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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION INCÔTE D'IVOIRE

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

Public Document

Consolidated response to Mr Gbagbo's and Mr Blé Goudé's requests 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)

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that Mr Gbagbo’s request (the “Gbagbo Request”) and Mr Blé Goudé’s request (the “Blé Goudé Request”) for leave to appeal the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)” issued by the Chamber on 9 June 2016 (the “Decision”)² do not satisfy the requirements of article 82(1)(d) of the Rome Statute and must be rejected.

2. Neither the Gbagbo Request nor the Blé Goudé Request demonstrates that the alleged issues identified by the Defence arise from the Decision and can be the subject of an interlocutory appeal. Both Requests merely represent the Defence’s disagreement with and misunderstanding or misreading of the Chamber’s rulings because the Decision (i) not only relies on the “good trial management” criterion to apply the legal requirements of rule 68 of the Rules of Procedure and Evidence, (ii) provides reasons for admitting entire prior statements under rule 68 and analyses in detail the ones ruled upon, (iii) does not draw a general distinction between witnesses but refers to the objective features of the statements at hand, (iv) does not limit the reliability analysis of the statements to the formal requirements of rule 111 of the Rules of Procedure and Evidence, and (v) reiterates past decisions regarding the submission of annexes to written statements.

3. Moreover, the Requests fail to show that the issues allegedly arising from the Decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In particular, the Requests do not articulate

¹ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015; and the “Decision on victims’ participation status” (Trial Chamber I), No. ICC-02/11-01/15-379, 7 January 2016, p. 23.

² See the “Public redacted Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)” (Trial Chamber I), No. ICC-02/11-01/15-573-Red, 9 June 2016 (the “Decision”).

how each of said issues specifically meets the requirements of article 82(1)(d) of the Rome Statute, and are based instead on hypotheses and mere speculations.

II. Background

4. On 3 September 2015, the Chamber adopted the “Directions on the conduct of the proceedings” (the “3 September 2015 Directions”).³

5. On 29 January 2016, the Chamber issued, by majority, the “Decision on the submission and admission of evidence”.⁴

6. On 4 May 2016, the Chamber issued the “Decision adopting amended and supplemented directions on the conduct of the proceedings”, whereby, *inter alia*, it adopted the revised “Directions on the conduct of the proceedings” (the “Revised Directions”),⁵ and decided that the Revised Directions “[s]hall replace and supersede the 3 September 2015 Directions in their entirety, as well as previous oral rulings of the Chamber departing from their content”.⁶

7. On 9 June 2016, the Chamber issued the Decision, with a partially dissenting opinion by Judge Henderson,⁷ allowing the introduction of the prior recorded statement of Witness P-0590 under rule 68(2)(b), and finding that the written statements of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587,

³ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015 (the “3 September 2015 Directions”).

⁴ See the “Decision on the submission and admission of evidence” (Trial Chamber I), No. ICC-02/11-01/15-405, 29 January 2016.

⁵ See the “Decision adopting amended and supplemented directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-498, 4 May 2016, para. 9 and p. 8; and the “Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-498-AnxA, 4 May 2016 (the “Revised Directions”).

⁶ See the “Decision adopting amended and supplemented directions on the conduct of the proceedings”, *supra* note 5, para. 14 and p. 8.

⁷ See the “Partially Dissenting Opinion of Judge Henderson”, No. ICC-02/11-01/15-573-Anx-Red, 13 June 2016 (“Judge Henderson’s Dissenting Opinion”).

P-0588 and P-0589 are suitable for introduction under rule 68(3) of the Rules of Procedure and Evidence.⁸

8. On 15 June 2016, Mr Gbagbo's Defence submitted its request (the "Gbagbo Request"),⁹ seeking leave to appeal the Decision on the following four issues:

- i) The Chamber made an error of law in introducing the criterion of "good trial management" as guiding principle for the admission of prior statements under rule 68, thereby depriving the Decision of legal basis (the "First Gbagbo Issue");¹⁰
- ii) The Chamber made an error of law in admitting under rule 68 portions of the statements that would not have been admissible during a *viva voce* questioning (the "Second Gbagbo Issue");¹¹
- iii) The Chamber made an error of law in introducing the notion of "system of evidence", thereby depriving the Decision of legal basis (the "Third Gbagbo Issue");¹² and
- iv) The Chamber made an error of law in declaring automatically admissible the annexes to the statements under rule 68, thereby depriving the Decision of legal basis (the "Fourth Gbagbo Issue");¹³

9. On 15 June 2016, Mr Blé Goudé's Defence submitted its request (the "Blé Goudé Request"),¹⁴ seeking leave to appeal the Decision on the following four issues:

⁸ See the Decision, *supra* note 2, p. 18.

⁹ See the "Version publique exurgée de la «Demande d'autorisation d'interjeter appel de la «Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)» (ICC-02/11-01/15-573-Conf)», No. ICC-02/11-01/15-591-Red, 15 June 2016 (the "Gbagbo Request").

¹⁰ *Idem*, paras. 34-43.

¹¹ *Ibid.*, paras. 44-49.

¹² *Ibid.*, paras. 50-56.

¹³ *Ibid.*, paras. 57-59.

- i) The Chamber erred in allowing the submission under rule 68 of statements that include opinion evidence and speculative evidence, comprising anonymous hearsay (the “First Blé Goudé Issue”);¹⁵
- ii) 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 and by resorting to the criterion of “good trial management” (the “Second Blé Goudé Issue”);¹⁶
- iii) 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 of Procedure and Evidence and under all applicable guarantees, and not expanding it to include other factors (the “Third Blé Goudé Issue”);¹⁷ and
- iv) The Chamber erred in law by finding that documentary evidence could be admitted under 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 referred document and without the proffering party being obliged to provide information indicating the relevance, probative and authenticity of said item (the “Fourth Blé Goudé Issue”).¹⁸

¹⁴ See the “Defence Request 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-02/11-01/15-573-Conf)”, No. ICC-02/11-01/15-592, 15 June 2016 (the “Blé Goudé Request”).

¹⁵ *Idem*, para. 6.

¹⁶ *Ibid.*, para. 7.

¹⁷ *Ibid.*, para. 8.

¹⁸ *Ibid.*, para. 9.

10. On 16 June 2016, Mr Blé Goudé's Defence filed a corrected version of its request for leave to appeal the Decision, with an explanatory Annex (the "Blé Goudé Corrected Request").¹⁹

11. Pursuant to regulation 65(3) of the Regulations of the Court, the Legal Representative submits the following consolidated response to the Gbagbo Request and to the Blé Goudé Request (the "Requests").

III. Submissions

12. Preliminarily, the Legal Representative notes that the Blé Goudé Defence filed a corrected version of its request for leave to appeal which seems to include some substantive amendments, namely the addition of several footnotes.²⁰ In accordance with the Appeals Chamber's jurisprudence, "[t]he purpose of corrigenda is to correct typographical errors. [...] A corrigendum may not be used to add or alter the substance of the submissions made in a document".²¹ Moreover, the Legal Representative notes that the Blé Goudé Defence does not provide any reasons for filing this substantive amendment after the lapse of the time limit for filing its request for leave to appeal. Therefore, the Legal Representative requests the Chamber to reject *in limine* and to not consider the Blé Goudé Corrected Request.²²

¹⁹ See the "Corrected Version of 'Defence Request 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-02/11-01/15-573-Conf)' filed on 15 June 2016 (ICC-02/11-01/15-592)", No. ICC-02/11-01/15-592-Corr, 16 June 2016; and the "Annex A to the Corrected Version of 'Defence Request 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-02/11-01/15-573-Conf)' filed on 15 June 2016 (ICC-02/11-01/15-592)", No. ICC-02/11-01/15-592-Corr-AnxA, 16 June 2016 (the "Blé Goudé Corrected Request").

²⁰ See the Blé Goudé Corrected Request, *supra* note 19, Annex A, paras. 3, 6-8 and 10-11.

²¹ See 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. 38.

²² For a similar resolution, see *idem*, para. 39.

1. The issues identified by the Defence do not arise from the Decision

a. The First Gbagbo Issue and the Second Blé Goudé Issue

13. The Legal Representative submits that the First Gbagbo Issue and the Second Blé Goudé Issue do not reveal the existence of an appealable “issue” under article 82(1)(d) of the Rome Statute, but a mere disagreement with the Decision or a misunderstanding thereof.

14. The Gbagbo Defence premises its arguments on the existence of an “error” on the contention that, in the Decision, the Chamber determines “[q]u’elle doit faire une balance entre ce qu’elle appelle le critère de «good trial management» et les droits de l’Accusé qu’il ne faudrait pas «unduly infringe»”.²³ However, the Decision does not refer anywhere to said “balance”, but expressly makes reference to the Chamber’s duty under article 68(1) of the Rome Statute to ensure that the introduction of prior recorded testimony is not prejudicial to or inconsistent with the rights of the accused.²⁴

15. This apparent misreading by the Gbagbo Defence is confirmed by its submission that the Decision raises the question of the relation between “*un management bureaucratique et des droits*”,²⁵ and that the use of the “good trial management” criterion in the Chamber’s application of rule 68 necessarily leads to “*en altérer l’esprit*”.²⁶

16. The Legal Representative submits that the Gbagbo Defence’s misunderstanding of the Decision is also evidenced by the fact that it merely elaborates on the wording used by the Chamber without drawing any clear

²³ See the Gbagbo Request, *supra* note 9, para. 35.

²⁴ See the Decision, *supra* note 2, paras. 10 and 24.

²⁵ See the Gbagbo Request, *supra* note 9, para. 38.

²⁶ *Idem*, para. 42.

conclusions thereof,²⁷ and that it refers to an alleged lack of explanation by the Chamber after having quoted a lengthy paragraph from the Decision.²⁸

17. Ultimately, the Gbagbo Defence Request shows that the First Gbagbo Issue is merely a disagreement with the Chamber's use of the "good trial management" criterion in said Decision.²⁹

18. Since a disagreement or conflicting opinion cannot amount to an appealable "issue" under article 82(1)(d) of the Rome Statute,³⁰ the fact that the Defence disagrees with the Decision, as such, does not suffice for leave to be granted regarding the First Gbagbo Issue.³¹

19. In turn, the Blé Goudé Defence misunderstands the Decision when it submits that "[t]he Chamber also found that Rule 68 applications would be based on one sole criterion, namely whether the introduction will contribute to good trial management",³² and that it departs from the Appeals Chamber jurisprudence requiring a consideration of whether the introduction of the prior recorded testimony prejudices the accused or violates the principle of orality.³³

20. In fact, regarding the two abovementioned principles, the Decision states that "[t]he 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.

²⁷ *Ibid.*, paras. 36-37.

²⁸ *Cf. ibid.*, para. 40 with *ibid.*, para. 34.

²⁹ *Ibid.*, para. 41.

³⁰ See 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. 9.

³¹ See the transcript of the hearing held on 10 November 2015, No. ICC-02/11-01/15-T-5-ENG ET, p. 15, lines 18-20; and the transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG ET, p. 38, lines 11-13. See also the "Decision on Defence's requests seeking leave to appeal the 'Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record' and seeking suspensive effect of it." (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015, para. 9; and the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'" (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 19.

³² See the Blé Goudé Request, *supra* note 14, para. 7 (emphasis added).

³³ *Idem.*

[...] *As concerns the principle of orality [...], the Chamber notes that this principle is not absolute, and that the Statute explicitly envisages exceptions to be provided by the Rules*".³⁴

21. Moreover, in analysing the prior recorded statements submitted by the Prosecution under rule 68, the Chamber analysed separately the potential prejudice to the accused and adopted measures to prevent any such prejudice.³⁵

22. In short, the Decision cannot be said to rely *only* on the "good trial management" criterion or to depart from the Appeals Chamber's judgement referred to by the Blé Goudé Defence.³⁶

23. Accordingly, the Legal Representative submits that the Defence misunderstands or misrepresents the Decision and, as such, the Second Blé Goudé Issue cannot constitute an appealable "issue" pursuant to article 82(1)(d) of the Rome Statute.³⁷

b. The First Blé Goudé Issue and the Second Gbagbo Issue

24. Regarding the First Blé Goudé Issue and the Second Gbagbo Issue, the Legal Representative submits that they are not appealable "issues" under article 82(1)(d) of the Rome Statute but again misunderstandings of the Decision or further disagreements therewith.

25. The Defence's contention that rule 68 prevents the submission of statements *in toto* and that the identification of the precise passages that a party wishes to submit

³⁴ See the Decision, *supra* note 2, para. 24. See also *idem*, para. 25 ("While the Chamber needs to ensure that the proceedings do not unduly infringe on the abovementioned statutorily protected interests, [...]").

³⁵ *Ibid.*, paras. 18, 21, 38 and 41.

³⁶ See the Blé Goudé Request, *supra* note 14, para. 7.

³⁷ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 31, para. 19. See also the "Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record'" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-132, 10 July 2015, para. 3 and references contained therein.

as evidence is required was rejected in the Decision as an “unfounded” “procedural objection”.³⁸

26. Contrary to the Blé Goudé Defence’s contention,³⁹ said rejection was reasoned. Relying on a literal interpretation, the Chamber explained that “[n]either the text of the aforesaid directions [for the conduct of the proceedings] nor Rule 68(3) of the Rules provide a basis to preclude the parties from requesting the introduction of prior recorded testimony in its entirety. In fact, any such interpretation of the Directions on the Conduct of Proceedings would be contrary to Rule 68 of the Rules and therefore impermissible”.⁴⁰

27. As indicated *supra*, the fact that the Defence disagrees with the reasoning above, as such, does not suffice for leave to be granted under article 82(1)(d) of the Rome Statute.⁴¹

28. Moreover, the Legal Representative submits that the Defence also misunderstands or misrepresents the Decision and, as such, the First Blé Goudé Issue and the Second Gbagbo Issue cannot constitute an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.⁴²

29. Contrary to the submissions made in the Requests, the Decision does not treat differently prior recorded testimony from *viva voce* testimony,⁴³ does not “[e]ntraîne l’abolition de cette distinction [between factual evidence and opinion evidence] lorsqu’il s’agit des déclarations antérieures”,⁴⁴ and does not “[e]ntraîne ipso facto soumission de ouï-dires anonymes, abolissant la différence entre ouï-dire et ouï-dires anonymes d’une part, témoignage direct et témoignage indirect d’autre part”.⁴⁵

³⁸ See the Decision, *supra* note 2, paras. 6-7.

³⁹ See the Blé Goudé Request, *supra* note 14, para. 6.

⁴⁰ See the Decision, *supra* note 2, para. 7.

⁴¹ See *supra* notes 30-31.

⁴² See *supra* note 37.

⁴³ See the Gbagbo Request, *supra* note 9, para. 45; and the Blé Goudé Request, *supra* note 14, para. 6.

⁴⁴ See the Gbagbo Request, *supra* note 9, para. 47.

⁴⁵ *Idem*, para. 48.

30. The Chamber did not draw such general conclusions in the Decision, but proceeded instead to analyse in detail the source and the content of each of the written statements submitted by the Prosecution.⁴⁶

31. In this regard, contrary to the Blé Goudé Request,⁴⁷ the Legal Representative submits that Judge Henderson did not find in his partially dissenting opinion that the Decision inversed the burden of proof to the Defence by not assessing the probative value or trustworthiness of the statements at hand.

32. Instead, Judge Henderson stated, in conditional terms, that “[i]f the Chamber were to allow the admission of hearsay evidence under rule 68(3) of the Rules, without any information as to the reliability of the source, the Chamber would be imposing the onus of rebutting the trustworthiness of the evidence on the Defence”.⁴⁸

c. The Third Gbagbo Issue

33. The Legal Representative submits that the Third Gbagbo Issue does not arise from the Decision but from the Defence’s misrepresentation thereof. As such, this Issue cannot constitute an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.⁴⁹

34. The Defence refers to the Chamber’s finding according to which, for the purpose of ruling on the Prosecution’s request under rule 68(3) of the Rules of Procedure and Evidence, it is “[n]ecessary to distinguish between the facts to the proof of which go the statements, which are undoubtedly of great importance for the case, and the relative importance of the witnesses within the system of the evidence that has been and is expected to be presented to the Chamber”.⁵⁰ From this conclusion, the Defence infers that

⁴⁶ See the Decision, *supra* note 2, paras. 16-17, 19 and 30-37.

⁴⁷ See the Blé Goudé Request, *supra* note 14, para. 6.

⁴⁸ See Judge Henderson’s Dissenting Opinion, *supra* note 7, para. 13.

⁴⁹ See *supra* note 37.

⁵⁰ See the Decision, *supra* note 2, para. 38.

*“[l]a Chambre semble donc avoir distingué entre les témoins importants qu’il faudrait passer au crible du test et par conséquent traiter normalement et des témoins moins importants qui n’auraient de poids qu’en faisant masse”.*⁵¹

35. The Legal Representative submits that the Decision cannot reasonably be said to draw the general distinction among witnesses referred to by the Defence since the finding at hand is limited to the ten concrete witnesses called by the Prosecution to testify on one same incident.⁵²

36. Moreover, the Chamber clarifies in the Decision that “[w]hile not individually of great importance, they [the ten witnesses], together with other evidence which has been or will be submitted by the parties, form a web of evidence which will allow the Chamber to appreciate how the events unfolded on the ground”.⁵³

37. In this regard, the Legal Representative submits that the Defence’s disagreement with the findings quoted *supra* stems from a misrepresentation thereof. Contrary to the submissions by the Gbagbo Defence,⁵⁴ the Decision does not consider the relevance of the prior recorded statements at hand without taking into account the evidence to be presented in the future, but expressly refers to “[t]he system of the evidence that has been and is expected to be presented to the Chamber”,⁵⁵ presumably referring to the list of evidence disclosed by the Prosecution.

38. Similarly, the Decision nowhere makes reference, either expressly or impliedly, to the Chamber’s subjective impression of the evidence the Prosecution has presented or intends to present.⁵⁶ It only refers to the objective features of the witnesses at hand (“[n]one of them have insider or other quality knowledge of the planning

⁵¹ See the Gbagbo Request, *supra* note 9, para. 53.

⁵² See the Decision, *supra* note 2, para. 38.

⁵³ *Idem*.

⁵⁴ See the Gbagbo Request, *supra* note 9, para. 54.

⁵⁵ See the Decision, *supra* note 2, para. 38.

⁵⁶ Cf. the Gbagbo Request, *supra* note 9, para. 55.

and overall conduct of the FDS operation during the events”),⁵⁷ features already disclosed by the Prosecution to the Defence and the Legal Representative. Accordingly, the Decision cannot be said to lack a valid legal reason.⁵⁸

d. The Third Blé Goudé Issue

39. Regarding the Third Blé Goudé Issue, the Legal Representative submits that the Defence’s submissions do not reveal the existence of an appealable “issue” under article 82(1)(d) of the Rome Statute but a misunderstanding of the Decision.⁵⁹

40. The Defence premises its arguments on the assertion that the Chamber “[l]imit[ed] 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)’”.⁶⁰

41. However, the Chamber did not “limit” its analysis to the abovementioned formal requirements. The Decision expressly indicates that the Chamber “[b]earing in mind that [the statement of Witness P-0590] was taken by the Office of the Prosecutor pursuant to Rule 111 of the Rules and under all applicable guarantees, including Article 54(1) of the Statute” considered said statement to bear “sufficient indicia of reliability” because “[t]he witness was explained the procedure and the significance of providing a statement to the Office of the Prosecutor. The statement also includes information as to how the witness came to know of particular facts”.⁶¹

42. In any event, the Third Blé Goudé Issue may at most be considered as a disagreement with the Decision, not an appealable “issue” pursuant to article

⁵⁷ See the Decision, *supra* note 2, para. 38.

⁵⁸ Cf. the Gbagbo Request, *supra* note 9, para. 56.

⁵⁹ See *supra* note 37.

⁶⁰ See the Blé Goudé Request, *supra* note 14, para. 4(iii).

⁶¹ See the Decision, *supra* note 2, para. 22.

82(1)(d) of the Rome Statute.⁶² In this regard, the Blé Goudé Request provides substantive arguments, only to be submitted if leave to appeal is granted,⁶³ in support of the Defence's contention that "[t]he formal requirements are not sufficient to prove that the statement demonstrates reliability in terms of its content".⁶⁴

e. The Fourth Gbagbo Issue and the Fourth Blé Goudé Issue

43. The Legal Representative submits that the Fourth Gbagbo Issue and the Fourth Blé Goudé Issue do not arise from the Decision but from another disagreement therewith by the Defence. As such, they cannot constitute appealable "issues" pursuant to article 82(1)(d) of the Rome Statute.⁶⁵

44. The Gbagbo Defence simply disagrees with the Chamber that the text of rule 68 of the Rules of Procedure and Evidence allows the introduction of the annexes to the witness statements submitted by the Prosecution.⁶⁶

45. In turn, the Blé Goudé Defence argues that the Chamber should have ruled on the reliability, probative value, and trustworthiness of said annexes for the purposes of rule 68, instead of admitting the annexes on the basis that such evidence was referred to in the statements.⁶⁷

46. Moreover, the Legal Representative submits that the Fourth Gbagbo Issue and the Fourth Blé Goudé Issue can at best be seen as referring to decisions issued by the

⁶² See *supra* notes 30-31.

⁶³ See the transcript of the hearing held on 9 March 2016, No. ICC-02/11-01/15-T-27-ENG ET (open session), p. 37, lines 23-25; and the "Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58" (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 22.

⁶⁴ See the Blé Goudé Request, *supra* note 14, para. 8.

⁶⁵ See *supra* notes 30-31.

⁶⁶ Cf. the Gbagbo Request, *supra* note 9, para. 58 with the Decision, *supra* note 2, para. 9.

⁶⁷ See the Blé Goudé Request, *supra* note 14, para. 9.

Chamber in the past. As already ruled by the Chamber,⁶⁸ this sort of requests for leave to appeal is inadmissible.

47. In particular, the Decision reiterates the Chamber's understanding that "[t]he annexes in question are referred to in the witness statements themselves and therefore need to be joined in order to allow the Chamber and the parties to properly appreciate the content of the witness statements [submitted under rule 68]",⁶⁹ and that "[t]he Chamber will then [when it will be deliberating its judgment, pursuant to Article 74(2) of the Statute] consider, in the appropriate context [with the rest of the evidence submitted], the witness statement and its annexes, and determine their relevance and probative value".⁷⁰

48. The Legal Representative notes that Judge Henderson wrote dissenting or separate opinions to the rulings quoted above,⁷¹ and that Defence requests for leave to appeal one of said rulings have already been rejected.⁷²

2. The issues identified by the Defence do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

49. Since it is clear that none of the Issues identified by the Defence arise from the Decision, the Requests must be dismissed on this basis alone. Assuming *arguendo* that any of said issues arises from the Decision, the Legal Representative opposes the Defence's contention that they significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial for the following three reasons.

⁶⁸ See the transcript of the hearing held on 9 March 2016, No. ICC-02/11-01/15-T-27-ENG ET (open session), p. 38, lines 6-9.

⁶⁹ Cf. the Decision, *supra* note 2, para. 9 with the Revised Directions, *supra* note 5, para. 51 and Judge Henderson's Dissenting Opinion, *supra* note 7, para. 32.

⁷⁰ Cf. the Decision, *supra* note 2, para. 9 with the "Decision on the submission and admission of evidence", *supra* note 4, para. 12.

⁷¹ See the "Dissenting Opinion of Judge Henderson", No. ICC-02/11-01/15-405-Anx, 1 February 2016; and the "Separate Opinion of Judge Henderson", No. ICC-02/11-01/15-498-Anx1, 4 May 2016.

⁷² See the "Decision on requests for leave to appeal the 'Decision adopting amended and supplemented directions on the conduct of the proceedings' (ICC-02/11-01/15-498)" (Trial Chamber I), No. ICC-02/11-01/15-569, 7 June 2016.

50. Firstly, contrary to the requirements of article 82(1)(d) of the Rome Statute,⁷³ neither the Gbagbo Defence nor the Blé Goudé Defence articulate how each of the alleged Issues specifically affects the fairness and expeditiousness of the proceedings or the outcome of the trial.

51. The Gbagbo Defence only makes a general argument regarding the alleged impact of “[l]’*utilisation massive de la Règle 68 par le Procureur, validée et encouragée par la Chambre dans la décision attaquée*”⁷⁴ on the fair conduct of the proceedings and the outcome of the trial, referring to the lack of oral and public proceedings arising therefrom and the impossibility for the Defence to question the witnesses.⁷⁵

52. Contrary to the submissions of the Gbagbo Defence,⁷⁶ the Legal Representative contends that it does not follow from the Decision that the Chamber will necessarily consider the parts of the prior recorded statements at hand containing speculative or opinion evidence or anonymous hearsay evidence. The Decision does not invalidate or amend the prior rulings by the Chamber in this regard.⁷⁷

53. In turn, the Blé Goudé Defence fails to identify the allegedly important portions of hearsay evidence which are at risk to remain unverified and untested as evidence pursuant to the Decision,⁷⁸ and merely refers the Chamber to the fact that another Trial Chamber certified for appeal an issue related to the Third Blé Goudé Issue.⁷⁹

⁷³ See the “Decision on the ‘Prosecution’s Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility” (Trial Chamber II), No. ICC-01/04-01/07-1958, 11 March 2010, para. 20. See also the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’” (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, para. 34.

⁷⁴ See the Gbagbo Request, *supra* note 9, para. 60.

⁷⁵ *Idem*, paras. 61-62.

⁷⁶ *Ibid.*, paras. 47-48.

⁷⁷ See the “Decision on the submission and admission of evidence”, *supra* note 4; and the Revised Directions, *supra* note 5.

⁷⁸ See the Blé Goudé Request, *supra* note 14, para. 13.

⁷⁹ *Idem*, para. 8.

54. The Legal Representative contends that these submissions, sparse and without any supporting arguments, do not explain how each of the alleged Issues affects the fairness of the proceedings or the outcome of the trial. Therefore, they cannot suffice for granting leave to appeal the Decision.

55. Secondly, both Requests fail to address the alleged impact of each Issue on the expeditiousness of the proceedings. Article 82(1)(d) of the Rome Statute requires verifying that each of the issues affects both the fair and the expeditious conduct of the proceedings.⁸⁰

56. The Gbagbo Defence does not provide any argument regarding the alleged impact of the Issues on the expeditiousness of the proceedings, arguing instead the lack of a need to prove said impact with absolute certainty.⁸¹

57. In turn, the Blé Goudé Defence addresses this requirement, but only on the basis of hypothetical considerations regarding the need for extensive time to question witnesses or the need to recall them.⁸²

58. Lastly, the Requests are largely based on hypotheses and speculations regarding the application of the Decision and future developments, which as such cannot be the subject of an interlocutory appeal under article 82(1)(d) of the Rome Statute.⁸³

⁸⁰ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21; and the “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’” (Pre-Trial Chamber II), No. ICC-01/05-01/08-532, 18 September 2009, para. 16.

⁸¹ See the Gbagbo Request, *supra* note 9, para. 63.

⁸² See the Blé Goudé Request, *supra* note 14, paras. 23 and 26.

⁸³ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 8; the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’”, *supra* note 73, para. 26 and the references contained therein; and the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on Defence Request

59. The Gbagbo Defence bases its Request on the premise that the Prosecution intends to use rule 68 of the Rules of Procedure and Evidence for the majority of the witnesses, whereas the Blé Goudé Defence refers not only to the potential use by the Prosecution of rule 68 in the future,⁸⁴ but also to hypothetical and non-verified arguments regarding the Defence's reaction in the future to the admission of prior recorded testimony under said rule.⁸⁵

60. In this regard, the Chamber has already clarified, in a different but related context, that “[w]hether the decision impacts on the fairness and expeditiousness of the proceedings or the outcome of the trial cannot be predetermined in the abstract but will depend on how the impugned decision is implemented on a case-by-case basis in the sense of how this control [by the Chamber] will be exercised”.⁸⁶

3. The Appeals Chamber's immediate resolution of the issues identified by the Defence will not materially advance the proceedings

61. The Defence contends that an immediate resolution by the Appeals Chamber would materially advance the proceedings because it would ensure that the proceedings follow the right course,⁸⁷ and because no adequate remedy could be provided for if the alleged Issues were to be decided in an appeal against the eventual judgement.⁸⁸

62. In this regard, since the Issues identified by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is

for Relief for Abuse of Process” (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6 and the references contained therein.

⁸⁴ See the Blé Goudé Request, *supra* note 14, paras. 19-20 and 27.

⁸⁵ *Idem*, para. 16.

⁸⁶ See the transcript of the hearing held on 5 February 2016, No. ICC-02/11-01/15-T-15-Red-ENG WT, p. 6, lines 16-19.

⁸⁷ See the Blé Goudé Request, *supra* note 14, para. 28.

⁸⁸ See the Gbagbo Request, *supra* note 9, para. 64.

unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁸⁹

IV. Conclusion

63. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to reject the Requests.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

**Paolina Massidda
Principal Counsel**

Dated this 20th day of June of 2016

At The Hague, The Netherlands

⁸⁹ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 31, para. 26.