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Date: **21 March 2022**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Confidential

Yekatom Defence Motion for Partial Reconsideration of 'Eleventh Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0954, P-1811, and P-0966' (ICC-01/14-01/18-1317-Conf)

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby respectfully requests partial reconsideration of the Chamber's 'Eleventh Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0954, P-1811, and P-0966'.¹
2. The Defence submits that reconsideration of the Chamber's decision to grant the Prosecution's request for the introduction of the witness statement of P-0954 and associated documents ('Impugned Decision') is warranted, as it contains clear errors of reasoning; and because reconsideration is necessary to prevent an injustice.

PROCEDURAL HISTORY

3. On 12 October 2021, the Prosecution filed the 'Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-0954 pursuant to Rule 68(3)' ('Request').²
4. On 25 October 2021, the Defence filed the 'Corrected version of the "Yekatom Defence Response to the "Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-0954 pursuant to Rule 68(3)"', 25 October 2021, ICC-01/14-01/18-1145-Conf' ('Response').³
5. On 18 March 2022, the Chamber issued the 'Eleventh Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies under Rule 68(3) of the Rules concerning Witnesses P-0954, P-1811, and P-0966'.⁴

¹ [ICC-01/14-01/18-1317-Conf.](#)

² [ICC-01/14-01/18-1137-Conf.](#)

³ [ICC-01/14-01/18-1145-Conf-Corr.](#)

⁴ [ICC-01/14-01/18-1317-Conf.](#)

APPLICABLE LAW

6. A Chamber has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute.⁵ Reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.⁶

7. Article 64(2) of the Statute states,

The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

8. Article 67(1) of the Statute states in relevant part,

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing[.]

9. Article 69(2) of the Statute states in relevant part,

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. [...] These measures shall not be prejudicial to or inconsistent with the rights of the accused.

10. Rule 64(2) of the Rules states in relevant part,

A Chamber shall give reasons for any rulings it makes on evidentiary matters.

11. Rule 68 of the Rules states in relevant part,

(1) When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony,

⁵ See e.g., *Prosecutor v. Al Hassan*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', [ICC-01/12-01/18-734](#), 9 April 2022, para. 11, and references cited therein.

⁶ *Ibid.*

provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met.

[...]

(3) If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

12. In deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony, a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally.⁷ This requires a cautious assessment.⁸
13. A Chamber must carry out an individual assessment of the evidence sought to be introduced under Rule 68(3), based on the circumstances of each case, which includes analysing the importance of this evidence in light of the charges and other evidence presented or intended to be presented.⁹
14. In conducting this analysis, a Chamber may take into account a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.¹⁰

⁷ *Prosecutor v. Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", [ICC-01/05-01/08-1386](#), 3 May 2011 ('Bemba Appeals Judgment'), para. 78.

⁸ *Ibid.*

⁹ *Prosecutor v. Gbagbo & Blé Goudé*, 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)", [ICC-02/11-01/15-744](#), 1 November 2016 ('Gbagbo & Blé Goudé Appeals Judgment'), para. 71.

¹⁰ [Bemba Appeals Judgment](#), para 78.

SUBMISSIONS

15. The Defence recalls that, as raised in its Response, the Statement contains the highly prejudicial allegation that, in a phone conversation with P-0954, Mr Yekatom made comments amounting to a confession to the killing of Saint Cyr LAPO N'GOMAT ('Alleged Confession').¹¹ The Alleged Confession is relied upon by the Prosecution to support its claim as to Mr Yekatom's 'involvement in and knowledge of' the crimes charged in relation to the alleged 'Yamwara School Incident', i.e. Counts 11 to 16 of the Prosecution case.¹²
16. P-0954's account of the Alleged Confession is not corroborated by any evidence in these proceedings. P-0954 does not suggest that any other individuals participated in the alleged phone conversation, overheard Mr Yekatom make the Alleged Confession, or were otherwise made aware of it; nor does P-0954 provide further details as to when and in what circumstances the phone conversation took place. The Defence's ability to challenge P-0954's account of the Alleged Confession is thus extremely limited.
17. Nor can the Alleged Confession itself be considered independently 'corroborated' simply because the Prosecution seeks to rely on additional evidence, purportedly going to Mr Yekatom's alleged 'ordering, endorsement of, and commission of the crimes', to prove his alleged knowledge and intent with respect to Counts 11 to 16.¹³ For the purposes of Rule 68(3), corroboration should be understood as evidence strengthening P-0954's factual account specifically – i.e. P-0954's account of the Alleged Confession itself – as opposed to strengthening the broader issue of Mr Yekatom's alleged *mens rea*. Such an interpretation would be consistent with the fact a party's ability to examine other witnesses on the same issues is a material consideration under Rule

¹¹ CAR-OTP-2048-0171-R02, para. 86; [ICC-01/14-01/18-1145-Conf-Corr](#), para. 13.

¹² [ICC-01/14-01/18-723-Conf](#), para. 456.

¹³ *Ibid.*

68(3).¹⁴ Given that the Defence will be unable to specifically test P-0954's account of the Alleged Confession in its examination of those witnesses through whom the Prosecution seeks to prove Mr Yekatom's *mens rea*, said witnesses cannot be considered as 'corroborating' for the purposes of Rule 68(3). Further, the fact that the Defence has provided formal notice of its intent to raise a defence of alibi with respect to the relevant charges, and the fact that Mr Yekatom's alleged presence at the Yamwara School at the material time is refuted by the Prosecution's main insider witness, P-1839, further militates against an undue broadening of the definition of corroboration in an assessment of the Alleged Confession.¹⁵

18. The potential prejudice that would be occasioned by the introduction into evidence of the Alleged Confession, and by extension, the Statement, is thus substantial.

I. The Impugned Decision contains clear errors of reasoning.

19. The Defence respectfully submits that the Impugned Decision contains a series of inter-related errors that, whether assessed on their own or in combination, comprise clear errors of reasoning, and thus warrants reconsideration.

20. First, in reaching the Impugned Decision, the Chamber improperly imposed the burden of disproving the admissibility of the Statement under Rule 68(3) on the Defence.¹⁶

¹⁴ See, [ICC-01/14-01/18-1317-Conf](#), para. 17.

¹⁵ See, [ICC-01/14-01/18-1145-Conf-Corr](#), para. 24; see also, [ICC-01/14-01/18-818-Conf](#), paras 11-14.

¹⁶ See also, [Bemba Appeals Judgment](#), paras 71-73, where the Appeals Chamber found merit in Mr Bemba's argument that Trial Chamber III's decision *prima facie* admitting all evidence on the Prosecution's List of Evidence improperly imposed a burden on Mr Bemba: 'rather than merely having to raise issues as to the relevance or admissibility of the evidence, Mr Bemba now has the additional burden of disproving the admissibility of items on which the Chamber has already ruled.'

21. As has been held in these proceedings, Rule 68(3) is an exception to the principle of orality,¹⁷ itself enshrined in Article 69(2) of the Statute;¹⁸ further, *viva voce* testimony is the default mode of testimony before the Court.¹⁹
22. In light of these established principles, the burden of justifying the introduction of the Statement via Rule 68(3) properly lay upon the Prosecution, as the calling party. In other words, it was for the Prosecution to establish why, in the circumstances, introduction of the Statement via Rule 68(3) was appropriate pursuant to the applicable legal framework, and especially with respect to Mr Yekatom's fair trial rights. By extension, it was for the Prosecution to justify the proposed deviation from the default mode of testimony before the Court, and the contravention of the principle of orality.
23. However, the Defence respectfully submits that it is apparent from the Impugned Decision that the Chamber improperly reversed the applicable burden.
24. This is evidenced in the following extracts of the Impugned Decision:

However, the Chamber notes that it sees no reason why, in the present circumstances, the introduction of P-0954's statement should be barred.²⁰

[T]he Chamber finds that a *viva voce* testimony is not necessary in the present circumstances.²¹

In light of the above, the Chamber finds it not necessary for P-0954's testimony to be presented orally in its entirety[.]²²

25. The reversal of this burden can be further discerned from the Chamber's reasoning. While the Chamber expressly took note of the Defence's submissions

¹⁷ [ICC-01/14-01/18-685](#), para. 26, and references cited therein.

¹⁸ *Ibid*, para. 25, and references cited therein; see also, [Bemba Appeals Judgment](#), paras 75-76.

¹⁹ [ICC-01/14-01/18-685](#), para. 25, and references cited therein.

²⁰ [ICC-01/14-01/18-1317-Conf](#), para. 16.

²¹ *Ibid*, para. 17.

²² *Ibid*, para. 19.

as to the 'extensiveness of the references to Mr Yekatom's acts and conduct' on core and contested issues, and that 'one of the most salient subjects of the statement, if not the most salient subject, of P-0954's statement is Mr Yekatom himself',²³ the Chamber recalled that such references 'do not *per se* constitute an obstacle to the introduction of a prior recorded testimony under Rule 68(3)', in finding that that there was 'no reason why, in the present circumstances, the introduction of P-0954's statement should be barred.'²⁴

26. Yet the mere fact that references in the Statement to Mr Yekatom's acts and conduct do not *per se* constitute a bar to introduction under Rule 68(3) is not, of itself, a positive argument in favour of allowing its introduction. In the absence of any further findings addressing these extensive references,²⁵ the Chamber's reasoning thus further indicates that a burden was imposed on the Defence to establish that these references precluded the introduction of the Statement, when in fact the burden was properly on the Prosecution to demonstrate that introduction of the Statement was permissible despite these references. Yet there is no indication in the Impugned Decision that the Chamber relied on any such demonstration on the part of the Prosecution, despite the fact that these extensive references – and especially the Alleged Confession – ought to have been a highly material consideration in the assessment of the Request.²⁶

27. The Chamber's findings in this regard indicate that the Chamber had considered that the Defence had failed to establish that the introduction of the Statement under Rule 68(3) was inappropriate in the circumstances. This was an error of reasoning: it was not for the Defence to establish reason(s) why the

²³ [ICC-01/14-01/18-1317-Conf](#), para. 16.

²⁴ *Ibid.*

²⁵ The Chamber's reliance on prior Rule 68(3) Decisions is addressed below; see *infra*, para. 33.

²⁶ General reference to the opportunity to cross-examine P-0954 are insufficient in this regard, as this would apply universally to all Rule 68(3) applications and are thus contrary to the requirement that the Chamber treat each Rule 68(3) application on a case-by-case basis, 'with due regard to the specific nature and content of each prior recorded testimony'; see *infra*, para. 33.

introduction of the Statement should be barred; nor was it for the Defence to demonstrate that *viva voce* testimony was necessary.

28. Second, in reversing this burden, the Chamber appears to have set the Defence the task of convincing the Chamber that these material factors outweighed the anticipated time-saving of three hours. In the event, the Chamber placed undue significance on the anticipated time-savings, at the expense of the multiple material factors militating against the introduction of the Statement. The Defence respectfully submits that this constituted an abuse of the Chamber's discretion, and comprises a clear error of reasoning.²⁷ In addition, a number of the Chamber's findings in relation to these material factors also constitute sub-errors of reasoning of themselves.
29. A Chamber's assessment of Rule 68(3) applications is a discretionary one.²⁸ Further, fulfilment of the criteria applicable to Rule 68(3) applications – i.e. i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence (collectively, 'Three Criteria') – is not a precondition for admission of prior recorded statements under that rule; nor does the fact that a statement contains reference to an accused's acts and conduct constitute a bar to its admission under Rule 68(3).²⁹
30. However, the fact that not one of the Three Criteria is met with respect to Alleged Confession objectively ought to have been a highly material consideration in the Chamber's assessment of the Request. The Defence recalls that the Alleged Confession, as well as the Counts underpinning the 'Yamwara

²⁷ *Prosecutor v. Ntaganda*, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', [ICC-01/04-02/06-2666-Red](#), 30 March 2021 ('Ntaganda Appeals Judgment') para. 46, and references cited therein.

²⁸ [Gbagbo & Blé Goudé Appeals Judgment](#), para. 69.

²⁹ *Ibid.*

School Incident', are materially in dispute; that the Alleged Confession is central to the Prosecution case regarding these Counts, as evidenced by the fact that express reference to the Alleged Confession is found in the charging documents;³⁰ and that P-0954's account of the Alleged Confession is not corroborated by other evidence in this case.³¹ Moreover, the Chamber itself expressly noted the Defence's 'submissions as to the "extensiveness of the references to Mr Yekatom's acts and conduct" on core and contested issues, and that "one of the most salient subjects of the statement, if not the most salient subject, of P-0954's statement is Mr Yekatom himself"'.³²

31. Given that the Statement does not meet any of the Three Criteria, and contains extensive references to Mr Yekatom's acts and conduct as charged (including the Alleged Confession), only findings of compelling, Statement-specific countervailing factors would have properly justified granting of the Request. Yet no such findings are set out in the Impugned Decision.
32. The Chamber's finding that 'it will have the opportunity to fully examine other witnesses on these topics'³³ is materially incorrect, given P-0954's uncorroborated account of the Alleged Confession; indeed, of itself this finding comprises a clear error of reasoning. As set out above, the Defence will not in fact have any opportunity to meaningfully examine other witnesses in a manner that could directly challenge P-0954's account in this respect.
33. The Chamber also relied on the fact that 'it had previously granted several other requests in which an accused was mentioned extensively in the relevant statements'.³⁴ However, as has been held by the Appeals Chamber, and

³⁰ See e.g., [ICC-01/14-01/18-723-Conf](#), para. 456.

³¹ See *supra*, paras 16-17.

³² [ICC-01/14-01/18-1317-Conf](#), para. 16.

³³ *Ibid*, para. 17.

³⁴ *Ibid*, para. 16. The Defence also submits that the Chamber's findings in its Decision ([ICC-01/14-01/18-1114-Conf](#)) cited in footnote 30 provide an illustrative contrast to the Impugned Decision: specifically see, para. 14, where the Chamber expressly referred to specific countervailing factors in the context of P-0808's references to the acts and conduct of Mr Ngaissona.

repeatedly reiterated by the Chamber, Rule 68(3) applications must be assessed on a case-by-case basis, 'with due regard to the specific nature and content of each prior recorded testimony'.³⁵ As such, previous successful Rule 68(3) applications should not have formed part of the Chamber's consideration at all, let alone relied upon as a countervailing factor to the highly material fact that the Statement contained extensive references to Mr Yekatom's acts and conduct. The Defence respectfully submits that the Chamber's reliance in this regard was thus improper, and also constituted a clear error of reasoning of itself.

34. The Chamber also relied on findings that are not specific to the Statement: i.e. that the Defence 'will be able to explore all these issues with P-0954 in court'; and that 'it will assess the probative value of P-0954's evidence as part of its holistic assessment when deliberating on the judgment pursuant to Article 74(2) of the Statute'.³⁶ Yet these findings are universally applicable to any Rule 68(3) applications that the Prosecution might make, and thus should not have been relied on as reasons in favour of granting the Request, given that the Chamber was obliged by law to assess the Request on its own merits.
35. Further, the Chamber acknowledged the Defence's submissions 'that P-0954's statement is directly contradicted by other witnesses and false', in finding that the *viva voce* testimony was 'not necessary in the circumstances', and cited to two prior Decisions in which Prosecution Rule 68(3) applications were denied.³⁷ To the extent that, in making this finding, the Chamber conducted a comparison between the Statement and the statements the subject of the two prior Rule 68(3) Decisions, this finding comprises a clear error of reasoning: the Chamber ought to have assessed this factor on its own merits, as opposed to simply comparing previous Rule 68(3) decisions in which defence challenges to credibility were in

³⁵ [ICC-01/14-01/18-685](#), para. 34; citing [Gbagbo & Blé Goudé Appeals Judgment](#), para. 69.

³⁶ [ICC-01/14-01/18-1317-Conf](#), para. 17.

³⁷ *Ibid*, para. 17 and fn. 32.

fact upheld.³⁸ Further, in not providing Statement-specific reasons³⁹ as to why contravention of the principle of orality was justifiable despite Defence challenges to the reliability of the Statement, the Chamber did not meet its duty to provide a reasoned decision.⁴⁰

36. Even assuming that the Chamber were empowered to take account of these two prior Rule 68(3) Decisions in the manner that it did, the Defence recalls that the first such Decision related to a witness who had expressed strong personal views⁴¹ against an accused and provided inconsistent accounts across and within multiple interviews;⁴² while the second such Decision related to a witness who had himself been involved in witness interference in another case before the Court.⁴³ In addition, both Decisions involved verbatim transcripts of interviews, as opposed to statements, which allowed the Chamber to closely scrutinise the manner in which this evidence was elicited by Prosecution investigators; further, interview transcripts differ from statements in that the latter are effectively investigators' summaries of information provided by witnesses and are thus subjected to a filtering process, through which 'strong views' about an accused, or inconsistencies, may be diluted in a final statement. The Chamber's reliance on these Decisions, which each involve unique factual circumstances, in ultimately finding that *viva voce* testimony for P-0954 was not warranted, would appear to suggest that the Chamber has set unduly high standards for its assessment of challenges to credibility for the purposes of Rule 68(3).

³⁸ In this regard, the Defence notes that apart from citing the two prior Rule 68(3) Decisions in question without comment, the Chamber made no further Statement-specific findings in relation to the fact that the Statement was 'directly contradicted by other witnesses and false'; see, [ICC-01/14-01/18-1317-Conf](#), para. 17 and fn. 32.

³⁹ The remaining Chamber findings in para. 17 of the Impugned Decision, cannot constitute reasons in favour of granting the Request for the purposes of the Chamber's Rule 64(2) obligations, in that they are either materially incorrect or universally applicable to all Rule 68(3) applications; see *supra*, paras 32, 34.

⁴⁰ Rule 64(2).

⁴¹ The Defence notes that P-0954 has also expressed arguably strong personal views against Mr Yekatom; see, where P-0954 states that Mr Yekatom 'is wealthy and considers others as dogs', CAR-OTP-2048-0171-R02, para. 92.

⁴² [ICC-01/14-01/18-1088-Conf](#), para. 15.

⁴³ [ICC-01/14-01/18-964-Conf](#), para. 19.

37. In light of the above therefore, the only finding in the Impugned Decision that could properly be relied on in favour of introduction of the Statement was the anticipated three-hour reduction in the Prosecution's examination time estimate for P-0954.⁴⁴
38. While the expeditiousness of proceedings is a concern properly shared by all parties and participants, only an accused is expressly guaranteed the right to an expeditious trial under the Statute.⁴⁵ It is therefore submitted that due caution should be exhibited when invoking expeditiousness to grant relief over express Defence objections. Further, as the Appeals Chamber held in *Bemba*, '[w]hile expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements'.⁴⁶ Nor should expeditiousness outweigh considerations of the fairness of proceedings.
39. Allowing the introduction into evidence of the Statement, which contains a purported confession in relation to a materially disputed incident that underpins six of the 21 charges faced by Mr Yekatom, for the sole purpose of saving three hours of in-court time – i.e. the equivalent of one morning's worth – was an unreasonable exercise of the Chamber's discretion. To put matters in perspective: Mr Yekatom, who is presumed innocent, has been in detention for the last three years and three months; further, this Trial has entered its second year of hearing the Prosecution case, by the end of which a further 61 witnesses will have appeared; the presentation of defence cases may very well then follow. In the circumstances therefore, the Defence respectfully submits that the Impugned Decision was so unreasonable as to force the conclusion that the Chamber did not exercise its discretion judiciously.⁴⁷

⁴⁴ [ICC-01/14-01/18-1317-Conf](#), para. 18.

⁴⁵ Article 67(1)(c).

⁴⁶ [Bemba Appeals Judgment](#), para. 55.

⁴⁷ [Ntaganda Appeals Judgment](#), para. 46, and references cited therein.

40. Third, the lack of any express mention in the Impugned Decision of the Alleged Confession indicates that insufficient consideration was afforded to it, which itself comprises a clear error of reasoning.
41. As a matter of law, the Chamber was obliged to cautiously assess whether the introduction of the Alleged Confession was not prejudicial or inconsistent with the rights of Mr Yekatom or with the fairness of these proceedings generally. In this regard, pursuant to the Appeals Chamber's findings in *Gbagbo & Blé Goudé*, the Chamber was required to 'be extra vigilant that introduction of the [Statement] will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally', given that the Three Criteria were not met in relation to the Statement; this ought to have been the Chamber's 'overriding concern'.⁴⁸
42. The Chamber was also required by law to analyse the importance of the Statement – and in particular, the Alleged Confession – in light of the charges and other evidence presented or intended to be presented in these proceedings. As the Appeals Chamber has held, 'the more important the Chamber assesses the evidence in question to be, the more likely it is that the Chamber will have to reject any application under [Rule 68(3)].'⁴⁹
43. Further, as part of its duty to provide a reasoned decision, and given the uniquely prejudicial nature of the Alleged Confession, the Chamber was obliged to explain the reasons underpinning its ultimate finding that the introduction into evidence of the Alleged Confession specifically was permissible under the relevant legal framework.⁵⁰

⁴⁸ [Gbagbo & Blé Goudé Appeals Judgment](#), para. 69.

⁴⁹ *Ibid*, para. 71.

⁵⁰ Rule 64(2).

44. Despite these overlapping and inter-linked obligations, nowhere in the Impugned Decision is express mention of the Alleged Confession made. It can be inferred from this that the Chamber failed to give sufficient weight to this consideration in exercising its discretion, which constituted an abuse of its discretion, and therefore a clear error of reasoning.

II. Reconsideration of the Impugned Decision is necessary to prevent an injustice.

45. As a preliminary matter, the introduction of the Statement would constitute an injustice, on account of the multiple errors of reasoning that underpin the Impugned Decision. In this regard, the above submissions apply *mutatis mutandis*.

46. In addition, and independently of the above, the introduction into evidence of the Statement via Rule 68(3) would constitute an injustice warranting reconsideration of the Impugned Decision.

47. As previously held by the Chamber, *viva voce* in-full testimony has the advantage of being given under oath and under the Chamber's oversight; further, it enables the Chamber and the accused to hear natural and spontaneous accounts from witnesses, to directly and closely observe their reactions, demeanour and composure, and to immediately seek clarifications.⁵¹

48. Further, *viva voce* in-full testimony would also allow the Chamber to control the presentation of P-0954's evidence, and ensure that it be elicited in a neutral and organic manner, as opposed to simply allowing the introduction of information elicited from P-0954 by Prosecution personnel during his interview. As held by His Honour Judge Henderson in *Gbagbo & Blé Goudé*:

There is a fundamental difference between giving sworn testimony in a formal courtroom setting in the presence of the accused and making incriminating

⁵¹ [ICC-01/14-01/18-685](#), para. 33; citing [Bemba Appeals Judgment](#), para. 76.

allegations in response to questions by investigators for one of the parties. [...] [O]ne does not have to presuppose conscious bias or bad faith on the part of Prosecution investigators to be concerned about important details being lost in the process of drawing up written statements.⁵²

49. As such, considering the uniquely prejudicial nature of the Alleged Confession, including the Defence's limited ability to directly challenge it, it would be an injustice for the Chamber to deprive itself, as well as the Defence, of the opportunity to hear P-0954 provide his evidence, including his account of the Alleged Confession, *viva voce* in full; likewise, for the Chamber to relinquish control over the presentation of this account. This is especially so given that the only⁵³ proper countervailing consideration is the anticipated streamlining of the Prosecution examination of P-0954 by three hours.

CONFIDENTIALITY

50. This motion is filed on a confidential basis corresponding to the classification of the Chamber's Decision of 18 March 2022. The Defence would not oppose its reclassification as public.

RELIEF SOUGHT

51. In light of the above, the Defence respectfully requests that Trial Chamber V:
RECONSIDER the Impugned Decision; and,
DENY the Request with respect to the Statement and associated exhibits of P-0954.

RESPECTFULLY SUBMITTED ON THIS 21st DAY OF MARCH 2022



⁵² See, *Prosecutor v. Gbagbo & Blé Goudé*, Corrected Version of Public Redacted Version of Partial Dissent of Judge Henderson, [ICC-02/11-01/15-950-Anx-Red-Corr](#), 23 June 2017, paras 20-22.

⁵³ See *supra*, paras 28-39.

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