

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: *ICC-02/11-01/15*

Date: **16 June 2016**

TRIAL CHAMBER I

Before:

**Judge Geoffrey Henderson
Judge Olga Herrera-Carbuccia
Judge Cuno Tarfusser**

SITUATION IN COTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE***

**Public
With Public Annex A**

**Corrected Version of “Defence Request for leave to appeal the Decision on the
Prosecutor’s application to introduce prior recorded testimony under Rules
68(2)(b) and 68(3) (ICC-02/11-01/15-573-Conf)” filed on 15 June 2016 (ICC-02/11-
01/15-592)**

Source: Defence of Mr Charles Blé Goudé

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

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I. Introduction

1. On 9 June 2016, the Majority of Trial Chamber I (“the Chamber”), Judge Henderson partially dissenting issued the *Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)* (“the impugned decision”). It constitutes the Chamber’s first decision with respect to the interpretation and the application of Rule 68 of the Rules of Procedure and Evidence (“the Rules”). The Defence for Mr. Blé Goudé (“the Defence”) seeks leave to appeal the impugned decision on four issues, which arise from it and satisfy the requirements provided by Article 82(1)(d) of the Rome Statute (“the Statute”).

II. Applicable Law

2. Under Article 82(1)(d) of the Statute, a party seeking leave to appeal must show that the impugned decision meets all of the following three requirements:
 - (i) The decision must involve an “appealable issue”
 - (ii) The appealable issue must affect:
 - a. the fair and expeditious conduct of the proceedings; or
 - b. the outcome of the trial; and
 - (iii) In the opinion of the Chamber, the immediate resolution of the issue by the Appeals Chamber could materially advance the proceedings
3. The Chamber has repeatedly found that the issue identified by the parties must arise from the operative part of the decision, and that it must satisfy the Appeals Chamber’s definition, meaning that an issue is “an identifiable

subject or topic requiring a decision for its resolution and not merely a question over which there is disagreement or conflicting opinion.¹

III. Submissions

4. The Defence seeks leave to appeal the impugned decision on the following four issues:

- (i) Whether the Chamber erred in allowing the submission of the Rule 68 statements that include opinion evidence and speculative evidence, including anonymous hearsay, which contravenes paragraph 23 of the amended Directions on the Conduct of Proceedings, and impermissibly contravenes Article 66(2) of the Statute
- (ii) Whether the Chamber erred by failing to apply the requirement that prior recorded testimony admitted under Rule 68(3) must not be prejudicial to the accused, by ignoring the guidance provided by the Appeals Chamber in *The Prosecutor v. Bemba*, which guidance does not provide for the criterion of “good trial management,” as introduced by paragraph 25 of the Impugned Decision
- (iii) Whether the Chamber erred by limiting its analysis of sufficient indicia of reliability to the formal requirement that the statement be taken by the Prosecution “pursuant to Rule 111 of the Rules and under all applicable guarantees, including article 54(1),”² and not expanding it to include other factors included in Judge Henderson’s dissent such as but not limited to : “the competence of the witness

¹ ICC-02/11-01/15-569, para. 13 *citing* . ICC-01/04-168, para. 9.

² Impugned Decision, para. 22.

to testify about the facts... potential bias of the witness, his or her (in)sincerity, but also the possibility of honest mistake.”

- (iv) Whether the Chamber by Majority erred in law by finding that documentary evidence could be admitted through Rule 68 on the sole basis that such evidence was referred to in the individual’s statement, irrespective of the author of the statement being the producer of the document him or herself without the proffering party being obliged to provide information indicating the items relevance, probative value as well as authenticity

III.1. The issues meet the requirements for a successful application for leave to appeal

a. The four aforementioned issues constitute appealable issues under Article 82(1)(d)

- 5. The four issues all arise out of the operative part of the decision, which require a resolution and are not “merely a question over which there is a disagreement or conflicting opinion.”
- 6. The first issue clearly arises from an operative part of the impugned decision in that the Chamber determined in paragraph 7 that the Defence’s objections to statements being introduced *in toto* through Rule 68 were unfounded. However, paragraph 23 of the amended Directions on the Conduct of Proceedings requires that parties refrain from asking witnesses to speculate or provide opinion evidence. Such a requirement ensures that the record contains alleged facts that the parties can test and the Chamber can evaluate. Thus, if the 11 witness whose statements were admitted under Rule 68 were to testify *viva voce*, such passages would not be permitted to be submitted to

the Chamber. The Defence respectfully submits that the Chamber did not provide sufficient reasoning as to why submission with respect to prior recorded testimony should be treated differently than *viva voce* testimony. Moreover, in allowing the introduction/submission of Rule 68 statements with no assessment as to their probative value or trustworthiness impermissibly inverses the burden proof to the Defence to rebut the admission of such statements, which as Judge Henderson found in his dissent, impermissibly infringes on Article 66(2) of the Statute.³

7. The Defence avers that under Article 21 of the Statue the Chamber is not required to defer to precedent of the Court in its application of its Core Legal Texts. However, the Defence's second issue does not simply result from a disagreement with the Chamber's decision to part with precedent, but rather it stems from the Chamber's decision to not take into account prejudice to the accused. While the Chamber found that it "must be attentive to the requirement that prior recorded testimony [not be] prejudicial to or inconsistent with the rights of the accused,"⁴ the Chamber also found that Rule 68 applications would be based on one sole criterion, namely whether the introduction will contribute to good trial management. The Chamber added that factors to be taken into consideration of this criterion should include: "the importance of the evidence for the case, the volume and detail of the evidence, among other factors."⁵ The Defence respectfully submits that this interpretation contravenes the plain language of Rule 68(1), which adds the caveat that introduction of prior recorded testimony cannot be prejudicial or inconsistent with the rights of the accused. Thus, prejudice to the accused must be a separate criterion to consider in assessing Rule 68 applications. The Appeals Chamber in *Bemba* delineated the factors that must be considered

³ ICC-02/11-01/15-573-Anx, para. 12.

⁴ Impugned Decision, para. 24.

⁵ Impugned Decision. Para. 25

when determining whether Rule 68 prior recorded testimony should be admitted such that its introduction does not prejudice the accused or violate the principle of orality. The Defence respectfully submits that the Impugned Decision does not provide reasons as to depart with this Appeals Chamber's Judgment.

8. The direct quote from the Impugned Decision contained in the Defence's third issue shows that the issue arises from the Chamber's finding at paragraph 22 of the impugned decision. The Defence respectfully submits that the Chamber did not provide sufficient reasoning as to why only the formal criteria need to be met for a finding of "sufficient indicia of reliability." The Defence notes that the interpretation of "sufficient indicia of reliability" with respect to Rule 68 applications was certified for appeal by Trial Chamber V(a) in *The Prosecutor v. Ruto and Sang*.⁶ The Defence also submits that the formal requirements are not sufficient to prove that the statement demonstrates reliability in terms of its content. The instant proceedings have shown that while the Prosecution may have kept an accurate record of what the witness as is required by Rule 111, the content of the witness' statement may not necessarily be accurate. In the instant case, witnesses live testimony has differed from the content of their statements, as has been shown most ostensibly by witness P-625.

9. The fourth issue clearly arises from the decision, in that the Chamber determined at paragraph 9 that with respect to Rule 68 applications "any documentary evidence annexed is also considered to be submitted." As Judge Henderson noted in his partially dissenting opinion at paragraph 32,⁷ the Majority did not take into consideration the admissibility test of Article

⁶ ICC-01/09-01/11-1953, para. 20, para. 27..

⁷ ICC-02/11-01/15-573-Conf-Anx.

69(4) of the statute. The impugned decision makes no findings as to the reliability, probative value, and trustworthiness of the annexes.

b. The resolution of the Issues would significantly affect the fair conduct of the proceedings.

10. In the Lubanga case, the Appeals Chamber provided a sound definition of the criteria to be met in order to be granted leave to appeal under article 82(1)(d) of the Statute:

“The term “fair” in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64 (2) and 67 (1)) and article 21 (3); making its interpretation and application subject internationally recognized human rights.”⁸

11. In the same decision, the Appeals Chamber held that the “expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial”.⁹

12. The Defence submits that the Impugned Decision infringes the Accused’s right to confront incriminating evidence by the way of putting questions to the witnesses, testing their credibility and asking them questions related to materials collected through the investigations conducted by the Defence.

13. In other words, the admitted written statements contain important portions of hearsay evidence which are at risk to remain unverified and untested evidence, i.e. a situation that is unacceptable before the Court. Indeed, as

⁸ ICC-01/04-168, para. 10.

⁹ Ibid. para. 11.

recalled by Judge Henderson in its partially dissenting opinion,¹⁰ article 66(2) of the Statute clearly provides that the onus of proof rests on the Prosecution. The legal consequences of such principle lays in the obligation for the Prosecution to establish the trustworthiness of the evidence proffered in support of the charges.¹¹

14. Accordingly, admitting hearsay evidence under rule 68(3) of the Rules as such, i.e. without sufficient information on the source of the hearsay would equal reversing the onus of proof on the Defence, which is expressly prohibited by article 67(1)(i) of the Statute.¹²

15. Indeed, the Chamber may not expect the Defence to spend most of the time granted for questioning the witness to elicit information about the trustworthiness of the hearsay's source. By doing so, the Chamber would request the Defence to "sacrifice" its time for questioning on trustworthiness matters that, according to the Statute, have to be proven by the Prosecution in the first place.

16. As also recalled by Judge Henderson, it is the duty of the Defence to challenge anonymous or quasi-anonymous hearsay evidence against the Accused.¹³ However, it would be unfair to the Defence to grant a general acceptance of the hearsay evidence subject to a posterior challenge of its trustworthiness. The mechanism of fair trial as implemented in the Statute does not consist in this pattern. The pattern established by articles 66(2) and 67(1)(i) of the Statute irretrievably embodies that the onus of proof rests on the Prosecution and never on the Defence.

¹⁰ ICC-02/11-01/15-573-Conf-Anx, paras. 11-15.

¹¹ Ibid., para. 12.

¹² Ibid., para. 13

¹³ Ibid., para. 14.

17. Besides, following Judge Henderson's partially dissenting opinion,¹⁴ the Defence would like to recall that, in Bemba, the Appeals Chamber has strongly stated that pursuant to article 69(2) of the Statute, in-court personal testimony is the rule before the Court.¹⁵ It is indeed the only testimony that allows the Chamber to hear "directly from the witness and [to be] able to observe his or her demeanour and composure, and [to be] able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded."¹⁶ In this respect, the submission and/or admission of prior recorded testimony may only constitute an exception to the principle of orality.

18. In the appreciation of these exceptions, the Appeals Chamber clearly recommended cautious assessment and suggested that Trial Chambers consider three factors: (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.

19. In the present case, the evidence submitted and/or admitted pursuant to the Impugned Decision covers eleven witnesses, i.e. almost as many witnesses as the ones who have personally appeared in court to date.¹⁷ Besides, during the Status Conference held on 27 May 2016, the Prosecution announced that not less than 78 applications under rule 68 of the Rules would be introduced in the course of the presentation of its case.¹⁸ Therefore, the submission and/or

¹⁴ Ibid. para. 16.

¹⁵ ICC-01/05-01/08-2011, para. 76.

¹⁶ Ibid., para. 78.

¹⁷ ICC-02/11-01/15-487.

¹⁸ ICC-02/11-01/15-T-45-CONF-ENG RT 27-05-2016, p. 4 line 19 to p. 6 line 3.

admission of prior recorded testimonies would cover 60% of the witnesses to be called by the Prosecution in the instant case.

20. Under such conditions, the Defence is of the view that the orality may no longer be seen as a principle before the Chamber. On the contrary, it clearly appears that the present trial is bound to be mainly based on prior recorded testimony, which, in itself and for the above mentioned reasons, is prejudicial to the Defence.

21. For the foregoing reasons, the Defence is of the view that the four Issues raised by the Impugned Decision significantly affect the fair conduct of the trial.

c. The resolution of the Issues would significantly affect the expeditious conduct of the proceedings.

22. As emphasized in Judge Henderson's partially dissenting opinion, the Impugned Decision will affect the expeditious conduct of the proceedings, contrary to what it aimed at in the first place.¹⁹

23. Indeed, the Defence will find itself in a delicate situation where :

- on the one hand, it will have no other choice but to request extensive periods of time for questioning the witnesses in order to assess the trustworthiness of the hearsay they reported in their prior recorded testimonies;

¹⁹ ICC-02/11-01/15-573-Conf-Anx.

- While on the other hand, the Defence may be obliged to request leave to recall certain witnesses to question them about the identity and trustworthiness of their sources.

24. Both ways irremediably lead to an extension of the presentation of the Defence's case. For the foregoing reasons, the Defence submits that the four Issues raised in the Impugned Decision significantly affect the expeditiousness of the proceedings.

c. Immediate resolution of the Issues by the Appeals Chamber could materially advance the proceedings

25. The Defence holds that the Appeals Chamber's immediate resolution of the four above issues would materially advance the proceedings. The Appeals Chamber provided definitions to the terms "immediate" which means avoiding errors by referring the issue to the Appeals Chamber; "advance" which means to move forward by ensuring that the proceedings follow the right course; and "proceedings" which means the proceedings in their entirety.²⁰ In this regard, the Appeals Chamber stated that:

"A wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back."²¹

26. Both ways irremediably lead to an extension of the presentation of the Defence's case. For the foregoing reasons, the Defence submits that the four Issues raised in the Impugned Decision significantly affect the expeditiousness of the proceedings.

27. The evidence admitted pursuant to the Impugned Decision covers eleven witnesses, that is to say almost as many witnesses as the one who have been

²⁰ ICC-01/04-168, paras. 14-19.

²¹ *Ibid*, para. 16.

called in court to date. Besides, during the Status Conference held on 27 May 2016, the Prosecution announced that not less than 78 applications under rule 68 of the Rules would be introduced in the course of the presentation of its case.²² Therefore, the submission or admission of prior recorded testimony would then concern 60% of the witnesses to be called by the Prosecution in the instant case.

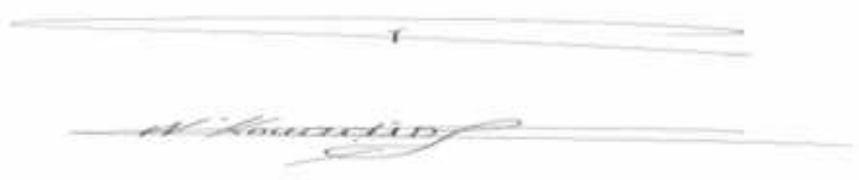
28. Given the evidence's importance, it will impact on every aspect of the trial going forward, including the evidence to be addressed in any "no case to answer" motion, the witnesses to be called in any defence case and the documentary evidence directly submitted to the case record. Accordingly, determination of the four Issues by the Appeals chamber at this stage would ensure that proceedings follow the right course and that important issues are determined at this early stage in proceedings, allowing the parties to reasonably foresee the importance and the role given to prior recorded testimony in this case.

RELIEF SOUGHT

29. In light of the foregoing, the Defence respectfully requests the Chamber to grant the Defence's request for leave to appeal

²² ICC-02/11-01/15-T-45-CONF-ENG RT 27-05-2016, p. 4 line 19 to p. 6 line 3.

Respectfully submitted,

A rectangular box containing a handwritten signature in dark ink. The signature is written in a cursive style and appears to be "N'Dry".

Mr. Knoops, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this

16 June 2016

At The Hague, the Netherlands