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No. ICC-02/11-01/15 OA 8
Date: 1 November 2016

THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chang-ho Chung

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Public document

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)"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr Laurent Gbagbo
Mr Emmanuel Altit
Ms Marie-Agathe Bahi Baroan

Legal Representative of Victims
Ms Paolina Massidda

Counsel for Mr Charles Blé Goudé
Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)" of 9 June 2016 (ICC-02/11-01/15-573-Red),

After deliberation,

By majority, Judge Kuniko Ozaki partially dissenting,

Delivers the following

JUDGMENT

The "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)" of 9 June 2016 (ICC-02/11-01/15-573-Red) is confirmed.

REASONS

I. KEY FINDINGS

1. A Trial Chamber may take good trial management into account when making a determination under rule 68 (3) of the Rules of Procedure and Evidence.

2. The factors referred to in the *Bemba* OA 5 OA 6 Judgment are not requirements but, rather, factors that may be considered in assessing whether the introduction of prior recorded testimony under rule 68 (3) of the Rules is prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally.

3. The Appeals Chamber considers that, in their assessment of indicia of reliability under rule 68 (2) (b) (i) of the Rules of Procedure and Evidence, 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 of Procedure and Evidence can be more cursory in nature so that, even if some factors, such as the witness's competence to testify about the facts, the internal consistency of the

statement and potential inconsistencies with other evidence in the record, are not taken into account during this assessment, they may still be considered when assessing the probative value of the evidence.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

4. On 19 April 2016, the Prosecutor filed a request[1] ("Prosecutor's Request") seeking the introduction of the prior recorded testimony of eleven witnesses pursuant to rules 68 (2) (b) and (3) of the Rules of Procedure and Evidence ("Rules").

5. On 28 April 2016, the Office of Public Counsel for Victims ("Victims") responded to the Prosecutor's Request,[2] submitting that it should be granted. On 2 May 2016, Mr Laurent Gbagbo ("Mr Gbagbo") and Mr Charles Blé Goudé ("Mr Blé Goudé") responded to the Prosecutor's Request in relation to rule 68 (3) of the Rules[3] and on 6 May 2016 they responded to the Prosecutor's Request with respect to rule 68 (2) (b) of the Rules.[4] Both Mr Gbagbo and Mr Blé Goudé requested that the Trial Chamber reject the Prosecutor's Request.

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[1] "Prosecution application to conditionally admit the prior recorded statements and related documents of P-0588, P-0589 and P-0590 under rule 68(2)(b) and the prior recorded statements and related documents of P-0169, P-0217, P-0230, P-0555, P-0573, P-0587, P-0112 and P-0344 under rule 68(3)", ICC-02/11-01/15-487-Conf; a public redacted version dated 26 April 2016 was registered on 28 April 2016 (ICC-02/11-01/15-487-Red).

[2] "Response to the Prosecution's application under rules 68(2)(b) and 68(3) of the Rules for the admission of prior recorded testimony of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588, P-0589 and P-0590 (ICC-02/11-01/15-487-Conf)", ICC-02/11-01/15-491-Conf; a public redacted version was registered on 2 May 2016 (ICC-02/11-01/15-491-Red).

[3] Mr Gbagbo: "Réponse de la Défense à la « Prosecution application to conditionally admit the prior recorded statements and related documents of P-0588, P-0589 and P-0590 under rule 68(2)(b) and the prior recorded statements and related documents of P-0169, P-0217, P-0230, P-0555, P- 0573, P-0587, P-0112 and P-0344 under rule 68(3)» (ICC-02/11-01/15-487-Conf) »", ICC-02/11-01/15-495-Conf; Mr Blé Goudé: "Defence Objections to the Prosecution's application to conditionally admit the prior recorded statements and related documents of P-0169, P-0217, P-0230, P-0555, P0573, P-0587, P-0112 and P-0344 under rule 68(3) (ICC-02/11-01/15-487-Conf)", ICC-02/11-01/15-496-Conf; a public redacted version dated 24 May 2015 was registered on 25 May 2016 (ICC-02/11-01/15-496-Red) ("Mr Blé Goudé's Response to Prosecutor's Request").

[4] Mr Gbagbo: "Réponse de la Défense à la «Prosecution application to conditionally admit the prior recorded statements and related documents of P-0588, P-0589 and P-0590 under rule 68(2)(b) and the prior recorded statements and related documents of P-0169, P-0217, P-0230, P-0555, P- 0573, P-0587, P-0112 and P-0344 under rule 68(3)» (ICC-02/11-01/15-487-Conf)", ICC-02/11-01/15-502-Conf; Mr Blé Goudé: "Defence Objections to the Prosecution's application to conditionally admit the prior recorded statements and related documents of P-0588, P-0589, P-0590 under Rule 68(2) (b)", ICC-02/11-01/15-504-Conf; a public redacted version was registered on 31 May 2016 (ICC-02/11-01/15-504-Red).

6. On 9 June 2016, Trial Chamber I ("Trial Chamber"), Judge Henderson partially dissenting, rendered the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)"[5] ("Impugned Decision"). The Trial Chamber decided "that the prior recorded statement of Witness P-0590 shall be introduced and considered submitted to the Chamber as evidence, on the condition that a declaration by the witness, as provided for in Rule 68(2)(b) of the Rules, is filed in the record of the case" and "that the written statements of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588 and P-589 are in principle suitable for introduction under Rule 68(3) of the Rules […]".[6]

7. On 15 June 2016, Mr Gbagbo and Mr Blé Goudé requested leave to appeal the Impugned Decision in respect of four issues each.[7] On 20 June 2016, the Prosecutor[8] and the victims[9] responded to the requests for leave to appeal, both submitting that the requests should be rejected in their entirety.

8. The Trial Chamber rendered the "Decision on requests for leave to appeal the 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and (68(3)'" dated 7 July 2016[10] ("Decision on Leave to Appeal"). The Trial Chamber, Judge Henderson partially dissenting[11] ("Partly Dissenting Opinion to Decision on Leave to Appeal"), granted Mr Gbagbo and Mr Blé Goudé leave to appeal the Impugned Decision as follows:

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[5] ICC-02/11-01/15-573-Conf; a public redacted version was registered on the same date (ICC-02/11-01/15-573-Red).
[6] Impugned Decision, p. 18.
[7] Mr Gbagbo: "Demande d'autorisation d'interjeter appel de la «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)", ICC-02/11-01/15-591-Conf; a public redacted version was registered on the same date (ICC-02/11-01/15-591-Red) ("Mr Gbagbo's Request for Leave to Appeal"); 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)", ICC-02/11-01/15-592; a corrigendum was registered on 16 June 2016 (ICC-02/11-01/15-592-Corr).
[8] "Prosecution's Consolidated Response to the Defence for Mr Blé Goudé and the Defence for Mr Gbagbo applications 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-02/11-01/15-591-Red and ICC-02/11-01/15-592-Red)", ICC-02/11-01/15-595.
[9] "Consolidated response to Mr Gbagbo's and Mr Blé Goudé's requests 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-02/11-01/15-591-Red and ICC-02/11-01/15-592)", ICC-02/11-01/15-596.
[10] Registered on 8 July 2016, ICC-02/11-01/15-612.
[11] ICC-02/11-01/15-612-Anx.

GRANTS the Defence of Laurent Gbagbo leave to appeal the Decision on the issue of whether "the Chamber erred in law in posing 'good trial management' as a guiding principle for the admission of prior statements";

GRANTS the Defence of Charles Blé Goudé leave to appeal the Decision on the issue of "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', and introduced by paragraph 25 of the Impugned Decision" and on the issue of "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),' 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 to testify about the facts… potential bias of the witness, his or her (in)sincerity, but also the possibility of honest mistake'"; and

REJECTS the requests for leave to appeal the Decision in other parts.[12]

B. Proceedings before the Appeals Chamber

9. On 21 July 2016, Mr Gbagbo[13] and Mr Blé Goudé[14] filed their documents in support of the appeal. The Victims and the Prosecutor filed their consolidated responses to the documents in support of the appeal on 26 July 2016[15] and 1 August 2016,[16] respectively.

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[12] Decision on Leave to Appeal, pp. 11-12.
[13] "Document in support of the appeal against the 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)' delivered on 9 June 2016 by Trial Chamber I (ICC-02/11-01/15-573-Conf)", dated 21 July 2016 and registered on 27 July 2016, ICC-02/11-01/15-633-tENG; original French version dated and registered on 21 July 2016 (ICC-02/11-01/15-633) ("Mr Gbagbo's Document in Support of the Appeal").
[14] "Defence appeal against the 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'", ICC-02/11-01/15-632-Conf; a public redacted version dated 14 September 2016 was registered on 15 September 2016 (ICC-02/11-01/15-632-Red) ("Mr Blé Goudé's Document in Support of the Appeal").
[15] "Consolidated response to Mr Blé Goudé's and Mr Gbagbo's documents in support of the appeal against 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)", ICC-02/11-01/15-637-Conf; a public redacted version was registered on 16 September 2016 (ICC-02/11-01/15-637-Red) ("Victims' Consolidated Response to the Documents in Support of the Appeal").
[16] "Consolidated response to Laurent Gbagbo's and Charles Blé Goudé's appeals against the 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'", ICC-02/11-01/15-644 ("Prosecutor's Consolidated Response to the Documents in Support of the Appeal"). This document was originally filed confidentially but was reclassified as public pursuant to the "Order on reclassification of document", 23 September 2016 (ICC-02/11-01/15-682).

III. MERITS

A. Preliminary Issue: Admissibility of Mr Gbagbo's second ground of appeal

10. Before the Trial Chamber, Mr Gbagbo requested leave to appeal, *inter alia*, the following issue: "whether the Chamber erred in law in introducing a notion of 'system of evidence'".[17] In the Trial Chamber's view, Mr Gbagbo seemed to be challenging the discretion of the Trial Chamber to decide whether to introduce prior recorded testimony under rule 68 (3) of the Rules based on the importance of certain witnesses in the system of evidence expected to be presented.[18] The Trial Chamber considered that if Mr Gbagbo's argument were to be accepted then this "would render Rule 68(3) of the Rules inapplicable".[19] On this basis, the Trial Chamber concluded that the issue raised was "not only a disagreement with the [Impugned] Decision but also a general disagreement with Rule 68(3) of the Rules"; it stated that "[s]uch disagreement [could not], however, be resolved on appeal"[20] and that "[a]ccordingly, the issue identified [did] not qualify as appealable under Article 82(1)(d) of the Statute".[21]

11. On appeal, and in relation to the single issue for which leave to appeal was granted to Mr Gbagbo ("whether the Chamber erred in law in posing 'good trial management' as a guiding principle for the admission of prior statements"),[22] Mr Gbagbo raises two grounds of appeal: (i) whether the Trial Chamber erred in law "in basing its decision to admit prior recorded statements on the principle of 'good trial management'";[23] and (ii) whether the Trial Chamber erred in law "by introducing the concept of 'system of evidence'".[24] Therefore, it would appear that Mr Gbagbo's second ground of appeal relates to an issue for which leave to appeal was specifically denied, a matter that the Appeals Chamber must address preliminarily.

12. The Appeals Chamber has previously explained that a right to appeal interlocutory decisions under article 82 (1) (d) of the Statute

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[17] Decision on Leave to Appeal, p. 4.
[18] Decision on Leave to Appeal, paras 18 and 19.
[19] Decision on Leave to Appeal, para. 19.
[20] Decision on Leave to Appeal, para. 20.
[21] Decision on Leave to Appeal, para. 20.
[22] *See* para. 8 *supra*.
[23] Mr Gbagbo's Document in Support of the Appeal, p. 14.
[24] Mr Gbagbo's Document in Support of the Appeal, p. 16.

> arises only if the Pre-Trial Chamber or the Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber". […]. In essence, the Pre-Trial Chamber or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue. By the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial Chamber or Trial Chamber may certify such a decision on its own accord.[25]

13. In addition, the Appeals Chamber has held that "it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent."[26] More recently, the Appeals Chamber, with reference to this jurisprudence, declined to conduct its own assessment of the criteria of article 82 (1) (d) of the Statute, noting the lack of a legal basis to do so.[27] However, notwithstanding the aforementioned jurisprudence, the Appeals Chamber recalls that it has also found that it may consider arguments that are "intrinsically linked to the issue on appeal as certified by the [relevant] Chamber".[28]

14. In this regard, the Appeals Chamber notes Mr Gbagbo's argument that his two grounds of appeal are "inextricably interwoven".[29] In support of his contention, Mr Gbagbo refers to the Partly Dissenting Opinion to the Decision on Leave to Appeal, wherein Judge Henderson stated as follows:

> 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

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[25] *Situation in the Democratic Republic of the Congo*, "Judgement 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 (OA 3) ("DRC OA 3 Judgment"), para. 20.
[26] *Prosecutor v. Laurent Gbagbo*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(1) of the Rome Statute'", 16 December 2013, ICC-02/11-01/11-572 (OA 5), para. 63.
[27] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", 18 December 2015, ICC-02/11-01/15-369 (OA 7) ("Gbagbo OA 7 Judgment"), para. 18.
[28] Gbagbo OA 7 Judgment, paras 25-26; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'", 27 May 2008, ICC-01/04-01/07-521 (OA 5), para. 37; *See also Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", 21 October 2008, ICC-01/04-01/06-1486 (OA 13), paras 14, 17.
[29] Mr Gbagbo's Document in Support of the Appeal, para. 39.

> 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.[30]

15. In Mr Gbagbo's view, in order to address the issue on appeal, the Appeals Chamber ought to examine not only the use of "a specific administrative criterion" (good trial management), but also the Trial Chamber's "overall reasoning in respect of rule 68".[31] In this respect, he submits that it is therefore "vital" to address his two grounds of appeal.[32]

16. In their responses, both the Prosecutor and the Victims submit that since Mr Gbagbo's second ground of appeal reproduces the third issue in his request for leave to appeal, for which leave was rejected it should be dismissed *in limine*.[33] Nevertheless, the Prosecutor, noting "the divergent jurisprudence on this topic and the potential connection with the issues on appeal", states that she "exceptionally" addresses the relevant submissions.[34]

17. The Appeals Chamber considers that, with respect to the first issue certified for leave to appeal ("good trial management"), in relation to which both Mr Gbagbo and Mr Blé Goudé were granted leave to appeal,[35] an examination of the exercise of discretion by the Trial Chamber to introduce prior recorded testimony under rule 68 (3) of the Rules is required. In particular, the Appeals Chamber notes that, in exercising its discretion, the Trial Chamber based its decision to introduce the prior recorded testimony in question on the criterion of "good trial management" and other factors such as "the importance of the evidence for the case" and the "volume and

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[30] Mr Gbagbo's Document in Support of the Appeal, para. 38 quoting the Partly Dissenting Opinion to the Decision on Leave to Appeal, para. 5.
[31] Mr Gbagbo's Document in Support of the Appeal, para. 38.
[32] Mr Gbagbo's Document in Support of the Appeal, para. 39 referring to the Partly Dissenting Opinion to the Decision on Leave to Appeal, para. 10.
[33] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 5; Victims' Consolidated Response to the Document in Support of the Appeal, paras 17-18.
[34] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 5.
[35] As noted at para. 8 above, the Trial Chamber granted Mr Blé Goudé leave to appeal, *inter alia*, the following issue: "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'".

detail of the evidence".[36] More specifically, when conducting its assessment, based on the aforementioned criterion and other factors, the Trial Chamber reasoned that "[…]it [is] necessary to distinguish between the facts to the proof of which go the statements, which are undoubtedly of great importance for the case, and the relative importance of the witnesses within the system of evidence that has been and is expected to be presented to the Chamber".[37]

18. The Appeals Chamber notes further that, under his second ground of appeal, Mr Gbagbo challenges the correctness of the criterion of "relative importance of the witnesses within the system of the evidence that has been and is expected to be presented" employed by the Trial Chamber in conjunction with the criterion of "good trial management". In his view, the use of these two criteria in this manner was an attempt by the Trial Chamber to "buttress the concept of 'good trial management' from another angle".[38] Thus, in his submission, the two criteria are linked and an examination of one necessarily involves an examination of the other.[39]

19. The Appeals Chamber is persuaded by Mr Gbagbo's arguments on this matter and finds that the arguments raised by him under his second ground of appeal are intrinsically linked to the first issue certified by the Trial Chamber. In this regard, if the criterion of "relative importance of the witnesses within the system of the evidence that has been and is expected to be presented" when assessed in conjunction with the criterion of "good trial management", was an irrelevant factor, or a factor not properly weighed, then this may amount to an error in the overall exercise of discretion by the Trial Chamber in determining whether the introduction of the prior recorded testimony in question was appropriate. Accordingly, the Appeals Chamber rejects the request by the Prosecutor and the Victims to dismiss Mr Gbagbo's second ground of appeal *in limine.*

[36] Impugned Decision, para. 25.
[37] Impugned Decision, para. 38.
[38] Mr Gbagbo's Document in Support of the Appeal, para. 50.
[39] Mr Gbagbo's Document in Support of the Appeal, paras 38-39.

B. Standard of Review

20. This appeal raises the question of the scope of a Trial Chamber's discretion in deciding whether to permit the introduction of prior recorded testimony pursuant to rule 68 of the Rules.

21. The Appeals Chamber recalls that it will not interfere with a Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling.[40] The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made.[41] In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion.[42] Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[43]

22. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the

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[40] *Prosecutor v. Uhuru Muigai Kenyatta*, "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'", 19 August 2015, ICC-01/09-02/11-1032 (OA 5) ("Kenyatta OA 5 Judgment"), para. 22, referring *inter alia* to *Prosecutor v. Joseph Kony et al*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA3) ("Kony et al. OA 3 Judgment"), para. 79; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'", 1 December 2014, ICC-01/04-01/06-3122 (A4 A6) ("Lubanga A 4 A 6 Judgment"), para. 41.

[41] *Kenyatta* OA 5 Judgment referring to *Kony et al.* OA 3 Judgment, para. 80; *Prosecutor v. Abdallah Banda Abakaer Nourain*, "Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest", 3 March 2015, ICC-02/05-03/09-632-Red (OA 5) ("*Banda* OA 5 Judgment"), para. 30; *Prosecutor v. Dominic Ongwen*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"", 17 June 2015, ICC-02/04-01/15-251 (OA 3) ("*Ongwen* OA 3 Judgment"), para. 35.

[42] *Kenyatta* OA 5 Judgment referring to *Kony et al.* OA 3 Judgment, paras 80-81; *Banda* OA 5 Judgment, para. 30; *Ongwen* OA 3 Judgment, para. 35.

[43] *Kenyatta* OA 5 Judgment referring to *Kony et al.* OA 3 Judgment, para. 80; *Banda* OA 5 Judgment, para. 30; *Ongwen* OA 3 Judgment, para. 35.

appropriate law and determine whether or not the first instance Chamber misinterpreted the law.[44]

23. With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings.[45] The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts.[46] Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion.[47] It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.[48]

24. The above standard of review will guide the analysis of the Appeals Chamber.

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[44] *Kenyatta* OA 5 Judgment referring, *inter alia*, to *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Conf (A 5) with a public redacted version, (ICC-01/04-01/06-3121-Red) (A 5) ("*Lubanga* A 5 Judgment"), para. 18; *Prosecutor v. Simone Gbagbo*, "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", 27 May 2015, ICC-02/11-01/12-75-Conf (OA) with a public redacted version, (ICC-02/11-01/12-75-Red) (OA) ("*S. Gbagbo* Admissibility OA Judgment"), para. 40.

[45] *Kenyatta* OA 5 Judgment referring to *Lubanga* A 5 Judgment, paras 24, 27; *S. Gbagbo* Admissibility OA Judgment, para. 39.

[46] *Kenyatta* OA 5 Judgment referring to *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07 (OA 4), para. 25; *Prosecutor v. Mathieu Ngudjolo Chui*, "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'", 27 February 2015, ICC-01/04-02/12-271 ("*Ngudjolo* A Judgment"), para. 22; *S. Gbagbo* Admissibility OA Judgment, para. 38.

[47] *Kenyatta* OA 5 Judgment referring to *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"', 14 July 2011, ICC-01/04-01/10-283 (OA) ("*Mbarushimana* OA Judgment"), para. 17; *Ngudjolo* A Judgment, para. 22; *S. Gbagbo* Admissibility OA Judgment, para. 38.

[48] *Kenyatta* OA 5 Judgment referring to *Mbarushimana* OA Judgment, para. 17; *Ngudjolo* A Judgment, para. 22; *S. Gbagbo* Admissibility OA Judgment, para. 38.

C. Mr Gbagbo and Mr Blé Goudé's First Ground of Appeal and Mr Gbagbo's Second Ground of Appeal

25. Mr Gbagbo and Mr Blé Goudé's first grounds of appeal are formulated as follows:

- "The Chamber made an error of law in basing its decision to admit prior recorded statements on the principle of 'good trial management'"[49] (Mr Gbagbo);
- "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' […]"[50] (Mr Blé Goudé).

26. Mr Gbagbo's second ground of appeal is:

- "[T]he Chamber committed a legal error by introducing the concept of 'system of evidence'".[51]

27. The Appeals Chamber notes that Mr Gbagbo raises a number of arguments under the heading "Introduction". To the extent that these arguments relate to his first and second grounds of appeal, they are addressed below. In addition, given the link between the arguments raised under Mr Gbagbo's first and second grounds of appeal to the first issue on appeal, both of these grounds will be addressed together.

1. Relevant part of the Impugned Decision

28. Before addressing the requests for the introduction of the prior recorded testimony of each of the witnesses, the Trial Chamber set out its understanding of the conditions that must be met under rule 68 (3) of the Rules:

> Rule 68(3) of the Rules posits the following conditions for the introduction of prior recorded testimony: (i) that the witness is present before the Trial Chamber; (ii) that the witness does not object to the introduction of the prior recorded testimony; and (iii) that the Prosecutor, the Defence and the Chamber have the opportunity to examine the witness during the proceedings. As always under Rule 68 of the Rules, the Chamber must also be attentive to the requirement that the introduction of prior recorded testimony must not be

[49] Mr Gbagbo's Document in Support of the Appeal, p. 14.
[50] Mr Blé Goudé's Document in Support of the Appeal, p. 7.
[51] Mr Gbagbo's Document in Support of the Appeal, p. 16.

> prejudicial to or inconsistent with the rights of the accused. In this regard, the Chamber considers that introduction of prior recorded testimony under Rule 68(3) of the Rules typically carries a lower risk of interfering with the fair trial rights of the accused, because the witness still appears before the Chamber and is available for examination, including by the Defence. As concerns the principle of orality under Article 69(2) of the Statute, which has been emphasised by the Defence, the Chamber notes that this principle is not absolute, and that the Statute explicitly envisages exceptions to be provided by the Rules. It is therefore inappropriate to effectively deprive Rule 68(3) of the Rules of its object and purpose merely by invoking the principle of orality.[52] [Footnote omitted.]

29. The Trial Chamber then affirmed that the decision to allow the introduction of prior recorded testimony was within its powers and continued as follows:

> While the Chamber needs to ensure that the proceedings do not unduly infringe on the abovementioned statutorily protected interests, a decision authorising the introduction of testimonial evidence via Rule 68 of the Rules instead of *viva voce* will be based on the criterion of good trial management, which includes considerations of expeditiousness and streamlining the presentation of evidence. This criterion will be applied on a case-by-case basis, taking into consideration the importance of the evidence for the case, the volume and detail of the evidence, among other factors. It is the duty of the Chamber to ensure that the trial unfolds in a focused and expeditious manner, while respecting the procedural rights of the parties and participants. Rule 68(3) of the Rules must be understood as a tool in the exercise of this duty.[53]

30. After summarising the arguments of the parties,[54] the Trial Chamber went on to summarise the content of the prior recorded statements of the relevant witnesses, witnesses P-0112,[55] P-0169,[56] P-0217,[57] P-0230,[58] P-0344,[59] P-0555.[60] P-0573,[61] P-0587,[62] P-0588[63] and P-0589.[64] It stated:

> The Chamber considers that the statements of the ten witnesses under consideration relate to facts which are central to the case, and are materially in

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[52] Impugned Decision, para. 24.
[53] Impugned Decision, para. 25.
[54] Impugned Decision, paras 27-29.
[55] Impugned Decision, para. 30.
[56] Impugned Decision, para. 31.
[57] Impugned Decision, para. 32.
[58] Impugned Decision, para. 33.
[59] Impugned Decision, para. 34.
[60] Impugned Decision, para. 35.
[61] Impugned Decision, para. 36.
[62] Impugned Decision, para. 37.
[63] Impugned Decision, para. 16.
[64] Impugned Decision, para. 17.

> dispute. These are mostly related to the events of 16 December 2010, but some of the witnesses also provide evidence in relation to other important facts of the case, such as the women's march in Abobo on 3 March 2011. However, the Chamber considers it necessary to distinguish between the facts to the proof of which go the statements, which are undoubtedly of great importance for the case, and the relative importance of the witnesses within the system of the evidence that has been and is expected to be presented to the Chamber. As concerns particularly the RTI march, all the witnesses testify to the events of 16 December 2010 and the following days from their own personal perspective. None of them have insider or other quality knowledge of the planning and overall conduct of the FDS operation during the events. Therefore, while not individually of great importance, they, together with other evidence which has been or will be submitted by the parties, form a web of evidence which will allow the Chamber to appreciate how the events unfolded on the ground. The same logic applies to the evidence provided by these witnesses in relation to other central issues in the case. In these circumstances, and provided that the Defence is given adequate opportunity to examine the ten witnesses, there is no overriding reason preventing the streamlining of the presentation of evidence by allowing the introduction of the witness statements pursuant to Rule 68(3) of the Rules.[65]

31. The Trial Chamber therefore found that, "in principle", the prior recorded testimony of the ten witnesses was "suitable for introduction under Rule 68(3) of the Rules".[66] The Trial Chamber clarified that introduction could only take place when all the legal requirements were met; that is, when the witnesses appeared before the Court and consented to having their prior recorded testimony introduced.[67] If at that time they did not object, their testimony would "be considered as submitted".[68] The Trial Chamber further accorded the Prosecutor the "opportunity to conduct a limited supplementary examination of the witnesses" and stated that the defence would "be granted a reasonable amount of time to examine each witness".[69]

2. Mr Gbagbo's submissions before the Appeals Chamber

32. Under his first ground of appeal, Mr Gbagbo submits that the fairness of the trial depends on the principle of orality and the adversarial principle and, as such, "any departure from the former must be exceptional and respect strict conditions."[70] In this regard, Mr Gbagbo emphasises the importance of the principle of orality and

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[65] Impugned Decision, para. 38. In relation to witnesses P-0588 and P-0589, *see also* Impugned Decision, paras 15-16, 18.
[66] Impugned Decision, para. 39.
[67] Impugned Decision, para. 39.
[68] Impugned Decision, para. 39.
[69] Impugned Decision, paras 40-41.
[70] Mr Gbagbo's Document in Support of the Appeal, paras 16, 22.

its link to the accused's right to cross-examine witnesses enshrined in article 67 (1) (e) of the Statute.[71] In Mr Gbagbo's view, the "key issue" in determining whether prior recorded testimony can be admitted is establishing whether such admission "is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally."[72]

33. In relation to the three criteria set out by the Appeals Chamber in a judgment delivered in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*[73] ("*Bemba* OA 5 OA 6 Judgment"), Mr Gbagbo argues that the Trial Chamber acknowledged that the prior recorded testimony of the ten witnesses introduced pursuant to rule 68 (3) of the Rules related to "facts which are central to the case, and are materially in dispute" which, in his view, should have precluded its introduction into evidence.[74] He further submits that the Trial Chamber "explicitly acknowledged that the testimony of two witnesses […] did not corroborate any other witness statements" and "implicitly acknowledged that other witness statements which the Prosecution wished to have admitted were not corroborated by any other statements in the record of the case".[75] In Mr Gbagbo's view, based on these considerations, the Trial Chamber should have rejected the Prosecutor's Request.[76]

34. Mr Gbagbo argues that, in the Impugned Decision, the Trial Chamber allowed the admission of prior recorded testimony of eleven witnesses "on the basis of the principal criterion of good trial management to the detriment of the objective legal

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[71] Mr Gbagbo's Document in Support of the Appeal, paras 12-15. *See also ibid.* paras 17-19 referring to *Prosecutor v. Jean-Pierre 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'", 3 May 2011, ICC-01/05-01/08-1386 (OA 5 OA 6); and *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, "Decision on the Conduct of Proceedings", 3 September 2015, ICC-02/11-01/15-205, para. 54, where the Trial Chamber recalled "the primacy of orality" and the right of the accused under article 67 (1) (e) of the Statute.

[72] Mr Gbagbo's Document in Support of the Appeal, para. 21 referring to *Prosecutor v. Jean-Pierre 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'", 3 May 2011, ICC-01/05-01/08-1386 (OA 5 OA 6), para. 78.

[73] "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 (OA 5 OA 6).

[74] Mr Gbagbo's Document in Support of the Appeal, para. 35 quoting the Impugned Decision, para. 38.

[75] Mr Gbagbo's Document in Support of the Appeal, para. 35 referring to Impugned Decision, paras 16, 30-37.

[76] Mr Gbagbo's Document in Support of the Appeal, para. 35.

requirements set out in rule 68 and applied in previous decisions."[77] In Mr Gbagbo's view, the Trial Chamber's approach has "opened the way to a potentially wholesale infringement of the principle of orality".[78]

35. Mr Gbagbo further submits that "wholesale application" of rule 68 (2) (b) of the Rules without observing the legal requirements "is tantamount to banning witnesses from appearing" while at the same time allowing the use of prior recorded testimony without an oral examination by the parties.[79] In this regard, Mr Gbagbo notes that testimony frequently differs from statements.[80] In relation to rule 68 (3) of the Rules, Mr Gbagbo submits that its application also undermines the principle of orality because "the essence of the testimony becomes confused with the statement", thereby abandoning any attempt to obtain "real testimony."[81] In Mr Gbagbo's view, wholesale application of rules 68 (2) (b) and 68 (3) of the Rules for administrative reasons turn "balanced proceedings into proceedings which disadvantage one of the parties" thereby undermining the fairness of the proceedings.[82] In this regard, Mr Gbagbo contends that application of rule 68 of the Rules "frees the Prosecution from part of the burden of proof and lowers the standard of proof that it needs to attain."[83]

36. In Mr Gbagbo's view, even if the Impugned Decision were to be understood as conveying the idea of a balance between "good trial management" and the rights of the accused, the Trial Chamber placed the parties' procedural rights and trial management on the same level thereby equalling "two essentially different factors on a par".[84]

37. Mr Gbagbo further contends that the Trial Chamber committed "several errors of reasoning".[85] In this respect, he argues that the Trial Chamber failed to explain what it meant by rights of the accused that could be "unduly infringed", remaining

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[77] Mr Gbagbo's Document in Support of the Appeal, para. 23. *See also ibid.*, paras 31, 47-49.
[78] Mr Gbagbo's Document in Support of the Appeal, para. 24. *See also ibid.*, para. 36.
[79] Mr Gbagbo's Document in Support of the Appeal, para. 26.
[80] Mr Gbagbo's Document in Support of the Appeal, para. 26.
[81] Mr Gbagbo's Document in Support of the Appeal, para. 26.
[82] Mr Gbagbo's Document in Support of the Appeal, para. 28.
[83] Mr Gbagbo's Document in Support of the Appeal, para. 29.
[84] Mr Gbagbo's Document in Support of the Appeal, para. 43.
[85] Mr Gbagbo's Document in Support of the Appeal, para. 45.

silent as to rights that could be "slightly 'infringed'".[86] It is Mr Gbagbo's submission that an infringement of the rights of the accused is a "breach of the rights" and no gradation could justify such a violation.[87]

38. Under his second ground of appeal, Mr Gbagbo questions the introduction of the concept of the "system of evidence", later referring to the Trial Chamber's wording of the "relative importance of the witnesses within the system of the evidence that has been and is expected to be presented to the Chamber".[88] In this regard, he contends that rule 68 of the Rules and related jurisprudence mandate that prior recorded testimony cannot be admitted when its content concerns matters in dispute.[89] Mr Gbagbo further argues that, by distinguishing between "important witnesses" and "less important witnesses who are significant only *en masse*", the Trial Chamber misinterpreted the concept of a witness.[90] Mr Gbagbo argues that this criterion finds no basis in the legal framework of the Court and contends that an evaluation of a witness can only be carried out at the end of the trial once the Trial Chamber has heard all the evidence.[91] In Mr Gbagbo's view, this "premature impression" of a witness "amounts to nothing but the product of what the Bench anticipates the Prosecutor's evidence will be."[92]

3. Mr Blé Goudé's submissions before the Appeals Chamber

39. Mr Blé Goudé argues that the Trial Chamber erred in introducing prior recorded statements pursuant to rule 68 (3) of the Rules "on the basis of 'one criterion', namely 'good trial management'".[93]

40. Mr Blé Goudé also refers to the *Bemba* OA 5 OA 6 Judgment and contends that, in that judgment, the Appeals Chamber did not consider 'good trial management' as a factor for admitting prior recorded testimony.[94] Mr Blé Goudé submits that Trial Chambers have consistently considered the factors set out in the *Bemba* OA 5 OA 6

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[86] Mr Gbagbo's Document in Support of the Appeal, para. 46
[87] Mr Gbagbo's Document in Support of the Appeal, para. 46.
[88] Mr Gbagbo's Document in Support of the Appeal, paras 50 and 55.
[89] Mr Gbagbo's Document in Support of the Appeal, para. 51.
[90] Mr Gbagbo's Document in Support of the Appeal, para. 54.
[91] Mr Gbagbo's Document in Support of the Appeal, para. 55.
[92] Mr Gbagbo's Document in Support of the Appeal, para. 56.
[93] Mr Blé Goudé's Document in Support of the Appeal, para. 14.
[94] Mr Blé Goudé's Document in Support of the Appeal, para. 15.

Judgment, even after the amendment of rule 68 of the Rules and in that sense the Trial Chamber erred in not considering the guidance provided by the Appeals Chamber.[95] In Mr Blé Goudé's view, the amendment did not envisage a modification to the interpretation, scope and applicability of rule 68 of the Rules when the witness is present before the Court, particularly in light of the fact that the object and purpose of the amendment was to provide Trial Chambers with more discretion to admit prior recorded testimony in instances where the witness is not present before the Court.[96]

41. Mr Blé Goudé further argues that the fact that he will have adequate time to examine rule 68 (3) witnesses does not suffice to protect his rights.[97] In this regard, he first submits that, according to the Trial Chamber's interpretation, it would be possible for the Prosecutor to have all the crime-base witnesses testify under rule 68 (3) of the Rules insofar as they "do not have 'insider or other quality knowledge on the planning and overall conduct' of the alleged direct perpetrators acts during the events".[98] In Mr Blé Goudé's view, this would erode the principle of orality.[99] He argues that the Trial Chamber erred in attaching considerable weight to the source of the witness statement while ignoring the three factors suggested by the Appeals Chamber in the *Bemba* OA5 OA 6 Judgment.[100] Secondly, Mr Blé Goudé argues that by not considering the fact that the ten witness statements relate to facts that are central to the case and materially in dispute, the Trial Chamber failed to properly weigh the "heavy burden" imposed on him to prepare his examination of these witnesses.[101] On these bases, Mr Blé Goudé submits that, even if 'good trial management' were a valid factor in the Trial Chamber's consideration, the Trial Chamber did not properly weigh it against the potential prejudice to Mr Blé Goudé.[102] In Mr Blé Goudé's view, in considering that time would be saved by introducing prior recorded testimony under rule 68 (3) of the Rules, the Trial Chamber failed to

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[95] Mr Blé Goudé's Document in Support of the Appeal, paras 16-17.
[96] Mr Blé Goudé's Document in Support of the Appeal, para. 16.
[97] Mr Blé Goudé's Document in Support of the Appeal, para. 18.
[98] Mr Blé Goudé's Document in Support of the Appeal, para. 18 referring to Impugned Decision, para. 38.
[99] Mr Blé Goudé's Document in Support of the Appeal, para. 18.
[100] Mr Blé Goudé's Document in Support of the Appeal, para. 18.
[101] Mr Blé Goudé's Document in Support of the Appeal, para. 19.
[102] Mr Blé Goudé's Document in Support of the Appeal, para. 20.

consider that Mr Blé Goudé would need additional time to examine the witnesses.[103] He also contends that, in light of the principle *in dubio pro reo*, any ambiguity as to the factors to be weighed when assessing rule 68 (3) of the Rules should be interpreted in favour of the accused.[104]

42. With respect to the content of the prior recorded testimony of the witnesses introduced pursuant to rule 68 (3) of the Rules, Mr Blé Goudé submits that they "cover a broad range of topics and issues that extend beyond [the events of 16 December 2010]", relate to facts that are materially in dispute and central to the case.[105] In relation to some of these witnesses, Mr Blé Goudé contends that they describe his alleged control over the militias "through his speeches and alleged orders."[106]

4. Prosecutor's Response

43. At the outset, the Prosecutor requests the Appeals Chamber to dismiss *in limine* Mr Gbagbo's submissions relating to an accused's right to question witnesses against him and the Prosecutor's intended use of rule 68 of the Rules in these proceedings.[107] In the Prosecutor's view, these submissions fall outside, and are not related to the scope of the appeal.[108] In any event, the Prosecutor contends that the right enshrined in article 67 (1) (e) of the Statute is not affected by the application of rule 68 (3) where the witnesses appear before the Court and can be questioned by the parties.[109]

44. First, the Prosecutor submits that in arguing that the Trial Chamber's main consideration in applying rule 68 of the Rules was 'trial management', Mr Gbagbo and Mr Blé Goudé misrepresent the Impugned Decision.[110] In this regard, the Prosecutor notes the Trial Chamber's duty under article 64 (2) of the Statute to ensure the expeditious conduct of the proceedings, and the right of the accused to be tried

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[103] Mr Blé Goudé's Document in Support of the Appeal, para. 20.
[104] Mr Blé Goudé's Document in Support of the Appeal, para. 21.
[105] Mr Blé Goudé's Document in Support of the Appeal, paras 22-25 referring to the prior recorded testimony of witness P-0213, P-0217, P-0169, P-0573, P-0587, P-0112, P-0588, P-0589, P-0344 and P-0555.
[106] Mr Blé Goudé's Document in Support of the Appeal, para. 25 referring to the prior recorded testimony of witnesses P-0344, P-0112 and P-0587.
[107] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 5.
[108] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 5.
[109] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 5.
[110] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, paras 7-10.

without undue delay enshrined in article 67 (1) (c) of the Statute.[111] The Prosecutor also submits that, in deciding on the applicability of rule 68 of the Rules, the Trial Chamber also referred to other criteria such as the mandatory requirements set out in rule 68 (3) of the Rules, the fact that introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused, and the case-by-case approach adopted whereby the Trial Chamber considered the importance, volume and detail of the evidence.[112]

45. Second, the Prosecutor contends that Mr Gbagbo and Mr Blé Goudé misrepresent the jurisprudence of the Appeals Chamber.[113] In this respect, the Prosecutor avers that in the *Bemba* OA 5 OA 6 Judgment, the Appeals Chamber set out a non-exhaustive list of factors that Chambers may take into account in applying the previous version of rule 68 (3) of the Rules.[114] She submits that Chambers are not precluded from considering other factors so long as the requirements of rule 68 (3) of the Rules are met and the rights of the accused are respected.[115] The Prosecutor further argues that the timing of the *Bemba* OA 5 OA 6 Judgment is relevant to its interpretation in the sense that, since its delivery, the "Court has evolved" and the adoption of amended rule 68 of the Rules was intended to meet the need for more efficient and expeditious proceedings.[116] It is for this reason that the Prosecutor affirms that the Chamber should be open to apply rule 68 (3) of the Rules not only to background or undisputed evidence but also to other types of evidence.[117]

46. Third, the Prosecutor contends that, by considering the "relative importance" of the evidence proffered by the ten witnesses and the other evidence that "has or will be submitted", the Trial Chamber addressed two of the factors referred to in the *Bemba*

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[111] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 8 referring to *Prosecutor v. Germain Katanga*, "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'", 12 July 2010, ICC-01/04-01/07-2259 (OA 10) ("*Katanga* OA 10 Judgment"), para. 45.
[112] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 9.
[113] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, paras 11-15 referring to *Bemba* OA 5 OA 6 Judgment.
[114] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 12.
[115] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 12.
[116] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 14.
[117] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, paras 13-14.

OA 5 OA 6 Judgment, namely (i) whether evidence is central to core issues of the case, and (ii) whether the evidence is corroborated.[118]

47. Fourth, the Prosecutor submits that the Trial Chamber correctly took into account the expeditiousness of the proceedings and that this approach is consistent with the Appeals Chamber's jurisprudence.[119] The Prosecutor further argues that, in light of the purpose of rule 68 of the Rules to reduce the length of proceedings and streamline the presentation of evidence, it was logical for the Trial Chamber to consider whether application of rule 68 (3) of the Rules would serve that purpose.[120] The Prosecutor also contends that the approach followed by the Trial Chamber is consistent with the jurisprudence of the Court and that of the *ad hoc* tribunals whereby Chambers consider whether time would be saved by the application of rule 68 (3) of the Rules.[121]

48. With respect to Mr Blé Goudé's submission that the Trial Chamber erred when it attached undue "weight to factors relating to the "source of the witness statement", the Prosecutor argues that the Trial Chamber did not consider the source of the statements to determine that the witnesses were of relative importance but rather assessed its content.[122] She further contends that Mr Blé Goudé's recital of the witnesses' testimony does not identify an error but merely shows disagreement with the Trial Chamber's conclusions.[123] In relation to Mr Gbagbo's arguments on the emphasis placed by the Trial Chamber on the "relative importance of witnesses' evidence", the Prosecutor submits that the assertion that "all witnesses are equally important - is misplaced" in that while "witnesses relating to the charges are important to sustain a conviction" this does not mean that "all witness must be treated the same for the purpose of the submission of evidence".[124] She contends that if all witnesses were "required to testify orally, this would render rules 68 (2) or 68 (3) of

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[118] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, paras 16-17.
[119] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, paras 18-19 referring to *Katanga* OA 10 Judgment, para. 47.
[120] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 20.
[121] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 21.
[122] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 26.
[123] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 26.
[124] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 27.

the Rules redundant.[125] In the Prosecutor's view, a Chamber may take into account, *inter alia*, the scope and nature of a witness' evidence and therefore the Trial Chamber did not err in its approach.[126] The Prosecutor further submits that, in any event, rule 68 (3) of the Rules, unlike rule 68 (2) (b) of the Rules, does not preclude the possibility of introducing prior recorded testimony that goes to the acts and conduct of the accused.[127] In the Prosecutor's view, this is in line with the fact that, under rule 68 (3) of the Rules, "the accused is still fully able to confront the witnesses and, to question them".[128] She affirms that the introduction of prior recorded testimony relating to disputed topics that were central to the case is an approach that is not only consistent with the jurisprudence of the Court but also with that of the *ad hoc* tribunals.[129]

49. In relation to Mr Blé Goudé's argument that he would need more time to examine the witnesses and that this, in turn, would prejudice him, the Prosecutor submits that it is "unsupported and speculative."[130] Lastly, the Prosecutor avers that "there is no ambiguity as to the factors to be weighed when applying rule 68 (3)".[131] In her view, apart from the mandatory three requirements set out in rule 68 (3) of the Rules coupled with the requirement in rule 68 (1) of the Rules that any introduction of prior recorded testimony not be prejudicial to the rights of the accused, a decision to introduce such testimony is "fact-specific and falls within the Chamber's discretion".[132]

5. *Victims' Response*

50. The Victims submit that the Trial Chamber allowed the introduction of prior recorded testimony pursuant to rule 68 (3) of the Rules after considering whether the requirements set out in that provision were met, whether the rights of the accused were ensured, and the guidance provided by the Appeals Chamber.[133] They further contend that, although the Trial Chamber found that the prior recorded testimony

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[125] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 27.
[126] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 28.
[127] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 29.
[128] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 29.
[129] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, paras 30-31.
[130] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 33.
[131] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para.34.
[132] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 34.
[133] Victims' Consolidated Response to the Documents in Support of the Appeal, paras 20-22.

related to facts central to the case and which were materially in dispute, they only provided "the personal perspective of those witnesses" and accordingly "information that is of relative significance."[134] In relation to the 'good trial management' criterion, the Victims aver that it was a "*preliminary remark*" and "a wide criterion, including not only the aforementioned formal and material factors, but also any other "[c]onsiderations of expeditiousness and streamlining the presentation of evidence […] to ensure that the trial unfolds in a focused and expeditious manner, while respecting the procedural rights of the parties and participants".[135] The Victims submit that, "as reiterated by the Chamber, this criterion cannot be said to conflict with the rights of the Defence or to be inconsistent with the letter or purpose of the legal instruments of the Court."[136] Finally, the Victims submit that Mr Blé Goudé has failed to establish how the fact that he will need more time to cross-examine the witnesses has resulted in an abuse of discretion on the part of the Trial Chamber.[137] In their view, Mr Blé Goudé's argument regarding the principle *in dubio pro reo* must be equally dismissed.[138]

6. Determination by the Appeals Chamber

(a) Relevant provisions of the Statute and the Rules of Procedure and Evidence

51. Provisions relevant to the introduction of prior recorded testimony of witnesses present before the Court are articles 64 (2), 67 (1) (c) and 69 (2) of the Statute and rules 68 (1) and (3) of the Rules.

52. Article 64 (2) of the Statute reads as follows:

> 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.

53. Article 67 (1) (c) of the Statute provides:

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[134] Victims' Consolidated Response to the Documents in Support of the Appeal, para. 23.
[135] Victims' Consolidated Response to the Documents in Support of the Appeal, para. 25, quoting from the Impugned Decision, para. 25 (italicisation of the quotation is removed and footnote omitted).
[136] Victims' Consolidated Response to the Documents in Support of the Appeal, para. 25 (footnote omitted).
[137] Victims' Consolidated Response to the Documents in Support of the Appeal, paras 28-29.
[138] Victims' Consolidated Response to the Documents in Support of the Appeal, para. 30.

> 1. 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 conducted impartially, and to the following minimum guarantees, in full equality:
>
> […]
>
> (c) To be tried without undue delay;
>
> […]

54. Article 69 (2) of the Statute reads as follows:

> 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. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

55. Rule 68 (1) and (3) of the Rules provides:

> 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, 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.
>
> 2. […]
>
> 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.

56. On 27 November 2013, the Assembly of States Parties adopted a resolution whereby rule 68 of the Rules was amended in accordance with the proposal submitted by the Working Group on Lessons Learnt.[139] The amendment of rule 68 of the Rules

[139] Resolution ICC-ASP/12/Res.7 adopted at the 12th plenary meeting, on 27 November 2013. *See also* Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, Annex II.A ("Report of the Working Group on Lessons Learnt, Annex II.A").

introduced further instances in which prior recorded testimony could be admitted where the witness is not present before the Court.[140] As a result of the amendment, former rule 68 (b) of the Rules became rule 68 (3) of the Rules. Aside from a small stylistic amendment, no substantive changes were made to the text of that provision.[141] However, the chapeau of former rule 68 became rule 68 (1) of the Rules.[142] Amendments to the original text "intended to make explicit the fair trial protections that apply to the rule".[143] To this effect, it was stipulated in the new rule 68 (1) of the Rules that the Trial Chamber may allow the introduction of prior recorded testimony "after hearing the parties" and "provided that this would not be prejudicial to or inconsistent with the rights of the accused".[144]

(b) Analysis

57. Mr Gbagbo and Mr Blé Goudé essentially submit that the Trial Chamber erred in the exercise of its discretion under rule 68 (3) of the Rules. Although Mr Gbagbo's arguments appear to challenge rule 68 of the Rules in its entirety, noting the Decision Granting Leave to Appeal and the specific reference to rule 68 (3) of the Rules in relevant part,[145] the Appeals Chamber will confine its consideration under this ground of appeal to rule 68 (3) of the Rules. The arguments made will be examined in turn.

58. Mr Gbagbo and Mr Blé Goudé submit that the Trial Chamber erred by authorising the introduction of prior recorded testimony under rule 68 of the Rules "on the basis of 'one criterion', namely 'good trial management'".[146] The Appeals Chamber considers that this misrepresents the Impugned Decision. Although the Trial Chamber did rely on 'good trial management' in reaching its decision,[147] it did this in a context that also referred to other factors. In this regard, the Trial Chamber stated that this criterion "include[d] considerations of expeditiousness and streamlining the

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[140] Report of the Working Group on Lessons Learnt, Annex II.A, paras 3, 14.
[141] Report of the Working Group on Lessons Learnt, Annex II.A, para. 40.
[142] Report of the Working Group on Lessons Learnt, Annex II.A, para. 10.
[143] Report of the Working Group on Lessons Learnt, Annex II.A, para. 11.
[144] Rule 68 (1) of the Rules. *See also* Report of the Working Group on Lessons Learnt, Annex II.A, para. 12 where it is explained that "[…] explicit reference to the rights of the accused was added, to draw attention expressly to this fundamental protection in the context of exceptions to the principle of orality".
[145] Decision on Leave to Appeal, paras 10-15, 18-20.
[146] Mr Gbagbo's Document in Support of the Appeal, paras 23, 28, 31, 47-49; Mr Blé Goudé's Document in Support of the Appeal, para. 14.
[147] Impugned Decision, para. 25.

presentation of evidence" and that it would be applied "on a case-by-case basis, taking into consideration the importance of the evidence for the case, the volume and detail of the other evidence, among other factors".[148] Prior to referring to good trial management, it set out the legal requirements stipulated in rule 68 (1) and (3) of the Rules, including "the requirement that the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused".[149] It then assessed the evidence and its importance.[150] Mr Blé Goudé's and Mr Gbagbo's argument that the Trial Chamber introduced prior recorded testimony *only* on the basis of 'good trial management' considerations is therefore dismissed.

59. Mr Gbagbo and Mr Blé Goudé also argue that, not only did the Trial Chamber err in relying solely on good trial management, but that it erred in relying on this factor at all, in particular since it was not referred to as a relevant factor in the *Bemba* OA 5 and OA 6 Judgment.[151] The Appeals Chamber finds no error in the fact that the Trial Chamber considered good trial management *per se* in deciding on the request before it. The Appeals Chamber notes that the criterion of good trial management, as applied by the Trial Chamber, includes considerations of expeditiousness and streamlining of the presentation of evidence. Articles 64 (2) and 67 (1) (c) of the Statute enjoin the Trial Chamber to ensure that the proceedings proceed expeditiously. In relation to expeditiousness in general, the Appeals Chamber has previously held that "[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial."[152] It has further stated that, while fully respecting the other rights of the accused, "an expeditious trial is a right that must be guaranteed to an accused."[153]

60. The Appeals Chamber also notes that, although the amendment to rule 68 of the Rules in 2013 did not substantially alter the wording of rule 68 (3) of the Rules, the

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[148] Impugned Decision, para. 25.
[149] Impugned Decision, paras 24-25.
[150] Impugned Decision, para. 38.
[151] Mr Gbagbo's Document in Support of the Appeal, para. 36; Mr Blé Goudé's Document in Support of the Appeal, para. 15;
[152] DRC OA 3 Judgment, para. 11.
[153] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'", 28 July 2010, ICC-01/04-01/07-2297 (OA 10), para. 47.

reasoning behind the amendment explained that it intended to reduce the length of proceedings before the Court and streamline the presentation of evidence and considered these to be the principal reasons for the adoption of the amendment.[154] In the resolution adopting the proposed amendment, the Assembly of States Parties recalled "the need to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and *enhancing the efficiency and effectiveness of the Court* […]" (emphasis added).[155]

61. The Appeals Chamber finds that the fact that it did not refer in the relevant part of its previous judgment to the need for expeditiousness is not decisive. The factors set out by the Appeals Chamber in that judgment were in a non-exhaustive list that may be considered in assessing whether the introduction of prior recorded testimony is prejudicial to or inconsistent with the rights of the accused or the fairness of the trial more generally (see further below).[156] It is also not surprising to conclude that expeditiousness is a factor relevant to the implementation of rule 68 (3) of the Rules, since its use in principle aims at reducing the amount of time devoted to hearing oral testimony in court.

62. In principle, therefore, the Appeals Chamber can find no error in the Trial Chamber taking good trial management into account in its decision-making under rule 68 (3) of the Rules. However, the requirements set out in that provision must also be observed and the introduction of the prior recorded testimony in question must not be prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial more generally (see article 67 of the Statute and rule 68 (1) of the Rules).[157] In this regard, the Appeals Chamber notes that it stated in the Bemba OA 5 OA 6 Judgment, albeit in a slightly different context, that "[w]hile expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements".[158]

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[154] Report of the Working Group on Lessons Learnt, Annex II.A, Executive Summary, para. 8 at p. 21.
[155] Resolution ICC-ASP/12/Res.7 adopted at the 12th plenary meeting, on 27 November 2013, p. 51.
[156] *Bemba* OA 5 OA 6 Judgment, para. 78.
[157] *See* also Report of the Working Group on Lessons Learnt, Annex II.A, para. 41.
[158] *Bemba* OA 5 OA 6 Judgment, para. 55.

63. As has been recalled, the Trial Chamber specifically referred to the fact that it "must also be attentive to the requirement that the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused"[159] and that it needed "to ensure that the proceedings do not unduly infringe on the above mentioned statutorily protected interests", presumably referring to, *inter alia*, the rights of the accused.[160] Mr Gbagbo and Mr Blé Goudé argue that the introduction of the prior recorded testimony was prejudicial to their rights. For the reasons that follow, the Appeals Chamber finds no merit in their arguments.

64. Mr Gbagbo and Mr Blé Goudé raise arguments in relation to the *Bemba* OA5 OA6 Judgment, arguing that the Trial Chamber erred in not considering this judgment and the factors therein and that if it had it would have rejected the Prosecutor's request to introduce the testimony in question.[161]

65. The Appeals Chamber notes that, in considering article 69 (2) of the Statute in that judgment, the Appeals Chamber held that "[t]he direct import of the first sentence […] is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality."[162] It went on to state that, "[n]evertheless, in-court personal testimony is not the exclusive mode by which a Chamber may receive witness testimony."[163] In relation to the second sentence of article 69 (2) of the Statute, the Appeals Chamber held that "a Chamber has the discretion to receive the testimony of a witness by means other than in-court personal testimony, as long as this does not violate the Statute and accords with the Rules of Procedure and Evidence."[164] It further stated that "[t]he most relevant provision [in respect of "the introduction of documents or written transcripts"] in the Rules of Procedure and Evidence is rule 68" but that it is subject to the strict conditions set out in the

[159] Impugned Decision, para. 24.
[160] Impugned Decision, para. 25.
[161] Mr Gbagbo's Document in Support of the Appeal, paras 35-36; Mr Blé Goudé's Document in Support of the Appeal, paras 15-17.
[162] *Bemba* OA 5 OA 6 Judgment, para. 76.
[163] *Bemba* OA 5 OA 6 Judgment, para. 77
[164] *Bemba* OA 5 OA 6 Judgment, para. 77

provision.[165] The Appeals Chamber held that, "[i]n 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", citing to the last sentences of articles 68 (5) and 69 (2) of the Statute.[166] It stated:

> In the view of the Appeals Chamber, this requires a cautious assessment. The Trial Chamber may, for example, 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.[167] [Footnotes omitted.]

66. The Appeals Chamber noted the difference between confirmation of charges proceedings and proceedings at trial and, with respect to the latter, stated that "the Trial Chamber must respect article 69 (2)" and "[w]itness statements may only be introduced under rule 68 of the Rules of Procedure and Evidence if the strict conditions of that rule are met."[168] It found "that the decision of the Trial Chamber [in that case] to admit all prior recorded statements without a cautious item-by-item analysis was incompatible with article 69 (2) of the Statute and with rule 68 of the Rules".[169]

67. In the Impugned Decision, the Trial Chamber did not expressly refer to the *Bemba* OA 5 OA 6 Judgment. However, it did refer to the aforementioned three factors (i) whether the evidence related to issues that are not materially in dispute; (ii) whether that evidence was not central to core issues in the case and (iii) whether the evidence is corroborative of other evidence. In this regard, however, the Trial Chamber found that the prior recorded testimony in question related to facts that were

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[165] *Bemba* OA 5 OA 6 Judgment, para. 77. More recently, the Appeals Chamber stated that "rule 68 of the Rules is an exception to the principle of orality enshrined in article 69 (2) of the Statute." *See Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, "Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", 12 February 2016, ICC-01/09-01/11-2024 (OA 10) , para. 84.
[166] *Bemba* OA 5 OA 6 Judgment, para. 78.
[167] *Bemba* OA 5 OA 6 Judgment, para. 78.
[168] *Bemba* OA 5 OA 6 Judgment, para. 80.
[169] *Bemba* OA 5 OA 6 Judgment, para. 81.

central to the case and materially in dispute[170] and that at least one,[171] if not two,[172] of the statements in question were uncorroborated, with no specific finding being made in relation to corroboration of the other statements.[173] Nevertheless, it found that they may be introduced pursuant to rule 68 (3) of the Rules.

68. Mr Blé Goudé raises the issue of the amendment to rule 68 of the Rules in 2013 and argues that it did not envisage a modification to the interpretation, scope and applicability of rule 68 (3).[174] In this regard, the Appeals Chamber notes that no significant amendment was made to rule 68 (3) of the Rules, while the aforementioned factors referred to in the *Bemba* OA 5 OA 6 Judgment were specifically inserted into the new rule 68 (2) (b) of the Rules. In the Appeals Chamber's view, this implies that greater discretion was intended to be accorded in respect of the application of rule 68 (3) of the Rules.

69. In addition, the Appeals Chamber notes that the factors referred to in the *Bemba* OA 5 OA 6 Judgment are not requirements but, rather, factors that may be considered in assessing whether the introduction of prior recorded testimony under rule 68 (3) of the Rules is prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In this respect, the Appeals Chamber, in its previous judgment, did not *per se* preclude the introduction of prior recorded testimony under rule 68 (3) of the Rules which related to issues that were materially in dispute, central to core issues of the case or were uncorroborated. The factors listed were factors that the Appeals Chamber stated may be taken into account by a Chamber in reaching its decision. While no one factor is, as a matter of principle, determinative, the Appeals Chamber considers, in particular, that where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally. This must be the Chamber's overriding concern, in particular bearing in mind "the general requirement of in-court personal

[170] Impugned Decision, para. 38.
[171] Impugned Decision, para. 16.
[172] Impugned Decision, para. 17.
[173] Impugned Decision, paras 30-38.
[174] Mr Blé Goudé's Document in Support of the Appeal, para. 16.

testimony".[175] Whether such testimony may be introduced under rule 68 (3) of the Rules will, therefore, depend upon the circumstances of the case. In addition, the extent to which such testimony may be introduced solely in writing, will be a matter for the discretion of a Chamber, bearing in mind that rule 68 (3) of the Rules provides for the possibility for the Prosecutor, the defence and the Chamber to have the opportunity to examine the witness during the proceedings – this *de facto* includes the calling party, which in the instant case is the Prosecutor. What is most important in this exercise is, as was stated by the Appeals Chamber, that the Chamber carries out a "cautious item-by-item analysis".[176] This assessment, sufficiently reasoned and explained, should be made on a case-by-case basis where the factors to be considered may vary per case and per witness.

70. In paragraphs 15-18 and 30-37 of the Impugned Decision the Trial Chamber addressed the content of the witness statements in question; in doing so, it thereby began its item-by-item analysis. Thereafter, it stated:

> The Chamber considers that the statements of the ten witnesses under consideration relate to facts which are central to the case, and are materially in dispute. […]. However, the Chamber considers it necessary to distinguish between the facts to the proof of which go the statements, which are undoubtedly of great importance for the case, and the relative importance of the witnesses within the system of the evidence that has been and is expected to be presented to the Chamber. As concerns particularly the RTI march, all the witnesses testify to the events of 16 December 2010 and the following days from their own personal perspective. None of them have insider or other quality knowledge of the planning and overall conduct of the FDS operation during the events. Therefore, while not individually of great importance, they, together with other evidence which has been or will be submitted by the parties, form a web of evidence which will allow the Chamber to appreciate how the events unfolded on the ground. The same logic applies to the evidence provided by these witnesses in relation to other central issues in the case. In these circumstances, and provided that the Defence is given adequate opportunity to examine the ten witnesses, there is no overriding reason preventing the streamlining of the presentation of evidence by allowing the introduction of the witness statements pursuant to Rule 68(3) of the Rules.[177]

71. Although the Trial Chamber stated that the statements in question "relate[d] to facts which are central to the case, and are materially in dispute", as can be seen, it

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[175] *Bemba* OA 5 OA 6 Judgment, para. 78.
[176] *Bemba* OA 5 OA 6 Judgment, para. 81.
[177] Impugned Decision, para. 38.

then proceeded to consider the importance of the statements in the context of the case as a whole. As stated above, the Appeals Chamber considers that, in order to make its determination under rule 68 (3) of the Rules, a Trial Chamber inevitably needs, and indeed must, carry out an individual assessment of the evidence sought to be introduced under that provision based on the circumstances of each case. In carrying out this individual assessment, the Trial Chamber must also necessarily analyse the 'importance' of each witness statement in light of the charges and the evidence already presented or intended to be presented before it. In the Appeals Chamber's view, this assessment is part and parcel of the analysis a Chamber must undertake in determining whether it is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally, to allow for the evidence in question to be introduced under rule 68 (3) of the Rules. Indeed, 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 this provision. Therefore, making such an assessment cannot *per se* be contrary to rule 68.

72. In this regard, the Appeals Chamber is unpersuaded by Mr Gbagbo's argument raised under his second ground of appeal that considering the relative importance of witness evidence when deciding under rule 68 (3) of the Rules is not possible as an evaluation of evidence can only be carried out at the end of the trial once the Trial Chamber has heard all of the evidence.[178] In the Appeals Chamber's view, rule 68 (3) of the Rules requires a Chamber to carry out a preliminary assessment of the evidence in question in order to determine whether its introduction under that provision 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.

73. The Appeals Chamber recalls that the third factor referred to in the *Bemba* OA5 OA 6 Judgment that a Chamber may take into consideration in determining potential prejudice to an accused is "whether the evidence is corroborative of other evidence". In this regard, Mr Gbagbo argues that, in introducing these statements, the Trial

[178] Mr Gbagbo's Document in Support of the Appeal, para. 55.

Chamber "explicitly acknowledged that the testimony of two witnesses […] did not corroborate any other witness statements", and "implicitly acknowledged that other witness statements which the Prosecution wished to have admitted were not corroborated by any other statements in the record of the case".[179] In Mr Gbagbo's view, based on these considerations, the Trial Chamber should have rejected the Prosecutor's Request.[180] The Appeals Chamber notes that the Trial Chamber appeared to find explicitly that at least one, if not two, statements were uncorroborated and proceeded to reject their introduction under rule 68 (2) (b) of the Rules but later accepted them under rule 68 (3) of the Rules. In relation to the remaining witness statements it did not explicitly state whether or not they were corroborated. The Appeals Chamber is of the view that the existence of corroborating evidence may go towards ensuring that the introduction of the evidence in question is not prejudicial to or inconsistent with the rights of the accused. Nevertheless, it again recalls that corroboration is not a requirement for the introduction of statements under rule 68 (3) of the Rules and, as such, Mr Gbagbo's argument in this regard must be dismissed.

74. Mr Gbagbo argues that the application of rule 68 of the Rules "frees the Prosecution from part of the burden of proof and lowers the standard of proof that it needs to attain".[181] If accepted, this argument would render rule 68 of the Rules obsolete due to it being inherently prejudicial to the rights of the accused. The introduction of prior recorded testimony pursuant to rule 68 of the Rules does not relieve the Prosecutor of her obligation to prove the charges beyond reasonable doubt in order to obtain a conviction; this obligation is clearly set out in article 66 of the Statute. The Prosecutor still needs to prove the guilt of the accused person beyond reasonable doubt on the basis of the evidence presented, be it oral or written.

75. Mr Gbagbo argues that the Trial Chamber erred in its consideration of trial management vis-à-vis the rights of the accused, by balancing one against the other. He submits that reference to "unduly infring[ing]" the rights of the accused was wrong, since "respect for the rights of the accused, as the weaker party, forms the cornerstone of criminal proceedings and that the trial's fairness is conditional on the

[179] Mr Gbagbo's Document in Support of the Appeal, para. 35 referring to Impugned Decision, paras 16, 30-37.
[180] Mr Gbagbo's Document in Support of the Appeal, para. 35.
[181] Mr Gbagbo's Document in Support of the Appeal, para. 29.

application of this principle".[182] The Appeals Chamber finds Mr Gbagbo's arguments to be based on a misrepresentation of the Impugned Decision. In the Impugned Decision, the Trial Chamber referred to "the *requirement* that the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused" (emphasis added). It further stated that "[i]t is the duty of the Chamber to ensure that the trial unfolds in a focused and expeditious manner, *while respecting the procedural rights* of the parties and participants" (emphasis added).[183] In this regard, the Impugned Decision makes clear that respect for the accused's rights is a prerequisite for the application of rule 68 (3) of the Rules. Indeed, pursuant to rule 68 (1) of the Rules, if the application of rule 68 (3) of the Rules is prejudicial to or inconsistent with the rights of the accused, its use is impermissible; this is not just an additional factor to be considered by the Trial Chamber in the exercise of its discretion, but is a requirement. The Appeals Chamber has previously underlined the importance of this, and it is noted that, in the amendments in 2013, the Assembly of States Parties reinforced this point in rule 68 (1) of the Rules. It is true that the Trial Chamber's reference to 'unduly infringing' the accused's rights was unfortunate, but this does not alter the Appeals Chamber's understanding that the Trial Chamber was cognisant of the import of the wording of, *inter alia*, rule 68 (1) of the Rules.

76. Mr Blé Goudé generally submits that, in considering that time would be saved by introducing prior recorded testimony under rule 68 (3) of the Rules, the Trial Chamber failed to consider that he would need additional time to examine the witnesses in question.[184] He further argues that the Trial Chamber failed to properly weigh the "heavy burden" imposed on him to prepare his examination of these witnesses.[185] Given that Mr Blé Goudé is not arguing that his rights have been violated but refers to "the potential prejudice" thereto,[186] the Appeals Chamber finds his arguments in this regard to be speculative and unjustified.[187] In addition, the Appeals Chamber notes that the Trial Chamber had not yet stipulated how much time the accused would be allocated in cross-examination. The Trial Chamber expressly

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[182] Mr Gbagbo's Document in Support of the Appeal, para. 42.
[183] Impugned Decision, paras 24-25.
[184] Mr Blé Goudé's Document in Support of the Appeal, para. 20.
[185] Mr Blé Goudé's Document in Support of the Appeal, para. 19.
[186] Mr Blé Goudé's Document in Support of the Appeal, para. 20.
[187] *See also* *Bemba* OA 5 OA 6 Judgment, para. 67.

stated that the accused would "not be constrained to the amount of time used by the Prosecutor for her supplementary examination, and [would] be granted a reasonable amount of time to examine each witness".[188] Earlier in its decision it referred to the need to ensure that the accused be "given adequate opportunity to examine the ten witnesses".[189] Should it become necessary, Mr Blé Goudé is not precluded from requesting additional time for cross-examination of the witnesses concerned. In any event, Mr Blé Goudé is required to prepare his cross-examination based on the relevant material disclosed to him, including the prior statements of the witnesses concerned.[190] In these circumstances, the Appeals Chamber finds no merit in this argument.

77. Mr Gbagbo[191] and Mr Blé Goudé[192] raise arguments in relation to the primacy of the principle of orality enshrined in article 69 (2) of the Statute. The Trial Chamber stated that "the principle of orality is not absolute and that the Statute explicitly envisages exceptions to be provided by the Rules."[193] This is indeed the case, as was acknowledged by the Appeals Chamber in the *Bemba* OA5 OA6 Judgment.[194] Exceptions to the principle of orality are explicitly provided for in article 69 (2) of the Statute and the introduction of prior recorded testimony in accordance with rule 68 (3) of the Rules is one of them. As has been stressed previously in this judgment, however, introduction of prior recorded testimony under this provision is subject to the strict conditions set out in that rule in addition to the overriding factor that it must not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally.

78. Mr Gbagbo argues that the Trial Chamber has "opened the way to a potentially wholesale infringement of the principle of orality",[195] referencing, *inter alia*, the dissenting judge's observations as to the anticipated number of witnesses who may

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[188] Impugned Decision, para. 41.
[189] Impugned Decision, para. 38.
[190] See e.g. ICTY, Trial Chamber, *Prosecutor v. Ratko Mladić* , "Decision with regard to prosecution motion for admission into evidence of witness Harland's statement and associated documents", 3 July 2012, IT-09-92-T, para. 5: "As a general rule, the opposing party should prepare for a witness's testimony assuming that the witness's full statement will be admitted into evidence".
[191] Mr Gbagbo's Document in Support of the Appeal, paras 12-19.
[192] Mr Blé Goudé's Document in Support of the Appeal, para. 18.
[193] Impugned Decision, para. 24.
[194] *Bemba* OA 5 OA 6 Judgment, para. 77.
[195] Mr Gbagbo's Document in Support of the Appeal, para. 24.

not provide their evidence orally.[196] The Appeals Chamber considers 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. However, in reaching a decision under rule 68 (3) of the Rules, the principle set out in article 69 (2) of the Statute must always be borne in mind.

79. The Appeals Chamber further recalls that, pursuant to rule 68 (3) of the Rules, "the Prosecutor, the defence and the Chamber have the opportunity to examine the witness" in Court. In this sense, the testimony cannot be considered to be exclusively written as it is not necessarily intended to replace oral testimony but, rather, complement it. As the ICTY Appeals Chamber has held, in such a case, "[t]he testimony of the witness constitutes a mixture of oral and written evidence."[197]

80. Mr Blé Goudé argues that the Trial Chamber's interpretation would erode the principle of orality because it would be possible to have all the crime-base witnesses testifying under rule 68 (3) of the Rules as long as they do not have insider or other quality knowledge of the planning and overall conduct of the alleged perpetrators.[198] The Appeals Chamber does not consider that the necessary implication of the Trial Chamber's reasoning is that the evidence of all crime-base witnesses may be introduced under rule 68 (3) of the Rules. Indeed, as previously stated, a careful case-by-case assessment is required in each instance. While the nature of certain crime-base evidence may make it more conducive to introduction under rule 68 (3) of the Rules, no general conclusions can be drawn on that basis alone. Many of the reasons warranting the hearing of testimony *viva voce* in its entirety, may apply equally to crime-base evidence. Such reasons may include issues regarding the credibility of the witness, whether direct oral testimony is likely to provide additional information or whether the witness in question is considered to be a key witness.

81. In the case at hand, the Appeals Chamber considers that Mr Gbagbo and Mr Blé Goudé have not demonstrated that the Trial Chamber erred in its approach under rule 68 (3) of the Rules to the introduction of prior recorded testimony. The Trial Chamber

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[196] Mr Gbagbo's Document in Support of the Appeal, para. 25.
[197] *Prosecutor v. Slobodan Milošević*, "Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the form of written statements", 30 September 2003, IT-02-54-AR73.4, para. 16.
[198] Mr Blé Goudé's Document in Support of the Appeal, para. 18.

was cognisant of the requirements set out in rule 68 (1) and (3) of the Rules and the Appeals Chamber can discern no error in the Trial Chamber's consideration of good trial management and the relative importance of the witnesses as relevant factors in its decision. The fact that the evidence in question may have been materially in dispute, related to facts central to the case and may have been uncorroborated does not necessarily require rejection of the Prosecutor's request.

82. The Appeals Chamber notes that, in relation to the factual assessment carried out by the Trial Chamber, Mr Blé Goudé argues that "[h]ad the Majority not erred, it would not have conditionally introduced the ten witness statements under rule 68 (3)."[199] In this regard, Mr Blé Goudé seems to be arguing that the witness statements concerned cover issues that are not limited to the events that took place during the march of 16 December 2010, relate to facts that are central to the case, materially in dispute and sometimes involve the description of Mr Blé Goudé's alleged control over the militias.[200] Mr Blé Goudé submits that witnesses P-0344, P-0112 and P-0587 refer to Mr Blé Goudé's "alleged control of militia group through his speeches and alleged orders" and that this is "a core element in dispute".[201] The Appeals Chamber notes that, although in the Impugned Decision, the Trial Chamber did not refer to these aspects of the statements,[202] it did find that the statements "relate to facts which are central to the case and […] materially in dispute."[203] The Appeals Chamber understands Mr Blé Goudé's argument to be that if the Trial Chamber would have followed the guidance given in the *Bemba* OA5 OA6 Judgment, "it would not have conditionally introduced the ten witness statements" because the testimony was materially in dispute and central to the case. As explained in paragraph 81 above, the Trial Chamber did not err in its interpretation of rule 68 (3) of the Rules. Accordingly, the Appeals Chamber dismisses Mr Blé Goudé's arguments.

83. Finally, the Appeals Chamber is also unpersuaded by Mr Blé Goudé's argument that, as "[r]ule 68 (3) concerns the potential admission of incriminatory evidence that

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[199] Mr Blé Goudé's Document in Support of the Appeal, para. 22.
[200] Mr Blé Goudé Document in Support of the Appeal, paras 22-25.
[201] Mr Blé Goudé's Document in Support of the Appeal, para. 25 referring to Mr Blé Goudé's Response to Prosecutor's Request, footnote 47.
[202] Impugned Decision, paras 30, 34, 37.
[203] Impugned Decision, para. 38.

has not been tested by the Defence, any ambiguity as to the factors to be weighed when assessing rule 68 (3) of the Rules should be construed in favour of the accused pursuant to the *in dubio pro reo* principle".[204] The Appeals Chamber notes that the principle *in dubio pro reo* is encapsulated in article 22 (2) of the Statute as a general principle of criminal law to be employed, where ambiguity arises, in the interpretation of the definition of a crime. Leaving aside whether this principle applies to the circumstances at hand, the Appeals Chamber considers that Mr Blé Goudé has not demonstrated any ambiguity in the Trial Chamber's assessment of the relevant factors when it introduced the prior recorded testimony under rule 68 (3) of the Rules. Mr Blé Goudé's argument is therefore dismissed.

84. Accordingly, Mr Gbagbo and Mr Blé Goudé's first ground of appeal and Mr Gbagbo's second ground of appeal are rejected.

D. Mr Blé Goudé's Second Ground of Appeal

85. Mr Blé Goudé formulates his second ground of appeal, which concerns the admission of one witness statement under rule 68 (2) (b) (i) of the Rules, as follows:

> 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)".[205]

1. Relevant part of the Impugned Decision

86. The Prosecutor requested the introduction of three witness statements under rule 68 (2) (b) of the Rules. The Trial Chamber introduced its analysis of the issue by stating:

> The conditions for the introduction of prior recorded testimony under Rule 68(2)(b) of the Rules are that the prior recorded testimony "goes to proof of a matter other than the acts and conduct of the accused", and that it is accompanied by a declaration confirming the veracity of its content under certain formal requirements. Importantly, after finding that these conditions are met, the Chamber must not automatically allow the introduction of the prior recorded testimony, but must determine whether this is appropriate in the particular circumstances. Rule 68(2)(b)(i) of the Rules provides examples of factors that the Chamber may take into account for its determination. The

[204] Mr Blé Goudé's Document in Support of the Appeal, para. 21.
[205] Mr Blé Goudé's Document in Support of the Appeal, p. 12.

> Chamber must also always bear in mind the general condition of Rule 68(1) of the Rules, which prohibits introduction of prior recorded testimony where this would be prejudicial to or inconsistent with the rights of the accused.[206]

87. Having rejected the Prosecutor's request in respect of two of the witness statements, the Trial Chamber turned to the third (witness P-0590). It "note[d] that the statement of this witness is peripheral and of very limited significance" and that it "does not go to the acts and conduct of the accused",[207] going on to describe in more detail its content.[208] The Trial Chamber considered whether introduction would cause any prejudice to the accused[209] and finally addressed the criteria of reliability. It considered that the witness statement in question,

> bearing in mind that it was taken by the Office of the Prosecutor pursuant to Rule 111 of the Rules and under all applicable guarantees, including Article 54(1) of the Statute, bears sufficient indicia of reliability. The witness was explained the procedure and the significance of providing a statement to the Office of the Prosecutor. The statement also includes information as to how the witness came to know of particular facts.[210]

88. The Trial Chamber concluded by finding it appropriate to grant the application in relation to this witness, and the Prosecutor was "directed to seek the requisite declaration from the witness and to file that declaration in the record of the case".[211] The Trial Chamber stated that "[u]pon receipt of the declaration, the witness statement and its annexes shall be considered submitted to the Chamber in their entirety, and the Chamber will address their relevance and probative value in its judgment pursuant to Article 74 of the Statute".[212]

2. Mr Blé Goudé's submissions before the Appeals Chamber

89. Mr Blé Goudé contends that the Trial Chamber erred in law in applying only a formalistic interpretation to the indicia of reliability requirement in disregard of the indicia relating to the content of the prior recorded testimony.[213] In Mr Blé Goudé's view, given the lack of determination in the law of the concept of 'reliability', it is

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[206] Impugned Decision, para. 10.
[207] Impugned Decision, para. 19.
[208] Impugned Decision, paras 19-20.
[209] Impugned Decision, para. 21.
[210] Impugned Decision, para. 22.
[211] Impugned Decision, para. 23.
[212] Impugned Decision, para. 23.
[213] Mr Blé Goudé's Document in Support of the Appeal, para. 28.

necessary under article 21 (2) of the Statute to resort to jurisprudence in order to find the relevant factors to be considered.[214] Mr Blé Goudé refers to jurisprudence of the Court and the ICTY to support his argument that Chambers should not only consider the formal criteria, but also the content of the statement sought to be introduced when deciding whether a prior recorded testimony bears "sufficient indicia of reliability".[215] Mr Blé Goudé submits that, although article 21 of the Statute does not oblige Chambers to follow previous jurisprudence, given the implications of the application of rule 68 (2) (b) of the Rules, particularly in relation to the principle of orality, the Trial Chamber ought to have considered the previous jurisprudence and taken into account the content of the statement.[216]

90. Mr Blé Goudé further contends that the error materially affected the Impugned Decision in the sense that, had the Trial Chamber considered the content of the prior recorded testimony, it would not have found it to bear sufficient indicia of reliability and it would not have allowed its introduction pursuant to rule 68 (2) (b) of the Rules.[217] In Mr Blé Goudé's view, the only part of witness P-0590 that connects him to the charges is based on anonymous hearsay evidence whose reliability cannot be established and, as such, does not contain sufficient indicia of reliability.[218]

3. Prosecutor's Response

91. In response to Mr Blé Goudé's arguments, the Prosecutor first submits that his arguments misrepresent the Impugned Decision given that the Trial Chamber did not limit its assessment of "sufficient indicia of reliability" to the formal requirement but also considered other factors that required an analysis of the content of the prior recorded testimony.[219] The Prosecutor refers in particular to the Trial Chamber's reference to the cumulative and corroborative nature of the evidence of witness P-

[214] Mr Blé Goudé's Document in Support of the Appeal, para. 29.
[215] Mr Blé Goudé's Document in Support of the Appeal, paras 30-32.
[216] Mr Blé Goudé's Document in Support of the Appeal, para. 33.
[217] Mr Blé Goudé's Document in Support of the Appeal, para. 34.
[218] Mr Blé Goudé's Document in Support of the Appeal, paras 35-36.
[219] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 38.

0590 and its reference to the information contained in the statement as to how the witness came to know of particular facts.[220]

92. Second, the Prosecutor argues that, even if *arguendo* the Trial Chamber failed to consider the content of the statement, this would not constitute an error because it was not required to do so.[221] In support of her contention, the Prosecutor avers that the jurisprudence referred to by Mr Blé Goudé sets out factors that "can" be taken into account when assessing "indicia of reliability" and affirms that the absence of any such indicia can be considered when ultimately weighing the evidence.[222] As such, in her opinion, "the mere introduction of a prior recorded statement without consideration of its content does not cause unfair prejudice."[223] The Prosecutor further refers to a report of the Working Group on Lessons Learnt as confirming that submission of prior recorded testimony under rule 68 (2) (b) of the Rules is not "subject to any assessment of relevance or probative value of the testimony".[224]

93. Third, the Prosecutor contends that Mr Blé Goudé has failed to demonstrate the material effect of the alleged error and that his arguments in this respect "are speculative and factually unsupported."[225] In this regard, the Prosecutor avers that the requirement of "indicia of reliability" is one factor that a Chamber must consider and submits that a prior recorded testimony can be introduced even if some factors are not satisfied.[226] In this regard, the Prosecutor argues that "it is entirely speculative to assume that a change" to the Trial Chamber's consideration of one of these factors would have materially affected the Impugned Decision.[227] Finally, the Prosecutor submits that Mr Blé Goudé mischaracterises the statement of witness P-0590 in the

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[220] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 38 referring to Impugned Decision, paras 20, 22.
[221] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 40.
[222] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, paras 41-42.
[223] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 41.
[224] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 43 quoting the Report of the Working Group on Lessons Learnt, Annex II.A: "[t]he fifth factor, which calls for consideration of whether prior recorded testimony 'has sufficient indicia of reliability', is without prejudice to the fact that judges of the Court have discretion to determine the probative value of evidence in accordance with article 69(4) of the Statute", para. 22.
[225] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 45.
[226] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 47.
[227] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 48.

sense that the Trial Chamber held that it is "peripheral and of very limited significance" and that it constitutes anonymous hearsay.[228]

4. Victims' Response

94. The Victims submit that in the Impugned Decision, the Trial Chamber referred to the content of the prior recorded testimony.[229] The Victims also argue that there is no exclusionary rule against hearsay evidence and note that Mr Blé Goudé's submissions in this regard "are very close" to an issue for which the Trial Chamber rejected leave to appeal, namely "[w]hether 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."[230]

5. Determination by the Appeals Chamber

95. Mr Blé Goudé argues that the Trial Chamber erred in law in applying only a formalistic interpretation to the indicia of reliability requirement, disregarding completely "the indicia relating to the content of the witness statement".[231] In this regard, rule 68 (2) (b) (i) of the Rules provides:

> In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question:
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> […]
>
> - has sufficient indicia of reliability.

96. The Appeals Chamber notes that, as stated by the Prosecutor[232] and the Victims,[233] and contrary to Mr Blé Goudé's argument, the Trial Chamber, in the Impugned Decision, did not limit itself to assessing the witness statement in question solely in respect of formalities. Having assessed the content of the statement in

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[228] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, para. 49 referring to Impugned Decision, para. 19.
[229] Victims' Consolidated Response to the Documents in Support of the Appeal, para. 33.
[230] Victims' Consolidated Response to the Documents in Support of the Appeal, paras 35-37.
[231] Mr Blé Goudé's Document in Support of the Appeal, para. 28.
[232] Prosecutor's Consolidated Response to the Documents in Support of the Appeal, paras 38-39.
[233] Victims' Consolidated Response to the Documents in Support of the Appeal, para. 33.

question for the purposes of other criteria in rule 68 (2) (b) of the Rules, the Trial Chamber specifically referred to the statement having been taken under rule 111 of the Rules, "and under all applicable guarantees, including Article 54(1) of the Statute", stating that it bore "sufficient indicia of reliability".[234] It also stated that it contained "information as to how the witness came to know of particular facts", without elaborating on what this was or meant.[235] Despite the latter, the Appeals Chamber considers that the main considerations taken into account in specifically assessing indicia of reliability were those related to the formal requirements for the taking of the witness statement and it is therefore appropriate to address whether the Trial Chamber erred in its approach.

97. The Appeals Chamber notes that the wording of rule 68 (2) (b) of the Rules, as set out above, does not provide any indication as to the factors that a Trial Chamber may or should consider in deciding whether prior recorded testimony "has sufficient indicia of reliability". It simply cites this factor as one which the Chamber shall consider. Rules 68 (2) (c) and (d) of the Rules also refer to indicia of reliability. Rule 68 (2) (c) (i) of the Rules reads:

> Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability.

Rule 68 (2) (d) (i) of the Rules provides:

> Prior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that:
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> […]
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> - the prior recorded testimony has sufficient indicia of reliability.

98. The Appeals Chamber notes that, while under rule 68 (2) (b) (i) of the Rules, the provision under consideration in this appeal, indicia of reliability is a factor that must be considered by the Trial Chamber but does not necessarily need to be present, rules

[234] Impugned Decision, para. 22.
[235] Impugned Decision, para. 22.

68 (2) (c) (i) and (d) (i) of the Rules establish it as a requirement for the introduction of prior recorded testimony.

99. As explained above, rule 68 (2) of the Rules is a provision which was adopted by the Assembly of States Parties on 27 November 2013 in accordance with the proposal submitted by the Working Group on Lessons Learnt.[236] In its report, the Working Group on Lessons Learnt indicated that rule 68 (2) (b) of the Rules corresponds to rule 92 *bis* of the ICTY Rules. Unlike rule 68 (2) (b) of the Rules, rule 92 *bis* of the ICTY Rules[237] does not require a Chamber to consider reliability. However, it lists it as one possible factor against the admission of prior recorded testimony, stating that such factors "include but are not limited to whether: […] (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value." No further information can be found in the provision as to how a party would demonstrate unreliability.

100. The Appeals Chamber notes that, in its report, the Working Group on Lessons Learnt stated that "[t]he fifth factor, which calls for consideration of whether the prior recorded testimony 'has sufficient indicia of reliability', is without prejudice to the fact that judges of the Court have discretion to determine the probative value of evidence in accordance with article 69 (4) of the Statute."[238]

101. The Appeals Chamber has not yet had the opportunity to consider rule 68 (2) of the Rules. However, Trial Chambers of this Court have applied it. In this regard, the

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[236] Resolution ICC-ASP/12/Res.7 adopted at the 12th plenary meeting, on 27 November 2013. *See also* Report of the Working Group on Lessons Learnt, Annex II.A.

[237] **Rule 92 *bis*** reads in relevant part: (A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. (i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question: (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts; (b) relates to relevant historical, political or military background; (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates; (d) concerns the impact of crimes upon victims; (e) relates to issues of the character of the accused; or (f) relates to factors to be taken into account in determining sentence. (ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether: (a) there is an overriding public interest in the evidence in question being presented orally; (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or (c) there are any other factors which make it appropriate for the witness to attend for cross-examination. […]

[238] Report of the Working Group on Lessons Learnt, Annex II.A, para. 22.

Appeals Chamber notes that the concept of 'indicia of reliability' provided for under rules 68 (2) (b), (c) and (d) of the Rules has been applied in different ways. While one Trial Chamber has limited itself to considering formal criteria only,[239] others have taken into consideration factors beyond formal criteria.[240]

102. While bearing in mind the non-binding nature of the jurisprudence of the ICTY,[241] the Appeals Chamber finds it useful to consider the relevant jurisprudence of that tribunal given that the wording of rule 68 (2) (b) of the Rules is based on the wording of rule 92 *bis* of the ICTY Rules. At the outset, the Appeals Chamber notes that rule 92 *bis* of the ICTY Rules provides for the "Admission of Written Statements and Transcripts in Lieu of Oral Testimony." As the ICTY Appeals Chamber has explained, although rule 92 *bis* of the ICTY Rules is *lex specialis* to rule 89 (C) of the ICTY Rules,[242] "the general propositions which are implicit in Rule 89 (C) –that evidence is admissible only if it is relevant and that it is relevant only if it has

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[239] In the case of the *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, the Trial Chamber held: [t]he Chamber considers that the assessment of reliability is preliminary at this stage, but notes that the Statement appears to have been: (i) obtained by the Prosecution in the ordinary course of its investigations; (ii) signed by the witness and the two investigators conducting the interview; (iii) given voluntarily; and (iv) declared to be accurate by the witness at the time of giving it. Noting further that reliability is not an issue contested by the Defence, the Chamber thus finds that the Statement bears sufficient indicia of reliability in accordance with Rule 68(2)(c)(i) of the Rules" ("Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence'", 12 November 2015, ICC-01/05-01/13-1481-Red, para. 20).

[240] In the case of the *Prosecutor v. Bosco Ntaganda*, the Trial Chamber has held: "In conducting its assessment of the reliability of P-0103's prior recorded testimony under Rule 68(2)(c) of the Rules, the Chamber has taken into consideration, *inter alia*, the fact that: i) his statement to the Prosecution was signed, and stated to have been given voluntarily; ii) his testimony was given in the presence of a qualified interpreter; iii) he declared on his honour and conscience that the information contained in his statement is accurate; iv) his statement is internally coherent; and v) he admitted when he did know certain information" (footnote omitted) ("Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103", 11 March 2016, ICC-01/04-02/06-1205, para. 16); *See also* "Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103", 20 November 2015, ICC-01/04-02/06-1029, paras 24, 34; In the case of the *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, with respect to some inconsistencies between the content of prior recorded testimony with other evidence on the record, the Trial Chamber considered that, "in light of the formal indicia of reliability […], [they were] not sufficient to make the written statement unreliable pursuant to Rule 68(2) (d) of the Rules" ("Decision on Prosecution Request for Admission of Prior Recorded Testimony", 19 August 2015, ICC-01/09-01/11-1938-Red-Corr, paras 86, 117, 133).

[241] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, "Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 23 May 2012, ICC-01/09-01/11-414 (OA 3) (OA 4), para. 31.

[242] Rule 89 (General Provisions): […] (C) A Chamber may admit any relevant evidence which it deems to have probative value.

probative value – remain applicable to Rule 92 *bis*".[243] It follows that, when considering the possible application of rule 92 *bis* of the ICTY Rules, Trial Chambers at the ICTY also analyse whether the general requirements for admission of evidence, including probative value, are met. It is noted that the ICTY has interpreted reliability under rule 92 *bis* of the ICTY Rules in different ways. While on some occasions, Trial Chambers have considered only formal requirements,[244] others have also taken into account factors beyond formal criteria.[245]

103. The jurisprudence of the Court and of the ICTY shows that, in assessing whether a statement bears 'sufficient indicia of reliability', Trial Chambers retain discretion to consider those factors that may be relevant to its determination on a case-by-case basis. The precedents referred to by Mr Blé Goudé follow the same approach and therefore do not support his argument that Trial Chambers *must* consider the content of prior recorded testimony in determining whether it bears 'sufficient indicia of reliability' under rule 68 (2) (b) (i) of the Rules.[246]

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[243] *Prosecutor v. Stanislav Galić*, "Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)", 7 June 2002, IT-98-29-AR73.2, ("Galić Appeal on Rule 92 *bis*"), para. 31.

[244] In the case of the *Prosecutor v. Stanislav Galić,* the ICTY Appeals Chamber upheld the Trial Chamber's finding that "there were satisfactory indicia of the reliability of each statement in the circumstances in which it was made and recorded" (*Galić* Appeal on Rule 92 *bis*, para. 36); In the case of the *Prosecutor v. Ante Gotovina et al.*, Trial Chamber I noted that "[t]he reliability of the witness statement has not been challenged" and found "that the procedural requirements set out in Rule 92 *bis* of the Rules have been met" ("Decision on Defendant Ante Gotovina's Motion for Admission of Evidence of One Witness Pursuant to Rule 92 *bis*", 16 September 2009, IT-06-90-T, para. 5); In the case of the *Prosecutor v. Vojislav Šešelj,* Trial Chamber III noted that some of the statements were incomplete or imprecise because some pages were missing, an interpreter's certificate had not been provided or the authority to which it was given was not specified and on this basis dismissed the request "since it is not able, as things stand, to evaluate their *prima facie* reliability" ("Redacted Version of the Second Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89 (F), 92 *Bis*, 92 *Ter* and 92 *Quater* of the Rules of Procedure and Evidence filed confidentially on 27 February 2008", 27 February 2008, IT-03-67-T, paras 19-20).

[245] *See e.g. Prosecutor v. Radovan Karadžić*, "Decision on Accused's Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 *bis*", 22 August 2012, IT-95-5/18-T, para. 9, where the Trial Chamber considered the hearsay nature of the evidence proffered by the witness; *See also Prosecutor v. Ante Gotovina et al.*, "Third Decision on Rule 92 Bis Witnesses", 3 November 2008, IT-06-90-T, para. 15, where in analysing reliability, the Trial Chamber considered certain inconsistencies between the prior recorded testimony and other evidence.

[246] *Prosecutor v. Radovan Karadžić*, "Decision on Accused's Motion for Admission of Evidence on Radislav Krstic Pursuant to Rule 92 *Quater*", 26 November 2013, IT-95-5/18-T, para. 12 referring to *Prosecutor v. Radovan Karadžić*, "Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *Quater*", 20 August 2009, IT-95-5/18-PT, paras 5-6; *Prosecutor v. Zlatko Aleksovski*, "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999, IT-95-14/1, ("*Aleksovski* Decision"), para. 15; similarly, the Appeals Chamber notes that that Mr Blé Goudé's reliance on paragraphs 29-30 of the "Decision on Interlocutory Appeal Concerning Rule 92*bis*(C)" in the *Prosecutor v. Stanislav Galić* rendered on 7

104. The Appeals Chamber considers that, in their assessment of indicia of reliability under rule 68 (2) (b) (i) of the Rules, 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, such as the witness's competence to testify about the facts, the internal consistency of the statement and potential inconsistencies with other evidence in the record, are not taken into account during this assessment, they may still be considered when assessing the probative value of the evidence. The Appeals Chamber underlines, however, that, in looking at 'indicia of reliability' for the purposes of rule 68 (2) b) (i) of the Rules, Trial Chambers are not precluded from looking beyond formal requirements if they consider it to be appropriate in a particular case.

105. In the case at hand, the Trial Chamber assessed indicia of reliability on the basis of formal criteria and, to some extent, also considered a factor beyond formal requirements, namely the fact that the statement "also includes information as to how the witness came to know of particular facts."[247] The Appeals Chamber discerns no error in this approach.

106. The Appeals Chamber notes that Mr Blé Goudé questions the reliability of the evidence solely on the basis that it is based on anonymous hearsay evidence.[248] Leaving aside the issue of whether the prior recorded testimony of P-0590 "is based on anonymous hearsay", the Appeals Chamber notes that in relation to hearsay evidence, the ICTY Appeals Chamber has held that

> whether the hearsay is "first-hand" or more removed, are also relevant to the *probative value* of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of its probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.[249] [Footnotes omitted and emphasis added.]

June 2002, IT-98-29-AR73.2 does not support his argument that Trial Chambers are obliged to consider the content of prior recorded testimony in deciding whether it has 'sufficient indicia of reliability'.

[247] Impugned Decision, para. 22.

[248] Mr Blé Goudé's Document in Support of the Appeal, para. 35.

[249] *Aleksovski* Decision, para. 15.

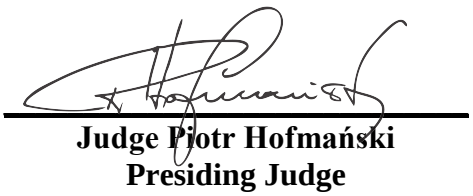
107. The Appeals Chamber notes that in support of his argument that because of the anonymous hearsay nature of the prior recorded statement, the Trial Chamber erred in finding that it had sufficient 'indicia of reliability', Mr Blé Goudé cites a decision rendered in the case of the *Prosecutor v. Thomas Lubanga Dyilo.*[250] However, in that decision, the Trial Chamber adopted the ICTY jurisprudence referred to above.[251] In such circumstances, without more, the Appeals Chamber can discern no error.

IV. APPROPRIATE RELIEF

108. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, having dismissed the grounds of appeal raised by the parties, it is appropriate to confirm the Impugned Decision.

The partially dissenting opinion of Judge Kuniko Ozaki will be filed in due course.

Done in both English and French, the English version being authoritative.



Judge Piotr Hofmański
Presiding Judge

Dated this 1st day of November 2016
At The Hague, The Netherlands

[250] *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on admissibility of four documents", 13 June 2008, ICC-01/04-01/06-1399 ("*Lubanga* Decision on admissibility of four documents").
[251] *Lubanga* Decision on admissibility of four documents, para. 28.