

1 International Criminal Court
2 Appeals Chamber
3 Situation: Central African Republic II
4 In the case of The Prosecutor v. Alfred Rombhot Yekatom and Patrice-Edouard
5 Ngaïssona - ICC-01/14-01/18
6 Presiding Judge Solomy Balungi Bossa, Judge Luz del Carmen Ibáñez Carranza,
7 Judge Gocha Lordkipanidze, Judge Kimberly Prost and Judge Erdenebalsuren
8 Damdin
9 Appeals Judgment - Courtroom 1
10 Monday, 20 May 2024
11 (The hearing starts in open session at 10.00 a.m.)
12 THE COURT USHER: [10:00:09] All rise.
13 The International Criminal Court is now in session.
14 Please be seated.
15 PRESIDING JUDGE BOSSA: [10:00:37] Good morning, everyone.
16 Would the court officer please call the case.
17 THE COURT OFFICER: [10:00:59] Good morning, Madam President.
18 Situation in the Central African Republic II, in the case of The Prosecutor
19 versus Alfred Yekatom and Patrice-Edouard Ngaïssona, case reference
20 ICC-01/14-01/18.
21 And for the record, we are in open session.
22 PRESIDING JUDGE BOSSA: [10:01:20] Thank you.
23 My name is Solomy Balungi Bossa, I'm presiding this appeal arising from the
24 Yekatom and Ngaïssona case. My fellow judges in this appeal are Judge Luz
25 del Carmen Ibáñez Carranza, Judge Gocha Lordkipanidze, Judge Kimberly

1 Prost and Judge Erdenebalsuren Damdin.

2 May I ask the parties and participants to please introduce themselves for the
3 record, starting with the Defence team of Mr Ngaïssona, whose appeal we are
4 deciding today.

5 MS PROULX: [10:02:01] Good morning, Madam President. Good morning,
6 everyone.

7 Mr Ngaïssona is represented today, to my right, by Alexandre Desevedavy,
8 Despoina Eleftheriou. And behind me, by Cristian Gonzalez Ruiz, Michael
9 Rowse, Justine Crête and by myself, Marie-Hélène Proulx. Thank you.

10 MS BAFADHEL: [10:02:31] Good morning, Madam President.

11 Mr Yekatom today is represented by Ms Yousra Lamqaddam, myself, Sarah
12 Bafadhel. And Mr Yekatom is present today in the courtroom.

13 PRESIDING JUDGE BOSSA: [10:02:44] Thank you.

14 The Office of the Prosecutor.

15 MS BRADY: [10:02:56] Good morning, your Honour. And good morning to
16 everyone in the courtroom.

17 Today, the Prosecution is represented by Mr Kweku Vanderpuye, senior trial
18 lawyer in the Yekatom, Ngaïssona case; and behind me, Mr Matteo Costi,
19 appeals counsel; and Mr Reinhold Gallmetzer, appeals counsel; and I'm Helen
20 Brady, I'm the senior appeals counsel for the Prosecution. Thank you.

21 PRESIDING JUDGE BOSSA: [10:03:23] Thank you, Counsel.

22 The legal representatives for victims, including all or, you know, some of
23 the (Overlapping speakers)

24 MS RABESANDRATANA: [10:03:30](Interpretation) Good morning, Madam
25 President. Good morning to everyone. The legal representative of victims 2

1 are represented today by Mr Orchlon Narantsetseg and myself, Elisabeth
2 Rabesandratana.

3 MR SUPRUN: [10:03:45] Good morning, Madam President.

4 The former child soldiers are represented by myself, Dmytro Suprun. Thank
5 you.

6 PRESIDING JUDGE BOSSA: [10:03:54] Thank you very much, Counsel.

7 Today, the Appeals Chamber will deliver its judgments in the appeals of the
8 Defence team for Mr Ngaïssona against two distinct decisions of Trial Chamber
9 V, both issued on October 6, 2023. The first one is the "Decision on the
10 Prosecution Request for Formal Submission of Prior Recorded Testimony
11 pursuant to Rule 68(2)(d) of the Rules". And the next one is the "Third
12 Decision on the Prosecution Request for Formal Submission of Recorded
13 Testimonies pursuant to Rule 68(2)(c) of the Rules". The numbers of these
14 requests are, respectively, ICC-01/14-01/18-2126-Conf and
15 ICC-01/14-01/18-2127-Red and ICC-01/14-01/18-2127-Red).

16 I will start by reading a summary of the Appeals Chamber's judgment on the
17 appeal that was filed first, which is the appeal against the "Decision on the
18 Prosecution Request for Formal Submission of Prior Recorded Testimony
19 pursuant to Rule 68(2)(d) of the Rules".

20 After a short break, I will provide a summary of the Appeals Chamber's
21 judgment on the appeal against the "Third Decision on the Prosecution
22 Requests for Formal Submission of Prior Recorded Testimonies pursuant to
23 Rule 68(2)(c) of the Rules".

24 I now proceed to read a summary of the Appeals Chamber's judgment on the
25 appeal against the "Decision on the Prosecution Request for Formal Submission

1 of Prior Recorded Testimony pursuant to Rule 68(2)(d) of the Rules", in
2 brackets, (OA3).

3 This is a non-authoritative summary of the Appeals Chamber's written
4 judgment in the appeal. The authoritative version is the written judgment,
5 which will be made available and notified after this hearing.

6 I will start with a brief background to this appeal.

7 In December 2017 and in August and September 2020, the Prosecutor's
8 investigators interviewed Witness P-1847 and prepared, respectively, two
9 witness statements. I will collectively refer to these statements as "prior
10 recorded testimony".

11 On 26, 29 and 30 March 2021, Witness P-1847 testified before the Trial
12 Chamber.

13 On his second and third day of his testimony, during examination by the
14 Prosecutor and related follow-up questions by the Trial Chamber, the witness
15 made a number of statements that significantly departed from his prior
16 recorded testimony.

17 On 14 June 2021, via email, the Trial Chamber rejected the Prosecutor's request
18 to recognise the prior recorded testimony as formally submitted under the
19 applicable procedure for the submission of evidence through a witness.

20 On 7 July 2023, the Prosecutor requested the formal submission of the prior
21 recorded testimony pursuant to Rule 68(2)(d) of the Rules. The Defence
22 opposed the request.

23 On 14 October 2023, the Trial Chamber rendered the Impugned Decision and
24 authorised the introduction of P-1847's prior recorded testimony into evidence
25 pursuant to Rule 68(2)(d) of the Rules.

1 On October 25, 2023, the Trial Chamber granted the Defence's request for leave
2 to appeal the Impugned Decision, certifying the six issues proposed by the
3 Defence.

4 On 15 November 2023, following a decision of the Appeals Chamber granting
5 an extension of time and page limits pursuant to a Defence request under
6 Regulations 35(2) and 37(2) of the Regulations of the Court, the Defence filed its
7 brief against the Impugned Decision.

8 On 6 December 2023, the Prosecutor and Common Legal Representatives of
9 Victims, whom I shall collectively refer to as "Victims", filed their respective
10 responses to the appeal brief.

11 I shall now go to the merits of the present appeal, starting with the first
12 ground.

13 Under the first ground of appeal, the Defence submits that the Trial Chamber
14 erred in applying Rule 68(2)(d)(i) of the Rules to a recanting witness.

15 In this regard, the Appeals Chamber recalls that Rule 68(2)(d)(i) provides as the
16 first requirement that the Chamber must be satisfied that "the person has failed
17 to attend as a witness, or, having attended, has failed to give evidence with
18 respect to a material aspect included in his or her prior recorded testimony". I
19 shall refer to this as the "first requirement".

20 The Defence argues that the Trial Chamber erred in law by finding that the first
21 requirement may be fulfilled in situations where the witness does not attend as
22 a witness, but recants fundamental aspects of his or her prior recorded
23 testimony.

24 The Appeals Chamber, having reviewed dictionary definitions of the term "fail
25 [...] to do something", finds that the term "fail [...] to give evidence"

1 applies -- the terms "fail [...] to give evidence" apply not only to situations in
2 which witnesses do not testify at all in relation to a material aspect included in
3 their prior recorded testimony, but also to those situations where witnesses
4 depart with respect to a material aspect from their prior recorded testimony.
5 This interpretation is in line with the specific purpose of Rule 6(2)(d) which, as
6 follows from the drafting history of this provision, is to provide a measure
7 against witness interference, ultimately protecting the integrity of the
8 proceedings and contributing to the determination of the truth by enabling a
9 Chamber to consider evidence that it would otherwise not be able to consider.
10 Moreover, by preventing witness interference, Rule 68(2)(d) of the Rules serves
11 the overarching purpose of enhancing the efficiency and effectiveness of the
12 Court.

13 Therefore, the Appeals Chamber finds that the Trial Chamber did not err in
14 finding that the first requirement "can be satisfied by persons who appear and
15 either do not testify at all or recant material aspects of their prior recorded
16 testimony" and the Defence has failed to demonstrate any error in the Trial
17 Chamber's determination. Accordingly, the Appeals Chamber rejects the first
18 ground of appeal.

19 Under the second ground of appeal, the Defence alleges that the Trial Chamber
20 erred in determining that the witness's testimony was materially influenced by
21 improper interference. Specifically, the Defence submits that the Trial
22 Chamber erred in law by disregarding the fact that P-1847 denied having been
23 subject to interference, based on the assumption that the witness would not
24 have admitted to having been interfered with, and that it further erred by
25 failing to provide a reasoned decision on this point.

1 The Appeals Chamber recalls that under the second requirement of Rule
2 68(2)(d)(i) of the Rules, the Chamber must be satisfied that "the failure of the
3 person to attend or to give evidence has been materially influenced by
4 improper interference, including threats, intimidation or coercion".
5 The Appeals Chamber considers that the Defence misrepresents the
6 Impugned Decision. Contrary to the Defence's submissions, the Trial
7 Chamber based its conclusion on various relevant factors and concrete factual
8 observations. The witness's denial of interference was only one of them. As
9 a preliminary matter, the Trial Chamber considered that the likelihood of a
10 witness openly admitting to having been subject to improper interference was
11 "close to nil".
12 Subsequently, turning to the circumstances before it, the Trial Chamber noted
13 several incidents suggesting direct and indirect interference with the witness
14 and provided sufficient reasons for its conclusion on this point.
15 The Trial Chamber duly noted that the witness denied having been subject to
16 interference, and gave reasons why it considered that these denials did "not
17 alter its conclusion" that the witness was interfered with in relation to his
18 testimony.
19 In this regard, the Trial Chamber considered the witness's indication of his
20 concerns following the aforementioned incidents and the fact that they were of
21 a nature to intimidate the witness, as well as the witness's demeanour in court
22 and the change in attitude between the first and second day of testimony. For
23 the reasons set out in detail in the written judgment, the Appeals Chamber is
24 also not persuaded by the other arguments made by the Defence under the
25 second ground. Consequently, the Appeals Chamber rejects the second

1 ground of appeal.

2 Under the third ground of appeal, the Defence submits that the Trial Chamber
3 erred in law in its interpretation and application of the "interests of justice"
4 requirement under Rule 68(2)(d) of the Rules.

5 The Appeals Chamber recalls that the fourth requirement under Rule 68(2)(d)(i)
6 of the Rules provides that "[p]rior recorded testimony falling under sub-rule (d)
7 may only be introduced if the Chamber is satisfied that [...] the interests of
8 justice are best served by the prior recorded testimony being introduced".

9 In this regard, the Defence submits that the Trial Chamber erred in finding that
10 the purpose of Rule 68(2)(d) is the same as contempt proceedings and by

11 failing to find that the requirement is linked to the main purpose of Rule 68 of
12 the Rules, namely, to expedite trial proceedings. The Appeals Chamber

13 recalls its findings on the specific purpose of Rule 68(2)(d) as set out under the
14 first ground of appeal, which is to provide a measure against witness

15 interference, ultimately protecting the integrity of the proceedings, and

16 contributing to the determination of the truth by enabling a Chamber to

17 consider evidence that it would otherwise not be able to consider. The

18 Appeals Chamber finds that the Trial Chamber correctly took into account the

19 purpose of this provision when assessing the "interests of justice" requirement.

20 Further, as explained in the judgment, the Appeals Chamber disagrees with the

21 Defence's contention that the Trial Chamber failed to consider that, in the case

22 at hand, improper interference was linked to third party actors.

23 Lastly, the Appeals Chamber observes that the Trial Chamber's conclusion that

24 the admission of the prior recorded testimony was in the interests of justice

25 was based on an assessment of various relevant factors.

1 In light of the foregoing, the Appeals Chamber rejects the third ground of
2 appeal.

3 Under the fourth ground of appeal, the Defence submits that the Trial
4 Chamber, by misinterpreting Rule 68(2)(d)(iv) of the Rules, found that P-1847's
5 prior recorded testimony was corroborated with respect to the acts and
6 conduct of Mr Ngaïssona, and that, in so doing, it abused its discretion by
7 failing to consider relevant factors.

8 The Appeals Chamber recalls that Rule 68(2)(d)(iv) of the Rules provides as
9 follows: "The fact that the prior recorded testimony goes to proof of acts and
10 conduct of an accused may be a factor against its introduction, or part of it".

11 The Appeals Chamber further recalls that according to Rule 68(1) of the Rules,
12 and subject to the specific requirements under the relevant sub-rules being met,
13 a Trial Chamber may allow the introduction of prior recorded testimony only if
14 such introduction "would not be prejudicial to or inconsistent with the rights of
15 the accused".

16 In the case at hand, the Defence contends that the Trial Chamber "fail[ed] to
17 consider relevant factors" and "only considered that [r]ule 68(2)(d) has a less
18 stringent standard than Rule 68(2)(b)".

19 The Appeals Chamber considers that, for the reasons explained in the
20 judgment, the Defence misinterprets the Impugned Decision by singling out a
21 general observation in isolation from the other factors considered by the Trial
22 Chamber. In addition, and also as explained further in the judgment, the
23 Appeals Chamber finds that the Defence argument that the Trial Chamber
24 failed to "appl[y] the concept of corroboration with due care" is misconceived.

25 In this regard, the Appeals Chamber notes that while not a requirement, the

1 existence of corroborative evidence in relation to the prior recorded testimony
2 as a whole may be a relevant factor for assessing any prejudice or inconsistency
3 with the rights of the accused arising from its introduction, as required under
4 Rule 68(1) of the Rules.

5 In the case at hand, the Trial Chamber assessed, among other factors, whether
6 the relevant aspects of the evidence going to proof of the acts and conduct of
7 the accused in the prior recorded testimony were mentioned by other witnesses
8 who appeared before the Chamber, and identified several examples regarding
9 various aspects.

10 For the reasons further explained in the judgment, the Appeals Chamber finds
11 that the Trial Chamber acted within the remits of its discretion and in line with
12 Rule 68(2)(d) of the Rules in concluding that the introduction of P-1847's prior
13 recorded testimony, including the portions related to the acts and conduct of
14 Mr Ngaïssona, was not prejudicial to or inconsistent with the rights of the
15 accused.

16 In view of the aforementioned considerations, the Appeals Chamber rejects the
17 fourth ground of appeal.

18 Under the fifth ground of appeal, the Defence submits that the Trial Chamber
19 erred in law by finding that the introduction of the prior recorded testimony
20 was not prejudicial to the accused because the Defence was aware of which
21 material aspects of the statement the Prosecutor had attempted, but ultimately
22 failed, to elicit from the witness, and therefore had an opportunity to
23 meaningfully question the witness.

24 At the outset, the Appeals Chamber observes that there is no requirement
25 under Rule 68(2)(d) of the Rules for an accused to have a meaningful

1 opportunity to question the witness. Rather, this factor is one among various
2 factors a chamber may consider in its assessment whether submission of the
3 evidence in a specific case and in view of the other circumstances at hand
4 would be prejudicial to or inconsistent with the rights of the accused.

5 In the Impugned Decision, the Trial Chamber noted that the Prosecutor had
6 attempted to elicit relevant incriminating information that was contained in the
7 prior recorded testimony; that it was clear and unambiguous from the
8 questioning of the Prosecutor and the Presiding Judge of the Trial Chamber
9 that the witness "plainly failed to give evidence on material aspects"; and that
10 the essential differences between the witness's testimony in court and his prior
11 recorded testimony, as well as the repeated attempts by both the Prosecutor
12 and the Presiding Judge to find explanations for such differences, left no doubt
13 as to what the material aspects at issue were, and that they concerned the
14 incriminating evidence the Prosecutor had attempted to elicit. The Appeals
15 Chamber finds no error in the Trial Chamber's reliance on these circumstances
16 to determine that the Defence had an opportunity to examine the witness on
17 the material aspects included in his prior recorded testimony.

18 Finally, as recalled under the fourth ground, the opportunity for the Defence to
19 question the witness was only one factor among others the Trial Chamber
20 considered in its assessment of whether the introduction of P-1847's prior
21 recorded testimony would be prejudicial to or inconsistent with the rights of
22 the accused.

23 Consequently, the Appeals Chamber finds that the Defence has failed to
24 demonstrate any error of the Trial Chamber in this regard. Accordingly, the
25 Appeals Chamber rejects the fifth ground of appeal.

1 Under the sixth ground of appeal, the Defence submits that the Trial Chamber
2 erred in the assessment of prejudice and, in particular, it abused its discretion
3 by failing to consider the impact of the "untimely nature" of the Prosecutor's
4 Rule 68(2)(d) request on Mr Ngaïssona's right under Article 67(1)(a) of the
5 Statute "to be informed promptly and in detail of the nature, cause and content
6 of the charge".

7 The Appeals Chamber observes that the Trial Chamber specifically considered
8 the timing of the Rule 68(2)(d) request when addressing a submission by the
9 Defence of Mr Yekatom. The Appeals Chamber further notes that by filing
10 the Rule 68(2)(d) request on 7 July 2023, the Prosecutor did not violate any
11 statutory time limit or any deadline set by the Trial Chamber for the filing of
12 such requests. Moreover, for the reasons explained in the judgment, the
13 Appeals Chamber considers that in the appeal brief, the Defence has failed to
14 substantiate its contention that the timing of the Rule 68(2)(d) request impacts
15 Mr Ngaïssona's right under Article 67(1)(a) of the Statute.

16 The Appeals Chamber therefore finds that, contrary to the Defence's
17 submission, the Trial Chamber considered the timing of the Rule 68(2)(d)
18 request and, in the exercise of its discretion, after assessing the concrete
19 circumstances of the case, concluded that the introduction of P-1847's prior
20 recorded testimony was not prejudicial to or inconsistent with the rights of the
21 accused. In view of the foregoing, the Appeals Chamber rejects the sixth
22 ground of appeal.

23 For the aforementioned reasons as elaborated upon in further detail in the
24 written judgment, the Appeals Chamber rejects the appeal and confirms the
25 Impugned Decision.

1 This brings us to the end of the summary of the Appeals Chamber's first
2 judgment of today. As indicated, we will now have a short break and we will
3 resume in 10 minutes to read the summary of the second judgment.

4 THE COURT USHER: [10:26:32] All rise.

5 (Recess taken at 10.26 a.m.)

6 (Upon resuming in open session at 10.38 a.m.)

7 THE COURT USHER: [10:38:31] All rise.

8 Please be seated.

9 PRESIDING JUDGE BOSSA: [10:38:57] Good morning, once again.

10 I'm presenting the Summary of the Appeals Chamber judgment on the appeal
11 against the "Third Decision on the Prosecution's Request for Formal
12 Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the
13 Rules", (AO4).

14 Would the court officer please introduce the case once again.

15 THE COURT OFFICER: [10:39:39] Good morning, Madam President.

16 Situation in the Central African Republic II, in the case of The Prosecutor
17 versus Alfred Yekatom and Patrice-Edouard Ngaïssona, case reference
18 ICC-01/14-01/18.

19 PRESIDING JUDGE BOSSA: [10:39:57] Is there any change in appearances?

20 If not - Defence? Prosecutor? Victims? Okay.

21 I will now proceed to read the summary of the judgment.

22 As indicated at the beginning of this hearing, I shall now read a summary of
23 the Appeals Chamber's judgment against the "Decision on the Prosecution
24 Request for Formal Submission of Prior Recorded Testimonies Pursuant to
25 Rule 68(2)(c) of the Rules".

1 This is a non-authoritative summary of the Appeals Chamber's written
2 judgment in the appeal. The authoritative version is the written judgment,
3 which will be made available and notified after this hearing.

4 I will now briefly explain the background of this appeal.

5 On 4 July 2023, following a decision granting a Prosecutor's request to summon
6 witnesses P-2602 and P-2269, and the Registry's subsequent indication that,
7 according to the information received from the authorities tasked with
8 notifying the summonses to appear, P-2602 and P-2269 are deceased, the
9 Prosecutor requested the submission of these two witnesses' prior recorded
10 testimonies pursuant to Rule 68(2)(c) of the Rules.

11 In its decision of 6 October 2023, the Trial Chamber granted the Prosecutor's
12 request for the submission of P-2269's and P-2602's prior recorded testimonies
13 pursuant to Rule 68(2)(c) of the Rules. I shall refer to this decision as the
14 "Impugned Decision".

15 On 25 October 2023, the Trial Chamber granted the Defence's request for leave
16 to appeal the Impugned Decision, certifying the three proposed issues.

17 On 15 November 2023, following a decision of the Appeals Chamber granting a
18 Defence's request pursuant to regulations 35(2) and 37(2) of the Regulations of
19 the Court, seeking an extension of the page and time limits, the Defence filed
20 its appeal brief against the Impugned Decision, raising four grounds of appeal.

21 On 6 December 2023, the Prosecutor and the Victims filed their respective
22 responses to the appeal brief.

23 I will now turn to the merits of the present appeal, starting with the first
24 ground of appeal.

25 Under the first ground of appeal, the Defence submits that by finding that

1 witnesses P-2269 and P-2602 were unavailable to testify orally due to "obstacles
2 that cannot be overcome with reasonable diligence" within the meaning of
3 Rule 68(2)(c) of the Rules, the Trial Chamber misappreciated the facts, took into
4 account irrelevant facts and failed to take into account relevant facts, in
5 particular the witnesses' apparent unwillingness to testify.

6 In this regard, the Appeals Chamber recalls that Rule 68(2)(c) of the Rules
7 provides for the introduction of prior recorded testimony in cases where "[t]he
8 prior recorded testimony comes from a person who has subsequently died,
9 must be presumed dead, or is, due to obstacles that cannot be overcome with
10 reasonable diligence, unavailable to testify orally."

11 The Appeals Chamber considers that the notion of "unavailability" may cover
12 different situations and needs to be assessed on a case-by-case basis.

13 The Appeals Chamber observes that, in the present case, the Trial Chamber
14 considered all relevant facts regarding the witnesses' whereabouts. In
15 concluding that the witnesses could not be located, the Trial Chamber
16 considered: (i) its previous finding, when it granted the summons request for
17 P-2602 and P-2269 to appear, that the Prosecutor had exhausted all avenues in
18 trying to contact the witnesses; and (ii) the failure of the Central African
19 Republic authorities to locate them. Contrary to the Defence's argument, the
20 Trial Chamber gave due weight to the witnesses' apparent unwillingness to
21 testify, finding that, and I quote, "even assuming that the witness[es] [were]
22 alive and [were] unwilling to testify", end of quote, their unavailability
23 stemmed from, quote, "obstacles that cannot be reasonably overcome", end of
24 quote, rather than from their reluctance or unwillingness to testify. The fact
25 that the witnesses were initially or still are unwilling to testify was not

1 considered a determinative factor. Instead, the Trial Chamber took into
2 account other factors, such as the subsequent inability to locate the witnesses
3 and the absence of any further available information on their potential
4 whereabouts, and concluded that those factors amounted to "obstacles that
5 cannot be overcome with reasonable diligence", within the meaning of
6 Rule 68(2)(c).

7 The Appeals Chamber finds no error in the Trial Chamber's assessment. A
8 witness's reluctance or unwillingness to testify does not preclude a finding that
9 the witness is "unavailable to testify orally" pursuant to Rule 68(2)(c) of the
10 Rules, if it is established that there are other circumstances that cannot be
11 overcome with reasonable diligence.

12 The Appeals Chamber therefore rejects the first ground of appeal.

13 The Defence's allegations as presented under the second and third grounds of
14 appeal relate to the question of whether the Trial Chamber erred in allowing
15 the introduction of P-2269's prior recorded testimony despite the fact that it
16 goes to proof of the acts and conduct of Mr Ngaïssona. The Appeals Chamber
17 has therefore addressed these grounds of appeal together.

18 The Defence submits that the Trial Chamber erred in fact in failing to take into
19 account a relevant aspect of P-2269's prior recorded testimony, and in law by
20 failing to provide sufficient reasoning or misapplying Rule 68(2)(c) of the
21 Rules.

22 The Appeals Chamber recalls that, in contrast to Rule 68(2)(b), Rule 68(2)(c) of
23 the Rules does not preclude the introduction of a prior recorded testimony that
24 goes to proof of acts and conduct of the accused. Rather, in accordance with
25 the express language of the sub-rule, the fact that the prior recorded testimony

1 goes to proof of acts and conduct "may be a factor against its introduction, or
2 part of it". This is a matter for the Trial Chamber's consideration in making its
3 discretionary decision with respect to the particular prior recorded testimony
4 in issue.

5 According to Rule 68(1) of the Rules, a trial chamber may allow the
6 introduction of prior recorded testimony only if such introduction "would not
7 be prejudicial to or inconsistent with the rights of the accused". In assessing
8 this issue, the Trial Chamber may take into account a number of factors
9 including, for example, whether the evidence relates to issues that are not
10 materially in dispute; whether that evidence is not central to core issues in the
11 case, but only provides relevant background information; and whether the
12 evidence is corroborative of other evidence.

13 Accordingly, while not a requirement, the existence of corroborative evidence
14 in relation to the prior recorded testimony as a whole may be a relevant factor
15 for assessing any prejudice or inconsistency with the rights of the accused
16 arising from its introduction, as required under Rule 68(1) of the Rules.

17 In the present case, after considering whether the conditions under
18 Rule 68(2)(c)(i) of the Rules were met, the Trial Chamber noted that P-2269's
19 prior recorded testimony included information related to Mr Ngaïssona's acts
20 and conduct, and concluded that this did not create prejudice of an extent
21 which would preclude its introduction into evidence. In this respect, the Trial
22 Chamber first correctly recalled that there is no absolute bar under Rule 68(2)(c)
23 to introducing prior recorded testimony that goes to the acts and conduct of the
24 accused. Furthermore, the Trial Chamber considered that "at least part of the
25 information concerns events or allegations regarding which other witnesses

1 who testified before the Chamber also provided information on", referring to
2 several examples of such evidence. Finally, the Trial Chamber noted that it
3 would take into account the fact that the Defence and the other participants
4 had not had the opportunity to examine the witness, and that any alleged
5 internal and external inconsistencies in the witness's statement would, in any
6 event, be taken into account when assessing the evidence's weight and
7 probative value.

8 In this context, the Appeals Chamber notes the Defence's argument that the
9 Trial Chamber failed to address "a crucial aspect" of P-2269's evidence, going to
10 "the very core of the charges against Mr Ngaïssona", which was not discussed
11 by any other Prosecution witnesses and that the Defence argues that it is
12 impossible for it to be corroborated. The Appeals Chamber observes that the
13 Trial Chamber correctly recalled that each request under Rule 68 of the Rules
14 would be assessed on a case-by-case basis and with due regard to the specific
15 nature and content of each prior recorded testimony, and that in its
16 determination as to whether a prior recorded testimony can be introduced
17 pursuant to Rule 68 of the Rules depends on its consideration of the testimony
18 as a whole. The Appeals Chamber further notes that the Trial Chamber did
19 not make a definitive finding on whether P-2269's prior recorded testimony
20 included unique information about Mr Ngaïssona's acts and conduct. Rather,
21 it referred to evidence "that might be considered as unique". Furthermore,
22 from the Impugned Decision, there is no indication that the Trial Chamber
23 failed to consider the part of the testimony identified by the Defence when
24 conducting its assessment. In this regard, the Appeals Chamber notes the
25 Prosecutor's submission that this particular portion of the witness's evidence

1 was in fact corroborated by "multiple evidence".

2 The Appeals Chamber recalls that corroboration "is a matter of appreciation on
3 a case-by-case basis", and that to be considered as corroborative, different
4 testimonies do not need to be "identical in all aspects or describe the same fact
5 in the same way" but "must confirm, even if in different ways, the same fact".

6 In any event, given the stage of the proceedings, the Trial Chamber's
7 assessment may be possible only at a general level in relation to broad themes
8 discussed by the witness, and it does not predetermine the manner in which
9 the evidence will be subsequently assessed and relied upon by the Trial
10 Chamber for the purpose of its judgment pursuant to Article 74 of the Statute.

11 Furthermore, and particularly with regard to the Defence's allegation that the
12 Trial Chamber failed to properly apply Rule 68(2)(c)(ii) of the Rules to the
13 remaining portions of P-2269's prior recorded testimony, or to sufficiently
14 reason its decision, the Appeals Chamber notes that the Trial Chamber
15 acknowledged that some portions of P-2269's prior recorded testimony may
16 concern matters which are not addressed in the evidence provided by other
17 witnesses. That notwithstanding, and bearing in mind the stage of
18 proceedings, the Trial Chamber found that the introduction of P-2269's prior
19 recorded testimony would not be inconsistent with or prejudicial to
20 Mr Ngaïssona's rights.

21 Specifically, the Appeals Chamber notes that the Trial Chamber found that "the
22 information provided by the witness in relation to the accused's alleged acts
23 and conduct does not create prejudice to an extent which would preclude
24 introduction of the prior recorded testimony". The Trial Chamber was clear
25 that aside from this general consideration of any prejudice, or impact on the

1 rights of the accused arising from the introduction of the prior recorded
2 testimony as a whole, it was deferring the assessment of the relevance and
3 probative value of the specific content of the prior recorded testimony to the
4 Article 74 judgment deliberations stage.

5 The Appeals Chamber finds that at this stage of the proceedings, the Trial
6 Chamber properly assessed whether the introduction of the witness's prior
7 recorded testimony was prejudicial to or inconsistent with the rights of the
8 accused, and sufficiently explained its assessment. First, the Appeals
9 Chamber is of the view that trial chambers are best placed to assess the
10 prejudice resulting from specific parts of prior recorded testimony introduced
11 under Rule 68(2)(c) of the Rules in the context of the overall evidence in a given
12 case and enjoy discretion in this regard. Further, it recalls that corroboration
13 is not a requirement for the introduction of evidence under Rule 68(2)(c) of the
14 Rules, and that when considered as a factor, the Trial Chamber's assessment at
15 this stage may be possible only at a general level in relation to broad themes
16 discussed by the witness. Furthermore, the Appeals Chamber notes that in
17 the present case the Trial Chamber found that even if certain portions of
18 P-2269's prior recorded testimony may be considered as "unique", the
19 introduction of his prior recorded testimony would not be inconsistent with or
20 prejudicial to Mr Ngaïssona's rights, and specified that it would consider,
21 especially with regard to such evidence, that the Defence and the other
22 participants did not have the opportunity to examine the witness, and that any
23 alleged internal and external inconsistency in witness's prior recorded
24 testimony would be considered when assessing the evidence's weight and
25 probative value.

1 In light of the aforementioned Trial Chamber's findings, the Appeals Chamber
2 considers that the Defence has failed to show any alleged lack of reasoning in
3 this regard or an error in the application of Rule 68(2)(c).

4 Having rejected all Defence's relevant arguments, the Appeals Chamber rejects
5 the second and third grounds of appeal.

6 Under the fourth ground of appeal, the Defence submits that the Trial
7 Chamber erred in law in taking into account that the Defence was expecting to
8 call, at the time of the Impugned Decision, a certain witness who appeared on
9 the preliminary witness list to testify about his experience in Gobere, and that
10 this alleged error materially affected the Impugned Decision. For the reasons
11 further set out in the judgment, the Appeals Chamber considers that the
12 Defence has failed to demonstrate that the Trial Chamber committed an error
13 in this regard.

14 The Appeals Chamber considers that the Defence misrepresents the Impugned
15 Decision. In particular, the Appeals Chamber notes *inter alia* that the
16 reference to Witness D30-4891 was only one among various factors considered
17 by the Trial Chamber in its assessment of prejudice. With regard to the
18 specific evidence concerning the "Gobere group", the Trial Chamber observed
19 that this was one of the many topics addressed by the witness in his interview,
20 and that other witnesses provided evidence concerning the relationship
21 between the Anti-Balaka and the "Gobere group".

22 Concerning the expected testimony of D30-4891, the Trial Chamber explicitly
23 noted that the witness appeared on the Defence's "Preliminary List of
24 Witnesses". Further, the Appeals Chamber underlines that it remains entirely
25 up to the Defence, when designing its strategy, to address P-2602's evidence on

1 Gobere, to decide whether to call D30-4891 or any other witness who can testify
2 to the matter. Accordingly, the Appeals Chamber considers that the Trial
3 Chamber did not force the Defence to call D30-4891, nor did it reverse the
4 burden of proof and that the Defence's contentions in this regard are
5 unsubstantiated.

6 Moreover, concerning the Defence's submission that P-2602's evidence is
7 unique, the Trial Chamber did not make any definitive finding as to whether
8 the witness's evidence included "unique" evidence; it rather considered the
9 possibility that some of the witness's evidence might be unique. In this
10 respect, the Trial Chamber noted that the extent to which P-2602's evidence is
11 corroborated by other witnesses will be assessed during its judgment
12 deliberations, together with the fact that the witness was not available for
13 examination by the Defence and the rest of the participants, "notably in relation
14 to evidence that might be considered unique".

15 The Appeals Chamber therefore finds that the Defence has failed to
16 demonstrate any error or abuse of discretion in this regard and, as a result, the
17 Appeals Chamber rejects the fourth ground of appeal.

18 For these reasons and for the reasons stated more fully in the written judgment,
19 the Appeals Chamber rejects the appeal and confirms the Impugned Decision.
20 This brings us to the end of the summary of the Appeals Chamber's second
21 judgment of today.

22 I would like to thank the parties, the participants and their counsel, the
23 Registry staff, including the court reporters, interpreters, the security officers
24 for their valuable assistance today in holding this hearing.

25 Finally, I would like to thank my colleagues, the judges, and the Appeals

- 1 Chamber's staff for their support.
- 2 The hearing is adjourned.
- 3 THE COURT USHER: [11:07:50] All rise.
- 4 (The hearing ends in open session at 11.07 a.m.)
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