

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

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

Date: **7 June 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’s Motion to prevent the Prosecution from calling Witness [REDACTED] as an expert witness and to restrict the scope of Witness [REDACTED] intended evidence”(ICC-02/11-01/15-562-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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I. Introduction

1. During the Status Conference held on 27 May 2016, the Prosecution announced its intention to make Witness [REDACTED] an expert witness.¹ On the List of Witnesses filed by the Prosecution on 30 June 2015,² [REDACTED] is identified as a fact witness.³
2. The Defence opposes such modification in Witness [REDACTED]'s status for the reasons that he does not meet the requirements to be accepted as an expert in this trial and that the request, if introduced by the Prosecution in the coming days, would be overdue. Indeed, Witness [REDACTED] is expected to testify from [REDACTED].
3. [REDACTED] is provided as confidential Annex A to the present motion.⁴

II. Confidentiality

4. The Defence files the present motion as confidential pursuant to regulation 23bis (2) of the Regulations of the Court ("the Regulations") as it relates to information that may lead to the identification of Witness [REDACTED]. The request may be reclassified as public once it is decided that the witness will testify in public, otherwise a redacted version will be filed in due course.

¹ ICC-02/11-01/15-T-45-Red-ENG WT 27-05-2016 1-1 NB T, p. 33 lines 24-25.

² ICC-02/11-01/15-114 with [REDACTED] filed on 27 July 2015.

³ [REDACTED], p. 6.

⁴ [REDACTED].

III. Applicable law

5. Article 69 of the Rome Statute (“the Statute”) states that *“before testifying the witness shall [...] give an undertaking as the truthfulness of the evidence to be given by the witness”*.
6. Paragraph 52 of the Directions on the conduct of the proceedings issued on 3 September 2015 (“the Initial Directions”) provides that: *“As ordered by the Chamber, on 30 June 2015, the Prosecution disclosed the names of the proposed expert witnesses it intends to call during the presentation of its evidence. The Chamber directs the parties to engage in inter partes consultations to the extent possible, jointly agree on experts. If no agreements can be reached, by 1 December 2015, each Defence team may file a notice indicating whether it (i) challenges the qualifications of the witness as an expert, and/or (ii) challenges the relevance of all, or parts of the report written by the expert, if any.”*⁵
7. Paragraphs 43-47 of the Directions on the Conduct of the Proceedings issued on 4 May 2016 (“the New Directions”)⁶ regulate the submission of documentary evidence before the Chamber. Paragraph 47 states inter alia that *“[...] documentary evidence other than testimonial shall be considered as being before the Chamber in its entirety, irrespective of the fact that the parties intended only to rely on portions thereof”*.
8. Paragraph 23 of the New Directions states that *“parties are directed to refrain from asking witnesses to speculate or to provide opinion evidence. It is the responsibility of the examining counsel to elicit the basis of the witness’ knowledge for every relevant fact”*.
9. The prohibition against anonymous evidence as interpreted by the Chamber is contained in the “Decision on the Prosecution's Application to

5 ICC-02/11-01/15-205, para. 52.

6 ICC-02/11-01/15-498-AnxA.

protect the confidentiality of the sources of P-0369”, 22 March 2016.⁷

10. The prohibition against opinion evidence as interpreted by the Chamber is contained in the “Decision on Defence's Motion to Preclude and Exclude the prospected Evidence of Witness P-0369, or, in the alternative, to restrict the Scope of Witness P-00369's intended Evidence”, 13 May 2016.⁸

IV. Submissions

11. On 3 September 2016, the Chamber adopted the Initial Directions. On 4 May 2016, the Chamber issued the new Directions. However, such New Directions which have amended and supplemented the initial Directions have not addressed the issue of expert witnesses. Therefore, the provisions related to this issue and contained in the Initial Directions continue to apply to the present case.

12. According to paragraph 52 of the Initial Directions:

“As ordered by the Chamber, on 30 June 2015, the Prosecution disclosed the names of the proposed expert witnesses it intends to call during the presentation of its evidence. The Chamber directs the parties to engage in *inter partes* consultations to the extent possible, jointly agree on experts. If no agreements can be reached, by 1 December 2015, each Defence team may file a notice indicating whether it (i) challenges the qualifications of the witness as an expert, and/or (ii) challenges the relevance of all, or parts of the report written by the expert, if any.”⁹

13. It results from the above mentioned applicable paragraph that the Prosecution has been ordered by the Chamber to disclose, by 30 June 2015, the names of the proposed expert witnesses it intended to call during the presentation of its evidence. On the list of witnesses disclosed by the

⁷ ICC-02/11-01/15-466-Conf.

⁸ ICC-02/11-01/15-539.

⁹ ICC-02/11-01/15-205, para. 52.

Prosecution on 30 June 2015, Witness [REDACTED] is identified as a fact witness.¹⁰ The Prosecution has thus failed to disclose in due time to the parties, participants and the Chamber his sought quality as expert.

14. Besides, from the same paragraph 52 of the Initial Directions, it appears that the parties had until 1 December 2015 to reach an agreement on experts. If such agreement could not be reached, the Defence could challenge in writing both the qualifications of the witness as an expert and the relevance of all, or parts of the report written by the expert, if any.
15. By requesting the announced recharacterization of Witness [REDACTED] as an expert witness [REDACTED] before his appearance before the Chamber, the Prosecution intends to circumvent the Defence's right to challenge both the qualifications of the witness and the relevance of his report, if any. Indeed, while the Chamber had reasonably evaluated that the Defence would need three months to make the necessary investigations in view of such challenges, the Prosecution has apparently waited until the last moment to reveal that it intends to call [REDACTED] as an expert, only after the Defence announced that it would file objections on the basis of the prohibition of giving opinion evidence.
16. On 30 June 2015, when disclosing its List of Witnesses, the Prosecution knew that it would call [REDACTED] as a witness. It also knew who [REDACTED] was, what his profession was and [REDACTED]. The Prosecution was in full knowledge of [REDACTED] background and works. [REDACTED]. The Prosecution could and should have revealed its intention to call him as an expert at that time like he did for the other expert witnesses.

17. Assuming that the Prosecution had decided to call the witness as an expert

¹⁰ [REDACTED].

later, i.e. between September and December 2015, it had the obligation, pursuant to the Chamber's order, to disclose such decision to the Defence in due time, i.e. before 1 December 2015, which it has not done.

18. Hence, it appears crystal clear that, by revealing at the last moment that [REDACTED] would be called as an expert witness, the Prosecution has tried to deprive the Defence of its right to challenge the qualifications of the witness and the content of his report.
19. In addition, the witness has not introduced a proper report. Instead, the Prosecution intends to rely on the [REDACTED], which contains purely his personal opinion, which is inadmissible before the Chamber pursuant to paragraph 23 of the New Directions.
20. The present opposition is not purely theoretical. Indeed, the Defence has serious and material reasons to challenge [REDACTED]'s qualifications and the content of his works. However, the time to raise such debate is over as modification in the witness' status is overdue.
21. Regarding the content of Witness [REDACTED]'s testimony, the Defence would like to recall the "Decision on the Prosecution's Application to protect the confidentiality of the sources of P-0369", in which the Chamber reminded the parties of the general principle and duty of disclosure. Therefore the protection of confidentiality of sources enshrined in Rule 73(2) of the Rules of Procedure and Evidence is of strict application and cannot benefit to [REDACTED].
22. In his written statement to the Prosecution,¹¹ Witness [REDACTED] repeatedly relies on anonymous sources. Therefore, [REDACTED] should not be allowed to testify on information provided to him by anonymous

¹¹ [REDACTED].

sources. Moreover, several portions of his statement and prospective testimony at trial will relate to opinion evidence such as [REDACTED]. In this regard, reference is made to the Decision on Witness P-0369, where the Chamber recalled the parties of the following:

“[i]n particular, in paragraph 23 of [the New Directions], the Chamber directed the parties to refrain from asking the witnesses to speculate or to provide opinion evidence. The Blé Goudé Defence is therefore right in noting that Witness P-0369 should not be asked to pronounce on the conclusions he drew from his research in Ivory Coast.”

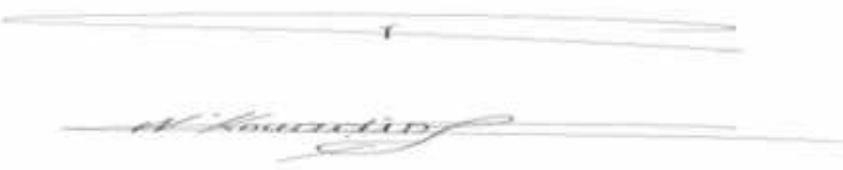
23. The Defence considers that such decision constitutes a precedent that should apply to [REDACTED]. [REDACTED] is referred to as a witness of facts and then, should only be questioned on the facts he personally observed.

RELIEF SOUGHT

For the foregoing reasons, the Defence respectfully request the Chamber to:

- REJECT any modification in Witness [REDACTED]'s status, especially his appearance before the Court as an expert witness;
- ORDER the Prosecution to limit its questioning of Witness [REDACTED] to the facts which he personally observed.

Respectfully submitted,



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

Dated this

7 June 2016

At The Hague, the Netherlands