

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Côte d'Ivoire
4 In the case of The Prosecutor v. Laurent Koudou Gbagbo and Charles Blé
5 Goudé - ICC-02/11-01/15
6 Presiding Judge Piotr Hofmański
7 Appeals Judgment - Courtroom 1
8 Tuesday, 1 November 2016
9 (The Appeals judgment starts in open session at 2.37 p.m.)
10 THE COURT USHER: [14:38:00] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE HOFMAŃSKI: [14:38:28] Good afternoon.
14 Would the court officer please call the case.
15 THE COURT OFFICER: [14:38:51] Thank you, Mr President.
16 The situation in the Republic of Côte d'Ivoire, in the case of The Prosecutor versus Laurent
17 Gbagbo and Charles Blé Goudé, case reference ICC-02/11-01/15.
18 For the record, we are in open session.
19 PRESIDING JUDGE HOFMAŃSKI: [14:39:10] Thank you.
20 My name is Piotr Hofmański, and I am the Presiding Judge on the appeal arising from the
21 case of The Prosecutor versus Laurent Gbagbo and Charles Blé Goudé. The other Judges
22 of the Appeals Chamber on this appeal are Judge Kuniko Ozaki,
23 Judge Sanji Mmasenono Monageng, Judge Howard Morrison and
24 Judge Chang-ho Chung. I am joined today by legal staff of the appeals division,
25 Ms Barbara Roche, Ms Magali Bobbio, Ms Natasha Naidoo and Mr Andrew Merrylees.

1 I note for the record that both Mr Gbagbo and Mr Blé Goudé are not present in the
2 courtroom today. However, counsel is present so at this point may I ask the parties and
3 participants to please introduce themselves for the record, starting with the Defence
4 Mr Gbagbo and Mr Blé Goudé whose appeal we are deciding today.
5 Please.

6 MR ALTIT: [14:40:21] (Interpretation) I thank you, Mr President. To my side,
7 Jennifer Naouri; Madam Agathe Bahi Baroan, co-counsel and former member of the
8 Constitutional Bar in Côte d'Ivoire; Professor Dov Jacobs; and I am Emmanuel Altit, lead
9 counsel for Laurent Gbagbo.

10 PRESIDING JUDGE HOFMAŃSKI: [14:40:52] Yes.

11 MR KNOOPS: [14:40:55] Mr President, good afternoon. My name is
12 Geert-Jan Knoops, I'm counsel for Mr Blé Goudé. To my left co-counsel, Mr N'Dry of the
13 Côte D'Ivoire Bar, to my right case manager Nina Dyk from the United States and case
14 managers Madam Vandeler and Madam Carrin. Thank you.

15 PRESIDING JUDGE HOFMAŃSKI: [14:41:18] Thank you very much.
16 Office of the Prosecutor.

17 MS BRADY: [14:41:21] Good afternoon, your Honours. Appearing for the
18 Prosecution today are Meritxell Regue, appeals counsel; Reinhold Gallmetzer, appeals
19 counsel; Yasmine Chubin, trial lawyer; and myself, Helen Brady, senior appeals counsel.
20 Thank you.

21 PRESIDING JUDGE HOFMAŃSKI: [14:41:37] Thank you.
22 And for the Legal Representative of Victims.

23 MS MASSIDDA: [14:41:45] Good afternoon, your Honour. For victims appearing
24 today to my right Mr Enrique Carnero Rojo, legal officer; Ms Ludovica Vetrucchio,
25 associate legal officer; behind me Mr Alexis Larivière, associate legal officer; and I am

1 Paolina Massidda, principal counsel.

2 PRESIDING JUDGE HOFMAŃSKI: [14:42:05] Thank you very much.

3 Today the Appeals Chamber is delivering its judgment on the appeals of

4 Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of the Trial Chamber I

5 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony

6 under Rules 48(2)(b) and 68(3)" rendered on 9 June 2016. In today's summary, I will refer

7 to this decision as the Impugned Decision.

8 I shall now summarise the Appeals Chamber's judgment, which was taken by majority,

9 Judge Kuniko Ozaki partially dissenting. This summary is not part of the written

10 judgment, which is the only authoritative account of the Appeals Chamber's ruling and

11 reasons. The written judgment will be made available to the parties and participants at

12 the conclusion of this hearing.

13 By way of procedural background, the present appeal arose out of a request by the

14 Prosecutor filed on 19 April 2016 seeking the introduction of the prior recorded testimony

15 of 11 witnesses pursuant to Rule 68(2)(b) and (3) of the Rules of Procedure and Evidence.

16 Following responses filed by Mr Gbagbo and Mr Blé Goudé and the Office of Public

17 Counsel for Victims, the Trial Chamber rendered on 9 June 2016, Judge Henderson

18 partially dissenting, the Impugned Decision, granting the Prosecutor's request in part.

19 On 7 July 2016, the Trial Chamber granted, in part, requests for leave to appeal the

20 Impugned Decision filed by Mr Gbagbo and Mr Blé Goudé.

21 On 21 July 2016, Mr Gbagbo and Mr Blé Goudé filed their documents in support of the

22 appeal. Mr Gbagbo raised two grounds of appeal, as did Mr Blé Goudé. The Victims

23 filed their response on 26 July 2016 and the Prosecutor filed hers on 1 August 2016.

24 In terms of the merits of the appeal, I will begin with Mr Gbagbo's first and second

25 grounds of appeal and Mr Blé Goudé's first ground of appeal.

1 Mr Gbagbo's first ground of appeal is that the Trial Chamber made an error of law in
2 basing its decision to admit prior recorded statements on the principle of "good trial
3 management." Mr Gbagbo, in his second ground of appeal, calls into question the Trial
4 Chamber's use of a criterion concerned with the importance of a witness in the system of
5 evidence expected to be presented. For reasons explained further in the written
6 judgment, the Appeals Chamber found that the arguments raised by Mr Gbagbo under
7 this second ground of appeal were linked to the first issue certified by the Trial Chamber
8 and therefore were admissible.

9 Mr Blé Goudé's first ground of appeal is whether the Trial Chamber erred by failing to
10 apply the requirements that prior recorded testimony admitted under Rule 68(3) must not
11 be prejudicial to the accused, by ignoring the guidance provided by the Appeals Chamber
12 in its previous judgment in the case of Jean-Pierre Bemba Gombo of 3 May 2011 which
13 guidance does not provide for the criterion of "good trial management." In this
14 summary, I will refer to this judgment as the "Bemba OA5 OA6 judgment."

15 Mr Gbagbo and Mr Blé Goudé essentially submit that the Trial Chamber erred in the
16 exercise of its discretion under Rule 68(3) of the Rules. Rule 68(3) provides as follows:
17 If the witness who gave the previously recorded testimony is present before the Trial
18 Chamber, the Chamber may allow the introduction of the previously recorded testimony
19 if he or she does not object to the submission of the previously recorded testimony and the
20 Prosecutor, the Defence and the Chamber have the opportunity to examine the witness
21 during the proceedings.

22 Mr Gbagbo and Mr Blé Goudé submit that the Trial Chamber erred by authorising the
23 introduction of prior recorded testimony under Rule 68 of the Rules "on the basis of 'one
24 criterion,' namely, 'good trial management.'" The Appeals Chamber considers that this
25 misinterprets the Impugned Decision and that it is clear from the decision that, although

1 the Trial Chamber did rely on "good trial management" in reaching its decision, it did this
2 in a context that also referred to other factors.

3 Mr Gbagbo and Mr Blé Goudé also argue that not only did the Trial Chamber err in
4 relying only on good trial management, but that it erred in relying on this factor at all, in
5 particular since it was not referred to as a relevant factor in the Appeals Chamber's Bemba
6 OA5 OA6 judgment. The Appeals Chamber finds no error in the fact that the Trial
7 Chamber considered good trial management per se in deciding on the request before it.
8 Furthermore, the Appeals Chamber finds that the fact that it did not refer in the relevant
9 part of its Bemba OA5 OA6 judgment to the need for the expeditiousness is not decisive.

10 Articles 64(2) and 67(1)(c) of the Statute enjoin the Trial Chamber to ensure that the
11 proceedings are expeditious and, as further explained in the judgment, the Appeals
12 Chamber has previously noted the importance of the need for proceedings to be
13 expeditious.

14 The Appeals Chamber also notes that the need for expeditious proceedings was
15 considered to be the principal reason for the adoption of the amendment to Rule 68
16 in 2013.

17 In addition, Mr Gbagbo and Mr Blé Goudé argue that the introduction of the prior
18 recorded testimony was prejudicial to their rights. For the reasons that follow, the
19 Appeals Chamber finds no merits in their arguments.

20 In this regard, Mr Gbagbo and Mr Blé Goudé argue that the Trial Chamber erred in not
21 considering the three factors mentioned in the Appeals Chamber's Bemba OA5 OA6
22 judgment, which were meant as safeguards against potential prejudice, and that if it had it
23 would have rejected the Prosecutor's request to introduce the prior recorded testimony in
24 question.

25 The Appeals Chamber held inter alia in that judgment that, "in deviating from the general

1 requirement of in-court personal testimony and receiving into evidence any prior
2 recorded witness testimony, a Chamber must ensure that doing so is not prejudicial to or
3 inconsistent with the rights of the accused or with the fairness of the trial generally." It
4 stated that a "cautious assessment" was required and that Trial Chambers "may, for
5 example, take into account, a number of factors, including the following: (i) whether the
6 evidence relates to issues that are not materially in dispute; (ii) whether that evidence is
7 not central to core issues in the case, but only provides relevant background information;
8 and (iii) whether the evidence is corroborative of other evidence. In this regard, the
9 Appeals Chamber notes that the factors referred to in the Bemba OA5 OA6 judgment are
10 not requirements but, rather, factors that may be considered in assessing whether the
11 introduction of prior recorded testimony under Rule 68(3) of the Rules is prejudicial. In
12 this respect, the Appeals Chamber, in its previous judgment, did not per se preclude the
13 introduction of prior recorded testimony under Rule 68(3) of the Rules which related to
14 issues that were materially in dispute, central to core issues of the case or were
15 uncorroborated. While no one factor is, as a matter of principle, determinative, the
16 Appeals Chamber considers, in particular, that where statements relate to issues that are
17 materially in dispute, central to core issues of the case or are not corroborated, a Chamber
18 must be extra vigilant that introduction of the prior recorded testimony in question will
19 not be prejudicial to or inconsistent with the rights of the accused or the fairness of the
20 trial generally. This must be the Chamber's overriding concern, in particular bearing in
21 mind "the general requirement of in-court personal testimony."
22 In the Impugned Decision, the Appeals Chamber notes that the Trial Chamber did not
23 expressly refer to the Bemba OA5 OA6 judgment. However, it did refer to the
24 aforementioned three factors, finding that the prior recorded testimony in question related
25 to facts that were centre to the case or materially in dispute and that at least one, if not

1 two, of the statements in question were not corroborated.

2 The Appeals Chamber notes that the fact that the criteria from the Bemba OA5 OA6
3 judgment were inserted into the new Rule 68(2)(b) of the Rules implies that greater
4 discretion was intended to be accorded in respect of the application of Rule 68(3) of the
5 Rules.

6 Whether such testimony may be introduced under Rule 68(3) of the Rules will, therefore,
7 depend upon the circumstances of the case. In addition, the extent to which such
8 testimony may be introduced in writing will be a matter for the discretion of a Chamber,
9 bearing in mind that Rule 68(3) provides for the possibility for the Prosecutor, the Defence
10 and the Chamber to have the opportunity to examine the witness during the
11 proceedings - this de facto includes the calling party, which in the instant case is the
12 Prosecutor. What is most important in this exercise is that the Chamber carries out a
13 "cautious item-by-item analysis. " This assessment sufficiently reasoned and explained,
14 should be made on a case-by-case basis where the factors to be considered may vary per
15 case and per witness.

16 In the case at hand, the Appeals Chamber notes that the Trial Chamber began an
17 item-by-item analysis and although it stated that the statements in question "related to
18 facts which are central to the case, and are materially in dispute," it then proceeded to
19 consider the importance of the statements in the context of the case as a whole.

20 The Appeals Chamber considers that, in order to make its determination under Rule 68(3)
21 of the Rules, a Trial Chamber indeed must carry out an individual assessment of the
22 evidence sought to be introduced. In carrying out this individual assessment, the Trial
23 Chamber must also analyse the importance of each witness statement in light of the
24 charges and the evidence already presented or intended to be presented before it.
25 Indeed, the more important the Chamber assesses the evidence in question to be, the more

1 likely it is that the Chamber will have to reject any application under this provision.
2 Therefore, making such an assessment cannot per se be contrary to Rule 68. This
3 assessment is without prejudice to the weight that the Trial Chamber will ultimately
4 attach to a witness's evidence, which indeed can only be determined once the trial has
5 heard all of the evidence.

6 Mr Gbagbo and Mr Blé Goudé raise arguments in relation to the primacy of the principle
7 of orality in Article 69(2) of the Statute. The Trial Chamber stated that the "principle of
8 orality is not absolute and that the Statute explicitly envisages exceptions to be provided
9 by the Rules." This is indeed the case, as was acknowledged by the Appeals Chamber in
10 the Bemba OA5 OA6 judgment. Exceptions to the principle of orality are explicitly
11 provided for in Article 69(2) of the Statute and the introduction of the prior recorded
12 testimony in accordance with Rule 68(3) of the Rules is one of them. As has been stressed
13 previously in this judgment, however, introduction of prior recorded testimony under this
14 provision is subject to the strict conditions set out in that Rule in addition to the
15 overriding factor that it must not be prejudicial to or inconsistent with the rights of the
16 accused or the fairness of the trial generally.

17 Mr Gbagbo argues that the Trial Chamber has "opened the way to a potentially wholesale
18 infringement of the principle of orality." The Appeals Chamber considers that respect for
19 the principle of orality cannot be reduced to a purely mathematical calculation of the
20 percentage of witnesses providing their entire evidence orally. However, in reaching a
21 decision under Rule 68(3) of the Rules, the principle set out in Article 69(2) of the Statute
22 must always be borne in mind.

23 The Appeals Chamber further recalls that, pursuant to Article 68(3) of the Rules, "the
24 Prosecutor, the Defence and the Chamber have the opportunity to examine the witness" in
25 court. In this sense, the testimony cannot be considered to be exclusively written as it is

1 not necessarily intended to replace oral testimony but, rather, complement it.

2 Mr Blé Goudé argues that the Trial Chamber's interpretation would erode the principle of

3 orality because it would be possible to have all the crime-base witnesses testifying under

4 Rule 68(3) of the Rules as long as they do not have insider or other quality knowledge of

5 the planning and overall conduct of the alleged perpetrators. The Appeals Chamber

6 does not consider that the necessary implication of the Trial Chamber's reasoning is that

7 the evidence of all crime-base witnesses may be introduced under Rule 68(3) of the Rules.

8 Indeed, as previously stated, a careful case-by-case assessment is required in each

9 instance. Many of the reasons warranting the hearing of testimony viva voce in its

10 entirety may apply equally to crime-base evidence.

11 In the case at hand and for reasons explained further in the written judgment, the Appeals

12 Chamber considers that Mr Gbagbo and Mr Blé Goudé have not demonstrated that the

13 Trial Chamber erred in its approach under Rule 68(3) of the Rules to the introduction of

14 prior recorded testimony.

15 The Appeals Chamber notes that Mr Blé Goudé raises arguments in relation to the factual

16 assessment carried out by the Trial Chamber. The Appeals Chamber understands

17 Mr Blé Goudé's argument to be that if the Trial Chamber would have followed the

18 guidance given in the Bemba OA5 OA6 judgment, "it would not have conditionally

19 introduced the ten witness statements" because the testimony was materially in dispute

20 and central to the case. As explained, the Trial Chamber did not err in its interpretation

21 of Rule 68(3) of the Rules. Therefore, the Appeals Chamber dismisses Mr Blé Goudé's

22 arguments.

23 Accordingly, Mr Gbagbo and Mr Blé Goudé's first ground of appeal and Mr Gbagbo's

24 second ground of appeal are rejected.

25 Mr Blé Goudé's second ground of appeal concerns the admission of one witness statement

1 under Rule 68(2)(b)(i) of the Statute. He argues that the Trial Chamber erred by limiting
2 its analysis of sufficient indicia of reliability to the formal requirement that the statement
3 be taken by the Prosecution, "pursuant to Rule 111 of the Rules and under all applicable
4 guarantees, including Article 54(1)". Mr Blé Goudé argues that the Trial Chamber erred
5 in law in disregarding completely "the indicia relating to the content of the witness
6 statement."

7 In this regard, Rule 68(2)(b)(i) of the Rules, in relevant part, provides:

8 In determining whether introduction of prior recorded testimony falling under sub-rule
9 (b) may be allowed, the Chamber shall consider inter alia whether the prior recorded
10 testimony in question has sufficient indicia of reliability.

11 The Appeals Chamber considers that, in their assessment of indicia of reliability under
12 Rule 68(2)(b)(i) of the Rules, trial chambers are not obliged to consider factors beyond
13 formal requirements. This is because an assessment of indicia of reliability under
14 Rule 68(2)(b)(i) of the Rules can be more cursory in nature so that even if some factors,
15 such as the witness' competence to testify about the facts, the internal consistency of the
16 statement and potential inconsistencies with other evidence in the record, are not taken
17 into account during this assessment, they may still be considered when assessing the
18 probative value of the evidence. The Appeals Chamber underlines, however, that in
19 looking at indicia of reliability for the purposes of Rule 68(2)(b)(i) of the Rules, trial
20 chambers are not precluded from looking beyond formal requirements if they consider it
21 to be appropriate in a particular case.

22 In the case at hand, the Trial Chamber assessed indicia of reliability on the basis of formal
23 criteria and, to some extent, also considered a factor beyond formal requirements, namely
24 the fact that the statement "also includes information as to how the witness came to know
25 of particular facts." The Appeals Chamber discerns no error in this approach.

1 The Appeals Chamber notes that Mr Blé Goudé questions the reliability of the evidence on
2 the basis that it is based on anonymous hearsay evidence. Leaving aside the issue of
3 whether the prior recorded testimony of the witness in question is based on anonymous
4 hearsay, the Appeals Chamber notes that in relation to the hearsay evidence, the ICTY
5 Appeals Chamber has held that whether the hearsay is first-hand, or more removed, are
6 also relevant to the probative value of the evidence. The Appeals Chamber notes that in
7 support of his argument that because of the anonymous hearsay nature of the prior
8 recorded statement, the Trial Chamber erred in finding that it had sufficient indicia of
9 reliability, Mr Blé Goudé cites a decision rendered in the case of Thomas Lubanga.
10 However, in that decision, the Trial Chamber adopted the ICTY jurisprudence I just
11 referred to. In such circumstances, without more, the Appeals Chamber can discern no
12 error.

13 For these reasons, the Appeals Chamber decided by majority, Judge Ozaki partially
14 dissenting, to confirm the Impugned Decision.

15 I shall now very briefly summarise the dissenting opinion of Judge Ozaki.

16 While Judge Ozaki concurs with her colleagues' affirmation that a careful case-by-case
17 assessment is required under Rule 68, she is of the view that, concretely, the Impugned
18 Decision provided inadequate reasoning to justify its departure from the principle of
19 orality in this instance. Judge Ozaki further considers that the Appeals Judgment
20 delivered today provides insufficient guidance and clarity, both to parties and Trial
21 Chambers, in respect of the prejudice assessment required under Rule 68(3).

22 Judge Ozaki's dissenting opinion will be filed in due course.

23 This concludes my summary of the judgment.

24 I thank the interpreters, court reporters, all the Registry staff and the parties and
25 participants.

Trial Hearing

(Open Session)

ICC-02/11-01/15

- 1 This session is now closed.
- 2 THE COURT USHER: [15:07:36] All rise.
- 3 (The Appeals Judgment ends in open session at 3.07 p.m.)