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TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Confidential

Response to Mr Gbagbo's request for leave to appeal the "Decision on the Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088" (ICC-02/11-01/15-969-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”)¹ submits that Mr Gbagbo’s request (the “Request”)² for leave to appeal the “Decision on the ‘Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088’” issued by the Chamber on 6 June 2017 (the “Decision”)³ does not satisfy the requirements of article 82(1)(d) of the Rome Statute and must be rejected.

2. The Request does not demonstrate that the alleged issues identified by the Defence arise from the Decision and merely represents the Defence’s disagreement with and misrepresentation of the Chamber’s rulings. Indeed the Chamber (i) does not introduce a newly created presumption of accuracy of the Prosecution’s investigative activities, but applies the legal requirements of rule 68(2)(b) of the Rules of Procedure and Evidence (the “Rules”); (ii) does not take into consideration only the corroborative nature of prior recorded statements in deciding on their introduction under rule 68(2)(b) of the Rules; (iii) provides reasons for partially admitting prior recorded statements under rule 68(3) and analyses in detail the

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

² See the “Demande d’autorisation d’interjeter appel de la ‘Decision on the ‘Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088’ (ICC-02/11-01/15-950-Conf)’”, No. ICC-02/11-01/15-969, 27 June 2017 (the “Request”).

³ See the “Decision on the ‘Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088’” (Trial Chamber I), No. ICC-02/11-01/15-950-Conf, 6 June 2017 (the “Decision”).

statements ruled upon; and (iv) does not infringe on the right of the Defence to question the witnesses concerned by the application of rule 68(2)(b).

3. Moreover, the Request fails to demonstrate how each of the issues allegedly arising from the Decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In this regard, the Defence only presents hypotheses, mere speculations and arguments that have already been addressed and dismissed by both the Trial Chamber and the Appeals Chamber.

II. Confidentiality

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

III. Background

5. On 6 June 2017, the Chamber issued the Decision, with a partially dissenting opinion by Judge Henderson,⁴ allowing the introduction of the prior recorded statement of Witnesses P-0129, P-0266, P-0294, P-0360, P-0380, P-0426, P-0471, P-0476, P-0479, P-0489, P-0543, P-0573 and P-0594 under rule 68(2)(b), and finding, *inter alia*, that the written statements of Witnesses P-0054, P-0105, P-0172, P-0237, P-0293, P-0297, P-0362, P-0363, P-0364, P-0381, P-0407, P-0521, P-0554, P-0567, P-0568, P-0580 and P-0582 are suitable for introduction under rule 68(3) of the Rules.⁵

6. On 27 June 2017, Mr Gbagbo's Defence filed the Request,⁶ seeking leave to appeal the Decision on the following five issues:

⁴ See the "Partially Dissenting Opinion of Judge Henderson", No. ICC-02/11-01/15-950-Conf-Anx-Corr, 23 June 2017 ("Judge Henderson's Dissenting Opinion").

⁵ See the Decision, *supra* note 3, p. 45.

⁶ See the Request, *supra* note 2.

- i) The Chamber made an error of law in (a) introducing a presumption of accuracy in the Prosecution's taking of the statements from the witnesses and (b) in reversing the burden of proof when requiring the Defence to demonstrate any wrongdoing or negligence from the Prosecution in the taking of those statements (the "First Issue");⁷
- ii) The Chamber made an error of fact in applying a presumption of accuracy in the Prosecution's taking of the statements from the witnesses, despite the experience accumulated in the proceedings (the "Second Issue");⁸
- iii) The Chamber made an error of law when applying the notion of corroboration under rule 68 of the Rules (the "Third Issue");⁹
- iv) The Chamber made an error of law in admitting under rule 68 of the Rules portions of the statements (the "Fourth Issue");¹⁰
- v) The Chamber made an error of law in considering that the Defence was not deprived of his right to question the witnesses whose declarations were introduced under rule 68(2)(b) of the Rules (the "Fifth Issue").¹¹

7. Pursuant to regulation 65(3) of the Regulations of the Court, the Legal Representative submits the following response to the Request.

⁷ *Idem*, paras. 22-29.

⁸ *Ibidem*, paras. 30-33.

⁹ *Ibid.*, paras. 34-46.

¹⁰ *Ibid.*, paras. 47-60.

¹¹ *Ibid.*, paras. 61-67.

IV. Submissions

8. Preliminarily, the Legal Representative notes that the Defence devotes nearly half of its Request to advance arguments in relation (i) to the “principle of orality” enshrined in article 69(2) of the Rome Statute and the need for a restrictive interpretation of rule 68 of the Rules,¹² including the argument that the Prosecution has filed requests under said rule leading to “*l’utilisation massive de la Règle 68*”;¹³ and (ii) to an alleged lack of control and thus of guarantees over the activities of the Prosecution when taking statements from the witnesses.¹⁴ The Legal Representative submits that these arguments do not relate to the identification of an issue for the purposes of an appeal under article 82 of the Rome Statute and, as recalled in the Decision,¹⁵ were already addressed and dismissed by both the Trial and the Appeals Chamber in this case.¹⁶ Therefore, the Legal Representative requests the Chamber to reject *in limine* and to not consider the Defence’s submissions in this regard.

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

a. The First Issue and the Second Issue

9. The Legal Representative submits that the First and the Second Issues do not reveal the existence of an appealable “issue” under article 82(1)(d) of the Rome Statute, but a misunderstanding of the Decision or a mere disagreement therewith.

¹² *Ibid.*, paras. 4-10.

¹³ *Ibid.*, paras. 2-3.

¹⁴ *Ibid.*, paras. 11-21.

¹⁵ See the Decision, *supra* note 3, paras. 6-7.

¹⁶ See the “Decision on the ‘Prosecution’s application to conditionally admit the prior recorded statements and related documents in relation to Witnesses P-0106, P-0107, P0117 and P-0578 under rule 68(3)’”, 11 October 2016, ICC-02/11-01/15-722-Conf, para. 18; and the Decision, *supra* note 3, paras. 6-7. See also the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’” (Appeals Chamber), No. ICC-02/11-01/15-744 OA8, 1 November 2016, paras. 78 and 96.

10. The Defence premises its arguments in relation to both the First and Second Issues on the existence of an “error” on the contention that, in the Decision, the Chamber creates a presumption of accuracy in the Prosecution’s taking of the statements from the witnesses, which in turn would entail a reversal of the burden of proof.¹⁷ The Legal Representative submits that the Chamber, by referring to the rules applicable to Prosecution’s staff members during the conduct of their activities, did not introduce a newly created presumption of accuracy for said activities. Instead, the Chamber merely indicated the obvious by recalling the duties incumbent on the Prosecution – also when taking statements from the witnesses – and which squarely fall into the applicable guarantees under rule 111 of the Rules and those under article 54 of the Rome Statute. Indeed, the Defence seems to confound the burden placed on the Prosecution to prove its case with the general obligation to prove a wrongdoing or a misconduct, which only lies with the party who alleges it (*“Affirmanti incumbit probatio”*).

11. The Legal Representative further submits that the alleged Second Issue represents not only a disagreement with the Decision, but also a misrepresentation of rule 68 as such. By alleging that the Chamber should have firstly obtained a *verbatim* transcription of the witnesses’ declarations before deciding on their introduction under rule 68 of the Rules, the Defence simply shows its disagreement with the manner in which the Chamber applied rule 68 and attempts to introduce requirements that are not contemplated in said provision or in the applicable jurisprudence.

12. In the same vein, the Defence plainly misrepresents rule 68 of the Rules when alleging an error of the Chamber in failing to take into account inconsistencies of previous testimonies, without providing any jurisprudence supporting such an approach.¹⁸ As recently clarified by the Appeals Chamber, *“in their assessment of*

¹⁷ See the Request, *supra* note 2, paras. 22-33.

¹⁸ *Idem*, paras. 30-33.

indicia of reliability under rule 68 (2) (b) (i) of the Rules of Procedure and Evidence, Trial Chambers are not obliged to consider factors beyond formal requirements. [...] [E]ven if some factors, such as the witness's competence to testify about the facts, the internal consistency of the statement and potential inconsistencies with other evidence in the record, are not taken into account during this assessment, they may still be considered when assessing the probative value of the evidence".¹⁹

13. Since neither a disagreement or a misinterpretation can amount to an appealable "issue" under article 82(1)(d) of the Rome Statute,²⁰ the fact that the Defence disagrees with the Decision or misreads it, as such, does not suffice for leave to appeal to be granted regarding the First and Second Issues.²¹

b. The Third Issue

14. Concerning the Third Issue, the Legal Representative contends that it is not an appealable "issue" under article 82(1)(d) of the Rome Statute, but again a misunderstanding of the Decision or a further disagreement therewith.²²

15. The Defence premises its arguments on a misrepresentation of both rule 68(2)(b) of the Rules and of the Decision. Indeed, according to the Defence, the

¹⁹ See the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" , *supra* note 16, paras. 3 and 105.

²⁰ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

²¹ See the transcript of the hearing held on 10 November 2015, No. ICC-02/11-01/15-T-5-ENG ET, p. 15, lines 18-20; and the transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG ET, p. 38, lines 11-13. See also the "Decision on Defence's requests seeking leave to appeal the 'Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record' and seeking suspensive effect of it" (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015, para. 9; and the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'" (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 19. See also the "Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record'" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-132, 10 July 2015, para. 3 and references contained therein.

²² See the Decision, *supra* note 3, paras. 10 and 24.

alleged error rests on the ground that a prior recorded statement can only be admitted under rule 68(2)(b) when it contains information that corroborates evidence already discussed orally, which in turn would create an obligation for the Chamber to exclude the introduction under rule 68(2)(b) in any other situation.²³

16. The Legal Representative recalls that, on the one hand, the corroborative or cumulative nature of the information contained in a prior recorded statement is only one factor among others listed in rule 68(2)(b). On the other hand, at no point does the Decision refer to the corroborative or cumulative character of the statements as the only consideration made in its assessment under rule 68(2)(b) of the Rules.

17. This apparent misrepresentation by the Defence is confirmed by its selective quotation of the Decision.²⁴ Indeed, in the two instances cited by the Defence, the Chamber referred to “*evidence [that] is corroborative of other evidence **that has been and is expected to be presented***”²⁵ in relation to a specific incident. Therefore, the Chamber did take into account both past and future oral testimonies on similar facts that other witnesses have given or will give at trial.

18. The Defence also misrepresents rule 68(2)(b) of the Rules when departing from the notion of “similar facts” contained therein and suggesting an unsupported stricter definition of corroboration which should have been followed by the Chamber.²⁶ Once more the Defence shows a mere disagreement with the Decision and with the discretion enjoyed by the Chamber in deciding whether to introduce prior recorded statements under rule 68 of the Rules.

19. The Defence mere disagreement is further revealed by its attempt to re-litigate issues that were already addressed and dismissed. The Legal Representative recalls

²³ See the Request, *supra* note 2, para. 34.

²⁴ *Idem*, para. 41.

²⁵ See the Decision, *supra* note 3, paras. 19 and 38.

²⁶ See the Request, *supra* note 2, para. 43.

that similar arguments challenging the Chamber's discretion in assessing the evidence before it were already put forward by the Defence in relation to rule 68, and dismissed by the Appeals Chamber.²⁷ In particular, the Appeals Chamber found that *"rule 68(3) of the Rules requires a Chamber to carry out a preliminary assessment of the evidence in question in order to determine whether its introduction under that provision is appropriate. This assessment, which includes an analysis of the relative importance of the evidence, is without prejudice to the weight that the Trial Chamber will ultimately attach to a witness's evidence, which indeed can only be determined once the Trial Chamber has heard all of the evidence"*.²⁸

20. In light of the above, the Defence's sub-issue concerning an alleged error committed by the Chamber in not providing a detailed analysis of the corroboration among witnesses,²⁹ does not arise from the Decision. The Legal Representative underlines that the purpose of the Decision was limited to a preliminary assessment of the evidence in question in order to determine whether its introduction under rule 68 is appropriate. A detailed analysis of the evidence, including its internal and external corroborative character, will be performed only at the end of the trial. Indeed, as recalled by the Appeals Chamber, in relation to the reliability assessment under rule 68(2)(b), *"even if some factors, such as [...] the internal consistency of the statement and potential inconsistencies with other evidence in the record, are not taken into account during this assessment, they may still be considered when assessing the probative value of the evidence"*.³⁰

²⁷ See the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", *supra* note 16, paras. 57 and 74.

²⁸ *Idem*, para. 72.

²⁹ See the Request, *supra* note 2, para. 45.

³⁰ See the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'", *supra* note 16, paras. 3 and 104.

21. Since a disagreement or conflicting opinion cannot amount to an appealable “issue” under article 82(1)(d) of the Rome Statute,³¹ the fact that the Defence disagrees with the Decision, as such, cannot suffice for leave to appeal to be granted regarding the Third Issue.³²

c. The Fourth Issue

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

23. In fact, the Defence misrepresents both the Decision and rule 68(3) of the Rules when alleging an error of law committed by the Chamber by partially introducing some of the relevant statements under said provision.³⁴ The Defence argues that the Decision (i) creates confusion between written statements and oral testimony, which in turn would affect the expeditiousness of the proceedings;³⁵ (ii) is inconsistent with a previous decision rejecting a similar Prosecution’s request,³⁶ and (iii) is contrary to the letter of rule 68(3) and unfairly favours the Prosecution.³⁷

³¹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” *supra* note 19, para. 9.

³² See the transcript of the hearing held on 10 November 2015, No. ICC-02/11-01/15-T-5-ENG ET, p. 15, lines 18-20; and the transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG ET, p. 38, lines 11-13. See also the “Decision on Defence’s requests seeking leave to appeal the ‘Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record’ and seeking suspensive effect of it”, *supra* note 21, para. 9; and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 20, para. 19.

³³ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 21, para. 19. See also the “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’” (Trial Chamber I, Single Judge), *supra* note 21, para. 3 and references contained therein.

³⁴ See the Request, *supra* note 2, paras. 47

³⁵ *Idem*, paras. 49-54.

³⁶ *Ibidem*, para. 55.

³⁷ *Ibid.*, paras. 56-59.

24. However, contrary to the Defence's contentions, the relevant provision clearly foresees testimony composed by both oral and written evidence. As recently recalled by the Appeals Chamber "*pursuant to rule 68 (3) of the Rules, 'the Prosecutor, the defence and the Chamber have the opportunity to examine the witness' in Court. In this sense, the testimony cannot be considered to be exclusively written as it is not necessarily intended to replace oral testimony but, rather, complement it. As the ICTY Appeals Chamber has held, in such a case, '[t]he testimony of the witness constitutes a mixture of oral and written evidence'*".³⁸

25. By the same token, the Defence's argument that the Decision departs without justification from a previous ruling on a similar Prosecution's request³⁹ is equally inapposite and stems from a misreading of the Decision. Indeed, the Decision explicitly recalls a previous ruling by the Chamber - where it elaborated on the practical concerns that might arise from excluding large portions of statements to be introduced under rule 68(3) – and finds, on a case-by-case analysis, that similar concerns did not arise in relation to the statements of Witnesses P-0054, P-0105, P-0172, P-0184, P-0293, P-0297, P-0407, P-0554, P-0568, and P-0582.⁴⁰

26. Finally, the Legal Representative argues that the Defence's contentions on an alleged favour of the ruling towards the Prosecution⁴¹ are grounded not only on a misrepresentation of the Decision, but also on purely speculative assumptions on how the Prosecution will possibly conduct the examination of the witnesses concerned by the Decision.

³⁸ See the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" , *supra* note 16, para. 79.

³⁹ See the Request, *supra* note 6, para. 55, referring to the "Decision on the 'Prosecution's application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P0402, P-0438, P-0459 and P-0109 under rule 67(1)'" (Trial Chamber I), No. ICC-02/11-01/15-870, 7 April 2017, para. 14.

⁴⁰ See the Decision, *supra* note 3, para. 81.

⁴¹ See the Request, *supra* note 2, para. 59.

27. Accordingly, the Legal Representative submits that the Defence misunderstands or misrepresents the Decision and, as such, the Fourth Issue cannot constitute an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.⁴²

d. The Fifth Issue

28. Regarding the Fifth Issue, the Legal Representative submits that it does not arise from the Decision but again from a misunderstanding of the Decision or a further disagreement therewith.

29. The Defence argues that the Chamber committed an error of law in considering that the Defence was not deprived of his right to question the witnesses whose declarations were introduced under rule 68(2)(b) of the Rules.⁴³ The Legal Representative reiterates that the purpose of the Decision was limited to a preliminary assessment of the evidence in question in order to determine whether its introduction under rule 68 is appropriate. The Chamber was indeed called to establish whether the requirements of the relevant provision were respected and not to decide about the opportunity of calling those witnesses to testify.⁴⁴

30. In this sense, the Defence’s contended infringement of its rights, due to possible difficulties in reaching out to those witnesses whose statements are introduced under rule 68(2)(b), or the possibility that those witnesses decline to cooperate, are wholly speculative and premature since the presentation of the evidence by the Defence has not started yet.

⁴² See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 21, para. 19. See also the “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’” (Trial Chamber I, Single Judge), *supra* note 21, para. 3 and references contained therein.

⁴³ See the Request, *supra* note 2, paras. 61-63.

⁴⁴ See the Decision, *supra* note 3, para. 21.

31. Furthermore, the Legal Representative notes that the Defence reiterates general arguments of principle against the application of rule 68 of the Rules⁴⁵ that do not relate to the Decision. As recalled *supra*,⁴⁶ these arguments were previously addressed and dismissed by both the Trial and the Appeals Chamber in this case.

32. Ultimately, the Request shows that the Fifth Issue is merely a disagreement with the Chamber's application of rule 68(2)(b) of the Rules and as such cannot be considered an appealable issue for the purposes of article 82(1)(d) of the Rome Statute.⁴⁷

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

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

34. Firstly, contrary to the requirements of article 82(1)(d) of the Rome Statute,⁴⁸ the Defence does not articulate how each of the alleged Issues specifically affects the fairness and expeditiousness of the proceedings or the outcome of the trial. The

⁴⁵ See the Request, *supra* note 2, paras. 64-65.

⁴⁶ See *supra*, para. 8.

⁴⁷ See *supra* note 32.

⁴⁸ See the "Decision on the 'Prosecution's Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility'" (Trial Chamber II), No. ICC-01/04-01/07-1958, 11 March 2010, para. 20. See also the "Decision on 'Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'''" (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, para. 34.

Defence, contrary to the Chamber's rulings in this regard,⁴⁹ merely reiterates arguments against the use of rule 68 of the Rules.

35. In this regard, the Chamber has already clarified, in a different but related context, that “[w]hether the decision impacts on the fairness and expeditiousness of the proceedings or the outcome of the trial cannot be predetermined in the abstract but will depend on how the impugned decision is implemented on a case-by-case basis in the sense of how this control [by the Chamber] will be exercised”.⁵⁰

36. In fact, the Defence only makes a general argument regarding the alleged impact of “[l]’utilisation massive de la Règle 68 par le Procureur, validée et encouragée par la Chambre dans la décision attaquée”⁵¹ on the fair conduct of the proceedings and the outcome of the trial, referring to the lack of oral and public proceedings arising therefrom and the impossibility for the Defence to question the witnesses.⁵²

37. The general assertions by the Defence,⁵³ sparse and without any supporting arguments, cannot suffice for granting leave to appeal the Decision.

38. Secondly, the Request fails to address the alleged impact of each Issue on the expeditiousness of the proceedings. Article 82(1)(d) of the Rome Statute requires verifying that each of the issues affects both the fair and the expeditious conduct of the proceedings.⁵⁴

⁴⁹ See the Decision, *supra* note 3, para. 6. See also “Decision on the ‘Prosecution’s application to conditionally admit the prior recorded statements and related documents in relation to Witnesses P-0106, P-0107, P-0117 and P-0578 under rule 68(3)’”, *supra* note 16, para. 18.

⁵⁰ See the transcript of the hearing held on 5 February 2016, No. ICC-02/11-01/15-T-15-Red-ENG WT, p. 6, lines 16-19.

⁵¹ See the Request, *supra* note 2, para. 68.

⁵² *Idem*, paras. 71-74.

⁵³ *Ibidem*, para. 72.

⁵⁴ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21; and the “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute

39. The Defence does not provide any argument regarding the alleged impact of the Issues on the expeditiousness of the proceedings, arguing instead the lack of a need to prove said impact with absolute certainty.⁵⁵ The Defence refers in the Request to the potential use by the Prosecution of rule 68 in the future⁵⁶ and to hypothetical and non-verified arguments regarding the Defence's reaction in the future to the admission of prior recorded testimony under said provision.⁵⁷

40. However, the Legal Representative notes that speculative arguments that do not rest upon solid factual foundations are not sufficient to demonstrate that an issue would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.⁵⁸

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

41. The Defence contends that an immediate resolution by the Appeals Chamber will materially advance the proceedings because it will ensure that the proceedings follow the right course, and because no adequate remedy can be provided for if the alleged Issues are decided in an appeal against the eventual judgement.⁵⁹

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

on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo" (Pre-Trial Chamber II), No. ICC-01/05-01/08-532, 18 September 2009, para. 16.

⁵⁵ See the Request, *supra* note 2, para. 63.

⁵⁶ See the Request, *supra* note 2, *inter alia*, paras. 38-39, 42, 49 and 59.

⁵⁷ *Idem*, paras. 61-66.

⁵⁸ See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 8; the "Decision on 'Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'"', *supra* note 48, para. 26 and the references contained therein; and the "Decision on 'Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'" (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6 and the references contained therein.

⁵⁹ See the Request, *supra* note 2, para. 74.

unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁶⁰

V. Conclusion

43. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to reject the Request.



Paolina Massidda
Principal Counsel

Dated this 3rd day of July 2017

At The Hague, The Netherlands

⁶⁰ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 21, para. 26.