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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

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 “Defence Response to the Prosecution’s Request for the
Formal Submission of the Prior Statements of P-1847”, ICC-01/14-01/18-2026-Conf, 14
August 2023**

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. On 7 July 2023, the Prosecution filed the “Prosecution Request for the Formal Submission of the Prior Recorded Statements of P-1847” (‘Prosecution Request’),¹ whereby it requested Trial Chamber V (‘the Chamber’) to introduce the two prior recorded statements of witness P-1847 under Rule 68(2)(d) of the Rules of Procedure and Evidence (‘the Rules’). The Defence for Patrice-Edouard Ngaïssona (‘the Defence’) strongly opposes the Prosecution Request, and hereby presents the Chamber with its response where it argues several bases on which the Prosecution Request should be rejected. Pursuant to Regulation 23(bis) of the Regulations of the Court, the Defence files the present response confidentially seeing as it responds to Prosecution request containing the same classification. A public redacted version shall be filed in due course.

II. SUBMISSIONS

2. Article 69(2) of the Rome Statute unequivocally states that “testimony of a witness shall be given in person except to the extent provided by the measures set forth in article 68 or in the Rules. The language used in the Statute, which refers to any deviation being only allowed to a defined limit as proposed by article 68 or in the Rules implies a narrow construction of any departure from the principle of orality enshrined in article 69(2). Therefore, the exceptions to Article 69(2), under Rule 68 should be construed narrowly. Nothing in the plain text of Rule 68(2)(d) suggests a deviation from this interpretation. Further, the Prosecution’s submissions that in the *Prosecutor v. Ruto & Sang*, Trial Chamber V(a) recognized that the Rule 68(2)(d) would have broad application is not supported in the slightest by the decision the Prosecution cites², and is contradicted by Judge Eboe-Osuji’s concurring opinion to the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’ (‘*Ruto* Rule 68(2)(d) and (c) Decision’)³. Specifically, Judge Eboe-Osuji noted that “that the drafters of the new rule [68] went to great lengths to

¹ ICC-01/14-01/18-1971-Conf

² Prosecution Request, para 7. The authority the Prosecution cites is the Decision on Defence Applications for Judgments of Acquittal. ICC-01/09-01/11-2027-Red-Corr. Paragraphs 147-148 do refer to witness interference in the *Ruto & Sang* case. However, nothing in these paragraphs relates to the application of Rule 68(2)(d) in general, and how it should be construed in particular.

³ ICC-01/09-01/11-1938-Corr-Red2

circumscribe the circumstances under which prior recorded 'testimony' is admissible into trials.”⁴

3. Indeed, in order for a Chamber to introduce a statement under Rule 68(2)(d), it must be satisfied that several cumulative criteria have been met, in particular :
 - i. the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony;
 - ii. the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion;
 - iii. reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness;
 - iv. the interests of justice are best served by the prior recorded testimony being introduced;
 - v. and - the prior recorded testimony has sufficient indicia of reliability.
4. Rule 68(2)(d) additionally provides other factors for Chambers to consider, among which is Rule 68(2)(d)(iv): “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.”
5. In the present response, the Defence will not address whether the Prosecution made reasonable efforts to secure from P-1847 all material facts. Additionally, the Defence understands that the Chamber has ruled that for both Rule 68(2)(b) and (c), sufficient indicia of reliability has sufficiently been demonstrated when certain formal requirements have been met.⁵ Therefore, the Defence does not contest that the formal requirements of taking P-1847’s statement were met. However, this does not translate to the Defence conceding the statements’ reliability, which is outside the scope of the present response.
6. For the remaining three criteria, the Defence submits that the Prosecution’s Request is deficient, and should be rejected for the following three reasons: (1) P-1847 did not fail to give evidence with respect to material aspects in his prior recorded testimony; (2) the Prosecution has not produced specific evidence of sufficient probative value to show improper interference with P-1847’s testimony; (3) introducing P-1847 statement would

⁴ Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony', ICC-01/09-01/11-1938-Anx-Red, para. 18.

⁵ ICC-01/14-01/18-1975-Red, paras 32-34

not be in the interests of justice and would encourage the Prosecution's inappropriate tactics.

a. P-1847 did not fail to give evidence with respect to material aspects included in his prior recorded testimony

7. The Defence submits that Rule 68(2)(d)(i) does not apply in a situation where a witness does attend trial, and under oath, tells the Chamber that certain material aspects included in his prior recorded statement were incorrect. Under general rules of interpretation, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".⁶ The Prosecution's interpretation of the rule is not in accordance with both the plain meaning of the rule and its object and purpose.
8. First, Rule 68(2)(d)(i) specifically requires an attending witness to "fail to give evidence with respect to a material aspect included in his or her prior recorded testimony." Providing different evidence with respect to material aspects included in a prior recorded statement does not constitute a failure to give evidence. Such an interpretation of the rule is in accordance with the plain meaning of Rule 68(2)(d)(i). Cambridge online dictionary defines failure as "the fact of not doing something that you must do or are expected to do."⁷ Here, the Prosecution is not alleging that P-1847 either did not attend trial or did not testify on certain material aspects included in his prior recorded statement. Therefore, under Rule 68(2)(d)(i)'s plain meaning, the Prosecution Request is beyond the legal scope of Rule 68(2)(d)'s application.
9. Second, interpreting Rule 68(2)(d) to be inapplicable in the present circumstances would also be in accordance with rule's object and purpose. The "Working Group on Lessons Learnt Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony)" ('Working Group Report')⁸, which outlines the drafting history of the amended Rule 68, provides that the main purpose for amending Rule

⁶ Vienna Convention on The Law of Treaties, United Nations Treaty Series 18232, vol. 1155, p 331, signed on 23 May 1969 and entered into force on 27 January 1980 [hereinafter "Vienna Convention"], Article 31.

⁷ Cambridge online dictionary, <https://dictionary.cambridge.org/us/dictionary/english/failure>

⁸ Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), Annex II.A, <https://www.legal-tools.org/doc/26fa09/pdf/>

68 was to expedite proceedings and streamline the presentation of evidence.⁹ Finding that Rule 68(2)(d) can apply instances where a witness does attend, but whose evidence deviates from the prior recorded statement would render trials undoubtedly more complex and longer. Introducing the prior recorded statements in such circumstances clutters the record with different versions of the witness' evidence, and the Chamber during deliberations must compare the two versions and determine which one is true. Rule 68(2)(d) applies in situations where there is no evidence that can be secured through the witness' attendance. Such an interpretation is also consistent with the remaining provisions of Rule 68(2)(b) and (c), both of which apply when the Chamber does not hear evidence *viva voce* from the witness. Further, such an interpretation is consistent with the principle of orality enshrined in Article 69(2). The Working Group Report specifically noted the importance of the amended Rule 68 being in conformity with the broader legal framework of the Court, namely Article 69(2)'s requirement that testimony be given "in person". Here, the witness has given testimony in person on all the material aspects the Prosecution wishes to introduce from his prior recorded statement. Therefore, the clear preference for oral testimony under Article 69(2) would dictate that the prior recorded statement of P-1847 should only be considered for impeachment purposes and not for the truth of its content. Moreover, while the Prosecution submits P-1847 testified under oath that his statement was accurate, this fact is not sufficient to establish a derogation from the general rule that evidence must be given in person pursuant to Article 69(2).¹⁰

10. The Prosecution cites the *Ruto* Rule 68(2)(d) and (c) Decision in support of its argument that Rule 68(2)(d) does apply in this case. So far, the *Ruto* Rule 68(2)(d) and (c) Decision is the only decision where a Chamber of this Court has been seized of the question whether a witness who does attend the trial, but who gives evidence which deviates from fundamental aspects included in their prior recorded statements can qualify as a witness who "failed to give evidence" under Rule 68(2)(d). Not only was this issue decided by

⁹ Ibid., paras, 6, 11. See *Ruto* Rule 68(2)(d) and (c) Decision, para. 60 ("The main purpose of Rule 68 of the Rules is to expedite trial proceedings").

¹⁰ The Prosecution's references to U.S. case law in the adjudication of this matter in para 16 of the Prosecution Request should be disregarded pursuant to article 21, which requires the Court to apply in the first place the Statute, Elements of Crime and Rules of Procedure and Evidence.

Majority,¹¹ it was overturned on appeal.¹² While the decision was overturned on different grounds, one of the grounds on which the Trial Chamber V(A) granted leave to appeal was this very issue, namely can Rule 68(2)(d) be applied in situations where the witness does testify but deviates from his prior recorded testimony.¹³ Therefore, this decision hardly constitutes a practice before this court to interpret “failure to give testimony” under Rule 68(2)(d) to include circumstances where a witness does testify on material aspects of his prior recorded statement.¹⁴

11. Given the Prosecution Request does not fall within the scope of Rule 68(2)(d)’s applicability, the Defence submits that the Chamber may reject the application on this ground alone.
12. With respect to the alleged timing of P-1847 recanting his previous recorded statement, the Defence submits that the Prosecution incorrectly states the witness had a change of position from his first day of testimony on Friday, 26 March 2021, that could be observed starting on his second day of testimony on Monday, 29 March 2021.¹⁵ Such a conclusion cannot be drawn since on the first day of the Prosecution’s examination, it never asked questions related to Mr Ngaïssona’s acts and conduct in 2013 while he was in Cameroon.¹⁶ Therefore, a comparison cannot be made to show that there was any change of position. To say that the witness would have answered differently had he been asked questions on 26 March 2021 about Mr Ngaïssona’s acts and conduct while he was in Cameroon during late 2013, amounts to pure speculation, and should not be entertained by the Chamber.
13. Indeed, the few topics that were addressed on both the first day of testimony and the subsequent two days show consistency between P-1847’s responses throughout his

¹¹ Jude Eboe Osuji issued a separate concurring opinion finding that Rule 68(2)(d) could not apply to the circumstances put forth by the Prosecution because a Rule 111 statement prior did not constitute “testimony” within the meaning of Rule 68(2). Therefore, his decision did not address the issue of whether a witness deviating from his prior recorded statement can qualify as a witness who fails to give evidence under Rule 68(2)(d).

¹² ICC-01/09-01/11-2024.

¹³ The Appeals Chamber never addressed this ground appeal of appeal since its determination that Trial Chamber V(A) erred on the first ground was dispositive. ICC-01/09-01/11-2024, para. 97.

¹⁴ Vienna Convention, Article 31(3)(b) (“any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”)

¹⁵ Prosecution Request, para. 17.

¹⁶ The Prosecution’s examination regarding Mr Ngaïssona on [REDACTED] [REDACTED] 2021 concerned: (1) whether the witness knew Mr Ngaïssona; (2) whether he was in contact with Mr Ngaïssona during the Relevant Period; (3) what was Levy Yakité’s relationship with Mr Ngaïssona, which the witness stated it began in Cameroon; (4) whether the witness saw Mr Ngaïssona at the [REDACTED], to which he responded no. ICC-01/14-01/18-T-022-CONF-ENG, pp 21,22,49,77.

testimony. The most notable example is the witness' consistent testimony regarding the nature of the group COCORA. On P-1847's first day of testimony, the Prosecution asked the open question of what the witness could tell the Chamber about COCORA. The witness spontaneous answer was that it was a movement within civil society.¹⁷ [REDACTED].¹⁸ P-1847's characterization of COCORA as a movement within civil society implies the nonviolent character of the group, which is further emphasized by P-1847's answer that the group was equipped with coffee and sugar. P-1847 did not have a change of position on his second day of testimony, but rather was completely consistent with his first day of testimony, when he testified that the members of COCORA were not armed,¹⁹ and specifically did not have knives or machetes.²⁰ P-1847 also testified consistent with his first day of testimony that COCORA called on civil society to be vigilant²¹ and again repeated that they were supplied with coffee.²²

14. Therefore, the conclusion that P-1847 would have changed his position between his first day and subsequent days of testimony cannot be drawn, since the Prosecution cannot demonstrate how P-1847 testified differently on the first day compared to the second or third day with respect to the same alleged fact. Moreover, in the one crucial instance where P-1847 did testify on the same alleged fact regarding COCORA, his testimony stayed consistent throughout all the days he testified.

b. The Prosecution has failed to show any improper interference with P-1847's testimony

15. To support its claims of improper interference with P-1847's testimony, the Prosecution relies on items comprising several hundred pages, the overwhelming majority of which are not in evidence. This constitutes a complete misuse of Rule 68(2)(d), whose purpose is to streamline proceedings and contribute to their expeditious conduct. The Prosecution relies on these items, some of which are completely devoid of probative value, to make cursory legal conclusions on the acts and conduct of certain individuals, significantly those of Mr

¹⁷ ICC-01/14-01/18-T-022-CONF-ENG CT, p. 39.

¹⁸ ICC-01/14-01/18-T-022-CONF-ENG CT, p. 48.

¹⁹ ICC-01/14-01/18-T-023-CONF-ENG CT, pp. 6-7.

²⁰ Ibid.

²¹ ICC-01/14-01/18-T-023-CONF-ENG CT, p.8.

²² ICC-01/14-01/18-T-023-CONF-ENG CT, p.7.

Ngaïssona and [REDACTED]. By doing so, the Prosecution litigates [REDACTED] that is not part of these proceedings, namely [REDACTED] case.

16. The Defence submits this is the inappropriate forum to litigate this issue, and only adds a needless layer of complexity to trial proceedings that are still ongoing after three years. The Defence understands that [REDACTED], and it is [REDACTED] which will [REDACTED].

17. Therefore, the Defence's response to these several hundred pages of items is limited to the discrete issue of whether P-1847's deviation from his prior recorded testimony with respect to certain key aspects of the case was materially influenced by improper interference. However, given the gravity of the accusations in the Prosecution Request that Mr Ngaïssona or [REDACTED] could have played a role in interfering with the testimony of witnesses in this case, the Defence is obliged to respond to them. The Defence will show that these allegations are based on evidence that is devoid of probative value, is known to be untrue, or even if accepted as true, makes no showing of an impact on the testimony of P-1847 or any other Prosecution witness.

i. P-1847 categorically denied that his testimony deviated from his prior recorded statement as a result of some external influence

18. In *The Prosecutor v. Ruto and Sang*, Trial Chamber (V)(A) found that for it to be satisfied that the factual thresholds for the criteria for Rule 68(2)(d) are met, it had to be provided with evidence of sufficient specificity and probative value.²³ The Prosecution has failed to produce any evidence which specifically indicates that P-1847's testimony would have been interfered with. Indeed, the most probative evidence in this respect is P-1847's testimony and the surreptitiously recorded interview with Prosecution investigators following his appearance where P-1847 consistently and categorically denied having been influenced to testify differently than in his prior recorded statement. P-1847's never wavered from his position that his testimony was the truth despite the Prosecution investigators inappropriately and significantly pressuring him to admit he had been interfered with.

²³ *Ruto* Rule 68(2)(d) and (c) Decision, para. 37.

19. At the conclusion of the Prosecution's examination of P-1847, the Prosecution questioned P-1847 specifically on the inconsistencies between his prior recorded statement and his testimony.[REDACTED].²⁴ [REDACTED]."²⁵ While the Presiding Judge admitted that the differences between P-1847's prior recorded statement and P-1847 testimony were not minor, the Chamber, when requested by the Prosecution to admonish P-1847 pursuant to his oath and to warn the witness that false testimony is sanctionable under Article 70 of the Statute, the Chamber refused. The Presiding Judge reasoned that he "would not go so far because this would -- this would mean that the Chamber would already take a stance on that, so I would not want to do that."²⁶
20. The day after P-1847 concluded his testimony, Prosecution investigators questioned P-1847 about the possible reasons for his deviations from his prior recorded statement for three consecutive days.²⁷ The transcripts of these meetings show that P-1847 was not subject to any interference, and specifically that the incidents mentioned in the Prosecution Request had no impact on his testimony.
21. On [REDACTED] March 2021, the [REDACTED], asked him to answer sincerely whether the differences between his prior recorded statement and his testimony were for fear for his security. P-1847 answered, "*je n'ai eu aucune menace.*"²⁸ Over the next [REDACTED], the Prosecution discussed with P-1847 the three specific incidents the Prosecution cites as leading P-1847 to recant his testimony, which are: (1) [REDACTED]; (2) [REDACTED] informing him that [REDACTED] mentioned his participation as a witness [REDACTED], and (3) a potential [REDACTED] that was being circulated in Bangui. With respect to each of these incidents, P-1847 never stated that his testimony deviated from his prior recorded statement because of them. Rather, P-1847's answers to the [REDACTED] relentless questioning of how these incidents may have influenced him, always came back to P-1847's expectations with respect to the Prosecution's examination, and that he wished

²⁴ ICC-01/14-01/18-T-023-CONF-ENG CT, p. 79 [REDACTED]

²⁵ ICC-01/14-01/18-T-023-CONF-ENG CT, p. 79 [REDACTED]

²⁶ ICC-01/14-01/18-T-023-CONF-ENG, page 82.

²⁷ CAR-OTP-00001658-R01; CAR-OTP-00001659-R01; CAR-OTP-00001660-R01; CAR-OTP-00001661-R01; CAR-OTP-00001662-R01; CAR-OTP-00001663-R01; CAR-OTP-00001664-R01; CAR-OTP-00001665-R01.

²⁸ CAR-OTP-00001658-000013. The Defence also refers the Chamber to a similar statement made to Prosecution's investigators on the last day of his post testimony interviews in particular:... très sincèrement, je vous dis ... euh ... que vraiment il y a ... il y avait pas de cas de ... de l'extérieur qui est venu toucher à ... vraiment à ma déclaration ou bien à mon ... à mon truc." CAR-OTP-00001665-000002.

the Prosecution would have gone into more detail about his prior recorded statement during it.

22. With respect to [REDACTED], P-1847 stated that he learned about the incident [REDACTED].²⁹ Witness P-1847 explained that the incident occurred before he came and testified in front of the Chamber, and thus any potential fears raised by it do not correspond to the Prosecution's allegation that P-1847 position changed from the first day of his testimony where he remained consistent with his prior recorded statement to the second and third day of testimony where the Prosecution states P-1847 repudiated his testimony.³⁰ Moreover, while the Prosecution investigator asked questions about P-1847 state of mind upon hearing that [REDACTED], P-1847 admitted that it worried him, but more importantly, P-1847 stated that the reason he may have deviated from his prior recorded statement was that maybe he did not understand the point of some of the Prosecution's questions during its examination,³¹ and that he expected the Prosecution to go more into the detail of his statement and not ask just yes or no questions.³² Moreover, the Prosecution has failed to show how [REDACTED], who work for [REDACTED], would intimidate a Prosecution witness whose anticipated testimony incriminates Mr Ngaïssona. As the Prosecution is aware, Mr Ngaïssona [REDACTED].³³

23. Similarly, Witness P-1847 admitted that the incident with [REDACTED] did upset him,³⁴ but like the incident with the [REDACTED] it had no influence on his testimony. In the spirit of wanting to give the Prosecution investigators more information, P-1847 shared with them that before his first day of testimony, his [REDACTED], [REDACTED] told

²⁹ CAR-OTP-00001658-000033

³⁰ See CAR-OTP-00001658-000023 (A.4: Vous avez été influencé par quelqu'un avant de...que vous veniez ? Vous savez que...vous devez...est-ce que vous avez été approché par quelqu'un ? Voilà. Ou bien vous avez des craintes ? Voilà. Par rapport à la déclaration que vous alliez...venir faire et tout... [REDACTED][REDACTED] : Non, avant...avant...avant...oui...oui....Avant la déclaration-là quand j'ai appelé sur le téléphone [REDACTED]...)

³¹ CAR-OTP-00001658-000028([REDACTED]: Quand on dit que bon, voilà[REDACTED], bon, ça moralement, ça....joue...ça inquiète aussi....dans le truc. Mais, franchement, dans le but de ce procès, peut-être.... j'ai mal compris le sens des questions du Procureur...) For the purposes of clarity, the Defence has omitted from the direct quote the interjections of the Prosecution investigator specifically the interjection "mm-mm."

³² CAR-OTP-00001658-000028, lines 904-908.

³³ CAR-OTP-2084-1763.

³⁴ See CAR-OTP-00001659-0000006(stating that he was going to call the Prosecution after hearing from [REDACTED] that [REDACTED] had said he was a Prosecution witness).

him that in political circles there was some talk and that [REDACTED] had told [REDACTED] that P-1847 was to testify against Mr Ngaïssona.³⁵

24. However, it is apparent from the interview that the incident had no impact on P-1847's testimony for the following reasons. First, P-1847 stated that he chose not to inform the Prosecution investigators about this incident because [REDACTED] believed P-1847 when he stated he was not a witness,³⁶ and [REDACTED] and others that P-1847 was not a witness in the proceedings.³⁷ Second, the incident ended there, since P-1847 never had any contact with [REDACTED]³⁸ and [REDACTED] went quiet on the matter after [REDACTED] denied P-1847's cooperation with the Prosecution.³⁹ Third, when asked whether this incident with [REDACTED] and [REDACTED] could have had an impact on his morale during his testimony, P-1847 denied it explicitly, and again referred to the examination of the Prosecution and how it was not what he expected:

A.4: ...mais est-ce que ça a pu jouer un peu sur votre morale ?

[REDACTED] : Bon franchement, quand je suis venu, rentré dans la salle...

A.4 : Oui...

[REDACTED] : et tout et tout...vraiment, j'ai pas prétexté [*phon.*]

[REDACTED] : ...peut-être j'attendais plus de détails de la parte de....

[REDACTED] : ...du Procureur.⁴⁰

25. The Prosecution also specifically questioned P-1847 about an alleged [REDACTED] that was being circulated in Bangui. It was not clear from the exchange who would have circulated the [REDACTED] and at what date P-1847 had discussed it with Prosecution investigators.⁴¹ The Prosecution states in its Request that it presumes it was [REDACTED] who was [REDACTED]. P-1847 mentioned [REDACTED] and a [REDACTED], who the Prosecution has not identified, who would have said on the radio that there is [REDACTED].⁴² P-1847 implied that he was concerned by it, but he stayed in Bangui because the [REDACTED] did not have any doubts about him, otherwise he would have

³⁵ CAR-OTP-00001659, pp. 00003-000005

³⁶ CAR-OTP-00001659-00004 ([REDACTED]).

³⁷ CAR-OTP-00001659-00005 ([REDACTED]).

³⁸ CAR-OTP-00001659-000004, lines 94-98 ; CAR-OTP-00001659-000005, lines 116-119.

³⁹ CAR-OTP-00001659-00005 ([REDACTED]).

⁴⁰ CAR-OTP-00001659-000009, lines 238-248. For the purposes of clarity, the Defence has omitted from the direct quote the interjections of the Prosecution investigator which were made at the same time as P-1847 was speaking, specifically the interjection "mm-mm."

⁴¹ The Prosecution investigator states that they discussed the [REDACTED]. CAR-OTP-00001661-000005, lines 106-131.

⁴² CAR-OTP-00001661-000005, lines 126-132.

left.⁴³ While it is unclear why [REDACTED] would be after him, the Prosecution has not substantiated what the link would be between this [REDACTED] and Mr Ngaïssona. Moreover, P-1847 again added that he just wished the Prosecution would have gone into the detail during his testimony, and that he expected certain questions from the Prosecution that were never asked.⁴⁴

26. P-1847 insistence that he was expecting the Prosecution during its examination to go into the details of his prior recorded statement as the reason for his deviation from it on the stand, is particularly probative when read in the context of the Prosecution investigators resorting to inappropriate tactics to elicit a different response from P-1847. These inappropriate tactics include: (1) telling P-1847 he was lying before the Prosecution had even spoken [REDACTED], and thus had no information pertaining to P-1847's potential contacts with the outside world during his testimony, (2) untrue warnings that the Judge assumed P-1847 was lying, (3) exerting pressure through [REDACTED].

27. On 31 March 2021, at the time the Prosecution began its interview after P-1847's testimony, the Prosecution had no specific evidence that P-1847 had testified falsely. The only tangible information the Prosecution had was that P-1847's prior recorded statement deviated from his testimony with respect to COCORA and Mr Ngaïssona's alleged conduct at the end of 2013.⁴⁵ However, deviations from prior recorded testimony, while not common, are not sufficient to show that a witness is lying. For example, in *The Prosecutor v. Laurent Gbagbo & Blé Goudé*, Judge Henderson expressed his concern with admitting prior recorded statements and found that prior recorded statements cannot be presumed to be reliable and credible despite witnesses confirming them on the stand, since on several occasions, witnesses changed their evidence while testifying.⁴⁶ These deviations occurred despite their being no allegation of witness interference in that case.

28. Under the Code of Conduct for the Office of the Prosecutor, one of the specific duties of the Office of the Prosecutor is objective-truth seeking which involves "conduct[ing] investigations with the goal of establishing the truth, and in the interests of justice" and to

⁴³ CAR-OTP-00001661-000006

⁴⁴ CAR-OTP-00001661-000006, lines 162-164.

⁴⁵ CAR-OTP-00001658-000006 A.4: enfin, on n'a pas compris, hein, les ...grands écarts qui existaient entre ce que vous avez dit et puis signé, lu et signé, et puis bon, à l'audience qu'est ce qui a pu se passer concrètement ? Dites-moi vraiment, de vous à moi, hein, ce qui a pu se passer, pour être ...très honnête.

⁴⁶ ICC-02/11-01/15-1263-AnxB-Red, para. 39.

“consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the prosecution.”⁴⁷ From the very start of their questioning, the Prosecution investigators failed to discharge this duty by beginning their questioning of P-1847 with the unsubstantiated premise that his testimony was false, and even exerting undue pressure by falsely stating that the Judge told P-1847 there was a risk of false testimony.⁴⁸ Despite P-1847 repeating throughout the post testimony interviews that it was the examination of the Prosecution that he was not expecting and even told the investigator that he did not see what he would have lied about,⁴⁹ the Prosecution investigators would not accept this explanation.⁵⁰ Instead, Prosecution investigators remained so attached to their theory of interference that they exerted undue pressure by incorrectly stating that the Judges thought P-1847 was lying,⁵¹ telling him that he may be subject to criminal liability,⁵² and by examining P-1847 with a [REDACTED] as a “warning”,⁵³ while never once offering him to consult with a lawyer. These methods are hardly reconcilable with a professional technique of impartial witness questioning for the purposes of obtaining the objective truth.

29. On 1 April 2021, P-2841 informed the Prosecution, on the same day that Prosecution investigator questioned P-1847 about his testimony, that [REDACTED] on 28 March 2021. However, this information did not impugn the credibility of P-1847 statements, specifically that he never spoke with anyone about the contents of his testimony, that he was currently testifying, or more generally that he was a witness in the proceedings.⁵⁴ According to the Prosecution’s investigation report, [REDACTED] would have spoken with P-1847 about his status as a Prosecution witness, and P-1847 never indicated that [REDACTED] when P-2841 spoke to him.⁵⁵ Indeed, P-2841 stated that P-1847 told him [REDACTED].⁵⁶

⁴⁷ Judge Henderson’s Reasons, ICC-02/11-01/15-1263-AnxB-Red, para. 39.

⁴⁸ CAR-OTP-00001658-000010.

⁴⁹ CAR-OTP-00001658-000040([REDACTED]).

⁵⁰ CAR-OTP-0001658-000010([REDACTED]).

⁵¹ CAR-OTP-000001658-000040 ([REDACTED]); CAR-OTP-00001660 -000013 (the investigator [REDACTED] falsely stated that the judge wanted to identify why there were material differences between P-1847’s prior recorded testimony and his statement); CAR-OTP-00001661-00007([REDACTED]) CAR-OTP-00001660-000012 ([REDACTED])

⁵² CAR-OTP-00001658 000022-0000023 ([REDACTED]) CAR-OTP-00001660-000005([REDACTED])CAR-OTP-00001660-000016([REDACTED])

⁵³ CAR-OTP-000001660-000005 ([REDACTED])

⁵⁴ CAR-OTP-00001660-000007 ([REDACTED] ;000009([REDACTED]) ; 000018 ([REDACTED]) ; 000024 ([REDACTED]) ; CAR-OTP-1661-000002 (Personne m’a conseillé sur cette affaire) ;

⁵⁵ CAR-OTP-2130-4051, at 4053([REDACTED])CAR-OTP-2127-8525, at 8525([REDACTED])) .

⁵⁶ CAR-OTP-2127-8525 at 8525([REDACTED])

Therefore, P-2841's statement is entirely consistent with P-1847's responses to Prosecution investigators, in which P-1847 insisted that no one knew he was [REDACTED] testifying and that they all thought [REDACTED].⁵⁷ Moreover, P-2841's statement that he never discussed with P-1847 that [REDACTED] would have told [REDACTED] was a [REDACTED] is corroborated by P-1847's interviews with the Prosecution investigators. P-1847 never mentioned this incident, whereas he brought up, with no prompting at all by the Prosecution investigator, the incident with [REDACTED].⁵⁸

ii. The Prosecution has failed to produce evidence of sufficient specificity and probative value to show interference with P-1847's testimony

30. In the face of P-1847's unambiguous denial of any influence over his testimony, the Prosecution presents a maze of arguments leading the Chamber and the parties down a path of conjecture in its attempt to show that P-1847's testimony was interfered with. The Prosecution submits that the timing and the extent of the various communications P-1847 had with various collocutors involved with Mr Ngaïssona or the Anti-balaka demonstrate that his failure to testify was a product of improper interference.⁵⁹ However, the underlying evidence in support of these very serious allegations is either: (1) completely devoid of probative value in that it consists of the Prosecution's internal work product or (2) does not support at all the Prosecution's allegations, and given this deficiency the Prosecution asks the Chamber to speculate as to its meaning. This is true for each of P-1847's alleged communications with each of his collocutors while he was at the Seat of the Court.

1. The Prosecution's evidence on whether P-1847 was actually communicating with individuals while at the Seat of the Court is contradictory and has not been sufficiently demonstrated

31. The Defence shall address the alleged communications that P-1847 had with the each of the collocutors in turn, however, as a preliminary matter, the Defence submits that the Prosecution's evidence in support of P-1847 having outside communications whether on Facebook or his phone is contradictory and therefore inconclusive.

⁵⁷ CAR-OTP-00001660-000009; CAR-OTP-00001660-000011; CAR-OTP-00001660-000007; CAR-OTP-00001660-000007.

⁵⁸ CAR-OTP-00001659-000001 ([REDACTED]).

⁵⁹ Prosecution Request, para. 65.

32. The Prosecution submits that P-1847 was communicating with various individuals between [REDACTED] and based on CDR records.⁶⁰ However, P-1847 informed Prosecution investigators during his interviews following his testimony that he [REDACTED], to use his Facebook account and [REDACTED] Whatsapp number to a [REDACTED].⁶¹ P-1847 did this when he was informed that he would not be able to use his phone to communicate in the Hague.⁶² While travelling to the Seat of the Court and before surrendering his phone to VWU, P-1847 instructed [REDACTED], which is exactly what the content of the alleged communications revealed.⁶³ Therefore, the Prosecution's own evidence provides a more likely inference to be drawn, namely that these communications were not between P-1847 and various interlocutors, but rather between [REDACTED] P-1847's phone and Facebook.
33. The ease with which P-1847 was able to [REDACTED] in order to allow them to [REDACTED] is a perfect illustration of the issues of authentication of Facebook messages and posts that the Defence raised in its response to the Prosecution's submission of Facebook material.⁶⁴ Similarly, the fact that P-1847 instructed [REDACTED] and Whatsapp number shows the pitfalls of drawing inferences from CDR evidence alleging contacts between individuals.⁶⁵ The Prosecution's CDR data also support that a [REDACTED] According to the Prosecution, the CDR show that P-1847 would have made a call at [REDACTED]⁶⁶ However, this is an impossibility since [REDACTED], P-1847 was testifying before the Chamber.⁶⁷ Given the instruction P-1847[REDACTED], specifically Whatsapp, the Prosecution needed to show that it was P-1847 who was making the calls.
34. The Prosecution did not make such a showing. While the Prosecution submits that P-1847 was [REDACTED], the evidence to support this [REDACTED] However, this information is non-specific and inconclusive for two reasons.

⁶⁰ Prosecution Request, paras 46-47.

⁶¹ CAR-OTP-00001660-000010([REDACTED]) ; CAR-OTP-00001660-000011([REDACTED]).

⁶² CAR-OTP-00001660-000011.

⁶³ Ibid.

⁶⁴ ICC-01/14-01/18-1999, para.15.

⁶⁵ ICC-01/14-01/18-1409, para. 64.

⁶⁶ Prosecution Request, para. 47 footnote 98.

⁶⁷ ICC-01/14-01/18-T-022-CONF-ENG CT.

35. First, while the Defence submits this [REDACTED], the Defence conducted a basic search that revealed [REDACTED] originated from [REDACTED]⁶⁸ which is [REDACTED]. To get there [REDACTED].⁶⁹ The Prosecution provides no explanation as to how and why P-1847 [REDACTED]. [REDACTED] would have been in complete contradiction with [REDACTED]. Second, [REDACTED], and [REDACTED].⁷⁰ Producing only one layer of [REDACTED], namely [REDACTED], especially [REDACTED].⁷¹

2. Assuming the veracity of P-1847's communications, such communications were completely unrelated to Mr Ngaïssona and P-1847's status as a witness in the case

36. Assuming P-1847 was the individual behind the communications cited by the Prosecution, the Defence submits that such behavior of a witness is regrettable. However, it does not translate to impugning his credibility entirely since throughout his interview as demonstrated by the Defence above, P-1847 stayed consistent in his claims that he was not interfered with, and the content of his communications is consistent with what he told Prosecution investigators, namely that he told everyone that he [REDACTED].⁷² He never once discussed being a witness in these proceedings and did not touch upon any aspect of his testimony.⁷³

37. While it appears that P-1847 [REDACTED], the Defence submits that such actions do not “strongly indicate” that P-1847 [REDACTED] as submitted by the Prosecution.⁷⁴ Rather, such actions are consistent with [REDACTED]. The most likely inference is that P-1847 was not at all thinking of the propriety of the communications. The Prosecution had demonstrated this was not important to them since with no proper basis, they put P-1847 [REDACTED].⁷⁵ Therefore, the most likely inference is that he [REDACTED]. The content of the communications supports this inference since no improper conduct can be implied from them, as noted above.

⁶⁸ CAR-OTP-2136-0019.([REDACTED]).

⁶⁹ [REDACTED]

⁷⁰ [REDACTED].

⁷¹ Ibid.

⁷² CAR-OTP-2127-8525; CAR-OTP-2134-0081; CAR-OTP-00000089-000032-CAR-OTP-00000089-000055; CAR-OTP-00000094-00004-CAR-OTP-00000094-000018; CAR-OTP-00001631-000007-CAR-OTP-00001631-000011.

⁷³ Ibid.

⁷⁴ Prosecution Request, para. 58.

⁷⁵ [REDACTED]. CAR-OTP-2130-4051 at 4053.

38. Turning to the communications themselves, the Defence submits that the Prosecution has failed to produce specific evidence of sufficient probative value showing: (1) the association between the collocutors with Mr Ngaïssona or anyone on [REDACTED] and (2) that P-1847 feared that his identity as a witness was being revealed when he engaged in these alleged communications.

-Alleged communications with P-2841

39. With respect to P-2841, the Prosecution requests that the Chamber find a link between : (1) the alleged phone call between [REDACTED], (2) [REDACTED] informing P-2841 that both he and P-1847 were [REDACTED] that was circulating, and (3) the eventual contact P-2841 would have had with P-1847 through Facebook while P-1847 was at the Seat of the Court.⁷⁶ However, such a link cannot be made based on the evidence provided by the Prosecution, for three reasons. First, the evidentiary foundation for the allegation involving the call with [REDACTED] and the alleged [REDACTED] discussed by [REDACTED] consists of a Prosecution investigation report, which is devoid of probative value. Second, the Defence through the present submissions wishes to provide necessary clarifications as to the alleged [REDACTED], which was wholly unrelated to the proceedings before the ICC, and the consequences that this placed call had [REDACTED]. Third, the investigation report, if believed, does not permit the inference the Prosecution wishes the Chamber to draw.

40. In support of its claims of interference, the Prosecution refers to certain [REDACTED] that would have been circulating in Bangui to which [REDACTED] would have been connected.⁷⁷ The Prosecution submissions on this point are unspecific, and only supported by reports written by Prosecution investigators, which are incapable of satisfying the evidentiary burden required by Rule 68(2)(d).⁷⁸ Despite the Prosecution investigating the matter since 2021, it has been unable to locate a copy of this [REDACTED], does not know how many [REDACTED],⁷⁹ and does not know who are the individuals responsible for [REDACTED].⁸⁰

⁷⁶ Prosecution Request, paras. 39-43.

⁷⁷ Ibid., paras. 34-35, 39, 49-50.

⁷⁸ P-884 investigation report, CAR-OTP-2130-4156; P-2841 investigation reports, CAR-OTP-2130-4051; CAR-OTP-2127-8340; CAR-OTP-2127-8525. [REDACTED].

⁷⁹ Prosecution Request, para. 49 ([REDACTED]).

⁸⁰ CAR-OTP-2130-4051 at 4053 ([REDACTED]).

41. The Defence submits that the Prosecution's investigation reports should not be considered by the Chamber in its adjudication of the Prosecution Request. Investigation Reports represent the internal work product of the Prosecution,⁸¹ and do not constitute evidence for two reasons. First, investigator reports are not verified for accuracy by the witnesses who are the subject of the report.⁸² Therefore, they cannot be readily assumed to be an accurate reflection of their exchange with the Prosecution. Second, notes written by a party to proceedings have an inherent bias that make such reports lack sufficient indicia of reliability.⁸³

42. In addition to these general objections regarding the use of investigation reports as evidence, in this instance there are also flagrant inaccuracies that show the inherent unreliability of the investigation reports on Witnesses P-2841 and P-0884. For example, the investigation report related to P-0884 mentions that [REDACTED], approached [REDACTED] about [REDACTED].⁸⁴ The report states that [REDACTED] would have allegedly told [REDACTED] about [REDACTED] for the Prosecution, and subsequently [REDACTED] would have told P-0884 about it. This is second-hand unverified hearsay and lacks probative value. Moreover, the report states that according to P-0884, [REDACTED] wished to meet with P-0884. The Prosecution knows this to be false since it indicated in the Prosecution Request, that [REDACTED] , mentioned in the P-0884's Investigation report, [REDACTED], did not work on [REDACTED]. This inaccuracy casts doubt as to the accuracy of the content of the entire report since [REDACTED] was at the heart of the allegations regarding the alleged [REDACTED].⁸⁵ The Prosecution also invites the Chamber to speculate as to the content of the conversations between [REDACTED]. And [REDACTED].⁸⁶ However, no information in the investigation report or any other documents underlying the present application permit an inference that [REDACTED] and [REDACTED] discussed confidential material together.⁸⁷

⁸¹ Investigator's Reports or screening notes are not equivalent to witness statements. ICC-01/14-01/18-618, para. 10 ("Thus, as settled by the Court's jurisprudence, these pre-interview assessments are 'a stage precedent to an interview when a formal statement is taken for the purposes of Rule 76(1) and Rule 111 of the Rules'"). In general, interview notes fall within the scope of Rule 81(1) of the Rules. ICC-01/05-01/08-3336, para.12.

⁸² Ibid.

⁸³ ICC-01/04-01/07-2635, para 27.

⁸⁴ CAR-OTP-2130-4156 at 4156.

⁸⁵ The Defence also wishes to clarify with the Chamber that [REDACTED]

⁸⁶ Prosecution Request, para 50.

⁸⁷ The investigation report taken at its highest only permits the inference that [REDACTED]. CAR-OTP-2130-4156 at 4156

43. The investigation reports linked to P-2841 also contain inaccuracies that the Defence was able to elucidate with [REDACTED]. On 5 May 2022, the Defence received the disclosure related to the irregularities that occurred with P-1847's testimony, and it proceeded to review the material. It was on this date that the Defence first became apprised of the [REDACTED] that was made in the presence of [REDACTED]. In response, [REDACTED]. The Defence's understanding of [REDACTED] as presented by [REDACTED] is summarized below.
44. [REDACTED] met with [REDACTED] at his residence in 2021 to request [REDACTED]. [REDACTED], and [REDACTED]. His case was next to be adjudicated before [REDACTED], Côte d'Ivoire, but [REDACTED]. The Defence avers that [REDACTED]. He is now deceased.
45. While at [REDACTED] residence, [REDACTED] made [REDACTED] in Abidjan [REDACTED], but never did, and thus [REDACTED].
46. The [REDACTED] took place on the [REDACTED]. During it, P-2841 came [REDACTED], but never [REDACTED]. Moreover, no one [REDACTED] indicated to [REDACTED] that P-2841 was present. Indeed, [REDACTED] did not recognize P-2841 since [REDACTED] had never seen his face before that day at [REDACTED]. [REDACTED] was familiar with P-2841's face because they are both [REDACTED]. However, after they ended [REDACTED], [REDACTED] left [REDACTED]. The only words exchanged with P-2841 were limited to a greeting when [REDACTED] with P-2841 after [REDACTED]. [REDACTED] did not stay to discuss with either [REDACTED] or P-2841. Therefore, this incident had no relationship to the security of witnesses before the ICC, including P-2841 and P-1847.
47. Upon [REDACTED], the [REDACTED] consulted internally, and determined to [REDACTED]. The [REDACTED] reminded [REDACTED] that (1) [REDACTED], and the [REDACTED]. While [REDACTED]. [REDACTED] or [REDACTED], let alone [REDACTED], since this [REDACTED].
48. [REDACTED] informed [REDACTED] to P-2841 about the case, that they never shared confidential information about the case with [REDACTED], if, as alleged, would have

spoken to P-2841 about [REDACTED], did not raise it in their presence. This information is not contradicted by the Prosecution's investigation report, which makes no indication that [REDACTED] would have obtained the information about Prosecution witnesses from [REDACTED]. Indeed, the investigation report states that [REDACTED] knew P-1847 was a witness.⁸⁸ Further, while [REDACTED],⁸⁹ the [REDACTED] did not [REDACTED]. The [REDACTED] specifically states that [REDACTED].⁹⁰ In this instance, [REDACTED] did not contact P-2841, but rather they ran into each other by chance. As indicated by the investigation report, P-2841 was very close to [REDACTED], and even referred to him as a [REDACTED].⁹¹ Therefore, it would not be surprising that [REDACTED], and that such a visit would therefore be entirely unrelated to [REDACTED] meeting with [REDACTED].

49. [REDACTED]. However, [REDACTED], would be a [REDACTED] would have told P-2841 that P-1847 was a witness had any impact on P-1847's testimony.

50. The Prosecution admits that P-2841 stated that he never discussed with P-1847 [REDACTED].⁹² Moreover, the Prosecution also admits that [REDACTED] never mentioned that [REDACTED].⁹³ Therefore, the Prosecution wishes the Chamber to speculate [REDACTED] whereas the Prosecution has not been able to produce any evidence on this point. At most the contacts of P-2841 with P-1847, if believed, show that P-2841 knew each other and spoke about events unrelated to the case.⁹⁴ From the Prosecution's investigation report, it appears that the two witnesses [REDACTED].⁹⁵

51. The Facebook conversation showing that P-1847 told P-2841 that he was [REDACTED]. This [REDACTED] by P-1847 well before he arrived [REDACTED], not just P-2841, as he explained in his interview with Prosecution investigators.⁹⁶ The reason for it was [REDACTED],⁹⁷ and had nothing to do with P-1847 being [REDACTED].⁹⁸

⁸⁸ CAR-OTP-2130-4051, at 4053.

⁸⁹ [REDACTED]

⁹⁰ Ibid., para. 27.

⁹¹ CAR-OTP-2130-4051 at 4052.

⁹² CAR-OTP-2127-8525 at 8526 ([REDACTED])

⁹³ Ibid., ([REDACTED]).

⁹⁴ See CAR-OTP-2127-8525; CAR-OTP-2130-4051.

⁹⁵ Ibid.

⁹⁶ CAR-OTP-00001660-000009-CAR-OTP-00001660-000011.

⁹⁷ Ibid.

⁹⁸ Indeed, P-1847 mentioned [REDACTED]. CAR-OTP-00001660-000018.

- Alleged communications with [REDACTED]

52. With respect to [REDACTED], the Prosecution's allegations that he was allegedly involved in the [REDACTED] are completely unsubstantiated by the evidence it cites. The Prosecution submits that [REDACTED] communicated that P-1847's name appeared on [REDACTED].⁹⁹ However, the evidence in support of this allegation makes no mention of [REDACTED]. As noted above, P-1847 told Prosecution investigators that there was talk [REDACTED] that P-1847 was a prosecution witness.¹⁰⁰ Not only did [REDACTED] not disseminate this information, but he also believed P-1847 when P-1847 told him that he was not a witness.¹⁰¹ He even told [REDACTED] that his information was incorrect.¹⁰² Moreover, [REDACTED] stopped talking about P-1847 being a witness after that.¹⁰³

53. The Prosecution also incorrectly asserts that P-0884 would have implicated [REDACTED] in the [REDACTED]. The investigation report cited in support of this proposition does not make any mention of anyone with the name [REDACTED]. This allegation remains completely unsubstantiated. Therefore, it cannot at all be reasonably inferred that P-1847 was "seriously apprehensive that [REDACTED] was seeking to determine whether he was in fact cooperative with the investigation and trial."¹⁰⁴ Rather than showing that P-1847 would have been apprehensive, the exchanges reflect that P-1847 and [REDACTED].¹⁰⁵ This is corroborated by P-1847's interview with Prosecution investigators where he told them [REDACTED].¹⁰⁶ Moreover, throughout the exchanges, P-1847 states that he is [REDACTED], and there is nothing in [REDACTED] responses that makes it appear that [REDACTED].¹⁰⁷ As noted before, P-1847's [REDACTED]. Moreover, assuming *arguendo* that [REDACTED] to P-1847 on [REDACTED] March 2021, the Prosecution has not produced a single element to show that this was not a [REDACTED] conversation consistent with the Facebook messages.

⁹⁹ Prosecution Request, paras 48, 50.

¹⁰⁰ CAR-OTP-00001659-000003.

¹⁰¹ CAR-OTP-00001659-000004.

¹⁰² CAR-OTP-00001659-000006.

¹⁰³ CAR-OTP-00001659-000005

¹⁰⁴ Prosecution Request, para. 51.

¹⁰⁵ [REDACTED]. CAR-OTP-00000089-000032- CAR-OTP-00000089-000055.

¹⁰⁶ CAR-OTP-00001659-000003.

¹⁰⁷ CAR-OTP-00000089-000032- CAR-OTP-00000089-000055.

-Alleged communications with [REDACTED]

54. The Prosecution's complete disregard for producing specific probative evidence with respect to Mr Ngaïssona's alleged interference in these proceedings is most exemplified by the Prosecution's submissions regarding [REDACTED]. The Prosecution submits that Mr Ngaïssona was in contact with [REDACTED] from the Hague and that he would have [REDACTED] and told him that P-2673 was [REDACTED].¹⁰⁸ For such a grave allegation, the Prosecution's only presents one fragment of one of [REDACTED].¹⁰⁹

55. This evidence is manifestly incapable of satisfying the required evidentiary burden to prove the Prosecution's allegations. First, the Prosecution has failed to show that Mr Ngaïssona and [REDACTED] have any sort of relationship. In support of this alleged relationship, the Prosecution cites P-0801's testimony who stated that ten years ago, [REDACTED] would have been in contact with Mr Ngaïssona "all the time".¹¹⁰ P-0801 gave no indication as to how he knew this information. However, the Prosecution has in its possession clear information that unequivocally shows Mr Ngaïssona does not have any relationship with [REDACTED]. For the purposes of adjudicating this request, the Defence requests the Chamber to take into consideration the statement [REDACTED] made to the Prosecution, in particular:

I have never sat at a table with NGAISSONA to talk and discuss anything....I recognise him, but he does not know me. We have never had a conversation on the telephone or in person.¹¹¹

Given the Prosecution would have known this to be [REDACTED] position, in its duty to investigate objectively, the Prosecution should have sought specific evidence with a solid foundation that would corroborate that [REDACTED] allegedly had any relationship with Mr Ngaïssona.

56. Moreover, the Prosecution is aware that Mr Ngaïssona's list of permitted contacts is limited to family, and thus it would be impossible for him to [REDACTED]. The Prosecution should have substantiated with specific information indicating when and how

¹⁰⁸ Prosecution Request, para. 59.

¹⁰⁹ Ibid., para. 60.

¹¹⁰ ICC-01/14-01/18-T-034-ENG CT, p.65.

¹¹¹ CAR-OTP-2094-0146, paras 87-88.

[REDACTED]. Instead, the Prosecution asks the Chamber to speculate as to how the conversation between Mr Ngaïssona and [REDACTED] would have taken place. Given that it was impossible for Mr Ngaïssona to contact [REDACTED], the Defence submits that [REDACTED] was transmitting false information.

57. Since the Prosecution has failed to produce any probative evidence of Mr Ngaïssona's [REDACTED] to [REDACTED], the Prosecution has failed to show that [REDACTED] contacts with P-1847 would have had any relationship to the present proceedings. Indeed, the messages between the two indicate that they are [REDACTED] and comfortable with each other, and nothing in their content suggests they were speaking about the present proceedings¹¹² Moreover, as submitted above, P-1847's insistence that he [REDACTED] as a protected witness, and not indicative of any fears he may have.

-Alleged communications with [REDACTED]

58. The Prosecution's submissions that [REDACTED] would have received confidential information about Prosecution's witnesses from Mr Ngaïssona, or individuals operating within his circle is based on pure conjecture about a [REDACTED] had with P-2673. The Prosecution does not produce a single piece of evidence that would indicate that Mr Ngaïssona or anyone close to him would communicate to [REDACTED] P-2673's [REDACTED]. Nonetheless, the Prosecution requests the Chamber to make such a finding based on a pattern between [REDACTED] with P-2673 and [REDACTED] with another individual about P-2673's [REDACTED].¹¹³ However, the Prosecution has not specified what is the alleged pattern between the conversations. Since [REDACTED] never referred to Mr Ngaïssona or to [REDACTED] in his communications with P-2673, it is entirely distinct from [REDACTED] communications with another individual, in which he alleged that Mr Ngaïssona told him P-2673 was [REDACTED]. [REDACTED] never indicated from whom he would have received the information that P-2673 was a [REDACTED] and how he knew P-2673 [REDACTED].

¹¹² [REDACTED] writes- [REDACTED]. CAR-OTP-00000094-00005.[REDACTED].CAR-OTP-00000094-000011-00000014

¹¹³ Prosecution Request, para.63.

59. In respect to the Facebook conversations P-1847 allegedly had with [REDACTED], the Prosecution submits that P-1847 tried to convince [REDACTED], and that he later said he was [REDACTED]. However, nothing in the content of the conversations allows the inference that P-1847 tried to convince [REDACTED]. Indeed, it was P-1847 who on [REDACTED]/03/2021 initiated the conversation with [REDACTED].¹¹⁴ [REDACTED] appeared to believe him right away as is evident from his response, [REDACTED].¹¹⁵ Moreover, P-1847's telling various collocutors that he was [REDACTED] was consistent with his [REDACTED], and does not indicate fear of being "outed" by them.

c. The interests of justice would not be served by introducing the prior recorded statement because it would unduly infringe on Mr Ngaïssona's fair trial rights and create undue delay

60. The Prosecution submissions arguing that introducing the statements would serve the interests of justice completely disregard the Court's statutory framework for the following reasons.

61. *First*, the Prosecution ignores that Rule 68(2)(d)(iv) specifically cautions against the use of the rule in matters that pertain to the acts and conduct of the accused. The Prosecution Request begins with how the prior recorded statement provides evidence on Mr Ngaïssona's role in the group's formation, organization, funding, equipping and operations in 2013-2014.¹¹⁶ In sum, it goes to the core of Mr Ngaïssona's alleged criminal responsibility, which is further highlighted by the Prosecution reproducing several pages of relevant quotes regarding Mr Ngaïssona from P-1847's prior recorded statement.¹¹⁷ This manner of proceeding by the Prosecution makes it seem as if this should be a factor that militates in favor of granting the Prosecution's Request, whereas the express terms of Rule 68(2)(d)(iv) require that the Chamber consider the centrality of P-1847's testimony as a factor *against* its introduction.

62. Introducing a prior recorded statement, that is not even a transcript of the witness' interview, but rather a Rule 111 statement that is written by the Prosecution in the present circumstances is highly problematic. It would mean that the Chamber would take into

¹¹⁴ CAR-OTP-00001631-000007-000008

¹¹⁵ Ibid.

¹¹⁶ Prosecution Request, para. 10.

¹¹⁷ Prosecution Request, paras. 11-15.

account in determining Mr Ngaïssona's alleged criminal responsibility a statement, which the witness, under oath, spontaneously stated was incorrect. This is inconsistent with the principle of orality enshrined in Article 69(2). While a Rule 111 statement is signed by the witness, in this instance it represents a highly summarized and sanitized version of the witness interview. The Prosecution interviewed P-1847 for a total of [REDACTED] days, which came to an approximate total of [REDACTED] hours.¹¹⁸ The result of such interviews was two statements totaling altogether not more than 64 pages.¹¹⁹

63. In addition to being a summary of the witness 'account on several topics, a rule 111 statement contains an inherent bias because it is written by one of the parties to the proceedings. In the present proceedings, especially with respect to P-1847, the Prosecution has shown how much it pressures witnesses to respond a certain way when they do not answer questions according to their narrative.¹²⁰ In such a circumstance, where the witness under oath spontaneously deviated from this sanitized version of his words, the Chamber should not look to his prior recorded statement for the truth of its content, especially when it relates to determining the alleged criminal responsibility of Mr Ngaïssona. Such an approach is analogous with this Chamber's decision to not allow witness preparation in the present proceedings.¹²¹ In its decision, the Chamber emphasized that if witness preparation is allowed there is an inherent risk that the party may influence the witness' answer, and this would be against the principle of immediacy.¹²² Here, the shortcomings of introducing the prior recorded statement are the same, the Chamber does not have before it a transcript of how P-1847 gave answers to the questions asked by the Prosecution, but rather a pre-prepared version of events that P-1847 read and signed.

64. Second, introducing the statement in these circumstances would unduly infringe on an accused's right under article 67(1)(g) of the Statute to remain silent without such silence being considered in the determination of their guilt or innocence, and their right to cross examine witnesses under article 67(1)(e) of the Statute. The Prosecution submits that the Defence made the strategic choice not to examine P-1847 on the aspects of his prior

¹¹⁸ The Defence added together the dates and times indicated in the cover page of each statement. The Defence did not include the time needed to read and sign the statements. *See* Prosecution Request, Annex B.

¹¹⁹ *Ibid.*

¹²⁰ The Defence refers the Chamber to the unprofessional tactics of Prosecution investigators in the questioning of P-1847 after his testimony.

¹²¹ ICC-01/14-01/18-677.

¹²² *Ibid.*, paras. 21-23.

recorded testimony that related to Mr Ngaïssona's alleged conduct in 2013.¹²³ Invoking a right is not a strategic choice. Since P-1847 categorically denied the accuracy of his previous recorded statement, there was no purpose for the Defence to go fully through the prior recorded statement during its examination. Thus, no conclusion can be drawn during the Chamber's deliberations under article 67(1)(e). Since the Defence chose to not address certain material aspects of P-1847's prior recorded statement, it did not have the opportunity to meaningfully examine P-1847 on the portions of his prior recorded testimony from which his live testimony deviated.

65. The Prosecution's argument that the Defence did have such an opportunity completely disregards the Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the *Ruto* Rule 68(2)(d) and (c) Decision ("*Ruto* Rule 68(2)(d) and (c) Appeals Judgment), whereby the Appeals Chamber found, in particular:

The Appeals Chamber therefore considers that, even if the accused had an opportunity to question the witnesses because they appeared before the Court, in the absence of the Prosecutor eliciting incriminating evidence from the witnesses in examination-in-chief, such questioning does not amount to a meaningful cross-examination..¹²⁴

66. Given the Defence's lack of opportunity to examine P-1847, if the Chamber were to introduce the prior-recorded statement, the Defence would request that P-1847 be recalled such that the Defence could examine him on these material aspects found in the previous recorded testimony. Recalling the witness would not be a fruitless exercise where P-1847 would merely repeat what he told the Prosecution during its examination. The 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, the same opportunity that was fully afforded to the Prosecution. These questions would be relevant for the purpose of the Chamber determining which version of P-1847's evidence would be true. Such an examination would undoubtedly delay the proceedings, and would be against the very reason Rule 68(2)(d) was adopted, namely to expedite them.

¹²³ Prosecution Request, para. 72.

¹²⁴ ICC-01/09-01/11-2024, para. 93

67. Fourth, introducing the statement is not consistent with the Chamber's choice to elect for a submission regime of evidence. The Prosecution's references to Article 69(4) are inapposite. In the *Ruto* Rule 68(2)(d) and (c) Appeals Judgment, the Appeals Chamber found that the criteria set out by Rule 68 must be met to introduce prior recorded testimony, if not "recourse to article 69 (2) and (4) of the Statute is not permissible given that such a course of action would render rule 68 of the Rules meaningless."¹²⁵
68. Fifth, the integrity of the proceedings would not be preserved through granting the Prosecution Request, because as demonstrated above, the application is manifestly incapable of showing any interference on P-1847's testimony caused by Mr Ngaïssona or anyone close to him. Indeed, the application in this regard is borderline frivolous given that the Prosecution has not been able to identify with any precision what specific conduct constituted the alleged interference with P-1847 that made him "change his position" from his first day of testimony, which was necessary given P-1847's insistence he was not interfered with. Granting the application would encourage the Prosecution to continue intimidating the Defence through capitalizing on: (1) [REDACTED], and (2) [REDACTED]. The Prosecution has impermissibly created [REDACTED].
69. Additionally, following the Prosecution down this path, would amount to Defence [REDACTED] for [REDACTED]. Yes, [REDACTED] did [REDACTED] with witness P-2841 who is a [REDACTED]. However, without any evidence to support, besides hearsay that [REDACTED] was in fact spreading the word that certain individuals were Prosecution witnesses, and that he received this information from Mr Ngaïssona or [REDACTED], the Prosecution's submissions amount to conjecture and guilt by association. Introducing the statement would send the message that [REDACTED]. Given [REDACTED], the chance of non case-related contact is high, and thus for the Prosecution, suspect.
70. One of the main reasons [REDACTED]¹²⁶. [REDACTED]. The Chamber is to deliver justice first and foremost to the people of CAR, therefore the conditions of the trial should be such that [REDACTED]. [REDACTED].

¹²⁵ Ibid., para. 86.

¹²⁶ ICC-01/14/-01/18-1889.

71. The Prosecution has put before the Chamber a manifestly ill-founded Rule 68(2)(d) request, which does not fall within the legal scope of the rule, has insufficiently demonstrated any interference with P-1847, and would not serve the interests of justice if granted.

III.RELIEF SOUGHT

32. For the aforementioned reasons, the Defence respectfully requests the Chamber to :

- REJECT the Prosecution Rule 68(2)(d)Request.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 13 October 2023,

At The Hague, the Netherlands