Cour
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International
Criminal
Court

Original: **English**

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

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public

Public Redacted Version of the "Victims' Joint Response to the 'Ngaïssona Defence Appeal Against the Decision on the Prosecution Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules, 6 October 2023, ICC-01/14-01/18-2126-Conf' (ICC-01/14-01/18-2206-Conf OA3)" (No. ICC-01/14-01/18-2245-Conf OA3, dated 6 December 2023)

Source: **Common Legal Representatives of Victims**

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Other Crimes and the Common Legal Representative of the Former Child Soldiers (jointly the "CLRV") herewith file their joint response to the appeal brought by the Defence of Mr Ngaïssona (the "Appeal")[1] against the decision issued by Trial Chamber V (the "Chamber") on 6 October 2023 (the "Impugned Decision")[2] and submit that it must be dismissed in its entirety.

2. The CLRV oppose in full the Appeal and contend that the Appellant fails to show that the Chamber committed any error of law or fact in the Impugned Decision. The Chamber correctly interpreted the law and reasonably assessed the specific circumstances of the case when it found that Witness P-1847's prior recorded testimony (the "Witness" or "P-1847") could be introduced into evidence pursuant to rule 68(2)(d) of the Rules of Procedure and Evidence (the "Rules").

3. In particular, the CLRV submit that the Chamber was correct in concluding that rule 68(2)(d) applies when a witness recants his or her statement(s) (the "First Ground of Appeal"), and in reading the "interests of justice" requirement (the "Third Ground of Appeal") in accordance with the general principles of interpretation. The Chamber was also correct in assessing the evidence and the particular circumstances of the case and thus concluding that the statements could be admitted into evidence pursuant to rule 68(2)(d) of the Rules, despite the Witness' denials of interference (the "Second Ground of Appeal") or the fact that the statements went to the acts and conduct of the Accused (the "Fourth Ground of Appeal"). Lastly, the Chamber acted reasonably and within the ambit of its discretion in assessing the prejudice in relation to the

[1] See the "Ngaïssona Defence Appeal Against the Decision on the Prosecution Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules, 6 October 2023, ICC-01/14-01/18-2126-Conf", No. ICC-01/14-01/18-2206-Conf OA3, 15 November 2023 (the "Appeal").
[2] See the "Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules", No. ICC-01/14-01/18-2126-Conf, 6 October 2023 (the "Impugned Decision").

Appellant's right to examine the witnesses (the "Fifth Ground of Appeal" and the "Sixth Ground of Appeal").

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, the present submission is classified as confidential, following the classification chosen by the Appellant. A public redacted version will be filed in due course.

III. PROCEDURAL BACKGROUND

5. On 6 October 2023, the Chamber granted the Prosecution's request for the formal submission of the prior recorded testimony of P-1847 pursuant to rule 68(2)(d) of the Rules.[3]

6. On 16 October 2023, the Ngaïssona Defence filed a request for leave to appeal the Impugned Decision,[4] which was granted by the Chamber on 25 October 2023.[5]

7. On 15 November 2023, the Ngaïssona Defence filed its Appeal,[6] after being granted an extension of page and time limit by the Appeals Chamber.[7]

[3] *Ibid*.
[4] See the "Defence request for leave to appeal the "Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules, ICC-01/14-01/18-2126-Conf", No. ICC-01/14-01/18-2145-Conf, 16 October 2023.
[5] See the "Decision on Ngaïssona Defence Request for Leave to Appeal the Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules" (Trial Chamber V), No. ICC-01/14-01/18-2163, 25 October 2023.
[6] See the Appeal, *supra* note 1.
[7] See the "Decision on the consolidated application of Mr Patrice-Edouard Ngaïssona for an extension of the page and time limits" (Appeals Chamber), No. ICC-01/14-01/18-2189, 3 November 2023.

IV. STANDARDS OF REVIEW

8. In exercising its powers under rule 158 of the Rules, the Appeals Chamber will only consider specific grounds of appeal alleging legal, factual or procedural errors that materially affect an impugned decision.[8] The Appeals Chamber will intervene only where "*clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision*",[9] or if the findings of the relevant Chamber "*are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues*".[10]

9. Regarding questions of law, the Appeals Chamber "[w]*ill not defer to the relevant Chamber's interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error*

[8] See the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled 'Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute'" (Appeals Chamber), ICC-02/11-01/11-548-Red OA4, 29 October 2013, para. 18. See also, the "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings" (Appeals Chamber), ICC-02/11-01/11-321 OA2, 12 December 2012, para. 44; and the Public Redacted Version of the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled 'Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo''" (Appeals Chamber), No. ICC-01/05-01/08-2151-Red OA10, 5 March 2012, para. 29.

[9] See the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release''" (Appeals Chamber), No. ICC-01/04-01/10-283 OA, 14 July 2011, para. 15; and the Public Redacted Version of the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'" (Appeals Chamber), No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 62.

[10] See the "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release" (Appeals Chamber), No. ICC-01/04-01/07-572 OA4, 9 June 2008, para. 25. See also, the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", *supra* note 9, para. 61.

materially affected the decision impugned on appeal".[11] In this regard, "[a] *decision is 'materially affected by an error of law' if the chamber 'would have rendered a* [decision] *that is substantially different from the decision that was affected by the error, if it had not made the error'*".[12]

10. As regards errors based on a misappreciation of facts, the Appeals Chamber has clarified that it "[w]*ill not disturb a trial chamber's factual findings only because it would have come to a different conclusion. When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of a chamber. However, the Appeals Chamber may interfere where it is unable to discern objectively how a chamber's conclusion could have reasonably been reached from the evidence on the record*".[13]

11. In relation to discretionary decisions, the Appeals Chamber has ruled that it will only "*interfere with the exercise of discretion where the appellant can demonstrate that a chamber gave weight to extraneous or irrelevant considerations, or failed to give weight or sufficient weight to relevant considerations. The degree of discretion afforded to a chamber may depend upon the nature of the decision in question*".[14] It further recalled that "*the Appeals Chamber will not interfere with a chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling*".[15]

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[11] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'" (Appeals Chamber), No. ICC-01/21-77 OA, 18 July 2023, paras. 35-36, and references contained therein (the "Philippines Appeal Judgement"). See also, the "Judgment on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled 'Decision on the Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-01/09-01/20-107 OA, 8 March 2021, para. 47, and references contained therein.
[12] See the Philippines Appeal Judgement, *supra* note 11, para. 36.
[13] *Idem*, para. 37.
[14] See the "Judgment on the appeal of the Prosecution against Trial Chamber X's 'Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules'" (Appeals Chamber), No. ICC-01/12-01/18-2222 OA4, 13 May 2022, para. 20 (the "Al Hassan Rule 68(2) Appeal Judgment").
[15] *Ibid*. See also, the "Public redacted version of the Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is

V. SUBMISSIONS ON THE GROUNDS OF APPEAL

1. First Ground of Appeal: The Chamber correctly interpreted the law in finding that the requirement of rule 68(2)(d)(i) are fulfilled in the case of a witness appearing in court and recanting fundamental aspects of his or her statement(s)

12. Pursuant to article 31(1) of the Vienna Convention on the Law of Treaties, 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*".[16]

13. The CLRV submit that the reading of rule 68(2)(d)(i) of the Rules in accordance with the general principles of interpretation shows that the Chamber correctly applied the law. The literal interpretation of the provision, coupled with the understanding of its context and purpose, demonstrates that the requirement that a witness "*failed to give evidence with respect to a material aspect included in his or her prior recorded testimony*" is fulfilled in the case of witnesses recanting their prior recorded statement(s).

14. Indeed, failure to give evidence with respect to a material aspect of a prior recorded testimony encompasses the situation where witnesses retract such a testimony.

15. First, the Chamber's decision is consistent with the ordinary meaning of the term "failure". In this regard, the verb "to fail" includes, among other definitions: to be unsuccessful in an attempt, to prove partly or completely insufficient in quantity,

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Liable'" (Appeals Chamber), No. ICC-01/04-01/06-3466-Red A7 A8, 18 July 2019, para. 31; and the "Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'" (Appeals Chamber), No. ICC-02/04-01/15-1562 OA4, 17 July 2019, paras. 46-47, and references contained therein.

[16] See the Vienna Convention on the Law of Treaties, 23 May 1969, article 31(1). See the "Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases" (Appeals Chamber), No. ICC-01/04-01/07-573 OA6, 9 June 2008; and the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 33 (the "DRC Appeal Judgment").

duration, or extent, to be lacking or insufficient;[17] to not do something that should be done, something that has been done very badly or gone completely wrong;[18] to not be enough when needed or expected.[19] In the same vein, "failure" is understood as failing to perform a duty or expected action;[20] the fact of someone not succeeding;[21] the state of not working correctly or as expected.[22] The term is, thus, not limited to "inaction"[23] or silence.

16. As the Defence itself contends, the verb can also include the notion of "*deficiency*"[24] – a term which must comprise deviation from one previous account to another, as it *lacks* fundamental aspects of something that has been already known/expected, it *falls short*[25] of a material aspect of an element, there is *incompleteness/scarcity*.[26] In this regard, the Defence acknowledges that P-1847 "*substantially deviated from and contradicted his prior recorded statements*",[27] a circumstance in his evidence which configures failure to provide evidence on material aspects of his prior recorded testimony.[28]

17. Second, the Appellant ignores[29] the contextual interpretation of the provision, as well its object and purpose.[30] In particular, the Defence misconstrues what

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[17] See the Collins English Dictionary.
[18] See the Cambridge Dictionary.
[19] See the Oxford Learner's Dictionaries.
[20] See the Merriam-Webster.
[21] See the Cambridge Dictionary.
[22] See the Oxford Learner's Dictionaries.
[23] *Contra* Appeal, *supra* note 1, para. 7.
[24] See the Appeal, *supra* note 1, para. 7.
[25] See the Merriam-Webster.
[26] See the Merriam-Webster; Cambridge Dictionary ("*the lack of something that is needed in order to meet a particular standard or level of quality, or the thing that is lacking*"; "*a fault that makes something not good enough*").
[27] See the Appeal, *supra* note 1, para. 8.
[28] *Contra* the Appeal, *supra* note 1, para. 8.
[29] See the Appeal, *supra* note 1, paras. 5-17.
[30] See article 21(1)(a) and (b) of the Statute.

constitutes legislative intent.[31] Relevant context-reading encompasses the analysis of not only the literal interpretation of the term used by the drafters,[32] but also the overall structure of the provision and any connection with other texts within the treaty.

18. In this regard, in proposing the amendment to rule 68(2)(d) of the Rules, the Working Group on Lessons Learnt (the "WGLL") stressed the necessity for a more flexible approach indicating, *inter alia*, that "[u]*nder the current rule 68, it would not be possible to introduce such evidence unless the strict requirements of the current rule 68(a) had been met*".[33] The WGLL's main *rationale* for the amendment evolved around the problematic applicability of the provision in its previous form, evoking the legal limitation of the text as the core of the matter. As such, the WGLL's intent was to have a more adaptable provision as a way to tackle witness interference. The WGLL's assessment took into consideration that "[w]*itness interference is a live and ongoing issue in ICC cases, and may be more of an issue at the ICC than the ICTY because of the lack of a* subpoena *power and the differences in the nature of criminal investigations at each institution*".[34] Notably, the Appellant recognises that "*the issue of interference lies at the heart of this provision* [rule 68(2)(d)]".[35] As a result, the applicability of rule 68(2)(d) to situations where witnesses recant their previous testimony aligns with the intention of the drafters and the very purpose of the provision – *i.e.* deterrence, in that there will be no benefit in interfering with witnesses if their prior recorded testimony can be admitted into evidence.[36]

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[31] See the Appeal, *supra* note 1, paras. 13-14, 16. On the drafting history, see the "Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'" (Appeals Chamber), No. ICC-01/09-01/11-2024 OA10, 12 February 2016, paras. 32-36 (the "Ruto & Sang Rule 68 Appeal Judgment").
[32] On the interpretation of the text in rule 68(2)(d), see *supra*, paras. 14-16.
[33] See the Study Group on Governance: Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, para. 32 (the "WGLL Report").
[34] *Idem*, para. 34.
[35] See the Appeal, *supra* note 1, para. 18.
[36] See the WGLL Report, *supra* note 33, para. 34.

19. The reference to article 70 of the Rome Statute (the "Statute") in rule 68(2)(d) of the Rules is a further indication of the object and purpose of the provision. The WGLL explicitly mentioned that "*Rule 68(2)(d)(iii) was included to create a link to article 70 of the Statute*".[37] As underlined *supra*, the WGLL emphasised the problematic aspects of an unduly limitation in interpretation, as well as the impracticality of certain restrictions in applying the provision.[38] The Appellant – in pointing out a passage of the WGLL's Report – does not dispute the undesirability of a narrow interpretation of rule 68(2)(d) as it would be "*unduly restrictive*".[39] However, the Defence takes issue with the absence of an explicit reference regarding witnesses recanting their testimony.[40] The CLRV submit that an explicit reference to such case is not required since it clearly transpires from the very purpose of the provision.[41]

20. Additionally, witness interference may materialise in multifaceted ways – retracting a previous testimony being one of them. Since rule 68(2)(d) of the Rules operates in the context of interference, a broad concept of failure to testify on material aspect of a prior recorded testimony is justified. To achieve the intended purpose of the amended rule 68(2)(d), the drafters even went further than the analogous ICTY rule 92 *quinquies* on which it is based.[42] Consequently, the requirement of failure to testify on material aspect "*can be satisfied by persons who appear and either do not testify at all or recant fundamental aspects of their prior recorded testimony*".[43]

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[37] *Idem*, para. 37.
[38] See also, *mutatis mutandis*, the WGLL Report, at para. 35.
[39] See the Appeal, *supra* note 1, para. 16, referring to the WGLL Report at para. 34 ("*the Working Group stated that limiting the rule only to interference by a party to the proceedings would be too limiting and explained that it should apply to supporters of a party*").
[40] See the Appeal, *supra* note 1, para. 16.
[41] See the DRC Appeal Judgment, *supra* note 16, para. 40. See also, *mutatis mutandis*, the WGLL Report *supra* note 33, para. 35, where the WGLL provides a practical *example* in its interpretation of the required "*reasonable efforts*", meaning that it did not intend to apply an exhaustive definition of the term, considering "*logic*" from a changed circumstance. In this regard, the Appeals Chamber has applied a broader reading of a provision which is silent in some aspects in the context of rule 68 requests (see, for instance Al Hassan Rule 68(2) Appeal Judgment, *supra* note 14, para. 49).
[42] See, for instance, the WGLL Report, *supra* note 33, paras. 34, 36 (fn. 29).
[43] See the "Decision on Prosecution Request for Admission of Prior Recorded Testimony" (Trial Chamber V(A)), No. ICC-01/09-01/11-1938-Red-Corr, 19 August 2015, para. 41 (the "Ruto & Sang Rule 68 Decision"), para. 41.

21. The Court's broader mandate to establish the truth further supports this approach.[44] Additionally, and as reasonably determined by the Chamber, following the Appellant's interpretation of the rule "*could lead to a situation in which a person subject to interference could have their prior recorded testimony introduced if they were intimidated into silence, but not if the same intimidation prompted them to recant fundamental aspects of what they said previously*".[45] In the CLRV's view, this could not have been the intention of the drafters, especially considering the object and purpose of the provision.[46]

22. For all the above reasons, the First Ground of Appeal should be dismissed.

2. Second Ground of Appeal: The Chamber's assessment of P-1847's testimony and the influence of improper interference was correct and reasonable

23. The Appellant fails to show that the Chamber erred by concluding that a witness subject to interference is unlikely to admit that he or she was subject to improper interference,[47] or that said alleged error in any way materially affected the Impugned Decision.[48]

24. The CLRV submit that the Chamber correctly interpreted and applied the law and reasonably determined that P-1847 was materially influenced by improper interference, even if he denied such circumstance. The Chamber's assessment was consistent with the law and reasonable.

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[44] See article 69(3) of the Statute.
[45] See the Impugned Decision, *supra* note 2, para. 15.
[46] See the Ruto & Sang Rule 68 Decision, *supra* note 43. *Contra* the Appeal, *supra* note 1, paras. 10-11.
[47] *Contra* the Appeal, *supra* note 1, paras. 18-23.
[48] *Idem*, para. 24.

25. In particular, the Chamber was satisfied that P-1847 had been materially influenced by improper interference on the basis of the following facts:

i. an incident which took place two weeks before his trip to The Hague to testify, that made him uncomfortable and made him want to call the Prosecution;[49]
ii. [REDACTED] at the time when he was reading his statement in The Hague, [REDACTED];[50]
iii. the Witness's concerns about [REDACTED];[51]
iv. [REDACTED].[52]

26. Additionally, the Chamber specifically analysed P-1847's denials of interference, and concluded that they did not alter its conclusion taking into account that: (i) when a witness has been subject to improper interference, the likelihood of such a person openly admitting it is close to nil;[53] (ii) the [REDACTED] incidents were of a nature to intimidate the Witness;[54] and (iii) the demeanour of the latter and his obvious change in attitude between the first and the second day of testimony.[55] Consequently, the Chamber determined that the explanations of the discrepancies were "*inconclusive and inconsistent, at best*".[56] Therefore, in the exercise of its discretion, it concluded that the Witness's failure to provide evidence with respect to material aspects included in his prior recorded testimony was materially influenced by improper interference.[57]

27. In a series of intertwined – and sometimes confused – arguments, the Appellant raises a mix of errors of law and fact, all related to the Chamber's conclusion that, in

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[49] See the Impugned Decision, *supra* note 2, paras. 59-61.
[50] *Idem*, paras. 62-63.
[51] *Idem*, para. 63.
[52] *Idem*, para. 64.
[53] *Idem*, para. 66.
[54] *Idem*, para. 67.
[55] *Idem*, para. 68.
[56] *Idem*, para. 71.
[57] *Idem*, para. 72.

the event of interference, it is unlikely that a witness openly admits that he or she was subject to intrusion.[58] Said arguments are unsubstantiated.

28. First, the Appellant misrepresents the Chamber's conclusion. Indeed, contrary to the Defence's arguments, the Chamber never concluded that "*a witness will never admit to being interfered with*".[59] It rather reasonably determined that "[a]*ssuming that a witness was subject to improper interference, the likelihood of such a person openly admitting to such interference is close to nil*".[60]

29. Second, the Appellant fails to look at the decision in its entirety when it alleges an error of law for a lack of reasoning. Contrary to the Defence's contentions,[61] the Chamber did provide a lengthy and reasonable assessment of the Witness's denials of interference.[62] While it was not required to detail every step of its reasoning,[63] the Chamber specifically devoted several paragraphs of its ruling to explain why it was convinced that the Witness was subject to interference, even having denied it.[64] This demonstrates that the Chamber's approach was meticulous, and that it did provide a reasoned opinion.[65]

30. Furthermore, it was entirely reasonable for the Chamber to conclude that limiting the application of rule 68(2)(d) of the Rules to situations in which a witness explicitly admits to having been interfered with was not the intention of the drafters and would unduly restrain the scope of the provision.[66]

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[58] See the Appeal, *supra* note 1, paras. 18-24.
[59] *Contra* the Appeal, *supra* note 1, para. 24.
[60] See the Impugned Decision, *supra* note 2, para. 66.
[61] See the Appeal, *supra* note 1, para. 19.
[62] See the Impugned Decision, *supra* note 2, paras. 65-68.
[63] See *e.g.*, the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/08-3636-Red A, 8 June 2018, para. 63 (the "Bemba Appeal Judgment").
[64] See the Impugned Decision, *supra* note 2, paras. 65-68, 71.
[65] *Contra* the Appeal, *supra* note 1, paras. 18-19.
[66] See the Impugned Decision, *supra* note 2, para. 66. In that regard, see the arguments under the First Ground of Appeal, *supra*, paras. 17-21. See also the WGLL Report, *supra* note 33, para. 34.

31. Lastly, the CLRV note that some of the Appellant's arguments simply refer to previous submissions without detailing how said arguments show that the Chamber committed an error.[67] In this regard, "*repetitions of submissions made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation of the evidence*".[68] Therefore, these arguments should be summarily dismissed as unsubstantiated.

32. Even assuming, *arguendo*, that the Chamber erred in finding that a witness is unlikely to admit being subject to improper interference, such error would not have materially affected the Chamber's ultimate conclusion that P-1847's failure to testify on material aspects was substantially influenced by improper interference.

33. In fact, the Appellant raises errors only with respect to the Chamber's finding that the likelihood that a witness will admit to interference is close to nil.[69] However, and as argued *supra*,[70] the Chamber's ultimate conclusion on the interference was based on additional factors, including (i) the Witness's concerns regarding the incidents [REDACTED] and him being confronted with his upcoming testimony being rumoured about [REDACTED];[71] (ii) the demeanour of the Witness and his obvious change in attitude during the testimony;[72] and (iii) the answers given by P-1847 when asked for explanations about the discrepancies.[73]

34. For all the above reasons, the Second Ground of Appeal should be dismissed.

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[67] See the Appeal, *supra* note 1, paras. 22 (fn. 36), 23 (fn. 40).
[68] See the Bemba Appeal Judgment, *supra* note 63, para. 65.
[69] See the Appeal, *supra* note 1, paras. 18-20.
[70] See *supra* paras. 24-26.
[71] See the Impugned Decision, *supra* note 2, para. 67.
[72] *Idem*, para. 68.
[73] *Idem*, para. 71.

3. Third Ground of Appeal: The Chamber correctly interpreted the "interests of justice" requirement

35. The Appellant fails to show that the Chamber erred in law in its interpretation of the "interests of justice" requirement.

36. Preliminary, the CLRV recall that the sole issue certified for appeal by the Chamber was in relation to an alleged error of law in its interpretation of the "interests of justice" requirement by finding that the purpose of rule 68(2)(d) is the same as a contempt proceeding under article 70 of the Statute.[74] The Appeals Chamber has previously declined to consider arguments going beyond what was certified by the Pre-Trial or Trial Chamber.[75] According to the Appeals Chamber, addressing such arguments is "*unhelpful for the proper determination of the* [present] *appeal*".[76] Therefore, the contentions by the Appellant alleging errors of fact or a misapplication of the requirement by the Chamber should be summarily dismissed.[77]

37. In relation to the contentions on the alleged error of law, the Appellant construes the "interests of justice" requirement narrowly, and again misinterprets the object and purpose of rule 68(2)(d) of the Rules.[78]

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[74] See the "Decision on Ngaïssona Defence Request for Leave to Appeal the Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules", *supra* note 5, para. 2(ii).

[75] See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" (Appeals Chamber), No. ICC-02/11-01/11-572 OA5, 16 December 2013, para. 63 referring to the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the WVU'"(Appeals Chamber), No. ICC-01/04-01/06-2582 OA18, 8 October 2010, para. 45. See also, the "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"(Appeals Chamber), No. ICC-01/09-02/11-1032 OA5, 19 August 2015, para. 28.

[76] See the "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute"(Appeals Chamber), No. ICC-01/09-02/11-1032 OA5, 19 August 2015, para. 28.

[77] See the Appeal, *supra* note 1, paras. 31-35.

[78] *Idem*, paras. 28-30.

38. As already indicated,[79] the drafting history of rule 68(2)(d) shows that the main purpose and object of the provision is to "*create a broader disincentive for interested persons to interfere with ICC witnesses*"[80] and to have a "*deterrent effect, in that there will be no benefit to interfering with a witness if their prior recorded testimony can be admitted to the Trial Chamber as evidence*".[81] This is perfectly in line with the fact that rule 68(2)(d)(iii) specifically mentions article 70 proceedings.[82]

39. Following the Appellant's interpretation would render rule 68(2)(d) ineffective and barely applicable. In addition, an analysis of rule 68(2)(d) of the Rules in the context of witness interference demonstrates that the provision also expedites the proceedings and streamlines the presentation of evidence. Indeed, allowing the introduction of evidence pursuant to rule 68(2)(d) can avoid to present additional evidence and/or to call witnesses to prove the interference or the issues that were not testified upon due to the interference. It can also prevent to resort to article 70 proceedings. In this perspective, the main purpose and object of the provision, which is to avoid witness interference and deter such actions, comes hand in hand with the general purpose and object of the whole rule 68 of the Rules as intended by the drafters.[83]

40. For all the above reasons, the Third Ground of Appeal should be dismissed.

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[79] See the arguments under the First Ground of Appeal, *supra* paras. 17-21.
[80] See the WGLL Report, *supra* note 33, para. 34.
[81] *Ibid*.
[82] *Idem*, para. 37. See also the arguments under the First Ground of Appeal, *supra* paras. 17-21.
[83] See the WGLL Report, *supra* note 33, para. 8.

4. Fourth Ground of Appeal: The Chamber properly assessed P-1847's prior recorded testimony and reasonably concluded that it could be admitted into evidence even if it went to the Accused's acts and conduct

41. The CLRV submit that the alleged abuse of discretion contended by the Appellant is unsubstantiated. The Defence misinterprets the Chamber's holistic assessment and merely disagrees with the Impugned Decision.

42. The Chamber's reasoning was based on a plethora of factors, among which the fact that rule 68(2)(d) "*should be more permissive of 'acts and conduct' evidence when compared to Rule 68(2)(b) of the Rules*".[84] This was not the Chamber's "*only*" consideration; nor did the Chamber reason that the "*mere possibility*" of introducing this type of evidence meant "*that such evidence should be readily introduced without careful consideration of prejudice*", as the Defence suggests.[85]

43. First, the literal interpretation of rule 68(2)(d)(iv) of the Rules demonstrates that there is no automatic prohibition to allow into evidence a prior recorded testimony which goes to proof of acts and conduct of an accused – as in rule 68(2)(b).[86]

44. Second, the comparison between rule 68(2)(b) and (d) was valid and in line with the contextual assessment alongside the objective and purpose of the provision.[87] In this regard, the WGLL Report underscored that "*Rule 68(2)(d)(iv) uses language which discourages the use of 'acts and conduct' evidence, although the introduction of such evidence is not prohibited. Due to the additional burdens placed on parties when faced with an intimidated witness, including the need to establish interference, it was seen that this provision should be more permissive of 'acts and conduct' evidence when compared to rule 68(2)(b)*".[88]

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[84] See the Impugned Decision, *supra* note 2, para. 35.
[85] See the Appeal , *supra* note 1, para. 37.
[86] See the Impugned Decision, *supra* note 2, paras. 35, 86.
[87] See *supra* paras. 17-20.
[88] See the WGLL Report, *supra* note 33, para. 38.

45. Third, a trial chamber has discretion in assessing a request pursuant to rule 68(2)(d) of the Rules.[89] Said assessment is based on a case-by-case analysis, considering the circumstances before it and, particularly, provided that the prior recorded testimony meets the legal requirements set forth in that provision. The Chamber considered all these factors and provided a reasoned decision, including regarding potential prejudice to the Accused.[90]

46. Fourth, the Chamber's consideration of other evidence relating to the acts and conduct of Mr Ngaïssona was a further element in its assessment.[91] On this point, the Appellant carries out an in-depth analysis between witnesses' accounts in an attempt to demonstrate divergencies, inconsistency and lack of probative value.[92] In this regard, the Appellant misconceives the evaluation of evidence – which is only pondered at the deliberation phase under article 74 of the Statute – with the admissibility stage. An alleged "*lack of sufficient corroboration*"[93] cannot be a bar to granting an application made under rule 68(2)(d) of the Rules, as the need for sufficient corroboration is not amongst the requirements provided in said provision.

47. Contrary to the Appellant's contention, the Chamber did not apply rule 68(2)(d)(iv) to P-1847's prior recorded testimony on the basis that it was "*corroborated on several aspects*".[94] By contrast, the Chamber merely found that it "*has received other evidence relating to these matters* [the alleged acts and conduct of Mr Ngaïssona]".[95] This ruling is consistent with the approach adopted by the Chamber for the submission of evidence.[96] In this regard, the Chamber reminded that "*in the*

[89] *Idem*, para. 33.
[90] See the Impugned Decision, *supra* note 2, paras. 31-32, 36, 99-100, 103-104.
[91] *Idem*, para. 92.
[92] See the Appeal, *supra* note 1, paras. 40-43.
[93] *Idem*, para. 44.
[94] *Idem*, para. 39.
[95] See the Impugned Decision, *supra* note 2, para. 92.
[96] See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber V), No. ICC-01/14-01/18-631, 26 August 2020, para. 56

context of its deliberations on the judgment pursuant to Article 74 of the Statute, [it] *will weigh the probative value and reliability of the Prior Recorded Testimony, considering* […] *whether the evidence contained in the Prior Recorded Testimony is corroborated by any other evidence submitted before the Chamber*".[97] Therefore, the Appellant's contention that the Chamber did not apply the concept of corroboration "*with due care*" must be dismissed.[98]

48. For all the above reasons, the Fourth Ground of Appeal should be dismissed.

5. Fifth Ground of Appeal: The Chamber made a correct prejudice assessment under rule 68(2)(d) when it found that Mr Ngaïssona's right to examine the witness was not violated

49. The Appellant raises several errors in relation to the Chamber's conclusion that the Defence was in a position to meaningfully question the Witness.[99] The Appellant seems to conflate an error of fact with an error of law when arguing that the Chamber erred in its assessment of prejudice under rule 68(2)(d).[100] Indeed, the assessment that a chamber has to make in this regard is factual and based on the circumstance of a specific case.

50. In any case, the Chamber did not err in its assessment when it concluded that the Appellant had the opportunity to meaningfully question the Witness.[101] In this regard, the Defence fails to show that no reasonable trier of fact, based on the evidence and the specific circumstances of this case, could have reached the same conclusion as the Chamber did.

51. In fact, the Chamber's decision was reasonable and based on the specific circumstances of the case. The Chamber listed the material facts which the Witness

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[97] See the Impugned Decision, *supra* note 2, para. 104.
[98] See the Appeal, *supra* note 1, paras. 39-44.
[99] *Idem*, paras. 45-53.
[100] *Idem*, para. 45.
[101] See the Impugned Decision, *supra* note 2, paras. 88, 103.

deviated from, elicited from the live testimony.[102] It further analysed the testimony and recalled some relevant examples of questions that clearly showed that the Prosecution attempted to elicit from the Witness the incriminatory evidence.[103]

52. Therefore, the Chamber acted reasonably and within the ambit of its discretion, in concluding that the Defence could not choose to refrain from further questioning the Witness, and later argue that it did not have sufficient opportunity to question him.[104] It was exactly for this reason, and because the specific circumstances of this case "*left no doubt as to what the material aspects at issue were, and that they concerned the incriminating evidence the Prosecution attempted to elicit*",[105] that the Chamber concluded that the Defence was in a position to meaningfully question the Witness. Contrary to the Appellant's contentions,[106] these elements were sufficient for the Chamber to distinguish the situation of the Appellant from the one of his co-Accused. The Defence fails to show that the same conclusion had to be rendered for both defendants.

53. Furthermore, the Chamber did not err in its application of the relevant Appeals Chamber's jurisprudence.[107] The Chamber rightly recalled that the important issue is to analyse if the calling party had elicited the incriminating evidence.[108] In the Chamber's view, the specific circumstances of the questioning of the Witness – in particular the repeated seeking of explanations for the discrepancies in his testimony – made it very clear to the Defence that the Prosecution attempted to elicit the incriminatory evidence contained in the prior recorded testimony.[109] The Defence fails to show any error in the Chamber's reasoning, and merely disagrees with the Impugned Decision.

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[102] *Idem*, para. 48.
[103] See, for instance, the Impugned Decision, *supra* note 2, para. 76.
[104] *Idem*, *supra* note 2, para. 88.
[105] *Idem*, para. 103.
[106] See the Appeal, *supra* note 1, paras. 47, 53.
[107] *Contra* the Appeal, *supra* note 1, para. 52.
[108] See the Impugned Decision, *supra* note 2, para. 101; see also the Ruto & Sang Rule 68 Appeal Judgment, *supra* note 31, para. 93.
[109] *Idem*, para. 103.

54. Finally, the CLRV emphasise the Chamber's caveats in respect of its final assessment of the evidence in its deliberation pursuant to article 74 of the Statute.[110] Accordingly, the Chamber did not violate the minimum fair trial rights of Mr Ngaïssona in finding that the Defence was in a position to meaningfully question the Witness.[111] What is more, procedural safeguards are in place to further limit any detriment to the rights of the Accused. As recalled by the WGLL, "*the Chamber is the ultimate arbiter on whether introducing prior recorded testimony under this provision is fair, and always retains the discretion to reject testimony submitted under rule 68(2)(d) if the fairness of the trial would be compromised by its introduction*".[112]

55. For all the above reasons, the Fifth Ground of Appeal should be dismissed.

6. Sixth Ground of Appeal: The Chamber was correct in its assessment of prejudice and reasonably determined the timeliness of the introduction of P-1847's prior recorded testimony by the Prosecution

56. The Appellant alleges that the Chamber erred in its assessment of prejudice by not considering the untimely nature of the Prosecution's request to introduce P-1847's statements.[113] According to the Defence, said error prevented the Accused from addressing the material aspects of the statement with the 70 Prosecution witnesses who testified subsequently.[114]

57. First, the Chamber specifically considered the timing of the Prosecution's request.[115] Despite recognising that the Prosecution could have filed said request earlier, the Chamber also stated that there was no statutory obligation to do so.[116]

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[110] *Idem*, para. 104.
[111] *Contra* the Appeal, *supra* note 1, paras. 48-50.
[112] See the WGLL Report, *supra* note 33, para. 33. See also rule 68(1) of the Rules.
[113] See the Appeal, *supra* note 1, paras. 54-59.
[114] *Idem*, paras. 56-57.
[115] See the Impugned Decision, *supra* note 2, para. 85.
[116] *Ibid*.

Furthermore, and considering that a chamber does not have to detail every step of its reasoning,[117] the Appellant fails to show that the Chamber did not consider the impact of the timely introduction of the Witness's statement into evidence.[118] The Chamber was fully aware of the consequences of the introduction of the evidence at that stage of the proceedings. Nevertheless, in the exercise of its discretion, it evaluated the concrete circumstances of the case and reasonably considered that the introduction of P-1847's statements was appropriate and not prejudicial to or inconsistent with the rights of the Accused[119] In this regard, the Appellant fails to show that no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the Chamber did.

58. Second, it is important to recall that the Chamber, when deciding on the admission of evidence in relation to P-1847's testimony in June 2021, specifically mentioned the possibility for the Prosecution to file a motion pursuant to rule 68(2) of the Rules.[120] An analysis of the case record shows that the Prosecution mentioned the possibility to file such a request in relation to P-1847 as early as 2 April 2021, *i.e.* three days after the end of his testimony.[121] The Appellant's contentions that the Defence was not apprised of even a potential rule 68(2)(d) application until after "*all the relevant witnesses on Cameroon*" had testified[122] are therefore inapposite.

[117] See *e.g.* the Bemba Appeal Judgment, *supra* note 63, para. 63.
[118] *Contra* the Appeal, *supra* note 1, para. 54.
[119] See the Impugned Decision, *supra* note 2, paras. 103-104.
[120] See the email of the Chamber of 14 June 2021 at 12:24 included in the "Annex 2 to the Registry's Report on the Evidence recognised as formally submitted by the Chamber for witness P-1847", No. ICC-01/14-01/18-1099-Conf-Anx2, 30 August 2021, pp. 2-3.
[121] See the email of the Prosecution of 2 April 2021 at 15:51 included in the "Annex 2 to the Registry's Report on the Evidence recognised as formally submitted by the Chamber for witness P-1847", No. ICC-01/14-01/18-1099-Conf-Anx2, 30 August 2021, pp. 5-6 ("*Lastly, although P-1847's Prior Inconsistent Statements are presently submitted on the basis of their inconsistency and formally recognisable as such under article 69, particularly given his 'adverse' nature, the Prosecution expressly reserves the right to reclassify the basis of its submission under rule 68(2)(d), pending further confirmation of interference in respect of its preliminary investigation*") (the "Prosecution 2 April 2021 Email").
[122] *Contra* the Appeal, *supra* note 1, para. 56.

59. Third, and even if the Prosecution or the Chamber would not have flagged the possibility of a rule 68(2)(d) application, the Appellant should have reasonably known that such an application could follow, and should therefore had planned his strategy accordingly.[123] As underlined by the Chamber, the questions asked in the courtroom during P-1847's testimony and the Witness's answers "*left no doubt as to what the material aspects at issue were, and that they concerned the incriminating evidence the Prosecution attempted to elicit*".[124] The Appellant does not demonstrate any error in that regard. The Prosecution's email of 2 April 2021 made it even clearer that it was alleging that P-1847 sought to distance his prior statements regarding Mr Ngaïssona, and particularly his "*involvement in the planning, structuring, financing, directing, ordering, and liaising with key figures among the Anti-Balaka, including regarding military operations*".[125] The Defence, had it been duly diligent, should have adapted its strategy in light of the possibility that a rule 68(2)(d) application be filed before the end of the presentation of evidence by the Prosecution.

60. For all the above reasons, the Sixth Ground of Appeal should be dismissed.

[123] *Idem*, paras. 55-56.
[124] See the Impugned Decision, *supra* note 2, para. 103.
[125] See the Prosecution 2 April 2021 Email, *supra* note 121, pp. 5-6.

VI. CONCLUSION

61. For the foregoing reasons, the CLRV respectfully request the Appeals Chamber to dismiss the Appeal in its entirety and confirm the Impugned Decision.

Respectfully submitted.

Dmytro Suprun

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Paolina Massidda
For the team of the Common Legal Representatives of Victims of the Other Crimes

Dated this 3rd day of April 2024

At The Hague, The Netherlands