Cour Pénale Internationale

International Criminal Court

Original*:*

No**:** ***ICC-01/14-01/18***
Date: **3 April 2024**

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 NGAÏSSONA

PUBLIC
Public Redacted Version of "Ngaïssona Defence Appeal Against the 'Decision on the Prosecution Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules', 6 October 2023, ICC-01/14-01/18-2126-Conf", ICC-01/14-01/18-2206, 15 November 2023

Source: **Defence of Patrice-Edouard Ngaïssona**

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

The Office of the Prosecutor
Mr Karim A.A. Khan KC
Mr Mame Mandiaye Niang
Ms Helen Brady

Counsel for the Defence of Mr Ngaïssona
Mr Geert-Jan Alexander Knoops
Ms Marie-Hélène Proulx
Ms Lauriane Vandeler
Ms Antonina Dyk

Counsel for the Defence of Mr Yekatom
Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Legal Representatives of the Victims
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. On 6 October 2023, Trial Chamber V ('the Trial Chamber') rendered the *Decision on the Prosecution's Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules*[1] ('Decision') whereby it granted the Prosecution's request to introduce the entirety of Witness P-1847`s statements pursuant to Rule 68(2)(d) of the Rules of Procedure and Evidence ('the Rules'). As acknowledged by the Trial Chamber, Witness P-1847's statements go to proof of the acts and conduct of Mr Ngaïssona to such an extent that they served as a basis upon which Pre-Trial Chamber II confirmed the charges against him [2] Despite this circumstance, the Trial Chamber allowed the introduction of the entirety of P-1847's unsworn and untested statements. It also did so although Witness P-1847 repeatedly and unequivocally stated both under oath and during subsequent interviews with the Prosecution that no external influence had contributed to the deviation from his prior recorded statements.

2. On 25 October 2023, the Trial Chamber issued the *Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules*.[3] The Trial Chamber granted the Defence's request for leave to appeal the Decision and unanimously certified for appeal the following six issues:[4]:

> **First Ground of Appeal**: Whether the Chamber erred in law by finding that the Rule 68(2)(d)(i) requirement that the witness must have "failed to give evidence with respect to a material aspect" may be fulfilled in situations where the witness does attend, but recants fundamental aspects of their prior recorded testimony;
>
> **Second Ground of Appeal**: Whether the Chamber made an error in reasoning when it assumed that a witness is unlikely to ever admit they were subject to improper interference in a situation where the Chamber based all its conclusions regarding interference on information which was obtained from the witness openly discussing with the Prosecution all the possible incidents that may have potentially affected their testimony;
>
> **Third Ground of Appeal**: Whether the Chamber erred in law in its interpretation of the Rule 68(2)(d)(i) "interest*[sic]* of justice" requirement by finding Rule 68(2)(d)'s purpose is the same as contempt proceedings namely to protect the integrity of the

[1] ICC-01/14-01/18-2126-Conf.
[2] Decision, para 51.
[3] ICC-01/14-01/18-2163.
[4] The Defence has changed the order of the certified issues because it provides a more coherent structure to the present appeal brief.

proceedings as a reactionary measure and not that the requirement is linked to the main purpose of Rule 68 of the Rules, which is to expedite trial proceedings;

Fourth Ground of Appeal: Whether in a situation where the prior recorded testimony "makes extensive reference to the alleged acts and conduct" of an accused, the Chamber gave due consideration to Rule 68(2)(d)(iv) when it only considered that Rule 68(2)(d) has a less stringent standard than Rule 68(2)(b)

Fifth Ground of Appeal: Whether the Chamber erred in its assessment of prejudice under Rule 68(2)(d) when it found that Mr Ngaïssona's right to examine P-1847 on his prior recorded statements was not violated through introducing the statements onto the record of the case since the Defence was aware of which material aspects of the statement the Prosecution had attempted, but ultimately failed, to elicit from the witness;

Sixth Ground of Appeal: Whether the Chamber erred in its assessment of prejudice by failing to consider that the Defence never had the opportunity to address the material aspects of P-1847's prior recorded statements with the over 70 Prosecution witnesses who testified after P-1847's appearance.[5]

3. The Defence submits that the Trial Chamber erred in its determination of the six above mentioned issues. These errors materially affected the Decision, in that, had the Trial Chamber not erred it would have rejected the Prosecution's request to introduce Witness P-1847's prior recorded statements and related materials. Pursuant to Regulation 23bis(2) of the Regulations, the Defence files the present appeal brief confidentially as it refers to information that may reveal the identity of Witness P-1847.

II. SUBMISSIONS

4. The Trial Chamber erred in law and abused its direction when it introduced into evidence the entirety of Witness P-1847's prior recorded statements pursuant to Rule 68(2)(d) of the Rules. Specifically, the Trial Chamber erred in determining that the five cumulative criteria of the rule were met and that introducing these statements would not be prejudicial or inconsistent with Mr Ngaïssona's rights. The Trial Chamber's interpretation and application of Rule 68(2)(d) was in direct contravention with the principle of orality enshrined in Article 69(2) and Article 67(1)(e) of the Rome Statute ('Statute'). The principle of orality enjoins trial chambers to conduct a cautious and stringent assessment when considering whether prior recorded testimony should be introduced in the absence of a witness.[6] As explained in the submissions below, the Trial Chamber did not conduct such

[5] Ibid., paras 6-7.
[6] *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, paras 83-84.

an assessment, which led it to commit several errors. Given these errors materially affected the Decision, the Appeals Chamber should pursuant to Rule 158 of the Rules reverse the Decision admitting the prior statements and related material of Witness P-1847.

A. First Ground of Appeal: Whether the Chamber erred in law by finding that the Rule 68(2)(d)(i) requirement that the witness must have "failed to give evidence with respect to a material aspect" may be fulfilled in situations where the witness does attend, but recants fundamental aspects of their prior recorded testimony

5. Rule 68(2)(d)(i) specifically requires an attending witness to "fail to give evidence with respect to a material aspect included in his or her prior recorded testimony".[7] The Trial Chamber found this criterion applies to situations where witnesses appear and provide testimony which deviates from their prior recorded statements.[8] In doing so, the Trial Chamber erred in law.

6. The Appeals Chamber has held that the general principles of interpretation of treaties as set out by Article 31 of the Vienna Convention on the Law of Treaties ('Vienna Convention') apply to both the Statute and the Rules.[9] Therefore, in accordance with Article 31(1) of the Vienna Convention, the terms of Rule 68(2)(d) must be interpreted according to their ordinary meaning, in their context and in light of Rule 68(2)(d)'s object and purpose.[10]

7. Interpreting Rule 68(2)(d)(i) according to its ordinary meaning establishes that it does not apply in the instant case. A witness whose testimony deviates on material aspects of their prior recorded statements does not qualify as a witness who has "failed to give evidence" under Rule 68(2)(d)(i). Broadly defined, the verb "to fail" includes a concept of inaction or deficiency.[11] Applying the ordinary meaning of failure in the context of Rule 68(2)(d)(i) entails an analysis of whether the witness testified fully on material aspects of the prior recorded testimony. If the answer to this inquiry is yes, then any application under Rule 68(2)(d) must fail. By not conducting this analysis, the Trial Chamber erred in law.

8. Had it made such an analysis, it would have found that Witness P-1847 did testify on all material aspects of his prior recorded statements that the Prosecution questioned him on.

[7] Rule 68(2)(d)(i) of the Rules.
[8] Decision, para. 15.
[9] ICC-01/04-01/06-1432, para. 55.
[10] Article 31(1) of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 18232.
[11] Cambridge online dictionary, https://dictionary.cambridge.org/us/dictionary/english/failure

During his examination, Witness P-1847 answered every question fully with respect to the acts and conduct of the youth group COCORA,[12] and with respect to Mr Ngaïssona's actions and role in Cameroon.[13] While Witness P-1847 substantially deviated from and contradicted his prior recorded statements, this does not equate with a deficiency of any kind with respect to Witness P-1847's testimony before the Trial Chamber. Indeed, the Trial Chamber has before it Witness P-1847's live testimony with respect to all material aspects of his prior recorded testimony. Since no "gap" in Witness P-1847's evidence can be identified, the Trial Chamber should have found that Witness P-1847 did testify on all material aspects of his prior recorded statements.

9. Such an interpretation of the terms "fail to give evidence" under Rule 68(2)(d)(i) is also consistent when read within Rule 68(2)(d)'s greater context and the Court's statutory framework. Rule 68(2) addresses all instances in which prior recorded testimony can be introduced when a witness is not present.[14] Rules 68(2)(b) and (c) which directly precede Rule 68(2)(d) address situations where the Court does not have before it any evidence emanating from the witness' live testimony. Specifically, Rule 68(2)(b) allows the parties to opt to not call a witness live before the Court whereas Rule 68(2)(c) allows them to introduce a prior recorded testimony under certain conditions if the witnesses are unavailable to testify live before the Court. In both these instances, the Court does not have before it the material aspects of the prior recorded testimony of the witness, in other words a gap in the evidence.

10. Rule 68(2)(d) which directly follows Rule 68(2)(b) and (c), and which was amended at the same time, should be read in conjunction with them. Thus, it is consistent with Rule 68(2)(b) and (c) to interpret Rule 68(2)(d)(i) as applying in situations where the Court does not have before it the relevant evidence. If the witness has provided such evidence, then Rule 68(2)(d)(i) has not been satisfied and any application under this rule should be rejected on this basis alone.

11. Not only is this interpretation consistent with Rule 68(2)(b) and (c), it is also the only interpretation that is consistent with the Court's broader statutory framework, which has

[12] P-1847: T-023-ENG, pp 5-6.
[13] P-1847: T-023-ENG, pp. 21-22; 27-29,31-33, 37-47, 62-64.
[14] Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), Annex II.A, ('Working Group Report') para. 14.

enshrined the principle of orality under Article 69(2) and Article 67(1)(e) of the Statute.[15] The Appeals Chamber has held that the direct import of the first sentence of Article 69(2) is that "witnesses must appear before the Trial Chamber in person and give their evidence orally."[16] While Article 69(2) explicitly provides for exceptions to this norm, given that Rule 68 is a subordinate norm to Article 69(2), trial chambers must conduct a cautious and stringent assessment of whether the criteria of Rule 68(2) are met.[17]

12. Before rendering the Decision, the Trial Chamber had before it Witness P-1847's live testimony, which was led under oath, in front of the Trial Chamber, the parties and participants. It consists of a recording of his recollection of the events that transpired in Cameroon, rather than the sanitized and highly summarized version of events that was prepared by one of the parties to the proceedings, namely the Prosecution.[18] It is consistent with the principle of orality to consider that recourse to the exception contained in Rule 68(2) is not necessary in such an instance. While it is true that Witness P-1847 did testify under oath that his prior recorded statements were truthful and that he only found small errors in those statements,[19] this was not indicative of his failure to provide evidence, as indicated by the Decision.[20] Instead, these factors in conjunction with his subsequent repudiation of the content of his prior recorded statements were considerations the Trial Chamber could ultimately take into account for evaluating the credibility of P-1847's testimony provided before the Court.

13. Given the exceptional nature of Rule 68, had the drafters of Rule 68(2)(d) meant to include witnesses who recant their statements and deviate from their prior recorded statements under Rule 68(2)(d)(i)'s criterion of "failure to give testimony", they would have done so. However, they did not. It follows from a careful and stringent application of this criterion, that the Trial Chamber should have found that Witness P-1847 did testify with respect to material aspects of his prior recorded testimony.

---

[15] The Prosecutor v. *Al Hassan*, ICC-01/12-01/18-2222, para. 77 ("The inclusion of this preference for live witness testimony twice in the Statute – in article 67 ("Rights of the accused"), and in article 69 ("Evidence") – gives effect to the opportunity for an accused person to examine a witness directly, in full equality").
[16] *The Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-2024, para. 84.
[17] The Prosecutor v. *Al Hassan*, ICC-01/12-01/18-2222, paras 82-83.
[18] The Prosecution interviewed P-1847 for a total of 8 days, which totaled approximately 23 hours. *See* CAR-OTP-2061-1534, at 1534, CAR-OTP-2122-8251, at 8251where the number of days and hours can be totaled. The result of such interviews was two statements totaling altogether not more than 64 pages. Ibid.
[19] Decision, para. 47.
[20] Ibid.

14. Interpreting Rule 68(2)(d)(i) according to the object and purpose of Rule 68(2)(d) also establishes that it does not apply to situations where witnesses appear and provide testimony which deviates from their prior recorded statements. Article 32 of the Vienna Convention states that the preparatory work of a treaty can confirm the meaning resulting from the application of Article 31.[21] The drafting history of the amended Rule 68 reveals that objective purpose of the amended Rule 68, which includes Rule 68(2)(d), "was to reduce the length of ICC proceedings and to streamline evidence presentation by increasing the instances in which prior recorded testimony could be introduced instead of hearing the witness in person"(emphasis added). [22] Again, in the instant case the Trial Chamber did hear from Witness P-1847, thereby excluding from its ambit the ability to introduce his evidence pursuant to Rule 68(2)(d).

15. Furthermore, when a witness does testify before the Chamber, introducing the prior recorded testimony under Rule 68(2)(d) does the exact opposite of streamlining the evidence and expedite the proceedings. It renders them more complex since now the Trial Chamber must assess two inconsistent accounts and determine which one is true. In the instant case, such complexity is rendered even more acute, given that P-1847's prior recorded testimony came in the form of a statement prepared by the Prosecution. Therefore, it is not a reflection of his spontaneous answers to the Prosecution's questions, but rather a highly sanitized and summarized version of his account of events, that was prepared by a party to the proceedings. Given the Prosecution investigators inappropriately pushed P-1847 to admit to being interfered with,[23] the search for the truth is rendered even more difficult by the introduction of the two statements of Witness P-1847.

16. It appears the drafters of Rule 68(2)(d) may have conceived of this added complexity by never mentioning in the Working Group Report that this provision could apply to witnesses who deviate from their prior recorded statements. In other sections of the same report, the Working Group expressly mentioned when certain limitations to Rule 68(2)(d) would be

[21] Article 32 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 18232.
[22] *The Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-2024, para. 35; The Prosecutor v. *Al Hassan*, ICC-01/12-01/18-2222, para. 55, fn 100.
[23] These are the [REDACTED] who conducted the [REDACTED] in preparing Witness P-1847's prior recorded statements. The Defence expounded upon these arguments in its response to the Prosecution's request to introduce the prior recorded statement of P-1847. The Defence kindly refers the Appeals Chamber to ICC-01/14-01/18-2026-Conf, para. 28.

unduly restrictive. For example, the Working Group stated that limiting the rule only to interference by a party to the proceedings would be too limiting and explained that it should apply to supporters of a party.[24] Since the Working Group made no such qualifications regarding the failure to give evidence, it implies that it did not find unduly restrictive to limit Rule 68(2)(d)(i) to situations where the witness does not testify on material aspects of their prior recorded testimony.

17. As a result of the Trial Chamber's failure to interpret Rule 68(2)(d)(i) correctly, it erred in law, which materially impacted the Decision. Since each of the cumulative criteria must be met under Rule 68(2)(d), the failure to meet one of the criteria must result in the prior recorded testimony not being introduced. Here, the Trial Chamber erred in law when it found that a witness who deviates from his prior recorded testimony can be considered a witness who fails to give evidence under Rule 68(2)(d)(i). Since Witness P-1847 did testify with respect to all material aspects of his testimony, the Trial Chamber should have found that Rule 68(2)(d)(i) was not satisfied. Consequently, the Prosecution's request should have been rejected. Given this error, the Appeals Chamber should reverse the Decision.

B. Second Ground of Appeal: Whether the Chamber made an error in reasoning when it assumed that a witness is unlikely to ever admit they were subject to improper interference in a situation where the Chamber based all its conclusions regarding interference on information which was obtained from the witness openly discussing with the Prosecution all the possible incidents that may have potentially affected their testimony

18. Rule 68(2)(d) provides, as a chapeau requirement, that the prior recorded testimony introduced under this provision must come from a witness who has been subjected to interference. Therefore, the issue of interference lies at the heart of this provision and must be applied with due care.[25] While Rule 68(2)(d)(i) does not define what standard of proof Trial Chambers must apply, the rule does state that a Trial Chamber must be satisfied that there has been improper interference. In the Decision, the Trial correctly noted that Witness P-1847 denied having been interfered with both under oath and during the extensive questioning by the Prosecution at the conclusion of his testimony. Nonetheless, the Trial Chamber disregarded this fact based on an unsupported assumption. In doing so, the Trial

[24] Working Group Report, para. 34.
[25] *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, paras 78, 82-84.

Chamber erred in law, which led it to misappreciate the facts, and erroneously conclude that Witness P-1847 was subjected to improper interference.

19. In the Decision, the Trial Chamber found that the likelihood that a witness will admit to interference is close to nil.[26] The Trial Chamber did not cite any authority for this proposition but merely stated that the rule was not intended to only apply when a witness openly admits to being interfered with.[27] This was not the issue before the Trial Chamber. Rather, the issue at hand was how to assess the question of interference when the witness consistently denies being interfered with both under oath and during subsequent interviews with the Prosecution. The Chamber did not provide an assessment of the Witness' constant denial of interference, and whether it found such denial credible, and if not, why not. Indeed, the Decision is opaque as to how the Trial Chamber concluded that P-1847 would not have admitted to being interfered with. Thus, the Trial Chamber failed to provide a reasoned decision on this point. By doing so, it erred in law.

20. This error in law led the Chamber to misappreciate the evidence adduced by the Prosecution regarding interference. First, the Trial Chamber ignored that there are instances where witnesses have admitted to being subject to witness interference.[28] Indeed, whether a witness will admit to interference or not depends on a host of factors. Some examples of factors that can be derived from the Court's case law include but are certainly not limited to: (1) the witness' security being compromised both in the scenario of admitting and not admitting to interference;[29] or (2) witnesses being promised or being given a sum of money in exchange for not testifying or testifying falsely.[30]

21. Here, the two incidents upon which the Trial Chamber relied to find interference with P-1847's testimony came from P-1847 openly discussing them [REDACTED].[31] Thus, the Trial Chamber found Witness P-1847's explanations credible with respect to the incidents

[26] Decision, para. 66.
[27] Ibid.
[28] *The Prosecutor v. Gicheru*, ICC-01/09-01/20-153-Red paras. 58, 73-74, 101-102, 127, 131-133(referring to several witnesses who for various reasons came forward to cooperate with the Prosecution by admitting they were subject to witness interference).
[29] Ibid., para 70.
[30] Ibid., paras. 102, 131-133. At the *ad hoc* tribunals, witnesses also have admitted to being subject to interference. *The Prosecutor v. Nzabonimpa*, Judgment, 25 June 2021, MICT-18-116-T, para 89.
[31] Decision para. 60 (noting how the Witness explained the incident involving [REDACTED] to Prosecution investigators), para. 61(noting how the Witness explained when asked whether there was any interference with his testimony the witness referred to an incident with [REDACTED]

that may have affected him on the day of his testimony. However, the Decision cites no evidence as to why Witness P-1847 credibility was impugned when Witness P-1847 affirmed that these incidents had no effect on his testimony.

22. Unlike in *Ruto & Sang*, where the trial chamber found there was a scheme to corrupt witnesses through payments,[32] the Chamber found no such external factor that would influence Witness P-1847 to shy away from admitting interference with his testimony. Indeed, the Trial Chamber even disregarded Witness P-1847's communications with third parties during his testimony, thus implying that it did not find that they constituted an external threat to Witness P-1847's security.[33] Specifically, the Chamber reasoned that it did not appear that P-1847 was influenced in providing evidence because of those communications.[34] In direct contradiction with this finding however, the Trial Chamber did find it significant that Witness P-1847 also communicated with Witness [REDACTED] the day before his second day of testimony.[35] However, no reasonable trial chamber could find that this conversation had any bearing on Witness P-1847's testimony. Indeed, the investigator report relied on by the Trial Chamber expressly states that Witness [REDACTED] never discussed with P-1847 the content of his testimony or that Witness P-1847 was a witness.[36]

23. It is therefore inapposite to conclude, in these circumstances, that Witness P-1847 would not have admitted to his testimony being interfered with had it indeed been the case. With respect to both incidents, cited by the Chamber, Witness P-1847 unequivocally and categorically denied their influence on his testimony. First, regarding the incident with P-1847's [REDACTED], Witness P-1847 decided ultimately not to contact Prosecution investigators regarding [REDACTED] in the present proceedings. Witness P-1847 did so because [REDACTED] believed him when Witness P-1847 told [REDACTED]. Further, after [REDACTED] told [REDACTED] that Witness P-1847 was not a witness in the present proceedings, Witness P-1847 told [REDACTED] went silent on the issue [REDACTED].[37] Second, regarding the incident with the [REDACTED], Witness P-1847

[32] ICC-01/09-01/11-1938-Red-Corr, para. 55 (noting a pattern of interference regarding the payment of witnesses).
[33] Decision, paras 57-58.
[34] Ibid., para. 58.
[35] Ibid., para. 64.
[36] The Defence expounded upon these arguments in its response to the Prosecution's request to introduce the prior recorded statement of P-1847. The Defence kindly refers the Appeals Chamber to ICC-01/14-01/18-2026-Conf, para 29.
[37] Ibid., para. 24.

said the incident worried him but that it did not affect his testimony.[38] Additionally, with respect to this specific incident, the Trial Chamber never engaged with the Defence's argument that the [REDACTED] [REDACTED] for the [REDACTED] which is opposed to Mr Ngaïssona.[39] No reasonable trial chamber could conclude that this incident would have led Witness P-1847 to testify favourably for Mr Ngaïssona given that the source of the alleged interference [REDACTED] for Mr Ngaïssona's [REDACTED]. Moreover, Witness P-1847's resolve was steadfast in his answers regarding the lack of interference, despite the unprofessional tactics of the Prosecution investigators pressuring him to give a different answer.[40] This undue pressure exerted by the Prosecution investigators was a factor the Trial Chamber should have considered when determining whether P-1847's explanations regarding possible influences on his testimony were spontaneous.[41]

24. The Trial Chamber did not take any of the abovementioned factors into account because of the false assumption that a witness will never admit to being interfered with. This materially affected the Decision because the Trial Chamber made a finding of interference that no reasonable trial chamber could make. Consequently, the Appeals Chamber should reverse the Decision.

C. Third Ground of Appeal: Whether the Chamber erred in law in its interpretation of the Rule 68(2)(d)(i) "interest[sic] of justice" requirement by finding Rule 68(2)(d)'s purpose is the same as contempt proceedings namely to protect the integrity of the proceedings as a reactionary measure and not that the requirement is linked to the main purpose of Rule 68 of the Rules, which is to expedite trial proceedings

25. Rule 68(2)(d)(i) requires trial chambers to assess whether the interests of justice would be best served before introducing the prior recorded testimony of a witness. In the Decision, the Trial Chamber determined that the objective of admitting the prior recorded testimony of a witness who has been subject to interference shares the same purpose as that of contempt proceedings.[42] Specifically, it determined that it is "another reactionary measure to potential witness interference whose objective is to protect the integrity of the

[38] Ibid., para.22.
[39] Ibid.
[40] The Defence expounded upon these arguments in its response to the Prosecution's request to introduce the prior recorded statement of P-1847. The Defence kindly refers the Appeals Chamber to ICC-01/14-01/18-2026-Conf, para. 28.
[41] Decision, para 61(noting the importance of the supposed spontaneous nature of P-1847's account of the incident with [REDACTED]).
[42] Decision, para. 27.

proceedings and to react to persons who impede the discovery of the truth by the Court".[43] By doing so the Trial Chamber erred in law.

26. As the Trial Chamber correctly noted, the Court's statutory framework does not define "interests of justice", and therefore, it needs to be interpreted in the specific context of Rule 68(2)(d) of the Rules.[44] As submitted above, the preparatory works of the amended Rule 68(2)(d) demonstrate that the overarching legislative objective of the amendments contained in Rule 68(2) was to expedite the proceedings and streamline the presentation of evidence.[45] This is true for all the provisions of the current Rule 68(2) without distinction.[46] This further supported by the Appeals Chamber's Judgment in the *Prosecutor v. Al Hassan* where the Appeals Chamber held that the aims of Rule 68(2), which includes Rule 68(2)(d) was to expedite the trial proceedings.[47] However, the Appeals Chamber equally cautioned that while this aim was legitimate it must be employed with great caution, in particular:

> [I]t must be emphasized that this constitutes a limitation on the right to confront a witness…, substantially restricting an internationally recognized fundamental fair trial right.[48]

27. While Rule 68(2)(d)(iii) specifically mentions Article 70 proceedings, thereby showing a link between contempt proceedings and this provision, it must be emphasized that this provision was specifically included as a compromise on the specific aim of expediting the proceedings. Specifically, the Working Group explained that while findings under Article 70 could be used by trial chambers applying Rule 68(2)(d), trial chambers did not have to wait for such findings to be rendered because it would be too impractical to limit the rule in such a way.[49]

---

[43] Ibid.
[44] Ibid., para. 24.
[45] *The Prosecutor v. Ruto & Sang*, para. 35 *citing* Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, Official Records, Volume I, ICC-ASP/12/20, p. 71. *See also* Report of the Working Group on Amendments, 24 October 2013, ICC-ASP/12/44, para. 8.
[46] Ibid.
[47] *The Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, para. 78
[48] Ibid.
[49] Working Group Report, para. 37.

28. Therefore, any aim of protecting the integrity of the proceedings by reacting to individuals who impede the discovery of the truth is a subsidiary aim of the overarching aim of Rule 68(2), which is to expedite the proceedings and streamline evidence.

29. This subsidiary aim specific to Rule 68(2)(d) can never be the overarching reason for introducing prior recorded testimony that is prejudicial to the accused. The interests of justice criterion requires trial chambers to conduct a two part analysis. First, trial chambers must determine whether introducing the prior recorded testimony will expedite the proceedings and streamline evidence.[50] Second, even if such introduction would benefit the expeditiousness of the proceedings, the inquiry does not stop there. Trial chambers must conduct a cautious analysis of all the factors militating for and against the introduction of a prior recorded statement under Rule 68(2) because any such introduction presents a limit to a fundamental right that is guaranteed to the accused under Article 67(1)(e).[51] The Appeals Chamber held that such a cautious analysis is consistent with Article 21(3) of the Statute's requirement that Rule 68 is interpreted and applied in a manner consistent with international human rights norms, including the right to confront one's accuser enshrined in Article 67. [52]

30. Here, the Trial Chamber erred in law when it made no findings on whether introducing P-1847's statements would contribute to the expeditiousness of the proceedings and did not analyze whether such introduction would be prejudicial to Mr Ngaïssona's fair trial rights with due care as required.[53] The Chamber should reverse the Decision because this error had a material impact on the Trial Chamber determining that introducing Witness P-1847's prior recorded statements was in the interests of justice.

31. First, the Trial Chamber grounded its finding on the interests of justice in its finding of interference. This is evidenced by the Chamber beginning its determinations with it being satisfied that Witness P-1847 had been subject to improper interference, and therefore the introduction of his statements "was appropriate and called for under the circumstances to preserve the integrity of the proceedings, and is, as such, in the interests of justice".[54]

---

[50] This is in line with the legislative objective of Rule 68(2). *The Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, para. 78.
[51] Ibid. paras 78-80.
[52] Ibid.
[53] *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, paras 78, 82-84.
[54] Decision, para. 84.

32. Second, due to the significant weight the Chamber placed on the subsidiary aim of Rule 68(2)(d) which is to react to witness interference, the Trial Chamber conducted a distorted assessment of the different countervailing interests that must be taken into account when determining whether introducing a statement is in the interests of justice under Rule 68(2)(d)(i).

33. With respect to discretionary decisions, the Appeals Chamber should interfere when "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.[55] Here, as submitted above, the Trial Chamber gave excessive weight to its finding of witness interference, and as a result both failed to give weight to relevant considerations or did not give them sufficient weight. For example, the Chamber did not at all address in its assessment that its finding on improper interference based on third party actors and not on the conduct of the Defence or Mr Ngaïssona.[56] However, the involvement or not of one of the parties in the interference is a factor that trial chambers should consider when determining whether it is in the interests of justice to introduce a prior recorded statement under Rule 68(2)(d).[57]

34. It was especially important to address it in the circumstances before the Trial Chamber where (1) the prior recorded statements relate to all the alleged contributions Mr Ngaïssona had to the crimes charged and (2) Mr Ngaïssona did not have a meaningful opportunity to examine Witness P-1847 on these material aspects. The fact that the Trial Chamber's findings on interference were unrelated to Mr Ngaïssona or the [REDACTED's] conduct should have weighed heavily against its introduction. The Decision made no finding on Mr Ngaïssona or [REDACTED] subverting justice by trying to significantly weaken the Prosecution's case by interfering with one of its main witnesses. Only a finding of grave misconduct could counterbalance the prejudice created by introducing into evidence an untested statement that goes to the heart of the Prosecution's case against Mr Ngaïssona.

35. Here, however, there is nothing to counterbalance the prejudicial effect of introducing Witness P-1847 statements. The Trial Chamber's focus on reacting to the behavior of third-

[55] *The Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, para 20.
[56] Decision, para 83.
[57] *The Prosecutor v. Ruto & Sang*, ICC-01/09-01/11-1938-Corr-Red2, para. 44; Working Group Report, para. 34.

party individuals that try to impede the discovery of the truth led it to not sufficiently consider the prejudice to Mr Ngaïssona's rights. As the Defence submitted in its response to the Prosecution's request to introduce Witness P-1847's prior recorded statements, there was no evidence the Prosecution adduced that could satisfy any reasonable trial chamber that the alleged interference could be linked to the Defence.[58] If the Trial Chamber had accurately interpreted the "interests of justice" criterion in Rule 68(2)(d) it would have given due consideration to the countervailing interests against introduction, and would have rendered a different decision. Given this material impact of the Trial Chamber's error, the Appeals Chamber should reverse the Decision.

D. Fourth Ground of Appeal: Whether in a situation where the prior recorded testimony "makes extensive reference to the alleged acts and conduct" of an accused, the Chamber gave due consideration to Rule 68(2)(d)(iv) when it only considered that Rule 68(2)(d) has a less stringent standard than Rule 68(2)(b)

36. Rule 68(2)(d)(iv) specifically states that "the fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it". In the Decision, the Trial Chamber found that Rule 68(2)(d)(iv) does not contain a blanket prohibition of introducing the acts and conduct of the accused and that it was "clear in the mind of the drafters that this factor would be interpreted with more flexibility than the comparable requirement under Rule 68(2)(b).[59] With this flexibility in mind, it found P-1847's prior recorded statement was corroborated with respect to the acts and conduct of Mr Ngaïssona. In doing so, the Trial Chamber abused its discretion by failing to consider relevant factors in determining that it was appropriate to introduce Witness P-1847's statements.

37. The Trial Chamber was incorrect when it reasoned that the mere possibility of the acts and conduct of the accused being introduced means that such evidence should be readily introduced without careful consideration of prejudice. The Working Group, that the Trial Chamber cited as having greater flexibility in mind with respect to the acts and conduct of the accused criterion, made a side-by-side comparison between Rule 68(2)(d) with its counterpart at the ICTY, namely Rule 92 *quinquies* to show the differences and similarities

[58] ICC-01/14-01/18-2026, para. 65.
[59] Decision, para 86

between the two rules.[60] Importantly, the Working Group explained at the outset of its report that:

> the ICTY's version of the principle of orality may be more permissive of exceptions than article 69(2) of the Statute. As a result, aspects of ICTY rules 92 bis, 92 *quater* and 92 *quinquies* have been adapted in the proposed amendment and language has been amended to reflect the ICC's statutory framework.[61]

38. At the end of the Working Group's report on the Rule 68 amendments, the Working Group provided a table comparing the ICTY's Rule 92 *quinquies* with the current Rule 68(2)(d). Under the interests of justice criterion, the Working Group referred to Rule 68(2)(d)(iv), namely whether the statement goes to proof of acts and conduct of the accused as the factor to consider when assessing whether introducing prior recorded testimony via Rule 68(2)(d) would be in the interests of justice.[62] Under Rule 92 *quinquies*, this factor was included in addition to two other factors, namely: (1) the reliability of the statement having regard to the circumstances in which it was made or recorded, and (2) the role of the party or someone acting on behalf of a party in the improper interference.[63] Given that Rule 68 is an exception to the principle of orality, Rule 68(2)(d)(iv), which is the only factor the Working Group listed under the "interests of justice" criterion, should not have been interpreted with any degree of flexibility. Indeed, it appears from the Working Group Report that it was written into Rule 68(2)(d) as a specific safeguard to protect the accused rights.

39. Here, the Trial Chamber's determinations on corroboration demonstrate that it did not carefully apply Rule 68(2)(d)(iv)'s criterion as required.[64] The Trial Chamber determined that P-1847's statement was corroborated on several aspects.[65] However, had the Trial Chamber applied the concept of corroboration with due care it would have found that P-1847's prior recorded statements were not sufficiently corroborated.

40. First, Witness P-1847's statement regarding the arming of COCORA youth groups is not consistent with the other three witnesses cited by the Trial Chamber. Witness P-1847 in his statement states that the youth in COCORA were armed with machetes that they procured

[60] Working Group Report, pages 34-35.
[61] Working Group Report, para. 4.
[62] Ibid., page 35.
[63] Ibid.
[64] Decision, para. 92.
[65] Ibid.

themselves[66] whereas witness P-0291 stated in his statement that such machetes were procured by the Chinese embassy and testified live that they were distributed for agricultural purposes.[67] Lastly, Witness P-0884 who the Trial Chamber also cited, appeared to not have a solid foundation for his knowledge regarding the arming of the COCORA group. When asked how COCORA group came to be armed, he testified that he did not know.[68]

41. With respect to the meetings in Yaoundé at the *Cité du Golf*, of the two witnesses the Trial Chamber cited, one of them, namely Witness [REDACTED] never saw Mr Ngaïssona there and obtained his information from hearsay.[69] Therefore, Witness [REDACTED] does not have the unique vantage point of P-1847 who allegedly saw Mr Ngaïssona at the *Cité du Golf*. The second witness cited in this regard, Witness [REDACTED] is a witness who the Defence had [REDACTED].[70] In these circumstances, it would be inappropriate to make a finding of corroboration on the sole basis of his evidence. Similarly, with respect to Mr Ngaïssona allegedly funding the Anti-Balaka while in Yaoundé, the Trial Chamber cited three witnesses, [REDACTED], [REDACTED] and [REDACTED]. [REDACTED's] evidence on the issue of Mr Ngaïssona's financing consists of either anonymous hearsay whose probative value is minimal. [REDACTED] explained that he obtained his information about Mr Ngaïssona from certain "miliary men".[71] Additionally, [REDACTED] also stated that some of his sources include [REDACTED] who is one of the main sources of information for P-1847's statements[72] thereby demonstrating the lack of independent corroboration of the alleged financing by Mr Ngaïssona of alleged Anti-Balaka elements in Cameroon[73]

42. Further, Witness [REDACTED] provided no evidence regarding the financing of alleged Anti-Balaka elements located in Cameroon, but rather testified about Mr Ngaïssona sending food and money to Zongo, Democratic Republic of the Congo.[74] Therefore, his evidence cannot be found to corroborate Witness P-1847's statement on the financing of

[66] CAR-OTP-2122-8251, at 8270, paras 182-183
[67] CAR-OTP-2024-0036, at 0056-57, para. 130; T-051-ENG, pp 13-14.
[68] T-054-ENG, p. 35,
[69] *See* CAR-OTP-2127-6435, at 6442-43, paras 44-48, at 6449, para. 86.
[70] ICC-01/14-01/18-882.
[71] CAR-OTP-2127-6435, at 6443 at para. 53.
[72] CAR-OTP-2061-1534, at 1551, para. 112.
[73] *Compare* T-042-ENG, pp. 26-27 *with* CAR-OTP-2127-6435, at 6451, para. 100.
[74] T-029-ENG, p. 42, T-030-ENG, p. 15.

alleged Anti-Balaka elements located in another country, namely Cameroon. Moreover, Witness [REDACTED] gave evidence contradicting P-1847's statements regarding Mr Ngaïssona's alleged financial dealings with Anti-Balaka elements. Witness [REDACTED] testified that there was no need for money transfers for the small amounts of money that Mr Ngaïssona gave since it was physically distributed to the alleged Anti-Balaka elements.[75] This does not at all corroborate Witness P-1847's statements stating that Mr Ngaïssona allegedly used Express Union to effectuate his money transfers.[76] Lastly, Witness P-2625 did not testify with respect to Mr Ngaïssona financing the specific individuals cited in Witness P-1847's statement like [REDACTED] and [REDACTED], and thus cannot be found to corroborate Witness P-1847 on these specific points. Witness P-2625's evidence on the issue of financing is anecdotal and lacking in any detail, such that its probative value is minimal.[77] He does not have the same unique perspective as Witness P-1847 who allegedly obtained specific information on financing from various alleged Anti-Balaka members including [REDACTED], namely [REDACTED] and [REDACTED].[78]

43. Lastly, with respect to any instructions Mr Ngaïssona would have given Anti-Balaka members, the Decision only cited two witnesses in support of corroboration.[79] The Decision cites P-2673 who gave no specific evidence on this point contrary to Witness P-1847's prior recorded statements. In his statement, Witness P-1847 stated that [REDACTED].[80] The Decision also cites P-0801, who as submitted above, the Defence [REDACTED].[81] Moreover, P-0801's testimony cited by the Decision does not refer to any instruction, but rather a general statement that Mr Ngaïssona allegedly made in November of 2013 that his troops would attack the Seleka coalition soon.[82] However, no specific detail is mentioned such as who were those troops, what instructions were issued and to whom.

---

[75] T-030-ENG, p. 25.
[76] CAR-OTP-2061-1534 at 1552, para. 116, at 1555, para. 135; CAR-OTP-2122-8252, at 8263, para. 115
[77] T-198-ENG, pp. 35-36 (testifying that Mr Ngaïssona told [REDACTED] he was spending significant money in Cameroon with no mention of the amount or the specific elements he was supposedly financing).
[78] CAR-OTP-2061-1534, at 1550, para. 103, at 1555, para. 133.
[79] Decision, para 92, fn 145.
[80] *Compare* CAR-OTP-2061-1534 at 1561 at para. 175 *with* CAR-OTP-2127-6435 at 6442, para. 44 where [REDACTED] explained that [REDACTED] and [REDACTED] told him very generally that they would organize themselves with the Anti-Balaka to form an armed group to fight Djotodia in Bangui and that they received their orders from François Bozizé, Mr Ngaïssona and Bernard Mokom).
[81] ICC-01/14-01/18-882.
[82] T-034-ENG, pp. 58-59, T-037-ENG, pp. 87- 89.

44. Due to the lack of sufficient corroboration of the material aspects introduced into evidence from P-1847's statement, the Trial Chamber should have found that it would be inappropriate to introduce the portions of the statement relating to the acts and conduct of Mr Ngaïssona. The issue of Mr Ngaïssona financing the Anti-Balaka and giving them orders are core issues that are disputed between the parties,[83] due regard should have been paid to them. While the Trial Chamber correctly stated at the outset that trial chambers should consider whether a statement touches on issues that are central to the case and disputed by the parties,[84] it gave no weight to these factors in its assessment of whether P-1847's statement should be introduced.[85] Since the Chamber failed to give due consideration to the centrality of Witness P-1847's evidence in the case of Mr Ngaïssona, it made an unbalanced assessment of whether the interests of justice would be served by introducing the statement pursuant to Rule 68(2)(d). This materially affected the Decision because had the Chamber properly exercised its discretion it would have found that it was inappropriate to introduce Witness P-1847's statements in the present circumstances for the aforementioned reasons. Therefore, the Defence requests that the Appeals Chamber reverse the Decision.

E. Fifth Ground of Appeal: **Whether the Chamber erred in its assessment of prejudice under Rule 68(2)(d) when it found that Mr Ngaïssona's right to examine P-1847 on his prior recorded statements was not violated through introducing the statements onto the record of the case since the Defence was aware of which material aspects of the statement the Prosecution had attempted, but ultimately failed, to elicit from the witness**

45. In the Decision, the Trial Chamber correctly stated the law when it recalled that regardless under which provision Rule 68 is applied, its application is not permitted if it is prejudicial or inconsistent with the rights of accused under Rule 68(1).[86] However, the Chamber then failed to apply the law correctly when it impermissibly linked two distinct criteria that must be met under Rule 68(2)(d), namely that reasonable efforts must be made to secure all material facts know to the witness under Rule 68(2)(d)(i) and that the Defence must have a meaningful opportunity to examine the witness. As a result, the Trial Chamber misinterpreted the Appeals Chamber precedent in this regard and incorrectly found that the

[83] T-016-ENG, pp. 43-46, 50.
[84] Decision, para. 32.
[85] Decision, para. 92(The Chamber only considered whether it had other evidence on record related to the acts and conduct of Mr Ngaïssona but did not consider that the issues where central to the case and materially disputed between the parties).
[86] Decision, para. 31.

introduction of P-1847's statements was not prejudicial to the rights of Mr Ngaïssona. By doing so the Trial Chamber, erred in law, which resulted in a manifestly unfair interpretation of the cardinal right of an accused to examine witnesses against him.

46. Rule 68(2)(d)(i) provides for five separate criteria that must all be met to find that prior recorded testimony may be introduced. Because Rule 68 is an exception to the right of the accused minimum guarantee to examine witnesses against him, each criteria must be applied restrictively.[87] Here, the Trial Chamber found it was satisfied that the Prosecution had made reasonable efforts to secure from the witness all material facts known to him with respect to the acts and conduct of Mr Ngaïssona.[88] In contrast, with respect to Mr Yekatom's acts and conduct, the Trial Chamber found that the Prosecution did not satisfy this criterion.[89]Since this is a separate criterion of Rule 68(2)(d)(i), the Trial Chamber erred when it reasoned that it would assess the impact of this criterion under the interests of justice criterion and the overarching principle that introducing prior recorded testimony cannot be prejudicial to the accused. [90]

47. The Trial Chamber should have reasoned that since this criterion of Rule 68(2)(d)(i) is not met, like in the case of Mr Yekatom, then the application under Rule 68(2)(d)(i) should be rejected on this basis alone. If, however it is met, as found by the Trial Chamber in the case of Mr Ngaïssona, then a separate analysis must be conducted regarding prejudice to the accused. To reason as the Trial Chamber did, would render the critical safeguards cautioning against the introduction of prior recorded testimony going to the proof of the acts and conduct of the accused meaningless. Any time the Prosecution would be able to satisfy the criterion that it attempted to elicit incriminating evidence on record would result in the finding that there was no prejudice to the accused's right to examine the witness under Article 67(1)(e). According to the Chamber, in such an instance, the accused is aware of what material aspects the Prosecution attempts to get on record and thus is placed in a position to question the witness.[91]

[87] *The Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, para.82.
[88] Decision, paras 76,78.
[89] Ibid.
[90] Decision, para 77.
[91] Decision, paras 88, 103.

48. The Trial Chamber's interpretation constitutes an egregious violation of the minimum fair trial rights Mr Ngaïssona is entitled to under Article 67 for the reasons that follow. At the outset of its determination on the Defence's meaningful opportunity to examine Witness P-1847, the Chamber noted that the Defence was aware that Witness P-1847's prior recorded statements and his live testimony could not both be correct.[92] While true, the Chamber failed to take into account that consistent with his right to be presumed innocent under Article 66, Mr Ngaïssona has not only pled not guilty to the crimes charged, but maintains that his role as the Anti-Balaka National Coordinator was to bring peace and reconciliation to Central African Republic ('CAR').[93] Therefore, the Defence's position with respect to P-1847's prior recorded statements regarding Mr Ngaïssona's acts and conduct is that they are incorrect.

49. When the Prosecution failed to lead evidence regarding Mr Ngaïssona's acts and conduct, the Defence did not make any strategic choice to not examine Witness P-1847 on these aspects. Rather, Mr Ngaïssona exercised his right under Article 67 to not place on record evidence that the Prosecution could potentially use to show that Mr Ngaïssona contributed to the charged crimes. The Trial Chamber appeared to initially have the same understanding as the Defence given that at the conclusion of the Prosecution's examination, the Presiding Judge intimated that Defence counsel would most likely adjust their questioning given Witness P-1847 disavowed his statements. [94]

50. Additionally, the Trial Chamber completely misapprehended the role of the Defence by finding it had a meaningful opportunity to examine Witness P-1847. Defence counsel had a duty to Mr Ngaïssona to refrain from putting incriminatory aspects of Witness P-1847 prior recorded statements into evidence. Article 5 of the Code of Conduct requires that counsel take a solemn undertaking to perform their duties with integrity and diligence. Questioning a witness on incriminatory aspects of their prior recorded statements that are not in evidence constitutes a failure to exercise the legal profession with due diligence. It

[92] Decision, para. 88.
[93] T-016-ENG, pp. 56-57.
[94] T-023-ENG, p. 62 (Presiding Judge Schmitt: " We don't know if the Defence will ask so many question as they intended, but nevertheless we don't know. They have their estimate now");T-023-ENG, p.95(Mr Knoops: But of course we'll make sure that, based on the testimony of today, we'll tonight streamline our questionnaire. So that might imply that our initial time frame - and the President already alluded to this - might change….Presiding Judge Schmitt: I'm absolutely sure that counsel is able to adjust that accordingly. I'm absolutely sure about that.).

creates an undue risk of Defence counsel adducing incriminatory evidence against their client. No counsel acting with reasonable diligence would take such a risk.

51. Contrary to the Trial Chamber's finding, the Appeals Chamber precedent in *Ruto & Sang* does not support its interpretation of the Defence being placed in a position to meaningfully examine Witness P-1847.[95] As submitted in the Defence's response to the Prosecution's Rule 68(2)(d) request, the Appeals Chamber judgment in *Ruto & Sang* stands for the proposition that the Defence is not able to meaningfully examine a witness on incriminatory aspects of their prior recorded testimony when the Prosecution does not elicit such aspects during its examination of the witness.[96] Whether the Prosecution attempted to elicit such aspects or not is not relevant to the specific issue of the Defence being able to meaningfully examine a witness on potentially incriminating information that has not been placed on the record. It is the absence or presence of such information on the record that is dispositive to the Trial Chamber's determination.

52. Such an interpretation of the Appeals Chamber's ruling is consistent with the circumstances under which the prior recorded testimonies were admitted in *Ruto & Sang*. In the Decision to admit the prior recorded testimonies for several witnesses under Rule 68(2)(d), Trial Chamber V(A) found that that the Prosecution made reasonable efforts to secure all material facts known to the witnesses as required by Rule 68(2)(d)(i).[97] If this criterion were dispositive to the Appeals Chamber determination of prejudice to the accused's right to examine a witness under Article 67, it would have been referred to by the Appeals Chamber as a factor mitigating such prejudice. Critically, it was not. Therefore, the Trial Chamber erred in its application of the *Ruto & Sang* appeals judgment in the instant case.

53. The material impact of this error had a very concrete manifestation- the Trial Chamber found that Mr Yekatom would suffer undue prejudice if the prior recorded statement was introduced on his acts and conduct whereas Mr Ngaïssona would not.[98] This was due to the Trial Chamber erroneously linking the criterion on whether the Prosecution attempted to elicit the material aspects of the prior recorded testimony to the separate issue of the Defence being placed in a position to meaningfully examine Witness P-1847 when he

[95] Decision, paras 101-102.
[96] ICC-01/14-01/18-2026, para. 62.
[97] *Ruto & Sang*, ICC-01/09-01/11-1938-Corr-Red2, paras 49, 73, 91, 122.
[98] Decision, para. 102.

appeared before the Court. Had the Chamber correctly interpreted and applied the accused right to meaningfully examine a witness on their prior recorded testimony in the context of a witness who recants it, it would have not made two different rulings with respect to prejudice. Rather, it would have found that both Mr Ngaïssona and Mr Yekatom would be unduly prejudiced by the introduction of Witness P-1847's statements. This is due to both accused having not been placed in a position to meaningfully examine Witness P-1847 with respect to the portions of his statements relating to Mr Ngaïssona's and Mr Yekatom's acts and conduct. Given the material impact of this error, the Defence requests the Appeals Chamber to reverse the Decision.

F. Sixth Ground of Appeal: Whether the Chamber erred in its assessment of prejudice by failing to consider that the Defence never had the opportunity to address the material aspects of P-1847's prior recorded statements with the over 70 Prosecution witnesses who testified after P-1847's appearance.[99]

54. Given the Rule 68(1) requirement that the introduction prior recorded testimony must not be inconsistent with or prejudicial to the rights of the accused, trial chambers should carefully consider the impact that such introduction may potentially have on the minimum guarantees to a fair trial enshrined in Article 67.[100] In the instant case, the Trial Chamber agreed with the Yekatom Defence submissions that the Prosecution could have presented its request to introduce Witness P-1847's prior recorded statements sooner.[101] Nevertheless, the Chamber concluded that the Defence was not prejudiced by the untimely nature of the Prosecution's request because the Defence could explore the material aspects of P-1847's statements in its submissions and through the presentation of its evidence.[102] By doing so, the Trial Chamber abused its discretion by failing to consider relevant factors. Specifically, it did not consider that the untimely nature of the Prosecution's request to introduce P-1847's prior recorded statements had an impact on Mr Ngaïssona's right "to be informed promptly and in detail of the nature, cause and content of the charge" under Article 67(1)(a).

55. Witness P-1847 was the fourth witness to testify in the present proceedings. When Witness P-1847 disavowed his prior recorded statements regarding the acts and conduct of Mr

[99] ICC-01/14-01/18-2163, paras. 6-7.
[100] *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2222, paras 78, 82-84.
[101] Decision, para. 85.
[102] Decision, para 85.

Ngaïssona, it constituted a watershed moment for the Defence's case strategy. Specifically, the Defence revised its case strategy with respect to the Prosecution's allegations regarding Mr Ngaïssona's acts and conduct in Cameroon. This revised case strategy was not an act of gamesmanship, but rather a reflection of Mr Ngaïssona's position that he had no role in the organizing, planning, and financing of the alleged Anti-Balaka while he was in Cameroon. This position is consistent with Mr Ngaïssona's right to be presumed innocent under Article 66.

56. Therefore, for the remaining witnesses who testified on the events in Cameroon, the Defence took stock of the gap created in the Prosecution's case theory as a result of Witness P-1847's live testimony and examined these witnesses according to a line of questioning that was in step with the deviations Witness P-1847 made from his prior recorded testimony.[103] Given the Defence was not apprised of even a potential Rule 68(2)(d) application until after all the relevant witnesses on Cameroon had testified,[104] Mr Ngaïssona's right to be promptly informed of the content of the charges under Article 67(1)(a) was irremediably violated as a result of the Decision. Had the Defence known that material aspects of Witness P-1847's prior recorded statements would be introduced into evidence following Witness P-1847's testimony, it would have revised its strategy accordingly. Specifically, it would have taken into account those material aspects in the questioning of the remaining witnesses on the specific subject of Mr Ngaïssona's acts and conduct in Cameroon.

57. Contrary to the findings of the Decision, this prejudice is not mitigated with the possibility of the Defence to make submissions on P-1847's prior recorded statements or to further impugn the statements with the Defence's presentation of evidence. [105] First, making

[103] The Defence notes the following witnesses testified after Witness P-1847 and provided relevant evidence with respect to the material aspects of Witness P-1847's statement regarding the events in Cameroon: **P-0306**: T-064-ENG, pp. 53-54, T-067-ENG, pp. 70-71; **P-0446**: T-097-ENG, pp. 35-36, 54-55, 62-62; **P-0801**:T-033-ENG, pp. 67-71, T-034-ENG, pp. 5-10, 51-65, T-037-ENG, pp. 87-89, T-038-ENG, pp. 8, 13-16, 23-30; **P-0808**: T-070-ENG, pp. 39-42; **P-0876**: T-085-ENG, pp. 14-16, T-088-ENG, pp. 48-49; **P-0884**: T-054-ENG, pp. 65-68, T-055-ENG, pp. 9-13, 38-39, 44-51, 71, T-058-ENG, pp. 33-34; **P-0952**: T-166-ENG, pp. 68-69; **P-0966**: T-116-ENG, pp. 13-14, T-117-ENG, pp. 9-10; **P-0974**: T-243-ENG ET, pp. 9-15; **P-1521**: T-080-ENG, pp. 55-59; **P-1719**: T-142-ENG, pp. 8-17, T-143-ENG, p. 57; **P-2027**: T-039-ENG, p. 15, T-040-ENG, p.22; **P-2232**, T-075-ENG, pp. 23-29, 55-57; **P-2625**: T-198-ENG, pp. 35-36; **P-2673**: T-041-ENG, pp. 7-9, 19-20, 42, T-042-ENG, pp. 18-27, 43-56, 65-68; **P-2841**: T-029-ENG, pp. 15-17, 42, 55-56, 79-84, T-030-ENG, pp.12-25, 57-58; **P-2843**: T-073-ENG, pp. 28-36, 50-56.

[104] The Prosecution filed its request to introduce Witness P-1847's prior recorded testimony on the last day the Trial Chamber had specified for filing the remaining Rule 68 applications and procedural motions, namely 7 July 2023. *Compare* ICC-01/14-01/18-1892, paras 4, 6 *with* ICC-01/14-01/18-1971.

[105] Decision, para.85.

supplementary submissions cannot mitigate that the incriminating evidence emanating from P-1847's statements completely escaped the adversarial process, thereby stripping the Defence's ability to mount a complete defence with respect to the remaining witnesses testifying on Cameroon Additionally, the ability of the Defence to present evidence in this regard is a factor that the Trial Chamber should not have relied on because it constitutes a reversal of the burden of proof. It places on Mr Ngaïssona the positive obligation to rebut evidence that was previously not on the record of the case, which is impermissible under Article 66 of the Statute.

58. Since the Trial Chamber agreed that the Prosecution was able to file its request sooner,[106] it should have found that the request to introduce Witness P-1847's prior recorded statements was untimely since nothing could mitigate the prejudice caused by the Prosecution filing its request over two years after Witness P-1847 had testified.

59. By both not considering relevant factors and considering irrelevant factors in its Decision, the Trial Chamber proceeded with a distorted analysis of whether the Prosecution's request to introduce P-1847's prior recorded statement was untimely. This undoubtedly impacted the decision since it was the prism through which the Trial Chamber analyzed whether there was prejudice to Mr Ngaïssona's right to know the detail and the content of the charges under Article 67(1)(a). Had the Chamber appropriately weighed the relevant factors in determining if Mr Ngaïssona's rights under Article 67(1)(a) would be violated through granting the Prosecution's request, it would have come to a different conclusion regarding the timeliness of the Prosecution's request. Specifically, it would have found that there were no factors that could mitigate the prejudice caused by the late introduction of Witness P-1847's statements into evidence. Given this material impact of the error, the Appeals Chamber should reverse the Decision.

III. RELIEF SOUGHT

60. For the reasons above, the Defence respectfully requests the Appeals Chamber to:

[106] Decision para. 85

- REVERSE the Decision following from the particular ground(s) of appeal sustained by the Appeals Chamber.

Respectfully submitted,

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 3 April 2024
At The Hague, the Netherlands.