

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

No.: ICC-02/11-01/15  
Date: 16 September 2016

**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***

**Public Document**

**Redacted version of “Consolidated response to Mr Blé Goudé’s and Mr Gbagbo’s documents 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)” (ICC-02/11-01/15-573-Conf)”**

**Source:** Office of Public Counsel for Victims

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

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## I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)<sup>1</sup> submits that Mr Blé Goudé’s and Mr Gbagbo’s appeals against the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)” (the “Impugned Decision”)<sup>2</sup> must be dismissed.

2. The appeal does not show that Trial Chamber I (the “Chamber”) committed any error when issuing the Impugned Decision.

3. The Legal Representative submits that the Chamber did not err in law in posing “good trial management” as a guiding principle for the admission of the previously recorded statements of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588 and P-0589 under rule 68(3) of the Rules of Procedure and Evidence (the “Rules”). The Chamber rightly allowed the introduction of the prior recorded statements of said witnesses under rule 68(3) of the Rules after considering that the conditions for admission under said provision were met, and that the rights of the Defence were duly ensured.

4. Moreover, the Legal Representative contends that the Chamber did not err in law in finding that the prior recorded testimony of Witness P-0590 presents sufficient “indicia of reliability” for the purposes of rule 68(2)(b) of the Rules as a result of being taken by the Prosecution pursuant to rule 111 of the Rules and under all applicable guarantees. The Chamber expressly made reference to the content of the statement at hand. Moreover, the alleged error may not materially affect the

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<sup>1</sup> See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, p. 24.

<sup>2</sup> 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 “Impugned Decision”).

Impugned Decision because there is no absolute rule against anonymous hearsay or hearsay as such.

## II. Background

5. On 3 September 2015, the Chamber issued the directions on the conduct of the proceedings (the “Directions”),<sup>3</sup> concerning, *inter alia*, the admission into evidence of prior recorded testimony under rule 68 of the Rules.<sup>4</sup>

6. On 21 October 2015, the Chamber granted the Prosecution’s request to designate a person authorised to witness a declaration under rule 68(2)(b)(iii) of the Rules.<sup>5</sup>

7. On 19 April 2016, the Prosecution filed the “Prosecution application to conditionally admit the prior recorded statements and related documents of [REDACTED] under rule 68(2)(b) and the prior recorded statements and related documents of [REDACTED] under rule 68(3)” (the “Rule 68 Application”).<sup>6</sup>

8. On 28 April 2016, the Legal Representative filed her response to the Rule 68 Application.<sup>7</sup>

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

<sup>4</sup> *Idem*, paras. 54-57.

<sup>5</sup> See the “Decision on the Prosecution’s request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules” (Trial Chamber I), No. ICC-02/11-01/15-303, 21 October 2015.

<sup>6</sup> See the “Corrected version of Public redacted version of “Prosecution application to conditionally admit the prior recorded statements and related documents of [REDACTED] under rule 68(2)(b) and the prior recorded statements and related documents of [REDACTED] under rule 68(3)”, 19 April 2016, ICC-02/11-01/15-487-Conf, 26 April 2016, ICC-02/11-01/15-487-Red”, No. ICC-02/11-01/15-487-Red-Corr, 28 April 2016 (the “Rule 68 Application”).

<sup>7</sup> See the “Redacted Version of the “Response to the Prosecution’s application under rules 68(2)(b) and 68(3) of the Rules for the admission of prior recorded testimony of Witnesses [REDACTED] (ICC-02/11-01/15-487-Conf)”, 28 April 2016, ICC-02/11-01/15-491-Conf”, No. ICC-02/11-01/15-491-Red, 2 May 2016.

9. On 4 May 2016, the Chamber amended and supplemented the directions on the conduct of the proceedings (the “Amended Directions”),<sup>8</sup> including those on the admission into evidence of prior recorded testimony under rule 68 of the Rules.<sup>9</sup>

10. On 9 June 2016, the Chamber, by majority, issued the Impugned Decision,<sup>10</sup> granting the Rule 68 Application and thereby authorising the introduction of the prior recorded statement of Witness P-0590, on the condition that a declaration by the witness, as provided for in rule 68(2)(b) of the Rules is filed in the record of the case, and finding that the prior recorded testimonies of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588 and P-0589 were in principle suitable for introduction under rule 68(3).

11. On 15 June 2016, Mr Gbagbo sought leave to appeal the Impugned Decision pursuant to article 82(1)(d) of the Rome Statute (the “Gbagbo Request for Leave to Appeal”).<sup>11</sup>

12. On 16 June 2016, Mr Blé Goudé also sought leave to appeal the Impugned Decision pursuant to article 82(1)(d) of the Rome Statute (the “Blé Goudé Request for Leave to Appeal”, and, together with Mr Gbagbo’s request, the “Requests for Leave to Appeal”).<sup>12</sup>

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<sup>8</sup> See 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 “Amended Directions”).

<sup>9</sup> *Idem*, paras. 48-51.

<sup>10</sup> See the Impugned Decision, *supra* note 2.

<sup>11</sup> 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 for Leave to Appeal”).

<sup>12</sup> 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 (the “Blé Goudé Request for Leave to Appeal”).

13. On 8 July 2016, the Chamber, by majority, issued a decision on the Requests for Leave to Appeal (the “Leave to Appeal Decision”),<sup>13</sup> granting Mr Gbagbo leave to appeal the Decision in respect of the following issue: i) *“whether the Chamber erred in law in posing ‘good trial management’ as a guiding principle for the admission of prior statements”*.<sup>14</sup> The Chamber also granted Mr Blé Goudé leave to appeal the Decision in respect of the following two issues: i) *“whether the Chamber erred by failing to apply the requirement that prior recorded testimony admitted under Rule 68(3) must not be prejudicial to the accused, by ignoring the guidance provided by the Appeals Chamber in The Prosecutor v. Bemba, which guidance does not provide for the criterion of ‘good trial management’, and introduced by paragraph 25 of the Impugned Decision”*;<sup>15</sup> and ii) *“whether the Chamber erred by limiting its analysis of sufficient indicia of reliability to the formal requirement that the statement be taken by the Prosecution ‘pursuant to Rule 111 of the Rules and under all applicable guarantees, including article 54(1),’ and not expanding it to include other factors included in Judge Henderson’s dissent such as but not limited to: ‘the competence of the witness to testify about the facts... potential bias of the witness, his or her (in)sincerity, but also the possibility of honest mistake’”*.<sup>16</sup>

14. On 21 July 2016, Mr Blé Goudé and Mr Gbagbo filed their documents in support of the appeal against the Impugned Decision (the “Blé Goudé Document in Support of the Appeal” and the “Gbagbo Document in Support of the Appeal”, respectively).<sup>17</sup>

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<sup>13</sup> See 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))” (Trial Chamber I), No. ICC-02/11-01/15-612, 8 July 2016 (the “Leave to Appeal Decision”).

<sup>14</sup> *Idem*, paras. 10-15 and p. 11.

<sup>15</sup> *Ibidem*.

<sup>16</sup> *Ibid.*, paras. 23-24 and pp. 11-12.

<sup>17</sup> See the “Public Redacted Version of “Defence appeal against the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3))” 21 July 2016, ICC-02/11-01/15-632-Conf”, No. ICC-02/11-01/15-632-Red OA8, 15 September 2016 (the “Blé Goudé Document in Support of the Appeal”); and the “Document à l’appui de l’appel de la « Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and (68(3)) » rendue le 9 juin 2016 par la Chambre de première instance I (ICC-02/11-01/15-573-Conf)”, No. ICC-02/11-01/15-633 OA8, 21 July 2016 (the “Gbagbo Document in Support of the Appeal”).

15. Pursuant to regulation 65(5) of the Regulations of the Court,<sup>18</sup> the Legal Representative files a consolidated response to the Documents in Support of the Appeal.

### III. Confidentiality

16. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is filed confidentially because it makes reference to submissions filed under the same classification. A public redacted version will be filed in due course.

### IV. Submissions

17. As a preliminary remark, the Legal Representative notes that the Gbagbo Document in Support of the Appeal includes submissions based on the argument that the “*system of evidence*” used in the Impugned Decision is “[u]n critère de mise en œuvre de la notion de «good trial management»”.<sup>19</sup> However, the Majority did not grant leave to appeal the issue of “[w]hether the Chamber erred in law in introducing a notion of ‘system of evidence’”.<sup>20</sup> In fact, the Defence of Mr Gbagbo relies on the Dissenting Opinion of Judge Henderson, who would have granted leave to appeal also on the “system of evidence” issue.<sup>21</sup>

18. Accordingly, the Legal Representative requests the dismissal *in limine* of the “*deuxième moyen d’appel*” submitted by the Defence of Mr Gbagbo and devoted entirely to the “system of evidence” issue.<sup>22</sup> To hold otherwise would render nugatory

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<sup>18</sup> See the “Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)” (Appeals Chamber), No. ICC-02/11-01/15-172 OA6, 31 July 2015, paras. 16 and 19.

<sup>19</sup> See the Gbagbo Document in Support of the Appeal, *supra* note 17, section 2.2.

<sup>20</sup> See the Leave to Appeal Decision, *supra* note 13, paras. 2(iii) and 18-20.

<sup>21</sup> See the Gbagbo Document in Support of the Appeal, *supra* note 17, para. 39.

<sup>22</sup> *Idem*, paras. 50-57.

the limiting power granted to the Chamber *a quo* by article 82(1)(d) of the Rome Statute.

1. **The Chamber did not err in law in posing “good trial management” as a guiding principle for the admission of the previously recorded statements of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588 and P-0589 under rule 68(3)**

19. The Defence argues that the Chamber erred in law because it determined that “[p]rior recorded statements and associated annexes could be introduced under Rule 68(3) on the basis of one criterion, namely ‘good trial management’ [...] this criterion would be applied on a case-by-case basis and would involve considering factors such as, but not limited to ‘the importance of the evidence for the case, and the volume and detail of the evidence’”.<sup>23</sup>

20. The Legal Representative opposes this ground of appeal because the challenged finding in the Impugned Decision is not misdirected on a question of law.<sup>24</sup> The Chamber rightly allowed the introduction of the prior recorded statements of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588 and P-0589 under rule 68(3) of the Rules after considering (a) whether the conditions for admission under said provision were met, and (b) whether the rights of the Defence were duly ensured.

- a) *The Chamber considered and gave proper weight to all relevant and necessary factors under rule 68(3)*

<sup>23</sup> See the Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 14.

<sup>24</sup> See the “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’” (Appeals Chamber), No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20; and the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (Appeals Chamber), No. ICC-02/04-01/15-251 OA3, 17 June 2015, para. 30.

21. As noted by the Defence,<sup>25</sup> the Majority reasoned that the “good trial management” criterion would be “[a]ppplied 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”.<sup>26</sup>

22. However, contrary to the Defence’s contention,<sup>27</sup> in applying the abovementioned criterion, the Majority did consider the guidance provided by the Appeals Chamber with respect to rule 68(3) applications, namely whether the *content* of the evidence at hand (i) relates to issues that are not materially in dispute, (ii) is not central to core issues in the case, but only provides relevant background information, and (iii) is corroborative of other evidence.<sup>28</sup> It must be noted that the Appeals Chamber listed these three factors not as legal requirements, but as examples of factors to be taken into account in order to “[e]nsure that doing so [receiving prior recorded testimony under rule 68] is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally”.<sup>29</sup> Indeed, while referring to the “cautious assessment” of factors to be taken into account, the Appeal Chamber also made reference to the *Katanga* case -<sup>30</sup> in which the Chamber stated that it “will assess the **relative importance** of the statement and determine whether it is more appropriate to hear the testimony directly from the witness”.<sup>31</sup>

<sup>25</sup> See the Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 14.

<sup>26</sup> See the Impugned Decision, *supra* note 2, para. 25.

<sup>27</sup> See the Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 17; and the Gbagbo Document in Support of the Appeal, *supra* note 17, paras. 31 and 36.

<sup>28</sup> See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 78.

<sup>29</sup> *Idem*. See also the Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 15. *Contra* the Gbagbo Document in Support of the Appeal, *supra* note 17, para. 34.

<sup>30</sup> See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’”, *supra* note 28, para. 78.

<sup>31</sup> See the “Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219” (Trial Chamber II), No. ICC-01/04-01/07-2362, 03 September 2010, para. 19 (Emphasis added).

23. In the case at hand, regarding the previously recorded statements of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P0555, P-0573, P-0587, P-0588 and P-0589, the Chamber specifically analyzed their content<sup>32</sup> and found that while they relate to facts which are central to the case and thus materially in dispute – *i.e.* the events of 16 December 2010 as well as some limited reference to the women march on 3 March 2011 – they only provide the personal perspective of those witnesses and as such, information that is of a relative significance on these facts.<sup>33</sup> Indeed, the Chamber found that “*none of them have insider or other quality knowledge of the planning and overall conduct of the FDS operation during the events*”.<sup>34</sup> Accordingly, the Chamber concluded that the ten statements are corroborative of other and more important evidence that has been and is expected to be presented to the Chamber.<sup>35</sup>

24. In these circumstances, the Legal Representative cannot agree neither with the contention by the Defence of Mr Blé Goudé that the Majority “[e]rrred when it gave considerable weight to factors relating to the source of the witness statement, while not considering the three factors relating to the (material) content of the statements”,<sup>36</sup> nor with the conclusion by the Defence of Mr Gbagbo that the Chamber “[a] substitué un critère bureaucratique aux critères juridiques dans le but de n’avoir pas à appliquer ces critères, donc de subvertir la logique du Statut et de la jurisprudence”.<sup>37</sup>

25. The Legal Representative understands the “criterion of good trial management”, introduced by the Chamber as a “*preliminary remark*”,<sup>38</sup> as a wide criterion, including not only the abovementioned formal and material factors, but also any other “[c]onsiderations of expeditiousness and streamlining the presentation of evidence [...] to ensure that the trial unfolds in a focused and expeditious manner, while

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<sup>32</sup> See the Impugned Decision, *supra* note 2, paras. 16-18 and 30-37.

<sup>33</sup> *Idem.*, para. 38.

<sup>34</sup> *Ibidem.*

<sup>35</sup> *Ibid.*

<sup>36</sup> See the Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 18.

<sup>37</sup> See the Gbagbo Document in Support of the Appeal, *supra* note 17, para. 31.

<sup>38</sup> See the Impugned Decision, *supra* note 2, para. 26.

respecting the procedural rights of the parties and participants”.<sup>39</sup> Consequently, as reiterated by the Chamber,<sup>40</sup> this criterion cannot be said to conflict with the rights of the Defence or to be inconsistent with the letter or purpose of the legal instruments of the Court.<sup>41</sup>

*b) The Chamber did not abuse its discretion under rule 68(3) of the Rules*

26. The Defence contends that the Impugned Decision “[d]id not appropriately weigh this criterion [good trial management] against the potential prejudice to Mr. Blé Goudé”<sup>42</sup> because “[t]he Majority’s reliance on the right for the Defence to have adequate time to examine Rule 68(3) witnesses is not sufficient to protect Mr. Blé Goudé’s statutory rights” from the alleged error of law discussed *supra* in applying rule 68(3) of the Rules.<sup>43</sup>

27. The Legal Representative opposes this contention because the Chamber expressly indicated that “[t]he Defence teams will not be constrained to the amount of time used by the Prosecutor for the supplementary examination, and will be granted a reasonable amount of time to examine each witness”.<sup>44</sup> The Chamber subsequently reiterated that “[t]he opportunity of the Defence teams to examine the witnesses has been fully preserved”.<sup>45</sup> In these circumstances, the Impugned Decision does not require correction by the Appeals Chamber.<sup>46</sup>

28. The mere statement by the Defence that “[i]t envisages needing more time to examine the witnesses”<sup>47</sup> as a consequence of the Impugned Decision cannot suffice to

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<sup>39</sup> *Idem*, para. 25.

<sup>40</sup> See the Leave to Appeal Decision, *supra* note 13, para. 11.

<sup>41</sup> *Contra* the Gbagbo Document in Support of the Appeal, *supra* note 17, paras. 42 and 46-48.

<sup>42</sup> See the Impugned Decision, *supra* note 2, para. 20.

<sup>43</sup> *Idem*, para. 18.

<sup>44</sup> *Ibidem*, para. 20.

<sup>45</sup> See the Leave to Appeal Decision, *supra* note 13, para. 13.

<sup>46</sup> See No. ICC-01/09-02/11-1032, para. 22.

<sup>47</sup> See the Impugned Decision, *supra* note 2, para. 20.

sustain an alleged abuse of discretion by the Chamber. Indeed, the Impugned Decision does not prevent the Defence from requesting an extension of time to question the witnesses appearing under rule 68(3) of the Rules if eventually deemed necessary in order to “[m]eet its obligation to defend Mr. Blé Goudé”.<sup>48</sup>

29. In this regard, the Legal Representative notes that [REDACTED].<sup>49</sup>

30. Lastly, the Defence’s argument that the Chamber abused its discretion in the Impugned Decision in failing to apply the *in dubio pro reo* principle must equally be dismissed,<sup>50</sup> as the Defence does not identify any doubt that may be amenable to the application of this principle. Moreover, rule 68(3) grants the parties, participants and the Chamber the opportunity to test the evidence at hand and dispel any relevant ambiguity in the prior recorded statements that may be prejudicial to the accused.

**2. The Chamber did not err in law in finding that the prior recorded testimony of Witness P-0590 presents sufficient “indicia of reliability” for the purposes of rule 68(2)(b) of the Rules as a result of being taken by the Prosecution pursuant to rule 111 of the Rules and under all applicable guarantees**

31. The Defence contends that the Chamber made an error of law by “[a]pplying only a formalistic interpretation to the indicia of reliability criteria in complete disregard to the indicia relating to the content of the witness statement” when it allowed the introduction of the statement of Witness P-0590 under rule 68(2)(b) of the Rules.<sup>51</sup>

32. As noted by the Defence, the Impugned Decision does not elaborate on the Chamber’s understanding of “indicia of reliability”, unlike the practice of other

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<sup>48</sup> *Idem*, para. 19.

<sup>49</sup> See [REDACTED].

<sup>50</sup> See the Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 21.

<sup>51</sup> See the Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 28.

Chambers in different circumstances.<sup>52</sup> However, the Chamber's silence in this regard cannot be read as the ignorance of said indicia (*iura novit curia*).

33. Moreover, without discussing whether the Chamber is obliged or not to consider the content of the statement at hand in order to determine whether it has sufficient "indicia of reliability" as required by rule 68(2)(b)(i),<sup>53</sup> the Legal Representative submits that the Impugned Decision expressly makes reference to said content when indicating that the "[t]he statement [of Witness P-0590] also includes information as to how the witness came to know of particular facts".<sup>54</sup> This statement is presented by the Chamber as a conclusion to the analysis of the content of the statement made in the preceding paragraphs of the Impugned Decision.<sup>55</sup>

34. In these circumstances, the Legal Representative submits that the reference in the Impugned Decision to the fact that the statement of Witness P-0590 "[w]as 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"<sup>56</sup> cannot reasonably be understood to mean that "the Majority restricted itself to only address the formal requirement"<sup>57</sup> when determining the reliability of the statement.

35. Furthermore, the Legal Representative argues that the Defence wrongly contends that the alleged error materially affects the Impugned Decision because "[h]ad the Chamber taken into account the content of the testimony of Witness P-0590, it would not have found it to have sufficient indicia of reliability and therefore would not have allowed its introduction under Rule 68(2)(b)".<sup>58</sup> In particular, the Defence opposes that Witness P-0590's statement does not have sufficient indicia of reliability because this

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<sup>52</sup> *Idem*, para. 30.

<sup>53</sup> See the Leave to Appeal Decision, *supra* note 13, para. 24.

<sup>54</sup> See the Impugned Decision, *supra* note 2, para. 22 (emphasis added).

<sup>55</sup> *Idem*, paras. 19-21.

<sup>56</sup> *Ibidem*, para. 22.

<sup>57</sup> *Contra* Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 32 (emphasis added).

<sup>58</sup> See the Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 34.

witness was “removed” from the crime scene and provides “anonymous hearsay” evidence.<sup>59</sup>

36. In this regard, the Chamber has already found that “[t]he Defence [...] incorrectly assume[s] that there exists an exclusionary and absolute rule against any evidence provided by a witness other than what the witness saw or heard, against speculation and opinion evidence, or against anonymous hearsay or hearsay as such. However, apart from Article 69(7) of the Statute, such an exclusionary (not absolute) provision does not exist”.<sup>60</sup>

37. Lastly, the Legal Representative notes that the content of the Defence’s submissions in this regard are very close to an issue for which the Chamber did not grant leave to appeal, namely “[w]hether the Chamber erred in allowing the submission of the Rule 68 statements that include opinion evidence and speculative evidence, including anonymous hearsay, which contravenes paragraph 23 of the amended Directions on the Conduct of Proceedings, and impermissibly contravenes Article 66(2) of the Statute”.<sup>61</sup> In fact, the Defence does not allege that the statement at hand is not voluntary, truthful or trustworthy.<sup>62</sup> Accordingly, a thorough analysis of the Defence’s arguments on the material impact of this alleged error goes beyond the scope of the Leave to Appeal Decision.

## V. Conclusion

38. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to dismiss the appeals.

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<sup>59</sup> *Idem*, paras. 36-37.

<sup>60</sup> See the Leave to Appeal Decision, *supra* note 13, para. 17. See also No. ICC-01/04-01/06-1399-Corr, 20 January 2011, para. 28.

<sup>61</sup> See the Leave to Appeal Decision, *supra* note 13, paras. 3(i) and 16.

<sup>62</sup> See the Blé Goudé Document in Support of the Appeal, *supra* note 17, para. 30.

It is hereby certified that this document contains a total of 4,313 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.<sup>63</sup>

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 16<sup>th</sup> day of September 2016

At The Hague, The Netherlands

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<sup>63</sup> This statement (30 words), not itself included in the word count, follows the Appeals Chamber's direction. See No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32. The Legal Representative notes that the Defence did not include a similar statement in their respective Documents in Support of the Appeal.