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Original: **English**

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 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, 6 December 2023

Source: **Office of the Prosecutor**

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Introduction

1. The Ngaïssona Defence's appeal[1] against the "Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules"[2] should be dismissed.

2. In its Decision, the Trial Chamber introduced into evidence pursuant to rule 68(2)(c) the prior recorded testimonies of four Prosecution witnesses. The Appellant challenges the part of the Decision which introduced into evidence the prior recorded testimonies of witnesses P-2269 and P-2602 ("Witnesses"), raising four grounds of appeal that allege multiple legal and factual errors.

3. The Appellant's arguments raised in respect of his four grounds of appeal lack merit. In particular:

a) The Trial Chamber correctly found that the Witnesses were unavailable to testify orally (First Ground);

b) The Trial Chamber correctly introduced into evidence the entirety of P-2269's prior recorded testimony including his evidence about the provision of finances (Second Ground);

c) The Decision was sufficiently reasoned (Third Ground); and

d) The Trial Chamber did not err by observing that the Ngaïssona Defence expected to call a witness to testify about his experience in Gobere (Fourth Ground).

4. The Appeal should therefore be dismissed and the Decision upheld.

Confidentiality

5. 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. The Prosecution does not object to the reclassification of this filing as public. It has ensured that in this filing, all references to the Decision are to the public redacted version.

[1] ICC-01/14-01/18-2207-Conf ("Appeal").
[2] ICC-01/14-01/18-2127-Conf and ICC-01/14-01/18-2127-Red ("Decision").

Submissions

6. The Appellant's four grounds of appeal allege that the Trial Chamber legally and factually erred when introducing into evidence the prior recorded testimonies of Witnesses P-2269 and P-2602 pursuant to rule 68(2)(c). These grounds lack merit and should be dismissed for the reasons set out below.

A. First Ground: The Trial Chamber correctly found that the Witnesses were unavailable to testify orally

(i) The Appellant's arguments

7. In its First Ground, the Appellant argues that the Trial Chamber committed several errors when concluding that the Witnesses were unavailable to testify orally within the meaning of rule 68(2)(c). According to the Appellant, the Trial Chamber erred by (i) failing to take into account the Witnesses' unwillingness to testify; (ii) misappreciating the Witnesses' withdrawal of cooperation with the Prosecution; and (iii) failing to take into account the causal link between the Witnesses' withdrawal of cooperation and the fact that they cannot be located.[3]

8. At the core of the Appellant's arguments is the incorrect understanding that if a witness is "unwilling" to give oral testimony, that witness cannot be "unavailable" within the meaning of rule 68(2)(c).[4] This ground therefore pivots on what constitutes a witness' unavailability to testify orally, and whether a witness who is unwilling to testify may be considered unavailable to testify.

9. The Appellant's submissions do not correctly reflect the law on rule 68(2)(c). Nor do they correctly represent the Trial Chamber's factual findings when it concluded that the Witnesses were unavailable to testify orally within the meaning of rule 68(2)(c). The Trial Chamber correctly found that the Witnesses were unavailable within the meaning of rule 68(2)(c), having accepted that the Prosecution had exhausted all avenues in trying to contact the Witnesses and that the CAR authorities had failed to successfully locate the Witnesses. For P-2269, the Trial Chamber further found that the attempts to execute the summonses upon him

[3] Appeal, paras. 24-31.
[4] *See e.g.* Appeal, paras. 26, 30.

were unsuccessful, and for P-2602, it found that any further attempts to execute the summons upon him would be futile.[5] Accordingly, the First Ground should be dismissed.

(ii) The meaning of "unavailable to testify orally"

10. The Court's regulatory framework does not define "unavailable" in rule 68(2)(c).[6] As noted by the Trial Chamber in a previous decision,[7] this term has been interpreted to include situations where: (i) a witness suffers from a medical condition that impacts their ability to testify orally;[8] (ii) a witness is in an area of high insecurity and the associated challenges cannot be overcome within a reasonable time without unduly delaying the trial proceedings;[9] (iii) a witness cannot be located after numerous attempts and efforts;[10] or (iv) the Registry is unable to provide for the *viva voce* testimony of the witness by video-link at a reasonable stage of the proceedings.[11]

11. Trial chambers have considered that situations do not fall within the meaning of "unavailable" include situations where: (i) a witness is "simply unwilling" to testify;[12] (ii) the Prosecution is unable to locate the witness but further efforts to locate them can still be made;[13] or (iii) a possibility of video-link testimony could be explored without placing the witness at undue risk.[14]

12. According to the Court's consistent jurisprudence, the term "unavailable" must be interpreted broadly.[15] This accords with the drafting history of rule 68(2)(c),[16] which shows that the drafters' intention was to broaden rule 92 *quarter* (A) of the ICTY's Rules of Procedure and Evidence.[17] That rule refers to the admission of a prior statement of a person "who has

[5] Decision, paras. 31-32 (for P-2269) and paras. 51-53 (for P-2602).
[6] ICC-01/05-01/13-1481-Red, para. 16.
[7] ICC-01/14-01/18-1975-Red, paras. 27-28.
[8] ICC-01/12-01/18-1588-Red; ICC-01/04-02/06-1802-Red.
[9] ICC-01/12-01/18-2461-Red, para. 11.
[10] ICC-02/05-01/20-834, para. 7.
[11] ICC-01/05-01/13-1481-Red, paras. 5, 17.
[12] ICC-01/12-01/18-2445-Red, para. 23; ICC-01/12-01/18-2124-Red, para. 12; ICC-01/04-02/06-1325, paras. 9-10; ICC-01/09-01/20-247-Red, para. 27.
[13] ICC-02/05-01/20-603-Red, para. 31.
[14] ICC-01/04-02/06-2100-Red, paras. 14-16.
[15] ICC-01/14-01/18-1975-Red, para. 27; ICC-01/05-01/13-1481-Red, para. 16; ICC-01/12-01/18-2445-Red, para. 21.
[16] The drafting history of the Rules of Procedure and Evidence is not binding (ICC-01/09-01/11-2024, para. 41), but may nevertheless be used as an interpretative guide.
[17] *See* ICTY Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015, Rule 92 *quater* (Unavailable persons): "(A) The 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 may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the

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".[18] The ASP Working Group on Lessons Learned — which proposed the new text of rule 68(2)(c) after discussion with the ASP Study Group on Governance — stated that it had "decided to replace the words 'insurmountable obstacles' in the original proposal with the phrase 'obstacles that cannot be overcome with reasonable diligence'. It […] considered that 'insurmountable obstacles' may import too high a standard into the sub-rule'".[19]

13. As observed by the Appellant when seeking leave to appeal,[20] the notion of unavailability entails an objective standard.[21] The text of rule 68(2)(c) states clearly that the unavailability of the witness must be "due to obstacles that cannot be overcome with reasonable diligence."[22] If the Court applies reasonable diligence to overcome any objective obstacles to secure the oral testimony of a witness and its efforts fail, then a Chamber can reasonably and appropriately conclude that the witness is unavailable within the meaning of rule 68(2)(c).[23]

14. Whether or not a witness is subjectively unwilling to give oral testimony is not the decisive factor in determining unavailability. If a witness is "simply unwilling" to give oral testimony,[24] the Court may still apply reasonable diligence to overcome such unwillingness to secure their testimony. For instance, if the witness's unwillingness is linked to perceived security risks, the Court may apply protective measures pursuant to article 68(1). For vulnerable or traumatised witnesses, the Chamber may adopt special measures under rule 88 to facilitate their oral testimony. And, if a witness is still unwilling to testify, a trial chamber has the power to compel the witness to appear before it, thereby creating a legal obligation for the individual concerned. The Court may also request a State Party to compel a witness to appear before the Court by way of video-link.[25] If those measures are not available or prove to

Trial Chamber: (i) is satisfied of the person's unavailability as set out above; and (ii) finds from the circumstances in which the statement was made and recorded that it is reliable.
(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it."

[18] ICC-01/05-01/13-1481-Red, para. 16; *see also* ICC-ASP/12/37/Add.1, 31 October 2013, para. 29.
[19] ICC-ASP/12/37/Add.1, 31 October 2013, para. 29.
[20] See ICC-01/14-01/18-2146-Conf, para. 25: "despite the broad interpretation conferred to the concept of 'unavailability', the causes of such unavailability are still limited to objective circumstances that render the witness inaccessible or otherwise incapable of testifying".
[21] *See e.g.* ICTY, *Prosecutor v. Milan Lukić*, IT-98-32/1, Appeals Judgment, 4 December 2012, para. 565: "Rule 92 *quarter* of the Rules allows for the admission of written evidence when the person giving the statement is objectively unavailable to attend a court hearing […]".
[22] *See also*, ICC-01/14-01/18-1975-Red, para. 26.
[23] *See e.g.* ICC-01/09-01/11-1938-Red, para. 138.
[24] *See above*, para. 11.
[25] ICC-01/09-01/11-1598, paras. 1-2.

be insufficient, for instance because an unwilling witness absconds and cannot be located or contacted by the Court or by national authorities after reasonably diligent efforts, then they may be considered objectively unavailable to testify orally within the meaning of rule 68(2)(c).

15. Trial chambers have applied this approach consistently when finding that a witness' simple unwillingness in itself was not the decisive factor to conclude that a witness was unavailable within the meaning of rule 68(2)(c). The Trial Chamber in this case rejected the Prosecution's request to admit P-1819's prior recorded testimony under rule 68(2)(c), on the basis that she was "simply unwilling to testify because of personal and/or professional concerns", but there was no information that she was "inaccessible or otherwise incapable of testifying, thus indicating unavailability".[26] It also found that it was not satisfied that the Prosecution applied reasonable diligence to secure her oral testimony.[27] The *Al Hassan* Trial Chamber similarly declined to admit the prior recorded testimony of a defence witness where it found that the witness was not unavailable. Despite the witness's refusal to take a rule 68(2)(b)(ii) declaration in a particular country, both the Registry and the Prosecution offered to provide further technical assistance to obtain the declaration through alternative means.[28] In another decision, the same Trial Chamber held that a witness's hesitation, preference or subjective fear cannot be the decisive factor for determining his unavailability. It required the witness's in-court appearance,[29] implicitly finding that his appearance was reasonably feasible. Similarly, the *Ntaganda* Trial Chamber found that a witness was not unavailable since he had previously stated he was available and ready to testify, and had changed his mind without the condition or situation having changed so as to render him inaccessible or otherwise incapable of testifying orally. The Trial Chamber did not find it necessary to resort to other available measures, such as summoning the witness to appear before the court, although such measures would have been available.[30]

16. Conversely, when trial chambers have found that the Court applied reasonable diligence to secure a witness's oral testimony and its efforts have proven unsuccessful, they have concluded that the witness was unavailable to testify within the meaning of rule 68(2)(c). The *Ruto & Sang* Trial Chamber found that a witness was unavailable to testify orally due to obstacles that could not be overcome with reasonable diligence. It noted that all attempts by

[26] ICC-01/14-01/18-2021, para. 13.
[27] ICC-01/14-01/18-2021, para. 14.
[28] ICC-01/12-01/18-2445-Red, para. 26; *see also* para. 23.
[29] ICC-01/12-01/18-2124-Red, paras. 11-12.
[30] ICC-01/04-02/06-1325, paras. 9-10.

the Prosecution to contact or trace the witness had proven unsuccessful, that he could not be traced to serve a summons to secure his attendance, and that he did not appear for testimony on the scheduled date.[31] The *Bemba et al.* Trial Chamber found that a witness was unavailable within article 68(2)(c) because she could not attend her testimony in person and was at a location where it was not possible for the VWU to arrange her *viva voce* testimony in person or *via* video link.[32] The *Al Hassan* Trial Chamber relied on expert medical evidence and other information provided by the Prosecution to conclude that a witness's medical conditions made him unavailable to testify orally due to obstacles which could not be overcome with reasonable diligence.[33] That Trial Chamber also admitted the prior recorded testimony of two defence witnesses, after reasonable measures to secure their oral testimony had been unsuccessful. It found that it was impossible for the Defence to establish contact with the witnesses, without sending its resource person to the relevant areas in contravention of the Registry's security assessment.[34] Finally, the *Abd-Al-Rahman* Trial Chamber found that a witness was "clearly unavailable to testify, as demonstrated by the numerous attempts and efforts made by the Prosecution to locate the witness without any success".[35]

17. If a witness's subjective unwillingness *per se* was fatal to the application of rule 68(2)(c), as argued by the Appellant,[36] this could lead to impractical results. It would circumvent the Court's powers to secure testimony from witnesses and thereby establish the truth, by making the admission of a witness's prior recorded testimony under rule 68(2)(c) entirely contingent on whether the witness is willing to testify. This would thwart the purpose of rule 68(2)(c) and significantly impact the Court's mandate.

(iii) The Appellant's arguments lack merit

18. In concluding that the Witnesses were unavailable within rule 68(2)(c), the Trial Chamber correctly applied the law to the facts of the case.[37] The Appellant raises four arguments alleging that the Chamber erred in finding that the Witnesses were unavailable. They each lack merit and should be rejected.

[31] *See e.g.* ICC-01/09-01/11-1938-Red, para. 138.
[32] ICC-01/05-01/13-1481-Red, paras. 5, 17.
[33] ICC-01/12-01/18-1588-Red, paras. 19-20. *See also*, ICC-01/04-02/06-1802-Red, paras. 10-11.
[34] ICC-01/12-01/18-2461-Red, para. 11.
[35] ICC-02/05-01/20-834, para. 7.
[36] *See e.g.* Appeal, paras. 26, 30.
[37] Decision, paras. 31-32 (for P-2269) and paras. 51-53 (for P-2602).

19. First, the Appellant asserts that the Trial Chamber did not mention the Witnesses' unwillingness to testify or consider this factor in assessing their unavailability.[38] This is not correct. The Chamber mentioned information suggesting that the Witnesses were unwilling to testify, and even assumed that they were alive and unwilling to testify.[39] However, consistent with the Court's practice,[40] the Chamber considered these facts were irrelevant to its conclusion that the Witnesses were unavailable. Rather, the Chamber concluded that they were unavailable after finding that there were objective obstacles to their appearance that could not be reasonably overcome with due diligence. The Chamber observed that the Prosecution had exhausted all avenues in trying to contact the Witnesses,[41] and that the CAR authorities had failed to successfully locate them.[42] For P-2269, the Trial Chamber further found that the attempts to execute the summonses upon him had been unsuccessful.[43] For P-2602, it found that any further attempts to execute the summons upon him would have been futile.[44]

20. Second, the Appellant argues that the Trial Chamber misappreciated the facts when it allegedly misconstrued the Witnesses' unwillingness to testify as their "mere reluctance".[45] This argument is also not supported. The Chamber's use of the word "reluctance" was not inaccurate. In any event, this reference was inconsequential to its conclusion that the Witnesses were unavailable. First, it is clear from the context that the Trial Chamber used the words "reluctance" and "unwillingness" synonymously. Second, and as noted above, the Chamber assumed that the Witnesses were unwilling to testify but nevertheless correctly found this was not relevant to its conclusion that they were unavailable. Rather, the Chamber concluded they were unavailable because it had found that there were objective obstacles to their appearance that could not be reasonably overcome with due diligence.[46]

21. Third, the Appellant argues that because the Witnesses were unwilling to testify, they deliberately severed all contacts with the Prosecution. Accordingly, all subsequent efforts by the Prosecution, the Court and the CAR authorities to secure the Witnesses' testimonies were moot, and should have been irrelevant to determine their unavailability. According to the

[38] Appeal, para. 28.
[39] Decision, paras. 31-32, 44, 53.
[40] *See above*, paras. 13-16.
[41] The Trial Chamber referred to a prior decision [REDACTED] (see para. 32 (footnote 50) and para. 52 (footnote 86), incorporating by reference its findings in decision ICC-01/14-01/18-1738-Conf, paras. 11 and 15).
[42] Decision, paras. 32, 53.
[43] Decision, para. 32.
[44] Decision, para. 53.
[45] Appeal, para. 29.
[46] Decision, paras. 32, 53.

Appellant, the Court's inability to secure the Witnesses' testimony was a mere "manifestation of their expressed unwillingness to testify".[47] The import of this argument is that if a witness is "unwilling" to give oral testimony, they cannot be considered "unavailable" within the meaning of rule 68(2)(c).[48]

22. This argument misstates the law on rule 68(2)(c). As noted above,[49] the language of rule 68(2)(c), its drafting history, and the Court's practice in applying this rule show that a witness's unavailability to testify entails an objective standard: namely, that their unavailability must be due to obstacles that cannot be overcome with reasonable diligence. The underlying reason why a person may be unavailable, including their unwillingness, is not dispositive. What matters are objective factors that impede a witness's oral testimony, such as the Court's inability to locate, contact, or access the witness, or their personal circumstances or condition. If the Court's reasonably diligent efforts to overcome these obstacles fail, the requisite threshold is met and a chamber can properly conclude that the witness is unavailable within rule 68(2)(c).

23. The Trial Chamber correctly found that the Prosecution, the Court, and the CAR authorities applied reasonable diligence to overcome the fact that the Witnesses could not be located or contacted, and concluded that they were unavailable. Accordingly, the Chamber also correctly assessed that the Witnesses' unwillingness to testify *per se* was not dispositive to its conclusion about their unavailability. As such, it was irrelevant that the Witnesses had expressed their unwillingness to testify before the Court applied reasonable diligence to secure their oral testimony.

24. The Appellant's fourth argument, that the Chamber failed to consider that the Court's inability to locate and contact the Witnesses directly arose from their unwillingness to testify,[50] is related to the previous argument. It is equally unsupported. Whether a witness is unwilling to testify *per se*, or whether there is a causal link between the their unwillingness to testify and the Court's inability to locate, contact, and secure their oral testimony after exercising reasonable diligence, is not determinative.[51] As correctly found by the Trial Chamber, the

[47] Appeal, para. 30.
[48] *See e.g.* Appeal, paras. 26, 30.
[49] See above, paras. 10-17.
[50] Appeal, para. 31.
[51] *Contra*, Appeal, para. 31.

unavailability of the Witnesses was not based on their subjective state of mind, but was rather contingent on objective "obstacles that cannot be reasonably overcome."[52]

(iv) The alleged error would not have materially affected the Decision

25. In any event, an error in this respect would not have materially affected the Decision.[53] Even if *arguendo* the Trial Chamber erred by not properly considering the Witnesses' unwillingness as the root cause of their unavailability, it would nevertheless have concluded that the underlying obstacles to their availability to testify could not have been reasonably overcome. The Trial Chamber could not have disregarded the consequences of their unwillingness on their unavailability to testify before the Chamber. The Court would still have had to apply reasonable diligence to overcome any obstacles impeding the Witnesses' oral testimony. The Trial Chamber found that the Prosecution, the Court and the CAR authorities had unsuccessfully taken such measures. As a result, the Chamber would still have concluded that the Witnesses were in fact, objectively, unavailable.

26. For the reasons set out above, the Trial Chamber correctly found that the Witnesses were unavailable to testify orally. The First Ground should be dismissed.

B. Second Ground: The Trial Chamber correctly introduced into evidence the entirety of P-2269's prior recorded testimony including his evidence about the provision of finances

(v) The Appellant's arguments

27. In the Second Ground, the Appellant argues that the Trial Chamber erred in fact by introducing into evidence the prior recorded testimony of P-2269 in its entirety, without properly considering that he is the only witness alleging that he [REDACTED]. He alleges that the Trial Chamber's approach violated rule 68(2)(c)(ii), according to which "the fact that the prior recorded testimony goes to proof of acts and conduct of the accused may be a factor against its introduction [into evidence], or part of it."[54] These arguments lack merit and should be rejected.

[52] Decision, paras. 32, 53.
[53] *Contra*, Appeal, para. 32.
[54] Appeal, paras. 36-39.

(vi) The relevance of corroboration under rule 68(2)(c)

28. As generally required under rule 68, the introduction into evidence of prior recorded testimony is not permitted if it is unfairly prejudicial to or inconsistent with the rights of the accused, as specified in rule 68(1).[55] Whether evidence is cumulative or corroborative of other evidence may be one factor, among others, to inform a trial chamber's assessment of prejudice.[56] These factors relating to prejudice are discretionary. Each prior recorded testimony must be assessed on a case-by-case basis based on the circumstances before the chamber.[57] At that stage, a chamber's assessment of whether a witness's evidence is cumulative or corroborative may only be assessed at a general level and regarding broad themes discussed by the witness. It does not predetermine or inform how the evidence may subsequently be weighed and used by the chamber for its decision under article 74.[58]

(vii) The Appellant's arguments lack merit

29. Consistent with rule 68(2)(c)(ii), the Trial Chamber observed that P-2269's prior recorded testimony included information relating to Mr Ngaïssona's acts and conduct. Nevertheless, it concluded that this did not create prejudice to an extent which would preclude its introduction into evidence.[59] First, the Trial Chamber noted that there is no absolute bar under rule 68(2)(c) to introducing into evidence prior recorded testimony that goes to the acts and conduct of the accused.[60] Second, the Chamber found that at least part of the information in P-2269's prior recorded testimony concerned "events or allegations" regarding which other witnesses who testified before the Chamber also provided information on.[61] Third, the Chamber stated that when assessing and weighing the evidence, it would take into account that P-2269 was not available for examination by the Defence and the other participants, notably in relation to evidence that might be considered as unique.[62] Finally, it observed that any internal and external inconsistencies within the witness's statement did not preclude its introduction

[55] ICC-01/09-01/11-2024, para. 85; ICC-01/05-01/08-1386, para. 78.
[56] ICC-01/14-01/18-1975-Red, paras. 36, 38; ICC-01/12-01/18-1588-Red; para. 10; ICC-01/14-01/21-506-Red, paras. 22, 25, 39, 46; ICC-02/05-01/20-603-Red, paras. 7, 37, 39. Other potential factors are: (i) whether the evidence relates to issues that are materially in dispute; and (ii)) whether the evidence provides background information or is central to core issues in the case".
[57] ICC-01/14-01/18-1975-Red, para. 37; ICC-01/04-02/06-1029, para. 14.
[58] ICC-01/14-01/21-506-Red, para. 25.
[59] Decision, paras. 35-36.
[60] Decision, para. 35.
[61] Decision, para. 36.
[62] Decision, para. 36.

into evidence, and would, in any event, be taken into account when assessing its weight and probative value.[63]

30. The Appellant shows no error in these findings. His argument that the Trial Chamber erroneously introduced into evidence the uncorroborated portions of P-2269's prior recorded testimony, stating that [REDACTED],[64] lack merit and should be rejected.

31. Corroboration is not required to introduce prior recorded testimony to into evidence under rule 68(2)(c). This is so even for portions of a witness's prior statement that relate to the acts and conduct of an accused.[65] The Trial Chamber correctly observed that it would consider the fact that some evidence in P-2269's prior recorded testimony could be unique and that the Defence had not had the opportunity to examine him, when assessing the weight and probative value to be accorded to his evidence.[66]

32. In any event, the Appellant is incorrect that P-2269's statement about [REDACTED] is uncorroborated. The Appellant misstates the legal notion of corroboration and misrepresents the relevant "key allegation[…] in the case."[67]

33. First, the Appeals Chamber has held that for the purposes of corroboration:

> "[d]ifferent testimonies do not need to be 'identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others.' Accordingly, while testimonies need not be identical in all aspects, they must confirm, even if in different ways, the same fact".[68]

34. Thus, evidence is corroborative where its different sources relate to the same material fact. The Appellant's assertion that corroboration requires identical evidence from another source is incorrect. It conflates the notion of 'corroborative' evidence with the notion of

[63] Decision, para. 36.
[64] Appeal, paras. 37-39.
[65] Appeal, para. 37. While a conviction cannot rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial, this does not preclude the introduction into evidence of the prior recorded testimony (ICC-01/04-02/06-2666-Red, para. 629).
[66] Decision, para. 36.
[67] Appeal, para. 39.
[68] ICC-01/04-02/06-2666-Red, para. 672. *See also* ICC-02/11-01/15-1400, paras. 357. See also para. 358 (With respect to the phrase "when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts, there is need for great care in describing the parameters of corroboration in terms so broad and uncertain.

'cumulative' evidence, which is repetitive evidence of the same character which goes to prove a point already established by other evidence.[69]

35. Second, contrary to the Appellant's submission, the relevant key allegation or material fact is not that P-2269 [REDACTED]. According to the dispositive part of the Pre-Trial Chamber's decision on the confirmation of charges, the relevant material fact which must be established is that Mr Ngaïssona contributed to the charged crimes, among other contributions, by "(ii) financing the Anti-Balaka, including for the purchase of weapons".[70] P-2269's evidence that he [REDACTED] is a subsidiary fact from which the existence of the material fact of Mr Ngaïssona financing the anti-Balaka may be inferred together with all other relevant evidence on the record.[71] The Trial Chamber therefore correctly considered that P-2269's prior recorded testimony included information concerning "events or allegations" which were corroborated by other evidence including testimony, and not whether each of P-2269's factual statements were corroborated.[72]

36. Third, the Appellant incorrectly argues that important events or allegations to which P-2269's prior recorded statement relates are uncorroborated, namely, his [REDACTED]. However, multiple evidence, including from witnesses who testified orally before the Trial Chamber, corroborates his evidence that Mr Ngaïssona [REDACTED]. These include Witnesses P-0884, [REDACTED], P-0889 and [REDACTED], who all testified orally before the Chamber.[73] The Trial Chamber specifically referred to the transcripts of evidence from some of these witnesses.[74] While their evidence may not be identical to P-2269's, each witness gave evidence from his individual perspective as to Mr Ngaïssona financing the Anti-Balaka. Accordingly they corroborate each other on this material fact. The Trial Chamber did not err

[69] 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. Chambers have cautioned against 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).
[70] ICC-01/14-01/18-403-Corr-Red, p. 111.
[71] Chambers Practice Manual, paras. 35-39. *See also* ICC-01/09-01/11-475, paras. 9-10; ICC-02/05-03/09-121-Corr-Red, paras. 35-36; ICC-01/04-01/06-3121-Red, para. 22; ICC-01/04-02/12-271-Corr, para. 125; ICC-01/05-01/13-2275-Red, para. 96.
[72] Decision, para. 36.
[73] The following references are non-exhaustive excerpts of oral testimonies relevant to Mr Ngaïssona having financed the Anti-Balaka, including for the purchase of weapons. In its closing brief, the Prosecution will refer to all testimonies and other sources of evidence, including documentary evidence which proves this material fact (see e.g. [REDACTED].
[74] *See* Decision, footnote 54, referring, among other evidence, to the evidence of **P-0884**: T-58 and **P-0889**: T-109.

by introducing into evidence the whole of P-2269's prior recorded testimony including his evidence of [REDACTED].

(iv) The alleged errors would not have materially affected the Decision

37. In any event, even if, *arguendo*, the Trial Chamber erred by introducing into evidence that specific portion of P-2269's prior recorded testimony, this would not have materially affected the Decision.[75] The Trial Chamber observed that some portions of P-2269's prior recorded testimony may not concern matters regarding which other witnesses also provided information.[76] It stated that introducing those portions into evidence would not cause unfair prejudice. It affirmed that it would consider that P-2269 was not available 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.[77]

38. For the reasons set out above, the Second Ground should be dismissed.

C. Third Ground: The Trial Chamber's Decision was sufficiently reasoned

(i) The Appellant's arguments

39. In its Third Ground, the Appellant argues that the Trial Chamber erred in law by not providing sufficient reasons for allowing into evidence P-2269's prior recorded testimony, in violation of rule 68(2)(c)(ii). He asserts that the Chamber was obliged to apply rule 68(2)(c)(ii) consistently to all allegations going to the acts and conduct of the accused not discussed by other testifying witnesses.[78] The Appellant submits that while the Chamber found that "at least part" of the information in P-2269's prior recorded testimony on the accused' acts and conduct were corroborated,[79] it did not deal with those other parts that were not corroborated.[80]

[75] *Contra*, Appeal, paras. 47-49.
[76] Decision, para. 36.
[77] Decision, para. 36.
[78] Appeal, paras. 40-46; see in particular para. 42 articulating the alleged error.
[79] Decision, para. 36.
[80] Appeal, para. 42.

(ii) The Appellant's arguments lack merit

40. The arguments in this ground repeat some of the misconceptions in the previous grounds. First, the Appellant argues that the Trial Chamber should have applied rule 68(2)(c)(ii) to "all [unique] allegations that go to the acts and conduct of the accused",[81] but fails to identify those parts. Apart from the alleged uniqueness of P-2269's evidence that he [REDACTED], addressed in the Second Ground,[82] the Appellant does not identify other portions of P-2269's prior recorded testimony which he alleges the Trial Chamber should have further reasoned. As such, the Appellant cannot fault the Trial Chamber for not providing sufficient reasons. The Appeals Chamber has repeatedly held that to justify its corrective intervention, an appellant must identify a "clear error" in the appealed decision.[83] The Appellant has failed to clearly identify an alleged error in the Decision and the Third Ground should be dismissed on that basis alone.

41. Second, the Appellant misinterprets the Decision. The Trial Chamber did not find that P-2269's prior statement contained unique portions. To the contrary, it found that "at least part" of the information P-2269 gave concerned events or allegations regarding which other witnesses also provided information on.[84] It also stated that P-2269's prior recorded testimony could include information that "might be considered as unique".[85] However, the Chamber did not — and was not required to — make a definitive finding on whether P-2269's prior recorded testimony included unique information about Mr Ngaïssona's acts and conduct.[86] As noted above,[87] corroboration is not required to introduce evidence under rule 68(2)(c), even if it goes to the acts and conduct of an accused. The Chamber was therefore not required to comprehensively analyse P-2269's testimony in light of all other information on the record to see if it was corroborated in all aspects. At this stage, assessing whether a witness's evidence is cumulative or corroborative can only be done at a general level and regarding broad themes discussed by the witness.[88] The Trial Chamber correctly did so. It admitted P-2269's prior

[81] Appeal, para. 43.
[82] As argued in response to the Second Ground of Appeal, the evidence that P-2269 had personally [REDACTED] is not unique (see above, paras. 29-38).
[83] See e.g. ICC-02/11-01/11-548-Red para. 103; ICC-01/05-01/08-631-Red, para. 62; ICC-02/11-01/15-992-Red, para. 14; ICC-01/04-01/10-283, para. 15.
[84] Decision, para. 36.
[85] Decision, para. 36.
[86] *See above*, para. 28: corroboration is not a legal requirement but rather a discretionary consideration.
[87] *See above*, para. 31.
[88] ICC-01/14-01/21-506-Red, para. 25.

recorded testimony, and affirmed that it would consider that he was not examined by the Defence, when assessing the weight and probative value of the evidence at the end of the case.[89]

42. Third, in any event, the Trial Chamber gave sufficient reasons for admitting the whole of P-2269's prior recorded testimony, including evidence relating to Mr Ngaïssona's acts and conduct. As held by the Appeals Chamber:[90]

> "[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion."

43. The Chamber's reasoning fully complied with these requirements. Without comprehensively assessing the statement in light of all the evidence before it, the Chamber allowed for the possibility that some portions may relate to Mr Ngaïssona's acts and conduct and be unique. It considered that any internal and external inconsistencies in the witness's statement were not such that they would preclude its introduction into evidence. The Chamber affirmed that it would take into account the fact that the Defence could not examine P-2269 on portions of his testimony that might be considered unique — including those relating to Mr Ngaïssona's acts and conduct — when assessing its weight and probative value.[91] This constitutes sufficient reasoning.

(iv) The alleged errors would not have materially affected the Decision

44. In any event, even if, *arguendo*, the Trial Chamber erred in law by giving insufficient reasons for allowing P-2269's prior recorded testimony into evidence under rule 68(2)(c), this would not have materially affected the Decision.[92] The Trial Chamber was fully alive to the potential for prejudice.[93] It stated that it would mitigate any such risk when assessing the weight and probative value of the evidence by considering that P-2269 was not examined by the Defence.[94] 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.[95] P-2269's prior recorded testimony is extensively corroborated by other evidence before the Trial

[89] Decision, para. 36.
[90] ICC-01/04-01/06-773, para. 20; ICC-01/04-01/06-774, para. 30.
[91] Decision, para. 36.
[92] *Contra*, Appeal, paras. 47-49.
[93] *Contra*, Appeal, para. 48.
[94] Decision, para. 36.
[95] Appeal, para. 49.

Chamber, including on the financing of the Anti-Balaka. When evaluating the weight and probative value of P-2269's prior recorded testimony at the end of the case in light of all other evidence, the Trial Chamber has affirmed that it will ensure that its admission does not prejudice the accused.

45. For the reasons set out above, the Third Ground should be dismissed.

D. Fourth Ground: The Trial Chamber did not err by observing that the Ngaïssona Defence expected to call a witness to testify about his experience in Gobere

(i) The Appellant's arguments

46. In its Fourth Ground, the Appellant argues that the Trial Chamber erred in law when it observed that "the Ngaïssona Defence currently expects to call [REDACTED] FACA member to testify about his experience in Gobere". The Chamber did so when deciding whether introducing P-2602's prior recorded testimony into evidence under Rule 68(2)(c) would be prejudicial to or inconsistent with the accused's rights.[96] The Appellant asserts that the Chamber justified this by reference to the future potential Defence Witness D30-4891. He argues that the Chamber effectively required the Defence to fill gaps in P-2602's unique evidence, thereby violating Mr Ngaïssona's right to remain silent, reversing the burden of proof and shifting the onus of rebuttal onto the Defence, in violation of articles 67(1)(g) and 67(1)(i) of the Statute.[97]

(ii) The Appellant's arguments lack merit

47. The Appellant's arguments are predicated on multiple misunderstandings of the Decision and should therefore be rejected.

48. First, the Trial Chamber did not "force the Defence to call D30-4891".[98] After finding that in addition to P-2602, multiple other witnesses gave evidence about the relationship between the Anti-Balaka and the "Gobere-group", it observed the "the Ngaïssona Defence currently expects to call [REDACTED] FACA member to testify about his experience in

[96] Decision, para. 57; see also paras. 58-59.
[97] Appeal, paras. 51-57.
[98] *Contra*, Appeal, para. 56.

Gobere".[99] This did not compel the Defence to call D30-4891. The Chamber expressly indicated that D30-4891 was on the Defence's "Preliminary List of Witnesses".[100]

49. Second, the Trial Chamber had no reason to rely on D30-4891's potential evidence to "justify" the introduction of P-2602's prior recorded testimony into evidence. The Appellant's assertion that P-2602's evidence is unique and it leave a gap in the Prosecution's evidence about Gobere unless the Defence were to call D30-4891,[101] are not supported by the Decision. The Chamber responded to the Defence's argument by observing that, in addition to P-2602, multiple "other witnesses – some of whom were also in Gobere – provided evidence and were examined in court concerning their relationship between the Anti-Balaka and the 'Gobere-group'".[102] Thus, while P-2602's own perspective about the Gobere group may be unique, his evidence on the relevant material facts about the Gobere group is not.[103] The Chamber's reference to portions of P-2602's evidence that "might be considered as unique",[104] does not show that it considered P-2602's evidence on Gobere was unique. Rather, similar to the Chamber's approach to P-2269, without comprehensively assessing P-2602's prior recorded testimony in light of all other evidence before it, the Trial Chamber was allowing for the possibility that some of P-2602's evidence could be unique. It affirmed that when assessing the evidence's weight and probative value, it would mitigate any prejudice by considering that P-2602 had not been questioned by the Defence .[105]

50. Third, the Trial Chamber did not make the introduction of P-2602's prior recorded testimony into evidence contingent on the Defence calling D30-4891.[106] Instead, it comprehensively assessed whether this would be prejudicial to or inconsistent with the rights of the accused, independently of D30-4891. The Chamber: (a) rejected the Defence's argument that P-2602's evidence was unique with regard to the "Gobere group";[107] (b) noted the extent to which P-2602's evidence was corroborated by other witnesses, and affirmed that it would consider that the witness had not been examined by the Defence when assessing its weight and

[99] Decision, para. 57.
[100] Decision, footnote 92.
[101] Appeal, paras. 55-56, 59.
[102] Decision, para. 57.
[103] *Contra,* Appeal, para. 56. As to the correct interpretation of corroboration in the context of rule 68(2)(c), see above, response to the Second Ground.
[104] Decision, para. 58.
[105] Decision, para. 58.
[106] *Contra,* Appeal, para. 53.
[107] Decision, para. 57.

probative value during its deliberations;[108] and (c) found that alleged internal inconsistencies in P-2602's prior recorded testimony were minimal and did not preclude its admission.[109] The Chamber's observation about D30-4891 was of minimal relevance to its assessment that introducing P-2602's prior recorded testimony into evidence was not prejudicial to or inconsistent with the rights of the accused. The Appellant does not show otherwise.

(iv) The alleged errors would not have materially affected the Decision

51. In any event, even if, *arguendo*, the Trial Chamber erred in law by observing that "the Ngaïssona Defence currently expects to call another FACA member to testify about his experience in Gobere", this would not have materially affected the Decision.[110] This factor was of minimal relevance to the Chamber's assessment of prejudice and decision to introduce P-2602's prior recorded testimony into evidence.

52. For the reasons set out above, the Fourth Ground should be dismissed.

[108] Decision, para. 58.
[109] Decision, para. 58.
[110] *Contra,* Appeal, paras. 58-61.

Conclusion

53. 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