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**International
Criminal
Court**

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Date: 31 May 2016

TRIAL CHAMBER I

Before:

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

SITUATION IN COTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE

PUBLIC

Public redacted version of “Defence Objections to the Prosecution’s application to conditionally admit the prior recorded statements and related documents of [REDACTED] under Rule 68(2) (b)”, 6 May 2016, ICC-02/11-01/15-504-Conf

Source: Defence of Mr Charles Blé Goudé

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

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1 Introduction

- 1) The Defence of Mr Blé Goudé (the Defence) challenges the introduction of the prior recorded statements of [REDACTED] primarily because such introduction would be prejudicial to the rights of the accused. Secondly, the Defence opposes the introduction of the prior recorded statements on the basis that the statements do not comply with the requirements of Rule 68 (2) (b) of the Rules of Procedure and Evidence (RPE).

2 Confidentiality

- 2) The Defence files the present response as confidential pursuant to Regulation 23*bis* (2) of the Regulations of the Court (“the Regulations”) as it relates to confidential information pertaining to three Prosecution witnesses. A public redacted version shall follow in due course.

3 Procedural History

- 3) On 19 April 2016, the Prosecution requested the Chamber 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) (the Application).
- 4) On 28 April 2016, the Legal Representative of Victims (“the LRV”) responded to the Prosecution’s application, and asked the Chamber to grant the application.
- 5) On 2 May 2016 both the Defence for Mr Gbagbo and that for Mr Blé Goudé responded, separately, to the section of the Application relating to Rule 68(3). The current response relates to the Rule 68 (2) (b) section.

4 Applicable law

- 6) Article 67 of the Rome Statute provides for the minimum guarantees afforded to the accused in the conduct of a fair trial. Particularly article 67 (1) (e) provides that the accused shall be entitled to “examine or have examined the witnesses against him/her”.

7) Article 69 (2) of the statute which states that “The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence.... These measures shall not be prejudicial to or inconsistent with the rights of the accused.”

8) Rule 68 (2) (b) provides that the 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 (emphasis added).

2. If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:

(b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. In such a case:

(i) 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:

- relates to issues that are not materially in dispute;
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- relates to background information;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability.

5 Submissions

5.1 The Defence submits that the introduction of the prior recorded statements of [REDACTED] would be prejudicial to the rights of Mr Blé Goudé

- 9) An accused person has the right to examine or have examined the witnesses against him/her which is enshrined in article 67 (1) (e) of the Rome Statute. The scope of this provision may be best explained by the interpretation given to a similarly worded article, article 6(3)(d) of the European Convention of Human Rights, by the European Court of Human Rights (ECHR). In the case of *Kostovski v. The Netherland*,¹ the ECHR explained the right of the accused to examine the witnesses against him to entail the following:

“In principle, all the evidence must be produced in the presence of the accused....As a Rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.”²

- 10) The Defence submits that indeed the fundamental right to examine a witness, as stated by the ECHR in the excerpt above, requires the witness to be present during the testimony and for the accused to have adequate and proper opportunity to examine him/her.

- 11) This right is further buttressed by the principle of orality enshrined in article 69 (2). This article guarantees *inter alia* that “the testimony of a witness 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.” This implies that as a general Rule, witnesses shall testify in person, in the presence the accused person to enable him/her to question them and challenge their evidence. This principle has been interpreted very strictly by the Appeals Chamber. For example in *Bemba* the Appeals Chamber held that:

“The direct import of the first sentence of this provision [article 69 (2)] is that witnesses must appear before the Trial Chamber in person and give their

¹ *Kostovski v. The Netherlands*, (Application No. 11454/85), ECtHR, Judgment, 20 November 1989.

² *Ibid* para. 41

evidence orally. This sentence makes in-court personal testimony the Rule, giving effect to the principle of orality. The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded.”³

12) Furthermore, the Appeals Chamber emphasised that this principle could only be deviated from in accordance with the “strict conditions” set out in Rule 68.⁴ In the interpretation of Rule 68, the Appeals Chamber added that, the Trial Chamber must exercise a “cautious assessment in order to ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally.”⁵ It is therefore clear, according to the above decision of the Appeal’s Chamber, that in interpreting Rule 68 (2) (b) the Chamber should take into account the fundamental right of the accused to examine witnesses.⁶

13) The Appeals Chamber later confirmed this strict interpretation of Rule 68 (2) (b) in *The Prosecutor v. Ruto and Sang*, and held that “where the specific circumstances of a case fall within the parameters set out in Rule 68 of the Rules, the legal requirements of that provision must be observed for the prior recorded testimony to be admissible.”⁷

14) The Defence submits that according to the provisions of the Statute, the Rules and the jurisprudence of the Appeals Chamber, the introduction of prior recorded testimony, especially in the absence of the witness, is a strictly limited exception to two fundamental principles, that is the right of the accused person to examine a witness,

³ *Prosecutor v. Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, ICC-01/05-01/08-1386, 3 May 2011 para 76.

⁴ Ibid para 77.

⁵ Ibid para 78.

⁶ See also Assembly of State Parties, Study Group on Governance, Working Group on Lessons Learnt: Recommendation on a proposal to amend Rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), 31 October 2013, para 19. It states partly as follows: “The WGLL emphasises that the Chamber retains its discretion on whether to introduce evidence under this provision, taking into account the rights of the accused and need to ensure that fair trial protections are upheld.”

⁷ ICC-01/09-01/11-2024, para 85-86.

and the principle of orality. The natural consequence of the above Appeals Chamber decisions, is that the introduction of prior recorded statements, in the absence of the witness, should only be allowed where the “strict conditions” of Rule 68 (2) (b) are fulfilled. Therefore the Defence submits, that the requirements of Rule 68 (2) (b) are pre-requisites for the admission of evidence under the Rule, contrary to the Prosecution submission in paragraph 15 of its application. If the prior recording statements sought to be included do not comply with the strict conditions in Rule 68 (2) (b), the consequence of their admission would be to breach the rights of the accused.

- 15) The Defence submits that the statements of [REDACTED] do not comply with the strict conditions set out in Rule 68 (2) (b) for the reasons explained below. For this reason, their introduction, without allowing Mr Blé Goudé to examine [REDACTED] would be against his right to examine witnesses under article 67 (1) (e) of the Rome statute.

5.2 The Defence submits that the strict criteria under Rule 68 (2) (b) are not met by the statements of [REDACTED], and therefore their introduction would be against the fairness of the trial and the truth finding nature of the ICC proceedings

- 16) Article 68 (2) provides for two conditions under which the Chamber may admit the prior recorded testimony of a witness who is not present before the Court. The first prong, Rule 68 (2) (a), involves a situation where both the Prosecution and the Defence had an opportunity to examine the witness during the recording of the statement. This is not applicable in this instance because the Prosecution does not make its request under this prong. The second prong, Rule 68 (2) (b), requires that the statement “[go] to prove a matter other than the acts and conducts of the accused.” Rule 68 (2) (b) (i) then states that in determining whether prior recorded testimony which “goes to prove a matter other than the acts and conducts of the accused”, should be introduced, the Chamber shall consider *inter alia* five factors.” These are : whether the prior recorded testimony in question: relates to issues that are not materially in dispute; is of a cumulative or corroborative nature, in that other

witnesses will give or have given oral testimony of similar facts; relates to background information; is such that the interests of justice are best served by its introduction; and, has sufficient indicia of reliability.

- 17) The Defence submits, as explained in paragraph 14 above that, contrary to the argument of the Prosecution in paragraphs 13-16 of the Application, the use of the words “shall” and “and” in the Rule implies that these factors are pre-requisites to admission of prior recorded statements under Rule 68 (2) (b). In other words, according to this Rule, even when the Court would determine that all the five criteria are satisfied, it still would refuse the introduction of the statements. The Defence submits that indeed the list is not exhaustive and the Chamber may, in exercise of its discretionary power add more criteria to the list in addition to those mentioned, in order to protect the fundamental right of the accused to examine witnesses and the principle of orality. The use of the word *inter alia* in the Rule implies that this is the case.
- 18) Such an interpretation would be in accordance with the jurisprudence of the Court. For example, *in Bemba*, as mentioned above in paragraph 8 above, the Appeals Chamber decided that prior recorded testimony shall only be accepted if the “strict conditions” in Rule 68 are met. Also in *Ruto and Sang*, discussed in paragraph 8 as well, the Appeals Chamber held that “where the specific circumstances of a case fall within the parameters set out in Rule 68 of the Rules, the legal requirements of that provision must be observed for the prior recorded testimony to be admissible.”
- 19) A strict interpretation of Rule 68 (2) (b) should particularly be upheld because it is an exception to two fundamental principles: the principle of orality and the right of an accused person to examine witnesses as enshrined in articles 69 (2) and 67 (1) (e) of the Rome Statute, respectively. The Defence submits that a failure to do so would result not only in an infringement of the rights of Mr Blé Goudé, but also in the endangerment of the truth finding function of the Court.
- 20) The application of the prosecution does not satisfy the strict conditions in Rule 68 (2) (b) because:

5.2.1 The testimonies of [REDACTED] go to prove the acts and conduct of the accused

- 21) The first requirement of Rule 68 (2) (b) is that the prior recorded statements may only be introduced in the absence of the witness if “it goes to prove a matter other than the acts and conduct of the accused.” The key question therefore is what criterion “acts and conduct of the accused” entails.
- 22) In the first place, the Chamber should give a wide interpretation to the term “acts and conduct of the accused” in order to comply with the principles as set out in paragraphs 4 and 5.1 above. The Defence submits that for the purposes of Rule 68 (2) (b), all the acts and conducts of persons which the Prosecution links to Mr Charles Blé Goudé in terms of individual criminal responsibility should form part of the term “acts and conduct of the accused”. The Defence submits that a narrow interpretation of the term may lead to introduction of prior recorded statements which will be used by the Prosecution to prove the individual criminal responsibility of Mr Blé Goudé while denying him the opportunity to examine such witnesses, and undermining the truth finding nature of the ICC process. Because the right to examine witnesses is so fundamental to a fair trial, the Defence requests the Chamber to adopt a broad interpretation as will be explained in more detail in paragraphs 26-35 below.
- 23) In the same vein, the Defence requests the Chamber to reject the limited scope of the interpretation of the term “acts and conduct of the accused” presented by the Prosecution in paragraph 14 of the Application for at least two reasons. The first is that the Prosecution relies upon the interpretation of the term by the International Criminal Tribunal of the Former Yugoslavia (ICTY), which is not binding on the Chamber.⁸ Admittedly, the Chamber may use its discretion to find the jurisprudence of the ICTY persuasive. However, the Defence submits that in the instant case such jurisprudence is not decisive and this forms the basis of the second reason for rejecting a limited interpretation of the term.
- 24) The Chamber should reject the narrow interpretation of the ICTY because the scenarios envisaged by the relevant provisions, Rule 92 *bis* of the ICTY RPE and the applicable Rule 68 (2) (b) of the ICC RPE are not similar. On one hand, Rule 92 *bis*,

⁸ See applicable law under Article 21 of the Rome Statute

unlike Rule 68 (2) (b), is merely the first step to deciding whether the Chamber will admit a written statement instead of an oral one. The second step, Rule 92 *ter*, sets out conditions in order to determine whether cross examination will be allowed. Rule 92 bis (c) provides that “The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it does so decide, the provisions of Rule 92 *ter* shall apply.” In other words the decision of whether to allow admission of written statement instead of oral statements under Rule 92 *bis*, unlike those under Rule 68 (2) (b), does not necessarily affect the right of the Defence to cross-examine the witness.

25) The interpretation of the term “acts and conduct of the accused” as set forth by the ICTY should therefore not be applied to Rule 68 (2) (b) because an application of the latter provision affects the right of the Defence to examine the witness. In fact, a complete reading of the ICTY jurisprudence clearly shows that such a narrow interpretation of the term “acts and conduct of the accused” should only be applied when the right to examination by the Defence is not affected.⁹ However when such right is affected, the acts of alleged co-perpetrators, subordinates, or other persons who allegedly commit crimes for which the accused is alleged to be responsible should be taken into account.¹⁰

26) Rule 68 (2) (b) has two direct implications; the Chamber not only decides to admit prior recorded testimony but also to disallow cross-examination of the witness. A decision under this Rule implies that the Defence would be denied the fundamental right to examine the witness and therefore the Defence argues for a wider interpretation of the term “acts and conduct of the accused.” According to the Defence, the acts which go to prove the individual criminal responsibility of the accused for the purposes of Rule 68 (2) (b) should also encompass those acts of

⁹ *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule 92 bis, 21 March 2002, (“Milošević Decision”), para.22 states that “The phrase “acts and conduct of the accused” in Rule 92bis is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the Rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so. The fact that conduct is that of co-perpetrators or subordinates is relevant to whether cross-examination should be allowed and not to whether a statement should be admitted.” (emphasis added)

¹⁰ *Ibid.*

individuals which are linked to him by the Prosecution. In this case, that would include the actions of all the alleged “pro-Gbagbo forces”.

27) The Prosecution’s theory on the individual criminal responsibility of Mr Blé Goudé is the following: he allegedly indirectly committed, contributed, ordered, and aided and abetted crimes allegedly committed by “the pro-Gbagbo forces” in furtherance of a common plan.¹¹ The term “pro-Gbagbo forces” is defined by the Prosecution to include the FDS, as well as the pro-Gbagbo youth, militia and mercenaries.¹² The Defence therefore submits that any alleged evidence involving any of these groups of people, whether the FDS or the alleged pro-Gbagbo youth, should be considered, for the purposes of Rule 68 (2) (b) as evidence meant to prove the acts and conduct of Mr Blé Goudé.

28) The Defence submits that the testimonies of [REDACTED] all go to prove the acts of other persons for whose alleged actions Mr Blé Goudé is alleged to be responsible: the FDS and the pro-Gbagbo youth. These statements should therefore be considered to go to prove “acts and conduct of the accused” for the purposes of Rule 68 (2) (b).

29) Firstly, all these witnesses allege that the FDS killed many civilians during the 16 December 2010 demonstration [REDACTED]. In this regard, [REDACTED] alleges that: [REDACTED] ». ¹³ He adds that: [REDACTED].¹⁴ [REDACTED] purports that « [REDACTED] ». ¹⁵ And [REDACTED] also alleges that «[REDACTED] ». ¹⁶

30) Since Mr Blé Goudé is alleged to bear individual criminal responsibility for the acts committed by the FDS, the Defence submits that the above three statements should not be admitted without giving him the opportunity to examine the witnesses.

31) Secondly at least two of the three witnesses make assertions about the actions of the pro-Gbagbo youth. [REDACTED] alleges that [REDACTED] ¹⁷

¹¹ See the Pre-trial Brief, ICC-02/11-01/15-148-Conf-Anx2 pages 220-235.

¹² Ibid Pages 50-60.

¹³ CIV-OTP-0084-0079 para 48.

¹⁴ Ibid para 49.

¹⁵ CIV-OTP-0084-0105-R01, Para 30 .

¹⁶ CIV-OTP-0084-0018-R02 para 57.

¹⁷ Para 39, witness Statement, 3-A-1.

- 32) In the same vein, [REDACTED] makes assertions about the violence at the roadblocks allegedly created by pro-Gbagbo youth, especially the jeunes patriotes, where he was allegedly harassed [REDACTED]
- 33) [REDACTED] prior recorded testimonies if admitted will therefore go towards proving an important element of the prosecution's case theory, implicating Blé Goudé in crimes allegedly committed at the roadblocks. One of the prosecutions allegations, in support of the existence of a purported common plan, is that from 2002-2010, Blé Goudé and other members of the alleged Inner Circle used a combination of the FDS, Jeunes Patriotes, militias and mercenaries to violently repress the political opposition" for example by setting up roadblocks.¹⁸ For this reason, these statements should be held to go into the acts and conduct of the accused himself and should not be admitted without permitting Mr Blé Goudé to exercise his right to examine the witnesses.
- 34) For the foregoing reasons, the Defence submits that, the statements to [REDACTED] go to prove the acts and conduct of the accused because they relate to conduct to which Blé Goudé is accused of bearing individual criminal responsibility. In light of the principles as set forth in sections 4 and 5.1 above, the Chamber should reject the narrow interpretation of the term "acts and conduct of the accused" employed by the ICTY and proposed by the Prosecution. Moreover, the Chamber is not bound to follow such jurisprudence. Finally, Rule 92 bis of the ICTY RPE to which one refers is different from Rule 68 (2) (b) to which the application relates as explained in paragraphs 21-25 above.
- 35) However, should the Chamber find that the statements do not go to prove the statements of the accused, Rule 68 (2) (b) (i) stipulates that in deciding whether to allow the introduction of the prior recorded testimonies, the Chamber shall consider the five factors enumerated therein. The Defence submits that the Application does not satisfy the requirements of Rule 68 (2) (b) (i) because:

5.2.1.1 *The statements relate to issues that are materially in dispute*

- 36) There are at least three cardinal issues which are materially in dispute that arise from the statements of the witnesses: 1) the pacific nature of the march 2) that the FDS allegedly opened fire at unarmed demonstrators 3) the actions of the FDS resulted in

¹⁸ See Pre-trial Brief para 36.

the death of unarmed civilians. Each of the witness statements touch upon one or more of the three issues as explained below. These questions go to the heart of the question of whether there was an alleged policy to attack civilians under Article 7 of the Statute. All the three witnesses whose prior recorded testimony the Prosecution seeks to admit their under Rule 68(2) (b), intend to introduce evidence on all the three key mentioned issues as explained below. This necessitates examination of these witnesses in court since their statements relate to issues materially in dispute.

37) The term “materially in dispute” was discussed in the case of *Prosecutor v. Bemba et al.*¹⁹ The Chamber, in deciding against the introduction of prior recorded testimony, held that the issues were materially in dispute because the Prosecution contested the testimony sought to be introduced and the Defence deemed the issue important. The Chamber Ruled as follows:

“The Chamber considers that when assessing the requirements in Rule 68(2)(b)(i) of the Rules, they do not militate in favour of receiving D23-1’s testimony without examination by all parties. The contents of the Report do relate to issues which are materially in dispute. The Prosecution clearly contests its contents in the Response, and the Mangenda Defence also gives all appearances of considering the issues raised by the Report as particularly important.”²⁰

38) Relying on the above interpretation of the term “materially in dispute” by the Chamber, the Defence submits that it contests the allegations of the three witnesses and considers the issues to be very essential at least with regard to the three above mentioned areas explained further below.

39) The first issue which is materially in dispute is the assertion that the march was peaceful and the demonstrators were unarmed. To prove this assertion [REDACTED] purports that:

[REDACTED].²¹

¹⁹ *Prosecutor v. Bemba et al*, Decision on Request for Formal Submission of D23-1’s Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rules 68(3) and 67, ICC-01/05-01/13-1641, 19 February 2016

²⁰ *ibid* para 7.

²¹ *Ibid* Para 43.

40) The second issue which is materially in dispute is the assertion that the FDS shot at unarmed civilians. [REDACTED] touches upon this assertion where he alleges that “« [REDACTED] »²² while [REDACTED] « [REDACTED] »²³

41) These statements relate to the three issues discussed above which are materially in dispute and it would be against the right of Mr Blé Goudé under article 67 (1) (e) if he were to be denied the opportunity to question the said witnesses.

5.2.1.2 The statements are not corroborative in nature

42) The requirement of Rule 68 (2) (b) is that the testimony be corroborative “in that other witnesses will give or have given oral testimony of similar facts”. Annexes given by the same witness cannot be considered corroborative for the purposes of this Rule.

43) With regard to witness [REDACTED] the Prosecution purports in paragraph 25 of the application that Annexes attached at 3-A-5, and 3-A-6 are corroborative of his brother’s death. The prosecution advances the same argument about [REDACTED] in paragraph 29 of the application, saying that: “[REDACTED] .” Witness [REDACTED] [REDACTED] ”. The same is said of [REDACTED] in paragraph 33 of the application. A proper interpretation of the above Rule shows that the corroboration has to be derived from the testimonies of other witnesses and not from the annexes provided by the witnesses in question.

44) Furthermore, to show that the statements of the witnesses are corroborative, the prosecution also argues that “[REDACTED] ”. The Prosecution repeats the same argument with regard to witnesses [REDACTED] arguing that the statements of these witnesses are corroborated by witness [REDACTED] autopsy report. However, it should be noted that [REDACTED] is an expert witness whose qualifications as a Medical forensics expert the Defence opposes. The Prosecution was made aware of the objection to the witness’ qualification on 30 November 2015.²⁴ The prosecution

²² CIV-OTP-0084-0079 para 28

²³ CIV-OTP-0084-0105-R01 para 36

²⁴ See email sent on behalf of both the Defence for Gbagbo and the Defence for Blé Goudé to the Prosecution on 30 November 2015 at 15:57

cannot rely on a witness statement which is challenged by the Defence to corroborate the statements of these three witnesses in order to introduce them via Rule 68 (2) (b).

5.2.1.3 *The statements do not relate merely to background information*

45) The Defence submits that background information by definition should relate to general facts about Cote d'Ivoire which are in the public domain and are uncontested and uncontroversial. The statements the Prosecution intends to introduce do not relate to background information but instead relate directly to the actions for which Blé Goudé is accused of bearing individual criminal responsibility as demonstrated in section 5.2.1 above. For this reason these statements should not be admitted without having the chance to examine the witnesses by Mr Blé Goudé.

46) Furthermore, the prosecution argues with regard to [REDACTED] that their incriminatory statements are limited to the 16 December 2010.²⁵ This is incorrect because these witnesses testify about other incriminating facts that have nothing to do with the first incident.²⁶

5.2.1.4 *The interest of justice will not be served by their introduction*

47) The argument developed by the prosecution in support of the assertion that the interest of justice will be served is by admission of the prior recorded statement of these witnesses is that it "...advances the interests of justice and contributes to a fair and expeditious trial by enabling the Prosecution to present its evidence in a more concise and streamlined manner without causing any prejudice to the fair trial rights of the Accused."²⁷

48) The Defence submits that allowing the admission of said statements would introduce allegations going to the heart of the case, like FDS shooting civilians, or pro-Gbagbo youth killing people in roadblocks, as explained in the above sections. For this reason admitting these statements without allowing the Defence to examine such witnesses does not serve the interest of justice. Indeed the Accused has a right to be tried without undue delay provided for under article 67, but the same article also provides

²⁵ See para 24 and 28 of the Application

²⁶ See from Para 61 onwards of CIV-OTP-0084-0079 and para 66 onwards of CIV-OTP-0084-0105

²⁷ The application para 26.

for the right to examine witnesses against him. The Chamber has to balance one fundamental right against the other. Yet, in the instant case, the preceding paragraphs make clear that the prejudice that Mr Blé Goudé would suffer if not allowed to examine witnesses [REDACTED] outweighs his right to be tried without undue delay. Moreover, it has not been showed that the examination in court of these witnesses will cause undue delay of the trial.

5.2.1.5 *The statements do not have sufficient indicia of reliability.*

49) All the three witness statements involve hearsay evidence in relation to the 16 December demonstration. None of the three witnesses participated in the march. [REDACTED] all introduce information that was given to him by other people who are either anonymous or people who will not present evidence before the court.²⁸ The only test of the reliability of such hearsay evidence is to allow the Defence to examine the witnesses by rejection of the prosecution's application.

6 Relief Sought

50) For the foregoing reasons the Defence requests the Chamber to reject the request of the prosecution to introduce the testimonies of [REDACTED] through Rule 68 (2) (b).



²⁸ CIV-OTP-0084-0079 para 35-36, CIV-OTP-0084-0105 para 30-42, CIV-OTP-0084-0018 para 55.

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

Dated this 6 May 2016

At The Hague, the Netherlands