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

APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public

Public redacted version of "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, 6 December 2023

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Introduction

1. The "Decision on the Prosecution Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules"[1] of Trial Chamber V ("Chamber") which introduced P-1847's prior recorded testimony into evidence is legally and factually correct. The Appeal[2] should be dismissed as it fails to show any error of law or fact. In particular:

a. The Chamber correctly held that rule 68(2)(d)(i) applies to situations where a witness recants fundamental aspects of their prior recorded testimony (First Ground);

b. The Chamber correctly found that P-1847 was subjected to improper interference under rule 68(2)(d)(i) (Second Ground);

c. The 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)(i) (Third Ground);

d. The Chamber properly considered that P-1847's prior recorded testimony goes to the acts and conduct of Mr Ngaïssona (Fourth Ground);

e. The 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 Ngaïssona Defence was put in a position to meaningfully question the witness (Fifth Ground);

f. The Chamber correctly found that the introduction of P-1847's prior recoded testimony into evidence was not prejudicial to or inconsistent with Mr Ngaïssona's rights (Sixth Ground).

Confidentiality

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this filing is classified as confidential, as it responds to the Appeal that is subject to the same classification and it refers to confidential parts of the Decision.

[1] ICC-01/14-01/18-2126-Conf and ICC-01/14-01/18-2126-Red ("Decision").
[2] ICC-01/14-01/18-2206-Conf ("Appeal").

Submissions

A. First Ground of Appeal: The Chamber correctly held that rule 68(2)(d)(i) applies to situations where a witness recants fundamental aspects of their prior recorded testimony

3. The Chamber properly assessed rule 68(2)(d)(i)'s requirements and concluded that P-1847 failed to give evidence with respect to material aspects of his prior recorded testimony.[3] It correctly found that rule 68(2)(d) applies where the witness who attends the hearing does not remain silent but recants fundamental aspects of their prior recorded testimony due to improper interference.[4] In the Chamber's reasoning, "failure to testify" encompasses "cases in which a witness substantially deviates from, or outright contradicts, such material aspects once under oath".[5] The Chamber correctly noted that, to the extent that rule 68(2)(d) is intended to enable its consideration of evidence despite witness interference, there is no reason to treat the situation where a witness recants fundamental aspects of their prior recorded testimony differently from where the witness remains silent. It reasoned: "[a] more limited understanding of the rule could lead to a situation in which a person subject to interference could have their prior recorded testimony introduced if they were intimidated into silence, but not if the same intimidation prompted them to recant fundamental aspects of what they said previously".[6] The Trial Chamber in *Ruto & Sang* likewise noted no meaningful distinction between the two situations.[7]

4. The Appellant agrees that P-1847 "substantially deviated from and contradicted his prior recorded statements",[8] but submits this is not a "failure to give evidence" for the purpose of rule 68(2)(d)(i).[9] He reiterates his argument before the Chamber,[10] that the verb "to fail" confines the rule's application to situations where the witness remains silent on material aspects

[3] Decision, paras. 14-16, 42-54.
[4] Decision, para. 15.
[5] Decision, para. 46.
[6] *See* Decision, para. 15 referring to *Ruto & Sang*, Decision on the Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Conf-Corr (public redacted version notified the same day, ICC-01/09-01/11-1938-Corr-Red2) ("*Ruto & Sang* Rule 68 Decision"), para. 41.
[7] *Ruto & Sang* Rule 68 Decision, paras. 40-41.
[8] Appeal, para. 8.
[9] Appeal, para. 7.
[10] Decision, para. 44 addressing ICC-01/14-01/18-2026-Conf, paras. 7-8.

of their prior recorded testimony.[11] This interpretation, based on the incorrect premise that the aim of rule 68(2)(d) is to expedite the proceedings,[12] is contrary to the ordinary meaning of the rule interpreted in context and in light of its object and purpose.

5. First, while the verb "to fail" may "include a concept of inaction or deficiency,"[13] its broader ordinary meaning is "to not succeed in what you are trying to achieve or *are expected to do*".[14] If a witness testifies but recants (in the sense of substantially deviating from, or outright contradicting) material aspects of their prior recorded testimony due to interference, they do not succeed in what is expected of them. Contrary to the Appellant's submission,[15] the Chamber's interpretation is consistent with the ordinary meaning of the term.

6. Second, the Chamber's interpretation is consistent with the Court's statutory framework.[16] It is true that sub-paragraphs (a) to (c) of rule 68(2) address situations where the witness is absent.[17] However, the Appellant minimises the fact that sub-paragraph (d) of rule 68(2) expressly encompasses situations where the witness is *present* at the hearing. He also overly emphasises that sub-paragraphs (a) to (c) of rule 68(2) entail the absence of the witness, to suggest that sub-paragraph (d)(i) of rule 68(2) must likewise be interpreted to require at least the *absence* of ("a gap in") the evidence.[18]

7. However, a good faith contextual interpretation of the rule suggests otherwise. Rule 68 sets out distinct situations which exceptionally allow the introduction of prior recorded testimony into evidence, *in lieu* of oral testimony. Some of these situations require the absence of the witness (i.e. rule 68(2)(a)-(c)), while others do not (rule 68(2)(d), 68(3)). Accordingly, a contextual interpretation of the provision does not support the proposition that a gap in the evidence is generally required under rule 68. The Chamber's interpretation that rule 68(2)(d)(i) applies to situations where a witness recants fundamental aspects of their prior recorded testimony due to interference is thus consistent with the Court's statutory framework and its limited exceptions to the principle of orality enshrined in article 69(2).

[11] Appeal, para. 7.
[12] Appeal, paras. 14, 16, 26.
[13] Appeal para. 7. The Appellant relies upon the definition of the noun "failure", *see* fn. 11.
[14] Cambridge online dictionary, https://dictionary.cambridge.org/dictionary/english/fail, last access 5 December 2023, (emphasis added).
[15] Appeal, paras. 7-8.
[16] *Contra* Appeal, paras. 9-13.
[17] Appeal, para. 9.
[18] *Contra* Appeal, paras. 10-13.

8. Third, the Chamber's interpretation is consistent with the object and purpose of rule 68(2)(d).[19] As the Chamber found, rule 68(2)(d) "is one measure available under the Court's legal framework to address witness interference"[20] and to "preserve the integrity of the proceedings".[21] It "shares the purpose of contempt proceedings by protecting the integrity of the proceedings before the Court by reacting to the behaviour of persons that impedes the discovery of the truth and the Court's ability to fulfil its mandate".[22] The Defence's submission that "any aim of protecting the integrity of the proceedings […] is a subsidiary aim of the overarching aim of Rule 68(2), which is to expedite the proceedings and streamline evidence"[23] depends on an incorrect and selective reading of the drafting history.

9. The overarching object and purpose of the amendments to rule 68 was to "enhanc[e] the efficiency and effectiveness of the Court," as the drafters recognised in their report to the Assembly of States Parties.[24] In this framework, one of the aims was to reduce the length of the proceedings.[25] But the drafting history also shows that rule 68(2)(d) was specifically adopted because "[w]itness interference is a live and ongoing issue" and "[h]aving a provision that is applicable to interference […] creates a broader disincentive for interested persons to interfere with ICC witnesses."[26] Notably, when specifically discussing rule 68(2)(d), the drafters did not refer to the object of expediting the proceedings.[27] Rather, they underscored rule 68(2)(d)'s "deterrent effect, in that there will be no benefit to interfering with a witness if their prior recorded testimony can be admitted to the Trial Chamber as evidence".[28] That there is a connection with interference is further confirmed by rule 68(2)(d)(iii), which was "included to create a link to article 70 of the Statute".[29] Rule 68(2)(d) aims at improving the Court's effectiveness, including by removing obstacles to the expedited progress of the proceedings,[30] avoiding the otherwise devastating consequences to cases before the Court where critical

[19] *Contra* Appeal, paras. 14-16, 26-28.
[20] Decision, para. 27. *Contra* Appeal, para. 27.
[21] Decision, para. 82.
[22] Decision, para. 27.
[23] Appeal, para. 28. *See* also paras. 14, 16, 26-27.
[24] Report of the Working Group on Amendments, ICC-ASP/12/44, Annex I, p.4.
[25] Working Group Report, ICC-ASP/12/37/Add.1, para. 11.
[26] Working Group Report, ICC-ASP/12/37/Add.1, Annex II. A., para. 34.
[27] Working Group Report, ICC-ASP/12/37/Add.1, Annex II.A., pp. 27-29.
[28] Working Group Report, ICC-ASP/12/37/Add.1, Annex II. A., para. 34.
[29] Working Group Report, ICC-ASP/12/37/Add.1, Annex II. A., para. 37.
[30] *See* International Bar Association, ICC Programme Legal Opinion, Rule 68 Amendment Proposal, Assembly of State Parties 12 November 2013, https://www.ibanet.org/document?id=2013-Legal-Opinion-Rule-68, last access 5 December 2023, pp 1-2.

evidence is not before the Court due to a witness having been improperly influenced,[31] and ultimately preserving the Court's ability to fulfil its truth-seeking mandate.

10. The ICTY's rule 92 *quinquies*, which was the basis for rule 68(2)(d), had the same declared object and purpose. The rule was adopted as a result of a working group on procedural and substantive aspects of contempt proceedings, as opposed to the distinct Working Group on Speeding Up Trials.[32] Its purpose was to "enable core proceedings to go forward even where there are attempts to interfere with the administration of justice".[33] The ICTY's rule 92 *quinquies* was therefore not adopted to expedite trial proceedings *per se*, but rather to set aside potential obstacles to the fair and expeditious conduct of proceedings.

11. Consistently with the ordinary meaning of the rule considered in context, and in light of its object and purpose to enable a chamber's consideration of evidence despite witness interference, the Chamber did not legally err by finding that for rule 68(2)(d)(i) there is no meaningful distinction between intimidating a witness into silence and prompting that person, through intimidation, to recant material aspects of their prior recorded testimony. The Chamber properly dismissed this argument at trial.[34] It observed that "failure to testify does not only refer to cases in which a witness […] does not provide any information at all" but also to cases in which a witness due to interference recants material aspects of their prior recorded testimony.[35] After reviewing the facts of this case,[36] the Chamber did not err in concluding that P-1847 had failed to give evidence with respect to material aspects included in his prior recorded testimony.[37] The introduction of his prior testimony into evidence enhances the effectiveness of the proceedings. The First Ground should accordingly be dismissed.

[31] ICC-01/05-01/13-1989-Red, para. 44.
[32] Report of the International Tribunal for the Former Yugoslavia to the Security Council and to General Assembly of the United Nations, A/65/205-S/2010/413, paras. 6-7.
[33] Statement by Judge Patrick Robinson, President of the International Criminal Tribunal for the former Yugoslavia, to the Security Council on 18, June 2010, https://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/100618_pdt_robinson_un_sc_en.pdf, last access 5 December 20023, pp. 3-4.
[34] Decision, para. 44 addressing ICC-01/14-01/18-2026-Conf, paras. 7-8.
[35] Decision, para. 46.
[36] Decision, paras. 47-53.
[37] Decision, para. 54.

B. Second Ground of Appeal: The Chamber correctly found that the witness was subjected to improper interference under 68(2)(d)(i)

12. The Chamber correctly concluded that P-1847's failure to give evidence was materially influenced by improper interference, for the purpose of rule 68(2)(d)(i).[38] It properly defined[39] and applied the law to the facts.[40] It concluded that "had it not been for the improper interference, the Witness's testimony concerning material aspects would have been substantially different".[41] In particular, in its careful five-page assessment of the evidence, the Chamber found that the interference was both direct (by the witness being confronted with information circulating [REDACTED] about his testimony "against Ngaïssona"),[42] and indirect [REDACTED].[43] Notably, the Chamber cautiously found that the witness's communications with individuals during his stay in The Hague was "not determinative" to the situation, and rejected the Prosecution's submission in this regard.[44]

13. The Appellant submits that the Chamber erred in law because, "based on [the] unsupported assumption" that a person subjected to interference is unlikely to openly admit to such interference, it allegedly disregarded the witness's denial of interference.[45] The Appellant argues that this led the Chamber to misappreciate the facts and erroneously conclude that P-1847 was subjected to improper interference.[46] While framed as a legal error, the Appellant seems to effectively argue that the Chamber erred in fact because it should have relied on P-1847's denial and made no findings of interference.[47] In any event, this ground of appeal is premised on misconceptions about the Decision and does not show any legal or factual error.

14. First, the Appellant overlooks that P-1847's denial of interference was only one of multiple circumstances considered by the Chamber.[48] In concluding that P-1847 was subjected

[38] Decision, paras. 17-20, 55-72.
[39] The Chamber found: i. that the test to establish whether the interference materially influenced the failure to testify is whether, had it not been for that interference, the witness would have given substantially different testimony (Decision, paras. 18, 66); ii. that the interference may relate to the physical, psychological, economic, or other interests of the person and may be direct or indirect (Decision, paras. 19, 69); and iii. that the interference need not be attributable to the accused (Decision, paras. 20, 70).
[40] Decision, paras. 57-71.
[41] Decision, para. 71.
[42] Decision, paras. 60-61, 69.
[43] Decision, paras. 62-64, 69.
[44] Decision, paras. 57-58. *See* Appeal, para. 22.
[45] Appeal. para. 18.
[46] Appeal. para. 18.
[47] The Appellant concludes that "the Trial Chamber made a finding of interference that no reasonable trial chamber could make" (Appeal, para. 24).
[48] Decision paras. 57-68.

to improper interference, the Chamber considered: i) the witness's conversation with [REDACTED] who confronted the witness with information circulating [REDACTED] about his testimony "against Ngaïssona".[49] The Chamber noted that the witness spontaneously indicated that this incident "unsettled him and made him want to call the Prosecution".[50] The Chamber further considered ii) [REDACTED].[51] The Chamber noted that the witness indicated that the incident concerned him "[REDACTED]".[52] The Chamber also found significant that iii) another witness had heard [REDACTED] the day before P-1847's second day of testimony.[53] Based on this multi-layered analysis, which the Appellant disregards, the Chamber reasonably found that the P-1847's denial of interference "does not alter its conclusion with regard to the interference with the witness's testimony".[54]

15. Second, the Appellant also disregards that the Chamber gave specific reasons why it did not consider P-1847's denial of interference was credible and capable of altering its conclusion.[55] It found that P-1847 was affected by these incidents since he clearly indicated that they were of "significant concern to him" and [REDACTED].[56] The Chamber observed an "obvious change in the attitude" of P-1847 when comparing his appearance on the first and second days of his testimony. It noted that "[t]he witness's demeanour on his second day of testimony was strikingly different, with the witness appearing closed and clearly feeling uncomfortable."[57] In the Chamber's finding, "the witness's forthcoming manner at the beginning stood in stark contrast to his reluctance thereafter, making it clear that the Witness had changed his disposition in relation to his testimony."[58] In light of these considerations, it was legally correct and factually reasonable for the Chamber to consider P-1847 credible in respect of his accounts of the incidents, and not credible in respect to his denial of interference.[59]

16. Finally, contrary to the Appellant's submission[60] it was also reasonable and legally correct, based on the facts of this case, to consider that "the likelihood of such a person openly

[49] Decision, para. 60.
[50] Decision, para. 61.
[51] Decision, para. 62.
[52] Decision, para. 63 ("[REDACTED]")
[53] Decision, para. 64.
[54] Decision, para. 65.
[55] Decision, paras. 65-68. *Contra* Appeal, para. 19.
[56] Decision, para. 67.
[57] Decision, para. 68.
[58] Decision, para. 68.
[59] *Contra* Appeal, para. 21.
[60] Appeal, paras. 19-20.

admitting to such interference is close to nil".[61] Whether in other instances witnesses have admitted to being subject to interference[62] is beside the point. The Chamber's determination not to consider P-1847's denial credible was based on the evidence in this case and the Chamber's reasonable assessment of the witness's demeanour during his testimony.[63] The Appellant has failed to show that this was erroneous in fact or in law.

17. In any event, even if the Chamber's consideration that "the likelihood of such a person openly admitting to such interference is close to nil"[64] was an "unsupported assumption" which should have been set aside,[65] it would not impact the reasonableness of the Chamber's conclusion that P-1847's denial was not credible and that he was subjected to improper interference. Contrary to the Appellant's unsupported submission,[66] the Chamber's consideration that a person subjected to interference is unlikely to admit interference was immaterial to the Chamber's findings about the two main incidents of interference[67] and on P-1847's demeanour in Court.[68] Ultimately, based on multiple unchallenged findings,[69] the Chamber would have equally concluded that P-1847 had been materially influenced by improper interference for the purpose of rule 68(2)(d)(i).

18. The Second Ground should be dismissed. The Appellant has failed to show any legal or factual error in the Chamber's reasoning and findings. In any event, even if the Chamber had erred by considering that a person subjected to interference is unlikely to admit it, this would not have affected the decision, which was firmly grounded in the Chamber's careful analysis of all the relevant circumstances.

C. Third Ground of Appeal: The Chamber properly found that the interests of justice were best served by introducing P-1847's prior recoded testimony into evidence under 68(2)(d)(i)

19. The Chamber properly found under rule 68(2)(d)(i) that the interests of justice were best served by P-1847's prior recorded testimony being introduced into evidence.[70] It correctly

[61] Decision, para. 66.
[62] Appeal, para. 20
[63] *See* Decision, paras. 67-68.
[64] Decision, para. 66.
[65] Appeal, para. 19.
[66] Appeal para. 23.
[67] Decision, paras. 60-62.
[68] Decision, para. 68.
[69] Decision, paras. 60-65, 67-68.
[70] Decision, para. 93.

defined[71] and applied the law to the facts.[72] In particular, the Chamber found that "interests of justice" under rule 68(2)(d)(i) must reflect "the specific purpose behind admitting the prior testimony of a person who has been subjected to interference."[73] As discussed above,[74] the Chamber correctly identified this purpose as "protecting the integrity of the proceedings […] the discovery of the truth and the Court's ability to fulfil its mandate."[75] The Chamber correctly took the purpose of the provision into account when assessing the interests of justice requirement.

20. The Appellant argues that the Chamber erred in law because rule 68(2)(d)'s purpose is to expedite trial proceedings.[76] Further, had the Chamber correctly interpreted the purpose of the rule and the interests of justice criterion under rule 68(2)(d)(i), it would have weighed the evidence differently,[77] given due consideration to interests militating against its introduction, and rendered a different decision.[78] This ground of appeal should be dismissed as it fails to show any error of law or fact.

21. First, the Chamber correctly identified the purpose of rule 68(2)(d).[79] As discussed above,[80] its purpose, to protect the integrity of the proceeding and the Court's truth-seeking mandate, is consistent with the drafting history of the provision and rule 68's overarching object and purpose to "enhance[e] the efficiency and effectiveness of the Court".[81] Based on this legal finding, the Chamber properly found that introducing P-1847's prior recorded testimony into evidence was "appropriate and called for under the circumstances to preserve the integrity of the proceedings and is, as such, in the interests of justice".[82] The Appellant's argument that the Chamber erred by failing to preliminarily assess "whether introducing the prior recorded testimony [would] expedite the proceedings and streamline evidence"[83] should be dismissed. It incorrectly assumes that rule 68(2)(d)'s sole purpose is to expedite the

[71] Decision, paras. 24-27.
[72] Decision, paras. 79-93.
[73] Decision, para. 25.
[74] *See* above Section A.
[75] Decision, paras. 27, 82, 84. The Chamber found "informative that Rule 92 *quinquies* of the [ICTY Rules of Procedure and Evidence], on which Rule 68(2)(d) was based, included in the notion of 'interests of justice' […] the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference" (Decision, para. 26).
[76] Appeal, para. 26.
[77] Appeal, paras. 33-34.
[78] Appeal, para. 35.
[79] Decision, paras. 25-27, 82. *Contra* Appeal, paras.25-28.
[80] *See* above Section A.
[81] Report of the Working Group on Amendments, ICC-ASP/12/44, Annex I, p.4.
[82] Decision, para. 84.
[83] Appeal, para. 28-32.

proceedings and streamline evidence presentation. Plainly it is not, but rather serves the purpose of ensuring that the Court's mandate is not undermined by witness interference.

22. The Appellant's reliance on the Appeals Chamber's decision in *Al Hassan* is misplaced. That decision is concerned with rule 68(2)(b), the primary purpose of which is, indeed, to expedite proceedings and streamline evidence presentation.[84] Further, the Appeals Chamber recognised the exceptional nature of rule 68 and cautioned that it should be used with care because of the risk of tensions with the right to confront a witness and the principle of equality of arms.[85] However, this does not necessitate "a two part analysis" be conducted to assess whether introduction of evidence under rule 68(2)(d)(i) best serves the interests of justice.[86] To the contrary, the Appeals Chamber recalled that "the chamber's *overarching* duty to ensure compliance with an accused's procedural rights requires a careful analysis of *all* relevant factors for and against the admission of prior recorded testimony in the absence of a witness".[87] This duty is embedded in the language of the Statute and the Rules—including article 69(2) and rule 68(1)—which both require that the introduction of a prior recorded statement is "not prejudicial to or inconsistent with the rights of the accused".[88] The Chamber was fully alive to, and expressly acknowledged its obligation to ensure that introduction of P-1847's prior testimony into evidence would not be prejudicial to or inconsistent with the rights of the accused.[89]

23. In any event, when considering the interests of justice requirement under 68(2)(d)(i), the Chamber took into account and properly weighed the factors raised by the Appellant.[90] In particular, the Chamber considered that the prior recorded testimony pertained to the acts and conduct of Mr Ngaïssona;[91] that the interference was not linked to the accused or someone close to him;[92] and that the Ngaïssona Defence had sufficient opportunity to question the witness.[93] The Appellant disagrees with how the Chamber weighed these factors.[94] But he fails

[84] *See* Appeal, paras. 29-30, fns. 50-53, referring to *Al Hassan*, ICC-01/12-01/18-2222, paras. 78-80, 82-84.
[85] *Al Hassan*, ICC-01/12-01/18-2222, para. 78, 80. *See* Appeal, para. 30.
[86] Appellant, para. 29.
[87] *Al Hassan*, ICC-01/12-01/18-2222, para. 83 (emphasis added).
[88] *Al Hassan*, ICC-01/12-01/18-2222, para. 79.
[89] Decision, paras. 8, 31, 36 .
[90] Decision, para. 81.
[91] Decision, para. 86, 92.
[92] Decision, para. 90. *Contra* Appeal, para. 33-34.
[93] Decision, para. 88. *Contra* Appeal, para. 34
[94] Appeal, para. 33-35.

to show the Chamber erred in applying these factors in its interests of justice analysis under rule 68(2)(d)(i), or erred in exercising its discretion.[95] The Third Ground should be dismissed.

D. Fourth Ground of Appeal: The Chamber properly considered that P-1847's prior recoded testimony goes to the acts and conduct of Mr Ngaïssona

24. The Chamber carefully considered the fact that P-1847's prior recorded testimony goes to the acts and conduct of Mr Ngaïssona. It correctly defined the law when it recalled that under rule 68(2)(d)(iv) "the fact that the prior recorded testimony goes to proof of acts and conduct of the accused may be a factor against its introduction, or part of it,"[96] and expressly recognised this was a guiding factor in exercising its discretion.[97] The Chamber acknowledged the drafters' view that "this provision should be more permissive of 'acts and conduct' evidence when compared to rule 68(2)(b)".[98] At the same time, it noted that particularly for testimony referring to acts and conduct of the accused, it had the duty to "ensure[] that this introduction is not prejudicial to or inconsistent with the rights of the Accused".[99]

25. The Appellant misstates the Decision when he suggests that the Chamber "reasoned that the mere possibility of the acts and conduct of the accused being introduced means that such evidence should be readily introduced without careful consideration of prejudice".[100] Rather, the Chamber carefully considered that P-1847's prior recorded testimony related to Mr Ngaïssona's acts and conduct twice in its analysis.

26. First, the Chamber considered this aspect when assessing the interests of justice requirement under 68(2)(d)(i).[101] It found that the Appellant had the opportunity to question P-1847 on "alleged acts and conduct"[102] and that there was "other evidence relating to these matters"[103] on the record. The Chamber reasonably concluded that the introduction of P-1847's prior testimony into evidence would best serve the interests of justice.[104]

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[95] *Contra* Appeal, para. 35.
[96] Decision, para. 10.
[97] Decision, para. 34.
[98] Decision, paras. 35 referring to Working Group Report, ICC-ASP/12/37/Add.1, Annex II. A., para. 38. ("Due to the additional burdens placed on parties when faced with an intimidated witness, including the need to establish interference, it was seen that this provision should be more permissive of 'acts and conduct' evidence when compared to rule 68(2)(b)").
[99] Decision, para. 36.
[100] *See* Appeal, para. 37.
[101] Decision, paras. 81, 86, 88, 92.
[102] Decision, para. 88.
[103] Decision, para. 92.
[104] Decision, para. 93.

27. Second, the Chamber also considered that P-1847's prior recorded testimony related to Mr Ngaïssona's acts and conduct when it exercised its discretion and found that its introduction into evidence was not prejudicial to or inconsistent with the rights of the Accused under rule 68(1).[105] Having found, among other circumstances, that Mr Ngaïssona was in a position to fully and meaningfully question P-1847 about his alleged acts and conduct,[106] the Chamber concluded that introduction of the evidence was not prejudicial to or inconsistent with his rights.[107]

28. The Appellant submits that the Chamber misapplied the concept of "corroboration".[108] He argues that if the Chamber had applied the proper concept of corroboration, it would have concluded that introducing the testimony was "inappropriate".[109] This argument should be dismissed, as it is based on two erroneous premises. Legally, corroboration is not required for a witness's prior recorded testimony to be introduced under rule 68(2)(d), even if it goes to the acts and conduct of an accused.[110] Factually, the Chamber made no final determination on whether P-1847's prior recorded testimony is *corroborated*, but rather found that other evidence on the record related to four matters addressed therein.[111] The Chamber explained that, in its final article 74 deliberations, it would eventually consider whether references to the acts and conduct of Mr Ngaïssona are corroborated by other evidence submitted before it.[112]

29. In any event, the Appellant's submissions appear to be based on the incorrect understanding that corroboration requires identical evidence from another source.[113] He seems to conflate the notion of 'corroborative' evidence with the notion of 'cumulative' evidence, which is repetitive evidence of the same character which goes to prove a point already established by other evidence.[114] To the contrary, the Appeals Chamber has held that for the

[105] Decision, paras. 99-100, 103-104.
[106] *See* below Section E.
[107] Decision, para. 103.
[108] Appeal, para. 39.
[109] Appeal, paras. 36, 39, 44.
[110] *Contra* Appeal, para. 44 where the Appellant appears to suggest that corroboration is legally required in this case ("[d]ue to the lack of sufficient corroboration of the material aspects introduced into evidence from P-1847's statement, the Trial Chamber should have found that it would be inappropriate to introduce the portions of the statement relating to the acts and conduct of Mr Ngaïssona.").
[111] The Chamber in broad terms identified the following "matters" "(i) whether the youth manning checkpoints established by COCORA were armed; (ii) meetings involving François Bozizé and Mr Ngaïssona at the *Cité du Golf* in Yaoundé; (iii) Mr Ngaïssona allegedly providing funds to the emerging Anti-Balaka while in Yaoundé; and (iv) Mr Ngaïssona allegedly giving instructions to the Anti-Balaka in 2013" (Decision, para. 92).
[112] Decision, para. 104.
[113] Appeal, paras. 41-43.
[114] *See* e.g. rule 68(2)(b)(i), second bullet point, distinguishing cumulative evidence from evidence of a corroborative nature. As to "cumulative evidence", *see* Black's Law Dictionary, https://blacks_law.en-academic.com/24972/cumulative_evidence, last access on 5 December 2023. Chambers have cautioned against

purposes of corroboration "[d]ifferent testimonies do not need to be 'identical in all aspects or describe the same fact in the same way. […] [W]hile testimonies need not be identical in all aspects, they must confirm, even if in different ways, the same fact".[115]

30. The Appellant further argues that rule 68(2)(d)(iv) "should not have been interpreted with any degree of flexibility,"[116] referring to his interpretation of a table attached to the Working Group's Report comparing rule 68(2)(d) with the ICTY's rule 92*quinquies*.[117] This argument should also be dismissed. First, the table's alignment of rule 68(2)(d)(iv) with ICTY's rule 92*quinquies*(B)(ii) (listing the factors to be assessed as 'interests of justice' including whether the prior recorded testimony goes to acts and conduct), does not show that the latter is subsumed in the ICC's rule 68(2)(d)(i)'s 'interests of justice' requirement. Rather, the structure of rule 68(2) shows that rule 68(2)(d)(iv) is a distinct factor guiding a Chamber's exercise of discretion once the mandatory requirements under 68(2)(d)(i) have been met. It vests a Chamber with discretion to decide not to introduce the prior recorded testimony into evidence, even if satisfied that all requirements under 68(2)(d)(i) are met.[118] In any event, whether a Chamber considers this factor in one context or the other is likely to be irrelevant.[119] Second, even if the Appellant's interpretation of the table was correct, it would not establish that rule 68(2)(d)(iv) "should not have been interpreted with any degree of flexibility."[120] This is particularly considering the drafters' express acknowledgement that "[rule 68(2)(d)] should be more permissive of 'acts and conduct' evidence when compared to rule 68(2)(b)".[121]

31. The Chamber did not "reason[] that the mere possibility of the acts and conduct of the accused being introduced means that such evidence should be readily introduced without careful consideration of prejudice".[122] As demonstrated, the Chamber carefully considered that the prior recorded testimony related to the acts and conduct of Mr Ngaïssona. The Fourth Ground should be dismissed.

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the presentation of cumulative evidence so as to prevent undue delays to the trial (*see* e.g. ICC-01/05-01/08-3384, 4 May 2016, para. 27. See also ICC-01/05-01/08-2138, para. 23).

[115] ICC-01/04-02/06-2666-Red, para. 672. *See also* ICC-02/11-01/15-1400, paras. 357-358.

[116] Appeal, paras. 37-38.

[117] Working Group Report, ICC-ASP/12/37/Add.1, Annex II. A., pp. 34-35.

[118] Decision, paras. 33-34.

[119] In this case the Chamber twice considered whether the prior recorded statement goes to the acts and conduct of the accused, in the context of interests of justice and later when assessing whether its introduction was prejudicial to the accused.

[120] Appeal, paras. 37-38.

[121] Working Group Report, ICC-ASP/12/37/Add.1, Annex II. A., para. 38.

[122] *Contra* Appeal, para. 37.

E. Fifth Ground of Appeal: The 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 Ngaïssona Defence was in a position to meaningfully question P-1847

32. The Chamber correctly concluded that the interests of justice were best served by introducing P-1847's prior recorded testimony into evidence.[123] It found that this was not prejudicial to or inconsistent with the rights of the accused.[124] It so concluded based, among other factors, on the Chamber's finding that the Ngaïssona Defence was in a position to meaningfully question P-1847.[125]

33. The Chamber correctly considered that once it was apparent that P-1847 had failed to give evidence on material aspects of his prior recorded testimony,[126] the Prosecution counsel and the Presiding Judge confronted the witness with relevant extracts of his prior recorded testimony when his answers deviated from it.[127] The Chamber noted that the Prosecution tried to elicit relevant aspects of P-1847's prior recorded testimony, and that both the Prosecution and the Presiding Judge repeatedly sought explanations for such differences.[128] The Chamber therefore correctly found that there was no doubt as to the material aspects in issue, which concerned incriminating evidence that the Prosecution attempted to elicit from the witness, namely:[129]

i. whether Bozizé and Mr Ngaïssona met at the *Cité du Golf* ;
ii. whether a meeting was held in July 2013 and attended by Mr Ngaïssona at which it was discussed how to organise their coordination to continue the political fight for a return to the constitutional order and for Bozizé to return to power;

[123] Decision, paras. 82-93.
[124] Decision, paras. 99-106.
[125] Decision, paras. 88, 103.
[126] Decision, para. 103; *see also* para. 52.
[127] The material aspects from P-1847's prior recorded testimony on which he gave divergent evidence in court included the following: (i) Whether individuals at checkpoints set up by COCORA were armed with knives and machetes; (ii) whether Bozizé and Mr Ngaïssona met at the *Cité du Golf*; (iii) whether a meeting was held in July 2013 and attended by Mr Ngaïssona at which it was discussed how to organise their coordination to continue the political fight for a return to the constitutional order and for Bozizé to return to power; (iv) whether Bozizé, met with Mr Ngaïssona '*très souvent*' at the *Cité du Golf*; (v) whether Godonam collect money from Mr Ngaïssona at the *Cité du Golf*; (vi) whether Mr Ngaïssona was involved in transferring funds to the Anti-Balaka; and (vii) whether Mr Ngaïssona was involved in giving instructions to the elements on the ground as well as passing on instructions by Bozizé (Decision, para. 48). The Chamber noted that all but one of these points concerned the alleged role and involvement of Mr. Ngaïssona (Decision, para. 51).
[128] Decision, para. 103.
[129] Decision, para. 103.

iii. whether Bozizé, met with Mr Ngaïssona '*très souvent*' at the *Cité du Golf*;
iv. whether Godonam collected money from Mr Ngaïssona at the *Cité du Golf*;
v. whether Mr Ngaïssona was involved in transferring funds to the Anti-Balaka; and
vi. whether Mr Ngaïssona was involved in giving instructions to the elements on the ground as well as in passing on instructions from Bozizé;[130]

34. The Chamber properly rejected the Appellant's submission[131] and concluded that the "Ngaïssona Defence was put in a position to fully and meaningfully question the Witness."[132] It considered that "it was not sufficient for the Ngaïssona Defence to choose not to further question the Witness and to now argue that it did not have sufficient opportunity to examine the Witness".[133] The Chamber correctly determined that the Appellant's strategic decision not to question the witness on these issues did not amount to a lack of a meaningful opportunity to do so. The Appellant's arguments lack merit and should be rejected.

35. First, the Chamber did not impermissibly link "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".[134] While the former is indeed a mandatory criteria under rule 68(2)(d)(i),[135] the latter is not. Instead, whether the Ngaïssona Defence had a meaningful opportunity to examine the witness is a factor that the Chamber properly considered when assessing the interests of justice under rule 68(2)(d)(i),[136] and potential prejudice under rule 68(1).[137] Further, the Chamber did not "impermissibly link[] two distinct criteria"[138] by assessing the impact of its factual findings on 'reasonable efforts' under the criteria of 'interests of justice' and

[130] Decision, para. 48. The Chamber noted that these points concern the alleged role and involvement of Mr. Ngaïssona (*See* Decision, para. 51).
[131] Decision, para. 81, 88, 103.
[132] Decision, para. 103.
[133] Decision, para. 88.
[134] *Contra* Appeal, paras. 45-47.
[135] Rule 68(2)(d)(i), third bullet point.
[136] Rule 68(2)(d)(i), forth bullet point.
[137] As to the discretionary nature of these factors, *see* ICC-01/14-01/18-1975-Red, para. 37; ICC-01/04-02/06-1029, para. 14. *See also* Decision, paras. 33-36.
[138] Appeal, paras. 45-47.

'prejudice'.[139] Rather, the Chamber appropriately considered the same (or closely related) factual circumstances[140] to assess different and separate legal requirements.[141]

36. Second, the Appellant alleges that under the Chamber's approach, finding that the Prosecution made reasonable efforts to secure all material facts known to the witness would automatically result in finding that there was no prejudice for the rights of an accused.[142] This is incorrect and does not reflect the Decision. Factors for assessing whether the introduction of prior recorded testimony into evidence is prejudicial to or inconsistent with the rights of an accused are discretionary. Each prior recorded testimony must be assessed on a case-by-case basis.[143] The Chamber did just that. It considered multiple relevant factors, including whether the Ngaïssona Defence had an opportunity to meaningfully question P-1847, to determine whether the introduction of the witness's prior recorded testimony into evidence had any detrimental impact.[144]

37. Third, the Chamber—having found that the Ngaïssona Defence had sufficient opportunity to question P-1847—properly found that it was not sufficient for the Ngaïssona Defence to choose not to further question P-1847 and now argue that it did not have sufficient opportunity to examine him.[145] The Ngaïssona Defence was not under an ethical obligation to refrain from questioning P-1847, on the basis that it would have forced it to place on the record incriminatory aspects of P-1847's prior recorded testimony.[146] To the contrary, the Ngaïssona Defence had an opportunity to meaningfully elicit evidence that could explain why the information contained in the prior recorded testimony was incorrect or otherwise unreliable, and provide reasons for discrepancies, without itself placing any incriminating evidence on the record.

38. In its request to recall P-1847, the Ngaïssona Defence conceded as much, arguing that "[r]ecalling the Witness would not be a fruitless exercise where P-1847 would merely repeat what he told the Prosecution during its examination." It submitted that if P-1847 were to be

[139] Appeal, para 46.
[140] That the Prosecution questioned P-1387 about material and incriminating evidence against Mr Ngaïssona (Decision, paras. 76-78).
[141] That reasonable efforts were made to secure the evidence under the third requirement of rule 68(2)(d)(i) (Decision, para. 76); that Ngaïssona Defence could fully and meaningfully question the witness for the purpose of assessing interests of justice (Decision, para. 88) and prejudice (Decision, para. 103).
[142] Appeal, para. 47.
[143] ICC-01/14-01/18-1975-Red, para. 37; ICC-01/04-02/06-1029, para. 14.
[144] Decision, paras. 82-93, 99-106.
[145] Decision, para. 88; *contra* Appeal, paras. 48-50.
[146] *Contra,* Appeal, paras. 48-50.

recalled, "[t]he Defence would question the Witness extensively on his sources of information, and the great extent to which his statement contained his assumptions rather than any facts he observed or heard. Further, the Defence would also like the opportunity to examine the Witness on the reasons he repudiated his prior recorded statement […]. These questions would be relevant for the purpose of the Chamber determining which version of P-1847's evidence would be true." [147]

39. The Ngaïssona Defence had the opportunity to ask P-1847 these same questions when he appeared before the Court, but choose not to do so. As the Chamber underscored, it cannot now claim that prejudice was incurred, as a direct result of its strategic choice.[148] Nor does it matter why the Ngaïssona Defence made this choice. By deciding not to question P-1847, it assumed the risk that the Chamber could later introduce P-1847's prior recorded testimony into evidence, regardless of its failure to question the witness.[149] The risk was evident from the start of the Prosecution questioning, since P-1847 was asked to confirm under oath the accuracy, completeness, and truthfulness of his prior recorded testimony—which he did.[150]

40. Fourth, the Trial Chamber's approach is not inconsistent with the Appeals Chamber's approach in *Ruto & Sang*.[151] The Appeals Chamber held that where a witness recants their prior recorded testimony and incriminating evidence is not elicited by the calling party—even if the accused had an opportunity to question these witnesses—such questioning does not amount to meaningful cross-examination.[152] However, the factual situation in that case significantly differs from the present one. In *Ruto & Sang*, the accused did not have a "proper opportunity […] to cross examine the witnesses" because the witnesses had recanted and the Prosecution had not elicited incriminating evidence from the witnesses in examination-in-chief.[153]

[147] ICC-01/14-01/18-2026-Red, para. 66.
[148] Decision, para. 88.
[149] In *Ngudjolo*, the Appeals Chamber similarly observed: "It is not for the Appeals Chamber to speculate why Mr Katanga did not raise the issue of the alleged unlawful pre-surrender arrest and detention in November 2008 and 3 February 2009. The Appeals Chamber notes, however, that Mr Katanga, by failing to do so for the sake of his strategy, took the risk that the Trial Chamber may later decide to reject a motion for stay of proceedings based on these facts. […] The Appeals Chamber therefore finds no fault in the Trial Chamber's treatment of Mr Katanga's strategy in this case. The Trial Chamber properly weighed Mr Katanga's discretion to determine his strategy against the Trial Chamber's duty to ensure the fair and expeditious conduct of the trial and considered it appropriate to reject the Defence Motion" (ICC-01/04-01/07-2259, paras. 79-80).
[150] ICC-01/14-01/18-1971-Red, para. 16.
[151] *Contra*, Appeal, paras. 51-52.
[152] ICC-01/09-01/11-2024, para. 93, referred to in Decision, para. 101. *Contra*, Appeal, paras. 51-52.
[153] ICC-01/09-01/11-2024, para. 93.

41. Conversely, P-1847 initially affirmed that the information in his prior recorded testimony was true.[154] The Prosecution then went to great lengths to elicit details of the incriminating information contained in his prior recorded testimony, but the witness gave answers that did not accord with his prior recorded testimony.[155] Thus, P-1847 presented two versions, which—as noted by the Chamber—cannot both be correct.[156] The discrepancies in P-1847's oral testimony were not determinative for the Chamber's Decision.[157] However, they put the Ngaïssona Defence on notice of the relevant material aspects from P-1847's prior recorded testimony on which he gave diverging evidence, and thereby put the Ngaïssona Defence in a position to meaningfully question him.[158]

42. The Appellant argues that the Appeals Chamber's decision in *Ruto & Sang* establishes that once a person has recanted and failed to give evidence before the Trial Chamber, their prior recorded testimony cannot be admitted pursuant to rule 68(2)(d), because the Defence would not have had an opportunity to effectively question the witness.[159] However, the *Ruto & Sang* decision does not stand for that proposition. Indeed, if it did, it would render rule 68(2)(d) effectively inapplicable. An intimidated or threatened witness who testifies but fails to give evidence on material aspects in their prior recorded testimony,[160] by definition usually would not have expressly placed critical incriminating evidence on the record; however he or she may affirm that the prior statement they gave was true and correct. The Chamber applied the *Ruto & Sang* decision correctly and consistently with the purpose of rule 68(2)(d), namely, to provide a means to address potential witness interference and thereby preserve the integrity of the proceedings.[161]

43. Even if, *arguendo*, the Chamber erred in finding that the Ngaïssona Defence was in a position to meaningfully question P-1847, any such error would not have materially affected the Decision. The Appellant argues that the alleged error materially affected the Decision because the alleged lack of opportunity to meaningfully examine P-1847 unduly prejudiced Mr Ngaïssona.[162] However, the Chamber did not only find that the Ngaïssona Defence was put in

[154] Decision, paras. 47, 88.
[155] Decision, para. 103.
[156] Decision, para. 88.
[157] Decision, para. 52.
[158] Decision, paras. 88, 103.
[159] Appeal, para. 51.
[160] Rule 68(2)(d)(i), first bullet point.
[161] Decision, para. 82. *Contra,* Appeal, para. 52. *See* above Section A.
[162] Appeal, para. 53.

a position to meaningfully question P-1847.[163] It also stated that "[i]n any event, in the context of its deliberations on the judgment pursuant to Article 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."[164] Given the Chamber's outlined approach to the evidence, the Appellant has not shown that the introduction of P-1847's prior recorded testimony into evidence causes unfair prejudice. The Fifth Ground should be dismissed.

F. Sixth Ground of Appeal: The Chamber properly found that the introduction of P-1847's prior recorded testimony into evidence was not prejudicial to or inconsistent with Mr Ngaïssona's rights

44. The Chamber properly found that the timing of the Prosecution's Request[165] did not affect its conclusion that the introduction of P-1847's prior recorded testimony into evidence serves the interests of justice.[166] The Chamber observed that the Prosecution—which filed the Request before the Chamber's deadline for Rule 68(2)(c) and other requests to submit evidence in writing—[167] "could have considered presenting the Request sooner," but noted that "there was no statutory requirement for it to do so".[168] The Chamber concluded that introducing the witness's prior recorded evidence would not militate against the interests of justice since 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."[169] The Appellant's argument that the timing of the Request affected his right to be informed of the charges under article 67(1)(a)[170] should be dismissed.

45. First, the Appellant misinterprets the scope of article 67(1)(a). As the Appeals Chamber held in *Bemba*, article 67(1)(a) "is not concerned with the timing of rulings on the admissibility of evidence." Rather, "[t]he accused person enjoys the right to be informed of the nature, cause

[163] Decision, para. 103.
[164] Decision, para. 104.
[165] ICC-01/14-01/18-1971-Conf ("Request").
[166] Decision, paras. 84-85.
[167] ICC-01/14-01/18-1892.
[168] Decision, para. 85.
[169] Decision, para. 85.
[170] Appeal, para. 54. *See* also Appeal, paras. 58-59.

and content of the *charges* against him" (emphasis in original).[171] The Appeals Chamber recalled that "the 'cause' of a charge is comprised of 'the acts [the accused] is alleged to have committed and on which the accusation is based', and that the 'nature' is the legal characterisation of those alleged acts."[172] Ultimately, "the information as to the charges does not 'necessarily [have to mention] the evidence on which the charge is based'".[173] The Appellant's right to be informed of the charges was not affected by the timing of the Request.

46. Second, the Appellant has not shown that the timing of the Request caused him prejudice. The Prosecution's case has not changed since it filed the Document Containing the Charges, as a result of P-1847's failure to testify.[174] That the Appellant independently decided to "revise[] its case strategy with respect to the Prosecution's allegations"[175] after P-1847 failed to testify does not establish prejudice under rule 68(1). Further, the Appellant submits that after P-1847 disavowed his prior recorded statement, he "revised [his] case strategy" to reflect that Mr Ngaïssona "had no role in the organizing, planning, and financing of the alleged Anti-Balaka while he was in Cameroon".[176] However, the Appellant does not explain how he "would have [further] revised his strategy" had he realised and taken into account[177] "a potential Rule 68(2)(d)".[178]

47. Finally, the Chamber properly considered the Ngaïssona Defence's ability to address any aspects it may wish in the course of its own presentation of evidence when deciding to introduce P-1847's prior recorded testimony into evidence.[179] That the P-1847's prior recorded testimony was introduced into evidence without cross-examination is consistent with rule 68(2)(d) [180]— especially considering that the rule encompasses situations where e a witness does not even appear. The Sixth Ground should be dismissed.

[171] ICC-01/05-01/08-1386, para. 63.
[172] ICC-01/05-01/08-1386, para. 64.
[173] ICC-01/05-01/08-1386, para. 64 referring to decisions of the European Court of Human Rights and the European Commission of Human Rights.
[174] *Contra* Appeal, paras. 55-56.
[175] Appeal, para. 55.
[176] Appeal, para. 55.
[177] Contrary to the Appellant's suggestion, it is not correct to suggest that he "was not apprised of even a potential Rule 68(2)(d) application" (Appeal, para. 56). *See* Decision, para. 88; *see* above Section E.
[178] Appeal, para. 56.
[179] Decision, para. 85.
[180] *Contra* Appeal, para. 57.

Conclusion

48. For the reasons set out above, the Prosecution respectfully submits that the Appeal should be dismissed.

Karim A.A. Khan KC, Prosecutor

Dated this 3rd day of April 2024

At The Hague, The Netherlands