PARTIALLY DISSENTING OPINION OF JUDGE HENDERSON

1. This request for leave to appeal raises a very important point of procedure. It follows the Chamber's decision granting the Prosecution permission to introduce the prior recorded statements of eleven witnesses. I am in agreement with some aspects of the majority decision. However, for the reasons that follow, I respectfully append this partially dissenting opinion.

2. As a general remark, I would like to stress that, in determining whether to grant this application for leave to appeal on any of the issues raised, the Trial Chamber's assessment ought not to be formalistic. As the Appeals Chamber said, "the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".[1] It is therefore neither productive nor helpful to avoid appellate review, particularly when matters of fundamental importance are at stake.

3. Some procedural background provides appropriate context in which to assess the impact of the impugned decision on the fairness of these proceedings or its outcome. In this trial, the Prosecution anticipates calling 138 witnesses of which thus far 13 witnesses have already provided *viva voce* testimony. The Prosecution have indicated their intention to make not less than 78 further applications pursuant to rule 68 of the Rules.[2] This would mean that well over half of the prosecution witnesses in this case would never provide their evidence orally. While it is both necessary and appropriate to conduct these

[1] Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, at para. 19.
[2] Status Conference held on 27 May 2016, ICC-02/11-01/15-T-45-ENG-ET.

proceedings expeditiously, the improper introduction of prior recorded statements under rule 68 can affect the fairness of the proceedings as well as its outcome.

I. Whether the impugned decision erred by relying on the criterion of "good trial management" - 1st Issue for Mr Gbagbo and 2nd Issue for Mr Blé Goudé

4. The majority concludes that the Defence for both Mr Gbagbo and Mr Blé Goudé have misrepresented the impugned decision but nevertheless grants leave to appeal on the issue of whether the criterion of "good trial management" is a relevant factor in the exercise of the Chamber's discretion. In my view, the majority misrepresents the real issues raised by the parties. There is little point, in my view, to grant leave to appeal for the issue of whether or not "good trial management" is a relevant factor in the Chamber's exercise of its discretion to introduce prior recorded testimony under rule 68(3) of the Rules.[3] It is undeniable that a Trial Chamber may take good trial management into consideration when ruling on any request, including requests for the introduction of prior recorded testimony under rule 68(3) of the Rules. The real question is how significant this factor is in relation to all the other requirements under this Rule. Directly related to this question is which other requirements, besides the presence of the witness and his or her agreement to introduce the prior recorded testimony, must be fulfilled when dealing with a request based on rule 68(3) of the Rules. In particular, just how the requirement of amended paragraph 1 of rule 68 of the Rules, namely that Chambers should only permit the introduction of prior recorded testimony if this would not be prejudicial to

[3] Majority Decision, para. 15.

or inconsistent with the rights of the accused, impacts upon requests under rule 68(3) of the Rules, is a matter that will benefit from appellate resolution.

5. In the event that the Chamber took into account irrelevant factors, or did not properly weigh those factors that are relevant, in reaching the impugned decision, such errors are likely to taint the exercise of discretion in future applications made under rule 68 to admit the prior recorded statements of witnesses. Appellate resolution is therefore necessary to ensure that the proceedings follow the right course.

II. Whether the impugned decision erred by allowing anonymous hearsay and opinion evidence to be tendered on the basis of rule 68 of the Rules – 2nd issue of Mr Gbagbo and 1st Issue of Mr Blé Goudé

6. The majority has refused to grant leave on the basis of two arguments. The first is that the Defence teams made the incorrect assumption that the statements are admitted, whereas the impugned decision did no such thing. While it is true that the Gbagbo Defence argues that the Chamber erred by admitting inadmissible evidence, it is a misreading of the Blé Goudé request to similarly dismiss the issue on this ground.[4]

7. The majority's second argument is that the Defence erroneously assume that there exists an absolute exclusionary rule against (anonymous) hearsay,

[4] The Blé Goudé Defence's leave to appeal request identifies as its first issue "whether the Chamber erred in allowing the *submission* of the Rule 68 statements that include opinion evidence and speculation 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." Defence for Mr Blé Goudé, "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), at para. 4 [emphasis added].

speculation and opinion evidence. However, this is, in my view, a mischaracterisation of the issue. The issue is not whether there is an exclusionary rule, but whether it is appropriate to allow the introduction of prior recorded testimony without taking into consideration the quality of such evidence. In other words, this is not a question of admissibility under article 69(4) or (7) of the Statute *per se*,[5] but rather a question of what the requirements are for making an exception to the principle of orality under article 69(2) of the Statute and rule 68(3) of the Rules. The fact that certain types of evidence are not automatically excluded does not imply that it is therefore appropriate for it to be introduced through rule 68(3) of the Rules. In my view, the Chamber should take into consideration the probative value of the prior recorded testimony, as well as the prejudice that allowing this evidence might cause to the accused. The majority clearly thinks this is not the case. *This* is the issue which the Defence wishes to raise on appeal and I do not believe that the majority has addressed their request on this point appropriately. Nevertheless, as I am of the opinion that the certified issue extends to all criteria for the application of rule 68(3) of the Rules, the Appeals Chamber is able to address it as appropriate.

8. I point out that, in my view, a decision which permits the introduction of anonymous hearsay, opinion evidence and speculation will affect the fairness of the proceedings. This is so as the impugned decision places the Defence in the objectionable position of having to either take the risk that the Chamber will not wittingly or unwittingly rely on such evidence or, alternatively, to

[5] Again, I note that there is a certain paradox in the majority's reasoning. On the one hand, my colleagues reproach the Defence for misinterpreting the impugned decision, because it did not decide on the admissibility of the prior recorded testimony. If that is the case, then it follows that exclusionary rules would be entirely irrelevant, regardless of their content.

shoulder the significant – and, in my view, illegal – burden of having to address each and every potentially adverse proposition contained in the prior recorded testimony (which may also be time and resource consuming). This is both unfair and has the potential to alter the outcome of the trial. The criteria of article 82(1)(d) of the Statute are therefore amply met.

III. Whether the impugned decision erred by allowing the introduction of prior recorded statements going to core and materially disputed issues on the basis that the witnesses in question form part of a wider web of evidence – 3rd issue of the Defence of Mr Gbagbo

9. In my respectful view, the majority's approach to this issue on its assessment is formalistic and perfunctory. The majority refuses to grant leave to appeal on this issue on the ground that the Defence would merely be challenging the Chamber's discretion and therefore constitutes "not only a disagreement with the [Impugned] Decision, but also a general disagreement with Rule 68(3) of the Rules." In my view this is a mischaracterisation of the Defence's request and a misunderstanding of the essence of the complaint. The point the Defence is raising is whether the Chamber was allowed to entirely set aside a criterion weighing *against* the introduction of prior recorded testimony, *i.e.* whether the evidence relates to issues that are materially in dispute, by introducing an entirely new notion that would *favour* such introduction, namely the "system of evidence". Whereas the factors developed by the Appeals Chamber in Bemba in regard to then rule 68(2)(b in *Bemba*[6] pertains

[6] Appeals Chamber, *Prosecutor v. Bemba,* "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'", 3 May 2011, ICC-01/05-01/08-1386, at para. 78.

to the *content* of the prior recorded testimony, the majority in effect circumvented this by focusing on the relative significance of the *source* of the evidence.

10. Given that this issue is inextricably interwoven with the 1st Issue of Mr Gbagbo and the 2nd Issue of Mr Blé Goudé, *i.e.* the requirements to authorise the introduction of prior recorded testimony under rule 68(3) of the Rules, it is hard to see how the majority could decide to grant leave to appeal for one but refuse it for the other. I therefore believe that both are appropriately before the Appeals Chamber.

IV. Whether the impugned decision erred by permitting the introduction of annexes to the witness statements introduced under rule 68 of the Rules – 4th issue of the Defences of Mr Gbagbo and Blé Goudé

11. I agree with my colleagues that it was not possible to grant leave to appeal on the fourth issue raised by both the Defence for Mr Gbagbo as well as the Defence for Mr Blé Goudé. The Defence challenge the Chamber's majority decision to allow the introduction of documentary evidence annexed to prior recorded testimony under rule 68 of the Rules. Although the issue does arise from the impugned decision and may, in my view, significantly affect the fair conduct of the trial or the outcome of the proceedings, I agree that immediate resolution of this issue would not materially advance the proceedings. The reason for this is that the error can easily be remedied by the Prosecutor making a formal application under paragraphs 43 and 44 of the Chamber's amended Directions on the Conduct of Proceedings. Moreover, since the majority has postponed the decision as to whether or not the annexed documentary evidence is to be formally admitted, it is not yet clear which criteria the Chamber will apply when eventually ruling on admissibility.

V. Whether the impugned decision erred by considering only formal indicia of reliability – 3rd issue of the Defence for Mr Blé Goudé

12. I agree with the majority decision on this issue.

VI. Conclusion

13. I am of the view that, with the exception of the 4th issues raised by the Defences of Mr Gbagbo and Mr Blé Goudé, the requests for leave to appeal should have been granted.

14. It should also be stressed that decisions on requests for leave to appeal ought not to be used for providing additional reasoning for the impugned decision, let alone for making entirely new substantial points. Such an approach is not only unfair to the appealing parties, as they are essentially aiming at a moving target, it also risks rendering significant rulings immune from appellate review because they are made in decisions on leave to appeal. It is for this reason that I have refrained from commenting on some statements in the impugned decision with which I do not agree.

Judge Geoffrey Henderson

Dated 7 July 2016

At The Hague, The Netherlands