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THE APPEALS CHAMBER

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

SITUATION IN CÔTE D'IVOIRE

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

Confidential with Public Annex A

Consolidated response to Laurent Gbagbo's and Charles Blé Goudé's appeals
against the "Decision on the Prosecutor's application to introduce prior recorded
testimony under Rules 68(2)(b) and 68(3)"

Source: Office of the Prosecutor

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Introduction

1. The appeals filed by Laurent Gbagbo¹ and Charles Blé Goudé² ("Appellants") against the Majority of Trial Chamber I's "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)"³ should be dismissed. The Appellants dispute the Majority's reliance on the criterion of "good trial management" in introducing ten prior recorded testimonies pursuant to rule 68(3) (Blé Goudé's First Ground and Gbagbo's Appeal), and the Majority's analysis of the criterion of "sufficient indicia of reliability" in introducing one statement pursuant to rule 68(2)(b) (Blé Goudé's Second Ground).⁴ The Appellants fail to show an error in the Decision or that it was unreasonable or unfair.
2. Blé Goudé's First Ground and Gbagbo's Appeal are premised on a misrepresentation of the Decision and the relevant jurisprudence. The Majority did not "invent" or rely solely on the criterion of "trial management" or expedition to apply rule 68(3). Rather, the Majority noted that, as "manager" of this trial, the Trial Chamber must ensure its expedient and efficient conduct while respecting the rights of the Accused. Thus, the Majority merely articulated its duty under article 64(2), which rule 68(3) serves. The Majority further clarified that any decision applying rule 68(3) would be made on a case-by-case basis and will consider several factors, such as the importance, volume and detail of the evidence, while always respecting the Accused's rights. There is thus no error in the Majority's interpretation of rule 68(3) or in its application to the ten prior recorded statements.

¹ ICC-02/11-01/15-633 ("Gbagbo's Appeal").

² ICC-02/11-01/15-632-Conf ("Blé Goudé's Appeal").

³ ICC-02/11-01/15-573-Red ("Decision"). Judge Henderson issued a partially dissenting opinion: ICC-02/11-01/15-573-Anx-Red ("Dissenting Opinion").

⁴ The statements were "conditionally" introduced on the condition that Witness P-0590's declaration was filed and that rule 68(3)'s three conditions were met for the other ten witnesses. See Decision, paras. 23, 39; p. 18. In this filing the Prosecution will use the term "introduced".

3. Blé Goudé's Second Ground is similarly premised on a misrepresentation of the Decision, as it ignores the Majority's consideration of the content of Witness P-0590's statement when assessing whether it contains "sufficient indicia of reliability". Moreover, even if, *arguendo*, the Majority failed to take into consideration the content of Witness P-0590's statement, it did not err, because the law does not require the Trial Chamber to do so. In any event, Blé Goudé fails to demonstrate how any error in assessing "sufficient indicia of reliability" of Witness P-0590's statement materially affected the Decision.

Confidentiality

4. Pursuant to regulation 23*bis*(2) this document is filed confidential because it responds to Blé Goudé's Appeal, which was filed "Confidential". The Prosecution does not object to a reclassification as "Public" without redactions.

Submissions

A. Preliminary Matters

5. Gbagbo advances two submissions which fall outside the issues certified for appeal by the Majority of the Trial Chamber. Gbagbo's Second Ground reproduces the third issue of his application for leave to appeal.⁵ Since the Majority declined to certify this issue,⁶ it should be dismissed *in limine*.⁷ Nevertheless, exceptionally, because of the divergent jurisprudence on this topic⁸

⁵ ICC-02/11-01/15-591-Red, paras. 50-56.

⁶ ICC-02/11-01/15-612, paras. 18-20. See *however* ICC-02/11-01/15-612-Anx, paras. 9-10.

⁷ ICC-02/11-01/11-572 OA5, para. 65.

⁸ ICC-01/04-01/06-2205 OA15 OA16, paras. 18-20; ICC-01/04-01/06-1433 OA11, paras. 11-19; ICC-01/04-01/07-521 OA5, para. 37 and ICC-02/11-01/15-369 OA7, para. 26. *Contra*: ICC-02/11-01/11-572 OA5, paras. 61-65.

and the potential connection with the issues on appeal, the Prosecution will address these submissions.⁹ Additionally, Gbagbo makes general submissions on the Accused's right to question witnesses against him,¹⁰ and disputes the Prosecution's intended use of rule 68 in these proceedings.¹¹ As these matters fall outside—and are not connected to—the confined scope of this appeal,¹² these submissions should be dismissed *in limine* and will not be further addressed by the Prosecution. Notably, the article 67(1)(e) right is unaffected by rule 68(3), where the witnesses appear in Court and may be questioned by the Parties.¹³

B. Blé Goudé's First Ground and Gbagbo's Appeal should be dismissed

6. Blé Goudé's First Ground and Gbagbo's Appeal should be dismissed. The Appellants fail to demonstrate that the Majority erred in law or in fact in its interpretation and application of rule 68(3).¹⁴ Nor did the Appellants demonstrate that the Majority's decision was unreasonable or unfair.¹⁵ First, the Appeals misrepresent the Decision—the Majority used the term “good trial management” to describe its statutory duty to ensure that the trial unfolds in a focused and expeditious manner. Second, the Appeals misrepresent the *Bemba* OA5 OA6 Appeal Judgment¹⁶—which does not set out a list of mandatory conditions when applying rule 68(3). Third, the Majority in any event was

⁹ See below paras. 23-32.

¹⁰ Gbagbo's Appeal, paras. 13-15.

¹¹ Gbagbo's Appeal, paras. 24-30. However, Gbagbo does not distinguish between testimonies submitted under rule 68(2)(b) and witnesses appearing under rule 68(3), who may be questioned by the Defence. Moreover, the figures provided on rule 68 applications were only estimates and not only included crime base witnesses, but also – for instance - witnesses testifying to the chain of custody and overview witnesses. Moreover, as the trial progresses, some witnesses may not have to be called. See ICC-02/11-01/15-T-45-CONF-ENG (Closed Session), pp. 2-8.

¹² The Appeals Chamber does not have the role of an advisory body: ICC-01/04-503 OA4 OA5 OA6, para. 30; ICC-01/04-01/07-3132 OA12, para. 7.

¹³ *Kostovski v. The Netherlands* (ECtHR's Judgment cited by Gbagbo in para. 15) is inapposite. The case related to the use of two anonymous witness statements as sufficient evidence to found a conviction. See para. 44.

¹⁴ Although the Appellants argue that the Majority erred in law, they appear to advance an error of fact. On the relevant standard for errors of fact: ICC-01/04-01/06-3121-Red A5 (“*Lubanga* AJ”), para. 21; ICC-01/04-02/12-271-Corr (“*Ngudjolo* AJ”), para. 22. On errors of law: *Lubanga* AJ, para. 18; *Ngudjolo* AJ, para. 20.

¹⁵ ICC-01/09-02/11-1032 OA5, para. 25.

¹⁶ ICC-01/05-01/08-1386 OA5 OA6 (“*Bemba* OA5 OA6 Appeal Judgment”)

consistent with this Judgment. Fourth, the Majority correctly considered expedition and efficiency in deciding on the application of rule 68(3). Fifth, the Majority correctly interpreted and applied rule 68(3) by weighing relevant factors.

(i) The Appeals do not correctly represent the Decision

7. Gbagbo argues that the Majority's sole or main consideration in applying rule 68 was "trial management".¹⁷ Similarly, Blé Goudé argues that the Majority considered "good trial management" as the "one" or "sole criterion".¹⁸
8. This is incorrect. The Majority used those terms to describe its duty as "manager" of the trial to ensure that it unfolds in a focused and expeditious manner.¹⁹ Indeed, the Trial Chamber is obliged by article 64(2) to ensure the expeditious conduct of the proceedings. Moreover, the Appeals Chamber has highlighted the Judges' responsibility to "properly manage [cases] from the start to forestall unnecessary delays".²⁰ In addition, the accused persons have a fundamental right, under article 67(1)(c), to be tried without undue delay.
9. Further, even if "trial management" is equated to "expedition", this was not the sole or principal criterion relied upon by the Majority. To the contrary and throughout the Decision, the Majority referred to other criteria that equally guided the exercise of its discretion:
 - First, the Majority noted the three mandatory requirements expressly envisaged by rule 68(3).²¹
 - Second, the Majority recalled that "the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused."²²

¹⁷ Gbagbo's Appeal, paras. 23-24, 47, 49.

¹⁸ Blé Goudé's Appeal, paras. 14, 20.

¹⁹ Decision, para. 25.

²⁰ ICC-01/04-01/07-2259 OA10, para. 45.

²¹ Decision, para. 24. In particular, that (1) the witness is present before the Trial Chamber, (2) the witness does not object to the submission of the prior recorded testimony, and (3) the Chamber and Parties have the opportunity to examine the witness.

²² Decision, para. 24. *See also* paras. 10 (on rule 68(2)(b)), 25 and 38 (also on rule 68(3)).

- Third, the Majority stressed that any decision under rule 68(3) would be made on a case-by-case basis, taking into consideration several factors, such as the importance, volume and detail of the evidence.²³
- Fourth, the Majority applied this approach to each of the ten statements submitted by the Prosecution.²⁴ After an individualised review, it concluded that rule 68(3) was in principle applicable²⁵ by noting the relative importance of the evidence²⁶ and—albeit implicitly—the limited volume and detail of the evidence.²⁷ Accordingly, the Majority concluded that the introduction of the ten statements permitted streamlining the presentation of the evidence²⁸ and caused no prejudice to the Accused, provided that they were afforded reasonable time to question the witnesses.²⁹

10. From the foregoing, it is apparent that the Majority did not solely or mainly rely on the criterion of “trial management” (or expedition) when introducing the ten statements pursuant to rule 68(3). Because Blé Goudé’s First Ground and Gbagbo’s Appeal are premised on an erroneous understanding of the Decision, they should be dismissed on this basis alone.

(ii) The Appeals do not correctly represent the Bemba OA5 OA6 Appeal Judgment

11. In any event, the Appellants do not properly represent the jurisprudence of the Appeals Chamber. Indeed, the Appellants erroneously argue that Chambers should always and solely consider the three criteria listed by the Appeals Chamber in the *Bemba* OA5 OA6 Appeal Judgment in deciding on the

²³ Decision, para. 25.

²⁴ Decision, paras. 15-18, 26-41.

²⁵ Decision, para. 39.

²⁶ Decision, para.38.

²⁷ Decision, paras. 38 (if read together with para. 25, where this factor is explicitly mentioned), 41 (where the Majority affords the Defence “reasonable amount of time to examine each witness”). The Majority did not indicate that the volume and detail of the submitted material would entail a more extensive questioning by the Defence that would negate the rationale of applying rule 68(3).

²⁸ Decision, paras. 38, 40. The examination in chief of the ten witnesses was expected to last a total of 33 hours, which would now be reduced to a total of five to six hours of supplementary examination. See ICC-02/11-01/15-487.

²⁹ Decision, paras. 38, 41.

introduction of prior recorded testimony pursuant to rule 68(3).³⁰ The Appellants submit that the Decision should be overturned because the Majority disregarded these criteria. However, this interpretation is not consistent with the terms and purpose of the appellate jurisprudence.

12. First, in the *Bemba* OA5 OA6 Appeal Judgment, the Appeals Chamber unmistakably sets out a *non-exhaustive* list of factors that Chambers “may, for example, take into account” in applying the previous version of rule 68.³¹ Indeed, the Appeals Chamber referred to the factors that Trial Chambers I and II had considered in applying this rule in the *Lubanga* and *Katanga* cases between 2008 to 2010.³² Considering that these are fact-specific decisions,³³ Chambers are not precluded from considering and basing their decisions under rule 68(3) on other factors, as long as the mandatory requirements of rule 68(3) are met, as well as the rights of the accused are respected, as recalled in rule 68(1).
13. Second, the timing of the *Bemba* OA5 OA6 Appeal Judgment is relevant to its interpretation. Indeed, when it was rendered (3 May 2011), the prior version of rule 68 represented an almost exclusive departure from the principle of orality enshrined in the statutory texts. The Parties rarely resorted to this provision³⁴ and, when they did, sought only the introduction of background or undisputed evidence. As a result, the decisions of Trial Chambers addressing these applications reflected this limited spectrum of evidence, and hence so did the *Bemba* OA5 OA6 Appeal Judgment in listing the factors previously considered by those Chambers.³⁵
14. However, the Court has evolved since May 2011: three trials have been completed with a final judgment and two proceedings have been terminated without a verdict rendered. Based on this experience, the Assembly of States

³⁰ Blé Goudé’s Appeal, paras. 14, 15; Gbagbo’s Appeal, paras. 32-36, 47-48.

³¹ *Bemba* OA5 OA6 Appeal Judgment, para. 78 (emphasis added).

³² *Bemba* OA5 OA6 Appeal Judgment, fn. 132. See e.g. ICC-01/04-01/06-1603, para. 24; ICC-01/04-01/07-2289-Corr-Red, para. 14.

³³ ICC-01/04-01/06-1603, para. 21; ICC-01/04-01/07-2289-Corr-Red, para. 14. See also ICC-01/05-01/13-1478-Red-Corr, para. 51; ICC-01/04-02/06-845, para. 6; ICC-01/04-02/06-961, para. 8.

³⁴ ICC-ASP/12/37/Add.1, Annex II.A, para. 6.

³⁵ *Bemba* OA 5 OA 6 Appeal Judgment, fn. 132.

Parties ("ASP"),³⁶ the Office of the Prosecutor³⁷ and the Judges³⁸ have identified the need for more efficient and expeditious proceedings. The adoption of the amended rule 68 by the ASP in November 2013 is one of the measures intended to achieve this goal.³⁹ Rule 68(3) should be interpreted in this context and the Chambers should be open to its application to different types of evidence (and consider other factors) from those submitted by the Parties before the amendment.⁴⁰ This interpretation of rule 68(3) is consistent with the terms and purpose of the provision and with the Appeals Chamber's guidance in *Bemba* OA5 OA6.

15. Thus, because Blé Goudé's First Ground and Gbagbo's Appeal are premised on a misrepresentation of the jurisprudence, they should be dismissed.

(iii) The Majority considered the criteria set out in the Bemba OA5 and OA6 Appeal Judgment

16. Moreover, and contrary to the Appellants' submissions,⁴¹ the Majority did in fact consider the non-mandatory factors set out by the Appeals Chamber. The Majority distinguished between the "facts" which the statements might prove, and the "*relative importance*" of the statements actually proffered, in relation to the totality of the evidence.⁴² The Majority noted that "[n]one of [the witnesses] have [sic] insider or other quality knowledge of the planning and overall conduct of the FDS operation during the events".⁴³ However, their testimony, "together with other evidence which has been or will be submitted by the parties, form a

³⁶ See ICC-ASP/9/Res.2 on the establishment of a study group on governance. See also ICC-ASP/10/30, in particular regarding Cluster III tasked with increasing the efficiency of the criminal process.

³⁷ See OTP Strategic Plan 2016-2018, Strategic goal 3.

³⁸ See performance indicators of the Presidency and the three divisions of the Chambers: ICC-ASP/11/20, pp. 23, 30-31. See also Chambers Practice Manual, February 2016, p. 5.

³⁹ ICC-ASP/12/37/Add.1, Annex II.A, p. 18 (Executive Summary). See also para. 8.

⁴⁰ On interpreting the Rome Statute in context and in light of its object and purpose in accordance with VCLT articles 31 and 32: ICC-01/04-168 OA3, para. 33. The same principle of interpretation applies to the rules: ICC-01/04-01/06-1432 OA9 OA10, para. 55.

⁴¹ *Contra*, Blé Goudé's Appeal, para. 17; Gbagbo's Appeal, paras. 33-36.

⁴² Decision, para. 38. (Emphasis added).

⁴³ Decision, para. 38.

web of evidence which will allow the Chamber to appreciate how the events unfolded on the ground".⁴⁴

17. These findings address two of the factors referred to in the *Bemba* OA5 OA6 Appeal Judgment: (i) whether evidence is central to core issues of the case⁴⁵ and (ii) whether the evidence is corroborated.⁴⁶ Blé Goudé's First Ground and Gbagbo's Appeal may again be dismissed on this basis.

(iv) The Majority did not err in considering whether the application of rule 68(3) would expedite the proceedings and streamline the presentation of evidence

18. The Appeals similarly fail, even on their own terms. Contrary to the contention of the Appellants,⁴⁷ the Majority was correct to take into account that the introduction of the ten statements pursuant to rule 68(3) would expedite the proceedings and streamline the presentation of evidence.
19. First, the Majority's approach is consistent with the Appeals Chamber's jurisprudence which has stated that expedition is "an independent and important value in the Statute to ensure the proper administration of justice [and] [f]or this reason, article 64(2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious."⁴⁸ Because the crimes under the Court's jurisdiction are by nature complex and their adjudication takes time,⁴⁹ there is an onus on all Parties and participants, and the Chamber, to act diligently and expeditiously at trial.⁵⁰ With respect to Chambers—and as noted above,⁵¹ the

⁴⁴ Decision, para. 38.

⁴⁵ *Bemba* OA5 OA6 Appeal Judgment, para. 78. See also: ICC-01/04-01/06-1633, para. 22 and ICC-01/04-01/07-2362, para. 19 cited in the Judgment. Trial Chambers I and II used the same language as (now recomposed) Trial Chamber I in the Decision. Further, the Prosecution understands that the Appeals Chamber referred to "issues" as meaning "topics" or "subjects" rather than facts underlying the charges.

⁴⁶ *Bemba* OA5 OA6 Appeal Judgment, para. 78. Note, however, that corroboration is not required at this Court. See rule 63(4). In any event, evidence need not be identical in all aspects, or describe the same fact in the same way, to be considered "corroborative". See *Gatete* AJ, para. 125 (citing *Kanyarukiga* AJ, para. 220; *Ntawukuliyayo* AJ, para. 24; *Munyakazi* AJ, para. 103; *Bikindi* AJ, para. 81; *Nahimana* AJ, para. 428); *Ntabakuze* AJ, para. 150. Rather, witness testimonies are deemed corroborative when "one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts". See *Gatete* AJ, para. 125 (citing *Kanyarukiga* AJ, paras. 177, 220); *Ntawukuliyayo* AJ, para. 121 (citing *Bikindi* AJ, para. 81; *Nahimana* AJ, para. 428). Therefore, thematic consistencies among testimonies may constitute corroboration; 'mirror images' are unnecessary and often unrealistic.

⁴⁷ Blé Goudé's Appeal, paras. 14-16; Gbagbo's Appeal, paras. 36, 47-49.

⁴⁸ ICC-01/04-01/07-2259 OA10, para. 47.

⁴⁹ *Ibid.*, para. 45.

⁵⁰ *Ibid.*, para. 43.

Appeals Chamber emphasised that cases must be managed properly from the start to avoid unnecessary delays.⁵² The Decision fully complies with these directions.

20. Second, as the purpose of the amended rule 68 is to reduce the length of the proceedings and to streamline the presentation of evidence,⁵³ it was only logical that the Majority considered whether the introduction of the prior recorded testimony pursuant to rule 68(3) served that purpose.
21. Finally, this approach is fully consistent with the Court's jurisprudence on rule 68(3)⁵⁴ and the prior version of rule 68(b) where the Chambers also determined whether Court time would be saved.⁵⁵ It is also consistent with the jurisprudence of the UN *ad hoc* tribunals which contain similar provisions as rule 68(3), such as rule 92ter at the International Criminal Tribunal for the former Yugoslavia ("ICTY")⁵⁶ and rule 156 at the Special Tribunal for Lebanon ("STL").⁵⁷
22. In sum, the Majority did not err in considering whether the application of rule 68(3) would save Court time and streamline the presentation of evidence.

(v) The Majority correctly applied rule 68(3)

23. Further, in its individualised assessment of the ten prior recorded statements,⁵⁸ the Majority correctly considered expedition and efficiency, but also adequately weighted these factors against other relevant criteria, such as the importance, volume and detail of the evidence.⁵⁹ Significantly, the Majority ensured that the rights of the Accused were not prejudiced.⁶⁰ It neither erred nor abused its discretion in this approach.

⁵¹ See above para.8.

⁵² ICC-01/04-01/07-2259 OA10, para. 45.

⁵³ See above fn. 39.

⁵⁴ *Bemba al.*: ICC-01/05/13-1478-Red-Corr, paras. 48, 51; *Ntaganda*: ICC-01/04-02/06-845, para. 8; ICC-01/04-02/06-988, paras. 12, 15; ICC-01/04-02/06-961, paras. 10-11, 13.

⁵⁵ *Lubanga*: ICC-01/04-01/06-1603, paras. 22, 24; *Bemba*: ICC-01/05-01/08-886, paras. 13, 19.

⁵⁶ *Hadžić* Decision on GH-043, para. 4; *Hadžić* Decision on DGH-005, para. 5.

⁵⁷ *Akhbar Beirut* Decision on AP02 and AP14, paras. 5, 14.

⁵⁸ Decision, paras. 15-18, 26-37.

⁵⁹ Decision, paras. 25, 38.

⁶⁰ Decision, paras. 24-25, 38, 41.

24. The Appellant disputes two aspects of the Majority's exercise of discretion: first, the conclusion that the ten witnesses are of "relative importance [...] within the system of the evidence that has been and is expected to be presented to the Chamber" despite relating to "facts which are central to the case, and are materially in dispute";⁶¹ and second, the existence of prejudice to the rights of the Accused resulting from the introduction of the ten statements pursuant to rule 68(3).⁶²

a. The relative importance of the witnesses' evidence

25. After assessing the content of their testimony, the Majority correctly found that the ten witnesses were of relative importance in relation to the evidence "that has been and is expected to be presented".⁶³ None of the Appellants' arguments identifies an error in this conclusion.

26. First, and contrary to Blé Goudé's submissions,⁶⁴ the Majority did not consider the source of the statements to determine that the witnesses were of relative importance; rather, it assessed their content. This is apparent from the Majority's individualised review of the witnesses' testimony⁶⁵ and its conclusion.⁶⁶ Moreover, Blé Goudé's recital of the witnesses' testimony⁶⁷ merely shows a disagreement with the Majority's assessment but fails to identify an error.⁶⁸

27. Second, Gbagbo's assertion of error – on the basis that all witnesses are equally important⁶⁹ – is misplaced. Indeed, all witnesses relating to the charges are important to sustain a conviction.⁷⁰ But it does not follow that all witnesses must

⁶¹ Blé Goudé's Appeal, paras. 18-19; Gbagbo's Second Ground; *see in particular* paras. 52-56.

⁶² Blé Goudé's Appeal, paras. 19- 20.

⁶³ Decision, para. 38.

⁶⁴ Blé Goudé's Appeal, para. 18.

⁶⁵ Decision, paras. 15-18, 26-37.

⁶⁶ Decision, paras. 38-41. *In particular*, para. 38: "None of them have insider or other quality knowledge of the planning and overall conduct of the FDS operation".

⁶⁷ *Contra*, Blé Goudé's Appeal, paras. 22-25.

⁶⁸ *Ngudjolo* AJ, para. 24 on the deference afforded to chambers of first instance in their assessment of the evidence.

⁶⁹ Gbagbo's Appeal, paras. 54-55.

⁷⁰ The Prosecution must prove beyond reasonable doubt the facts comprising the elements of the crimes, the forms of the responsibility alleged, and facts indispensable for entering a conviction. *See Ngudjolo* AJ, paras. 124-125. *See also Ntagerura* AJ, para. 174. However, not every underlying fact needs to be separately proved beyond reasonable doubt to sustain a conviction. *See Lubanga* AJ, para. 22.

be treated exactly the same for the purpose of the submission of evidence. If this were so, and all witnesses were required to testify fully *viva voce*, no relevant evidence could ever be introduced pursuant to rule 68(3)—or rule 68(2). Such an interpretation would make rule 68 redundant and cannot be correct.

28. Rather, for the purpose of the submission of evidence, the Chamber may properly find that witness testimonies, as anticipated by the calling party, differ in their scope and nature. Correspondingly, the Chamber may take this into account, among all relevant circumstances, in concluding that a testimony is amenable to introduction by rule 68(3). In this case, the Majority noted that none of the ten witnesses had “insider or other quality knowledge of the planning and overall conduct of the FDS operation” and thus were, relatively, of less “importance” than other evidence submitted, or that the Chamber expects to have presented.⁷¹ There is no error in this approach.
29. In any event, and contrary to the Appellants’ submissions,⁷² rule 68(3) does not preclude the introduction of prior recorded testimony relating to facts that are central to the case, that are materially in dispute or that constitute important evidence. Unlike rule 68(2)(b), prior recorded testimony under rule 68(3) *can* go to proof of the acts and conduct of the accused. This is consistent with the fact that, under rule 68(3), the accused is still fully able to confront the witnesses, and to question them. Moreover, unlike rule 92*ter* at the Special Court for Sierra Leone (“SCSL”), rule 68(3) does not require agreement of the parties. The only requirements are those set out in rule 68(3), bearing in mind the rights of the accused as envisaged by rule 68(1).
30. To the contrary, the Majority’s approach is consistent with the jurisprudence of this Court which has introduced prior recorded testimony pursuant to rule 68(3) relating to disputed topics that were central to the case. Chambers have

⁷¹ Decision, para. 38.

⁷² *Contra*, Gbagbo’s Appeal, para. 52; Blé Goudé’s Appeal, para. 18.

extensively, and with a few exceptions,⁷³ applied rule 68(3) on a wide range of witnesses.⁷⁴ For instance, in the *Bemba et al. case*, Trial Chamber VII introduced pursuant to rule 68(3) the prior recorded testimony of four witnesses which related to core and contestable issues of the case, including the accused's forms of responsibility.⁷⁵ It also introduced pursuant to rule 68(3) an expert report relating to issues that were materially in dispute, important to the case and that were not corroborated.⁷⁶ Chambers have expressly encouraged the Parties to resort to this provision.⁷⁷

31. The Majority's approach is also consistent with the jurisprudence of the *ad hoc* tribunals. ICTY Trial Chambers have indicated that although the significance of the proffered evidence may be a factor militating against its admission of evidence under rule 92ter, the Chamber will only very exceptionally disallow a party from using rule 92ter on this ground.⁷⁸ Judges at the STL have interpreted rule 156 similarly.⁷⁹
32. Because of the foregoing, the Majority did not err in finding that the ten witnesses were of relative importance and to consider this factor in the application of rule 68(3).

b. No prejudice to the rights of the Accused

33. Blé Goudé argues that the Majority did not appropriately weigh the potential prejudice to him because he would need more time to examine the witnesses.⁸⁰

This argument is unsupported and speculative. Blé Goudé does not explain why

⁷³ ICC-01/04-02/06-961, paras. 10-12; ICC-01/04-02/06-988, paras. 11-15. Trial Chamber VI relied on a multiplicity of factors to reject the introduction under rule 68(3) of lengthy transcripts from *Lubanga* of two witnesses, such as that the evidence related to the accused's forms of responsibility and that time would not be saved because the Prosecution would still require extensive supplementary questioning and the Defence would need a more extensive cross-examination.

⁷⁴ See *Bemba et al.*: ICC-01/05-01/13-1478-Red-Corr, paras. 48-94; ICC-01/05-01/13-1641, para. 11; *Ntaganda*: ICC-01/04-02/06-845, paras. 6-10; ICC-01/04-02/06-T-110-CONF-ENG, p. 34 (Open session); ICC-01/04-02/06-T-106-CONF-ENG, p. 90, ln. 12 to p. 92, ln. 9 (Open session); ICC-01/04-02/06-T-105-CONF-ENG, p. 91, ln. 21 to p. 95 (Open session); ICC-01/04-02/06-T-99-CONF-ENG (Open session), pp. 61-63.

⁷⁵ ICC-01/05-01/13-1478-Red-Corr, paras. 48, 50-94.

⁷⁶ ICC-01/05-01/13-1641, paras. 7, 11.

⁷⁷ ICC-01/04-02/06-961, para. 13; ICC-01/04-02/06-988, para. 15.

⁷⁸ *Mladić* Decision on Harland's statement, para. 10; *Mladić* Decision on Witness RM-115, para. 8.

⁷⁹ *Akhbar Beirut* Decision on AP02 and AP14, para. 14.

⁸⁰ Blé Goudé's Appeal, para. 20.

he needs more time to examine the ten rule 68(3) witnesses than if the witnesses testify fully *viva voce*. Nor does he indicate how much more time he would need, in particular since the Majority would allow the Appellant “a reasonable amount of time to examine each witness”.⁸¹ As ICTY Chambers have noted, there is no such right as a cross-examination without limitation.⁸²

34. Further, there is no ambiguity as to the factors to be weighed when applying rule 68(3).⁸³ The provision is plain: rule 68(3) sets three mandatory requirements, and the chapeau of rule 68(1) requires that any introduction of prior recorded testimony pursuant this provision is not prejudicial to or inconsistent with the rights of the Accused. Apart from these limitations, any decision is fact-specific⁸⁴ and falls within the Chamber’s discretion.⁸⁵
35. Thus, the Majority did not err in concluding that the introduction of the ten statements pursuant to rule 68(3) would not be prejudicial to the rights of the Accused.

C. Blé Goudé’s Second Ground should be dismissed

36. The Majority correctly introduced the prior recorded testimony of Witness P-0590 pursuant to rule 68(2)(b).⁸⁶ In particular, the Majority did not err in its analysis of “sufficient indicia of reliability” under rule 68(2)(b)(i) by limiting it to the formal requirement that the statement has been taken by the Prosecution pursuant to rule 111 and under all applicable guarantees, including article 54(1).⁸⁷

⁸¹ Decision, para. 41.

⁸² *Mladić* Decision on Harland’s statement, para. 11.

⁸³ *Contra*, Blé Goudé’s Appeal, para. 21.

⁸⁴ *See above*, fn. 33.

⁸⁵ ICC-01/05-01/13-1478-Red-Corr, para. 50.

⁸⁶ Decision, paras. 19-23.

⁸⁷ *Contra*, Blé Goudé’s Appeal, paras. 27-37. *See above* fn. 14 on the nature of the error and standard of review. The same considerations apply.

37. First, Blé Goudé's Second Ground does not correctly represent the Decision and ignores the Majority's consideration of the content of Witness P-0590's statement when assessing its "sufficient indicia of reliability". Second, even if, *arguendo*, the Majority had failed to take into consideration the content of Witness P-0590's statement, it did not err, because it was not required to do so. Third, Blé Goudé fails to demonstrate how any error in assessing "sufficient indicia of reliability" of Witness P-0590's statement materially affected the Decision.

(i) *Blé Goudé's Second Ground does not correctly represent the Decision*

38. Contrary to Blé Goudé's contention,⁸⁸ the Majority's assessment of "sufficient indicia of reliability" of Witness P-0590's statement was not limited to the formal requirement that the statement had been taken by the Prosecution pursuant to rule 111 and under all applicable guarantees, including article 54(1). Instead, the Majority took this factor into consideration along with others that required it to consider the content of the statement. In particular, it held that Witness P-0590's evidence is "cumulative and corroborative"⁸⁹ and noted that Witness P-0590's statement included information as to how the witness came to know of particular facts.⁹⁰

39. The Majority thereby implicitly included in its assessment the factors identified in Judge Henderson's Dissenting Opinion, such as Witness P-0590's competence to testify accurately, his credibility and the statement's coherence with other available evidence.⁹¹ Because Blé Goudé's Second Ground misinterprets the Decision, it should be dismissed.

⁸⁸ Blé Goudé's Appeal, paras. 28, 32.

⁸⁹ Decision, para. 20.

⁹⁰ Decision, para. 22. In addition, the Trial Chamber held that the witness was informed about the procedure and the significance of providing a statement to the Prosecution.

⁹¹ Dissenting Opinion, para. 27.

- (ii) *The Majority was not required to assess the “sufficient indicia of reliability” of Witness P-0590’s statement on the basis of its content*
40. Even if, *arguendo*, the Majority failed to consider the content of the statement, this would not constitute an error, because it was not required to assess “sufficient indicia of reliability” on the basis of a statement’s content.⁹²
41. Trial Chamber V(A) in the *Ruto & Sang* case held that a Chamber, when assessing “indicia of reliability” for the purposes of rule 68, “can” (*i.e.* has discretion to) take into consideration factors that go beyond the circumstances in which the testimony arose, such as the absence of manifest inconsistencies, whether the evidence was cross-examined or whether it is corroborated by other evidence. It further clarified that these indicators are “non-exhaustive” and that none of them is “definite”, in the sense that “even where one or more of the indicia are absent the Chamber may still admit the material”.⁹³ According to Trial Chamber V(A), the absence of any such indicia, together with other relevant factors, can be taken into consideration when ultimately weighing the evidence.⁹⁴ Therefore, the mere introduction of a prior recorded statement without consideration of its content does not cause unfair prejudice.⁹⁵
42. The *Lubanga* decision referred to by Blé Goudé,⁹⁶ and the jurisprudence of other international tribunals,⁹⁷ are consistent with Trial Chamber V(A)’s decision in the *Ruto & Sang* case.
43. In addition, the report of the Working Group of Lessons Learnt—the body that drafted and proposed the current text of the amended rule 68—further confirms that submission of prior recorded testimony pursuant to rule 68(2)(b) is not

⁹² *Contra*, Blé Goudé’s Appeal, paras. 30-33.

⁹³ ICC-01/09-01/11-1938-Red-Corr, para. 65.

⁹⁴ *Ibid.*

⁹⁵ *Contra*, Blé Goudé’s Appeal, para. 33.

⁹⁶ Blé Goudé’s Appeal, paras. 30, 33, 36 (referring to ICC-01/04-01/06-1399-Corr). Trial Chamber I held that a Chamber has discretion to take various factors into consideration when assessing “indicia of reliability”, but emphasised that “there is no finite list of possible criteria that are to be applied, and a decision on a particular disputed piece of evidence will turn on the issues in the case”: ICC-01/04-01/06-1399-Corr, paras. 28-29.

⁹⁷ See *Popovic* Decision on Rule 92quater, para. 41; *Karadzic* Decision on Rule 92quater, paras. 12, 26-27; *Aleksovsi* Decision on Prosecutor’s Appeal on Admissibility, para. 15 (ICTY). See also SCSL *Taylor* Decision on witness TF1-021 and TF1-083, para. 17. See also STL *Ayyash* Decision on Admission of PRH082, PRH041 and PRH459, para. 9.

necessarily subject to any assessment of relevance or probative value of the testimony, which would necessarily arise in the content-based analysis proposed by Blé Goudé. The report states that “[t]he fifth factor, which calls for consideration of whether the prior recorded testimony ‘has sufficient indicia of reliability’, is without prejudice to the fact that judges of the Court have discretion to determine the probative value of evidence in accordance with article 69(4) of the Statute.”⁹⁸

44. Accordingly, to introduce the statement of Witness P-0590 pursuant to rule 68(2)(b), the Trial Chamber was not required to determine whether its *content* provides sufficient indicia of reliability.

(iii) *The alleged error under Blé Goudé’s Second Ground does not materially affect the Decision*

45. Blé Goudé fails to show that the outcome of the Decision would have been materially different had the Majority taken into account the content of Witness P-590’s statement. His arguments are speculative and factually unsupported.⁹⁹
46. First, as previously stated, this argument is hypothetical, because the Majority *did* consider the content of Witness P-590’s statement when assessing its “sufficient indicia of reliability”.
47. In any event, whether a prior recorded statement has “sufficient indicia of reliability” is one among five factors that a Chamber must “consider”, together with others, when deciding to introduce that statement pursuant to rule 68(2)(b).¹⁰⁰ However, a Chamber may introduce a statement even if some factors are not satisfied.¹⁰¹ As noted in the report of the Working Group of Lessons Learnt, “[t]he list of factors under rule 68(2)(b)(i) is not exhaustive and was

⁹⁸ ICC-ASP/12/37/Add.1, Annex II.A, p. 25, para. 22.

⁹⁹ Blé Goudé’s Appeal, para. 34.

¹⁰⁰ ICC-ASP/12/37/Add.1, Annex II.A, p. 24, para. 20.

¹⁰¹ *Contra*, Blé Goudé’s Appeal, para. 29.

developed to guide the Trial Chamber's exercise of its discretion under rule 68(2)(b)."¹⁰²

48. When introducing Witness P-0590's statement, the Majority held that four of the five factors under rule 68(2)(b) were satisfied,¹⁰³ while one was not met.¹⁰⁴ In this context, it is entirely speculative to assume that a change to the Majority's consideration of one of these four factors (sufficient indicia of reliability) would have materially affected the outcome of the Decision.
49. In addition, Blé Goudé's arguments regarding the impact of the alleged error on the Decision are predicated on a mischaracterisation of the Decision and of Witness P-0590's statement. First, the statement does not go to issues that are "central to the case".¹⁰⁵ The Chamber specifically held that Witness P-0590's statement is "is peripheral and of very limited significance".¹⁰⁶ Second, Blé Goudé incorrectly argues that the relevant portions of the statement are "anonymous hearsay".¹⁰⁷ Witness P-0590 identified the person who informed him of his brother's death¹⁰⁸ and he personally located his brother's body at the morgue and he saw the injuries on his body.¹⁰⁹ This evidence together with other evidence on the record constitutes circumstantial evidence on when, where and how Witness P-590's brother died. None of this evidence is anonymous hearsay.
50. For the reasons set out above, Blé Goudé's Second Ground should be dismissed.

¹⁰² ICC-ASP/12/37/Add.1, Annex II.A, p. 24, para. 22.

¹⁰³ Decision, paras. 19-22 (addressing the second, third, fourth and fifth factor under rule 68(2)(b)(i)).

¹⁰⁴ On the first factor, the Chamber noted that the events of 16 December 2010 are disputed: Decision, para. 20.

¹⁰⁵ *Contra*, Blé Goudé's Appeal, para. 35.

¹⁰⁶ Decision, para. 19.

¹⁰⁷ Blé Goudé's Appeal, para. 35.

¹⁰⁸ CIV-OTP-0084-0018, at 0024, para. 26.

¹⁰⁹ CIV-OTP-0084-0018, at 0024-0025, paras. 27-31.

Conclusion

51. For all the reasons above, the Appeals should be rejected.



Fatou Bensouda, Prosecutor

Dated this 1st day of August 2016

Word Count: 6,000¹¹⁰

At The Hague, The Netherlands

¹¹⁰ The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.