordingly, this constituted "*obstacles that cannot be overcome with reasonable diligence*" within the meaning of rule 68(2)(c) of the Rules.

20. For all the above reasons, the First Ground of Appeal should be dismissed.

2. Second Ground of Appeal: The Chamber correctly assessed the nature and content of P-2269's prior recorded testimony

21. The Appellant argues that the Chamber erred in fact in failing to consider that parts of P-2269's evidence could never be corroborated.⁴⁸ According to the Defence, the Chamber failed to weigh the fact that P-2269 would be the only witness in the case to allege having received money directly and in person from Mr Ngaïssona.⁴⁹

22. An assessment of the entirety of the Impugned Decision demonstrates that the Chamber diligently considered the alleged uniqueness of P-2269's evidence. It specifically noted his evidence according to which he "*received money from [Mr Ngaïssona] three times when he was in Cameroon*".⁵⁰ The Chamber further noted that it will take into account that P-2269 was not available for examination by the Defence, "*notably in relation to evidence that might be considered as unique*".⁵¹ Finally, the Chamber correctly stated, by cross-referencing to its first decision pursuant to rule 68(2)(c) of the Rules, that its determination whether a prior recorded testimony can be introduced "*depends on its consideration of the testimony as a whole*".⁵² Therefore, it cannot be

⁴⁷ *Contra* the Appeal, *supra* note 1, paras. 30-31.

⁴⁸ See the Appeal, *supra* note 1, paras. 37-39.

⁴⁹ *Idem*, para. 39.

⁵⁰ See the Impugned Decision, *supra* note 2, para. 29.

⁵¹ *Idem*, para. 36.

⁵² See the First Decision pursuant to Rule 68(2)(c), *supra* note 44. See also, the Impugned Decision, *supra* note 2, paras. 17, 19 (where the Chamber confirmed that it assessed P-2269's evidence on a case-by-case basis and with due regard to the specific nature and content of each prior recorded testimony).

reasonably argued that the Chamber ignored the alleged uniqueness of P-2269's prior recorded testimony.

23. Furthermore, corroboration is not, *per se*, a requirement for the admission of prior recorded testimony pursuant to rule 68(2)(c) of the Rules.⁵³ However, in the exercise of its discretion in determining whether the introduction of such testimony is prejudicial to or inconsistent with the rights of the accused, the Chamber may consider whether the evidence is cumulative or corroborative of other evidence.⁵⁴ This is exactly what the Chamber did.⁵⁵ The Appellant's arguments according to which the Chamber failed to consider the impossibility of corroboration⁵⁶ are therefore inapposite.

24. Finally, even assuming *arguendo*, that the Chamber erred, the alleged error did not materially affect the Impugned Decision.

25. A crucial aspect of the Chamber's assessment of the prejudice was that it would consider, in its deliberations pursuant to article 74 of the Statute, the fact that P-2269 was not available for examination by the Defence.⁵⁷ The Chamber expressly emphasised that it would give due regard to evidence that might be considered as unique.⁵⁸ In this respect, the CLRV recall that safeguards exist to avoid that the introduction of prior recorded testimony without examination by the Defence is prejudicial to the rights of the accused.⁵⁹ Therefore, it is clear that the Chamber would have reached the same conclusion as to the absence of prejudice to the Accused, even

⁵³ See the "Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses" (Trial Chamber VI), No. [ICC-01/14-01/21-506-Red](#), 26 October 2022, para. 24 (the "Said Rule 68(2)(c) Decision").

⁵⁴ *Idem*, para. 25.

⁵⁵ See the Impugned Decision, *supra* note 2, paras. 17, 36-37; and the First Decision pursuant to Rule 68(2)(c), *supra* note 52, para. 35-36.

⁵⁶ See the Appeal, *supra* note 1, para. 39.

⁵⁷ See the Impugned Decision, *supra* note 2, para. 36.

⁵⁸ *Ibid.*

⁵⁹ See *e.g.* the "Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'" (Appeals Chamber), No. [ICC-01/04-02/06-2666-Red A A2](#), 30 March 2021, paras. 627-629.

if it had failed to consider the alleged uniqueness of P-2269's evidence. The Appellant merely disagrees with the Impugned Decision when it submits that the prejudice assessment would necessarily have brought the Chamber to exclude the introduction of P-2269's evidence, or parts of it.⁶⁰

26. For all the above reasons, the Second Ground of Appeal should be dismissed.

3. Third Ground of Appeal: The Chamber correctly applied rule 68(2)(c) and provided sufficient reasoning in allowing the introduction of P-2269's evidence

27. The Appellant contends that the Chamber erred in law in interpreting rule 68(2)(c) of the Rules and did not provide a reasoned opinion.⁶¹ In particular, according to the Defence, the Chamber failed to consider, in its prejudice assessment, that parts of P-2269's evidence were going to the acts and conduct of Mr Ngaïssona.⁶²

28. The CLRV recall that the jurisprudence recognises that a trial chamber is not required to individually set out each and every factor that it considered, provided that it indicates with sufficient clarity the basis for its conclusion.⁶³ Moreover, there is a presumption that a trier of fact has evaluated all the evidence before it when reaching its factual conclusions.⁶⁴ In light of these principles, and considering that the Chamber thoroughly summarised P-2269's evidence,⁶⁵ it can be reasonably concluded that the

⁶⁰ *Contra* Appeal, *supra* note 1, paras. 48-49.

⁶¹ See the Appeal, *supra* note 1, paras. 42-46.

⁶² *Idem*, paras. 42-44.

⁶³ See *e.g.* the "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'" (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 1049; and the "Public Redacted Version of 'Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled 'Decision on the 'Prosecution's Request for Extension of Contact Restrictions', 29 June 2021, ICC-01/14-01/21-111" (Appeals Chamber), No. [ICC-01/14-01/21-111-Red2](#) OA, 17 May 2022, para. 45.

⁶⁴ See *e.g.* the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber VII), No. [ICC-01/05-01/13-1989-Red](#), 19 October 2016, para. 196.

⁶⁵ See the Impugned Decision, *supra* note 2, paras. 27-30.

Chamber correctly applied the law and sufficiently detailed its reasoning. Furthermore, contrary to the Appellant's contentions,⁶⁶ the Chamber, in assessing the prejudice, did not stop its reasoning at the conclusion that "*at least part of the information concerns events or allegations regarding which other witnesses who testified before the Chamber also provided information on*".⁶⁷ Importantly, the Chamber noted – in the same paragraph – that it "*will take into account the fact that P-2269 was not available for examination by the Defence and the rest of the participants, notably in relation to evidence that might be considered as unique*".⁶⁸ It is therefore clear that the Chamber assessed the entirety of P-2269's evidence going to Mr Ngaïssona's acts and conduct, including the parts that could eventually be considered as "*unique*". Consequently, the Chamber reasonably determined, within the ambit of its discretion, that the admission of the evidence was not prejudicial to or inconsistent with the rights of the Accused.

29. For all the above reasons, the Third Ground of Appeal should be dismissed.

4. Fourth Ground of Appeal: The Chamber correctly interpreted and applied rule 68(2)(c) when it allowed the introduction of P-2602's prior recorded testimony

30. The Appellant fails to show that the Chamber erred in law in observing that the Defence was expecting, at the time of the Impugned Decision, to call [REDACTED] FACA member to testify about his experience in Gobere,⁶⁹ or that this alleged error materially affected the Impugned Decision.⁷⁰

31. In its analysis pursuant to rule 68(2)(c) of the Rules the Chamber could, within the ambit of its discretion, consider a potential Defence witness. By doing so, the Chamber neither forced the Defence to call this witness,⁷¹ nor reversed the burden of

⁶⁶ See the Appeal, *supra* note 1, paras. 42, 44.

⁶⁷ See the Impugned Decision, *supra* note 2, para. 36.

⁶⁸ *Ibid.* (emphasis added).

⁶⁹ *Idem*, paras. 51-57.

⁷⁰ *Idem*, paras. 58-61.

⁷¹ *Contra* Appeal, *supra* note 1, para. 56.

proof.⁷² On the contrary, the Chamber was simply analysing a relevant factor in its assessment of prejudice to the Accused under rule 68(1) of the Rules.⁷³

32. As mentioned by Trial Chamber VI in the *Said* case:

*“in line with the Appeals Chamber’s pronouncement on the assessment of prejudice to the accused under rule 68(1) of the Rules, the Chamber may have regard to whether the prior recorded testimony is corroborated by other evidence, but also more broadly whether the testimony is cumulative of other evidence of similar facts. The purpose of the assessment is to inform the Chamber’s exercise of discretion in determining whether prior recorded testimony should be introduced under rule 68(2)(c) of the Rules. In light of this purpose and at this stage in the proceedings, the Chamber considers that this assessment is possible only at a general level in relation to broad themes discussed by the witness”.*⁷⁴

33. The Chamber’s assessment was reasonable and meant to address the Appellant’s arguments that P-2602’s evidence was *“unique with regard to the ‘Gobere group’ [REDACTED]”*.⁷⁵ In light of the Appellant’s submissions before the Chamber,⁷⁶ it was entirely reasonable for the latter to take into account the fact that the Defence was expecting to call [REDACTED] FACA member to testify about his experience in Gobere.

34. In any event, even assuming *arguendo*, that the Chamber erred, said alleged error did not materially affect the Impugned Decision.

35. The Chamber analysed several elements to assess if P-2602’s evidence could be admitted pursuant to rule 68(2)(c) of the Rules.⁷⁷ One of these elements was the

⁷² *Idem*, para. 57.

⁷³ See *e.g.* the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), No. [ICC-01/05-01/08-1386 OA 5 OA 6](#), 3 May 2011, para. 78.

⁷⁴ See the *Said* Rule 68(2)(c) Decision, *supra* note 53, para. 25.

⁷⁵ See the Impugned Decision, *supra* note 2, para. 57.

⁷⁶ See the “Defence Response to the ‘Prosecution Request for the Formal Submission of the Prior Recorded Testimony of P-2602 pursuant to Rule 68(2)(c)’”, No. [ICC-01/14-01/18-1987-Conf](#), 17 July 2023, paras. 21-24.

⁷⁷ See the Impugned Decision, *supra* note 2, para. 56-58.

scrutiny of his evidence with regard to the Gobere group. Within this assessment, the Chamber first noted that P-2602's evidence was relevant to many additional topics, and that other witnesses – including some who were also in Gobere – provided evidence and were examined in court in relation to the that topic.⁷⁸ Only then did the Chamber observe that the Defence was expecting to call [REDACTED] about his experience in Gobere.⁷⁹ Accordingly, this observation from the Chamber was an *additional* element considered in its assessment of the uniqueness of P-2602's evidence. The decision rendered by the Chamber would have been exactly the same had it not considered the potential Defence witness.

36. This view is reinforced by the fact that the Chamber specifically noted that “*the extent to which P-2602's evidence is corroborated by other witnesses rather concerns issues of reliability and probative weight, which will be assessed during its judgement deliberations*”,⁸⁰ and that it will take into account that P-2602 was not available for examination by the Defence, “*notably in relation to evidence that might be considered unique*”.⁸¹ Therefore, the Appellant's allegations about a lack of corroboration are irrelevant and mischaracterise the Impugned Decision.⁸² The jurisprudence is indeed clear that corroboration is not required for prior recorded testimony to be introduced under rule 68(2)(c) of the Rules.⁸³

37. For all the above reasons, the Fourth Ground of Appeal should be dismissed.

⁷⁸ *Idem*, para. 57.

⁷⁹ *Ibid.*

⁸⁰ *Idem*, para. 58.

⁸¹ *Ibid.*

⁸² See the Appeal, *supra* note 1, para. 59.

⁸³ See the *Said* Rule 68(2)(c) Decision, *supra* note 53, para. 24.

VI. CONCLUSION

38. For the foregoing reasons, the CLRV respectfully request the Appeals Chamber to dismiss the Appeal in its entirety and confirm the Impugned Decision.

Respectfully submitted.



Dmytro Suprun

Common Legal Representative
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Paolina Massidda

For the team of the Common Legal
Representatives of Victims of the Other
Crimes

Dated this 3rd day of April 2024

At The Hague, The Netherlands