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**International
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Court**

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Date: **1 November 2023**

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 the
‘Defence Request for Leave to Appeal the “Third Decision on the Prosecution Requests
for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the
Rules”’ (ICC-01/14-01/18-2146-Conf), filed 16 October 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. The Defence for Mr Ngaïssona (the “Defence”) hereby requests for a leave to appeal (‘Leave’) 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 Impugned Decision comprises errors in law and in fact that affect the fair conduct of the proceedings and for which an immediate resolution by the Appeals Chamber is necessary to materially advance the proceedings.
2. The Chamber adopted an erroneous definition of what constitutes ‘unavailability’ for the purpose of Rule 68 and as such failed to consider the unwillingness of both witnesses to testify as the primary cause of their unavailability. This legal mistake is fatal to this decision and constitutes more than a mere disagreement. Considering the importance of the content of the prior recorded statements admitted in evidence by the Impugned Decision, especially in light of the fast approaching start of the Defence case, the imminent resolution of this issue is warranted for the Defence to present its evidence.
3. The Impugned Decision allows the Prosecution to circumvent the principle of orality and submit testimonial evidence despite the witness’s unwillingness to testify.
4. Finally, the Impugned Decision introduces evidence that creates an impermissible reversal of the burden of proof and evidence that goes to the acts and conducts of the Accused without significant corroboration resulting in a prejudice that requires immediate resolution by the Appeals Chamber.

¹ ICC-01/14-01/18-2127-Conf (the “Impugned Decision”).

II. PROCEDURAL HISTORY

5. On 31 January 2023, the Chamber granted a Prosecution request to summons Prosecution witnesses P-2269 and P-2602.²
6. On 16 May 2023, the Registry informed the parties and participants that [REDACTED], Prosecution witnesses P-2602 and P-2269 are deceased.³
7. On 29 May 2023, the Chamber directed the Prosecution to file any further requests pursuant to Rule 68(2)(c) of the Rules no later than 7 July 2023.⁴
8. On 28 June 2023, upon the request of the Prosecution, the Registry provided the [REDACTED] attempt to serve the summonses to appear on Prosecution witnesses P-2602 and P-2269, and further relayed that “both Witnesses are believed to have died”.⁵
9. 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”),⁶ arguing both that “witness P- 2269 is unable to testify because he is [...] otherwise unavailable based on the withdrawal of his cooperation with the Court”⁷ and that the “Chamber may appropriately rely on a presumption of his death for the purposes of [the] application.”⁸
10. On the same day, the Prosecution also filed its Request for the Formal Submission of the Prior Recorded Testimony of P-2602 pursuant to Rule 68(2)(c) (the “P-2602

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 Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence), ICC-01/14-01/18-1892, para. 6.

⁵ See Registry email dated 29 June 2023, at 16:35.

⁶ P-2269 Request, ICC-01/14-01/18-1957-Conf.

⁷ P-2269 Request, para. 8.

⁸ P-2269 Request, para. 18.

Request”),⁹ arguing that “[REDACTED] he reportedly died”¹⁰ and “the Chamber may appropriately rely on a presumption of his death for the purposes of [the] application”.¹¹

11. On 17 July 2023, the Defence filed its Response to the P-2269 Request (the “P-2269 Response”),¹² arguing that the Prosecution failed to sufficiently establish P-2269’s death. Indeed, “when taken cumulatively”, the contradictory information received throughout the proceedings around P-2269’s alleged death make it seem that he is simply “[...] trying to avoid testifying for the Prosecution and decided to make people believe that he has passed away”.¹³
12. On the same day, the Defence filed its Response to the P-2602 Request (the “P-2602 Response”),¹⁴ disputing the allegation that P-2602 is dead and the interpretation of “unavailability” as put forward by the Prosecution since the witness is “deliberately avoiding further contact” with the Prosecution” and not “unavailable” for the purpose of Rule 68(2)(c) of the Rules.¹⁵
13. On 27 July 2023, the Defence provided an investigation report from P-2602 [REDACTED] stating that [REDACTED] is not dead but hiding in the bushes. [REDACTED] further stated that his last contact with P-2602 dates back beginning of [REDACTED].¹⁶
14. On 6 October 2023, the Chamber issued the Impugned Decision.

⁹ P-2602 Request, ICC-01/14-01/18-1958-Conf.

¹⁰ P-2602 Request, para. 10.

¹¹ P-2602 Request, para. 15.

¹² P-2269 Response, ICC-01/14-01/18-1986-Conf.

¹³ P-2269 Request, para. 17.

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

¹⁵ P-2602 Response, para. 11.

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

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

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”.¹⁷ 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.¹⁸

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”.¹⁹ Article 67(1)(e) provides, *inter alia*, that the accused has the right “[t]o examine, or have examined, the witnesses against him”.²⁰ 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”.²¹

18. The Defence incorporates by reference the principles governing the introduction of prior recorded testimony pursuant to Rule 68(2)(c) of the Rules as set out in paragraph

¹⁷ Article 64(2) of the Statute.

¹⁸ Article 68(1) of the Statute.

¹⁹ *The Prosecutor v. Germain Katanga*, Judgement pursuant to article 74 of the Statute, 7 March 2014, para. 1572.

²⁰ Article 67(1)(e) of the Statute.

²¹ Article 67(1)(i) of the Statute.

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.²²

19. Pursuant to Article 82(1)(d) of the Statute, either party may, in accordance with the Rules,²³ request leave to appeal of:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

20. The Impugned Decision meets all of the cumulative criteria set forth in Article 82(1)(d) of the Statute, i.e. two appealable issues stem out from the Impugned Decision, which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

V. SUBMISSIONS

A. The Impugned Decision raises three appealable issues (the "Issues")

21. The Impugned Decision erred in law and in fact in reaching the Impugned Decision. As demonstrated below, all Issues concern subjects for which an immediate resolution is essential for the determination of matters arising in the judicial cause under

²² 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.

²³ Rule 155(1) of the Rules (*"When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal"*).

examination and are not merely a question about which there is disagreement or conflicting opinions.²⁴

- i. *The Chamber erred in law and in fact when it misinterpreted the concept of “unavailable to testify” (the “First Issue”)*

22. The Chamber erred in law when interpreting that P-2269 and P-2602 are unavailable to testify when the witnesses intentionally took steps to subtract themselves from the Court upon withdrawing their cooperation with the Prosecution.

23. The rules governing the introduction of prior recorded testimonies were enacted as a deviation from the general principle of orality and as the exception to the fundamental right of the accused to examine the witnesses testifying against him. Although the jurisprudence of the Court establishes that the term “unavailable” in Rule 68(2)(c) of the Rules must be interpreted broadly,²⁵ it circumscribes what could be understood as a witness’s “unavailability” which should be arising from objective circumstances. For instance, the Chamber endorsed the reasoning of other Trial Chambers and held that:

[...] this term has been interpreted to include situations where (i) a witness suffers from a medical condition(s) that impacts their ability to testify orally; (ii) a witness is in an area of high insecurity [...]; a witness cannot be located after numerous attempts and efforts; or the Registry is unable to provide for the *viva voce* testimony of the witness by video-link at a reasonable stage of the proceedings”.²⁶

²⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para. 22; *Situation in Darfur, Sudan*, Decision on Request for leave to appeal the ‘Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor’, ICC-02/05-118, 23 January 2008, p. 3.

²⁵ See for example *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Magenda, Fidèle Babala Wandu and Narcisse Arido*, “Decision on ‘Prosecution Submission of Evidence Pursuant to Rule 68(2)9c of the Rules of Procedure and Evidence’”, ICC-01/05-01/13-1481-Red-Corr, 12 November 2015, para. 16.

²⁶ ICC-01/14-01/18-1975-Conf., para. 27.

24. Additionally, the Working Group on Lessons Learnt (the “Working Group”) pursuant to the Roadmap on Reviewing the Criminal Procedures of the International Criminal Court stated that the amendment of the Rule 68(2)(c) covers examples raised in Rule 92 *quarter* of the Rules of Procedure and Evidence before the International Criminal Tribunal for ex-Yugoslavia, including those relating to physical or mental conditions which render a witness unavailable.²⁷ The Working Group also considered that the amendment was intended to broaden the scope of Rule 68(2)(c) so as to include situation where a “witness was in detention and his or her release could not be secured”.²⁸

25. As such, the Defence submits that, despite the broad interpretation conferred to the concept of “unavailability”, the causes of such unavailability are still limited to objective circumstances that render the witness inaccessible or otherwise incapable of testifying. In other words, the unavailability of the witness to testify orally should arise only from circumstances that are independent of the witness’s will e.g., death, illnesses, areas of high insecurity, incarceration, or the impossibility to set up a video-link by the Registry.

26. 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 [...]”,²⁹ and that they cannot be located, “even assuming [...] that [they are] unwilling to testify”.³⁰

27. The Defence recalls that the P-2602 expressly stated over the phone that [REDACTED].³¹ It is only *after* this exchange that the Prosecution “has unsuccessfully attempted to contact P-2602 since [REDACTED], when the witness stopped

²⁷ ICC-ASP/12/37/Add.1, para. 29.

²⁸ *Ibid.*

²⁹ Impugned Decision, paras. 32, 53.

³⁰ Impugned Decision, paras. 32 and 53.

³¹ [REDACTED], ICC-01/14-01/18-1690-Conf-Red2 [REDACTED]

responding.”³² Similarly, the Defence recalls that the Prosecution received “clear” information from [REDACTED] that P-2269 [REDACTED].³³ These actions cannot be downplayed as constitutive of “mere reluctance”.³⁴ Those actions constitute in fact very clear indications from those two witnesses of their unwillingness to testify for the Prosecution and it the Chamber committed in a mistake by construing those withdrawal of cooperation as ‘mere reluctance’. A witness that would be merely reluctant to testify would be a witness that would communicate security concerns to the Prosecution or asking for a postponement of his testimony until another moment, not faking his own death or completely stopping to answer the Prosecution after having been very clear on his unwillingness to testify.

28. The Chamber failed to take into consideration that the “obstacles” that could not have been overcome are the actions of the witnesses themselves when they withdrew their cooperation with the Prosecution and took subsequent actions to subtract themselves from all contacts with the Court or the Prosecution. Deliberately avoiding contacts with the Prosecution and successfully evading the Court should be regarded as the expression of their unwillingness to testify. The Chamber either misconstrued their success in putting an end to – of their own volition and out of their own manoeuvres – their cooperation with the Prosecution as an objective cause of their unavailability to testify or failed to take into consideration the causal relation between the two elements.

29. The Chamber erred in law by interpreting that successfully withdrawing his collaboration to testify with the Court is an objective cause of unavailability to testify orally, or erred in fact by failing to consider the chain of causation between the unwillingness of the witnesses to testify and the inability of the Prosecution to locate

³² Decision on the Prosecution Requests to Summon Witnesses P-2602 and P-2269, ICC-01/14-01/18-1738-Conf., para. 11.

³³ [REDACTED]ICC-01/14-01/18-1701-Conf-Red [REDACTED].

³⁴ Impugned Decision, paras. 32, 53.

them. This is a clear mistake from the Chamber and not a mere disagreement from the Defence. In any event, the Chamber went against the spirit of the Rules in reaching the Impugned Decision.

- ii. *The Chamber erred in law when it allowed the introduction of P-2269's prior recorded testimony (the "Second Issue")*

30. P-2269's evidence touches upon Mr Ngaïssona's acts and conduct. 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 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".³⁵ However, P-2269's evidence includes first-hand information that he alleges to have witnessed directly. Notably, and as pointed out by the Prosecution,³⁶ P-2269 alleges that he was personally appointed by Mr Ngaïssona and that he personally received money from Mr Ngaïssona.³⁷ These allegations cannot be commented by any other prosecution witnesses. Moreover, P-2269 is the only witness in this case that alleges receiving money from Mr Ngaïssona directly for his own use.

31. The Chamber erred in fact when it failed to take into consideration that no witness can comment on the above allegations and erred in law when it allowed the introduction of P-2269's prior recorded testimony when it goes to the accused's acts and conduct.

32. No other reason was provided by the Chamber regarding aspects of P-2269's evidence that affect Mr Ngaïssona's acts and conducts. Therefore, no other reason was provided by the Chamber to substantiate why it allowed the introduction of P-2269's prior

³⁵ Impugned Decision, para. 36.

³⁶ [REDACTED].

³⁷ CAR-OTP-2111-0336, para. 105.

recorded testimony despite comprising allegations on Mr Ngaïssona acts and conducts. Therefore, the Impugned Decision lacks reasoning on that matter.

- iii. *The Chamber erred in law when it allowed the introduction of P-2602's Prior recorded testimony (the "Third Issue")*

33. 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 Gobre" ³⁸ to justify the introduction of P-2602's unique evidence on GOBERE pursuant to Rule 68(2)(c) of the Rules. The Defence recalls that [REDACTED] 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 [...]" ³⁹. As such, [REDACTED] is included for the time being only and his status as a defence witness remains conditional to several factors. 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 and whose testimony is uncertain at this stage, considering the 17 November 2023 deadline. 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] ⁴⁰ The Defence should not be in a position to call a witness to make up for the absence of key evidence nor be burdened to create an adversarial setting to compensate the introduction of incriminatory evidence through Rule 68(2)(c) of the Rules.

34. The Chamber, in reaching such decision, proceeded to an impermissible reversal of the burden of proof, put the onus on the Defence to bring evidence on a the alleged

³⁸ Impugned Decision, para. 57.

³⁹ 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.

⁴⁰ [REDACTED] ICC-01/14-01/18-1690-Conf-Red2[REDACTED].

GOBERE Group in an adversarial setting, and violated Mr Ngaïssona's right to remain silent. The Chamber therefore erred in law in reaching the Impugned Decision and, in doing so, infringed Mr Ngaïssona's statutory rights as enshrined in Article 67(1)(g) and 67(1)(i) of the Statute.

35. Therefore, by relying on a potential Defence witness to bring evidence on GOBERE in an adversarial setting to justify the introduction of P-2602's prior recorded testimony in its totality, the Chamber erred in law.

B. The Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

36. With respect to the fair and expeditious conduct of the proceedings, the Appeals Chamber held that "[t]he term 'fair' in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right incorporated in the Statute by distinct provisions of it (articles 64(2), 67(1) and 21(3))".⁴¹ In the same judgment it is underlined that "[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial".⁴² The fairness of the proceedings implies the evaluation of the proceedings of a particular case as a whole⁴³ and "[t]he term 'proceedings' as encountered in the first part of article 82(1)(d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto".⁴⁴ In other words, the

⁴¹ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 11.

⁴² *Idem*, para. 11.

⁴³ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para. 24, citing ECtHR, *Monnell and Morris v. United Kingdom*, Judgement, 2 March 1987, Series A, No. 115; ECtHR, *Barbera, Mességué and Jabardo v. Spain*, Judgement, 6 December 1988, Series A, No. 146; ECtHR, *Granger v. United Kingdom*, Judgement, 28 March 1990, Series A, No. 174.

⁴⁴ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 13.

Chamber, in its evaluation of the application for leave to appeal, shall consider whether or not the issue raised by either of the parties would significantly affect the fair and expeditious conduct of the proceedings in its entirety.

37. By ruling that witnesses are unavailable because they cannot be located, “even assuming [...] that [they are] unwilling to testify”,⁴⁵ the Chamber overlooked the procedural safeguard – that is the willingness of the witness to testify – to introduce evidence that the Defence cannot challenge in an adversarial setting. There is a reason why ‘unwillingness’ to testify is not a motive to introduce prior recorded evidence under Rule 68 is to prevent witnesses to simply withdraw their collaboration and their statement to be admitted, which would go against the principle of orality. As such, this First Issue affects the fairness of the proceedings as the Defence cannot challenge the witnesses’ respective credibility which, with all due respect to the Article 74 holistic assessment of the evidence, can only be effectively achieved through in-person testimony. The reasons behind their clear withdrawal of cooperation is paramount to assess the credibility and reliability of their evidence, and without such reasons, no proper evidentiary weight can be given to their prior recorded testimonies.

38. The adoption of an erroneous legal criteria inevitably caused a prejudice to the Accused. The Defence limited his arguments to the fact that the witnesses were both unwilling to testify. The Defence could not have anticipated that the Chamber would rule the prior recorded statements of the witnesses admissible on the basis of their unavailability as both witnesses were unwilling to testify. Should the Defence had known that the Chamber would adopt a different legal standard, the Defence would have carried investigations in order to demonstrate that both witnesses are available in the sense of the jurisprudence and were simply trying to subtract themselves from this Court. As a result, the Impugned Decision causes a significant prejudice to the Defence.

⁴⁵ Impugned Decision, paras. 32 and 53.

39. Further, the Impugned Decision effectively allowed the introduction of first hand evidence on Mr Ngaïssona's acts and conduct. The Second Issue involved in the Impugned Decision deprives the Defence from challenging the only witness's testimony who alleged that Mr Ngaïssona gave him money personally, without intermediaries. It is inconsistent with the Mr Ngaïssona's statutory right to have a written statement introduced without the possibility for the Defence to examine the witness.

40. Finally, by imposing the reversal of burden of proof onto the Defence, the Third Issue affects the fairness of the proceedings and goes directly against the principle of fair trial of the Accused.

C. The Issues require an immediate resolution by the Appeals Chamber in order to materially advance the proceedings

41. The fulfilment of the first two criteria found in Article 81(1)(d) of the Statute does not automatically qualify the Issues as subjects of an appeal. The Issues have to be such that the proceedings may be materially advanced should the Appeals Chamber immediately resolve them meaning that "prompt reference of the issue to the Appeals Chamber will ensure that the proceedings follow the right course, pre-empting any repercussions of erroneous decisions on the fair and expeditious conduct of the proceedings or the outcome of the trial".⁴⁶

42. *First*, the Issue require an immediate resolution by the Appeals Chamber as the Defence is about to call its witnesses in support of its case. The 17 November deadline set by the Chamber for the Defence to file its final list of witnesses and disclose their mode of testimonies urgently calls for a foreseeable standard. The legal standard as set in the Impugned Decision allows for the introduction of prior record testimonies

⁴⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para. 26.

“even if the witness is unwilling to testify”. Therefore, should the Defence be unable to locate its witnesses because they withdrew their cooperation with the Defence, it needs the Appeals Chamber’s immediate reassurance that such standard can be relied upon to conclude that the witness have become “unavailable”. Absent that reassurance, the Defence case will be punctuated with future litigations and delays caused by locating and/or securing the witnesses. This would unnecessarily overburden the Defence’s resources and prejudice the expeditiousness of the proceedings.

43. *Second*, there is a need for an immediate resolution of the Second Issue by the Appeals Chamber as there is now incriminatory evidence on the acts and conduct of the accused that was introduced in the case record unchallenged.

44. *Third*, the Appeals Chamber has to resolve the Third Issue immediately as it will lead to an unnecessary reconsideration request from the Defence should it decide to drop [REDACTED].

VI. RELIEF SOUGHT

45. The Defence respectfully requests the Chamber to **GRANT** the present **LEAVE TO APPEAL** the Impugned Decision.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard
Ngaïssona

Dated this 1 November 2023,

At The Hague, the Netherlands