

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: *ICC-01/14-01/18*

Date: **3 April 2024**

THE APPEALS CHAMBER

Before:

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Public Redacted Version of the “Corrected Version of the “Ngaïssona Defence Appeal against Trial Chamber V’s “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”, ICC-01/14-01/18-2127-Conf, issued on 6 October 2023”, 01/14-01/18-2207-Conf, filed on 15 November 2023”, ICC-01/14-01/18-2207-Conf-Corr, filed on 26 March 2024

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. The Defence for Mr Ngaissona (the “Defence”) hereby files its 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’ (‘Impugned Decision’), notified on 6 October 2023.¹ The Defence requests the Appeals Chamber to reverse the Impugned Decision (the “Appeal”) as it comprises three issues that are appealable on four grounds:

- **The First Ground of Appeal** : The Chamber failed to take into account the witnesses’ unwillingness to testify, misappreciated the witnesses’ withdrawal of cooperation with the Prosecution and failed to take into account the causal link between the witnesses’ withdrawal of cooperation and the fact that they cannot be located
- **The Second Ground of Appeal** : The Impugned Decision is vitiated by a factual error as the Chamber failed to take into account a relevant aspect of P-2269’s prior recorded testimony
- **The Third Ground of Appeal** : The Impugned Decision is vitiated by a legal error as the Chamber failed to provide sufficient reasoning or misapplied Rule 68(2)(c)(ii) of the Rules
- **The Fourth Ground of Appeal** : The Chamber erred in law when it allowed the introduction of P-2602’s Prior recorded testimony on the basis that the Defence expects to call another FACA member to testify about his experience in GOBERE

¹ ICC-01/14-01/18-2127-Conf (the “Impugned Decision”). The Defence clarifies that the “Impugned Decision” encompasses the Trial Chamber V’s determination on the introduction of P-2269’s and P-2602’s prior recorded testimonies *only*, namely ICC-01/14-01/18-2127-Conf., paras. 21 to 60.

2. Trial Chamber V (the “Chamber”) failed to exercise caution in allowing the introduction of testimonial evidence in deviation of the principle of orality, and committed legal and factual errors in doing so.

II. PROCEDURAL HISTORY

3. On 31 January 2023, the Chamber granted a Prosecution request to summon Prosecution witnesses P-2269 and P-2602.²
4. On 16 May 2023, the Registry informed the parties and participants that according to the [REDACTED] tasked with notifying the summonses to appear, Prosecution witnesses P-2602 and P-2269 are deceased.³
5. On 28 June 2023, upon the request of the Prosecution, the Registry provided the [REDACTED] reports on his attempt to serve the summonses to appear for Prosecution witnesses P-2602 and P-2269, and further relayed that “both Witnesses are believed to have died”.⁴
6. On 4 July 2023, the Prosecution filed its Request for Submission of the Prior Recorded Testimony of P-2269 pursuant to Rule 68(2)(c) (the “P-2269 Request”)⁵ and its Request for the Formal Submission of the Prior Recorded Testimony of P-2602 pursuant to Rule 68(2)(c) (the “P-2602 Request”).⁶
7. On 17 July 2023, the Defence filed its Response to the P-2269 Request (the “P-2269 Response”),⁷ arguing that the Prosecution failed to sufficiently establish P-2269’s death. Indeed, “when taken cumulatively”, the contradictory information received

² Decision on the Prosecution Requests to Summon Witnesses P-2602 and P-2269, ICC-01/14-01/18-1738-Conf.

³ See VWS email dated 16 May, at 16:16.

⁴ See Registry email dated 29 June 2023, at 16:35.

⁵ P-2269 Request, ICC-01/14-01/18-1957-Conf.

⁶ P-2602 Request, ICC-01/14-01/18-1958-Conf.

⁷ P-2269 Response, ICC-01/14-01/18-1986-Conf.

throughout the proceedings around P-2269's alleged death make it seem that he is simply "[REDACTED]".⁸

8. On the same day, the Defence filed its Response to the P-2602 Request (the "P-2602 Response"),⁹ disputing the allegation that P-2602 is dead and the interpretation of "unavailability" as put forward by the Prosecution since the witness has been "[REDACTED]" for the purpose of Rule 68(2)(c) of the Rules.¹⁰
9. On 27 July 2023, the Defence provided an investigation report from P-2602's brother stating that [REDACTED]. The brother further stated that his last contact with P-2602 dates back beginning of July 2023.¹¹
10. On 6 October 2023, the Chamber issued the Impugned Decision.
11. On 16 October 2023, the Defence filed its "Request for Leave to Appeal the "Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules",¹² wherein it raised three appealable issues.
12. On 25 October 2023, the Chamber granted the Defence's leave to appeal the Impugned Decision.¹³
13. On 30 October 2023, the Defence filed its "Consolidated Defence Request for an Extension of Page and Time Limits",¹⁴ whereby it requested the Appeals Chamber an additional 5 pages for its appeal against the Impugned Decision and to suspend the deadline until 1 December 2023.

⁸ P-2269 Request, para. 17.

⁹ P-2602 Response, ICC-01/14-01/18-1987-Conf.

¹⁰ P-2602 Response, para. 11.

¹¹ See Defence email dated 27 July 2023, at 16:22; CAR-D30-0003-0011.

¹² ICC-01/14-01/18-2127-Conf.

¹³ ICC-01/14-01/18-2164.

¹⁴ ICC-01/14-01/18-2171-Conf.

14. On 3 November 2023, the Appeals Chamber granted the extension of pages and set the deadline to file the present appeal on 15 November 2023.¹⁵

III. CONFIDENTIALITY

15. In accordance with regulation 23*bis*(1) of the Regulations of the Court, the present request is filed confidentially as it contains confidential information about Prosecution witnesses. A public redacted version will be filed in due course.

IV. APPLICABLE LAW & STANDARD OF REVIEW ON APPEAL

16. Article 64(2) of the Rome Statute (the “Statute”) provides that “[t]he Trial Chamber shall ensure that a trial is fair [...] and is conducted with full respect for the rights of the accused and due regard for the protection of [...] witnesses”.¹⁶ The protection of the “safety, physical and psychological well-being, dignity and privacy of [...] witnesses” equally falls within the Chamber’s duties, pursuant to Article 68(1) of the Statute.¹⁷

17. Article 67 provides for the right of the accused to a fair trial. As held by Trial Chamber II in the *Katanga* case, “the right to a fair trial [...] mandates [...] that each party to proceedings be afforded a reasonable opportunity to present its case under conditions which do not clearly disadvantage it vis-à-vis its adversary”.¹⁸ Article 67(1)(e) provides, *inter alia*, that the accused has the right “[t]o examine, or have examined, the witnesses against him”.¹⁹ The same Article provides the right of the accused to “[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal”.²⁰

¹⁵ ICC-01/14-01/18-2189.

¹⁶ Article 64(2) of the Statute.

¹⁷ Article 68(1) of the Statute.

¹⁸ *The Prosecutor v. Germain Katanga*, Judgement pursuant to article 74 of the Statute, 7 March 2014, para. 1572.

¹⁹ Article 67(1)(e) of the Statute.

²⁰ Article 67(1)(i) of the Statute.

18. The Defence incorporates by reference the principles governing the introduction of prior recorded testimonies pursuant to Rule 68(2)(c) of the Rules as set out in paragraphs 26 to 28 of the Chamber’s First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules.²¹

19. The Appeals Chamber previously found that

“[i]n the absence of specification of any grounds the parties are at liberty to raise any relevant ground of appeal, including the grounds as specified under article 82(1)(a) and (b).”²²

In other words, an appellant may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law, as well as (iv) ‘[a]ny other ground that affects the fairness or reliability of the proceedings or decision’, pursuant to Article 81(1)(b) of the Statute.²³ Additionally, the appellant is “obliged [...] to indicate, with sufficient precision, how [these] errors would have materially affected the Impugned Decision”,²⁴ failing which the Appeals Chamber will not interfere with the decision of the Chamber.²⁵ The impugned decision is materially affected by the error if the decision would otherwise have been “substantially different”.²⁶ In this regard, the Appeals Chamber would examine whether Trial Chambers gave weight “to

²¹ First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules, ICC-01/14-01/18-1975-Red, paras 26 – 28.

²² Situation in the DRC, Judgment on the Ntaganda Arrest Warrant Appeal, ICC-01/04-169 OA, 13 July 2006, paras. 32–33 ;

²³ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on Lubanga’s Appeal against Conviction, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 16.

²⁴ *The Prosecutor v. Laurent Gbagbo*, Judgment on Gbagbo’s Appeal against the Third Review Decision on his Detention, ICC-02/11-01/11-548-Red OA4, 29 October 2013, para. 96 ; *The Prosecutor v. Katanga & Ngudjolo*, Judgment on the Unlawful Detention and Stay of Proceedings Appeal, ICC-01/04-01/07-2259 OA10, 12 July 2010, para. 34 ; *The Prosecutor v. Ruto, Kosgey & Sang*, Judgment on Kenya’s Appeal on the Admissibility of the Case, ICC-01/09-01/11-307 OA, 30 August 2011, para. 89

²⁵ *The Prosecutor v. Kony et al.*, Judgment on the Ad Hoc Defence’s Appeal on the Admissibility of the Case, ICC-02/04-01/05-408 OA3, 16 September 2009, para. 80; *The Prosecutor v. Ruto, Kosgey & Sang*, Judgment on Kenya’s Appeal on the Admissibility of the Case, ICC-01/09-01/11-307 OA, 30 August 2011, para. 89; *The Prosecutor v. Muthaura, Kenyatta & Ali*, Judgment on Kenya’s Appeal on the Admissibility of the Case, ICC-01/09-02/11-274 OA, 30 August 2011, para. 87.

²⁶ *Situation in the Democratic Republic of Congo*, ICC A. Ch., ICC-01/04-169, 13 July 2006, para. 83.

extraneous or irrelevant considerations, [or] failed to give weight or sufficient weight to relevant considerations”.²⁷

20. In case of alleged errors of fact, the Appeals Chamber will only interfere when the first instance Chamber “misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts”.²⁸ A Trial Chamber misappreciated the facts when it cannot be discerned “[...] how the Chamber’s conclusion could have reasonably been reached from the evidence before it”.²⁹

21. Rule 158(1) of the Rules sets out the power of the Appeals Chamber to confirm, reverse or amend a decision that is appealed under Article 82(1)(d) of the Statute.

V. SUBMISSIONS

22. The rules governing the introduction of prior recorded testimonies were enacted as a deviation from Article 69 of the Statute that provides for the general principle of orality. It follows that Rule 68 of the Rules is the exception to the fundamental right of the accused to examine the witnesses testifying against him. As such, when assessing the introduction of evidence stemming from any prior recorded testimony, a “Chamber must ensure that [in] doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally [...]. [T]his requires a cautious assessment”.³⁰ The requirement for a cautious assessment is spelled out by the Appeals Chamber in both the *Gbagbo & Blé Goudé* case and in the *Ruto & Sang* case. The Appeals Chamber has emphasised that

²⁷ *The Prosecutor v. Kony et al.*, Judgment on the *Ad Hoc* Defence’s Appeal on the Admissibility of the Case, ICC-02/04-01/05-408 OA3, 16 September 2009, para. 81.

²⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on Lubanga’s Appeal against Conviction, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 21.

²⁹ *The Prosecutor v. Callixte Mbarushimana*, Judgment on Mbarushimana’s Interim Release Appeal, ICC-01/04-01/10-283 OA, 14 July 2011, paras. 1, 17; *The Prosecutor v. Ruto, Kosgey & Sang*, Judgment on Kenya’s Appeal on the Admissibility of the Case, ICC-01/09-01/11-307 OA, 30 August 2011, para. 56.

³⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the Appeals against the Decision on the Admission of Evidence, ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 78; *The Prosecutor v. William Samoei Ruto & Joshua Arap Sang*, Judgment on the Decision on the Admission of Prior Recorded Testimony under Rule 68, ICC-01/09-01/11-2024 OA10, 12 February 2016, para. 85 (emphasis added).

“since Rule 68(2) constitutes an exception to the principle of orality, its application was subject to ‘strict conditions’, which should be assessed in a cautious manner”.³¹ It follows that the preconditions set out under Rule 68(2)(c), including the witness’ unavailability to testify, should be interpreted strictly and with sufficient caution so to safeguard the rights of the accused.

23. The Defence respectfully submits that, as detailed below, the Chamber failed to take a cautious approach when it exercised its discretion to receive the testimonies of P-2269 and P-2602 by means other than in court personal testimony.³²

A. The First Ground of Appeal : The Chamber failed to take into account the witnesses’ unwillingness to testify, misappreciated the witnesses’ withdrawal of cooperation with the Prosecution and failed to take into account the causal link between the witnesses’ withdrawal of cooperation and the fact that they cannot be located

i. The Chamber failed to take into account relevant facts, took into account irrelevant facts, and misappreciated the facts as evidenced before it

24. The Chamber, when ruling on the P-2269 and P-2602 Requests, misappreciated the facts, took into account irrelevant facts, and failed to take into account relevant facts.

25. The Chamber ruled that P-2602’s and P-2269’s respective “unavailability would not stem for [their] mere reluctance, but rather obstacles that cannot be reasonably overcome [...]”,³³ and that they cannot be located, “even assuming [...] that [they are] unwilling to testify”.³⁴

³¹ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgement on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, ICC-02/11-01/15 OA 8, para. 66.

³² *See The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the Appeals against the Decision on the Admission of Evidence, ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 77.

³³ Impugned Decision, paras. 32, 53.

³⁴ Impugned Decision, paras. 32 and 53.

26. The Defence recalls that “a witness’s simple unwillingness to testify [...] is not sufficient to conclude that said witness is ‘unavailable’ within the meaning of Rule 68(2)(c) of the Rules”.³⁵
27. The Defence equally recalls that witness P-2602 expressly stated over the phone that “[REDACTED]” and was “[REDACTED]”.³⁶ It is only *after* this exchange that the Prosecution “has unsuccessfully attempted to contact P-2602 since April 2021, when the witness stopped responding.”³⁷ Similarly, the Defence recalls that the Prosecution received clear information from the witness’s wife that P-2269 “[REDACTED]” to a point where she helped her husband “[REDACTED]”.³⁸
28. *First*, considering the above, the Defence finds alarming the fact that the Chamber, in its *rationale* on both the P-2269 Request and the P-2602 Request, did not even once mention the witnesses’ unwillingness to testify as expressed unequivocally, let alone consider this fact in its assessment. It only does so obliquely in its final findings on “unavailability”. Indeed, it is only when the Chamber concluded that the witnesses were “unavailable” that it added “even if [they were] unwilling to testify”. This hasty and impromptu addition is the only vague reference to the fact that the witnesses expressed their unwillingness to testify. The Chamber thus failed to take into account – or at the very least failed to give sufficient weight to – the most relevant fact there is in assessing “unavailability”, namely that P-2602 expressly said “he was not willing to testify”

³⁵ See Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0130’s prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, 21 February 2022, ICC-01/12-01/18-2124-Conf, para. 12; See also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039, 19 May 2016, ICC-01/04-02/06-1325, para. 9.

³⁶ “Confidential redacted version of “Prosecution’s Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness””, 8 December 2022, ICC-01/14-01/18-1690-Conf-Red2., paras. 18 and 18.a.

³⁷ Decision on the Prosecution Requests to Summon Witnesses P-2602 and P-2269, ICC-01/14-01/18-1738-Conf., para. 11.

³⁸ Version confidentielle expurgée de la « Requête de l’Accusation sur le fondement des articles 64(6)(b) et 93 du Statut de Rome aux fins de délivrance d’une citation à comparaître au témoin P-2269 », 15 décembre 2022, ICC-01/14-01/18-1701-Conf-Red., paras. 2 and 25.

and that P-2269 does not wish to be contacted by the Prosecution to such point that [REDACTED] to subtract himself from the Court.

29. *Second*, the Chamber misappreciated the facts when it misconstrues those withdrawals of cooperation as constitutive of “mere reluctance”³⁹ when they clearly illustrate the witnesses’ unwillingness to testify for the Prosecution. Following common sense, a witness that would merely be reluctant to testify would be a witness that would, for instance, communicate security concerns to the Prosecution or asking for a postponement of his testimony until another moment. [REDACTED], [REDACTED] or clearly communicating their unwillingness to testify is far more than “mere reluctance”.

30. *Third*, the Chamber took into account irrelevant facts in the course of its assessment, and even speculated on the witnesses’ intentions. Indeed, there is no indication that the witnesses may have recanted their withdrawal of cooperation or renewed their willingness to cooperate with the Prosecution prior to the Prosecution being unable to locate them. As such, it follows that the subsequent

- Prosecution’ requests for summonses following unsuccessful attempts to contact the witnesses;
- Decision granting the summonses;
- failure of the CAR authorities to locate the witnesses;
- [REDACTED] inability to serve the summonses to the witnesses;⁴⁰ and
- fact that P-2602 may have joined [REDACTED] in the bushes and is therefore unreachable⁴¹

all became irrelevant factors in determining the witnesses’ unavailability to testify orally. The above summonses, by definition, are judicial documents intended to compel the appearance of witnesses and, as agued by the Prosecution, it is

³⁹ Impugned Decision, paras. 32, 53.

⁴⁰ Impugned Decision, paras. 32 and 52.

⁴¹ Impugned Decision, para. 53.

apparent that P-22609 and P-2602 “[REDACTED]” or “[REDACTED]”.⁴² Therefore, the requests for summonses and the Decision granting them⁴³ cannot be taken into account to support the witnesses’ unavailability, but rather their unwillingness to testify. The summonses were requested because the witnesses severed all contacts with the Prosecution after it received clear information that the witnesses were unwilling to testify. No evidence suggesting that the witnesses may have renewed their interest to testify came to light after these requests for summonses were filed or granted. Similarly, if a witness decided to go on with his life and join a [REDACTED] after expressing his unwillingness to testify, the “unlikelihood” of “the execution of the summons” due to the fact that he had joined the [REDACTED] is irrelevant in assessing the witness’ unavailability;⁴⁴ he remains unwilling and resumed his life accordingly. In the absence of evidence that suggests a renewal of willingness to testify, there is no indication that their so-called unavailability is nothing more than the manifestation of their expressed unwillingness to testify. Therefore, from the moment the witnesses expressed their unwillingness to testify, all the above factors became moot and irrelevant in the assessment of the P-2269’s Request and the P-2602 Request. The Chamber ignored the chronology of the events as established by the evidence before it, and consequently took into account facts that are irrelevant. In doing so, the Chamber incautiously applied Rule 68(2)(c) of the Rules.

31. *Fourth*, the Chamber failed to take into consideration that the “obstacles” that could not have been overcome, namely the fact that they cannot be located, are the consequences of witnesses’ actions to ignore or subtract themselves from all contacts with the Court or the Prosecution after they expressed their unwillingness to testify. As mentioned above, the Chamber ignored the chronology of the events

⁴² ICC-01/14-01/18-1690-Conf-Red2., para. 19; ICC-01/14-01/18-1701-Conf-Red2, para. 26 («[...] [REDACTED] »).

⁴³ ICC-01/14-01/18-1738-Conf-tFRA.

⁴⁴ See Impugned Decision, para. 53 (“[REDACTED].”). (emphasis added).

and ignored the causal effect the witnesses' unwillingness to testify had on the authorities' inability to locate them. In this sense, the Chamber failed to take into consideration the causal relation between (1) the witnesses' success in putting an end to – of their own volition and out of their own manoeuvres – their cooperation with the Prosecution; and (2) the fact that they cannot be located.

ii. *The Chamber's factual and legal errors materially affected the Impugned Decision*

32. As explained above, the evidence that is before the Chamber, notably the Prosecution's requests to summons P-2269 and P-2602,⁴⁵ demonstrates that both witnesses expressed their unwillingness to testify for the Prosecution prior to being unlocatable. Had the Chamber taken into consideration such fact in its *rationale* and properly appreciated the witnesses' unwillingness to testify as the underlying cause to the "obstacles that cannot be reasonably overcome", the Impugned Decision would have been substantially different. Indeed, had the Chamber properly taken into account the chronology of the events as evidenced before it, it would have no other choice but to conclude that the witnesses' so-called unavailability stems solely from their unwillingness to testify. The factual errors impacted the Impugned Decision materially as, had not been for these errors, the P-2269 Request and P-2602 Request would have been rejected in their entirety as the witnesses were simply unwilling to testify.

33. Given the factual errors as detailed above, the Appeals Chamber should reverse the Decision.

⁴⁵ ICC-01/14-01/18-1701-Conf-Red2 and ICC-01/14-01/18-1690-Conf-Red2.

B. The Second Issue : The Chamber erred in fact and in law when it allowed the introduction of P-2269's prior recorded testimony in its totality without assessing the fact that P-2269's evidence touches upon Mr Ngaïssona's acts and conducts properly

34. The Trial Chamber held that

“the information provided by the witness in relation to the accused's alleged acts and conduct does not create prejudice to an extent which would preclude introduction of the prior recorded testimony. First, at least part of the information concerns events or allegations regarding which other witnesses who testified before the Chamber also provided information on.”⁴⁶

35. The Defence submits that the above finding involves one issue that is appealable on two grounds.

- i. *The Second Ground of Appeal : The Impugned Decision is vitiated by a factual error as the Chamber failed to take into account a relevant aspect of P-2269's prior recorded testimony.*

36. Pursuant to Rule 68(2)(c)(ii) of the Rules, “the fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.” P-2269's evidence goes to proof of Mr Ngaïssona's acts and conduct.

37. The Chamber ruled that one of the reason why it allowed the introduction of the witness's prior recorded testimony despite being in relations to Mr Ngaïssona's alleged acts and conduct is that “at least part of the information concerns events or allegations regarding which other witness who testified before the Chamber also provide information on”.⁴⁷ While a prior recorded testimony that contains extensive reference to the acts and conduct of the accused can be admitted where testimony on the same acts had been heard by other witnesses, a crucial aspect of

⁴⁶ Impugned Decision, para. 36.

⁴⁷ Impugned Decision, para. 36.

P-2269's evidence has not been corroborated by any Prosecution witnesses and will not be in light of the current phase of the case..

38. Indeed, P-2269's evidence includes incriminating information that he allegedly witnessed directly. Notably, and as pointed out by the Prosecution,⁴⁸ P-2269 alleges that he was personally [REDACTED] and that he personally [REDACTED].⁴⁹ These allegations were not discussed by any other prosecution witnesses. Additionally, in his prior recorded statement, P-2269 did not mention that he was in presence of anyone else when [REDACTED]. Therefore, not only this particular allegation was not discussed by other prosecution witnesses, but it cannot be without hearsay evidence. Yet, this allegation goes to the very core of the charges against Mr Ngaïssona.

39. The Chamber misappreciated P-2269's evidence and failed to take into consideration the fact that it is impossible for P-2269's evidence in this regard to be corroborated. Not only parts of his evidence cannot be corroborated but P-2269 is the only witness in this case who alleges [REDACTED]. The unique perspective of P-2269's incriminating evidence on key allegations in the case against the accused should have been expressly addressed and cautiously assessed by the Chamber. As such, the Chamber committed a factual error in allowing the introduction of P-2269's prior recorded testimony in its entirety without weighing in the relevant fact that P-2269 is the only witness in the case to allege [REDACTED]

- ii. *The Third Ground of Appeal : The Impugned Decision is vitiated by a legal error as the Chamber failed to provide sufficient reasoning or misapplied Rule 68(2)(c)(ii) of the Rules*

⁴⁸ Version confidentielle expurgée de la « Requête de l'Accusation sur le fondement des articles 64(6)(b) et 93 du Statut de Rome aux fins de délivrance d'une citation à comparaître au témoin P-2269 », 15 décembre 2022, para. 20.

⁴⁹ CAR-OTP-2111-0336, para. 105 (“[REDACTED].”).

40. Decisions of courts and tribunals should adequately state the reasons on which they are based.⁵⁰ Reasoned decisions serve the purpose of demonstrating to the parties and participants that their submissions have been examined and taken into consideration. Additionally, reasoned decisions oblige judges to base their reasoning on objective arguments, while preserving the rights of the Defence. Courts should therefore indicate with sufficient clarity the grounds on which they base their decision. The Appeals Chamber in *Lubanga* case has indicated the need for a well-reasoned decision, noting that the extent of the reasoning will depend on the circumstances of the case but that it is nonetheless essential that a decision indicates with sufficient clarity its basis.⁵¹ The reasoning need not recite and set out each and every factor, but it must identify facts it found to be relevant to the conclusion reached.⁵²

41. More importantly, “[r]easoning is at the heart of a judicial decision and an important aspect of the right to a fair trial. Articles 64(2) and 67(1) of the Statute require the Court to conduct a fair trial.”⁵³ Therefore, a reasoned decision is a requirement under Rule 68(2)(c) as the overarching precondition for the introduction of prior recorded testimony in that such introduction should not be inconsistent with the rights of the accused pursuant to Rule 68(1) of the Rules.

42. The Chamber held that introducing P-2269’s prior recorded testimony in relation to Mr Ngaïssona’s alleged acts and conduct does not create prejudice to an extent which would preclude its introduction⁵⁴ because “at least part of the information concerns events or allegations regarding which other witnesses who testified before the Chamber also provided information on”.⁵⁵ Yet, the Chamber does not

⁵⁰ ECtHR, *Moreira Ferreira v. Portugal (No. 2)*, Judgment, Application no. 19867/12, 11 July 2017, para. 84.

⁵¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-774, 14 December 2006, para. 30.

⁵² *Idem*, para. 30.

⁵³ *The Prosecutor v. Laurent Gbagbo*, Dissenting Opinion of Judge Ušacka in the Judgment on Interim Release, ICC-02/11-01/11-278-Red OA, 26 October 2012, para. 8. Diss. Op.

⁵⁴ Impugned Decision, para. 36.

⁵⁵ *Ibid.* (emphasis added).

address the remaining part of the information that was not discussed by testifying witnesses but yet relates to Mr Ngaïssona's alleged acts and conduct. In this regards, the Impugned Decision lacks reasoning, and was reached in violation of Rule 68(1) of the Rules, at best. At worst, the Chamber exercised its discretionary powers incorrectly as it misapplies Rule 68(2)(c)(ii) of the Rules.

43. Indeed, while the fact that the prior recorded testimony goes to proof of acts and conduct of the accused is not an absolute bar to its submission,⁵⁶ it remains a "factor" that needs to be taken into consideration by the Chamber as a legal criterion. And, the mere presence of Rule 68(2)(c)(ii) within the Rules imposes that the Chamber applies such criterion when cautiously assessing the introduction of a prior recorded testimony pursuant to Rule 68(2)(c) of the Rules. When Rule 68(2)(c)(ii) provides that the fact that the prior recorded testimony goes to proof of acts and conduct of the accused "[...] may be a factor against its introduction [...]", it does not relieve the Chamber from consistently applying Rule 68(2)(c)(ii) to all allegations that go to the acts and conduct of the accused. The spirit of Rule 68(2)(c)(ii) is to safeguard fair trial rights of the accused who was deprived of his or her rights to cross-examine witnesses and to have incriminating evidence challenged in court.

44. Yet, the Chamber did not assess whether the rest of P-2269's evidence that goes to Mr Ngaïssona's alleged acts and conduct militates against the introduction of his prior recorded testimony or not.

45. The Chamber abused its discretionary powers by allowing the introduction of P-2269's prior recorded testimony in its entirety without having put the totality of the information that relates to Mr Ngaïssona's alleged acts and conduct contained therein against Rule 68(2)(c)(ii) of the Rules. Here, the Chamber incorrectly

⁵⁶ ICC-01/14-01/18-1975-Red, para. 38 ; See also *The Prosecutor v. Bosco Ntaganda*, Trial Chamber, Decision on Prosecution Application under Rule 68(c)(2) for Admission of Prior Recorded Testimony of Witness P-0016 (24 February 2017) at para. 26

exercised its discretion to receive the testimony of a witness by means other than in-court personal testimony, as it did so in disregard of the Rules of Procedure and Evidence.⁵⁷

46. As such, the Impugned Decision is vitiated by a legal error as the Chamber failed to apply the law properly. This showcases once again that the Chamber failed to exercise caution when admitting written evidence going to the acts and conduct of the accused without cross-examination.

iii. The factual and legal errors materially affected the Impugned Decision

47. The Chamber held that “[...] the information provided by the witness in relation to the accused’s alleged acts and conduct does not create prejudice to an extent which would preclude introduction (sic.) of the prior recorded testimony”.

48. *First*, the factual error materially affected this finding as the Chamber did not take into consideration the totality of P-2269’s evidence, and consequently did not properly assess the “extent” of the prejudice caused by the introduction of prior recorded testimony. Should the Chamber have taken into account P-2269’s allegations that he [REDACTED], the corroboration of which is inexistent and impossible, it could not have reasonably allowed the introduction of paragraph 105 of P-2269’s prior recorded testimony.⁵⁸ The Chamber could not have reasonably allowed the introduction of P-2269’s prior recorded testimony in its entirety from P-2269’s evidence as whole.

49. *Second*, and in similar veins, the Chamber did not apply Rule 68(2)(c)(ii) of the Rules to “other parts” of P-2269’s evidence that goes to Mr Ngaissona alleged acts

⁵⁷ See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the Appeals against the Decision on the Admission of Evidence, ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 77 (“Thus, under the second sentence of article 69(2) of the Statute, a Chamber has the discretion to receive the testimony of a witness by means other than in-court personal testimony, as long as this does not violate the Statute and accords with the Rules of Procedure and Evidence.”).

⁵⁸ CAR-OTP-2111-0336, para. 105.

and conducts. The Chamber therefore failed to assess whether these “other parts” of P-2269’s evidence weigh against or in favour of the introduction of his prior recorded testimony. Therefore, the Chamber did not properly assess the “extent” of the prejudice caused by the introduction of prior recorded testimony, as it limited the application of Rule 68(2)(c)(ii) of the Rules to “at least part of the information” in relation to Mr Ngaissona’s alleged acts and conduct. Should have the Chamber applied the law correctly, the extent of the prejudice caused would have been larger so as to exclude the introduction P-2269’s prior recorded testimony, or part of it.

50. *Overall*, had the Chamber not committed these factual and legal errors, the P-2269 Request would have been rejected in its totality, or at least partially.

C. The Fourth Ground of Appeal : The Chamber erred in law when it allowed the introduction of P-2602’s Prior recorded testimony on the basis that the Defence expects to call [REDACTED] FACA member to testify about his experience in GOBERE.

i. The Chamber exercised its discretionary powers incorrectly by reversing the burden of proof and by shifting the onus of rebuttal on the Defence

51. As previously held by the Appeals Chamber, “[g]rounds of appeal for appeals brought under article 82(1)(d) of the Statute can include those grounds that are listed at article 81(1)(a) of the Statute, which includes errors of law”.⁵⁹

52. Article 67 of the Statute provides for fair trial rights that are interwoven with the presumption of innocence of the accused as guaranteed by Article 66 of the Statute. As such, Article 67(1)(i) of the Statute prohibits, as a corollary of the presumption of innocence, any reversal of the burden of proof or onus of rebuttal to the detriment of the accused. Rule 68(1) of the Rules provides for the “[...] Trial

⁵⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on Disclosure Restriction Pursuant to Rule 81(2) and (4), ICC-01/04-01/06-568 OA3, 13 October 2006, para. 19.

Chamber may [...] allow the introduction of previously recorded audio or video testimony of a witness [...] or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused [...].”

53. The Chamber erred in law when it took into account that the Defence “currently expects to call [REDACTED] FACA member to testify about his experience in Gobere”⁶⁰ to justify the introduction of P-2602’s unique evidence on GOBERE pursuant to Rule 68(2)(c) of the Rules.
54. The Defence recalls that D-30-4891 is a provisional witness for the Defence, and the Defence previously “emphasize[d] the provisional nature of the composition of its list [of witnesses] and the estimates, given: (1) the uncertainties as to the state of the present evidence against Mr Ngaïssona [...]”.⁶¹ As such, D30-4891’s status as a defence witness remains conditional to several factors, and his presence on the Defence Final List of Witnesses is far from being secured.
55. The Chamber cannot motivate a decision on the basis that the gap in the Prosecution’s evidence on GOBERE will be filled with potential evidence provided by a defence witness, whose very status as a witness is not definitive, whose testimony is uncertain and whom, crucially, the Defence is under no obligation to call. This is even more worrisome when P-2602’s evidence on GOBERE is so crucial that absent his testimony, in the Prosecution’s words, “[REDACTED].”⁶²
56. The Chamber’s finding in this regard would force the Defence to call D30-4891 so that P-2602’s unique evidence on GOBERE may be put to debate in an adversarial setting. However, the application of the principle of orality surrounding the

⁶⁰ Impugned Decision, para. 57.

⁶¹ Ngaïssona Defence notice of intent to present evidence pursuant to Trial Chamber V’s “Further Directions on the Conduct of the Proceedings” (ICC-01/14-01/18-1892), ICC-01/14-01/18-2055-Conf., para. 6.

⁶² “Confidential redacted version of “Prosecution’s Request under Articles 64(6)(b) and 93 of the Rome Statute to Summon a Witness””, 8 December 2022, ICC-01/14-01/18-1690-Conf-Red2., para. 20.

admission of evidence should not rest on the Defence's shoulders. The Defence should not be made to call a witness so to create an adversarial setting and compensate for the prejudice caused by the introduction of Prosecution evidence through Rule 68(2)(c) of the Rules.

57. The Chamber, in reaching the Impugned Decision, proceeded to an impermissible reversal of the burden of proof, put the onus on the Defence to bring evidence on the alleged GOBERE Group in an adversarial setting, and violated Mr Ngaïssona's right to remain silent. The Chamber therefore infringed Mr Ngaïssona's statutory rights as enshrined in Article 67(1)(g) and 67(1)(i) of the Statute. By relying on a potential Defence witness to bring evidence on GOBERE and by shifting the burden of creating an adversarial setting around said evidence, the Chamber erred in law when it granted the introduction of P-2602's prior recorded testimony in its totality.

ii. The legal error of relying on a potential Defence witness to bring evidence on GOBERE and of shifting the burden of creating an adversarial setting around said evidence materially affected the Impugned Decision

58. As mentioned above, the above finding is in clear disregard of the overarching pre-condition of the introduction of prior recorded testimony asset out in Rule 68(1) of the Rules. But for this error, the P-2602 Request would have been rejected in its entirety.

59. Rule 68(2)(c) evidence can be corroborated with evidence that is not exactly identical, but it has to be on similar facts,⁶³ which, due to the uniqueness of P-2602's evidence, is not the case. Here, the Chamber's finding suggests that a potential Defence witness corroborates P-2602's unique evidence.

⁶³ *The Prosecutor v. Bosco Ntaganda*, Judgement on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 entitled 'Judgement', ICC-01/04-02/06-2666-Red, 30 March 2021, para. 672.

60. Had the Chamber not committed the reversal of the burden of proof and the onus of rebuttal, the P-2602 Request would have been rejected in its entirety, or partially regarding aspect of the prior recorded testimony that is unique.

61. Given this legal error, the Appeals Chamber should reverse the Impugned Decision on the P-2602 Request.

VI. CONCLUSION

62. The Chamber, when it issued the Impugned Decision, did not exercise its discretionary powers correctly or did exercise it in an abusive manner. The Impugned Decision effectively allows for the introduction of prior recorded testimonies that come from persons who were not willing to testify anymore. Additionally, the Chamber failed to apply Rule 68(2)(c)(ii) of the Rules consistently to the evidence before it. Finally, to grant the P-2602 Request and the P-2269 Request, the Chamber proceeded to an impermissible reversal of the burden of proof and burdened the Defence to create an adversarial setting. All the above shows that the Chamber failed to take a cautious approach when it exercised its discretion to receive the testimonies of P-2269 and P-2602 by means other than in-court personal testimony.

VII. RELIEF SOUGHT

63. The Defence respectfully requests the Appeals Chamber to **REVERSE** the Impugned Decision on the P-2602 Request and the P-2269 Request.

Respectfully submitted,



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Ngaïssona

Dated this 3 April 2024,

At The Hague, the Netherlands