

**Original: English****No. ICC-01/14-01/18 OA4****Date: 20 May 2024****THE APPEALS CHAMBER****Before:****Judge Solomy Balungi Bossa  
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  
“Third Decision on the Prosecution Requests for Formal Submission of Prior  
Recorded Testimonies pursuant to Rule 68(2)(c) 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 “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”, of 6 October 2023 (ICC-01/14-01/18-2127-Red),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

The decision of Trial Chamber V entitled “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules” is confirmed.

## REASONS

### I. KEY FINDINGS

1. The Appeals Chamber considers that the notion of “unavailability” may cover different situations and needs to be assessed on a case-by-case basis. A witness’s reluctance or unwillingness to testify does not preclude a finding that the witness is “unavailable to testify orally” pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence, if it is established that there are other circumstances that cannot be overcome with reasonable diligence.

2. The Appeals Chamber recalls that, in contrast to rule 68(2)(b) of the Rules, rule 68(2)(c) 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

3. This is the appeal of Mr Patrice-Edouard Ngaïssona against the “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”, rendered on 6 October 2023, in which Trial Chamber V (hereinafter: “Trial Chamber”) introduced into evidence pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (hereinafter: “Rules”) the prior recorded testimonies of, *inter alia*, witnesses P-2269 and P-2602 (hereinafter: “Impugned Decision”).<sup>1</sup> The Defence challenges the part of the Impugned Decision in which the Trial Chamber introduced the prior recorded testimonies of witnesses P-2269 and P-2602, raising four grounds of appeal.

4. 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) of the Statute, in cases where the Appeals Chamber does not hold a hearing, be rendered within four months from the date of the filing of the response to the appeal brief.<sup>2</sup> Any extension of that four-month period must be limited to exceptional circumstances and be explained in detail in a public decision.<sup>3</sup>

5. 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)(d) of the Rules,<sup>4</sup> 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.

---

<sup>1</sup> ICC-01/14-01/18-2127-Conf (public redacted version filed on the same day, [ICC-01/14-01/18-2127-Red](#)).

<sup>2</sup> [Chambers Practice Manual](#), para. 92.

<sup>3</sup> [Chambers Practice Manual](#), para. 93.

<sup>4</sup> See [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).

### III. PROCEDURAL HISTORY

#### A. Proceedings before the Trial Chamber

6. On 9 November 2020, the Prosecutor filed his final list of witnesses, which included P-2602 and P-2269.<sup>5</sup>

7. On 31 January 2023, the Trial Chamber granted the Prosecutor's requests to summon P-2602 and P-2269.<sup>6</sup>

8. On 16 May 2023, the Registry informed the parties and participants that according to the information received from the authorities tasked with notifying the summonses to appear, witnesses P-2602 and P-2269 are deceased.<sup>7</sup>

9. On 4 July 2023, the Prosecutor, in compliance with the time limit set in the Trial Chamber's further directions of 29 May 2023,<sup>8</sup> requested the submission of P-2269's and P-2602's prior recorded testimonies pursuant to rule 68(2)(c) of the Rules.<sup>9</sup>

10. On 6 October 2023, the Trial Chamber issued the Impugned Decision, granting the Prosecutor's requests for the submission of P-2269's and P-2602's prior recorded testimonies pursuant to rule 68(2)(c) of the Rules.<sup>10</sup>

---

<sup>5</sup> Annex A to the Prosecution's List of Witnesses and Evidence, ICC-01/14-01/18-724-Conf-AnxA.

<sup>6</sup> Decision on the Prosecution Requests to Summon Witnesses P-2602 and P-2269, 31 January 2023, ICC-01/14-01/18-1738-Conf (hereinafter: "Decision on the Prosecutor's Summons Requests"), para. 17, p. 8. *See also* Prosecution's Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness, 8 December 2022, ICC-01/14-01/18-1690-Conf-Exp, confidential *ex parte*, only available to the Prosecutor and the Registry (confidential redacted version registered on the same day, ICC-01/14-01/18-1690-Conf-Red); *Requête de l'Accusation sur le fondement des articles 64(6)(b) et 93 du Statut de Rome aux fins de délivrance d'une citation à comparaître au témoin P-2269*, 15 December 2022, ICC-01/14-01/18-1701-Conf-Exp, confidential *ex parte*, only available to the Prosecutor and the Registry (confidential redacted version registered on the same day, ICC-01/14-01/18-1701-Conf-Red), with one confidential *ex parte* annex, only available to the Prosecutor and the Registry.

<sup>7</sup> *See Impugned Decision*, para. 7.

<sup>8</sup> [Further Directions on the Conduct of the Proceedings \(Presentation of Evidence by the CLRV and the Defence\)](#), 29 May 2023, ICC-01/14-01/18-1892, para. 4 ("The Chamber hereby orders the Prosecut[or] to submit any further requests under Rule 68(2)(c) of the Rules no later than 7 July 2023").

<sup>9</sup> Prosecution's Request for Submission of the Prior Recorded Testimony of P-2269 pursuant to Rule 68(2)(c), ICC-01/14-01/18-1957-Conf, with confidential annex A; Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-2602 pursuant to Rule 68(2)(c), ICC-01/14-01/18-1958-Conf, with confidential annexes A and B.

<sup>10</sup> *See* footnote 1 above.

11. On 16 October 2023, the Defence team for Mr Ngaïssona (hereinafter: “Defence”) requested leave to appeal the Impugned Decision in respect of three issues (hereinafter: “Request for Leave to Appeal”).<sup>11</sup>

12. On 25 October 2023, the Trial Chamber granted the Request for Leave to Appeal, certifying the three proposed issues.<sup>12</sup>

## **B. Proceedings before the Appeals Chamber**

13. 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,<sup>13</sup> 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 Victims (hereinafter: “Victims”) by five 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.<sup>14</sup>

14. On 15 November 2023, the Defence filed its appeal brief against the Impugned Decision (hereinafter: “Appeal Brief”), raising four grounds of appeal.<sup>15</sup>

---

<sup>11</sup> [Defence Request for Leave to Appeal the “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68\(2\)\(c\) of the Rules”, ICC-01/14-01/18-2127-Conf](#), ICC-01/14-01/18-2146-Conf (public redacted version registered on 1 November 2023, ICC-01/14-01/18-2146-Red).

<sup>12</sup> [Decision on the Ngaïssona Defence Request for Leave to Appeal the Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68\(2\)\(c\) of the Rules](#), ICC-01/14-01/18-2164.

<sup>13</sup> [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).

<sup>14</sup> [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.

<sup>15</sup> [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-

15. On 6 December 2023, the Prosecutor<sup>16</sup> and the common legal representatives of the victims (hereinafter: collectively, “Victims”)<sup>17</sup> filed their respective responses to the Appeal Brief.

#### IV. STANDARD OF REVIEW

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

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

will not defer to the relevant Chamber’s interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.<sup>18</sup>

---

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).

<sup>16</sup> [Prosecution Response to “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-01/14-01/18-2247-Conf (public redacted version (ICC-01/14-01/18-2247-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) (hereinafter: “Prosecutor’s Response”).

<sup>17</sup> [Victims’ Joint Response to the “Ngaïssona Defence Appeal against Trial Chamber V’s ‘Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68\(2\)\(c\) of the Rules’](#), ICC-01/14-01/18-2127-Conf, issued on 6 October 2023” (ICC-01/14-01/18-2207-Conf OA4), ICC-01/14-01/18-2244-Conf (public redacted version (ICC-01/14-01/18-2244-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 (hereinafter: “Victims’ Response”).

<sup>18</sup> *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 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](#)

18. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.<sup>19</sup> 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”.<sup>20</sup>

19. 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.<sup>21</sup>

---

[“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.

<sup>19</sup> [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.

<sup>20</sup> [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.

<sup>21</sup> [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 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



20. 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.<sup>22</sup>

21. Finally, the Appeals Chamber recalls that 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”.<sup>23</sup>

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

## V. MERITS

23. The Defence challenges the Trial Chamber's decision to introduce into evidence the prior recorded testimonies of witnesses P-2269 and P-2602, raising four grounds of appeal.

24. Noting that the Defence's allegations as presented under the second and third grounds of appeal relate to the question of whether the Trial Chamber erred in allowing the introduction of P-2269's prior recorded testimony despite the fact that it touches

---

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.

<sup>22</sup> 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), 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.

<sup>23</sup> [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.

upon the acts and conduct of Mr Ngaissona, the Appeals Chamber will address these grounds of appeal together.

**A. First ground of appeal: Alleged misappreciation and failure to consider relevant facts in the Trial Chamber’s assessment of “unavailability to testify”**

*1. Relevant part of the Impugned Decision*

25. In the Impugned Decision, noting that each request under rule 68 of the Rules would be assessed on a case-by-case basis and with due regard to the specific nature and content of each prior recorded testimony,<sup>24</sup> the Trial Chamber recalled the applicable law as set out in the First Rule 68(2)(c) Decision,<sup>25</sup> in which it found that the term “unavailable” in rule 68(2)(c) of the Rules “must be interpreted broadly”.<sup>26</sup>

26. With respect to witnesses P-2269 and P-2602, the Trial Chamber found that while, on the basis of the information available, it was not in a position to conclude that the witnesses were “in fact dead”,<sup>27</sup> the information showed that the witnesses were “unavailable to testify orally” within the meaning of rule 68(2)(c) of the Rules.<sup>28</sup> In this regard, the Trial Chamber recalled its previous finding, when granting the Prosecutor’s requests to summon P-2269 and P-2602, that the Prosecutor had exhausted all avenues in trying to contact the witnesses.<sup>29</sup>

27. In relation to P-2269, the Trial Chamber also noted that the Central African Republic (hereinafter: “CAR”) authorities failed to successfully locate the witness, and that [REDACTED] charged with executing the summons concluded, based on the information received from [REDACTED], that the witness had died.<sup>30</sup>

---

<sup>24</sup> [Impugned Decision](#), para.19, referring to Trial Chamber V, [Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules](#), 16 October 2020, ICC-01/14-01/18-685 (hereinafter: “Initial Guidance”), paras 28, 34.

<sup>25</sup> [Impugned Decision](#), para. 17, referring to [First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68\(2\)\(c\) of the Rules](#), 12 July 2023, ICC-01/14-01/18-1975-Conf (public redacted version registered on the same day, ICC-01/14-01/18-1975-Red) (hereinafter: “First Rule 68(2)(c) Decision”), paras 17-39.

<sup>26</sup> [First Rule 68\(2\)\(c\) Decision](#), para. 27.

<sup>27</sup> [Impugned Decision](#), paras 31, 51. The Trial Chamber also noted that, in the past, witness P-2269 appeared to have simulated his own death. [Impugned Decision](#), para. 31.

<sup>28</sup> [Impugned Decision](#), paras 32, 52.

<sup>29</sup> [Impugned Decision](#), paras 32, 52, referring to Decision on the Prosecutor’s Summons Requests, paras 15 and 11, respectively.

<sup>30</sup> [Impugned Decision](#), para. 32.

28. Concerning P-2602, the Trial Chamber observed that according to the Prosecutor, the CAR authorities indicated in October and November 2022 that the witness was no longer an active member of the [REDACTED], making it impossible to locate or contact him through the [REDACTED]; that the CAR authorities failed to successfully locate the witness; and that if the witness was “in the bush” [REDACTED], as reported by the Defence, the execution of the summons would be unlikely to succeed.<sup>31</sup>

29. In these circumstances, the Trial Chamber found that even assuming that the witnesses might be alive and that they are unwilling to testify, their “unavailability would not stem from [their] mere reluctance, but rather obstacles that cannot be reasonably overcome”.<sup>32</sup>

## 2. *Summary of the submissions*

30. The Defence submits that the Trial Chamber, in concluding that P-2602’s and P-2269’s respective “unavailability would not stem from [their] mere reluctance, but rather obstacles that cannot be reasonably overcome”, and that they cannot be located, “even assuming [...] that [they are] unwilling to testify”,<sup>33</sup> (i) failed to take into account, or at the very least, to give sufficient weight to the witnesses’ apparent unwillingness to testify;<sup>34</sup> (ii) misappreciated the facts when it misconstrued the withdrawals of cooperation as constitutive of “mere reluctance”;<sup>35</sup> (iii) took into account irrelevant facts and even speculated on the witnesses’ intentions;<sup>36</sup> and (iv) misconstrued the sequence of events by failing to consider that the “obstacles” which could not have been overcome, namely the inability to locate the witnesses, are the consequences of the witnesses’ actions to ignore or subtract themselves from all contacts with the Court after having expressed their unwillingness to testify.<sup>37</sup>

31. The Defence argues that the alleged factual and legal errors materially affected the Impugned Decision, because had the Trial Chamber not committed those errors, it would have concluded that the witnesses’ unavailability stems solely from their

---

<sup>31</sup> [Impugned Decision](#), paras 52-53.

<sup>32</sup> [Impugned Decision](#), paras 32, 53.

<sup>33</sup> [Appeal Brief](#), para. 25, referring to [Impugned Decision](#), paras 32, 53.

<sup>34</sup> [Appeal Brief](#), para. 28.

<sup>35</sup> [Appeal Brief](#), para. 29.

<sup>36</sup> [Appeal Brief](#), para. 30.

<sup>37</sup> [Appeal Brief](#), para. 31.

unwillingness to testify, and it would have therefore rejected the Prosecutor's requests pursuant to rule 68(2)(c) of the Rules.<sup>38</sup>

32. The Prosecutor submits that the first ground of appeal should be dismissed as the Trial Chamber correctly found that the witnesses were unavailable to testify orally, and that the Defence's understanding that a witness who is unwilling to give testimony cannot be "unavailable" within the meaning of rule 68(2)(c) of the Rules is incorrect.<sup>39</sup> In this regard, the Prosecutor argues that, in accordance with the Court's consistent jurisprudence and the drafting history of the provision, the term "unavailable" must be interpreted broadly,<sup>40</sup> and that a witness's subjective unwillingness to testify is not fatal to the application of rule 68(2)(c) of the Rules, as long as the chamber is satisfied that the witness is also objectively unavailable.<sup>41</sup>

33. The Prosecutor contends that, contrary to the Defence's arguments, (i) the Trial Chamber duly noted the information suggesting that the concerned witnesses were unwilling to testify but correctly considered these factors to be irrelevant to its conclusion that the witnesses were unavailable;<sup>42</sup> (ii) the Trial Chamber's reference to the witnesses' "reluctance" was not inaccurate and in any event inconsequential to its conclusion that the witnesses were unavailable;<sup>43</sup> (iii) the Trial Chamber, in concluding that the witnesses were unavailable, correctly found that the Prosecutor, the Court and the CAR authorities had applied reasonable diligence to overcome the fact that the witnesses could not be located or contacted, and correctly assessed that the witnesses' unwillingness to testify *per se* was not dispositive to its conclusion about their unavailability;<sup>44</sup> and (vi) whether there is a causal link between the witnesses'

---

<sup>38</sup> [Appeal Brief](#), para. 32.

<sup>39</sup> [Prosecutor's Response](#), paras 8, 18-24.

<sup>40</sup> [Prosecutor's Response](#), para. 12, referring, *inter alia*, to [First Rule 68\(2\)\(c\) Decision](#), para. 27; Trial Chamber VII, [Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68\(2\)\(c\) of the Rules of Procedure and Evidence'](#), 12 November 2015, ICC-01/05-01/13-1481-Red-Corr (hereinafter: "*Bemba et al.* Rule 68(2)(c) Decision"), para. 16; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68\(2\)\(b\) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68\(2\)\(c\) of the Rules](#), 16 December 2022, ICC-01/12-01/18-2445-Conf-Exp, confidential *ex parte*, only available to the Defence and the Registry (public redacted version filed on the same day, ICC-01/12-01/18-2445-Red) (hereinafter: "*Al Hassan* Decision on Request for Variation of Time Limit"), para. 21.

<sup>41</sup> [Prosecutor's Response](#), paras 13-17.

<sup>42</sup> [Prosecutor's Response](#), para. 19; *see also* para. 23.

<sup>43</sup> [Prosecutor's Response](#), para. 20.

<sup>44</sup> [Prosecutor's Response](#), para. 23; *see also* paras 21-22.

unwillingness to testify and the Court's inability to locate, contact and secure their oral testimony is not determinative.<sup>45</sup> The Prosecutor lastly submits that, in any case, such alleged error would not have materially affected the decision, since, even if the Trial Chamber had erred by not properly considering the witnesses' unwillingness as the root cause of their unavailability, it would still have concluded that the witnesses were objectively unavailable.<sup>46</sup>

34. The Victims submit that the first ground of appeal should be dismissed,<sup>47</sup> because the Trial Chamber correctly assessed the concept of "unavailability" within the meaning of rule 68(2)(c) of the Rules,<sup>48</sup> and considered all relevant facts regarding the witnesses' whereabouts in concluding that the unavailability stemmed from "obstacles that cannot be reasonably overcome".<sup>49</sup> They aver that the Defence misinterprets the relevant law in arguing that in assessing "unavailability", the emphasis has to be placed on the unwillingness to testify.<sup>50</sup> In this respect, the Victims note that the jurisprudence of the Court only recognises that "a simple unwillingness to testify is insufficient to prove the unavailability of a witness",<sup>51</sup> whereas unwillingness to testify, coupled with additional factors, such as a subsequent inability to locate a witness, can represent obstacles that cannot be overcome with reasonable diligence.<sup>52</sup> According to the Victims, the fact that the witnesses were initially or still are unwilling to testify is irrelevant since additional information before the Trial Chamber proved that their situation had changed in a way that rendered them inaccessible or otherwise incapable of testifying orally.<sup>53</sup>

### 3. *Determination by the Appeals Chamber*

35. Under this ground of appeal, the Defence submits that by finding that witnesses P-2269 and P-2602 were unavailable to testify orally due to "obstacles that cannot be

---

<sup>45</sup> [Prosecutor's Response](#), para. 24; *see also* paras 21-23.

<sup>46</sup> [Prosecutor's Response](#), para. 25.

<sup>47</sup> [Victims' Response](#), paras 12, 20.

<sup>48</sup> [Victims' Response](#), para. 13, *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, Annex II.A (hereinafter: "Working Group on Lessons Learnt Report Annex II.A"), para. 29.

<sup>49</sup> [Victims' Response](#), para. 16, *referring, inter alia, to* [Impugned Decision](#), paras 32, 52-53.

<sup>50</sup> [Victims' Response](#), para. 18.

<sup>51</sup> [Victims' Response](#), para. 18 (emphasis in original omitted).

<sup>52</sup> [Victims' Response](#), para. 18, *referring to* Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda, Decision on Prosecution on application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039, 19 May 2016, ICC-01/04-02/06-1325, para. 9.*

<sup>53</sup> [Victims' Response](#), para. 19.

overcome with reasonable diligence” within the meaning of rule 68(2)(c) of the Rules, the Trial Chamber misappreciated the facts, took into account irrelevant facts and failed to take into account relevant facts.<sup>54</sup> For the reasons that follow, the Appeals Chamber considers that the Defence has failed to demonstrate any error in this regard.

36. Rule 68(2)(c) of the Rules provides for the introduction of prior recorded testimony in cases where

[t]he prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally.

37. In such a case, rule 68(2)(c)(i) of the Rules further provides that such testimony may only be introduced “if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability”.

38. The Appeals Chamber considers that the notion of “unavailability” may cover different situations and needs to be assessed on a case-by-case basis. In this respect, the Appeals Chamber notes that, as highlighted in the Working Group Report, the reference to “insurmountable obstacles” in a previous draft version of rule 68(2)(c) of the Rules was considered to “import too high a standard”, and subsequently replaced with “obstacles that cannot be overcome with reasonable diligence”, which may cover not only “the examples that are explicitly” mentioned in the corresponding ICTY Rules of Procedure and Evidence provision, but also “other potential situations that may arise in the course of the Court’s work as a permanent institution”.<sup>55</sup>

39. The Appeals Chamber notes that the Trial Chamber, by recalling the applicable law as set out in the First Rule 68(2)(c) Decision,<sup>56</sup> noted that the term “unavailable” in rule 68(2)(c) of the Rules has been interpreted to cover different situations, including

---

<sup>54</sup> [Appeal Brief](#), para. 24; *see also* Headings A and *i.* at p. 9.

<sup>55</sup> [Working Group on Lessons Learnt Report Annex II.A](#), para. 29. *See also* rule 92 *quater* of the [ICTY Rules of Procedure and Evidence](#), which provides that “[t]he evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally [...]”.

<sup>56</sup> [Impugned Decision](#), para. 17, *referring to* [First Rule 68\(2\)\(c\) Decision](#), paras 17-39.

those where “a witness cannot be located after numerous attempts and efforts”.<sup>57</sup> It also observed that trial chambers have considered that situations where, for instance, a witness is “simply unwilling to testify” or “the Prosecution is unable to locate the witness but further efforts to locate them can still be made” do not fall within the meaning of ‘unavailable’.<sup>58</sup>

40. The Appeals Chamber observes that, in the present case, the Trial Chamber considered all relevant facts regarding the witnesses’ whereabouts. In concluding that the witnesses could not be located, the Trial Chamber considered: (i) its previous finding, when it granted the summons request for P-2602 and P-2269 to appear,<sup>59</sup> that the Prosecutor had exhausted all avenues in trying to contact the witnesses; and (ii) the failure of the CAR authorities to locate them.<sup>60</sup> Contrary to the Defence’s argument, the Trial Chamber gave due weight to the witnesses’ apparent unwillingness to testify, finding that, “even assuming that the witness[es] [were] alive and [were] unwilling to testify”, their unavailability stemmed from “obstacles that cannot be reasonably overcome”, rather than from their reluctance or unwillingness to testify.<sup>61</sup> The fact that the witnesses were initially or still are unwilling to testify was not considered a determinative factor. Instead, the Trial Chamber took into account other factors, such as the subsequent inability to locate the witnesses and the absence of any further available information on their potential whereabouts, and concluded that those factors amounted to “obstacles that cannot be overcome with reasonable diligence” within the meaning of rule 68(2)(c) of the Rules.

41. The Appeals Chamber finds no error in the Trial Chamber’s assessment. A witness’s reluctance or unwillingness to testify does not preclude a finding that the

---

<sup>57</sup> [First Rule 68\(2\)\(c\) Decision](#), para. 27, referring, *inter alia*, to [Bemba et al. Rule 68\(2\)\(c\) Decision](#), para. 16; [Al Hassan Decision on Request for Variation of Time Limit](#), paras 21-29; Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, [Decision on the Prosecution’s second application to introduce the prior recorded testimony of P-0085 under Rule 68\(2\)\(c\)](#), 14 December 2022, ICC-02/05-01/20-834.

<sup>58</sup> [First Rule 68\(2\)\(c\) Decision](#), para. 28, referring to [Al Hassan Decision on Request for Variation of Time Limit](#), para. 23. See also [Second Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68\(2\)\(c\) of the Rules concerning Witness P-1819](#), 11 August 2023, ICC-01/14-01/18-2021, paras 13-14.

<sup>59</sup> Decision on the Prosecutor’s Summons Requests, para. 17, p. 8.

<sup>60</sup> [Impugned Decision](#), paras 32, 52-53. See also [First Rule 68\(2\)\(c\) Decision](#), para. 27 (the Trial Chamber found that a situation where the witnesses “cannot be located after numerous attempts” amounted to “unavailability” within the meaning of rule 68(2)(c) of the Rules).

<sup>61</sup> [Impugned Decision](#), paras 32, 53.

witness is “unavailable to testify orally” pursuant to rule 68(2)(c) of the Rules, if it is established that there are other circumstances that cannot be overcome with reasonable diligence.

42. In light of the above, the Appeals Chamber finds that the Defence has failed to demonstrate that the Trial Chamber erred in finding that the witnesses were “unavailable to testify orally”. Accordingly, the Appeals Chamber rejects the first ground of appeal.

## **B. Second and third grounds of appeal: Alleged errors in applying rule 68(2)(c)(ii) of the Rules considering the “unique nature” of P-2269’s prior recorded testimony**

### *1. Relevant part of the Impugned Decision*

43. The Trial Chamber referred to its First Rule 68(2)(c) Decision, where it recalled that when making its assessment under this provision, it may consider whether the prior recorded testimony goes to the “acts and conduct” of the accused, which, while not precluding the introduction of the testimony, may be a factor against it.<sup>62</sup>

44. In relation to P-2269, the Trial Chamber was of the view that

the information provided by the witness in relation to the accused’s alleged acts and conduct does not create prejudice to an extent which would preclude introduction of the prior recorded testimony. First, at least part of the information concerns events or allegations regarding which other witnesses who testified before the Chamber also provided information on. [...].<sup>63</sup>

45. The Trial Chamber added that:

[T]he Chamber will take into account the fact that P-2269 was not available for examination by the Defence and the rest of the participants, notably in relation to evidence that might be considered as unique. As regards the alleged internal and external inconsistencies of the witness’s statement, the Chamber finds that they are not such that they would preclude the introduction of the statement, and will, in any event, be taken into account by the Chamber when assessing its weight and probative value.<sup>64</sup>

---

<sup>62</sup> [Impugned Decision](#), para. 17, referring to [First Rule 68\(2\)\(c\) Decision](#), paras 17-39, see in particular paras 38-39.

<sup>63</sup> [Impugned Decision](#), para. 36.

<sup>64</sup> [Impugned Decision](#), para. 36.



## 2. *Summary of the submissions*

46. The Defence submits that the Trial Chamber erred in fact in failing to take into account a relevant aspect of P-2269's prior recorded testimony,<sup>65</sup> and in law by failing to provide sufficient reasoning or misapplying rule 68(2)(c) of the Rules.<sup>66</sup>

47. With regard to the alleged error of fact, the Defence argues that, by finding that one of the reasons for allowing the introduction of P-2269's prior recorded testimony in relation to Mr Ngaïssona's acts and conduct is that "at least part of the information concerns events or allegations regarding which other witnesses who testified before the Chamber also provided information on",<sup>67</sup> the Trial Chamber failed to take into account "a crucial aspect" of P-2269's evidence that was not discussed by any other Prosecutor's witnesses.<sup>68</sup> The Defence notably refers to the statement in P-2269's prior recorded testimony [REDACTED], without anyone else being present.<sup>69</sup> According to the Defence, "this allegation goes to the very core of the charges against Mr Ngaïssona",<sup>70</sup> and the Trial Chamber failed to "expressly addres[s] and cautiously asses[s]" the "unique perspective of P-2269's incriminating evidence on key allegations in the case against the accused".<sup>71</sup>

48. Concerning the alleged error of law, the Defence contends that by failing to "address the remaining part of [P-2269's evidence] that was not discussed by testifying witnesses but yet relates to Mr Ngaïssona's alleged acts and conduct",<sup>72</sup> the Impugned Decision "lacks reasoning, and was reached in violation of [r]ule 68(1) of the Rules, at best", and "[a]t worst, the [Trial] Chamber exercised its discretionary powers incorrectly as it misapplie[d] rule 68(2)(c)(ii) of the Rules".<sup>73</sup> This legal error, according to the Defence, vitiates the Impugned Decision and "showcases [...] that the [Trial] Chamber failed to exercise caution when admitting written evidence going to the acts and conduct of the accused without cross-examination".<sup>74</sup>

---

<sup>65</sup> [Appeal Brief](#), paras 36-39.

<sup>66</sup> [Appeal Brief](#), paras 40-46.

<sup>67</sup> [Impugned Decision](#), para. 36.

<sup>68</sup> [Appeal Brief](#), paras 37-39, 42-46, 49.

<sup>69</sup> [Appeal Brief](#), paras 38-39; *see also* para. 48.

<sup>70</sup> [Appeal Brief](#), para. 38; *see also* para. 48.

<sup>71</sup> [Appeal Brief](#), para. 39.

<sup>72</sup> [Appeal Brief](#), para. 42; *see also* para. 44.

<sup>73</sup> [Appeal Brief](#), para. 42; *see also* paras 43-46, 48-49.

<sup>74</sup> [Appeal Brief](#), para. 46.

49. Lastly, the Defence submits that the aforementioned errors materially affected the Impugned Decision.<sup>75</sup>

50. The Prosecutor submits that the Defence's argument that the Trial Chamber erroneously introduced into evidence uncorroborated portions of P-2269's prior recorded testimony stating that [REDACTED] lacks merit and should be rejected.<sup>76</sup> In this regard, the Prosecutor contends, *inter alia*, that the Defence (i) "misstates the legal notion of corroboration" by "conflat[ing] the notion of 'corroborative' evidence with the notion of 'cumulative' evidence";<sup>77</sup> and (ii) misrepresents the relevant "key allegation" as relating to the fact that the witness [REDACTED], whereas the material fact to be established is that "Mr Ngaïssona contributed to the charged crimes, among other contributions, by financing the Anti-Balaka, including for the purchase of weapons".<sup>78</sup> The Prosecutor submits that P-2269's evidence on this point was corroborated by other evidence, including witnesses who testified orally before the Trial Chamber.<sup>79</sup> In any event, even if the Trial Chamber had erred by introducing into evidence that specific portion of testimony, the Prosecutor argues that this would not have materially affected the Impugned Decision because the Trial Chamber specified that it would consider P-2269's unavailability for examination by the Defence and the other participants, especially for evidence that could be considered as unique, and that it would consider such evidence holistically when assessing its weight and probative value.<sup>80</sup>

51. The Prosecutor further submits that the Trial Chamber's decision in authorising the submission of P-2269's evidence was sufficiently reasoned, and that the Defence has failed to identify any alleged error in this respect.<sup>81</sup> Specifically, the Prosecutor argues that the Defence has (i) failed to identify "all [unique] allegations that go to the acts and conduct of the accused" other than the witness [REDACTED];<sup>82</sup> (ii) misinterpreted the Impugned Decision to the extent that the Trial Chamber did not and was not required to make a definitive finding on whether P-2269's prior recorded

---

<sup>75</sup> [Appeal Brief](#), paras 47-50.

<sup>76</sup> [Prosecutor's Response](#), paras 27, 30.

<sup>77</sup> [Prosecutor's Response](#), paras 32-34.

<sup>78</sup> [Prosecutor's Response](#), para. 35.

<sup>79</sup> [Prosecutor's Response](#), paras 35-36.

<sup>80</sup> [Prosecutor's Response](#), para. 37.

<sup>81</sup> [Prosecutor's Response](#), paras 40, 42-43.

<sup>82</sup> [Prosecutor's Response](#), para. 40.

testimony included unique information about Mr Ngaïssona's acts and conduct;<sup>83</sup> and that (iii) in line with the Appeals Chamber's jurisprudence, the Trial Chamber gave sufficient reasons for admitting P-2269's testimony in its entirety.<sup>84</sup> In any event, even if the Trial Chamber had erred in law by giving insufficient reasoning, this would not have materially affected the decision since the Defence's argument that absent the alleged error, the Trial Chamber would have concluded that the extent of the prejudice was larger is unsupported and speculative.<sup>85</sup>

52. The Victims submit that the Trial Chamber did not ignore the alleged uniqueness of P-2269's prior recorded testimony and considered, in line with its discretion, whether the evidence was cumulative or corroborative of other evidence.<sup>86</sup> Even if the Trial Chamber had erred, the Victims argue that the alleged error would not have materially affected the Impugned Decision because a crucial aspect of the Trial Chamber's assessment of the prejudice was that it would consider the witness's unavailability for examination by the Defence in its deliberations pursuant to article 74 of the Statute.<sup>87</sup>

53. Concerning the alleged lack of reasoning, the Victims contend that "in light of [the relevant] principles, and considering that the [Trial] Chamber thoroughly summarised P-2269's evidence" and referred to "evidence that might be considered unique", "it can be reasonably concluded that the [Trial] Chamber correctly applied the law and sufficiently detailed its reasoning", and that it reasonably determined, within the ambit of its discretion, that the introduction of the evidence was not prejudicial to, or inconsistent with, the rights of the accused.<sup>88</sup>

### 3. *Determination by the Appeals Chamber*

54. Under these grounds of appeal, the Defence submits that the Trial Chamber erred in fact and in law when it allowed the introduction of P-2269's prior recorded testimony in its totality, without properly assessing the fact that P-2269's evidence, in some instances uniquely, touches upon Mr Ngaïssona's acts and conducts.<sup>89</sup>

---

<sup>83</sup> [Prosecutor's Response](#), para. 41.

<sup>84</sup> [Prosecutor's Response](#), paras 42-43.

<sup>85</sup> [Prosecutor's Response](#), para. 44.

<sup>86</sup> [Victims' Response](#), paras 22-23.

<sup>87</sup> [Victims' Response](#), paras 24-25.

<sup>88</sup> [Victims' Response](#), para. 28.

<sup>89</sup> [Appeal Brief](#), paras 34-50.

55. Provided that the trial chamber is satisfied that the requirements for the introduction of prior recorded testimony under rule 68(2)(c)(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.<sup>90</sup>

56. The Appeals Chamber recalls that, in contrast to rule 68(2)(b) of the Rules, rule 68(2)(c) does not preclude the introduction of a prior recorded testimony that goes to proof of acts and conduct of the accused.<sup>91</sup> 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.

57. 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 to core issues in the case, but only provides relevant background information; and whether the evidence is corroborative of other evidence.<sup>92</sup>

58. 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".<sup>93</sup>

---

<sup>90</sup> See also [Impugned Decision](#), para. 19.

<sup>91</sup> The same distinction exists between rule 68(2)(b) and rule 68(2)(d) of the Rules.

<sup>92</sup> See, for example, 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.

<sup>93</sup> *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](#).

59. 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.

60. In the present case, having examined the nature and content of P-2269's evidence,<sup>94</sup> and considered the submissions of the parties,<sup>95</sup> the Trial Chamber assessed each of the requirements of the prior recorded testimony and subsequently the existence of evidence relating to the acts and conduct of the accused, as well as the resulting potential prejudice.

61. In particular, after considering whether the conditions under rule 68(2)(c)(i) of the Rules were met,<sup>96</sup> the Trial Chamber noted that P-2269's prior recorded testimony included information related to Mr Ngaïssona's acts and conduct,<sup>97</sup> and concluded that this did not create prejudice of an extent which would preclude its introduction into evidence.<sup>98</sup> In this respect, the Trial Chamber first correctly recalled that there is no absolute bar under rule 68(2)(c) to introducing prior recorded testimony that goes to proof of acts and conduct of the accused.<sup>99</sup> Furthermore, in line with its obligation to ensure that the introduction of the witness's evidence is not prejudicial to or inconsistent with the rights of the accused, the Trial Chamber considered that "at least part of the information concerns events or allegations regarding which other witnesses who testified before the Chamber also provided information on",<sup>100</sup> referring to several examples of such evidence.<sup>101</sup> Finally, the Trial Chamber noted that it would take into account the fact that the Defence and the other participants had not had the opportunity to examine the witness, and that any alleged internal and external inconsistencies in the witness's statement would, in any event, be taken into account when assessing the evidence's weight and probative value.<sup>102</sup>

---

<sup>94</sup> [Impugned Decision](#), paras 27-30.

<sup>95</sup> [Impugned Decision](#), paras 22-26.

<sup>96</sup> [Impugned Decision](#), paras 31-34.

<sup>97</sup> [Impugned Decision](#), para. 35.

<sup>98</sup> [Impugned Decision](#), para. 36.

<sup>99</sup> [Impugned Decision](#), para. 35.

<sup>100</sup> [Impugned Decision](#), para. 36.

<sup>101</sup> [Impugned Decision](#), fn 54.

<sup>102</sup> [Impugned Decision](#), para. 36.

62. In this context, with respect to the Defence’s argument that the Trial Chamber failed to address “a crucial aspect” of P-2269’s evidence, going to “the very core of the charges against Mr Ngaïssona”, which was not discussed by any other Prosecutor’s witnesses and that is purportedly impossible to be corroborated,<sup>103</sup> the Appeals Chamber makes the following observations.

63. First, the Trial Chamber recalled that each request under rule 68 of the Rules would be assessed on a case-by-case basis and with due regard to the specific nature and content of each prior recorded testimony.<sup>104</sup> Second, the Trial Chamber also considered that its determination as to whether a prior recorded testimony can be introduced pursuant to rule 68 of the Rules depends on its consideration of the testimony as a whole.<sup>105</sup> Third, the Trial Chamber did not make a definitive finding on whether P-2269’s prior recorded testimony included unique information about Mr Ngaïssona’s acts and conduct. Rather, the Trial Chamber referred to evidence “that might be considered as unique”.<sup>106</sup> Fourth, from the Impugned Decision, there is no indication that the Trial Chamber failed to consider the part of the testimony identified by the Defence, when conducting its assessment. In this regard, the Appeals Chamber notes the Prosecutor’s submission that this particular portion of the witness’s evidence was in fact corroborated by “multiple evidence, including from witnesses who testified orally before the Trial Chamber”.<sup>107</sup>

64. The Appeals Chamber recalls that corroboration “is a matter of appreciation on a case by case basis”,<sup>108</sup> 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”.<sup>109</sup> In any event, given the stage of the proceedings, the Trial Chamber’s 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

---

<sup>103</sup> [Appeal Brief](#), paras 37-39, 42-46, 48, 49.

<sup>104</sup> [Impugned Decision](#), para. 19, referring to [Initial Guidance](#), paras 28, 34. See also [First Rule 68\(2\)\(c\) Decision](#), para. 37.

<sup>105</sup> [Impugned Decision](#), para. 17, referring to [First Rule 68\(2\)\(c\) Decision](#), paras 17-39, see in particular para. 20.

<sup>106</sup> [Impugned Decision](#), para. 36.

<sup>107</sup> [Prosecutor’s Response](#), para. 36.

<sup>108</sup> [Gbagbo and Blé Goudé Appeal Judgment](#), para. 358.

<sup>109</sup> [Ntaganda A A2 Judgment](#), para. 672.

upon by the Trial Chamber for the purpose of its judgment pursuant to article 74 of the Statute.<sup>110</sup>

65. Furthermore, and particularly with regard to the Defence's allegation that the Trial Chamber failed to properly apply rule 68(2)(c)(ii) of the Rules to the remaining portions of P-2269's prior recorded testimony, or to sufficiently reason its decision, the Appeals Chamber notes that the Trial Chamber acknowledged that some portions of P-2269's prior recorded testimony may concern matters which are not addressed in the evidence provided by other witnesses, and found that, despite this, the introduction of P-2269's prior recorded testimony would not be inconsistent with or prejudicial to Mr Ngaïssona's rights.

66. Specifically, the Appeals Chamber notes that the Trial Chamber found that "the information provided by the witness in relation to the accused's alleged acts and conduct does not create prejudice to an extent which would preclude introduction of the prior recorded testimony".<sup>111</sup> The Trial Chamber was clear that aside from this general consideration of any prejudice or impact on the rights of the accused arising from the introduction of the prior recorded testimony as a whole, it was deferring the assessment of the relevance and probative value of the specific content of the prior recorded testimony to the article 74 judgment deliberations stage.

67. The Appeals Chamber finds that at this stage of the proceedings, the Trial Chamber properly assessed whether the introduction of the witness's prior recorded testimony was prejudicial to or inconsistent with the rights of the accused, and sufficiently explained its assessment. First, the Appeals Chamber is of the view that trial chambers are best placed to assess the prejudice resulting from specific parts of prior recorded testimony introduced under rule 68(2)(c) of the Rules in the context of the overall evidence in a given case and enjoy discretion in this regard. Further, it recalls that corroboration is not a requirement for the introduction of evidence under rule 68(2)(c) of the Rules, and that when considered as a factor, the trial chamber's assessment at this stage may be possible only at a general level in relation to broad

---

<sup>110</sup> 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.

<sup>111</sup> [Impugned Decision](#), para. 36.

themes discussed by the witness. Furthermore, the Appeals Chamber notes that, in the present case, the Trial Chamber found that even if certain portions of P-2269's prior recorded testimony may be considered as "unique", the introduction of his prior recorded testimony would not be inconsistent with or prejudicial to Mr Ngaïssona's rights. The Trial Chamber specified that it would consider, especially with regard to the witness' evidence that "might be considered as unique", that the Defence and the other participants did not have the opportunity to examine the witness, and that any alleged internal and external inconsistency in the witness's prior recorded testimony would be considered when assessing the evidence's weight and probative value.<sup>112</sup>

68. Finally, 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", 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".<sup>113</sup> In light of the aforementioned Trial Chamber's findings, the Appeals Chamber considers that the Defence has failed to show any error in the Impugned Decision in this regard.

69. In light of the above, the Appeals Chamber finds that the Defence has failed to demonstrate that the Trial Chamber erred in its application of rule 68(2)(c) of the Rules and in determining that the introduction of P-2269's prior recorded testimony, including the parts related to the acts and conduct of Mr Ngaïssona, was not prejudicial to or inconsistent with the rights of the accused. Having rejected all Defence's relevant arguments, the Appeals Chamber rejects the second and third grounds of appeal.

---

<sup>112</sup> [Impugned Decision](#), para. 36. See also [First Rule 68\(2\)\(c\) Decision](#), para. 16, and fn 21.

<sup>113</sup> 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.



### **C. Fourth ground of appeal: Alleged error by allowing the introduction of P-2602’s prior recorded testimony on the basis of the Defence’s provisional witness list**

#### *1. Relevant part of the Impugned Decision*

70. Concerning P-2602, and noting the Defence’s argument that “P-2602’s evidence is unique with regard to the Gobere group, [REDACTED]”, the Trial Chamber observed that this was “but one of the many topics touched upon by the witness in his interview, and that other witnesses – some of whom were also in Gobere – provided evidence and were examined in court concerning the relationship between the Anti-Balaka and the ‘Gobere group’”.<sup>114</sup> Furthermore, it noted that the Defence “expect[ed] to call [REDACTED] FACA member to testify about his experience in Gobere”.<sup>115</sup> Moreover, the Trial Chamber noted that the extent to which P-2602’s evidence is corroborated by other witnesses “rather concerns issues of reliability and probative weight, which will be assessed during its judgment deliberations”, together with the fact that the witness was not available for examination by the Defence and the rest of participants, “notably in relation to evidence that might be considered as unique”.<sup>116</sup> Lastly, as to the alleged internal inconsistencies of the statement pointed out by the Defence, the Trial Chamber found that they “are minimal and do not preclude the introduction of the witness’s evidence”.<sup>117</sup>

#### *2. Summary of the submissions*

71. The Defence submits that the Trial Chamber erred in law by taking into account the fact that the Defence expected to call [REDACTED] FACA member to testify about his experience in Gobere, in order to “justify the introduction of P-2602’s unique evidence on Gobere”.<sup>118</sup> According to the Defence, in reaching its conclusion, the Trial Chamber “infringed Mr Ngaïssona’s statutory rights as enshrined in [a]rticle 67(1)(g) and (i) of the Statute”, by imposing a reversal of the burden of proof and the onus of rebuttal.<sup>119</sup> In support, the Defence contends that, given the Prosecutor’s assertion that P-2602’s prior recorded testimony contains “[REDACTED]”,<sup>120</sup> the “[Trial]

---

<sup>114</sup> [Impugned Decision](#), para. 57.

<sup>115</sup> [Impugned Decision](#), para. 57.

<sup>116</sup> [Impugned Decision](#), para. 58.

<sup>117</sup> [Impugned Decision](#), para. 58.

<sup>118</sup> [Appeal Brief](#), para. 53.

<sup>119</sup> [Appeal Brief](#), paras 57; *see also* paras 55-56.

<sup>120</sup> [Appeal Brief](#), para. 55.

Chamber's finding in this regard would force the Defence to call D30-4891", "a provisional witness" "whose [...] status as a witness [was] not definitive",<sup>121</sup> in order to put P-2602's unique evidence on Gobere in an adversarial setting, and to "compensate for the prejudice caused by the introduction of Prosecution evidence through [r]ule 68(2)(c) of the Rules".<sup>122</sup> Lastly, the Defence submits that the aforementioned errors materially affected the Impugned Decision.<sup>123</sup>

72. According to the Prosecutor, the Defence's arguments under this ground of appeal are "predicated on multiple misunderstandings" of the Impugned Decision and should therefore be rejected.<sup>124</sup> Specifically, the Prosecutor submits that the Trial Chamber (i) did not compel the Defence to call D30-4891;<sup>125</sup> (ii) had no reason to rely on D30-4891's potential evidence to "justify" the introduction of P-2602's prior recorded testimony into evidence because P-2602's evidence on the relevant material facts about the Gobere group is not unique and the Trial Chamber only referred to the possibility that some of the witness's evidence could be unique;<sup>126</sup> and (iii) comprehensively assessed whether the introduction of P-2602's prior recorded testimony would be prejudicial to or inconsistent with the rights of the accused, independently of D30-4891.<sup>127</sup> The Prosecutor also submits that, in any event, even if the Appeals Chamber were to find that the Trial Chamber did err in law with this observation, this was of minimal relevance to the Trial Chamber's assessment of prejudice, and consequently would not have materially affected the decision.<sup>128</sup>

73. The Victims submit that the fourth ground of appeal should be dismissed, because it was reasonable for the Trial Chamber to take into account the fact that the Defence was expecting to call [REDACTED] FACA member to testify about his experience in Gobere, and that by considering this factor, the Trial Chamber neither forced the Defence to call the witness nor reversed the burden of proof.<sup>129</sup> Even if such reference was an error, the Victims submit that this did not materially affect the decision because

---

<sup>121</sup> [Appeal Brief](#), paras 54-55.

<sup>122</sup> [Appeal Brief](#), para. 56; *see also* para. 57.

<sup>123</sup> [Appeal Brief](#), paras 58-60.

<sup>124</sup> [Prosecutor's Response](#), para. 47.

<sup>125</sup> [Prosecutor's Response](#), para. 48.

<sup>126</sup> [Prosecutor's Response](#), para. 49.

<sup>127</sup> [Prosecutor's Response](#), para. 50.

<sup>128</sup> [Prosecutor's Response](#), para. 51.

<sup>129</sup> [Victims' Response](#), paras 31-33.

it was only “an *additional* element in the [Trial Chamber’s] assessment of the uniqueness of P-2602’s evidence”.<sup>130</sup>

### 3. *Determination by the Appeals Chamber*

74. Under this ground of appeal, the Defence submits that the Trial Chamber erred in law in taking into account that the Defence was expecting to call, at the time of the Impugned Decision, [REDACTED] FACA member to testify about his experience in Gobere, and that this alleged error materially affected the Impugned Decision.<sup>131</sup> For the reasons that follow, the Appeals Chamber considers that the Defence has failed to demonstrate that the Trial Chamber committed any error in this regard.

75. The Appeals Chamber considers that the Defence misrepresents the Impugned Decision. In particular, the Appeals Chamber notes that the reference to D30-4891 in the Defence’s preliminary list of witnesses was made when addressing the Defence’s submission that P-2602’s evidence was “unique with regard to the ‘Gobere group’ [...]”,<sup>132</sup> and was only one among various factors considered by the Trial Chamber in its assessment of prejudice.<sup>133</sup> Specifically, the Trial Chamber noted that the witness mentions the two accused persons only briefly, “mostly to point out that he does not know ‘anything’ about them in their respective alleged roles during the crisis”.<sup>134</sup> With regard to the specific evidence concerning the “Gobere group”, the Trial Chamber observed that this was one of the many topics addressed by the witness in his interview, and that other witnesses provided evidence concerning the relationship between the Anti-Balaka and the “Gobere group”.<sup>135</sup> Concerning the expected testimony of D30-4891, the Trial Chamber explicitly noted that the witness appeared on the Defence’s “Preliminary List of Witnesses”.<sup>136</sup> Further, the Appeals Chamber underlines that it remains entirely up to the Defence, when designing its strategy to address P-2602’s evidence on Gobere, to decide whether to call D30-4891 or any other witnesses who can testify to the matter. Accordingly, the Appeals Chamber considers that the Trial Chamber did not force the Defence to call D30-4891, nor did it reverse

---

<sup>130</sup> [Victims’ Response](#), paras 34-36 (emphasis in original).

<sup>131</sup> [Appeal Brief](#), paras 53-60.

<sup>132</sup> [Impugned Decision](#), para. 57.

<sup>133</sup> [Impugned Decision](#), paras 57-58.

<sup>134</sup> [Impugned Decision](#), para. 56.

<sup>135</sup> [Impugned Decision](#), para. 57.

<sup>136</sup> [Impugned Decision](#), para. 57, fn 92.

the burden of proof and that the Defence's contentions in this regard are unsubstantiated.

76. Moreover, concerning the Defence's submission that P-2602's evidence is unique, the Trial Chamber did not make any definitive finding as to whether the witness's evidence included "unique" evidence; it rather considered the possibility that some of the witness's evidence might be considered as unique. In this respect, the Trial Chamber noted that the extent to which P-2602's evidence is corroborated by other witnesses concerns issues of reliability and probative weight, which will be assessed during its judgment deliberations, together with the fact that the witness was not available for examination by the Defence and the rest of participants, "notably in relation to evidence that might be considered as unique".<sup>137</sup>

77. The Appeals Chamber therefore finds that the Defence has failed to demonstrate any error or abuse of discretion in this regard. Accordingly, the Appeals Chamber rejects the fourth ground of appeal.

## VI. APPROPRIATE RELIEF

78. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.<sup>138</sup> In the present case, the Appeals Chamber finds it appropriate to confirm the Impugned Decision.

---

<sup>137</sup> [Impugned Decision](#), para. 58.

<sup>138</sup> See rule 158(1) of the Rules.

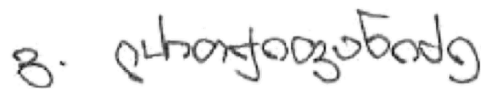
Done in both English and French, the English version being authoritative.



**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