

**Cour
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**International
Criminal
Court**

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THE APPEALS CHAMBER

Before: Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Chang-ho Chung

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ***

Public

**Document in support of the appeal against
the “Decision on the Prosecutor’s application to introduce prior recorded testimony
under Rules 68(2)(b) and 68(3)” delivered on 9 June 2016 by Trial Chamber I
(ICC-02/11-01/15-573-Conf)**

Source: Defence team for Laurent Gbagbo

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Counsel for the Defence of Laurent

Gbagbo

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Counsel for the Defence of Charles Blé

Goudé

Mr Geert-Jan Alexander Knoops

Mr Claver N'Dry

Legal Representatives of Victims

Ms Paolina Massidda

REGISTRY

Registrar

Mr Herman von Hebel

I. Procedural history

1. On 19 April 2016, the Prosecution filed the “Prosecution application to conditionally admit the prior recorded statements and related documents of P-0588, P-0589 and P-0590 under rule 68(2)(b) and the prior recorded statements and related documents of P-0169, P-0217, P-0230, P-0555, P-0573, P-0587, P-0112 and P-0344 under rule 68(3)”¹ in which it requested the admission of the prior recorded statements of 11 witnesses under rule 68 of the Rules of Procedure and Evidence.

2. On 2 May 2016, the Defence for Laurent Gbagbo submitted that the Prosecution’s application under rule 68(3) (relating to Witnesses P-0169, P-0217, P-0230, P-0555, P-0573, P-0587, P-0112 and P-0344) should be dismissed since the statements of these witnesses concerned crucial disputed facts and did not corroborate other statements in any way whatsoever.²

3. On 6 May 2016, the Defence for Laurent Gbagbo submitted that the Prosecution’s application under rule 68(2)(b) (relating to Witnesses P-0588, P-0589 and P-0590) should be dismissed since the statements of these witnesses concerned crucial disputed facts and did not corroborate other statements in any way whatsoever.³ The Defence recalled that the orality of proceedings was a fundamental principle essential to the fairness of proceedings, and that granting the Prosecution’s application when the requirements of rule 68 were not met amounted to preventing the Defence from cross-examining witnesses.

4. On 9 June 2016, the Chamber delivered the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”⁴ (“the Impugned Decision”) in which it granted the Prosecution’s application in part and admitted as evidence the prior recorded statement of P-0590 pursuant to

¹ ICC-02/11-01/15-487-Conf.

² ICC-02/11-01/15-495-Conf.

³ ICC-02/11-01/15-502-Conf.

⁴ ICC-02/11-01/15-573-Conf.

rule 68(2)(b) and the prior recorded statements of P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573 and P-0587 pursuant to rule 68(3). The Chamber dismissed the application for the prior recorded statements of witnesses P-0588 and P-0589 to be admitted as evidence under rule 68(2)(b) but of its own motion decided to admit both witnesses' statements under rule 68(3).

5. On 15 June 2016, the Defence for Laurent Gbagbo filed the "*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)*".⁵

6. The same day, the Defence for Charles Blé Goudé filed the "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)".⁶ A corrigendum was filed the next day.⁷

7. On 20 June 2016, the Prosecution⁸ and the Legal Representative of victims⁹ each filed a consolidated response to the requests for leave to appeal submitted by the two Defence teams.

8. On 7 July 2016, Trial Chamber I delivered the "Decision on 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)'"'.¹⁰

9. Judge Henderson appended a partially dissenting opinion.¹¹ He noted that,

[...] well over half of the prosecution witnesses in this case would never provide their evidence orally. While it is both necessary and appropriate to conduct these proceedings

⁵ ICC-02/11-01/15-591-Conf-tENG.

⁶ ICC-02/11-01/15-592.

⁷ ICC-02/11-01/15-592-Corr.

⁸ ICC-02/11-01/15-595.

⁹ ICC-02/11-01/15-596.

¹⁰ ICC-02/11-01/15-612.

¹¹ ICC-02/11-01/15-612-Anx.

expeditiously, the improper introduction of prior recorded statements under rule 68 can affect the fairness of the proceedings as well as its outcome.¹²

Accordingly, he considered that, “[i]t is therefore neither productive nor helpful to avoid appellate review, particularly when matters of fundamental importance are at stake”.¹³ With regard to the approach adopted by the majority in the decision granting the Defence leave to appeal, he added:

It should also be stressed that decisions on requests for leave to appeal ought not to be used for providing additional reasoning for the impugned decision, let alone for making entirely new substantial points. Such an approach is not only unfair to the appealing parties, as they are essentially aiming at a moving target, it also risks rendering significant rulings immune from appellate review because they are made in decisions on leave to appeal. It is for this reason that I have refrained from commenting on some statements in the impugned decision with which I do not agree.¹⁴

II. Discussion

1. Introduction

10. Article 69(2) of the Statute provides that: **“The testimony of a witness at trial shall be given in person**, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence.”

11. In a judgment delivered in *Bemba* on 3 May 2011, the Appeals Chamber stated that:

The direct import of the first sentence of this provision is that **witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality. The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber.** The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness’ testimony that may be unclear so that it may be accurately recorded.¹⁵

¹² *Ibid.*, para. 3.

¹³ *Ibid.*, para. 2.

¹⁴ *Ibid.*, para. 14.

¹⁵ ICC-01/05-01/08-1386, para. 76.

12. Above all, the principle of orality safeguards the adversarial character of proceedings and gives expression to the accused's right to cross-examine witnesses against him or her.

13. Article 67(1)(e) of the Statute stipulates that the accused is entitled

in full equality [...] **[t]o examine, or have examined, the witnesses against him or her** and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.

14. This principle is straightforward: there can be no trial without cross-examination or, in other words, if the Defence does not test the incriminatory testimony, that is to say, the allegations. The Chamber may legitimately rule only when sufficiently enlightened, after having heard both parties and assessed the outcome of the test.

15. Article 6(3)(d) of the ECHR states that, "[e]veryone charged with a criminal offence has the following minimum rights [...] to examine or have examined witnesses against him [...]."¹⁶ Accordingly, the European Court of Human Rights (ECtHR) ruled that, "[i]n principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument". The ECtHR specified that the principle of adversarial proceedings and a fair trial require "that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings".¹⁷

16. As the trial's fairness depends on the principle of orality and the adversarial principle, any departure from the former must be exceptional and respect strict conditions. The only departures possible are set out under article 69(2) of the Statute and expanded under the Rules of Procedure and Evidence, specifically rule 68.

¹⁶ The wording is almost identical to that of article 67(1)(e) of the Statute.

¹⁷ ECtHR, *Kostovski v. the Netherlands*, Application No. 11454/85, 20 November 1989, para. 41.

17. In *Bemba*, the Appeals Chamber stated that “the introduction of such evidence is subject to strict conditions set out in [rule 68]”,¹⁸ and

[i]n deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony a Chamber must ensure that doing so **is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally**. In the view of the Appeals Chamber, this requires a **cautious assessment**.¹⁹

It added that, “the decision of the Trial Chamber to admit all prior recorded statements without a **cautious item-by-item analysis** was incompatible with article 69 (2) of the Statute and with rule 68 of the Rules of Procedure and Evidence”.²⁰

18. In its decision of 3 September 2015 on the “directions on the conduct of the proceedings”, the Trial Chamber also highlighted this principle of exceptional use of rule 68 in the instant case:

In respect of the admission into evidence of prior recorded testimony, the Chamber recalls the primacy of orality and the right of the accused to examine or have examined witnesses against him, in accordance with Article 67(1)(e) of the Statute.²¹

19. In order not to violate the rights of the accused, the conditions set out for the implementation of rule 68 therefore must be strictly complied with.

20. For instance, rule 68(2)(b)(i) sets forth a number of relevant criteria to be applied in determining whether to allow the introduction of a witness’s prior recorded testimony, namely whether the prior recorded testimony (1) relates to issues that are not materially in dispute; (2) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (3) relates to background information; (4) is such that the interests of justice are best

¹⁸ ICC-01/05-01/08-1386, para. 77.

¹⁹ *Ibid.*, para. 78.

²⁰ *Ibid.*, para. 81.

²¹ ICC-02/11-01/15-205, para. 54.

served by its introduction; and (5) has sufficient indicia of reliability. These criteria are also to a large extent reflected in previous judicial decisions on rule 68(3).

21. It should be noted that these requirements are not the only ones applicable when determining whether admission of a prior recorded statement could be prejudicial to the fairness of a trial. The Bench's examination of the application of the criteria under rule 68(3) is not an objective *per se*. In fact, the key issue consists of establishing whether the admission of prior recorded statements **"is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally"**,²² especially when a request is made to the Chamber for the witnesses not to be cross-examined.

22. Since orality is the fundamental principle, rule 68 may be applied only in exceptional cases as in practice it violates this principle. The spirit of rule 68 therefore dictates that objective criteria must be met exactly for the rule to be implemented.

23. However, in granting the Prosecution's application to allow the prior recorded statements of 11 witnesses on the basis of the principal criterion of good trial management to the detriment of the objective legal requirements set out in rule 68 and applied in previous decisions, the Impugned Decision is clearly inconsistent with the spirit of rule 68. In other words, in substituting an administrative criterion for objective legal criteria, the Bench misconstrued its role and transformed its decision from a judicial decision into an administrative one based on time management:

[...] 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.²³

²² ICC-01/05-01/08-1386, para. 78.

²³ ICC-02/11-01/15-573-Conf, para. 25.

24. In so doing, the Judges have opened the way to a potentially wholesale infringement of the principle of orality: if the only pertinent or essential criterion is that of time management in the interests of the Court (and not of the accused), the Bench has fashioned an implement allowing it to cut through normal judicial process at will and to refuse to hear witnesses as the fancy takes it. It matters little whether rule 68(2)(b) or rule 68(3) is applied since the principle of orality of proceedings is violated either way.

25. However, the risk is real as Judge Henderson observes in his dissenting opinion:

In this trial, the Prosecution anticipates calling 138 witnesses of which thus far 13 witnesses have already provided *viva voce* testimony. The Prosecution have indicated their intention to make not less than 78 further applications pursuant to rule 68 of the Rules. This would mean that well over half of the prosecution witnesses in this case would never provide their evidence orally.²⁴

26. Wholesale application of rule 68(2)(b) without adherence to the criteria set out in the rule and applied in previous decisions is tantamount to banning witnesses from appearing; yet the party calling witnesses may use their prior recorded statements without an oral examination by both parties. This results in a significant imbalance that disadvantages the other party, in this case the Defence. It should be noted that in the instant case, as in others, testimony frequently differs from statements: witnesses retract claims that often turn out to have been made in particular conditions. Applying rule 68(3) also undermines the principle of orality since the essence of the testimony becomes confused with the statement: the Bench decides not to hear everything that a witness has to say and accords greater weight to written statements that were sometimes composed long ago in particular circumstances. In so doing, Judges obstruct the normal course of judicial examination. Otherwise put, the Bench is in fact abandoning any attempt to obtain real testimony since testimony can be given only in certain conditions – in an impartial court of law – and if it is tested by the opposing party. By favouring

²⁴ ICC-02/11-01/15-612-Anx, para. 3.

statements over real testimony – even if the opposing party can question witnesses about their statements – the Bench has misconstrued its duty and the nature of legal process. In other words, the persons heard – even if they are present – cannot be considered witnesses since they do not testify in the normal sense of the word.

27. Furthermore, since under rule 68 there is no oral, public or tested testimony, the principles of the right to public proceedings and the transparency of modern, democratic justice are also infringed.

28. Wholesale application of rules 68(2)(b) and 68(3) for administrative reasons therefore immediately alters the very nature of the legal process and changes balanced proceedings into proceedings which disadvantage one of the parties (namely, the party which did not call the witnesses and is confronted with the use of statements, in this case the Defence) and which are subject to arbitrary decision-making by the Bench. In consequence, the fairness of proceedings is undermined.

29. Proof of the risk that the Court incurs by allowing unfair proceedings is provided by the Prosecution's statement that it would apply rule 68 wholesale **to the majority of its witnesses!** Perhaps it is seeking to avoid subjecting its witnesses to a test that would undermine the plausibility of their accounts and their credibility. This goes to the essence of the risk: the application of rule 68 allows a party, under the guise of expediting proceedings – that is, improving time management – to circumvent its duties in terms of the standard of proof needed to satisfy the Bench. It also flouts the logic behind the burden of proof since the Prosecution will no longer have to prove its allegations in court. It is hence no surprise that the Prosecution is attempting to adopt this approach since it frees the Prosecution from part of the burden of proof and lowers the standard of proof that it needs to attain.

30. This appeal therefore concerns what may become a practice – namely, the wholesale admission of witnesses' prior recorded statements for administrative

reasons – that jeopardises the fairness of future trials before the International Criminal Court. By undermining the principle of orality and the Defence’s ability to test the Prosecution’s evidence fully, the practice introduced in this case of allowing the systematic admittance of witnesses’ prior statements endangers the equilibrium of the trial and the fairness of proceedings.

2. Grounds of appeal

31. In the decision granting the Defence leave to appeal the Impugned Decision, the majority held that the Defence could appeal on the following point “whether ‘the Chamber erred in law in posing “good trial management” as a guiding principle for the admission of prior statements’”.²⁵

For this question to be discussed, it needs to be put in perspective: a discussion of the relevance of the administrative criterion posed by the Chamber – in this instance, “good trial management” – entails a discussion of the use of any administrative criterion; that in turn entails discussion as to whether an administrative criterion can replace the legal criteria set forth in the Statute and jurisprudence, which in turn again entails a discussion of why the criteria set forth in the Statute and jurisprudence exist, a question that goes to the nature of a fair trial. Here the discussion will specifically focus on the fact that the Chamber replaced legal criteria with an administrative criterion in the aim of circumventing these criteria and hence subverting the logic of the Statute and jurisprudence. Otherwise put, the Chamber sought a way of admitting prior statements under rule 68 **despite the Statute and jurisprudence.**

32. The Chamber’s approach is particularly clear in respect of the admission of prior recorded statements under rule 68(3) of the Rules.

²⁵ ICC-02/11-01/15-612, operative part.

33. A previous judgment delivered by the Appeals Chamber on rule 68(3) in *Bemba* clearly indicates that a Chamber

may, for example, take into account, a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.²⁶

34. Three criteria for determining whether to admit a witness's prior recorded statements emerge from this appeals judgment: (1) the statement relates to issues that are not in dispute between the parties; (2) it relates to background information; and (3) the statement does not contain any new facts in the sense that it merely corroborates other statements.

35. Nevertheless, in the Impugned Decision, the majority considered that, "the statements of the ten witnesses under consideration relate to facts which are central to the case, and are materially in dispute",²⁷ which should, in line with previous judicial decisions, have led to a refusal to admit these witnesses' prior recorded statements into evidence. This is all the more the case since the Chamber explicitly acknowledged that the testimony of two witnesses (P-0588 and P-0589) did not corroborate any other witness statements²⁸ and implicitly acknowledged that other witness statements which the Prosecution wished to have admitted were not corroborated by any other statements in the record of the case.²⁹ These considerations should have impelled the Chamber to dismiss the Prosecution application.

36. However, rather than following the Court's established jurisprudence, the Chamber invented alternative criteria allowing it to admit the prior recorded statements of the witnesses in question under rule 68(3) regardless. Judge Henderson observed in his dissenting opinion on the Impugned Decision:

²⁶ ICC-01/05-01/08-1386, para. 78.

²⁷ ICC-02/11-01/15-573-Conf, para. 38.

²⁸ *Ibid.*, para. 16.

²⁹ *Ibid.*, paras. 30-37.

The point the Defence is raising is whether the Chamber was allowed to entirely set aside a criterion weighing against the introduction of prior recorded testimony, i.e. whether the evidence relates to issues that are materially in dispute, by introducing an entirely new notion that would favour such introduction.³⁰

37. It is hence appropriate for the Appeals Chamber to rule clearly on the criteria for the application of rule 68(3) with a view not only to correcting the Impugned Decision, but **also to guiding the future practice of Trial Chambers.**

38. Should the Appeals Chamber rule only on the use of a specific administrative criterion – here “good trial management” – without examining why the Trial Chamber used this criterion and hence without examining the Trial Chamber’s understanding of rule 68, it would be failing to address the issue raised. In other words, the Chamber’s overall reasoning in respect of rule 68 must be examined if the issue of its use of the “good trial management” criterion is to be resolved. It was in this spirit that Judge Henderson noted in his dissenting opinion:

In the event that the Chamber took into account irrelevant factors, or did not properly weigh those factors that are relevant, in reaching the impugned decision, such errors are likely to taint the exercise of discretion in future applications made under rule 68 to admit the prior recorded statements of witnesses. Appellate resolution is therefore necessary to ensure that the proceedings follow the right course.³¹

39. In answering the issue on appeal, it is hence vital to consider the two grounds of appeal in the light of the criteria adopted by the Trial Chamber in the Impugned Decision, which are, as Judge Henderson noted in his dissenting opinion, “inextricably interwoven”³² and hence “both appropriately before the Appeals Chamber”.³³

³⁰ ICC-02/11-01/15-612-Anx, para. 9.

³¹ *Ibid.*, para. 5.

³² *Ibid.*, para. 10.

³³ *Idem.*

2.1 First ground of appeal: The Chamber made an error of law in basing its decision to admit prior recorded statements on the principle of “good trial management”

40. In the Impugned Decision, the majority of the Chamber construed the manner in which it was to assess whether a prior statement was to be admitted as follows:

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. This criterion will be applied on a case-by-case basis, taking into consideration the importance of the evidence for the case, the volume and detail of the evidence, among other factors. It 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.³⁴

41. In other words, the Chamber considers its principle duty is to ensure that “the trial unfolds in a focused and expeditious manner”, although it recognises that in this context the procedural rights of parties and participants must be observed and that it must find a balance between what it calls “good trial management” and the rights of the accused, which it must not “unduly infringe”. In so determining, the Chamber committed several errors of reasoning.

42. Firstly, this statement is debatable given that respect for the rights of the accused, as the weaker party, forms the cornerstone of criminal proceedings and that the trial’s fairness is conditional on the application of this principle.

43. Secondly, even if the Chamber’s wording is understood to convey the idea of a balance between what the Chamber calls “good trial management” and the rights of the accused, which the Chamber says must not be “unduly infringe[d]”, the question of the relationship between case management and rights remains. By putting the parties’ and participants’ “procedural rights” and “trial management” on

³⁴ ICC-02/11-01/15-573-Conf, para. 25.

an equal footing, the Chamber places two essentially different factors on a par, which is logically impossible.

44. Lastly, the Chamber does not explain what “procedural rights of the parties and participants” would be taken into consideration as part of a “focused and expeditious” trial. The Chamber appears to be distinguishing between the accused’s rights.

45. In reality, the Chamber appears to have committed several errors of reasoning here.

46. Firstly, the Chamber does not explain what it means by the concept of rights of the accused that could be “unduly infringe[d]”.³⁵ Otherwise put, the Chamber is silent with regard to rights of the accused that could be slightly “infringe[d]”. The view that any of the accused’s rights could be – even partially, even slightly – infringed misconstrues the nature of legal proceedings, which to be fair postulate the full exercise of the accused’s rights. A fair trial requires full observance of the rights of the Defence in their entirety. A breach of the rights of the Defence is a breach of the rights of the Defence, and there is no gradation or alternative criterion that could justify such an infringement.

47. Secondly, the criterion of “good trial management” was invented by the Chamber. It has no basis in the Statute or case law on the assessment of whether prior recorded statements should be allowed.

48. Thirdly, the fact that the Chamber has a natural “trial management” function should not mean that this function prevails over the application of the law and permits the Bench to grant itself room to manoeuvre with regard to the Statute and the Rules of Procedure and Evidence on the grounds that this is justified by good “trial management”. Rule 68 sets out extremely clear conditions for prior recorded

³⁵ *Idem.*

statements to be admitted, in which the concept of “good trial management” plays no part. Adding this concept would alter the spirit of the rule.

49. Thus, by introducing “good trial management” as the principal criterion for its decision as to whether an application to trigger rule 68 should be granted, the Chamber erred in law and failed to give its decision a legal basis.

2.2 Second ground of appeal: the Chamber committed a legal error by introducing the concept of “system of evidence”

50. The Chamber’s invention of the criterion of “good trial management” logically led it to invent a second criterion that would allow it – still with a view to “good trial management” – to distinguish between witnesses for whom oral testimony would be necessary and for whom the use of rule 68 would suffice. Since the Chamber invoked the criterion of “good trial management” as its “guiding principle” for determining whether to admit prior recorded statements – that is, for deciding whether a witness should appear for cross-examination – it follows that all subsequent criteria adopted will reflect that vision and, in the Chamber’s mind, will represent nothing but the practical application of the criterion of “good trial management”. This is made abundantly clear by the use of a new concept, the “system of evidence”, with which the Chamber attempted to buttress the concept of “good trial management” from another angle.

51. Rule 68 and the relating case law are clear: a witness’s prior recorded statement cannot be admitted when its content concerns matters in dispute.

52. In the Impugned Decision, a majority of the Chamber considered that, “the statements of the ten witnesses under consideration relate to facts which are central

to the case, and are materially in dispute”,³⁶ which should have led it to dismiss the Prosecution’s application.

53. Nevertheless, the Chamber continues its line of reasoning by stating:

However, the Chamber considers it necessary 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.**³⁷

54. The Chamber hence appears to have distinguished between important witnesses who must be put to the test and hence treated normally, and less important witnesses who are significant only *en masse* and for whom the application of rule 68 suffices. In other words, they are second class witnesses. By so doing, the Chamber misinterprets the concept of a witness: a witness is a witness.

55. Given this distinction between witnesses, the Chamber introduces a new criterion for allowing a witness’s prior recorded statements to be admitted that applies only to some witnesses, namely, the “relative importance of the witnesses within the system of the evidence that has been and is expected to be presented to the Chamber”.³⁸ However, not only does this criterion lack any legal foundation in the Statute, the Rules of Procedure and Evidence and case law, but its application appears to suggest an assessment by the Chamber of a witness’s relative importance, which is logically and practically impossible: a witness is a witness and such an evaluation is impossible since by definition it can be carried out only at the end of the trial, once the Bench has heard all the exculpatory as well as all the incriminatory evidence.

56. It should be noted that the criterion used by the Bench here is simply not valid since it stems from a subjective, premature assessment that is based on a mere impression formed before any testimony is heard. This criterion may even be

³⁶ *Ibid.*, para. 38.

³⁷ *Idem.*

³⁸ *Idem.*

considered essentially subjective since a testimony's importance depends on the observer's standpoint and on the particular issue examined in the testimony. It could further be said that this "premature impression" amounts to nothing but the product of what the Bench anticipates the Prosecution's evidence will be.

57. By setting this criterion for allowing a witness's prior statements, the majority of the Bench failed to provide the Impugned Decision with a legal basis.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

- **Reverse** the Impugned Decision;
- **Find** that the requirements for applying rule 68 are not met;

And consequently,

- **Dismiss** the Prosecution application.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 21 July 2016

At The Hague, the Netherlands