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**International
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Court**



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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION IN CÔTE D'IVOIRE

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

Public Document

Redacted Version of the “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 [REDACTED] (ICC-02/11-01/15-487-Conf)”, 28 April 2016, ICC-02/11-01/15-491-Conf

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that the application by the Prosecution to admit the prior recorded testimony and related documents of eleven witnesses under rule 68(2)(b) and rule 68(3) of the Rules of Procedure and Evidence (the “Application”)² should be granted.

2. Regarding the introduction of the statements of Witnesses [REDACTED] pursuant to rule 68(2)(b), the Legal Representative submits that these statements go to “*proof of a matter other than acts and conduct of the accused*” because they refer to persons other than the Accused and the Prosecution does not intend to rely on said statements to prove the alleged conduct of Mr Gbagbo and Mr Blé Goudé.

3. Regarding the introduction of the previously recorded testimony of Witnesses [REDACTED] pursuant to rule 68(3), the Legal Representative agrees with the Prosecution that said rule grants her the possibility to question any of these witnesses.

4. The Legal Representative submits that the introduction of all the documents attached to the statements of the eleven witnesses mentioned in the Application should also be granted because said documents are referred to in the respective statements and are therefore compliant with the directions about the conduct of the proceedings previously issued by the Chamber.

¹ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015; and the “Decision on victims’ participation status” (Trial Chamber I), No. ICC-02/11-01/15-379, 7 January 2016, p. 23.

² See the “Public redacted version of ‘Prosecution application to conditionally admit the prior recorded statements and related documents of [REDACTED] under rule 68(2)(b) and the prior recorded statements and related documents of [REDACTED] under rule 68(3)’, 19 April 2016, ICC-023-/11-01/15-487-Conf”, No. ICC-02/11-01/15-487-Red, 28 April 2016 (dated 26 April 2016) (the “Application”).

5. Finally, applying the general principles established by the Chamber for the questioning of witnesses, the Legal Representative already foresees the need to question [REDACTED] regarding their victimisation and the prejudice they suffered from, to the extent that these matters are not covered by the Prosecution and for a time not exceeding 30 minutes per witness. Concerning the other witnesses, the Legal Representative will further assess the need to preserve her clients' interests and she will eventually introduce a request for questioning at the time the relevant witness will appear, in compliance with the Chamber's instruction on the matter.

II. Confidentiality

6. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially because it makes reference to submissions filed under the same classification.

III. Background

7. On 3 September 2015, the Chamber issued the directions on the conduct of the proceedings (the "Directions"),³ concerning *inter alia* the admission into evidence of prior recorded testimony under rule 68 of the Rules of Procedure and Evidence.⁴

8. On 21 October 2015, the Chamber granted the Prosecution's request to designate a person authorised to witness a declaration under rule 68(2)(b)(iii) of the Rules of Procedure and Evidence.⁵

9. On 19 April 2016, the Prosecution filed the Application.⁶

³ See the "Directions on the conduct of the proceedings" (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015 (the "Directions").

⁴ *Idem*, paras. 54-57.

⁵ See the "Decision on the Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules" (Trial Chamber I), No. ICC-02/11-01/15-303, 21 October 2015.

IV. Submissions

10. The Legal Representative submits that the requirements of rule 68(2)(b) and rule 68(3) of the Rules of Procedure and Evidence are met regarding the documents identified by the Prosecution in the Application.

11. Concerning the introduction of the “*previously recorded testimony*” of Witnesses [REDACTED] pursuant to rule 68(2)(b), and of Witnesses [REDACTED] pursuant to rule 68(3),⁷ the Legal Representative notes that the Court has repeatedly clarified that said expression encompasses not only “*testimony sworn under oath or affirmation*”,⁸ but also “*written statements*”, “*transcripts of interviews*” and “[e]xhibits associated with these recordings [...] so long as the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced”,⁹ such as certificates, photographs, maps, etc. attached to said statements.

12. Consistently with this approach, the Directions specify that “[i]f these passages [of the previously recorded testimony that a party wishes to tender into evidence under rule 68] *contain references to other material available to the calling party, without which the passages would not be understandable, these materials are to be attached to the application*”.¹⁰

⁶ See *supra* note 2.

⁷ *Idem*, para. 2.

⁸ See the “Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony” (Trial Chamber V(a)), No. ICC-01/09-01/11-1938-Corr-Red2, 28 August 2015, para. 32.

⁹ *Idem*, para. 33. See also the “Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests” (Trial Chamber VII), No. ICC-01/05-01/13-1478-Red-Corr, 12 November 2015, para. 29; the “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” (Trial Chamber VI), No. ICC-01/04-02/06-1029, 20 November 2015, paras. 23 and 35; and the “Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103” (Trial Chamber VI), No. ICC-01/04-02/06-1205, 11 March 2016, paras. 7 and 15.

¹⁰ See the Directions, *supra* note 3, para. 57.

13. Accordingly, the Legal Representative supports the introduction under rule 68(2)(b) and rule 68(3) of all the material listed in Annex 1 to the Application. The material listed therein as annexes are referred to in the statements of the witnesses.

14. Moreover, regarding the understanding of the pre-requisite included in rule 68(2)(b) that the prior recorded testimony goes to proof of “*a matter other than acts and conduct of the accused*”, the Legal Representative notes that Trial Chamber VII in the *Bemba et al.* case has pondered this formal pre-requisite by considering not only the content of the testimony sought to be introduced, but also the intended use thereof by the party requesting its introduction.¹¹ Accordingly, Trial Chamber VII has admitted prior recorded statements where they only concerned the acts and conduct of persons other than the accused,¹² and has rejected the introduction of similar testimony submitted with the intention primarily to prove that the accused carried out the alleged conduct.¹³

15. In turn, Trial Chamber VI has interpreted the similar pre-requisite included in rule 68(2)(c) as not allowing the introduction of testimony if it is “[s]o proximate to the accused, [...] that it would be unfair to allow its admission under Rule 68(2)(c) of the Rules”.¹⁴

16. In these circumstances, the Legal Representative understands that the issue under rule 68(2)(b) is not only whether the acts and conduct referred to in the prior recorded testimony are those of persons other than the accused, but also how the Prosecution attributes said acts and conduct.

¹¹ See the “Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules” (Trial Chamber VII), No. ICC-01/05-01/13-1430, 29 October 2015, para. 6; and the “Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests”, *supra* note 9, para. 34.

¹² See the “Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests”, *supra* note 9, para. 102.

¹³ See the “Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules”, *supra* note 11, para. 8.

¹⁴ See the “Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103”, *supra* note 9, para. 18.

17. From this perspective, the Legal Representative submits that the prior recorded testimony of [REDACTED] goes to proof of a matter other than the acts and conduct of the accused and, as a consequence, may be introduced under rule 68(2)(b).¹⁵

18. These testimonies concern [REDACTED] during the 16 December 2010 incident, referring to [REDACTED]¹⁶ and [REDACTED]¹⁷ [REDACTED]. [REDACTED] ([REDACTED]), [REDACTED].¹⁸

19. Moreover, the Prosecution does not intend to rely on this evidence to prove the allegedly criminal conduct of the Accused, as the Application explains that each of these prior recorded statements “*does not relate to disputed issues at the core of this case*”.¹⁹

20. In this regard, the Legal Representative notes that the reference to the “*disputed issues at the core of this case*” made in the Application appears to be limited to the “Prosecution’s case”, namely the determination of the charges brought against Mr Gbagbo and Mr Blé Goudé.

21. This limitation is consistent with the Chamber’s recognition of the different roles played in the proceedings by the Prosecution and the Legal Representative.²⁰ Whereas the Prosecution is meant to investigate the crimes, formulate the charges and prove the guilt of the accused,²¹ the Legal Representative may advance the

¹⁵ See the Application, *supra* note 2, para. 22.

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ See the Application, *supra* note 2, paras. 24, 28 and 32.

²⁰ See the transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG ET, p. 34, lines 8-15.

²¹ See the “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, paras. 93 and 95.

eventually different interests of the victims participating in the proceedings,²² and enjoys a broader scope of action to argue the victims' case for reparations.²³ In this sense, the "cases" of the Prosecution and the Legal Representative are not necessarily one and the same. The Appeals Chamber has *impliedly* recognised this difference when interpreting the former text of rule 68.²⁴

22. The difference explained *supra* is also relevant to the Prosecution's request to introduce the previously recorded testimony of Witnesses [REDACTED] pursuant to rule 68(3) of the Rules of Procedure and Evidence.²⁵ The Legal Representative notes that the wording of this rule only envisages the Prosecutor, the Defence and the Chamber having the opportunity to question the witnesses concerned.²⁶ However, as expressly indicated in the Application,²⁷ the Legal Representative may also be allowed to question said witnesses if deemed necessary to present the views and concerns of her clients.

23. In this regard, it must be noted that during the amendment process leading to the current version of rule 68(3) of the Rules of Procedure and Evidence it was agreed

²² See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, para. 155; and the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", *supra* note 21, paras. 96-98.

²³ See the "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings" (Appeals Chamber), No. ICC-01/04-01/06-2953 A1 A2 A3 OA21, 14 December 2012, para. 67.

²⁴ See the "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'" (Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 78, and the jurisprudence cited therein.

²⁵ See the Application, *supra* note 2, para. 36.

²⁶ See rule 68(3) of the Rules of Procedure and Evidence ("[...] 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").

²⁷ See the Application, *supra* note 2, para. 3 ("Of these [witnesses], it is intended that eight (the Rule 68(3) witnesses) will be present in court for limited, supplemental examination by the Prosecution, followed by questioning by the Parties/participants and re-examination, in the usual way") (emphasis added).

that the rights of victims under article 68(3) of the Rome Statute would not be prejudiced by the amendment.²⁸

24. This was confirmed by the text of the resolution amending rule 68, where it was expressly provided that the current text for said rule would replace its former version “[w]ith the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused, and to article 68, paragraph 3, of the Rome Statute related to the protection of the victims and witnesses and their participation in the proceedings”.²⁹

25. Accordingly, pursuant to the general principle established by the Chamber for the questioning of witnesses,³⁰ the Legal Representative may be authorised to question any of the eight witnesses who are intended to be present in court pursuant to rule 68(3) on any issue addressed in their statements, if said issues affect the personal interests of the victims and they have not been fully addressed during the prior questioning by the Prosecution.

26. The Chamber also clarified that the questioning of witnesses who are also admitted as victims on issues related to reparations is allowed to the extent that the questioning is aimed to establishing the nature and the extent of the harm allegedly suffered by said witnesses.³¹ The Chamber applied these principles when it authorised the Legal Representative to question Witnesses P-0547 (dual status individual) and P-0536.³²

²⁸ See Assembly of States Parties, “Report of the Working Group on Amendments”, ICC-ASP/12/44, 24 October 2013, para. 10 (“Some delegations who originally had concerns expressed appreciation that those concerns had been addressed and that these amendments [to Rule 68] appeared to help expedite the workings of the Court in addition to providing safeguards for the rights of the accused and without prejudice to Article 68(3) of the Rome Statute”) (emphasis added).

²⁹ See Assembly of States Parties, Resolution ICC-ASP/12/Res.7 (Amendments to the Rules of Procedure and Evidence), 27 November 2013, para. 2 (emphasis added).

³⁰ See the transcript of the hearing held on 3 February 2016, No. ICC-02/11-01/15-T-13-CONF-ENG ET (open session), p. 2, lines 17-25.

³¹ *Idem*, p. 3, lines 1-8.

³² *Ibid.*, p. 3, lines 9-11.

27. Against this background, out of the eight witnesses whose previously recorded testimony the Prosecution seeks to introduce under rule 68(3), the Legal Representative already foresees the need to question [REDACTED] with respect to areas relevant to the interests of her clients and to the harm they suffered from as a result of the crimes charged.

28. In light of the purpose of rule 68(3) of the Rules of Procedure and Evidence, namely to shorten the in-court testimony of witnesses and expedite the proceedings,³³ the Legal Representative's questions will be limited to the extent of the victimisation of [REDACTED], and the prejudice they suffered from. The Legal Representative will be able to complete her questioning on these issues, if granted, within thirty minutes for each witness.

29. The Legal Representative's need to question witnesses [REDACTED] cannot be affected by the Prosecution's argument that [REDACTED].³⁴ As already argued above,³⁵ the Prosecution's "case" is to prove the criminal responsibility of the accused. By contrast, the Legal Representative's responsibility is to defend the personal interests of her clients during the proceedings.

30. In fact, it is apparent from the Application that the Prosecution will not address in full during its "*limited and focused examination-in-chief*"³⁶ of [REDACTED] the issues identified *supra* by the Legal Representative.

31. Regarding [REDACTED], the Prosecution [REDACTED].³⁷ When it comes to [REDACTED], the Prosecution [REDACTED].³⁸

³³ See the "Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", *supra* note 9, paras. 31 and 48. See also the "Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931" (Trial Chamber VI), No. ICC-01/04-02/06-845, 21 September 2015, paras. 8 and 10.

³⁴ See the Application, *supra* note 2, para. 51.

³⁵ See *supra* paras. 20-21.

³⁶ See the Application, *supra* note 2, para. 40.

³⁷ *Idem*, para. 52.

32. Accordingly, the Legal Representative considers that her questioning [REDACTED] on the topics of victimisation and prejudice is necessary to comply with her responsibility to present and have considered the victims' views and concerns.

33. Concerning the other witnesses, the Legal Representative will further assess the need to preserve her clients' interests and she will eventually introduce a request for questioning at the time the relevant witness will appear, in compliance with the Chamber's instruction on the matter.

34. Last but not least, the Legal Representative notes the Prosecution's intention to spend no more than one hour questioning each of these witnesses,³⁹ and submits that reducing as well the time granted to the Defence for questioning them will limit the risk of re-traumatising the witnesses and will be in their best interest.⁴⁰ This limitation would be consistent with the duty of the Court under article 68(1) of the Rome Statute to "[t]ake appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".

V. Conclusion

35. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to grant the Application.

³⁸ *Ibid.*, para. 65.

³⁹ *Ibid.*, paras. 42, 59 and 62.

⁴⁰ See the "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010" (Trial Chamber VI), No. ICC-01/04-02/06-988, 6 November 2015, para. 13.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 2nd day of May of 2016

At The Hague, The Netherlands