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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 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'",
3 July 2017, ICC-02/11-01/15-975-Conf

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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

The Office of Public Counsel for Victims

States' Representatives

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. Mr Gbagbo's request for leave to appeal¹ the Trial Chamber's decision of 6 June 2017² should be rejected. The Decision related to the conditional introduction of the prior recorded statements, together with annexes and associated documents,³ of 38⁴ Prosecution witnesses, under rules 68(2)(b)⁵ and 68(3)⁶ of the Rules of Procedure and Evidence ("Rules"), and the submission of documentary evidence, under paragraphs 43 and 44 of the directions on the conduct of the proceedings.⁷

2. It is apparent from the Application that the Gbagbo Defence not only disagrees with the Decision, but, more generally, disagrees with rule 68 itself, and in particular the use of rule 68(2)(b). This is impermissible.⁸

3. None of the five alleged issues raised in the Application is appealable, since they either do not arise from the Decision or constitute a mere disagreement with it. They do not meet the criteria for leave to appeal under article 82(1)(d) of the Rome Statute ("Statute"), requiring that the fairness and expedition of the trial, or its outcome, is significantly affected by the proposed issue, and that immediate resolution by the Appeals Chamber may materially advance the proceedings.

Confidentiality

4. Consistent with regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially to reflect the classification of the Application⁹ and the Decision.

¹ ICC-02/11-01/15-969-Conf ("Application").

² ICC-02/11-01/15-950-Conf ("Decision").

³ See Decision, paras. 74 and 137.

⁴ Of the 38 Prosecution witnesses, the Trial Chamber rejected the Prosecution's application in respect of 8 witnesses (Witnesses P-0087, P-0088, P-0164, P-0184, P-0185, P-0226, P-0239 and P-0316): Decision, p. 45.

⁵ The Trial Chamber granted the Prosecution's application in respect 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 (13 Prosecution witnesses): Decision, p. 45.

⁶ The Trial Chamber granted the Prosecution's application in respect 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 (17 Prosecution witnesses): Decision, p. 45.

⁷ ICC-02/11-01/15-498-AnxA.

⁸ See *e.g.* ICC-02/11-01/15-612, para. 20; ICC-01/04-02/06-1779, paras. 7-9.

Submissions

5. The Application presents five issues (together, the “Issues”) for certification. The Prosecution understands these to mean:

- First Issue: whether the Chamber erred in law in creating a “presumption of accuracy” of witness statements taken by Prosecution investigators, and thus “reversing the burden of proof” by requiring the Defence to prove errors in those statements.¹⁰
- Second Issue: whether the Chamber committed an error of fact “*en ne tirant pas dans sa décision les conséquences de l’expérience*” in rejecting as speculative the Defence claims concerning the manner in which statements were taken.¹¹
- Third Issue: whether the Chamber erred in law in its understanding of “corroboration”.¹²
- Fourth Issue: whether the Chamber erred in law in receiving into evidence truncated witness statements.¹³
- Fifth Issue: whether the Chamber erred in law in finding that the Defence was not deprived of its right to examine witnesses whose statements are admitted under rule 68(2)(b).¹⁴

6. None of the proposed Issues should be certified for appeal since they are not ‘appealable’, but merely involve a disagreement with the Decision or do not arise

⁹ See Application, para. 1.

¹⁰ See Application, paras. 22-29 (“*La Chambre a erré en droit 1) en créant une présomption d’exactitude dans la prise des déclarations antérieures des témoins par les enquêteurs du Bureau du Procureur et 2) en renversant la charge de la preuve lorsqu’elle a imposé à la Défense d’avoir à démontrer l’existence d’erreurs dans la prise des déclarations antérieures pour que leur utilisation soit rejetée*”).

¹¹ See Application, paras. 30-33 (“*La Chambre a erré en fait en ne tirant pas dans sa décision les conséquences de l’expérience*”).

¹² See Application, paras. 34-46 (“*La Chambre a commis un certain nombre d’erreurs de droit dans la compréhension de ce qu’est la notion de corroboration*”).

¹³ See Application, paras. 47-60 (“*La Chambre a erré en droit en admettant des déclarations non entières, c’est-à-dire tronquées*”).

¹⁴ See Application, paras. 61-67, under the sub-heading: “*La Chambre a erré en droit en estimant que la Défense n’était pas privée de son droit d’interroger les témoins dont les déclarations sont admises au titre de la Règle 68(2)(b).*”

from the Decision. This contradicts the well-established law that an ‘appealable’ issue is “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”¹⁵ Such topics must be “essential for the determination of matters arising in the judicial cause under examination.”¹⁶ They must genuinely arise from the impugned decision.¹⁷ Issues which fail some or all of these requirements may not be certified for appeal.

7. Nor in any event do any of the proposed Issues satisfy the cumulative requirements of article 82(1)(d). Just like previous Defence requests for leave to appeal,¹⁸ the Application makes no more than a desultory attempt to address these mandatory criteria—indeed, it addresses them (and, even then, still in a generalised manner) only in the last 8 paragraphs of the 75-paragraph Application. The Chamber has already made clear that such incomplete applications may be rejected for this reason alone.¹⁹ It should dismiss the Application accordingly.

8. The Defence fails to show that the Issues significantly affect the fair *and* expeditious conduct of the proceedings. Rather, the Application complains vaguely, and in general terms, of the “*utilisation massive*” by the Prosecution of rule 68²⁰—with particular emphasis upon the use of rule 68(2)(b).²¹ But such generalised arguments concerning the use of rule 68 are insufficient; indeed, the Appeals Chamber has already warned the Defence that “respect for the principle of orality cannot be reduced to a purely mathematical calculation of the percentage of witnesses providing their entire evidence orally.”²² Moreover, the Application not only fails to elaborate on the application of the article 82(1)(d) criteria to each issue, as has been

¹⁵ See e.g. ICC-01/04-168 (“DRC Appeal Decision”), para. 9.

¹⁶ See e.g. DRC Appeal Decision, para. 9.

¹⁷ See e.g. ICC-01/05-01/13-1278, paras. 9-10.

¹⁸ See ICC-02/11-01/15-685-Red, para. 5; ICC-02/11-01/15-756, para. 5.

¹⁹ See ICC-02/11-01/15-756, para. 6 (citing ICC-02/11-01/15-685-Red, para. 6 and ICC-02/11-01/15-612, para. 6).

²⁰ See Application, para. 68.

²¹ See Application, para. 70.

²² ICC-02/11-01/15-744 OA8 (“Gbagbo Rule 68 Appeal Decision”), para. 78.

consistently required,²³ but also fails to explain the extent to which its proposed issues relate to the various witnesses considered in the Decision. The Application makes little effort to show how the expedition of the proceedings is significantly affected by any of the proposed Issues.

9. The Application makes no assertion at all that the proposed Issues affect the outcome of the trial.²⁴

10. Similarly, the Defence fails to show that the immediate intervention of the Appeals Chamber may materially advance the proceedings. Instead, the Application generally asserts that the trial “*serait conduit sur la base d’une utilisation de la Règle 68 qui porterait atteinte à l’équité de la procédure.*”²⁵ The Application fails to advance an argument as to why, in respect of any or each of the proposed Issues, immediate resolution by the Appeals Chamber will materially advance the proceedings.

11. In the remainder of this response, and to further demonstrate the deficiency of the Application, the Prosecution addresses particular arguments raised under each proposed issue, as relevant to salient aspects of the requirements for leave to appeal. These confirm that none of the proposed issues may be certified, and that the Application should be dismissed.

First Issue

12. The First Issue mischaracterises or misunderstands the Decision, and therefore does not arise from it. The Chamber found that:

“[t]he Prosecutor, her staff and interpreters engaged by the Court are subject to rules applicable to their function and/or profession and, in the absence of any indication of wrongdoing or negligence on their part, both arguments

²³ See ICC-02/11-01/15-756, para. 5; ICC-02/11-01/15-685-Red, paras. 5-6.

²⁴ See Application, para. 73.

²⁵ See Application, para. 74.

raised by the Defence of Laurent Gbagbo are entirely speculative and without merit.”²⁶

13. This determination related to arguments advanced by the Gbagbo Defence—as summarised by the Chamber—that:

there is “no control over the investigators of the Office of the Prosecutor in the taking of statements from witnesses and that therefore, essentially, the statements must be received with circumspection [citation omitted], and the argument that no statement taken with the assistance of an interpreter may be introduced, including because it is not known whether the written statements in French were properly interpreted back to the witnesses before they were signed [citation omitted].”²⁷

14. The Defence thus misunderstands the Decision in arguing that this finding amounts to a reversal of the burden of proof²⁸ because “*la Chambre estime qu’existe une présomption faisant de toute déclaration antérieure le reflet fidèle de la pensée du témoin. Elle en déduit qu’il appartient à la Défense de renverser cette présomption.*”²⁹

15. First, the Defence argument, although expressed in broad terms, can only relate to the introduction of written statements under rule 68(2)(b), since it contends that “*seul un contre-interrogatoire en bonne et due forme permettra de vérifier que les informations données dans la déclaration correspondent bien à ce qu’a dit le témoin, étape évidemment incontournable avant même de pouvoir tester ces informations.*”³⁰ Within this context, it mischaracterises the Decision which introduced no ‘presumption of accuracy’ in relation to written statements introduced under this rule.

16. Rather, following the established practice, the Chamber simply conditioned the introduction of the written statements under rule 68(2)(b) upon compliance with the verification process provided for under rule 68(2)(b)(ii) and (iii).³¹ The verification process under rule 68(2)(b)(ii) and (iii) is geared towards ensuring the accuracy of

²⁶ See Application, para. 22; Decision, para. 7.

²⁷ See Decision, para. 7.

²⁸ See Application, para. 24.

²⁹ See Application, para. 23.

³⁰ See Application, para. 26.

³¹ See Decision, para. 73.

written statements, and requires both that the written statement is “accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person’s knowledge and belief,”³² and that that declaration is witnessed in accordance with the provisions of rule 68(2)(b)(iii)—in this case, by the Registry legal counsel, or any appropriate person delegated by him.³³ Beyond this process, further questions of the weight to be attributed to such evidence—including the ultimate assessment of its reliability—is a matter for deliberation at the end of the trial.³⁴ For this reason, the First Issue does not arise from the Decision.

17. Second, the Chamber does not say that the burden is upon the Defence to *show* wrongdoing or negligence but, instead, only required “an indication”—in other words, at least some foundation—of wrongdoing or negligence on the part of Prosecutor, her staff and interpreters—for arguments based on such allegations to be seriously considered. This goes no further than the established practice of this and other courts, based on principles not only of judicial economy but also fairness, in declining to engage with mere speculation. Parties owe the Court a duty to provide a factual basis for their submissions. This is not the same as reversing the burden of proof, nor indeed does the burden of proof in the strict sense of article 66 apply to procedural decisions.³⁵ For example, if and when the Defence seeks to present evidence under rule 68, no more would the Prosecution be able to rely on pure speculation to oppose such an application. For this reason too, therefore, the First Issue mischaracterises the Decision and does not arise from it.

18. Moreover, as previously observed, the Application does not even attempt to demonstrate how the First Issue significantly impacts upon the fair and expeditious conduct of the trial, or its outcome. In particular, the First Issue cannot significantly

³² See rule 68(2)(b)(ii).

³³ See Decision, para. 73; ICC-02/11-01/15-303.

³⁴ See *e.g.* *Gbagbo* Rule 68 Appeal Decision, para. 72.

³⁵ *Contra* Application, para. 24. See also *Gbagbo* Rule 68 Appeal Decision, para. 74.

affect the fairness of the trial because rejecting purely speculative arguments provides equal protection to both Parties—and, indeed, positively supports the expeditious conduct of the trial by promoting judicial economy. Moreover, beyond the threshold question in rule 68(2)(b)(i) of whether prior recorded testimony—which includes witness statements—have “sufficient indicia of reliability”, further questions of the probative value of the evidence are a matter for final deliberations,³⁶ and can hence be appealed if necessary under article 81 of the Statute. Since there is no requirement at this preliminary stage to consider, for example, whether witnesses were asked “all pertinent questions”,³⁷ no fairness concerns can arise in this respect, nor will the Defence be denied an opportunity to make submissions (in closing argument, for example) along these lines, or to litigate the matter on appeal, if required. For similar reasons, the intervention of the Appeals Chamber will not materially advance the proceedings.

The Second Issue

19. The Second Issue, apparently related to the First Issue, contends that the Chamber erred in fact in considering the Defence claims of inadequate “control” over Prosecution investigators to be speculative. However, the arguments outlined in the Application are vague, unsubstantiated and overly generalised—if anything, they support the correctness of the Chamber’s finding. They show no basis on which it could properly be argued before the Appeals Chamber that no reasonable chamber could have decided this issue as the Chamber did.

20. The Defence argues that the supposed presumption of accuracy in the taking of Prosecution witness statements must be overturned (*renversée*) because “*il n’y a pas eu un seul témoin – dont la déclaration antérieure a été admise sous la Règle 68 – qui,*

³⁶ See *Gbagbo* Rule 68 Appeal Decision, para. 104 (in assessing indicia of reliability under rule 68(2)(b)(i), “Trial Chambers are not obliged to consider factors beyond formal requirements. This is because an assessment of ‘indicia of reliability’ under rule 68(2)(b)(i) of the Rules can be more cursory in nature so that, even if some factors [...] are not taken into account during this assessment, they may still be considered when assessing the probative value of the evidence”; however, “Trial Chambers are not precluded from looking beyond formal requirements if they consider it to be appropriate in a particular case”).

³⁷ See Application, para. 27.

lorsqu'il a été interrogé, a confirmé l'entièreté de cette déclaration."³⁸ Instead, it is argued, *"tous les témoins appelés ont donné une version des événements différente de celle donnée dans leur déclaration antérieure, ce qui aurait dû la conduire à refuser d'utiliser les déclarations antérieures."*³⁹ It is apparent from these arguments that the Second Issue is a mere disagreement with the Decision and, tacitly, with rule 68 itself. As this Chamber has previously found, within the context of rule 68(3), such disagreement cannot properly be resolved on appeal.⁴⁰

21. Moreover, the specific arguments now advanced in relation to Witness P-0109⁴¹ were not raised by the Defence before the Chamber and hence formed no part of the Decision.⁴² To this extent—insofar as it is based upon the specific example of Witness P-0109—the Second Issue cannot arise from the Decision.

22. Nor indeed is there any logical foundation for the Defence's broader (and speculative) claim that, because in its view *other* witnesses did not testify completely in accord with their original statements, it must be assumed that *these* witnesses relevant to the Decision would testify differently from their statements. Again, such an illogical concern cannot be said to arise from the Decision.

23. For similar reasons, the Second Issue cannot satisfy the cumulative requirements of article 82(1)(d). The Appeals Chamber is not the forum to raise new or manifestly unfounded arguments on factual issues which were not litigated before the Chamber. Such an approach is not only deleterious to the expeditious conduct of the proceedings, but can never materially advance the proceedings.

The Third Issue

24. The Third Issue alleges a vague and unspecified error of law in the Chamber's "understanding" of the "notion of corroboration". Of itself, this may not meet the

³⁸ See Application, para. 30.

³⁹ See Application, para. 33.

⁴⁰ See ICC-02/11-01/15-612, para. 20.

⁴¹ See Application, paras. 31-32.

⁴² See ICC-02/11-01/15-884-Conf, *for e.g.*, paras. 56-61.

requirement for an appealable issue to be an “identifiable” subject or topic, requiring a decision for its resolution.

25. Furthermore, the Application fails to show that the Third Issue was essential to the Decision. As such, it cannot be ‘appealable’. Indeed, the Application at no point even specifies *which* witness statements conditionally introduced under rule 68(2)(b) it considers to be affected by the proposed issue.

26. In this context, it is well established that whether a statement is “of a cumulative or corroborative nature”⁴³ is not essential to the application of rule 68(2)(b). Rather, this is one of a number of factors which the Chamber *shall* consider under rule 68(2)(b)(i)—but which need not necessarily be present.⁴⁴ Indeed, in the closely related context of rule 68(3), the Appeals Chamber has already reminded Mr Gbagbo “that corroboration is not a requirement for the introduction of statements.”⁴⁵ Nor does anything in rule 68(2)(b) dictate the weight to be given to each of the factors enumerated under rule 68(2)(b)(i); rather, this is a matter to be decided in the particular circumstances of the case. Notably, the Defence has not challenged, or even addressed, the *extent* to which the Chamber relied upon the ‘corroboration factor’ for particular witnesses.

27. The Decision expressly relied upon the corroborative nature of the statements presented by the Prosecution under rule 68(2)(b)(i) on just two occasions.⁴⁶

28. First, concerning Witnesses P-0266, P-0426, P-0471, P-0476, P-0479, and P-0542 [(REDACTED)], whose evidence relates “to [(REDACTED)]”,⁴⁷ the Chamber

⁴³ See rule 62(2)(b)(i).

⁴⁴ See rule 62(2)(b)(i).

⁴⁵ *Gbagbo* Rule 68 Appeal Decision, para. 73.

⁴⁶ The Chamber also expressly referred to corroboration in the context of Witness P-0251, whose statement was presented for the purpose of rule 68(3). Witness P-0251’s evidence “relates to his work [(REDACTED)]” and “describes in detail [(REDACTED)]”, as well as also referring to “[(REDACTED)]” (Decision, para. 127). Consistent with its other approaches to corroborative information, the Chamber determined that the statement “provides background information”—an independent factor under rule 68(2)(b)(i)—“and is corroborative of the statements of other witnesses in similar position” (Decision, para. 128). Since this witness’s statement was received under rule 68(3), the Defence will be in a position to cross-examine him (Decision, para. 129).

determined that the statements did not “relate to core issues materially in dispute”⁴⁸—another independent factor under rule 68(2)(b)(i). It then observed that this evidence is “*also*” “corroborative of other evidence that has been and is expected to be presented.”⁴⁹

29. Second, concerning Witnesses P-0129, P-0294, P-0360, and P-0489 (‘Abobo Witnesses’), whose evidence relates to the shelling of Abobo on 17 March 2011,⁵⁰ the Chamber determined that the “statements are limited in the sense that they relate only to the destruction caused and the casualties of the alleged shelling, and not to its authors or causes.” Accordingly, it determined that they relate to facts materially in dispute only “to a limited extent.”⁵¹ The Chamber also expressly noted that it considered these witnesses’ statements could be received under rule 68(2)(b) based on “its assessment of the *other relevant factors*” under rule 68(2)(b)(i).⁵² It then referred to its view that “the statements are corroborative [...] as other witnesses have given and are expected to give evidence relevant to the alleged shelling”—but the use of the plural suggests again that this was not the dispositive consideration even in this latter context, apart from the limited extent to which this evidence was in dispute.

30. Accordingly, nothing in the Decision concerning the [REDACTED] or the Abobo Witnesses suggests that the Chamber’s approach to corroboration was essential to its determination to receive their statements into evidence. Nor does the Application make any argument to the contrary.

31. Indeed, the arguments in the Application concerning the Third Issue show instead a preference to concentrate on re-litigating the merits of the Chamber’s analysis. This is not the purpose of proceedings under article 82(1)(d). Thus, the Application discloses three sub-arguments:

⁴⁷ See Decision, para. 19. See further paras. 13-18.

⁴⁸ See Decision, para. 19.

⁴⁹ See Decision, para. 19 (emphasis added).

⁵⁰ See Decision, paras. 33-36.

⁵¹ See Decision, para. 37.

⁵² See Decision, para. 38 (emphasis added). See rule 68(2)(b)(i).

- First, whether the Chamber erred in affirming that the witness statements would be “corroborative of other evidence that [...] is expected to be presented” [citation omitted].⁵³
- Second, whether the Chamber erred in adopting too broad a definition of corroboration.⁵⁴
- Third, whether the Chamber erred in that there is no “trace” within the Decision of an analysis of what is corroborated or corroborative.⁵⁵

32. The first and second sub-arguments merely disclose a disagreement with the Chamber’s discretionary assessment of what evidence they considered to be corroborative,⁵⁶ and consequently are not appealable. Moreover, not only is it well understood that corroborative evidence need not be *identical* evidence,⁵⁷ but the Defence also overlooks the significance of the preliminary stage of this analysis, when—unlike final deliberations—the Chamber does not yet know precisely the contours of the evidence which will be presented.⁵⁸ This was expressly acknowledged by the Chamber, in noting that it considered corroboration, “*within the meaning of that provision* [rule 68(2)(b)(i)].”⁵⁹

33. Likewise, the third sub-argument merely complains about the reasoning of the Chamber in making this preliminary determination, but does not address the

⁵³ See Application, para. 41 (“*Premièrement, la Chambre a commis une erreur de droit en affirmant que les déclarations antérieures seraient “corroborative of other evidence that [...] is expected to be presented”*”).

⁵⁴ See Application, para. 43 (“*Deuxièmement, la chambre adopte une définition trop large de la corroboration dans la décision attaquée*”).

⁵⁵ See Application, para. 45 (“*Troisièmement, que la Chambre ait procédé à une analyse ou pas de ce qui serait corroboré ou corroboratif, il n’y en a pas trace dans la décision attaquée*”).

⁵⁶ See Application, paras. 41-43.

⁵⁷ See e.g. ICTR, *Jean-Baptiste Gatete v. Prosecutor*, Case No. ICTR-00-61-A, App.Ch., Judgment, 9 October 2012, available at <http://www.legal-tools.org/doc/1d0b08/>, para. 125 (“two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way”).

⁵⁸ See *Gbagbo* Rule 68 Appeal Decision, para. 72 (in the context of rule 68(3), noting that the Chamber is only required to “carry out a *preliminary* assessment of the evidence in order to determine whether its introduction [...] 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”, emphasis added).

⁵⁹ See Decision, para. 38 (emphasis added).

relevant legal test. In particular, a chamber is not required to recite each and every factor that was before it, but rather to identify “facts which it found to be relevant in coming to its conclusion.”⁶⁰ This is what the Chamber did. Thus, with respect to the Abobo Witnesses, for example, the Chamber reasoned with “sufficient clarity” by: first, describing the content of each written statement;⁶¹ second, identifying that it found more than one factor under rule 68(2)(b)(i) to permit receiving these statements; and, third, indicating the basis on which (at this preliminary stage) it considered the statements to be corroborative in nature.⁶² Its reasoning is similar with regard to the [REDACTED].⁶³

34. Furthermore, the Third Issue fails the cumulative requirements of article 82(1)(d). Defence concern about the Chamber’s view of the law, but which does not touch upon a matter which was crucial to the outcome of the Decision, cannot significantly affect the fair and expeditious conduct of the proceedings. Nor can the proceedings be materially advanced by what would be, at most, a mere advisory opinion from the Appeals Chamber (which is beyond its jurisdiction).

The Fourth Issue

35. The Fourth Issue is not an appealable issue but a mere disagreement with the Chamber’s determination as to the scope of the evidence that it will receive in writing, under rule 68(3), in respect of nine witnesses.⁶⁴ The Chamber found these witnesses’ statements were in principle suitable for introduction under rule 68(3), in circumstances where the Prosecution had excluded “limited, discrete portions of the statements.”⁶⁵ The Application claims, *inter alia*, that this will be confusing,⁶⁶ but does

⁶⁰ See ICC-01/04-01/06-773 OA5, para. 20.

⁶¹ See Decision, paras. 33-36.

⁶² See Decision, para. 38. See *above* para. 29.

⁶³ See *above* para. 28.

⁶⁴ See Decision, para. 81. The Chamber dismissed the Prosecution’s rule 68(3) request in respect of the tenth witness (Witness P-0184): para. 90.

⁶⁵ See Decision, para. 81.

⁶⁶ See Application, paras. 48-54.

not identify “an identifiable subject or topic requiring a decision for its resolution,” but “merely a question over which there is disagreement or conflicting opinion.”⁶⁷

36. Nor can the Fourth Issue meet the cumulative requirements of article 82(1)(d). In particular, since the witnesses’ statements are conditionally received under rule 68(3), they will appear before the Chamber and will be subject to questioning by the Defence. In this context, subject to the usual limitations, the Parties will be free to pose any additional questions which fairness might require. The Chamber’s cautious view concerning the extent to which truncation of witness statements might adversely affect the proceedings is, moreover, demonstrated by its resolution in the Decision to deny the Prosecution rule 68(3) request concerning other witnesses where “several large and important portions” of their statements would need to be excluded.⁶⁸

37. Accordingly, it cannot be said that the Chamber’s approach will significantly affect the fair conduct of the proceedings—rather, the Chamber’s ongoing control of the proceedings in which the witnesses appear to testify will ensure fairness. For the same reason, intervention by the Appeals Chamber will not materially advance the proceedings because any necessary matters remain within the control of the Chamber when the witnesses appear before it.

The Fifth Issue

38. The Fifth Issue is no more than a generalised complaint, in similar vein to previous unsuccessful complaints, as opposed to an appealable issue. Attempts to ‘repackage’ this complaint, with reference to the following reasoning of the Chamber concerning the Abobo Witnesses, are unconvincing. The Chamber stated:

⁶⁷ See above para. 6. See Application, paras. 48-60.

⁶⁸ See Decision, para. 80.

If this request [under rule 68(2)(b)] is rejected, this does not create an obligation for the calling party to actually call the witness. Therefore it does not follow that a request for introduction of prior recorded testimony under Rule 68(2)(b) of the Rules must be rejected because the witness may have knowledge of facts which are of interest to the Defence but are not reported in the statement taken by the Prosecutor. Indeed, the Defence will, in due course, have a full opportunity to present its case to the Chamber. The Chamber notes that there is a procedure in place for contacting witnesses of another party and that introduction of a written statement under Rule 68(2)(b) of the rules in and of itself does not preclude that the other party subsequently conducts an interview with the witness to cover topics not covered in the statement introduced.⁶⁹

39. The Defence seems simply to disagree with this finding, but does not overcome the basic logic of the Chamber's position.⁷⁰ Nor indeed is there any demonstration of the impact of this reasoning on the Chamber's determination under rule 68(2)(b)—to the contrary, the logic of the Chamber's position was that the two questions are unrelated. This is, moreover, supported by the object and purpose of rule 68(2)(b) itself. If such an application could be defeated simply because the Defence expresses its own interest in the witness in question, the Defence would effectively exercise a veto over the use of this provision in the Prosecution case. This cannot be correct. Accordingly, at its heart, the Fifth Issue amounts to no more than mere disagreement in principle with the use of rule 68, and does not attempt to show any error in the Chamber's application of the rule itself.

40. In any event, the Fifth Issue fails to meet the cumulative requirements of article 82(1)(d). On the specific issue of fairness, as the Chamber found (and notwithstanding the Defence complaints in this context),⁷¹ the Defence remains fully able to call, during the Defence case, any Prosecution witness whose evidence is not presented by the Prosecution, or whose evidence is introduced entirely in writing under rule 68(2)(b).⁷² As such, nothing in the Decision has prejudiced the ability of

⁶⁹ See Decision, para. 21.

⁷⁰ See Application, para. 62.

⁷¹ See Application, para. 63.

⁷² See Decision, para. 21.

the Defence to obtain the evidence which it desires, and thus it cannot be said that the fairness of the proceedings has significantly been affected.

41. Even calling the Abobo Witnesses in the Defence case would, moreover, have no more than a marginal effect (at most) on the expeditious conduct of the proceedings—on the one hand, granting the rule 68(2)(b) application at this point in the trial saves time; on the other, it is by no means certain that the Defence will wish to call any of the Abobo Witnesses once it has heard the entirety of the Prosecution case. Even if it does, the time spent on litigation leading to the present Decision has hardly been wasted because it has resulted in time savings with respect to many witnesses, and not just the Abobo Witnesses. Indeed, by a similar logic, the intervention of the Appeals Chamber in this essentially procedural question, far from materially advancing the proceedings, could undermine a highly efficient use of time by the Chamber.

Conclusion

42. For all the reasons above, the Chamber should reject the Application.



Fatou Bensouda, Prosecutor

Dated this 19th day of September 2017

At The Hague, The Netherlands