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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

***IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

Public document

Prosecution's Consolidated Response to the Defence for Mr Blé Goudé and the Defence for Mr Gbagbo applications for leave to appeal the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)" (ICC-02/11-01/15-591-Red and ICC-02/11-01/15-592-Red)

Source: Office of the Prosecutor

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Introduction

1. On 9 June 2016, Trial Chamber I found that the prior recorded statement of Witness P-0590 shall be introduced and considered submitted to the Chamber as evidence, on the condition that a declaration by the witness, as provided for in rule 68(2)(b), is filed in the record of the case. The Trial Chamber also found that the written statements of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588 and P-0589 are in principle suitable for introduction under rule 68(3).¹ Judge Henderson appended a partially dissenting opinion.²

2. On 15 June 2016, the Defence for Laurent Gbagbo and the Defence for Charles Blé Goudé each filed applications for leave to appeal the Decision.³ Each Application identifies four purported Issues. The Applications should be dismissed *in limine* because they fail to explain how any of the Issues meets the article 82(1)(d) criteria. Further, should the Chamber decide to entertain the Applications, they should equally be dismissed because they fail to identify appealable issues arising from the Decision. Out of the eight Issues, seven Issues are premised on misunderstandings of the Decision or previous decisions issued in the case (the Amended Directions and, in particular, the Decision on Submission and Admission of Evidence). Indeed, although the statements are in the record, the Trial Chamber will only assess their relevance, probative value and weight in its decision pursuant to article 74. As such, these seven purported Issues do not arise from the Decision. Moreover, Gbagbo's Fourth Issue merely disagrees with the Trial Chamber's ruling to admit the documents annexed to the written statements. Accordingly, it is not an appealable issue. And even if the Trial Chamber were to find that any of the Issues arise, none of them meets the remaining criteria under article 82(1)(d). The Defence arguments are general and largely speculative and similarly premised on a misunderstanding of the Decision and the evidentiary regime of this case. The Applications should therefore be dismissed.

¹ ICC-02/11-01/15-573-Red ("Decision").

² ICC-02/11-01/15-573-Red-Anx ("Judge Henderson Dissent").

³ ICC-02/11-01/15-591-Red ("Gbagbo Application") and ICC-02/11-01/15-592-Red ("Blé Goudé Application").

Submissions

A. The Issues are not appealable issues

3. Blé Goudé and Gbagbo each raise four Issues.⁴ An “issue” is a subject the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.⁵ As set out below, none of the Defence Issues meet all article 82(1)(d) criteria.

Gbagbo’s First Issue and Blé Goudé’s Second Issue do not arise from the Decision

4. Gbagbo’s First Issue⁶ and Blé Goudé’s Second Issue⁷ both challenge the Trial Chamber’s use of the term “good trial management” in paragraph 25 of the Decision. Blé Goudé argues that the Decision was “based on one sole criterion, namely whether the introduction will contribute to good trial management” and “[decided] to not take into account prejudice to the accused”.⁸ Similarly, Gbagbo submits that “good trial management” was the “*principe directeur*”,⁹ “[the Chamber’s] *devoir principal*”,¹⁰ and “*critère principal*”.¹¹

5. The Defence’s arguments do not accurately represent the Decision. As such, Gbagbo’s First Issue and Blé Goudé’s Second Issue do not arise from the Decision.

6. Indeed, paragraph 25 of the Decision, which refers to the criterion of “good trial management”, must be read in the context of the entire Decision. By doing so, it is apparent that the Trial Chamber used this term to explain the essence and purpose

⁴ Collectively referred to as “Issues”. As three of the issues raised in both Applications are intrinsically linked, the Prosecution has jointly responded to them.

⁵ ICC-01/04-168, para. 9.

⁶ Gbagbo’s First Issue (“*La Chambre a erré en droit en posant comme principe directeur pour l’admission de déclarations antérieures le ‘good trial management’*”). See Gbagbo Application, paras. 34-43.

⁷ Blé Goudé’s Second Issue (“Whether the Chamber erred by failing to apply the requirement that prior recorded testimony admitted under Rule 68(3) must not be prejudicial to the accused, by ignoring the guidance provided by the Appeals Chamber in *The Prosecutor v. Bemba*, which guidance does not provide for the criterion of ‘good trial management’ as introduced by paragraph 25 of the Impugned Decision”). See Blé Goudé Application, paras. 4(ii), 7.

⁸ Blé Goudé Application, para. 7.

⁹ Gbagbo Application, p. 11, see title of First Issue.

¹⁰ Ibid., para. 35.

¹¹ Ibid., para. 43.

of rule 68, namely, to streamline the proceedings by introducing testimonial evidence *via* this provision instead of *viva voce*.¹² The Chamber then referred to its duty under article 64(2) to ensure that the proceedings are fair and expeditious and noted that rule 68(3) is a tool in the exercise of this duty.¹³ The Chamber's reasoning, if read in its full context, is impeccable.

7. In addition, and contrary to the Defence submissions, the Chamber firmly noted that "[it] must also always bear in mind *the general condition* of Rule 68(2) of the Rules, which prohibits introduction of prior recorded testimony where this would be prejudicial to or inconsistent with the rights of the accused".¹⁴ The Chamber reiterated, in the context of rule 68(3), "[a]s always under Rule 68 of the Rules the Chamber must also be attentive to the requirement that the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused"¹⁵ and "[it] needs to ensure that the proceedings do not unduly infringe on the abovementioned statutorily protected interests".¹⁶

8. Blé Goudé refers generally to the "Appeals Chamber in Bemba" and argues that the criterion of "good trial management" was not among the factors that a Chamber must consider in applying rule 68.¹⁷ Blé Goudé's submission lacks merit. First, as noted above, the Trial Chamber used this term to explain the purpose of rule 68. Second, and contrary to Blé Goudé's contention, the Appeals Chamber did not find that a Chamber, in admitting statements under the amended rule 68, must *always* and *solely* consider the three factors spelt out in paragraph 78 of the *Bemba*

¹² See Decision, para. 11 ("[t]he essence of Rule 68(2)(b) of the Rules is to allow for streamlining of the evidentiary proceedings by not calling some witnesses in person, even if they are available") and 25 ("[i]n any case, the decision to allow the introduction of prior recorded testimony under Rule 68(3) of the Rules is within the powers of the Trial Chamber. While the Chamber needs to ensure that the proceedings do not unduly infringe on the abovementioned statutorily protected interests, a decision authorising the introduction of testimonial evidence via Rule 68 of the Rules instead of *viva voce* will be based on the criterion of good trial management, which includes considerations of expeditiousness and streamlining the presentation of evidence."). See also para. 24: "[i]t is therefore inappropriate to effectively deprive Rule 68(3) of the Rules of its object and purpose merely by invoking the principle of orality".

¹³ Decision, para. 25: "[i]t is the duty of the Chamber to ensure that the trial unfolds in a focused and expeditious manner, while respecting the procedural rights of the parties and participants. Rule 68(3) of the Rules must be understood as a tool in the exercise of this duty."

¹⁴ Decision, para. 10 (emphasis added).

¹⁵ Decision, para. 24.

¹⁶ Decision, para. 25.

¹⁷ Blé Goudé Application, para. 7.

OA5 OA6 Appeals Judgment. Rather, the Appeals Chamber listed a number of non-exhaustive factors that a Chamber *might* consider in receiving into evidence prior recorded witness testimony.¹⁸ Third and notably, the Judgment was issued before rule 68 was amended.

9. In conclusion, the Trial Chamber did not solely consider the criterion of “good trial management”, nor was “good trial management” the Chamber’s guiding principle in permitting the introduction of the witness statements under rule 68. Accordingly, Gbagbo’s First Issue and Blé Goudé’s Second Issue do not arise from the Decision. They are premised on a misrepresentation of the Decision and should therefore be dismissed.

Gbagbo’s Second Issue and Blé Goudé’s First Issue are not appealable issues arising from the Decision

10. Gbagbo’s Second Issue¹⁹ and Blé Goudé’s First Issue²⁰ both challenge the Chamber’s introduction of the statements in their entirety. According to the Defence, the admission *in toto* of the statements is inconsistent with paragraph 23 of the Amended Directions, which directs the Parties “to refrain from asking the witness to speculate or to provide opinion evidence”.²¹ Further, Blé Goudé refers to Judge Henderson’s Dissent to argue that “in allowing the introduction/ submission of Rule 68 statements with no assessment as to their probative value or trustworthiness impermissibly reverses the burden of proof to the Defence to rebut the admission of such statements”.²² Gbagbo also refers to a previous decision of this Trial Chamber

¹⁸ ICC-01/05-01/08-1386 OA5 OA6, para. 78.

¹⁹ Gbagbo’s Second Issue (“*La Chambre a erré en droit en admettant des portions de déclarations qui n’auraient pas été admissibles lors d’un interrogatoire viva voce*”). See Gbagbo Application, paras. 44-49.

²⁰ Blé Goudé’s First Issue (“Whether the Chamber erred in allowing the submission of the Rule 68 statements that include opinion evidence and speculative evidence, including anonymous hearsay, which contravenes paragraph 23 of the amended Directions on the Conduct of Proceedings, and impermissibly contravenes Article 66(2) of the Statute”). See Blé Goudé Application, paras. 4(i), 6.

²¹ Blé Goudé Application, para. 6 and Gbagbo Application para. 47, referring to ICC-02/11-01/15-498-AnxA, para. 23 (“Amended Directions”).

²² Blé Goudé Application, para. 6 referring to Judge Henderson’s Dissent, para. 12. See also para. 13.

declining to hear evidence from a witness whose testimony partially relied on anonymous hearsay.²³

11. At the outset, it is unclear whether the Issues refer to the Chamber's application of rule 68(2)(b) or rule 68(3), or to both. The difference between the two paragraphs is relevant because pursuant to rule 68(3) the witnesses will appear before the Court and are available for questioning by the non-calling party. As a result, the scope of the Issues raised is not clear and, on this basis alone, the Issues should be dismissed.²⁴

12. Further—and more significantly—the Defence, in their Applications, do not point to any extract of the statements containing opinion evidence, hearsay or anonymous hearsay.²⁵ Thus, the Issues, as presented, are merely abstract questions or hypothetical concerns, which do not constitute appealable issues.²⁶ Even assuming, *arguendo*, that the statements did include passages of opinion evidence or hearsay, the Applications should still be dismissed as they are premised on a misunderstanding of the Amended Directions and the Decision on Submission and Admission of Evidence.²⁷ As such, the Issues do not arise from the Decision. First, paragraph 23 of the Amended Directions does not absolutely preclude the submission or introduction of opinion evidence. It merely directs the Parties not to elicit such evidence from witnesses. Further, as Judge Henderson noted in his Dissent, “there is no general exclusionary rule against hearsay”.²⁸ Moreover, and in accordance with the Chamber's Decision on Submission and Admission of Evidence, even if opinion evidence or hearsay is contained in statements which are on the

²³ Gbagbo Application, para. 48 referring to ICC-02/11-01/15-539.

²⁴ “If an appealable issue is not clearly identified, the Chamber will simply be unable to carry out an assessment under article 82(1)(d) of the Statute as to whether the issue, if wrongly decided, may have implication on the fairness and expeditiousness of the proceedings or the outcome of the trial”. See ICC-02/11-01/11-389, para. 28; ICC-02/11-01/11-464, para. 26.

²⁵ The Prosecution does note that the Defence, in their submissions before the Decision was rendered, argued that some witnesses referred to hearsay evidence. See ICC-02/11-01/15-504-Red, para. 49; ICC-02/11-01/15-502-Conf, paras. 44, 46, 62.

²⁶ ICC-01/05-01/08-75 para. 11; ICC-01/09-01/11-301, para. 34; ICC-01/09-02/11-406, paras. 50, 61.

²⁷ ICC-02/11-01/15-405 (“Decision on Submission and Admission of Evidence”).

²⁸ Judge Henderson's Dissent, para. 8. See also ICC-01/04-02/12-271-Corr A, para. 226 and ICC-01/04-02/12-271-AnxA, para. 50; ICC-01/04-01/06-1399, paras. 29-30. Also ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, paras. 14-15, 19, 27.

record pursuant to rule 68, the relevance and probative value of such evidence will be assessed by the Trial Chamber in light of the totality of the evidence at the end of the trial.²⁹ This is the same for any testimony given in person before the Chamber.

13. Finally, and contrary to Blé Goudé's submissions, there is no reversal of the Prosecution's burden to prove the guilt of the accused under article 66(1).³⁰ The Prosecution bears the burden of proving beyond reasonable doubt the factual allegations set out in the charges.³¹ But the Prosecution need not prove beyond reasonable doubt each underlying piece of evidence.³² Further, the Prosecution must still establish the credibility and reliability of the evidence—even if submitted pursuant to rule 68. Hence, if at the end of the trial the Prosecution has not adequately established the credibility and reliability of certain pieces of evidence, when assessed in light of the totality of evidence, the Trial Chamber might decide not to rely on them in its judgment under article 74(2).³³

14. In conclusion, as Gbagbo's Second Issue and Blé Goudé's First Issue are similarly premised on a misunderstanding of the Amended Directions and the Decision on Submission and Admission of Evidence, they do not arise from the Decision.

²⁹ Decision on Submission and Admission of Evidence, para. 12. The evidentiary regime adopted in this decision is consistent with the Appeals Chamber's jurisprudence: *see* ICC-01/05-01/08-1386 OA5 OA6, para. 37. On the assessment of the evidence as a whole, *see*: ICC-01/04-01/06-3121-Red A5, para. 22; ICC-01/04-01/06-2842, para. 94; ICC-01/04-02/12-3-tENG, para. 45; ICC-01/05-01/08-3343, para. 225. *See also* ICTR, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgment, 7 July 2006, ("*Ntagerura* Appeal Judgment"), para. 171: : <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict9-46/trial-judgements/en/060707.pdf>.

³⁰ Blé Goudé Application, para. 6.

³¹ Namely, the facts comprising the elements of the crimes and forms of the responsibility alleged, and facts indispensable for entering a conviction. *See* ICC-01/04-02/12-271-Corr A, paras. 124-125. *See also* *Ntagerura* Appeals Judgment, para. 174.

³² Nor every underlying fact needs to be separately proved beyond reasonable doubt to sustain a conviction. *See* ICC-01/04-01/06-3121-Red A5, para. 22.

³³ Decision on the Submission and Admission of Evidence, para. 12. Contrary to Blé Goudé's contention, the mere introduction of hearsay evidence does not presume it credible and reliable. *See* ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-A, Appeal Judgment, 1 June 2001, para. 292: "admission of hearsay evidence does not automatically carry any particular finding as to its assessment. That a Trial Chamber admits a hearsay statement does not necessarily imply that it accepts it as reliable and probative. Those are qualities which a Trial Chamber will freely consider at the end of the trial when weighing and evaluating the evidence as a whole, in light of the context and of the nature of the evidence itself, including the credibility and reliability of the relevant witness": <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict9-46/appeals-chamber judgements/en/010601.pdf>.

Gbagbo's Fourth Issue is not an appealable issue and Blé Goudé's Fourth Issue does not arise from the Decision

15. Gbagbo's Fourth Issue³⁴ and Blé Goudé's Fourth Issue³⁵ challenge the Trial Chamber's decision to consider as "submitted" any documentary evidence annexed to the written statements.³⁶ As with the previous Issues, the Applications do not identify appealable issues arising from the Decision.

16. Gbagbo partially reproduces the text of rule 68(1) to conclude—without further elaboration—that this provision does not permit the admission of annexes to witness statements.³⁷ However, Gbagbo ignores the Trial Chamber's reasoning. The Chamber noted that the annexes are referred to in the witness statements and must be joined in order to allow the Chamber and the Parties to properly appreciate the content of the statements.³⁸ Accordingly, Gbagbo's Fourth Issue simply disagrees with the Decision and is not an appealable issue within the terms of article 82(1)(d).

17. Blé Goudé argues that the Trial Chamber did not consider the admissibility test set out in article 69(4) and "[made] no findings as to the reliability, probative value, and trustworthiness of the annexes".³⁹ As with his previous issues, Blé Goudé does not properly represent the Decision and the Decision on Submission and Admission of Evidence. Indeed, the documentary evidence annexed to the statements is submitted on record as with any other evidence. Only at the end of the trial when the Trial Chamber deliberates its decision pursuant to article 74, will it

³⁴ Gbagbo's Fourth Issue ("*La Chambre a erré en droit en permettant l'admission automatique des annexes à la déclaration du témoin par le biais de la Règle 68 lorsque la déclaration elle-même est admise*"). Gbagbo Application, paras. 57-59.

³⁵ Blé Goudé's Fourth Issue ("Whether the Chamber by Majority erred in law by finding that documentary evidence could be admitted through Rule 68 on the sole basis that such evidence was referred to in the individual's statement, irrespective of the author of the statement being the producer of the document him or herself without the proffering party being obliged to provide information indicating the items relevance, probative value as well as authenticity"). Blé Goudé Application, paras. 4(iv), 9.

³⁶ Decision, para. 9.

³⁷ Gbagbo Application, paras. 58-59.

³⁸ Decision, para. 9.

³⁹ Blé Goudé Application, para. 9.

assess, *inter alia*, the relevance and probative value of the evidence to determine its weight.⁴⁰ Consequently, Blé Goudé's Fourth issue does not arise from the Decision.

Blé Goudé's Third issue does not arise from the Decision

18. Blé Goudé's Third Issue⁴¹ does not correctly represent the relevant portion of the Decision and therefore does not arise from it. Contrary to Blé Goudé's contention, the Trial Chamber did not limit its analysis of sufficient indicia of reliability to the formal requirements that the statement be taken pursuant to rule 111 and article 54(1). The Trial Chamber took these factors into consideration together with other criteria to assess the reliability of the statement of Witness P-0590. In particular, the Trial Chamber noted that the witness was informed about the procedure and the significance of providing a statement to the Prosecution, and pointed out that the statement included information as to how the witness came to know of particular facts.⁴²

19. These additional factors overlap to some extent with factors identified by Judge Henderson in his Dissent.⁴³ In fact, by assessing the manner and circumstances in which a witness gave his or her statement and the circumstances under which he or she came to know the relevant information, the Trial Chamber implicitly included in its assessment factors such as the competence of a witness to testify about the facts, potential bias or (in)sincerity, or honest mistake. Blé Goudé's Third Issue should therefore be rejected.

⁴⁰ Decision on Submission and Admission of Evidence, para. 12.

⁴¹ Blé Goudé's Third Issue: "Whether the Chamber erred by limiting its analysis of sufficient indicia of reliability to the formal requirement that the statement be taken by the Prosecution 'pursuant to Rule 111 of the Rules and under all applicable guarantees, including article 54(1),' and not expanding it to include other factors included in Judge Henderson's dissent such as but not limited to: 'the competence of the witness to testify about the facts... potential bias of the witness, his or her(in)sincerity, but also the possibility of honest mistake.'" See Blé Goudé Application, paras. 4(iii), 8.

⁴² Decision, para. 22.

⁴³ Judge Henderson Dissent, para. 27.

Gbagbo's Third Issue does not arise from the Decision

20. Gbagbo's Third Issue⁴⁴ relating to the "system of evidence" is predicated on an incorrect legal assumption, namely that only statements that relate to facts which are not central to the case and that are not materially in dispute can be admitted under rule 68(3).⁴⁵ While this is a criterion that guides the exercise of a Chamber's discretion to admit prior recorded testimony pursuant to rule 68(2)(b),⁴⁶ it is not a legal criterion for the admission of evidence under rule 68(3). The Decision clearly and correctly set out the conditions for the introduction of prior recorded testimony pursuant to rule 68(3).⁴⁷ Gbagbo's Third Issue should be dismissed on that basis alone.

21. In addition, Gbagbo also misinterprets the scope of the Trial Chamber's assessment of the "relative importance of the witnesses within the system of evidence".⁴⁸ Contrary to Gbagbo's assertion, the Trial Chamber did not create a distinction between different types of witnesses, namely important and less important witnesses, to determine the applicability of rule 68(3).⁴⁹ Instead, the Trial Chamber, having noted that the statements of the witnesses, taken individually, are of not of great importance, assessed the relevance of those statements together with other evidence which has been or will be submitted by the Parties. The Chamber then concluded that the evidence, assessed together, might permit the Chamber to ascertain how the events unfolded on the ground.⁵⁰ This reasoning is consistent with the evidentiary regime in this case, in which the Chamber will assess the relevance and probative value of the evidence at the end of the trial when assessing its weight.⁵¹ Gbagbo's Third Issue should therefore be rejected.

⁴⁴ Gbagbo's Third Issue : "*La Chambre a erré en droit en introduisant une notion de 'system of evidence'*". See Gbagbo Application, paras. 50-56.

⁴⁵ Gbagbo Application, paras. 50-51.

⁴⁶ Rule 68(2)(b)(i), first bullet point.

⁴⁷ Decision, para. 24.

⁴⁸ Gbagbo Application, para. 54 referring to Decision, para. 38.

⁴⁹ Gbagbo Application, paras. 52-55.

⁵⁰ Decision, para. 38.

⁵¹ Decision on Submission and Admission of Evidence, para. 12.

B. The Issues do not meet the criteria for leave to appeal under article 82(1)(d)

22. As noted above, none of the Issues referred to in either the Gbagbo Application or the Blé Goudé Application are appealable issues arising from the Decision. In any event, both Applications fail to show how the Issues meet the remaining requirements of article 82(1)(d).

23. Gbagbo's submissions consist of a few short sentences that generally address rule 68, but fail to refer to or link any of the Issues for which he seeks leave to appeal to the criteria under article 82(1)(d).⁵² Trial Chamber III has recently held that applications for leave to appeal may be dismissed *in limine* if the applicant fails "to expressly link the relevant criteria to either the specific issues identified or even the specific Impugned Decision".⁵³ On this basis, the Gbagbo Application should be dismissed *in limine*.

24. Similarly, Blé Goudé Application only refers to the purported impact of rule 68 in general—without distinguishing between rule 68(2)(b) or 68(3)—on the fair⁵⁴ and expeditious⁵⁵ conduct of the proceedings and argues that the immediate intervention by the Appeals Chamber against the Decision would materially advance the proceedings.⁵⁶ However, Blé Goudé fails to explain how the four discrete Issues raised in his Application, which are of a very diverse nature, would meet the criteria for leave to appeal under article 82(1)(d). His Application should therefore also be dismissed *in limine*.

⁵² Gbagbo Application, paras. 60-65.

⁵³ ICC-01/05-01/08-3382, para. 12.

⁵⁴ Blé Goudé Application, paras. 12-21.

⁵⁵ Blé Goudé Application, paras. 22-24.

⁵⁶ Blé Goudé Application, paras. 25-28.

The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

25. In any event, none of the Issues raised in the two Applications significantly affect the fair or expeditious conduct of the proceedings or on the outcome of the trial.

26. First, Blé Goudé's arguments regarding the impact of the Issues on the fair conduct of the proceedings are factually and legally inaccurate: Blé Goudé assumes that the statements contain largely hearsay evidence which, in turn, has been erroneously admitted pursuant to rule 68.⁵⁷ However, Blé Goudé does not point to hearsay evidence in the statements and nor is there a general exclusionary rule against hearsay evidence.⁵⁸ Further, although in the record, the Chamber will assess the relevance, probative value and determine the weight of the statements at the end of the trial in issuing its article 74 decision.⁵⁹ Hence, any arguments on the purported impact of the Issues are premature and speculative.

27. Second, Blé Goudé's arguments on the reversal of the burden of proof are similarly misplaced.⁶⁰ As noted above,⁶¹ by introducing statements under rule 68(2)(b), or by finding them suitable for introduction under rule 68(3), although in the record, the Chamber has not yet determined the ultimate relevance or probative value of such evidence. Thus, the Defence need not rebut any such finding.

28. Third and as also noted above,⁶² Blé Goudé does not accurately represent *Bemba* Appeals Judgment OA5 OA6.⁶³ The Appeals Chamber merely referred to certain non-exhaustive factors that a Chamber might consider in admitting documentary evidence into evidence. The Appeals Chamber did not consider that

⁵⁷ Blé Goudé Application, para. 14.

⁵⁸ See above fn. 28 .

⁵⁹ Decision on Submission and Admission of Evidence, para. 12.

⁶⁰ Blé Goudé Application, paras. 13-16.

⁶¹ See above, para. 8.

⁶² See above, para. 5.

⁶³ Blé Goudé Application, paras. 17-18.

those three factors were exhaustive; nor was the Appeals Chamber's decision made in the context of amended rule 68.

29. Because of the foregoing, Blé Goudé's submissions fail to establish that the Issues would significantly affect the fair conduct of the proceedings.

30. Moreover, both Blé Goudé⁶⁴ and Gbagbo⁶⁵ also appear to challenge the appropriateness of the introduction of evidence under rule 68 in general, as opposed of *viva-voce* witness testimony.⁶⁶ These arguments exceed the discrete scope of the Issues raised in their respective Applications and therefore cannot demonstrate any impact of those Issues on the fair conduct of the proceedings.

31. Blé Goudé's arguments regarding the impact of the Issues on the expeditious conduct of the proceedings⁶⁷ are equally hypothetical. They incorrectly assume that the Defence's questioning of witnesses pursuant to rule 140(2)(b) would be prolonged simply because the evidence of some witnesses was introduced through rule 68. This argument is further premised on the incorrect assumption that the Defence's questioning would be shorter if witnesses gave all of their evidence *viva voce*, and further, that this saving of time would significantly outweigh the time the Prosecution would have needed to question the witnesses pursuant to rule 140(2)(a) had it not sought to rely on rule 68. Blé Goudé's argument is unsupported and should therefore be dismissed.⁶⁸

32. Further, the Issues do not impact on the outcome of the trial: any argument to that effect is speculative. It is true that the evidence has been submitted and forms part of the record, and that as a consequence these statements will form part of the evidentiary material that the Trial Chamber will consider for its decision under article 74. However, whether this evidence will have an impact on the outcome of the

⁶⁴ Blé Goudé Application, paras. 19-20.

⁶⁵ Gbagbo Application, paras. 61-62.

⁶⁶ Blé Goudé Application, paras. 17-20.

⁶⁷ Blé Goudé Application, paras. 22-24.

⁶⁸ The Prosecution notes that Gbagbo does not provide any arguments suggesting that the Issues affect the expeditious conduct of the proceedings.

trial will ultimately depend on the weight that the Chamber accords to such evidence in its judgment pursuant to article 74.

The Appeals Chamber's immediate resolution of the Issues would not materially advance the proceedings

33. Finally, any Application is premature at this stage.⁶⁹ As noted above, any impact of the Decision will depend on the Chamber's assessment of the evidence in its judgment. Any argument to the contrary is speculative. Accordingly, at the current stage of the proceedings, granting the Applications would only delay the proceedings.

Conclusion

34. For the above reasons, the Prosecution requests the Chamber to dismiss the Applications.



Fatou Bensouda, Prosecutor

Dated this 20th day of June 2016

At The Hague, The Netherlands

⁶⁹ *Contra*, Blé Goudé Application, paras. 27-28; Gbagbo Application, paras. 64-65.