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No. ICC-01/14-01/18 OA3
Date: 20 May 2024

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public redacted

Judgment on the appeal of Mr Patrice Edouard Ngaïssona against the decision of Trial Chamber V of 6 October 2023 entitled "Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules"

Judgment 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, Prosecutor
Ms Mame Mandiaye Niang

Counsel for Mr Alfred Yekatom
Me Mylène Dimitri
Mr Thomas Hannis

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

Counsel for Mr Patrice-Edouard Ngaïssona
Mr Geert-Jan Alexander Knoops
Mr Richard Omissé-Namkeamai

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

Other
Trial Chamber V

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Patrice-Edouard Ngaïssona against the decision of Trial Chamber V entitled "Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules" of 6 October 2023 (ICC-01/14-01/18-2126-Red),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Trial Chamber V entitled "Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules" is confirmed.

REASONS

I. KEY FINDINGS

1. The Appeals Chamber considers that rule 68(2)(d) of the Rules of Procedure and Evidence has the specific purposes of providing a measure against witness interference, ultimately protecting the integrity of the proceedings, and contributing to the determination of the truth by enabling a chamber to consider evidence that it would otherwise not be able to consider. Moreover, by preventing witness interference, rule 68(2)(d) serves the overarching purpose of enhancing the efficiency and effectiveness of the Court.

2. The Trial Chamber did not err in finding that the first requirement of rule 68(2)(d)(i) of the Rules of Procedure and Evidence [that the Chamber must be satisfied that "the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony"] "can be satisfied by persons who appear and either do not testify at all or recant material aspects of their prior recorded testimony".

3. The Appeals Chamber recalls that, in contrast to rule 68(2)(b) of the Rules, rule 68(2)(d) of the Rules does not preclude the introduction of a prior recorded testimony that goes to proof of acts and conduct of the accused. Rather, in accordance with the express language of the sub-rule, the fact that the prior recorded testimony goes to acts and conduct "may be a factor against its introduction, or part of it". This is a matter for the trial chamber's consideration in making its discretionary decision with respect to the particular prior recorded testimony in issue.

II. INTRODUCTION

4. This is the appeal of Mr Patrice-Edouard Ngaïssona against the "Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules" (hereinafter: "Impugned Decision"),[1] rendered on 6 October 2023. In the Impugned Decision, Trial Chamber V (hereinafter: "Trial Chamber") granted the Prosecutor's request for submission into evidence pursuant to rule 68(2)(d) of the Rules of Procedure and Evidence (hereinafter: "Rules") of the prior recorded testimony of witness P-1847 (hereinafter: "Rule 68(2)(d) Request").[2] In support of his request, the Prosecutor argued that the witness had failed to testify with respect to material aspects of his prior recorded testimony as a result of unlawful interference.[3] The Trial Chamber granted the Rule 68(2)(d) Request, finding that the conditions for introduction of prior recorded testimony under rule 68(2)(d) of the Rules were met.[4] The Defence challenges the Impugned Decision, raising six grounds of appeal.

5. As a preliminary matter, the Appeals Chamber notes that the Chambers Practice Manual requires that a judgment on an interlocutory appeal filed under article 82(1)(d)

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[1] ICC-01/14-01/18-2126-Conf (public redacted version filed on 31 October 2023, ICC-01/14-01/18-2126-Red).
[2] Prosecution's Request for the Formal Submission of the Prior Statements of P-1847, dated 6 July 2023 and registered on 7 July 2023, ICC-01/14-01/18-1971-Conf (public redacted version filed on 13 October 2023, ICC-01/14-01/18-1971-Red), with confidential annexes A, B, and C.
[3] Rule 68(2)(d) Request, para. 26.
[4] Impugned Decision, p. 36. [4] ICC-01/14-01/18-2126-Conf (public redacted version filed on 31 October 2023, ICC-01/14-01/18-2126-Red).
[4] Prosecution's Request for the Formal Submission of the Prior Statements of P-1847, dated 6 July 2023 and registered on 7 July 2023, ICC-01/14-01/18-1971-Conf (public redacted version filed on 13 October 2023, ICC-01/14-01/18-1971-Red), with confidential annexes A, B, and C.
[4] Rule 68(2)(d) Request, para. 26.
[4] Impugned Decision, p. 36.

of the Statute, in cases where the Appeals Chamber does not decide to hold a hearing, be rendered within four months from the date of the filing of the response to the appeal brief.[5] Any extension of that four month period must be limited to exceptional circumstances and be explained in detail in a public decision.[6]

6. In the present case, the responses to the appeal brief were filed on 6 December 2023. On 12 March 2024, the Appeals Chamber was recomposed with the mandate of two Judges coming to an end and the assignment of two new Judges to the Appeals Division. Moreover, the Defence in the present case simultaneously appealed a decision on a Prosecutor's request for formal submission of prior recorded testimony pursuant to rule 68(2)(c) of the Rules,[7] raising grounds of appeal, which were partly interrelated with the instant appeal. Under these circumstances, it was considered more appropriate to have the two appeals examined by the Appeals Chamber in its new composition. For these reasons, the present judgment is delivered after the time limit provided for in the Chambers Practice Manual.

III. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

7. From 26 to 30 December 2017,[8] and on 28, 31 August, 3 and 9 September 2020,[9] the Prosecutor's investigators interviewed witness P-1847, and prepared, respectively, two witness statements (hereinafter, collectively: "Prior Recorded Testimony").

8. On 26, 29 and 30 March 2021, witness P-1847 testified before the Trial Chamber.[10]

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[5] Chambers Practice Manual, para. 92.
[6] Chambers Practice Manual, para. 93.
[7] *See* 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 (corrected confidential version filed on 26 March 2023, ICC-01/14-01/18-2207-Conf-Corr; public redacted version (ICC-01/14-01/18-2207-Corr-Red) filed on 3 April 2024, pursuant to Order on reclassification and filing of public versions, 20 March 2024, ICC-01/14-01/18-2415).
[8] *Déclaration de témoin* (P-1847), dated 30 September 2017, CAR-OTP-2061-1534 (FRA), English translation available at CAR-OTP-2107-0102, inclusive of two associated documents (CAR-OTP-2061-1576 and CAR-OTP-2061-1578).
[9] *Déclaration de témoin* (P-1847), dated 9 September 2020, CAR-OTP-2122-8251 (FRA).
[10] Transcript of 26 March 2021, ICC-01/14-01/18-T-022-Red2-ENG; Transcript of 29 March 2021, ICC-01/14-01/18-T-023-Red2-ENG; Transcript of 30 March 2021, ICC-01/14-01/18-T-024-Red-ENG.

9. On his second and third day of testimony, during examination by the Prosecutor and related follow-up questions by the Trial Chamber, the witness made a number of statements that significantly departed from his Prior Recorded Testimony.[11]

10. Via email dated 31 March 2021, under the applicable procedure for the submission of evidence through a witness,[12] the Prosecutor tendered P-1847's Prior Recorded Testimony "as prior inconsistent statements on the basis of his oral testimony", and requested the Trial Chamber to recognise the Prior Recorded Testimony as formally submitted.[13] Both defence teams objected to the submission of the Prior Recorded Testimony.[14]

11. Via email dated 14 June 2021, the Trial Chamber rejected the Prosecutor's request as regards the witness's Prior Recorded Testimony,[15] stating, *inter alia*, that this ruling was without prejudice to consideration of any request under rule 68(2) of the Rules that may be submitted in compliance with the applicable requirements.[16]

12. On 7 July 2023, the Prosecutor requested the formal submission of the Prior Recorded Testimony pursuant to rule 68(2)(d) of the Rules.[17] The Defence team for Mr Ngaïssona (hereinafter: "Defence") submitted in response that the Rule 68(2)(d) Request should be rejected,[18] and that, should it be granted, "the Defence would request that P-1847 be recalled such that the Defence could examine him on [the] material aspects found in the [P]rior [R]ecorded [T]estimony".[19]

13. On 6 October 2023, the Trial Chamber rendered the Impugned Decision and authorised the introduction of P-1847's Prior Recorded Testimony into evidence pursuant to rule 68(2)(d) of the Rules. It further rejected the Defence's request to recall

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[11] *See* Impugned Decision, para. 48.
[12] Initial Directions on the Conduct of the Proceedings, ICC-01/14-01/18-631, paras 61-63.
[13] Annex 1 to the Registry's Report on the Evidence recognised as formally submitted by the Chamber for witness P-1847, 30 August 2021, ICC-01/14-01/18-1099-Anx1 (hereinafter: "Registry's Report Annex 1").
[14] Registry's Report Annex 1, pp. 3-4, 6.
[15] Registry's Report Annex 1, pp. 1-2.
[16] Registry's Report Annex 1.
[17] Rule 68(2)(d) Request, paras 1, 78.
[18] Defence Response to the Prosecution's Request for the Formal Submission of the Prior Statements of P-1847, 14 August 2023, ICC-01/14-01/18-2026-Conf (public redacted version filed on 13 October 2023 and registered on 16 October 2023, ICC-01/14-01/18-2026-Red) (hereinafter: "Defence Response to Rule 68(2)(d) Request"), paras 1, 6, 32.
[19] Defence Response to Rule 68(2)(d) Request, para. 66.

P-1847, considering that the Defence had had sufficient opportunity to question the witness.[20]

14. On 16 October 2023, the Defence requested leave to appeal the Impugned Decision in respect of six issues (hereinafter: "Request for Leave to Appeal").[21]

15. On 25 October 2023, the Trial Chamber granted the Request for Leave to Appeal, certifying the six issues proposed by the Defence.[22]

B. Proceedings before the Appeals Chamber

16. On 3 November 2023, the Appeals Chamber, pursuant to regulations 35(2) and 37(2) of the Regulations of the Court (hereinafter: "Regulations"), granted in part the Defence's request of 30 October 2023,[23] and extended (i) the page limit for the filing of the appeal brief against the Impugned Decision and the respective responses thereto by the Prosecutor and the common legal representatives of the victims (hereinafter: collectively, "Victims") by seven additional pages; and (ii) the time limit for the filing of the appeal brief, as well as for the filing of the respective responses by the Prosecutor and the Victims, by 10 days, to 6 December 2023.[24]

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[20] Impugned Decision, para. 89.
[21] 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", ICC-01/14-01/18-2126-Conf, confidential version filed on 16 October 2023, ICC-01/14-01/18-2145-Conf (public redacted version filed on 1 November 2023, ICC-01/14-01/18-2145-Red).
[22] 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, ICC-01/14-01/18-2163 (hereinafter: "Decision on the Request for Leave to Appeal").
[23] Consolidated Defence Request for an Extension of Page and Time Limits, ICC-01/14-01/18-2171-Conf (reclassified as public (ICC-01/14-01/18-2171) on 4 April 2024, pursuant to Email from the Appeals Chamber to the Registry on 4 April 2024 at 11.50, following the Ngaïssona Defence Request for Reclassification, 3 April 2024, ICC-01/14-01/18-2434). *See also* Prosecution Response to "Consolidated Defence Request for an Extension of Page and Time Limits", ICC-01/14-01/18-2176-Conf (reclassified as public (ICC-01/14-01/18-2176) on 20 March 2024, pursuant to Order on reclassification and filing of public versions, 20 March 2024, ICC-01/14-01/18-2415); Joint response by the Common Legal Representatives of the Victims to the "Consolidated Defence Request for an Extension of Page and Time Limits", ICC-01/14-01/18-2185-Conf (reclassified as public (ICC-01/14-01/18-2185) on 20 March 2024, pursuant to Order on reclassification and filing of public versions, 20 March 2024, ICC-01/14-01/18-2415).
[24] Decision on the consolidated application of Mr Patrice-Edouard Ngaïssona for an extension of the page and time limits, ICC-01/14-01/18-2189.

17. On 15 November 2023, the Defence filed its appeal brief against the Impugned Decision (hereinafter: "Appeal Brief").[25]

18. On 6 December 2023, the Prosecutor[26] and the Victims[27] filed their respective responses to the Appeal Brief.

IV. STANDARD OF REVIEW

19. In the present appeal, the Defence alleges errors of law, errors of fact, and abuse of discretion.

20. Regarding errors of law, the Appeals Chamber has previously held that it

> will not defer to the relevant Chamber's legal 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.[28]

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[25] 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-Conf (public redacted version filed on 3 April 2024, ICC-01/14-01/18-2206-Red).

[26] Prosecution Response to "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-01/14-01/18-2246-Conf (public redacted version filed on 3 April 2024, ICC-01/14-01/18-2246-Red) (hereinafter: "Prosecutor's Response").

[27] Victims' Joint Response to the "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-Conf OA3), confidential version filed on 6 December 2023, ICC-01/14-01/18-2245-Conf (public redacted version filed on 3 April 2024, ICC-01/14-01/18-2245-Red) (hereinafter: "Victims' Response").

[28] *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Trial Chamber I of 17 February 2023 entitled "Decision on the admissibility of video (DAR-OTP-0216-0119) and records of telephone calls (DAR-OTP-0216-0127, DAR-OTP-0216-0128)", 28 June 2023, ICC-02/05-01/20-982 (OA12) (hereinafter: "*Abd-Al-Rahman* OA12 Judgment"), para. 20, *referring to The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled "Decision on legal representation further to the Appeals Chamber's judgment of 19 July 2022", 19 December 2022, ICC-01/14-01/22-124-Red (OA3) (hereinafter: "*Mokom* OA3 Judgment"), para. 19; *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, ICC-01/09-01/11-2024 (OA10) (hereinafter: "*Ruto and Sang* OA10 Judgment"), para. 20; *The Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 23; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour

21. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.[29] 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".[30]

22. As to errors of fact,

> the Appeals Chamber will determine whether a chamber's factual findings were reasonable in the particular circumstances of the case. The Appeals Chamber will 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.[31]

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insuffisance de gravité de l'affaire soulevée par la défense', 19 February 2020, ICC-01/12-01/18-601-Red (OA) (hereinafter: "*Al Hassan* OA Judgment"), para. 38. *See also Situation in the Republic of the Philippines*, 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", 18 July 2023, ICC-01/21-77 (hereinafter: "*Philippines* OA Judgment"), para. 35.

[29] *Abd-Al-Rahman* OA12 Judgment, para. 21, *referring to* *Mokom* OA3 Judgment, para. 20; *Al Hassan* OA Judgment, para. 38; *The Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015, ICC-02/11-01/12-75-Red (OA) (hereinafter: "*Simone Gbagbo* OA Judgment"), para. 40. *See also The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence '*Exception d'incompétence*' (ICC-02/05-01/20-302)", 1 November 2021, ICC-02/05-01/20-503 (OA8) (hereinafter: "*Abd-Al-Rahman* OA8 Judgment"), para. 12; *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 17 July 2019, ICC-02/04-01/15-1562 (OA4) (hereinafter: "*Ongwen* OA4 Judgment"), para. 45.

[30] *Abd-Al-Rahman* OA12 Judgment, para. 21, *referring to The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 12 September 2022, ICC-01/04-02/06-2782 (A4-A5) (hereinafter: "*Ntaganda* A4-A5 Judgment"), para. 29; *Mokom* OA3 Judgment, para. 20; *Al Hassan* OA Judgment, para. 38; *Simone Gbagbo* OA Judgment, para. 41. *See also* *Abd-Al-Rahman* OA8 Judgment, para. 12; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled 'Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court', 1 July 2021, ICC-01/12-01/18-1562-Red (OA3), para. 18; *Ongwen* OA4 Judgment, para. 45. *See also Situation in the Islamic Republic of Afghanistan*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation", 4 April 2023, ICC-02/17-218 (OA5), para. 23.

[31] *Abd-Al-Rahman* OA12 Judgment, para. 22, *referring to* *Mokom* OA3 Judgment, para. 21. *See also* *Ntaganda* A4-A5 Judgment, para. 30; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer

23. Where a decision allegedly amounts to an abuse of discretion, the Appeals Chamber has clarified that it

> will 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. In its review, 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. Moreover, even if an error has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to force the conclusion that the relevant chamber failed to exercise its discretion judiciously.[32]

24. The appellant is obliged to set out all the alleged errors in the appeal brief and "indicate, with sufficient precision, how [the] alleged error would have materially affected the impugned decision".[33]

25. The above standard of review will guide the analysis of the Appeals Chamber.

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motions, 31 March 2021, ICC-02/11-01/15-1400 (A) (hereinafter: "*Gbagbo and Blé Goudé* Appeal Judgment"), para. 68; *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment', 30 March 2021, ICC-01/04-02/06-2667-Red (A3) (hereinafter: "*Ntaganda* A3 Judgment"), paras 27-29; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention", 19 July 2017, ICC-02/11-01/15-992-Red (OA10), para. 16.

[32] *See, for example, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 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", 13 May 2022, ICC-01/12-01/18-2222 (OA4) (hereinafter: "*Al Hassan* OA4 Judgment"), para. 20, *referring to The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06-2666-Red (A A2) (hereinafter: "*Ntaganda* A A2 Judgment"), para. 46.

[33] *Abd-Al-Rahman* OA12 Judgment, para. 23, *referring to Abd-Al-Rahman* OA8 Judgment, para. 14; *The Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 (OA3), para. 48.

V. MERITS

A. First ground of appeal: Alleged error in applying rule 68(2)(d)(i) of the Rules to a recanting witness

1. Relevant part of the Impugned Decision

26. In the Impugned Decision, noting that rule 68(2)(d)(i) of the Rules "provides as the first requirement that the Chamber must be satisfied that 'the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony'" (hereinafter: "First Requirement"),[34] the Trial Chamber considered that "in principle, [this] requirement can be satisfied by persons who appear and either do not testify at all or recant material aspects of their prior recorded testimony".[35] In the Trial Chamber's view, "a more limited understanding of the [First Requirement] could lead to a situation where a person subject to interference could have their prior recorded testimony introduced if they were intimidated into silence, but not if the intimidation prompted them to recant fundamental aspects of what they said previously".[36]

27. In line with these principles, the Trial Chamber was of the view that failure to testify can apply to cases in which a witness "substantially deviates from, or outright contradicts, […] material aspects [included in a prior recorded testimony] once under oath".[37]

28. Concerning P-1847's Prior Recorded Testimony, the Trial Chamber noted that at the beginning of his testimony, the witness acknowledged his Prior Recorded Testimony as being truthful and only discovered "very small" or "tiny" errors when re-reading it.[38] However, on his second day of testimony, after an intervening weekend,

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[34] Impugned Decision, para. 14.
[35] Impugned Decision, para. 15.
[36] Impugned Decision, para. 15, *referring to* Trial Chamber V(A), *The Prosecutor v. Ruto and Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, dated 19 August 2015 and registered on 28 August 2015, ICC-01/09-01/11-1938-Corr-Red2 (hereinafter: "*Ruto and Sang* Rule 68 Decision"). In the referenced decision, Trial Chamber V(A) found that a situation where a person subject to interference was intimidated into silence was not meaningfully distinct from a situation where the same intimidation prompted the person to recant fundamental aspects of what they said previously. Noting that rule 68(2)(d) of the Rules is intended to enable consideration of evidence despite witness interference, Trial Chamber V(A) did not see any purpose in treating the two situations differently. *See* *Ruto and Sang* Rule 68 Decision, para. 41.
[37] Impugned Decision, para. 46.
[38] Impugned Decision, para. 47.

the witness provided answers which, in the Trial Chamber's assessment, amounted to "plain contradictions" with material aspects of his Prior Recorded Testimony.[39] In the Trial Chamber's view, the witness's explanations for these deviations did not explain why the witness attested to the truthfulness of his Prior Recorded Testimony on the first day of the testimony, only to substantially depart from it on the second day.[40]

29. Consequently, the Trial Chamber found that the First Requirement was met in the case at hand.[41]

2. Summary of the submissions

30. The Defence submits that the Trial Chamber erred in law by finding that the First Requirement may be fulfilled in situations where the witness does attend as a witness, but recants fundamental aspects of his or her prior recorded testimony.[42]

31. In support of its submission, the Defence argues that (i) the ordinary meaning of the verb "failed" in rule 68(2)(d)(i) of the Rules entails a concept of "inaction" or "deficiency" which is not applicable to witness P-1847 who testified on all material aspects of his Prior Recorded Testimony, thus leaving no "gap" in his evidence;[43] (ii) rule 68(2)(d)(i) of the Rules needs to be read within the context of rule 68(2) of the Rules and in conjunction with rule 68(2)(b) and (c) of the Rules which all address instances in which a witness is not present;[44] (iii) limiting the application of rule 68(2)(d)(i) of the Rules to situations where a witness fails to give testimony is the only interpretation in line with the Court's broader statutory framework, namely the principle of orality;[45] and (iv) interpreting rule 68(2)(d)(i) according to the object and purpose of rule 68(2)(d) also confirms its interpretation, and had the drafters intended that rule 68(2)(d) of the Rules cover situations where a witness recants his or her prior recorded testimony, they would have included such scenario in the Rules, or the Working Group on Lessons Learnt (hereinafter: "Working Group") would have

[39] Impugned Decision, paras 48, 50.
[40] Impugned Decision, paras 49-50.
[41] Impugned Decision, paras 45-54.
[42] Appeal Brief, Heading A at p. 5, paras 5-17.
[43] Appeal Brief, paras 7-8.
[44] Appeal Brief, paras 9-10.
[45] Appeal Brief, paras 11-12.

mentioned this scenario in its report to the Assembly of States Parties (hereinafter: "ASP").[46]

32. In this context, the Defence avers that the drafting history of the amendments to rule 68 of the Rules shows that the objective of the amendments was to expedite proceedings and to streamline the presentation of evidence by increasing instances in which prior recorded testimony can be introduced instead of hearing the witness in person.[47] In this regard, the Defence argues that, in the present case, introducing the Prior Recorded Testimony in addition to the live testimony renders the proceedings more complex by requiring the Trial Chamber to assess two inconsistent accounts.[48] Consequently, the Defence contends that the First Requirement was not satisfied, and that the witness's assertion under oath that his Prior Recorded Testimony was truthful except for "small errors" was not indicative of his failure to testify but was one of the factors that could be considered for evaluating the credibility of his testimony before the Court.[49]

33. The Prosecutor submits that the first ground of appeal should be dismissed because the Trial Chamber, consistent with the ordinary meaning of rule 68(2)(d)(i) of the Rules, considered in context and in light of its object and purpose, did not legally err by finding that rule 68(2)(d) of the Rules applies to a situation where a witness recants fundamental aspects of his or her prior recorded testimony.[50] In essence, the Prosecutor contends that (i) the broader ordinary meaning of the verb "to fail" covers the scenario of a recanting witness;[51] (ii) rule 68(2)(d) of the Rules, contrary to sub-rules (a) to (c), expressly encompasses situations where the witness is *present* at the hearing, and a contextual interpretation of that provision does not support the position that rule 68 of the Rules generally requires a gap in the evidence;[52] (iii) the Trial Chamber's interpretation is consistent with the object and purpose of rule 68(2)(d)

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[46] Appeal Brief, paras 13-16, *referring to* International Criminal Court Assembly of States Parties, 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 (hereinafter: "Working Group on Lessons Learnt Report").
[47] Appeal Brief, para. 14.
[48] Appeal Brief, paras 14-15.
[49] Appeal Brief, paras 12-13.
[50] Prosecutor's Response, paras 3-11.
[51] Prosecutor's Response, para. 5.
[52] Prosecutor's Response, paras 6-7 (emphasis in original).

of the Rules which, according to the drafting history, is to protect the integrity of the proceedings rather than expediting the proceedings and streamlining evidence.[53]

34. The Victims submit that the first ground of appeal should be dismissed because the Trial Chamber did not err in finding that the First Requirement is met in cases of witnesses recanting their prior recorded statements.[54] They argue that (i) the definition of the verb "to fail" encompasses not only "'inaction' or silence" but also a notion of "deficiency" or, in other words, the lack of "fundamental aspects of something that has been already known/expected";[55] (ii) "the applicability of rule 68(2)(d) of the Rules to situations where witnesses recant their previous testimony aligns with the intention of the drafters";[56] (iii) "an explicit reference to [a situation where a witness recants his or her prior recorded testimony] is not required since it clearly transpires from the very purpose of the provision";[57] (iv) "[s]ince rule 68(2)(d) of the Rules operates in the context of interference", which "may materialise in multifaceted ways", "a broad concept of failure to testify on material aspects of a prior recorded testimony is justified";[58] and that (v) the Trial Chamber's approach is supported by "[t]he Court's broader mandate to establish the truth".[59]

3. Determination by the Appeals Chamber

35. Under this ground of appeal, the Defence submits that the Trial Chamber erred in law by finding that the First Requirement can be satisfied in situations where a witness appears in court and provides testimony that deviates from his or her prior recorded testimony.[60]

36. The Appeals Chamber recalls rule 68(2)(d) of the Rules, which provides in relevant parts:

> 2. If the witness who gave the previously recorded testimony is *not present* before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:

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[53] Prosecutor's Response, paras 8-9; *see also* para. 11.
[54] Victims' Response, paras 12-22.
[55] Victims' Response, paras 15-16.
[56] Victims' Response, paras 17-18.
[57] Victims' Response, para. 19.
[58] Victims' Response, para. 20.
[59] Victims' Response, para. 21.
[60] *See* Appeal Brief, paras 5, 17.

> […]
>
> (d) The prior recorded testimony comes from *a person who has been subjected to interference*. In such a case:
>
> (i) Prior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that:
>
> - the person has failed to attend as a witness or, *having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony*;[61]
>
> […]

37. As a preliminary matter, the Appeals Chamber notes the Defence's argument that rule 68(2)(d)(i) of the Rules needs to be read within the context of rule 68(2) of the Rules and in conjunction with rule 68(2)(b) and (c) of the Rules, which all address instances in which a witness is not present. In this regard, while mindful that the *chapeau* of rule 68(2) of the Rules broadly refers to situations where "the witness who gave the previously recorded testimony *is not present* before the Trial Chamber",[62] the Appeals Chamber considers that rule 68 of the Rules needs to be read as a whole, recognising and giving due weight to distinctions between each sub-rule. Rule 68 of the Rules sets out distinct situations which allow the introduction of prior recorded testimony into evidence. With regard to rule 68(2) of the Rules, while sub-rules 68(2)(a) to (c) address situations where the witness is absent, rule 68(2)(d) expressly encompasses situations where the witness is present at the hearing: where a witness, "has failed to attend as a witness or, *having attended*, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony".[63] Accordingly, the Appeals Chamber considers that a contextual interpretation of rule 68(2) of the Rules as a whole does not support the proposition that it is limited in application to situations where the witness is not present before the Chamber, especially given the plain language of sub-rule 68(2)(d) itself.

38. To determine whether rule 68(2)(d)(i) of the Rules also applies to a situation where a witness departs from his or her prior recorded testimony, the Appeals Chamber

[61] Rule 68(2) of the Rules (emphasis added).
[62] Rule 68(2) of the Rules (emphasis added).
[63] Rule 68(2)(d) of the Rules (emphasis added).

will, in line with article 31(1) of the Vienna Convention on the Law of Treaties,[64] examine the ordinary meaning of the terms "failed to give evidence with respect to a material aspect", in their context and in light of the object and purpose of this provision.

39. The Appeals Chamber notes that the verb "fail" may have different meanings, including: "to fall short in performance or attainment";[65] "to not do something that you should do";[66] and "to not do what is expected, needed, or wanted".[67] Furthermore, the French version of rule 68(2)(d)(i) reads, in its relevant part, as follows: « *[…] que le témoin […], bien qu'ayant comparu, n'a pas abordé en cette occasion certains points importants qui figurent dans son témoignage préalablement enregistré* ». In light of the above, the Appeals Chamber finds that the terms "fail […] to give evidence" apply not only to situations in which a witness does not testify at all in relation to a material aspect included in his or her prior recorded testimony but also to those situations where a witness departs with respect to a material aspect from his or her prior recorded testimony. Such an interpretation, as further elaborated below, is in line with the objective of rule 68(2)(d) of the Rules to contribute to the determination of the truth.

40. With respect to the object and purpose of rule 68(2)(d)(i) of the Rules, the Appeals Chamber notes the Defence's argument that "the objective purpose of the amended [r]ule 68 [of the Rules] […] 'was to reduce the length of ICC proceedings and to streamline evidence presentation'".[68]

41. In this regard, the Appeals Chamber observes that with respect to the overarching purpose of rule 68(2) of the Rules, the Working Group reports provide that "enhancing the efficiency and effectiveness of the Court is of common interest both for the [ASP] and the Court",[69] and that the overall purpose of rule 68(2) of the Rules is to "reduce the length of Court proceedings and streamline evidence presentation".[70] As regards

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[64] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 18232.
[65] Oxford English Dictionary, https://www.oed.com/dictionary/fail_v?tab=meaning_and_use#4646706.
[66] Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/fail.
[67] Longman Dictionary of Contemporary English, https://www.ldoceonline.com/dictionary/fail.
[68] Appeal Brief, para. 14.
[69] International Criminal Court Assembly of States Parties, Report of the Working Group on Amendments, 24 October 2013, ICC-ASP/12/44 (hereinafter: "Working Group on Amendments Report"); Annex I to Working Group on Amendments Report, Draft resolution: Amendment to Rule 68 and Rule 100 of the Rules of Procedure and Evidence, p. 4; Working Group on Lessons Learnt Report, para. 11.
[70] Working Group on Lessons Learned Report, para.11.

rule 68(2)(d) of the Rules, the drafting history indicates that the provision allows the Court to introduce prior recorded testimony that it would otherwise not be able to consider,[71] and may have a potentially deterrent effect by creating "a broader disincentive for interested persons to interfere with ICC witnesses".[72]

42. In light of the above, the Appeals Chamber considers that rule 68(2)(d) of the Rules has the specific purposes of providing a measure against witness interference, ultimately protecting the integrity of the proceedings, and contributing to the determination of the truth by enabling a chamber to consider evidence that it would otherwise not be able to consider. Moreover, by preventing witness interference, rule 68(2)(d) of the Rules serves the overarching purpose of enhancing the efficiency and effectiveness of the Court.

43. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in finding that the First Requirement "can be satisfied by persons who appear and either do not testify at all or recant material aspects of their prior recorded testimony".[73] In the view of the Appeals Chamber, it would be inconsistent with the purpose of rule 68(2)(d) of the Rules to treat situations where a witness departs from his or her prior recorded testimony in respect of a material aspect differently from a situation where a witness does not provide any information at all with regard to such material aspect.

44. In view of the above, the Appeals Chamber finds that the Defence has failed to demonstrate any error in the Trial Chamber's determination in this regard. Accordingly, the Appeals Chamber rejects the first ground of appeal.

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[71] Study Group on Governance Cluster I: Expediting the Criminal Process, Working Group on Lessons Learnt, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), ICC-ASP/12/37/Add.1, Annex II.A (hereinafter: "Working Group on Lessons Learnt Report Annex II.A") para. 32.
[72] Working Group on Lessons Learnt Report Annex II.A, para. 34.
[73] Impugned Decision, para. 15.

B. Second ground of appeal: Alleged error in determining that the witness's testimony was materially influenced by improper interference

1. Relevant part of the Impugned Decision

45. The Trial Chamber, on the basis of the information before it, was satisfied that witness P-1847's failure to give evidence with respect to material aspects included in his Prior Recorded Testimony was materially influenced by improper interference.[74] The Trial Chamber found that while the witness "denied, under oath before the Chamber, having been approached by anyone in relation to his testimony", "this [did] not alter its conclusion with regard to the interference with the witness's testimony".[75]

46. In reaching this conclusion, the Trial Chamber noted, as a preliminary matter, that the likelihood of a witness openly admitting to having been subject to improper interference was "close to nil", and that if rule 68(2)(d) of the Rules were applicable only in cases where a witness explicitly admits to having been interfered with, its field of application would be "extremely limited, perhaps even non-existent and its insertion as an amendment to the original [r]ule 68 of the Rules pointless".[76]

47. With respect to P-1847, the Trial Chamber first noted that the witness "was clear in indicating that" two incidents, which had occurred prior to the witness's appearance before the Trial Chamber for his testimony, "were of significant concern to him".[77] First, the witness stated that before travelling to The Hague for his testimony, he [REDACTED] had told 'them' that the [w]itness was to testify 'against [Mr] Ngaïssona'",[78] which, according to P-1847, "unsettled" him.[79] Second, the witness indicated that before the start of his testimony, at the time he was reading his statement , "his wife […] [REDACTED], which "concerned" him.[80] The Trial Chamber found that "these concerns were clearly of a nature to intimidate the [w]itness",[81] and that "the interference was both direct, through him being confronted by others with

[74] Impugned Decision, para. 72.
[75] Impugned Decision, para. 65.
[76] Impugned Decision, para. 66.
[77] Impugned Decision, para. 67.
[78] Impugned Decision, para. 60.
[79] Impugned Decision, para. 61.
[80] Impugned Decision, paras 62-63.
[81] Impugned Decision, para. 67.

information circulating [REDACTED] about him testifying 'against [Mr] Ngaïssona', and indirect [REDACTED]".[82]

48. In addition, the Trial Chamber found of significance the information in an investigator's report provided by the Prosecutor that another witness, at the time of P-1847's testimony, heard [REDACTED].[83] This other witness [REDACTED] the day before [P-1847]'s second day of testimony".[84] The Trial Chamber noted that "[i]t was on this second day of [his] testimony that [P-1847] started deviating from his Prior Recorded Testimony".[85]

49. The Trial Chamber further noted that it "observed an obvious change in the attitude of the [w]itness comparing his appearance on the first and second day of testimony".[86] Specifically, the Trial Chamber found that the witness's "forthcoming manner" on his first day of testimony "stood in stark contrast to his reluctance thereafter, making it clear that the [w]itness had changed his disposition in relation to his testimony".[87]

50. Lastly, the Trial Chamber was satisfied that the witness's failure to testify was materially influenced by the improper interference since he initially confirmed that his Prior Recorded Testimony was correct and contained his truthful recollection, but subsequently failed to testify in relation to material aspects of his testimony with regard to Mr Ngaïssona.[88]

2. Summary of the submissions

51. According to the Defence, the Trial Chamber committed an error of law in disregarding the fact that "P-1847 denied having been interfered with both under oath and during extensive questioning by the Prosecutor", based on an "unsupported assumption" that the witness would not have admitted to having been interfered with.[89] The Defence contends that this alleged error led the Trial Chamber to "misappreciate

[82] Impugned Decision, para. 69.
[83] Impugned Decision, para. 64.
[84] Impugned Decision, para. 64.
[85] Impugned Decision, para. 64.
[86] Impugned Decision, para. 68.
[87] Impugned Decision, para. 68.
[88] Impugned Decision, paras 71-72.
[89] Appeal Brief, paras 18-19.

the evidence adduced by the Prosecut[or] regarding interference".[90] In this regard, the Defence avers that the Trial Chamber did not provide any credibility assessment of the witness's consistent denial of being interfered with and, as such, failed to provide a reasoned decision on that point.[91] Similarly, the Defence argues that the Trial Chamber did not cite any evidence as to why it found that the witness's credibility was impugned when he affirmed that the two incidents referred to in the investigator's report had no effect on his testimony.[92]

52. The Prosecutor submits that the second ground of appeal should be dismissed as it is "premised on misconceptions" about the Impugned Decision and that the Defence "does not show any legal or factual error".[93] In particular, the Prosecutor argues that (i) while framed as an error of law, the Defence seemed to effectively argue that the Trial Chamber erred in fact because it should have relied on P-1847's denial of interference and concluded that there was no interference;[94] (ii) in reaching the conclusion that the witness was subjected to improper interference, the Trial Chamber relied on multiple circumstances, including several incidents reported by the witness as well as a shift in the witness's attitude after his first day of testimony;[95] (iii) the Trial Chamber duly noted that the witness denied having been influenced and gave specific reasons why it nevertheless did not find his denial credible;[96] and (iv) the Trial Chamber's consideration that a person subject to interference is unlikely to admit interference was factually and legally correct in this case, even though witnesses in other instances have admitted to being subject to interference.[97] In any event, the Prosecutor submits that, even if the Trial Chamber had erred in considering that a person subjected to interference is unlikely to admit this, this error would not have materially affected the decision.[98]

53. The Victims submit that the second ground of appeal should be dismissed as the Trial Chamber correctly interpreted and applied the law, and reasonably determined

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[90] Appeal Brief, para. 20.
[91] Appeal Brief, para. 19.
[92] Appeal Brief, paras 21, 23.
[93] Prosecutor's Response, paras 13, 18.
[94] Prosecutor's Response, para. 13.
[95] Prosecutor's Response, paras 14-15.
[96] Prosecutor's Response, para. 15.
[97] Prosecutor's Response, para. 16.
[98] Prosecutor's Response, paras 17-18.

that P-1847 was materially influenced by improper interference despite his denial.[99] They contend that the Trial Chamber took a meticulous approach to analysing P-1847's denials of interference by taking into account relevant factual circumstances, after which it reasonably concluded that improper interference did take place.[100] They further aver that the Trial Chamber's consideration concerning the likelihood of a witness admitting interference was only one of many factors considered by the Chamber and even if such finding was incorrect, it would not have materially affected the Trial Chamber's decision.[101]

3. Determination by the Appeals Chamber

54. Under this ground of appeal, the Defence submits that the Trial Chamber erred in law by disregarding the fact that P-1847 denied having been subject to interference, based on the assumption that the witness would not have admitted to having been interfered with; and by "fail[ing] to provide a reasoned decision on this point".[102] It further submits that "this error of law led the [Trial] Chamber to misappreciate the facts, and erroneously conclude that Witness P-1847 was subjected to improper interference".[103] The Appeals Chamber will address these arguments in turn.

55. The Appeals Chamber recalls the second requirement of rule 68(2)(d)(i) of the Rules, which provides that the chamber must be satisfied that

> the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion.

56. Furthermore, rule 68(2)(d)(ii) of the Rules specifies that

> [f]or the purposes of sub-rule (d)(i), an improper interference may relate, *inter alia*, to the physical, economic or other interests of the person.

57. Concerning the alleged lack of reasoning, the Appeals Chamber recalls that "the extent of the reasoning will depend on the circumstances of the case"; that while a chamber "must identify which facts it found to be relevant in coming to its conclusion",

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[99] Victims' Response, paras 24-34.
[100] Victims' Response, paras 25-26, 29.
[101] Victims' Response, paras 32-33.
[102] *See* Appeal Brief, paras 18-19.
[103] *See* Appeal Brief, paras 18-20.

it is not required to individually set out and "recit[e] each and every factor that was before [it]"; and that "[r]elatively sparse reasoning will not amount to an error if it is nonetheless sufficiently clear to discern the basis for the finding challenged on appeal".[104]

58. With respect to the Defence's arguments relating to the Trial Chamber's alleged failure to consider or give sufficient weight to the witness's denial of having been subject to interference, based on an "unsupported assumption", the Appeals Chamber considers that the Defence misrepresents the Impugned Decision. Contrary to the Defence's submissions, the Trial Chamber based its conclusion on various relevant factors and concrete factual observations. The witness's denial of interference was only one of them. The Trial Chamber noted several incidents suggesting direct and indirect interference with the witness and provided sufficient reasons for its conclusion on this point. In particular, the Trial Chamber noted, as a preliminary matter, that the likelihood of a witness openly admitting to having been subject to improper interference was "close to nil", and that if rule 68(2)(d) of the Rules were applicable only in cases where a witness explicitly admits to having been interfered with, its field of application would be "extremely limited, perhaps even non-existent and its insertion as an amendment to the original [r]ule 68 of the Rules pointless".[105] The Trial Chamber duly noted that the witness denied having been subject to interference, and gave reasons why it considered that these denials did "not alter its conclusion" that the witness was interfered with in relation to his testimony.[106] In this regard, the Trial Chamber considered the witness's indication of his concerns following the aforementioned incidents and the fact that they were of a nature to intimidate the witness, as well as the witness's demeanour in court and the change in attitude between the first and second day of testimony.[107]

59. Furthermore, the Defence has not demonstrated that the Trial Chamber erred or abused its discretion by noting that, based on the facts of the present case, "the likelihood of such a person openly admitting to such interference is close to nil".[108] In

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[104] *See, for example*, *The Prosecutor v. Mahamat Said Abdel Kani*, 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'", 17 May 2022, ICC-01/14-01/21-111-Red, para. 45 (footnotes omitted), *referring to* relevant jurisprudence.
[105] Impugned Decision, para. 66.
[106] Impugned Decision, para. 65.
[107] Impugned Decision, paras 65-69.
[108] Impugned Decision, para. 66.

any event, even if the Trial Chamber erred in relying on this consideration, as mentioned above, this was only one among other factors considered by the Trial Chamber, and consequently, such error would not have materially affected the outcome of the Impugned Decision.

60. As regards the Defence's claim regarding the Trial Chamber's purported failure to engage with the argument pertaining to the [REDACTED],[109] the Appeals Chamber recalls that there is no requirement for a trial chamber to address every single submission of the parties. The Trial Chamber reasonably concluded that the witness had been improperly interfered with in relation to his testimony, and it was not required to make any further findings on the exact nature of such interference.

61. The Appeals Chamber is not persuaded by the Defence's contention that the Trial Chamber made contradictory findings concerning the impact of the witness's communications with third parties during his testimony. In this regard, the Appeals Chamber notes that the Trial Chamber, "having reviewed the communications provided by the Prosecut[or]", concluded that the witness's alleged conversations with third parties during his stay in The Hague were "not determinative", explaining that "at best, the [w]itness may have been exchanging with others at the time of his testimony […] through means as yet unclear to the [Trial] Chamber"; and that "[a]side from whether it was in fact the [w]itness communicating in this way", these messages were "inconclusive for the purpose of determining whether the [w]itness's failure to give evidence with respect to material aspects in his Prior Recorded Testimony was materially influenced by improper interference".[110] On the other hand, the Trial Chamber found the information concerning [REDACTED] another witness the day before his second day of testimony "of significance", based on the specific content [REDACTED].[111] The Appeals Chamber does not find any contradiction in these findings.

62. Lastly, the Appeals Chamber considers that the Defence has failed to substantiate its submissions concerning the Trial Chamber's alleged failure to consider the "undue pressure exerted by the Prosecution investigators" when questioning the witness on the

[109] Appeal Brief, para. 23.
[110] Impugned Decision, paras 57-58.
[111] Impugned Decision, para. 64.

discrepancies with his Prior Recorded Testimony.[112] The Defence merely refers to arguments developed in previous filings.[113] Since the arguments have not been substantiated on appeal, they are dismissed.[114]

63. In view of the above, the Appeals Chamber finds that the Defence has failed to demonstrate that the Trial Chamber committed an error of law or fact, or that it abused its discretion. Accordingly, the Appeals Chamber rejects the second ground of appeal.

C. Third ground of appeal: Alleged error in the interpretation of the "interests of justice" requirement

1. Relevant part of the Impugned Decision

64. Noting that the concept of "interests of justice" is "not defined in the Court's legal framework", the Trial Chamber found that it needs to be interpreted "in the specific context of [r]ule 68(2)(d) of the Rules", and "to reflect the specific purpose behind admitting the prior recorded testimony of a person who has been subject to interference".[115] In this respect, it found it "informative that Rule 92 *quinquies* of the [ICTY Rules of Procedure and Evidence], on which [r]ule 68(2)(d) was based, included in the notion of 'interests of justice', *inter alia*, the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference".[116] The Trial Chamber considered that rule 68(2)(d) of the Rules, "as another reactive measure against potential witness interference, shares the purpose of contempt proceedings [under article 70 of the Statute], to protect the integrity of the proceedings by reacting to the behaviour of persons that impedes the discovery of the truth and the Court's ability to fulfil its mandate".[117] The Trial Chamber also considered that "the underling purpose of [r]ule 68(2)(d) of the Rules is to provide a means to address potential witness interference and preserve the integrity of the proceedings".[118]

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[112] Appeal Brief, para. 23.
[113] Appeal Brief, fn 40, *referring to* Defence Response to Rule 68(2)(d) Request, para. 28.
[114] *See, for example*, Appeals Chamber, *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment", 15 December 2022, ICC-02/04-01/15-2022-Red, paras 91-97.
[115] Impugned Decision, paras 24-25.
[116] Impugned Decision, para. 26.
[117] Impugned Decision, para. 27.
[118] Impugned Decision, paras 27, 82.

65. In the present case, in concluding that "the interests of justice [were] best served by the Prior Recorded Testimony being introduced" pursuant to rule 68(2)(d) of the Rules,[119] the Trial Chamber noted that (i) "rule 68(2)(d)(iv) of the Rules does not prohibit the introduction of a prior recorded testimony which goes to proof of acts and conduct of the accused";[120] (ii) "by long-standing jurisprudence", "'prior recorded testimony' which may be introduced under [r]ule 68(2)(d) of the Rules […] includes statements taken pursuant to [r]ule 111 of the Rules";[121] (iii) the "Defence had sufficient opportunity to question the [w]itness" since "[c]learly, as regards the alleged acts and conduct of Mr Ngaïssona, the Prosecut[or] did try to elicit the relevant incriminating evidence" contained in the Prior Recorded Testimony;[122] (iv) "the failure of the [w]itness to testify on material aspects in the Prior Recorded Testimony has been materially influenced by improper interference";[123] (v) [REDACTED][124] and (vi) "in relation to the parts of the Prior Recorded Testimony discussing the alleged acts and conduct of Mr Ngaïssona, the [Trial] Chamber [had] received other evidence relating to these matters".[125]

2. Summary of the submissions

66. The Defence submits that the Trial Chamber erred in law in its interpretation of the "interests of justice" requirement by finding that rule 68(2)(d)'s purpose is the same as contempt proceedings, and by failing to find that the requirement is linked to the main purpose of rule 68 of the Rules, namely to expedite trial proceedings.[126] The Defence argues that "due to the significant weight the [Trial] Chamber placed on the subsidiary aim of [r]ule 68(2)(d) which is to react to witness interference, [it] conducted a distorted assessment of the different countervailing interests that must be taken into

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[119] Impugned Decision, para. 93.
[120] Impugned Decision, para. 86.
[121] Impugned Decision, para. 87. *See also* rule 111(1) of the Rules which provides: "A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall also be noted when someone has not signed the record as well as the reasons therefore".
[122] Impugned Decision, para. 88.
[123] Impugned Decision, para. 90.
[124] Impugned Decision, para. 91.
[125] Impugned Decision, para. 92.
[126] Appeal Brief, Heading C., at p. 12; *see also* paras 25-35.

account when determining whether introducing a statement is in the interests of justice under [r]ule 68(2)(d)(i)".[127]

67. Specifically, the Defence argues that the Trial Chamber (i) failed to determine whether such introduction would contribute to the overarching aim of rule 68(2) of the Rules, which is the expeditiousness of the proceedings;[128] (ii) gave excessive weight to "the subsidiary aim of [r]ule 68(2) of the Rules, which is to react to witness interference", and to its finding of witness interference;[129] (iii) failed to take into account that the improper interference was based on third party individuals and not on the conduct of [REDACTED] or Mr Ngaïssona, despite the involvement of a party in the interference being a factor that trial chambers should consider when determining whether it is in the interests of justice to introduce a prior recorded testimony under rule 68(2)(d) of the Rules;[130] and (iv) without a finding on an involvement by Mr Ngaïssona or the Defence, there is nothing to counterbalance the particularly prejudicial effect of introducing P-1847's Prior Recorded Testimony.[131]

68. The Prosecutor submits that the third ground of appeal should be dismissed as the Trial Chamber properly found that the interests of justice were best served by introducing P-1847's Prior Recorded Testimony into evidence under rule 68(2)(d) of the Rules, and that the Defence failed to show any error of law or fact.[132] In support, the Prosecutor avers that (i) the Trial Chamber correctly assessed the interests of justice requirement with regard to the purpose of rule 68(2)(d) of the Rules to protect the integrity of the proceedings and the Court's truth-seeking mandate;[133] (ii) the Defence's reliance on the *Al Hassan* OA4 Judgment is misplaced as this judgment concerns rule 68(2)(b) of the Rules, the primary purpose of which is to expedite proceedings and streamline evidence presentation;[134] (iii) the Trial Chamber did consider and properly weigh the facts that the Prior Recorded Testimony pertains to the acts and conduct of Mr Ngaïssona, that the interference was not linked to the accused or someone close to

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[127] Appeal Brief, paras 32-35.
[128] Appeal Brief, paras 28, 30.
[129] Appeal Brief, paras 32-33.
[130] Appeal Brief, paras 33-34, *referring to* *Ruto and Sang* Rule 68 Decision, para. 44; Working Group on Lessons Learnt Report, para. 34.
[131] Appeal Brief, para. 35.
[132] Prosecutor's Response, paras 19-20.
[133] Prosecutor's Response, para. 21.
[134] Prosecutor's Response, para. 22.

him, and that the Defence had sufficient opportunity to question the witness;[135] and that (iv) the Defence fails to show that the Trial Chamber erred in applying these factors in its interests of justice analysis or in exercising its discretion.[136]

69. The Victims submit that the third ground of appeal should be dismissed.[137] At the outset, the Victims argue that the Defence's allegations of error of fact or misapplication of the "interests of justice" requirement exceed the scope of the issue certified by the Trial Chamber and therefore should be summarily dismissed.[138] Concerning the alleged error of law, the Victims contend that the Defence construes this requirement too narrowly, namely to expedite the proceedings,[139] and misinterprets the object and purpose of rule 68(2)(d) of the Rules, "which is to avoid witness interference and deter such actions" that "comes in hand in hand with the general purpose and object of the whole rule 68 of the Rules as intended by the drafters".[140]

3. Determination by the Appeals Chamber

70. Under this ground of appeal, the Defence submits that the Trial Chamber erred in law in its interpretation and application of the "interests of justice" requirement under rule 68(2)(d) of the Rules.[141]

71. The Appeals Chamber recalls that the fourth requirement under rule 68(2)(d)(i) of the Rules provides that "[p]rior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that […] the interests of justice are best served by the prior recorded testimony being introduced".

72. As a preliminary matter, the Appeals Chamber notes the Victims' submission that the Defence's allegations of error of fact or misapplication of the "interests of justice" requirement exceed the scope of the relevant issue certified for appeal, and thus should be summarily dismissed.[142] In this regard, the Appeals Chamber recalls that it will not consider arguments of an appellant that go beyond the issue for which leave to appeal

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[135] Prosecutor's Response, para. 23.
[136] Prosecutor's Response, para. 23.
[137] Victims' Response, para. 40.
[138] Victims' Response, para. 36.
[139] Victims' Response, para. 37.
[140] Victims' Response, paras 37-39.
[141] *See* Appeal Brief, paras 25-35.
[142] Victims' Response, para. 36.

was granted, or those that are "not intrinsically linked to the issue as defined by the chamber granting leave".[143]

73. In the case at hand, the Trial Chamber certified the issue in relation to the "interests of justice" as follows:

> Whether the Chamber erred in law in its interpretation of the Rule 68(2)(d)(i) "interests 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.[144]

74. The Appeals Chamber notes that the Defence's allegations in relation to the "interests of justice" requirement are linked with the broader argument relating to the Trial Chamber's alleged erroneous interpretation and application of the "interests of justice" requirement under rule 68(2)(d)(i) of the Rules, and, therefore, considers that they do not exceed the scope of the issue certified by the Trial Chamber.

75. Concerning the concept of "interests of justice", the Appeals Chamber notes the Trial Chamber's findings that since "the Court's legal framework does not define the concept of 'interests of justice', […] its meaning must […] be interpreted in the specific context of [r]ule 68(2)(d) of the Rules",[145] and that "the understanding of 'interests of justice' under [r]ule 68(2)(d) of the Rules needs to reflect the specific purpose behind admitting the prior recorded testimony of a person who has been subject to interference".[146] In this respect, the Appeals Chamber recalls its previous finding that "it is not possible, in the abstract, to define exhaustively what might be 'in the interests of justice': this will depend upon all relevant factors and circumstances of a particular

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[143] *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the oral decision of Trial Chamber I of 26 September 2022, 7 March 2023, ICC-02/05-01/20-893-Conf (OA11), para. 48. *See also The Prosecutor v. Mahamat Said Abdel Kani*, Decision on the admissibility of the appeal, 25 October 2022, ICC-01/14-01/21-514 (OA5), para. 24.
[144] Decision on the Request for Leave to Appeal, paras 2, 6-7.
[145] Impugned Decision, para. 24.
[146] Impugned Decision, para. 25.

case".[147] The Appeals Chamber considers that the Trial Chamber's findings are in line with the established jurisprudence in this regard.

76. Regarding the Defence's arguments about the overarching aim of rule 68(2) of the Rules, "which is to expedite the proceedings and streamline evidence" and the "subsidiary aim specific to" rule 68(2)(d) of the Rules,[148] the Appeals Chamber recalls its finding above concerning the purpose of rule 68(2)(d) of the Rules,[149] and considers that the Trial Chamber correctly took into account the purpose of this provision when assessing the "interests of justice" requirement. The Defence's arguments in this regard are therefore rejected.

77. With respect to the Defence's contention regarding the Trial Chamber's alleged failure to consider that improper interference was linked to third party individuals, the Appeals Chamber notes that while the Trial Chamber found that "linking such interference to an accused or someone close to him" "is not required", it considered that such a link "may be a factor in determining whether introduction of a prior recorded testimony is in the interests of justice",[150] and duly noted that in the case of P-1847, the interference was "both direct, through him being confronted by others with information circulating […] about him testifying 'against [Mr] Ngaïssona', and indirect" without linking this interference to the Defence or the accused.[151] Consequently, the Appeals Chamber rejects the Defence's argument in this regard.

78. Lastly, the Appeals Chamber observes that the Trial Chamber's conclusion was based on an assessment of various relevant factors. In addition to the purpose of rule 68(2)(d) of the Rules, the Trial Chamber also considered (i) that rule 68(2)(d)(iv)

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[147] Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 10 November 2011, ICC-01/09-02/11-365 (OA3), paras 2, 69. *See also The Prosecutior v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, 13 May 2022, ICC-01/12-01/18-2222-Anx, para. 5 (In the context of rule 68(2)(b)(i) of the Rules, Judge Luz del Carmen Ibáñez Carranza opined that "[o]ne of the most important factors of the discretionary assessment under rule 68(2)(b)(i) is the concept of the 'interests of justice'. It involves, *inter alia*, consideration of the determination of the truth, fairness and effectiveness of the proceedings, in keeping with the object and purpose of the Statute, respecting the rights of all parties and participants, and not only a consideration of judicial economy").
[148] Appeal Brief, paras 28-29.
[149] *See* paragraphs 40-42 above.
[150] Impugned Decision, para. 90.
[151] Impugned Decision, paras 69-70.

of the Rules does not prohibit the introduction of a prior recorded testimony which goes to proof of acts and conduct of the accused, and that it is clear from the drafting history of the rule that this factor would have to be interpreted with more flexibility than the comparable requirement under rule 68(2)(b) of the Rules; (ii) the timing of the Rule 68(2)(d) Request and the fact that "prior recorded testimony" within the meaning of rule 68(2)(d) of the Rules includes statements taken pursuant to rule 111 of the Rules; (iii) that the Defence had an opportunity to question the witness on the alleged acts and conduct of Mr Ngaïssona; (iv) that the witness's failure to testify on material aspects of his Prior Recorded Testimony had been materially influenced by improper interference; and (v) that it has received other evidence in relation to the parts of P-1847's Prior Recorded Testimony discussing the alleged acts and conduct of Mr Ngaïssona.[152] Moreover, the Trial Chamber noted with concern the information provided by the Prosecutor according to which [REDACTED].[153]

79. In light of the foregoing, the Appeals Chamber finds that the Defence has failed to show any error of the Trial Chamber in its interpretation and application of the "interests of justice" requirement under rule 68(2)(d) of the Rules, and in finding that the interests of justice were best served by the witness's Prior Recorded Testimony being introduced pursuant to this provision. Having rejected all of the Defence's arguments, the Appeals Chamber rejects the third ground of appeal.

D. Fourth ground of appeal: Alleged abuse of discretion by failing to duly consider relevant factors

1. Relevant part of the Impugned Decision

80. In its determination of whether the interests of justice were best served by the Prior Recorded Testimony being introduced, the Trial Chamber found that when making its assessment under rule 68(2)(d) of the Rules, it "may also consider whether a prior recorded testimony goes to the 'acts and conduct' of the accused".[154] In this regard, it noted that while rule 68(2)(d)(iv) of the Rules does not preclude the introduction of prior recorded testimony going to the acts and conduct of the accused,

[152] Impugned Decision, paras 86-92.
[153] Impugned Decision, para. 91.
[154] Impugned Decision, para. 34.

it provides that this may be a factor against the introduction of the evidence.[155] It further considered that according to the drafting history of rule 68(2)(d) of the Rules, and in light of the additional burden placed on the parties when faced with an intimidated witness, including the need to establish interference, rule 68(2)(d)(iv) of the Rules should be more permissive of "acts and conduct" evidence when compared to rule 68(2)(b) of the Rules.[156] Lastly, it noted that when allowing the submission of prior recorded testimony referring to acts and conduct of the accused, it has ensured that this introduction is not prejudicial to or inconsistent with the rights of the accused.[157]

81. As for the Defence's arguments according to which the introduction of the Prior Recorded Testimony would be against the interests of justice, the Trial Chamber noted, first, that "rule 68(2)(d)(iv) of the Rules does not prohibit the introduction of a prior recorded testimony which goes to proof of acts and conduct of the accused. Even more so, it was clear in the mind of the drafters of the rule that this factor would have to be interpreted with more flexibility than the comparable requirement under [r]ule 68(2)(b) of the Rules".[158]

82. The Trial Chamber found that, in particular in relation to the parts of the Prior Recorded Testimony discussing the alleged acts and conduct of Mr Ngaïssona, it had received other evidence relating to these matters.[159]

83. In the instant case, when assessing whether the Prior Recorded Testimony concerned the acts and conduct of the accused and whether its introduction would be prejudicial to or inconsistent with the rights of the accused, the Trial Chamber noted that P-1847's Prior Recorded Testimony "makes extensive reference to the alleged acts and conduct, in particular, of Mr Ngaïssona and, to a more limited extent of Mr Yekatom".[160] With regard to Mr Ngaïssona, the Trial Chamber further noted that the Prosecutor attempted to elicit relevant incriminating information concerning Mr Ngaïssona and at times, when the witness's statements in court deviated from his Prior Recorded Testimony, the Presiding Judge of the Trial Chamber posed questions

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[155] Impugned Decision, para. 34.
[156] Impugned Decision, para. 35, *referring to* Working Group on Lessons Learnt Report, para. 38.
[157] Impugned Decision, para. 36.
[158] Impugned Decision, para. 86.
[159] Impugned Decision, para. 92.
[160] Impugned Decision, para. 99.

to the witness referring to relevant extracts of his Prior Recorded Testimony. Consequently, the Trial Chamber was satisfied that the Ngaïssona Defence was put in a position to fully and meaningfully question P-1847.[161]

84. The Trial Chamber further held that, "[i]n any event, in the context of its deliberations on the judgment pursuant to article 74 of the Statute, it [would] weigh the probative value and reliability of the witness's Prior Recorded Testimony, considering the nature of the evidence provided by the witness, any references to the acts and conduct of the accused, and whether the evidence contained in the Prior Recorded Testimony is corroborated by any other evidence submitted before the [Trial] Chamber".[162] On the basis of these observations, it found that the introduction of P-1847's Prior Recorded Testimony was not prejudicial to or inconsistent with the rights of the accused.[163]

2. Summary of the submissions

85. The Defence submits that, by finding that rule 68(2)(iv) of the Rules does not contain a blanket prohibition of introducing statements concerning 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 requirements under [r]ule 68(2)(b)", the Trial Chamber "found that P-1847's [P]rior [R]ecorded [T]estimony was corroborated with respect to the acts and conduct of Mr Ngaïssona".[164] The Defence submits that, in doing so, the Trial Chamber abused its discretion by failing to consider relevant factors in determining that it was appropriate to allow the introduction of P-1847's Prior Recorded Testimony.[165]

86. Specifically, the Defence argues that the factor provided in rule 68(2)(iv) of the Rules should not have been interpreted with any degree of flexibility since, by contrast to ICTY Rule 92 *quinquies*, the Working Group listed rule 68(2)(d)(iv) of the Rules as the only factor under the "interests of justice" criterion and included it as a specific safeguard to protect the accused's rights.[166] It further avers that the Trial Chamber failed

[161] Impugned Decision, paras 101-103.
[162] Impugned Decision, para. 104.
[163] Impugned Decision, para. 105.
[164] Appeal Brief, para. 36, *referring to* Impugned Decision, para. 86.
[165] Appeal Brief, para. 36.
[166] Appeal Brief, paras 37-38.

to "give due consideration to the centrality of [P-1847]'s evidence in the case of Mr Ngaïssona" and to apply the concept of corroboration with due care, and that due to the lack of corroboration of the material aspects in P-1847's statement, it should have found that it would be inappropriate to introduce the portions relating to Mr Ngaïssona's acts and conduct.[167]

87. The Prosecutor submits that the fourth ground of appeal should be dismissed because the Trial Chamber, in concluding that the introduction of P-1847's Prior Recorded Testimony would best serve the interests of justice and was not prejudicial to or inconsistent with the rights of the accused, carefully considered that (i) P-1847's Prior Recorded Testimony relates to the acts and conduct of Mr Ngaïssona; (ii) the Defence had the opportunity to question the witness on these acts and conduct; and (iii) there was other evidence on relevant matters.[168] The Prosecutor further argues that corroboration is not legally required for a witness's prior recorded testimony to be introduced under rule 68(2)(d) of the Rules even if it goes to the acts and conduct of an accused.[169] He also avers that the Defence "seems to conflate the notion of 'corroborative' evidence with the notion of 'cumulative' evidence".[170] Lastly, the Prosecutor urges the Appeals Chamber to dismiss the Defence's argument that rule 68(2)(d)(iv) of the Rules should not have been interpreted with any degree of flexibility. In this respect, the Prosecutor notes that this provision is not subsumed in the "interests of justice" requirement under rule 68(2)(d)(i) of the Rules but is rather a distinct factor guiding a chamber's exercise of discretion to decide against the introduction of the statement even if it is satisfied that all the mandatory requirements under rule 68(2)(d)(i) of the Rules are met.[171]

88. The Victims submit that the fourth ground of appeal should be dismissed as the Trial Chamber reasonably concluded that the Prior Recorded Testimony could be submitted into evidence despite the references to the accused's acts and conduct.[172] According to the Victims, the Defence misinterpreted the Trial Chamber's holistic assessment which was based on "a plethora of factors" and not only on the

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[167] Appeal Brief, paras 39-44.
[168] Prosecutor's Response, paras 24-27.
[169] Prosecutor's Response, para. 28.
[170] Prosecutor's Response, paras 28-29.
[171] Prosecutor's Response, paras 30-31.
[172] Victims' Response, paras 41-47.

consideration that rule 68(2)(d) of the Rules should be more permissive of acts and conduct evidence than rule 68(2)(b) of the Rules.[173] Specifically, the Victims note that (i) rule 68(2)(d)(iv) of the Rules is not an absolute bar to introducing a prior recorded testimony which goes to proof of acts and conduct of an accused; (ii) the comparison between rule 68(2)(b) and (d) of the Rules was valid and in line with the contextual assessment alongside the objective and purpose of the provision; (iii) the Trial Chamber, in the exercise of its discretion in this specific case, considered all relevant factors, including regarding potential prejudice to the accused, and provided a reasoned decision; and that (iv) the Defence misrepresents the Impugned Decision and "misconceives the evaluation of evidence [...] at the deliberation phase […] with the admissibility stage" in arguing that the acts and conduct evidence lacks sufficient corroboration and that the Trial Chamber did not apply the concept of corroboration with due care.[174]

3. Determination by the Appeals Chamber

89. Under this ground of appeal, the Defence submits that the Trial Chamber, by misinterpreting rule 68(2)(d)(iv) of the Rules, found that P-1847's Prior Recorded Testimony was corroborated with respect to the acts and conduct of Mr Ngaïssona, and that, in so doing, it abused its discretion by failing to consider relevant factors.[175]

90. The Appeals Chamber recalls that rule 68(2)(d)(iv) of the Rules provides:

> 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.

91. The Appeals Chamber further recalls that according to rule 68(1) of the Rules, and subject to the specific requirements under the relevant sub-rules being met, a trial chamber may allow the introduction of prior recorded testimony only if such introduction "would not be prejudicial to or inconsistent with the rights of the accused".

92. In the case at hand, the Appeals Chamber notes the Defence's contention that the Trial Chamber "fail[ed] to consider relevant factors"[176] and "only considered that

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[173] Victims' Response, para. 42.
[174] Victims' Response, paras 43-47.
[175] *See* Appeal Brief, para. 36, *referring to* Impugned Decision, para. 86.
[176] Appeal Brief, p. 16.

[r]ule 68(2)(d) has a less stringent standard than [r]ule 68(2)(b)".[177] The Appeals Chamber considers that the Defence misinterprets the Impugned Decision by singling out a general observation in isolation from the other factors considered by the Trial Chamber.

93. In the Impugned Decision, the Trial Chamber recalled the fundamental difference between rule 68(2)(b) on the one hand, and rule 68(2)(d) on the other, noting that the latter does not prohibit the introduction of evidence going to proof of acts and conduct of the accused. In this context, it referred to the drafting history of the rule, indicating the relative flexibility in interpretation of this factor.[178] Against this background, the Trial Chamber subsequently turned to the relevant considerations in the instant case and assessed whether or not in relation to P-1847's Prior Recorded Testimony, the introduction of the Prior Recorded Testimony, including the evidence related to the acts and conduct of Mr Ngaïssona, would be prejudicial to or inconsistent with the rights of the accused.[179]

94. The Trial Chamber noted that P-1847's Prior Recorded Testimony makes "extensive reference" to the alleged acts and conduct of Mr Ngaïssona.[180] In this regard, it first correctly recalled that the fact that the Prior Recorded Testimony refers to acts and conduct of the accused "is no absolute bar to its introduction".[181] The Appeals Chamber recalls that, in contrast to rule 68(2)(b) of the Rules, rule 68(2)(d) of the Rules does not preclude the introduction of a prior recorded testimony that goes to proof of acts and conduct of the accused.[182] Rather, in accordance with the express language of the sub-rule, the fact that the prior recorded testimony goes to acts and conduct "may be a factor against its introduction, or part of it". This is a matter for the trial chamber's consideration in making its discretionary decision with respect to the particular prior recorded testimony in issue.

95. The Trial Chamber further considered that the Defence was put in a position to "fully and meaningfully" question the witness.[183] Moreover, when assessing whether

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[177] Appeal Brief, p. 16, Heading "D", and para. 36.
[178] Impugned Decision para. 86.
[179] Impugned Decision, paras 99-105.
[180] Impugned Decision, para. 99.
[181] Impugned Decision, para. 100.
[182] The same distinction exists between rule 68(2)(b) and rule 68(2)(c) of the Rules.
[183] Impugned Decision, para. 103; *see also* para. 88.

the interests of justice were best served by the introduction of P-1847's evidence, the Trial Chamber also considered that, in particular in relation to the parts of the Prior Recorded Testimony discussing the acts and conduct of Mr Ngaïssona, it had received other evidence relating to these matters, providing examples of such evidence.[184]

96. Finally, the Trial Chamber recalled that in its deliberations on the judgment pursuant to article 74 of the Statute, it would weigh the probative value and reliability of the witness's Prior Recorded Testimony.[185] A holistic reading of the Impugned Decision therefore shows that the Trial Chamber duly balanced any prejudice to Mr Ngaïssona caused by the introduction of the Prior Recorded Testimony, despite it going to proof of the acts and conduct of Mr Ngaïssona, along with other relevant factors, including the testimony provided by other witnesses on similar facts.

97. Turning to the Defence's argument that the Trial Chamber failed to "appl[y] the concept of corroboration with due care" for the purposes of authorising the introduction of evidence under rule 68(2)(d) of the Rules, the Appeals Chamber finds this argument to be misconceived for the reasons that follow.

98. First, the Appeals Chamber notes that provided that the trial chamber is satisfied that the requirements for the introduction of prior recorded testimony under rule 68(2)(d)(i) of the Rules are met, the decision whether to allow the introduction of a witness's prior recorded testimony is a discretionary one. Each prior recorded testimony must be assessed on a case-by-case basis, based on the circumstances before the chamber.

99. According to rule 68(1) of the Rules, a trial chamber may allow the introduction of prior recorded testimony only if such introduction "would not be prejudicial to or inconsistent with the rights of the accused". In assessing this issue, the trial chamber may take into account a number of factors including, for example, whether the evidence relates to issues that are not materially in dispute; whether that evidence is not central

[184] Impugned Decision, para. 92.
[185] Impugned Decision, para. 104.

to core issues in the case, but only provides relevant background information; and whether the evidence is corroborative of other evidence.[186]

100. In this respect, the Appeals Chamber further recalls that these "are not requirements but, rather, factors that may be considered in assessing whether the introduction of prior recorded testimony […] is prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally".[187]

101. Accordingly, while not a requirement, the existence of corroborative evidence in relation to the prior recorded testimony as a whole may be a relevant factor for assessing any prejudice or inconsistency with the rights of the accused arising from its introduction, as required under rule 68(1) of the Rules.

102. In the case at hand, the Appeals Chamber considers that the Trial Chamber acted within the remits of its discretion and in line with rule 68(2)(d) of the Rules in concluding that the introduction of P-1847's Prior Recorded Testimony, including the portions related to the acts and conduct of Mr Ngaïssona, was not prejudicial to or inconsistent with the rights of the accused. As recalled above, the Trial Chamber first considered that the Defence was put in a position to "fully and meaningfully" question the witness.[188] It also duly examined whether the relevant aspects of the evidence going to proof of the acts and conduct of the accused in the Prior Recorded Testimony were mentioned by other witnesses who appeared before the Chamber, and identified several examples regarding various aspects.[189] The Appeals Chamber recalls that corroboration "is a matter of appreciation on a case by case basis",[190] and that to be considered as corroborative, different testimonies do not need to be "identical in all aspects or describe the same fact in the same way", but "must confirm, even if in different ways, the same fact".[191] In any event, given the stage of the proceedings, the Trial Chamber's

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[186] *See* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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", 3 May 2011, ICC-01/05-01/08-1386 (OA5 OA6) (hereinafter: "*Bemba* OA5 OA6 Judgment"), para. 78.
[187] *The Prosecutor v. Laurent Gbagbo and Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, ICC-02/11-01/15-744 (OA8), para. 69, *referring to* *Bemba* OA5 OA6 Judgment.
[188] Impugned Decision, para. 103.
[189] Impugned Decision, para. 92.
[190] *Gbagbo and Blé Goudé* Appeal Judgment, para. 358.
[191] *Ntaganda* A A2 Judgment, para. 672.

assessment may be possible only at a general level in relation to broad themes discussed by the witness, and it does not predetermine the manner in which the evidence will be subsequently assessed and relied upon by the Trial Chamber for the purpose of its judgment pursuant to article 74 of the Statute.[192]

103. Finally, the Trial Chamber noted that in its deliberations on the judgment pursuant to article 74 of the Statute, it would weigh the probative value and reliability of the witness's Prior Recorded Testimony, considering the nature of the evidence provided by the witness, any references to the acts and conduct of the accused, and whether the evidence contained in the Prior Recorded Testimony was corroborated by any other evidence submitted before it.[193]

104. In view of the above, the Appeals Chamber finds that the Defence has failed to demonstrate any error or abuse of discretion in the Trial Chamber's determination in this regard. The Appeals Chamber therefore rejects the fourth ground of appeal.

E. Fifth ground of appeal: Alleged error in the assessment of prejudice resulting from to lack of opportunity to meaningfully question the witness

1. Relevant part of the Impugned Decision

105. In its assessment whether the introduction of P-1847's Prior Recorded Testimony, in particular the portions going to proof of the acts and conduct of the accused, would be prejudicial to or inconsistent with the rights of the accused, the Trial Chamber examined whether the Defence was put in a position to fully and meaningfully question the witness with knowledge of the material aspects of his Prior Recorded Testimony at issue.[194] Noting the relevant finding in the *Ruto and Sang* OA10 Judgment[195] and the Prosecutor's attempt to elicit from the witness in court relevant incriminating information as regards Mr Ngaïssona which was also contained in the Prior Recorded Testimony,[196] the Trial Chamber found that the Defence was "put in a position to fully

[192] *See also* Trial Chamber VI, Decision on the Prosecution's Request under Rule 68(2)(c) to Introduce the Prior Recorded Testimony of Six Witnesses, 26 October 2022, ICC-01/14-01/21-506-Red, paras 24-25.
[193] Impugned Decision, para. 104.
[194] Impugned Decision, para. 103.
[195] Impugned Decision, para. 101, *referring to* *Ruto and Sang* OA10 Judgment, para. 93.
[196] Impugned Decision, para. 103.

and meaningfully question the witness",[197] since there was "no doubt as to what the material aspects at issue were, and that they concerned the incriminating evidence the Prosecut[or] [had] attempted to elicit".[198] In concluding that the introduction of the Prior Recorded Testimony was not prejudicial to or inconsistent with the rights of the accused,[199] the Trial Chamber also recalled that

> in the context of its deliberations on the judgment pursuant to [a]rticle 74 of the Statute, the Chamber will weigh the probative value and reliability of the Prior Recorded Testimony, considering the nature of the evidence provided by the Witness, any references to the acts and conduct of the accused, and whether the evidence contained in the Prior Recorded Testimony is corroborated by any other evidence submitted before the Chamber.[200]

2. Summary of the submissions

106. The Defence submits that the Trial Chamber erred in law by "impermissibly linking two distinct criteria" that must be met under rule 68(2)(d) of the Rules, namely (i) that reasonable efforts be made to secure all material facts known to the witness under rule 68(2)(d)(i) of the Rules; and (ii) respect of the accused's right under article 67(1)(e) of the Statute to have a meaningful opportunity to examine the witness.[201] By finding that the latter requirement was met because the Prosecutor had made all reasonable efforts to question the witness on material aspects of his Prior Recorded Testimony concerning the acts and conduct of Mr Ngaïssona, the Defence argues that the Trial Chamber erred in law, which "resulted in a manifestly unfair interpretation" of the right of an accused to examine witnesses against him or her under article 67 of the Statute, and misinterpreted the relevant finding in the *Ruto and Sang* OA10 Judgment.[202] The Defence avers that the Trial Chamber should have conducted a separate analysis regarding prejudice to the accused, and since "this is a separate criterion of [r]ule 68(2)(d)(i)", it erred in reasoning "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".[203] In the Defence's view, under the Trial Chamber's approach, "[a]ny time the Prosecution

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[197] Impugned Decision, para. 103.
[198] Impugned Decision, para. 103.
[199] Impugned Decision, para. 105.
[200] Impugned Decision, para. 104.
[201] Appeal Brief, paras 45-53.
[202] Appeal Brief, paras 51-52.
[203] Appeal Brief, paras 45-47, 51-52.

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 [a]rticle 67(1)(e)", "render[ing] the critical safeguards […] meaningless".[204]

107. Concerning the alleged violation of Mr Ngaïssona's fair trial rights under article 67 of the Statute, the Defence contends that its decision not to examine the witness on the incriminating evidence contained in the Prior Recorded Testimony, which the Prosecutor failed to adduce in court, was not a "strategic choice", but rather Mr Ngaïssona's exercise of his right under article 67 of the Statute to not place on the record evidence that the Prosecutor could potentially use to show that Mr Ngaïssona contributed to the charged crimes.[205]

108. The Prosecutor submits that the fifth ground of appeal should be dismissed as the Trial Chamber correctly found that introducing P-1847's Prior Recorded Testimony into evidence was not prejudicial to or inconsistent with the rights of the accused, especially since the Defence was in a position to meaningfully question P-1847.[206]

109. In support, the Prosecutor contends that (i) the Trial Chamber did not impermissibly link two distinct criteria under rule 68(2)(d) of the Rules;[207] (ii) the Defence misrepresents the Impugned Decision in arguing that under the Trial Chamber's approach, a finding that the Prosecutor made all reasonable efforts to secure all material facts known to the witness would automatically lead to a finding that there was no prejudice;[208] (iii) the Defence had an opportunity to meaningfully elicit evidence that could explain why the information contained in the Prior Recorded Testimony was incorrect or unreliable and provide reasons for discrepancies without itself placing any incriminating evidence on the record;[209] (iv) the Trial Chamber's approach was not inconsistent with the *Ruto and Sang* OA10 Judgment, given that the situation before the Trial Chamber was "significantly different" from that of *Ruto and Sang*;[210] (v) the Defence's reading of the *Ruto and Sang* OA10 Judgment would render rule 68(2)(d) of

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[204] Appeal Brief, para. 47.
[205] Appeal Brief, para. 49.
[206] Prosecutor's Response, paras 32, 33-34.
[207] Prosecutor's Response, para. 35.
[208] Prosecutor's Response, para. 36.
[209] Prosecutor's Response, para. 37.
[210] Prosecutor's Response, paras 40-41.

the Rules effectively inapplicable;[211] and (vi) even if the Trial Chamber had erred in finding that the Defence was in a position to meaningfully question P-1847, such error would not have materially affected the decision because the Trial Chamber also stressed that it would weigh the probative value and reliability of the Prior Recorded Testimony in its judgment deliberations.[212]

110. The Victims submit that the fifth ground of appeal should be dismissed as the Trial Chamber correctly found that the accused's right to examine the witness was not violated.[213] They argue that the Defence appears to conflate an error of fact with an error of law, and that, since the Trial Chamber's assessment of prejudice was a question of fact, the Defence was required to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber did.[214] According to the Victims, the Defence has failed to satisfy this standard since the Impugned Decision was reasonable and within the ambit of the Trial Chamber's discretion, considering the specific circumstances of the case.[215] Noting further the caveats recalled by the Trial Chamber in respect of its final assessment of the evidence, the Victims contend that the Trial Chamber did not violate the minimum fair trial rights of Mr Ngaïssona.[216]

3. Determination by the Appeals Chamber

111. Under this ground of appeal, the Defence submits that the Trial Chamber erred in law by finding that the introduction of the Prior Recorded Testimony was not prejudicial to the accused because the Defence was aware of which material aspects of the statement the Prosecutor had attempted, but ultimately failed, to elicit from the witness, and therefore had an opportunity to meaningfully question the witness.[217]

112. The Appeals Chamber recalls that article 67(1)(e) of the Statute provides that the accused shall be entitled to "examine, or have examined, the witnesses against him or her". Concerning the Defence's reliance on this provision, the Appeals Chamber observes that, as correctly noted by the Prosecutor, there is no requirement under

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[211] Prosecutor's Response, para. 42.
[212] Prosecutor's Response, para. 43.
[213] Victims' Response, paras 49-55.
[214] Victims' Response, paras 49-50.
[215] Victims' Response, paras 50-52.
[216] Victims' Response, paras 50-54.
[217] *See* Appeal Brief, paras 45-53.

rule 68(2)(d) of the Rules for an accused to have a meaningful opportunity to question the witness.[218] Such requirement also does not apply to the scenarios envisaged under rule 68(2)(b) and (c), and under rule 68(2)(d) where the witness fails to attend. In all these circumstances, the defence would not normally have an opportunity to question the witness. As such, this factor is one among various factors a chamber may consider in its assessment whether submission of the evidence in a specific case and in view of the other circumstances at hand would be prejudicial to or inconsistent with the rights of the accused.

113. In this context, the Appeals Chamber is not persuaded by the Defence's argument that the Trial Chamber 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 known to the witness […], and that the Defence must have a meaningful opportunity to examine the witness".[219] While the former is a requirement under rule 68(2)(d)(i) of the Rules, the latter is not. Accordingly, the Trial Chamber explicitly examined whether, and was satisfied that, reasonable efforts have been made to secure all material facts. Conversely, the question whether the Defence had a meaningful opportunity to examine the witness, while not a requirement under rule 68(2)(d)(i) of the Rules, was considered by the Trial Chamber when assessing the interests of justice under rule 68(2)(d)(i), and potential prejudice under rule 68(1), together with other factors. Consequently, the Defence's contention misrepresents the Impugned Decision in arguing that under the Trial Chamber's approach, finding that the Prosecutor made reasonable efforts to secure all material facts known to the witness, would automatically result in finding that there was no prejudice to the rights of an accused.

114. The Appeals Chamber is equally not persuaded by the Defence's argument that "the Appeals Chamber precedent in *Ruto and Sang* does not support [the Trial Chamber's] interpretation of the Defence being placed in a position to meaningfully examine [w]itness P-1847".[220] In the present case, the Trial Chamber recalled the relevant finding in the *Ruto and Sang* OA10 Judgment that "in cases in which witnesses recant their prior recorded testimony and incriminating evidence is not elicited by the

[218] *See* Prosecutor's Response, para. 35.
[219] *See* Appeal Brief, para. 45.
[220] *See* Appeal Brief, para. 51.

calling party, even if the accused had an opportunity to question these witnesses, such questioning does not amount to meaningful cross-examination".[221] The Trial Chamber, "[b]earing in mind the Appeals Chamber's position", noted the particular situation concerning the references to the alleged acts and conduct of Mr Ngaïssona, and found that the Defence was "put in a position to fully and meaningfully question the [w]itness".[222] In particular, it found that (i) "the Prosecutor attempted to elicit relevant incriminating information" that was contained in the Prior Recorded Testimony; (ii) "[i]t was clear and unambiguous from [the questioning of the Prosecutor and the Presiding Judge of the Trial Chamber] that while the Prosecution tried to elicit the relevant evidence, the [w]itness plainly failed to give evidence on material aspects"; and that (iii) the "essential difference[s]" between the witness's testimony in court and his Prior Recorded Testimony, as well as the repeated attempts by both the Prosecutor and the Presiding Judge to find explanations for such differences, "left no doubt as to what the material aspects at issue were, and that they concerned the incriminating evidence the Prosecut[or] [had] attempted to elicit".[223] The Appeals Chamber finds no error in the Trial Chamber's reliance on these circumstances to determine that the Defence had an opportunity to examine the witness on the material aspects included in his Prior Recorded Testimony.

115. Concerning the Defence's arguments relating to its decision not to examine the witness,[224] the Appeals Chamber is of the view that this choice made by the Defence cannot be equated with an absence of opportunity to meaningfully question the witness. Rather, the Defence, having had this opportunity, was aware of it and accepted the potential risks associated with its choice.

116. Finally, as recalled above,[225] the opportunity for the Defence to question the witness was only one factor among others the Trial Chamber considered in its assessment of whether the introduction of P-1847's Prior Recorded Testimony would be prejudicial to or inconsistent with the rights of the accused.

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[221] Impugned Decision, para. 101, *referring to* *Ruto and Sang* OA10 Judgment, para. 93.
[222] Impugned Decision, para. 103.
[223] Impugned Decision, para. 103.
[224] *See* Appeal Brief, paras 49-50.
[225] *See* paragraphs 95 and 102 above.

117. In view of the above, the Appeals Chamber finds that the Defence has failed to demonstrate any error of the Trial Chamber in this regard. Accordingly, the Appeals Chamber rejects the fifth ground of appeal.

F. Sixth ground of appeal: Alleged abuse of discretion in the assessment of prejudice by failing to consider the timing of the Rule 68(2)(d) Request

1. Relevant part of the Impugned Decision

118. In its assessment of whether the interests of justice were best served by the Prior Recorded Testimony being introduced, the Trial Chamber, with reference to a submission by the defence team for Mr Yekatom (hereinafter: "*Yekatom* Defence") concerning the timing of the Rule 68(2)(d) Request, stated:

> While the Chamber agrees that the Prosecut[or] could have considered presenting the Request sooner, there was no statutory requirement for it to do so. The Defence will still be in a position to address any aspects it may wish to explore further in the context of other submissions or during the questioning of witnesses it will call in the course of its own presentation of evidence.[226]

2. Summary of the submissions

119. The Defence submits that the Trial Chamber failed to consider that the untimely nature of the Rule 68(2)(d) Request had an impact on Mr Ngaïssona's right under article 67(1)(a) of the Statute "to be informed promptly and in detail of the nature, cause and content of the charge".[227] The Defence argues that when P-1847 disavowed his Prior Recorded Testimony regarding the acts and conduct of Mr Ngaïssona, it revised its strategy with respect to the Prosecutor's allegations regarding Mr Ngaïssona's acts and conduct in Cameroon, and questioned the remaining witnesses who testified on the events in Cameroon in accordance with its new strategy.[228] Had the Defence known that the Prior Recorded Testimony would be subsequently introduced, it would have taken the material aspects into account in the questioning of the remaining witnesses on the specific subject of Mr Ngaïssona's acts and conduct in Cameroon.[229] Further,

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[226] Impugned Decision, para. 85.
[227] Appeal Brief, paras 54, 58.
[228] Appeal Brief, para. 55.
[229] Appeal Brief, para. 56.

the Defence submits that the Trial Chamber erred in finding that the prejudice could be mitigated by the possibility of the Defence to make submissions on P-1847's statements or to impugn the Prior Recorded Testimony with its own evidence.[230]

120. The Prosecutor submits that the sixth ground of appeal should be dismissed because the Trial Chamber properly found that the timing of the introduction of P-1847's Prior Recorded Testimony was not prejudicial to or inconsistent with Mr Ngaïssona's rights.[231] He notes that the Prosecutor submitted the Rule 68(2)(d) Request "before the [Trial] Chamber's deadline for [r]ule 68(2)(c) and other requests to submit evidence in writing",[232] and argues that (i) the accused's right under article 67(1)(a) of the Statute to be informed of the charges against him is not affected by the timing of the Rule 68(2)(d) Request since the Defence misinterprets the scope of the concept of "charges" under article 67(1)(a) of the Statute, given the *Bemba* OA5 OA6 Judgment;[233] (ii) the Defence has failed to demonstrate that the timing of the Rule 68(2)(d) Request caused the accused prejudice, considering that the Prosecutor's case has not changed as a result of P-1847's failure to testify and given that the Defence does not explain how its strategy would have changed if it had been aware of a potential application under rule 68(2)(d) of the Rules;[234] and that (iii) the Trial Chamber considered the Defence's ability to address any aspects it may wish in the course of its own presentation of evidence.[235]

121. The Victims submit that the sixth ground of appeal should be dismissed as the Trial Chamber reasonably determined that the timing of the introduction of P-1847's Prior Recorded Testimony was not unduly prejudicial to or inconsistent with the rights of the accused.[236] In support, the Victims aver that (i) the Defence has failed to show that the Trial Chamber failed to consider the impact of the timing of the Rule 68(2)(d) Request;[237] (ii) the Defence's contention that it was not apprised of a potential rule 68(2)(d) application is inapposite since this possibility was mentioned by the Prosecutor as early as three days after the end of P-1847's testimony and subsequently

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[230] Appeal Brief, paras 57-58.
[231] Prosecutor's Response, para. 44.
[232] Prosecutor's Response, para. 44.
[233] Prosecutor's Response, para. 45, *referring to* *Bemba* OA5 OA6 Judgment, para. 64.
[234] Prosecutor's Response, para. 46.
[235] Prosecutor's Response, para. 47.
[236] Victims' Response, paras 56-60.
[237] Victims' Response, para. 57.

by the Trial Chamber in June 2021;[238] and that (iii) even if the Prosecutor or the Trial Chamber would not have referred to such a possibility, the Defence should have reasonably known that such an application could follow and should have planned their strategy accordingly.[239]

3. Determination by the Appeals Chamber

122. Under this ground of appeal, the Defence submits that the Trial Chamber erred in the assessment of prejudice and, in particular, it abused its discretion by failing to consider the impact of the "untimely nature" of the Rule 68(2)(d) Request on Mr Ngaïssona's right under article 67(1)(a) of the Statute.[240]

123. The Appeals Chamber first notes that in its response to the Rule 68(2)(d) Request, the Defence did not make any material submissions on the timing of the request. Further, the Appeals Chamber observes that the Trial Chamber specifically considered the timing of the Rule 68(2)(d) Request, when addressing a submission by the *Yekatom* Defence.[241] While recognising that the Prosecutor could have filed the request earlier, the Trial Chamber stated that there was no statutory obligation to do so.[242] In this regard, the Appeals Chamber notes that, by filing the Rule 68(2)(d) Request on 7 July 2023, the Prosecutor did not violate any statutory time limit or any deadline set by the Trial Chamber for the filing of such requests.[243]

124. Moreover, the Appeals Chamber considers that in the Appeal Brief, the Defence has failed to substantiate its contention that the timing of the Rule 68(2)(d) Request impacts Mr Ngaïssona's right under article 67(1)(a) of the Statute "to be informed promptly and in detail of the nature, cause and content of the charge".[244] In this regard, the Appeals Chamber notes that the Defence had been provided with and had an opportunity to examine P-1847's Prior Recorded Testimony in the context of its preparations for the witness's testimony. In addition, the Appeals Chamber recalls that

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[238] Victims' Response, para. 58.
[239] Victims' Response, para. 59.
[240] *See* Appeal Brief, paras 54-59.
[241] Impugned Decision, para. 85.
[242] Impugned Decision, para. 85.
[243] *See* Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence), ICC-01/14-01/18-1892, para. 5 ("The Chamber hereby sets the time limit for any further requests by the Prosecution to submit evidence in writing as part of the Prosecut[or]'s presentation of evidence on 25 August 2023" (emphasis in original omitted)).
[244] Appeal Brief, paras 54, 58.

the Defence had been put on notice of a potential application under rule 68(2) of the Rules with respect to P-1847 already in April 2021, when the Prosecutor responded to a Defence's objection to the Prosecutor's request for formal submission of the witness's Prior Recorded Testimony, and subsequently in June 2021, when the Trial Chamber, in its decision rejecting the Prosecutor's request, stated, *inter alia*, that this ruling was without prejudice to consideration of any request under rule 68(2) of the Rules that may be submitted in compliance with the applicable requirements.[245]

125. The Appeals Chamber therefore finds that, contrary to the Defence's submission, the Trial Chamber considered the timing of the Rule 68(2)(d) Request and, in the exercise of its discretion, after assessing the concrete circumstances of the case, concluded that the introduction of P-1847's Prior Recorded Testimony was not prejudicial to or inconsistent with the rights of the accused.[246] The Defence failed to demonstrate any error or abuse of discretion on this point.

126. In view of the foregoing, the Appeals Chamber rejects the sixth ground of appeal.

VI. APPROPRIATE RELIEF

127. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.[247] In the present case, the Appeals Chamber finds it appropriate to confirm the Impugned Decision.

[245] Registry's Report Annex 1, pp. 2-3.
[246] *See* Impugned Decision, in particular paras 85, 103-104.
[247] *See* rule 158(1) of the Rules.

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

Judge Solomy Balungi Bossa
Presiding

Judge Luz del Carmen Ibáñez Carranza

Judge Gocha Lordkipanidze

Judge Kimberly Prost

Judge Erdenebalsuren Damdin

Dated this 20th day of May 2024

At The Hague, The Netherlands