

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/11-01/15
Date: **30 September 2016**

TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Public redacted version of "Prosecution's response to Mr Gbagbo's request for leave to appeal the decision receiving written evidence of P-0414, P-0428, P-0501, P-0549, P-0550 (ICC-02/11-01/15-635-Conf)", 29 July 2016, ICC-02/11-01/15-639-Conf

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Eric MacDonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. Mr Gbagbo's request for leave to appeal¹ the Trial Chamber's decision receiving the written evidence of five witnesses² should be denied.

2. In the Decision, the Chamber determined that it would: receive, conditionally, the statement of Witness P-0428 under rule 68(2)(b) of the Rules of Procedure and Evidence;³ receive, conditionally, the statements of Witnesses P-0414 and P-0501 under rule 68(3),⁴ and; receive certain documentary evidence (including 360-degree presentations made by Witnesses P-0549 and P-0550, explanatory reports, and affirmations of truth) under paragraph 43 of the Directions on the Conduct of Proceedings.⁵

3. It is apparent from the Motion that the Gbagbo Defence not only disagrees with the Decision, but, more generally, disagrees with rule 68 itself.⁶ It confuses the need for due caution with the mistaken belief that rule 68 can rarely, if ever, be legally applied.⁷ It deprecates those who do not share this view as misunderstanding the nature of the judicial process⁸—and thus in turn premises many of its arguments on a misconception of the fundamental laws applied by this Court.

4. Conversely, even though the Motion devotes considerable argument to rule 68, the issues proposed for certification mostly do not relate to the legal interpretation of rule 68 at all. Instead, they turn on discrete factual issues, or the interpretation of the Chamber's own Directions on the Conduct of Proceedings. The

¹ ICC-02/11-01/15-635-Conf ("Motion").

² ICC-02/11-01/15-629-Conf ("Decision").

³ See Decision, paras. 5-15.

⁴ See Decision, paras. 16-34.

⁵ See Decision, paras. 35-40. See also ICC-02/11-01/15-498-AnxA ("Directions on the Conduct of Proceedings").

⁶ See e.g. Motion, para. 11 (arguing without substantiation that rule 68(3) may only be used "exceptional[ly]"). But see Statute, art. 69(2) ("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. The Court may also permit [...] the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused"). See also ICC-02/11-01/15-612 ("Rule 68 Certification Decision"), para. 20.

⁷ On due caution, see ICC-01/05-01/08-1386 OA5 OA6 ("*Bemba* Appeal Decision"), paras. 77-78, 81.

⁸ Motion, para. 8.

Motion fails to bridge the gap between the discrete issues proposed for appeal and the generalised arguments it advances for their impact on the proceedings.

Confidentiality

5. Consistent with regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially to reflect the classification of the Motion and the Decision.⁹

Submissions

6. Interlocutory appeals are “exceptional”,¹⁰ and should not be a device “to express mere disagreement with any of the Chamber[’s] decisions”.¹¹ None of the proposed issues may be certified for appeal since, impermissibly, they do just that. They are not ‘appealable’ issues. Nor in any event do they meet the criteria of article 82(1)(d) of the Rome Statute, necessary to justify appellate intervention in an ongoing trial.

The issues proposed for certification are not ‘appealable’ or do not arise from the Decision

7. The Motion presents six issues for certification:

- First Issue: whether the Chamber committed an error of fact in determining that “the statement of Witness P-0428 is peripheral and does not immediately relate to any fact of the charges”.¹²
- Second Issue: whether the Chamber committed an error of fact in determining that “it is not evident how [P-0428] would be able to provide evidence beyond the scope of the written statement”.¹³

⁹ See Motion, para. 1.

¹⁰ See e.g. ICC-02/05-03/09-109, para. 2; ICC-02/04-01/15-428, para. 4.

¹¹ See e.g. ICC-01/12-01/15-T-1-ENG, p. 12 (lns. 11-12); ICC-01/05-01/13-T-10-Red-ENG, p. 11 (lns. 4-8).

¹² See Motion, paras. 15-19 (under the sub-title: “*La Chambre a commis une erreur de fait en estimant que « the statement of Witness P-0428 is peripheral and does not immediately relate to any fact of the charges »*”).

- Third Issue: whether the Chamber committed an error of fact in determining that “[t]here is no reason to suspect [P-0428] of bias against either of the accused simply for [REDACTED]”.¹⁴
- Fourth Issue: whether the Chamber committed an error of law in admitting the statements of P-0501 and P-0414 under rule 68(3).¹⁵
- Fifth Issue: whether the Chamber erred in permitting the admission of materials emanating from staff of the Office of the Prosecutor (P-0549 and P-0550) without requiring them to attend as witnesses.¹⁶
- Sixth Issue: whether the Chamber erred in law by proceeding, with regard to non-testimonial documents received in the Decision, on the basis of paragraph 47 of the Directions on the Conduct of Proceedings.¹⁷

8. None of these issues is an ‘appealable’ issue, defined as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹⁸ Such topics must be “essential for the determination of matters arising in the judicial cause under examination.”¹⁹ They must genuinely arise from the impugned decision.²⁰ Issues which fail some or all of these requirements may not be certified for appeal.

The First Issue

¹³ See Motion, paras. 20-26 (under the sub-title: “*La Chambre a commis une erreur de fait en estimant que « it is not evident how the witness would be able to provide evidence beyond the scope of the written statement »*”).

¹⁴ See Motion, paras. 27-30 (under the sub-title: “*La Chambre a commis une erreur de fait en estimant que « There is no reason to suspect the witness of bias against either of the accused simply [REDACTED] »*”).

¹⁵ See Motion, paras. 31-38 (under the sub-title: “*La Chambre a commis une erreur de droit en admettant au dossier les déclarations de P-0501 et P-0414 sous la Règle 68(3)*”).

¹⁶ See Motion, paras. 39-43 (under the sub-title: “*La Chambre a erré en permettant l’admission d’éléments émanant de membres du Bureau du Procureur tout en refusant leur venue en tant que témoins*”).

¹⁷ See Motion, paras. 44-52 (“*La Chambre a erré en droit en procédant de manière prématurée et illégale à une notification sur la base du paragraphe 47 de la décision sur la conduite des débats*”).

¹⁸ See e.g. ICC-01/04-168 (“DRC Appeal Decision”), para. 9.

¹⁹ See e.g. DRC Appeal Decision, para. 9.

²⁰ See e.g. ICC-01/05-01/13-1278, paras. 9-10

9. The First Issue questions the Chamber's conclusion that P-0428's statement is relevant merely because it provides "certain information which may serve to explain the provenance of other evidence which the Prosecutor intends to submit."²¹ In this sense, the Chamber found, P-0428's statement is "peripheral" and "does not immediately relate to any fact of the charges." This consideration in turn was relevant to its assessment under rules 68(2)(b) and 68(2)(b)(i) whether, *inter alia*, the statement related to the "acts and conduct" of the accused, or to issues which were materially in dispute, or merely to "background information".

10. The Gbagbo Defence suggests that the Chamber's reasoning rested on a "misunderstanding" of the charges,²² which may be proven by means including showing "*incitations à la haine*". Yet this fact was quite clearly known to the Chamber, and reflected in its Decision.²³ The Defence further asserts that P-0428's statement "speaks" of or "touches upon this question"²⁴—but such an indirect link is not inconsistent with the Chamber's view that the statement does not "*immediately*" relate to the charges. Moreover, the Gbagbo Defence alleges no error in the factors considered by the Chamber in concluding that the link with the charges was "peripheral"—specifically, the absence of any reference "to any specific [REDACTED] instance of incitement to violence or hate speech, nor to any individual person or organisation", or any qualification of "news items as incitements to hatred".²⁵

11. In this context, the identity of P-0428's [REDACTED] likewise discloses no possible basis for the First Issue to arise from the Decision.²⁶ If the Gbagbo Defence

²¹ Decision, para. 11. *See also* paras. 6-10 (P-0428's statement describes the [REDACTED] and "does not refer to any specific [REDACTED] instance of incitement to violence or hate speech, nor to any individual person or organisation [...] Moreover, it is not true that the witness qualifies news items as incitement to hatred"), 13.

²² Motion, para. 16.

²³ *See especially* Decision, para. 8 ("The Defence of Laurent Gbagbo emphasises that the written statement of Witness P-0428 relates to contested facts, as the allegation of use of hate speech is at the core of the charges and of the alleged common plan").

²⁴ Motion, para. 17.

²⁵ Decision, para. 10.

²⁶ *Contra* Motion, para. 18.

wishes to explore “broader issues related to the [REDACTED]²⁷ it can do that by calling suitable witnesses in the defence case. Rule 68 gives no credence to mere speculation about what a witness might say on topics *beyond* the content of the prior recorded testimony presented to the Chamber.²⁸

12. For all these reasons, since the First Issue simply disagrees with the Decision, and does not genuinely arise from it, it cannot be certified for appeal.

The Second Issue

13. The Chamber recalled that the Gbagbo Defence had opposed the reception of P-0428’s statement under rule 68(2)(b) because, among other factors:

Witness P-0428 [REDACTED] and therefore [...] it is “*fondamental que la Défense puisse exercer son droit d’interroger le témoin non seulement sur les points abordés dans sa déclaration, mais également sur toute question utile qui pourrait éclairer plus généralement la Chambre sur [REDACTED]*.”²⁹

14. Nothing in P-0428’s statement—which relates exclusively [REDACTED]³⁰—suggests that [REDACTED] is in a position to provide informed testimony on the [REDACTED] raised by the Gbagbo Defence.³¹ Accordingly, P-0428’s evidence on the additional topics proposed by the Gbagbo Defence would be no more than impermissible speculation. Conversely, whereas P-0428 manifestly *is* equipped to provide further explanation, if required, of the specific topics addressed in [REDACTED] statement, it is implicit in the Chamber’s reasoning that it saw no need for any such further explanation in this respect.

²⁷ Decision, para. 12.

²⁸ See also below paras. 15-16.

²⁹ Decision, para. 8 (underlining added).

³⁰ Decision, para. 9. See also above fn. 21.

³¹ This was the term used by the Chamber: see e.g. Decision, para. 12.

15. The Gbagbo Defence criticises the Chamber's conclusion as difficult to comprehend.³² Yet its criticisms depend on a strained and unfeasible interpretation of the Decision,³³ and the Chamber's prior directions,³⁴ or a mere semantic quibble with the Chamber's wording.³⁵ The examples it cites of how P-0428 might usefully testify beyond the scope of [REDACTED] statement are, in fact, mere clarifications of the *contents* of [REDACTED] statement or, otherwise, merely underline why the Chamber considered exploring such avenues with this witness to be speculative.³⁶ Accordingly, the Second Issue does not genuinely arise from the Decision, and represents no more than a disagreement with its outcome.

16. In any event, there is nothing prejudicial in the Chamber's evaluation of the scope of P-0428's knowledge. Rather, the Gbagbo Defence continues to be entitled, when presenting its own case, to call suitable witnesses to testify on those matters it considers relevant.³⁷ The Chamber's direction on the scope of examination by the non-calling Party was never intended to supplant the need for the non-calling Party to call its own witnesses at a suitable time.

The Third Issue

³² See Motion, para. 26.

³³ The Gbagbo Defence theorises that relying on a written statement to determine the scope of a witness' knowledge could create an inequality of arms since the statement will be focused upon the case theory of the Party that took the statement—but omits to note that the relevant questions in this case (P-0428's [REDACTED]) are in fact entirely clear from the statement: *contra* Motion, para. 22; *see above* para. 14.

³⁴ The Gbagbo Defence is incorrect to suggest that the Chamber's own directions would be inconsistent with its approach in the Decision. Although the Gbagbo Defence relies upon paragraph 30 of the Directions on the Conduct of Proceedings (permitting the non-calling Party to ask questions beyond the scope of the questions posed by the calling Party), it fails to refer to paragraph 23 (requiring the Parties to refrain from asking the witness to speculate or to provide opinion evidence). See Motion, para. 21 (“*la partie non-appelante puisse interroger un témoin sur des sujets qui n’ont pas été abordés lors de l’interrogatoire par la partie appelante et donc a fortiori sur des sujets qui n’avaient pas été abordés dans la déclaration antérieure du témoin*”).

³⁵ Motion, para. 23 (questioning the meaning of the Chamber's phrasing that “it is not evident” that P-0428 could provide evidence beyond the scope of her statement). Manifestly, the Chamber's usage did not reflect a legal standard, but merely the reasonable factual conclusion that nothing in the statement suggested relevant knowledge beyond the matters addressed.

³⁶ *Contra* Motion, paras. 24-25.

³⁷ See *above* para. 11.

17. The Third Issue alleges that the Chamber erred in fact in concluding that “[t]here is no reason” to suspect P-0428 of bias [REDACTED].³⁸ However, this allegation appears to be based on fundamental misunderstandings of the Decision and P-0428’s statement and hence the Third Issue does not arise from the Decision. Indeed, contrary to the implication of the Motion, nothing in the Decision expresses a view concerning [REDACTED].³⁹ Rather, the Decision simply declines to attribute bias to P-0428 solely on the basis [REDACTED]. The Gbagbo Defence does not explain the basis for its view that an error of fact arose in this context.⁴⁰ To the extent the Gbagbo Defence appears to imply that P-0428 [REDACTED].⁴¹

The Fourth Issue

18. The Fourth Issue is presented vaguely, alleging an unspecified error of law in the application of rule 68(3) in admitting the statements of P-0501 and P-0414. Of itself, this may not meet the requirement for an appealable issue to be an “identifiable” subject or topic, requiring a decision for its resolution. Instead, it merely challenges the conclusion reached by the Chamber on the basis of the rule applied.

19. Yet, in any event, the Fourth Issue as further explained in the Motion ultimately discloses two narrower—and discrete—sub-issues:

- whether the Chamber erred in considering the ‘importance’ of the evidence of P-0501 and P-0414 as part of its rule 68(3) assessment;⁴² and
- whether the Chamber erred in taking into account the opportunity for cross-examination as part of its rule 68(3) assessment.⁴³

³⁸ Decision, para. 13.

³⁹ *Contra* Motion, para. 28 ([REDACTED]).

⁴⁰ *Contra* Motion, para. 29 ([REDACTED]).

⁴¹ *Contra* Motion, para. 29, fn. 16 (citing CIV-OTP-0061-0144-R01, para. 41).

⁴² Motion, paras. 35-37.

⁴³ Motion, para. 38.

20. These sub-issues in turn constitute mere disagreements from the Decision, which do not constitute appealable issues and, in any event, do not genuinely arise from the Decision.

21. The first of these sub-issues assumes that the Decision repeats the approach of the Chamber's prior decision applying rule 68.⁴⁴ The Chamber has recently certified for appeal two issues associated with its interpretation of rule 68 in that former decision⁴⁵—but denied, by majority, a third issue challenging “the validity of the Chamber's consideration of the relative importance of the prior recorded testimony in the system of evidence expected to be presented”.⁴⁶ The Gbagbo Defence now repeats a substantially similar argument, stressing the impossibility of assessing the importance of witness testimony *ex ante*.⁴⁷ For the same reasons as before, however, it should again be denied:

The Defence contests the ability of the Chamber to distinguish between witnesses, and the appropriateness of such an exercise, arguing that ‘a witness is a witness’. It appears that the Defence purports to challenge the mere existence of discretion of the Trial Chamber to decide whether to introduce prior recorded testimony under Rule 68(3) of the Rules. Moreover, the logical end of the argument of the Defence that the Chamber could not have

⁴⁴ Motion, para. 35 (“la Chambre procède à une analyse de l’importance du contenu des deux déclarations, procédant, sans le dire explicitement, de la même manière que dans sa première décision sur l’admission de déclarations antérieures, c’est-à-dire en hiérarchisant l’importance des informations fournies par les témoins”).

⁴⁵ See Motion, para. 3; Rule 68 Certification Decision, paras. 15, 24. The issues certified for appeal are: 1.) whether the Chamber erred in law in its consideration of “good trial management” in considering the admission of prior statements (formulated slightly differently by the Gbagbo and Blé Goudé Defences); 2.) “whether the Chamber erred by limiting its analysis of sufficient indicia of reliability to the formal requirement that the statement be taken by the Prosecution ‘pursuant to Rule 111 of the Rules and under all applicable guarantees, including article 54(1),’ and not expanding it to include other factors included in Judge Henderson’s dissent such as but not limited to: ‘the competence of the witness to testify about the facts... potential bias of the witness, his or her (in)sincerity, but also the possibility of honest mistake’”. See also ICC-02/11-01/15-632-Conf OA8 (“Blé Goudé Appeal”); ICC-02/11-01/15-633-Conf OA8 (“Gbagbo Appeal”); ICC-02/11-01/15-637-Conf OA8 (“OPCV Response”).

⁴⁶ Rule 68 Certification Decision, para. 18.

⁴⁷ See e.g. Motion, para. 36 (“non seulement cette hiérarchisation entre témoins n’a pas de fondement juridique dans le Statut, le Règlement de procédure et de preuve ou la jurisprudence, mais sa mise en œuvre semble impliquer une évaluation de la Chambre de l’importance relative d’un témoin qu’il est impossible logiquement de mettre en œuvre, puisqu’un témoin est un témoin, et qu’il est impossible pratiquement de mettre en œuvre puisqu’une telle évaluation par définition ne peut être faite qu’à l’issue du procès lorsque les Juges ont connaissance non seulement de l’ensemble de la preuve du Procureur, mais également de l’ensemble de la preuve de la Défense”).

introduced the prior recorded testimony of certain witnesses because they were relatively less important in the system of evidence expected to be presented would render Rule 68(3) of the Rules inapplicable.

As such, the issue raised by the Defence is not only a disagreement with the Decision, but also a general disagreement with Rule 68(3) of the Rules. Such disagreement cannot, however, be resolved on appeal. Accordingly, the issue identified does not qualify as appealable under Article 82(1)(d) of the Statute.⁴⁸

22. Furthermore, the Gbagbo Defence's premise that the Decision is materially identical to the former decision is incorrect. In particular, the Chamber—ruling unanimously in the case of P-0501, and by majority in the case of P-0414 (but with Judge Henderson reasoning separately on a different point)⁴⁹—determined that, although the tendered statements could be “*linked* to an issue of importance for the Prosecutor's case”,⁵⁰ the evidence is “limited” (P-0501)⁵¹ or “mostly for purposes of [REDACTED]” (P-0414).⁵² Unlike before, at no point in this analysis does the Decision refer to the “system of evidence” or “the relative significance of the *source* of the evidence”.⁵³ In this context, the objections raised by the Gbagbo Defence are revealed, even more clearly, to be a disagreement with the basic functioning of rule 68(3), which necessarily entails some preliminary assessment of the scope of the evidence in the context of the issues in the case.⁵⁴

23. For all these reasons, the first sub-issue of the Fourth Issue constitutes a mere disagreement with the Decision, and does not arise from it. The Prosecution notes in this context that, unlike the other issues presented for appeal, the Gbagbo

⁴⁸ Rule 68 Certification Decision, paras. 19-20.

⁴⁹ See ICC-02/11-01/15-629-Conf-Anx, paras. 1, 3-6 (partially dissenting opinion of Judge Henderson).

⁵⁰ Decision, para. 26 (emphasis added).

⁵¹ Decision, para. 23 (continuing: “Besides explaining [REDACTED], Witness P-0501 provides names of [REDACTED]. His statement, however, contains no information on the reasons for [REDACTED], nor any content of [REDACTED]”).

⁵² Decision, para. 24.

⁵³ See ICC-02/11-01/15-612-Anx, para. 9 (emphasis supplied). The Prosecution notes that, in paragraph 25 of the Decision, the Chamber refers to the “relative importance of the witnesses”, but in the broader context of the Chamber's reasoning it seems apparent that this is a colloquial usage, based on the recorded analysis of the scope of their testimony.

⁵⁴ See *e.g.* Bemba Appeal Decision, para. 78. See also Motion, para. 32 (citing Bemba).

Defence does not appear to challenge the Chamber's factual assessment of the scope of P-0414's and P-0501's testimonies.

24. The second sub-issue is based on a misunderstanding of the Decision, and does not arise from it.⁵⁵ It is true that the Chamber took into account the opportunity given to the Defence "to question both witnesses in the necessary depth on [...] all relevant matters arising" from their statements.⁵⁶ It is also true that "the opportunity to examine the witness" is indeed a condition for the application of rule 68(3). But the Chamber did not consider the opportunity for examination as a factor *favouring* receiving the witnesses' statements under rule 68(3), as the Gbagbo Defence contends. Rather, it relied upon it as "a sufficient *counter-balancing* factor" to the relative importance of the witnesses' testimony.⁵⁷ In other words, the Chamber took into account that the Gbagbo Defence would be able to verify the limits of the scope of P-0501's and P-0414's evidence which it had identified on the basis of their statements, and thus reached a view on the importance of the statements in the context of the case.⁵⁸ It did not simply reason that the statements could be received under rule 68(3) because the witnesses would be present before the Chamber, which might constitute the type of 'double-counting' suggested by the Gbagbo Defence.

The Fifth Issue

25. The essence of the Fifth Issue as a mere disagreement with the Decision is manifest from the vague manner in which the issue is described.⁵⁹ The Gbagbo Defence seems to recognise that the question whether material may be submitted under paragraph 43 of the Directions on the Conduct of Proceedings ('over the bar table') is a distinct procedural question,⁶⁰ conditioned in part by the question whether

⁵⁵ *Contra* Motion, para. 38.

⁵⁶ Decision, para. 25.

⁵⁷ Decision, para. 25. *See also* para. 26. *See further above* para. 22.

⁵⁸ *See e.g.* Decision, paras. 30-31.

⁵⁹ *See* Motion, paras. 39-43.

⁶⁰ Motion, para. 41.

the material is “testimonial”.⁶¹ The Chamber duly determined that the materials prepared by P-0549 and P-0550 are *not testimonial*.⁶² Yet the Gbagbo Defence disagrees with, or even overlooks, this conclusion, and merely argues instead that P-0549 and P-0550 should be required to testify, due in particular to their employment by the Office of the Prosecutor.⁶³ Since it makes no attempt to describe any kind of error in the legal conclusion that the technical materials in question are not testimonial, the Fifth Issue cannot be certified for appeal.

The Sixth Issue

26. Finally, the Gbagbo Defence takes issue with the notice given by the Chamber that the documents received ‘over the bar table’ in the Decision are now considered “submitted in their entirety, ‘for the purpose of supporting any findings relating to the charges’” in accordance with paragraph 47 of the Directions on the Conduct of Proceedings.⁶⁴ This direction provides merely that the Chamber will “give notice to the parties” if it may substantively rely on passages *additional* to those identified by the Party when submitting a document.⁶⁵

27. The Gbagbo Defence not only disagrees with the Decision, but seems to attribute an unlikely significance to an essentially procedural notification.⁶⁶ The Sixth Issue therefore does not arise from the Decision.

⁶¹ Directions on the Conduct of Proceedings, para. 43 (“the parties are encouraged to introduce documentary evidence other than testimonial (i.e. documents and audio-visual material), whenever feasible”). *See also* para. 47.

⁶² Decision, paras. 35, 40 (noting, *inter alia*, that “the reports in question” contain “purely technical information explaining how certain evidence was received or created” and “considering the purpose of their creation”).

⁶³ Motion, paras. 42-43. *See also* Decision, para. 47 (recalling the Gbagbo Defence’s emphasis on “the importance of the witnesses being made available for questioning by the Defence”).

⁶⁴ Decision, para. 38, fn. 49.

⁶⁵ Directions on the Conduct of Proceedings, para. 47 (“Pursuant to Article 69(3) of the Statute, documentary evidence other than testimonial shall be considered as being before the Chamber in its entirety, irrespective of the fact that the parties intended only to rely on portion(s) thereof [...] If the Chamber intends to rely on other portions of the item for the purpose of supporting any findings relating to the charges, it will give notice to the parties”).

⁶⁶ If anything, these arguments tend to suggest that the Sixth Issue is really an (out of time) challenge to the legal correctness of paragraph 47 of the Directions on the Conduct of Proceedings.

28. The Gbagbo Defence emphasises that it can only be “exception[al]” for the Chamber to rely on passages in documents received ‘over the bar table’ which were not addressed by the tendering Party. This is inconsistent with the truth-seeking mandate of the Chamber, set out for example in article 69(3) of the Statute.⁶⁷ Giving the Parties early notice of this possibility best prepares them to address such matters in presenting their cases,⁶⁸ and thus favours a fair and expeditious trial. Such notice, and indeed the practice of referring if necessary to the entirety of a document received by the Chamber, is not inconsistent with the obligation of the Prosecution to prove its case beyond reasonable doubt.⁶⁹

29. Both matters complained of by the Gbagbo Defence—the notice regarding the entirety of the documents received,⁷⁰ and the timing of the notice⁷¹—are essentially formalistic. Nothing in the Directions on the Conduct of Proceedings—which were themselves created by the Chamber, and may indeed be varied by the Chamber in relevant parts—requires that the Chamber must give specific notice of particular passages upon which it must rely, or must wait until after the Prosecution has filed its final brief.⁷² Accordingly, the Gbagbo Defence raises concerns which are irrelevant to the basis upon which the Decision was rendered in relevant part. For this reason, the Sixth Issue cannot be certified for appeal.

The proposed issues do not meet the requirements of article 82(1)(d)

30. In any event, none of the proposed issues meets the cumulative requirements of article 82(1)(d), and thus cannot be certified for appeal.

The proposed issues do not significantly affect the fair and expeditious conduct of proceedings, or the outcome of the trial

⁶⁷ *Contra* Motion, para. 46.

⁶⁸ *See also* Motion, para. 50.

⁶⁹ *Contra* Motion, para. 47.

⁷⁰ Motion, para. 50.

⁷¹ Motion, para. 51.

⁷² *Contra* Motion, paras. 50-51.

31. The Gbagbo Defence fails to particularise its arguments concerning the impact of the proposed issues upon the fair and expeditious conduct of the trial, or its outcome, but only complains in general terms that the “massive use” of rule 68 is inconsistent with the principles of orality and the publicity of proceedings, and the ability of the Defence to challenge Prosecution evidence.⁷³ As formulated, however, these complaints address only the negative consequences—as framed by the Gbagbo Defence—of the use of rule 68. They fail entirely to argue with the necessary specificity how the first five issues presented on appeal—alleged errors of fact relating to the evidence of P-0428, errors of law relating to P-0414 and P-0501, and an unexplained error relating to P-0549 and P-0550—would impact the proceedings. This is insufficient.

32. Only with regard to the Sixth Issue does the Gbagbo Defence seek to show the necessary impact upon the proceedings.⁷⁴ However, given the nature of the Chamber’s determination in this respect—and especially the timely notice given to the Parties, as well as its adequate and reasonable degree of specificity—this cannot be said to significantly affect either the fairness of the proceedings or the outcome of the trial. Likewise, the approach proposed by the Gbagbo Defence—deferring notifications under paragraph 47 of the Directions on the Conduct of Proceedings until after the Prosecution has submitted its final brief, and on a passage-by-passage basis—would significantly *arrest* the expeditious conduct of the proceedings. As such, the requirements of article 82(1)(d) are not met.

Immediate resolution by the Appeals Chamber of any of the proposed issues will not materially advance the proceedings

33. Similarly, the Gbagbo Defence does not explain with specificity how the intervention of the Appeals Chamber may materially advance the proceedings. Again, the generalised assertion that the proceedings might continue on the basis of a

⁷³ Motion, paras. 53-54.

⁷⁴ Motion, para. 55.

costly misunderstanding of rule 68 is largely irrelevant to the issues proposed for appeal⁷⁵—of which three address the circumstances of particular witnesses (the First, Second, and Third Issues), and two do not relate to rule 68 at all (the Fifth and Sixth Issues). Just one issue (the Fourth Issue) concerns the legal interpretation of rule 68.

34. Moreover, even if the Chamber is minded to certify for appeal any aspect of the Fourth Issue, it should consider the extent to which that issue may be related with the issues previously certified for appeal.⁷⁶ If it is indeed related to the pending appeal, the Fourth Issue should not be certified unless the Chamber considers that, by doing so, the Appeals Chamber will be assisted in fairly and expeditiously determining the pending appeal, thus materially advancing the proceedings. Otherwise, at a time when its proceedings are already well under way, the Appeals Chamber will be burdened by additional and unnecessary briefing of a matter which is essentially duplicative to the matters of which it is already seised. Moreover, in such circumstances, certification is not necessary to vindicate the concerns of the Gbagbo Defence if their pending appeal is upheld. This Chamber has all the necessary powers to vary its prior decisions if necessary, and make any

⁷⁵ See e.g. Motion, para. 56 (“*le procès serait conduit sur la base d’une utilisation de la Règle 68 qui porterait atteinte à l’équité de la procédure*”).

⁷⁶ See above fn. 45. The Prosecution further notes in this context that the Gbagbo Defence, on appeal, has sought to resurrect its complaint regarding the “system of evidence”—reproduced here as the first sub-issue of the Fourth Issue—even though this was not certified by the Chamber.

consequential orders, to reflect the Appeals Chamber's guidance.

Conclusion

35. For all the reasons above, the Chamber should dismiss the Motion.

A handwritten signature in blue ink, appearing to read 'Fatou Bensouda', is written over a horizontal line. The signature is stylized and cursive.

Fatou Bensouda, Prosecutor

Dated this 30th day of September 2016

At The Hague, The Netherlands