

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **19 July 2016**

TRIAL CHAMBER I

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

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

Public redacted

Decision on the "Prosecution's application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549 and P-0550"

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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**Unrepresented Applicants for
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**The Office of Public Counsel for
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Others

Trial Chamber I (“Chamber”) of the International Criminal Court, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 64, 67(1)(e), 68(1) and 69 of the Rome Statute (“Statute”), and Rule 68 of the Rules of Procedure and Evidence (“Rules”), issues this decision on the “Prosecution’s application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549 and P-0550”, filed on 10 June 2016 (“Application”).¹

1. The Application is threefold: first, the Prosecutor seeks the “conditional submission into evidence of the prior recorded statement, including related documents, of Witness P-0428” under Rule 68(2)(b) of the Rules; second, the “conditional submission into evidence of the prior recorded statements, including related documents”, of Witnesses P-0414 and P-0501 under Rule 68(3) of the Rules; and, third, the “submission of documentary evidence [...] under paragraphs 43 and 44 of the Conduct Directions”.² Annexes 1 and 3 to the Application specify the precise items of evidence which are covered by the Application.³
2. In addition, the Prosecutor seeks permission to “conduct limited witness preparation of [Witnesses P-0414 and P-0501], with a view to saving the time that might otherwise be taken in Court for the witness to first, read the statement, and second, identify any corrections”.⁴
3. The other participants responded on 30 June 2016. The common legal representative of the victims requests the Chamber to grant the Application.⁵ The Defence of Charles Blé Goudé submits that it does not oppose the conditional submission of the prior recorded statements of Witness P-0501 under Rule 68(3)

¹ ICC-02/11-01/15-582-Conf and confidential annexes 1-3.

² Application, para. 1.

³ ICC-02/11-01/15-582-Conf-Anx1, ICC-02/11-01/15-582-Conf-Anx3.

⁴ *Ibid.*, para. 2.

⁵ ICC-02/11-01/15-605-Conf.

of the Rules and the submission of documentary evidence relating to Witnesses P-0549 and P-0550, but that it objects to the Application in so far it relates to the introduction under Rule 68 of the statements and related documents of Witnesses P-0414 and P-0428, to the request for witness preparation and to the submission of certain items of documentary evidence.⁶ Finally, the Defence of Laurent Gbagbo objects to the entirety of the Application.⁷

4. This is the second instance in which the Chamber addresses a request from the Prosecutor to introduce prior recorded testimony under rule 68(2)(b) and 68(3) of the Rules. In the present decision, the Chamber follows the same general approach as that laid out in the first decision on the matter.⁸

I. Introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of Witness P-0428

5. 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. In particular, the Chamber shall take into account, *inter alia*, the factors listed in Rule 68(2)(b)(i). The Chamber must also always bear in mind the general condition of Rule 68(1) of the Rules, which prohibits introduction of prior

⁶ ICC-02/11-01/15-607-Conf (“Blé Goudé Defence Response”).

⁷ ICC-02/11-01/15-608-Conf (“Gbagbo Defence Response”).

⁸ “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 9 June 2016, ICC-02/11-01/15-573-Conf, para. 9. A public redacted version is available, see ICC-02/11-01/15-573-Red.

recorded testimony where this would be prejudicial to or inconsistent with the rights of the accused.

6. The Prosecutor submits that the introduction of the written statement of Witness P-0428 under Rule 68(2)(b) of the Rules is warranted because the statement does not relate to the acts and conduct of the accused, does not relate to disputed issues at the core of the case, bears sufficient indicia of reliability, and because introduction of the written statement would serve the interests of justice.⁹
7. The Defence of Charles Blé Goudé contends that since Witness P-0428's [REDACTED] [REDACTED] alleged incitement to violence", [REDACTED] statement "undoubtedly goes to prove the acts and conduct of Mr Blé Goudé, who is charged *inter alia* with inciting pro-Gbagbo youth to violence".¹⁰ More specifically, the Defence reasons that "Mr Blé Goudé is accused of incitement to violence, and therefore [REDACTED] [REDACTED] should be considered as evidence going to prove his acts and conduct".¹¹ It argues that by introducing under Rule 68(2)(b) of the Rules the statement of the witness who explains the [REDACTED] [REDACTED], the Prosecutor is preparing to seek to introduce, under paragraph 43 of the Directions on the Conduct of Proceedings, the said [REDACTED].¹² This, in the view of the Defence of Charles Blé Goudé, amounts to an attempt to circumvent Rule 68(2)(b) of the Rules, and is impermissible.¹³ Further, the Defence of Charles Blé Goudé submits that the written statement of Witness P-0428 should be "excluded all together", because: (i) the witness "was engaged in legal qualification of [REDACTED] which is the mandate of the Chamber"; and (ii) "[REDACTED]

⁹ Application, paras 20-22.

¹⁰ Blé Goudé Defence Response, para. 19.

¹¹ *Ibid.*, para. 20.

¹² *Ibid.*, para. 19.

¹³ *Id.*

10. The Chamber notes that the statement of Witness P-0428 is strictly limited to [REDACTED]. It does not refer to any specific [REDACTED] instance of incitement to violence or hate speech, nor to any individual person or organisation. In these circumstances, the Chamber cannot adhere to the arguments of the Defence of Charles Blé Goudé that the statement pertains to acts and conduct of Charles Blé Goudé. Nor can it be said that the statement relates to issues that are materially in dispute. Moreover, it is not true that the witness qualifies news items as incitement to hatred as submitted by the Defence of Charles Blé Goudé. The fact that the Prosecutor may at some point submit [REDACTED] incitement to violence by Charles Blé Goudé is unrelated to the question whether the statement of Witness P-0428 can be introduced under Rule 68(2)(b) of the Rules.
11. In the assessment of the Chamber, the statement of Witness P-0428 is peripheral and does not immediately relate to any fact of the charges. Its significance is merely in providing certain information which may serve to explain the provenance of other evidence which the Prosecutor intends to submit.¹⁹ In these circumstances, the Chamber also does not attribute particular weight to the fact that, as stated by the Defence of Laurent Gbagbo, the evidence of Witness P-0428 is not corroborative in the sense that other witnesses have given or will give oral testimony of similar facts.
12. The Chamber does not consider dispositive the Defence argument that Witness P-0428 is [REDACTED] who are relied upon by the Prosecutor, and that [REDACTED] should therefore appear before the Chamber to be questioned by the Defence, apparently, on broader issues related to [REDACTED]. Based on the information contained in [REDACTED] statement as to Witness P-0428's position at the

¹⁹ Cf. Application, para. 21, footnote 21.

relevant time, it is not evident how the witness would be able to provide evidence beyond the scope of the written statement.

13. The Chamber also notes that the statement of Witness P-0428 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. The witness was explained the procedure and the significance of providing a statement to the Office of the Prosecutor. The Chamber also notes that Witness P-0428's statement relates to the [REDACTED]. This information is obviously known to the witness and [REDACTED] is therefore competent to give evidence on these issues. There is no reason to suspect the witness of bias against either of the accused simply for [REDACTED]. The information [REDACTED] provides is also largely first-hand, and there appears to be no cause to be concerned about the reliability of [REDACTED] memory regarding the topics [REDACTED] mentioned in [REDACTED] prior recorded testimony. The Chamber is therefore satisfied that the prior recorded testimony of Witness P-0428 bears sufficient indicia of reliability.
14. In light of the above analysis, the Chamber is of the view that the position of the accused will not be adversely affected if the Defence is not given an opportunity to examine the witness in court. Moreover, considering that the witness's expected testimony is more technical and for authentication purposes, the Chamber considers that its introduction pursuant to Rule 68(2)(b) would be in the interests of justice, as it would expedite proceedings avoiding unnecessary use of court time.
15. In conclusion, the Chamber considers it appropriate to grant the Application with respect to Witness P-0428. The Prosecutor is directed to seek the requisite declaration from the witness and to file that declaration in the record of the case. The Chamber notes, in this regard, that Registry Legal Counsel, or any

appropriate person delegated by him, has been designated to be the person authorised to witness declarations made pursuant to Rule 68(2)(b) of the Rules for the purposes of this case.²⁰ Upon 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.

II. Introduction under Rule 68(3) of the Rules of the prior recorded testimony of witnesses P-0414 and P-0501

16. 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 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.

17. The Prosecutor proposes the introduction under Rule 68(3) of the Rules of the written statements of Witnesses P-0414 and P-0501. Witness P-0414's evidence is, according to the Prosecutor, of limited nature and not central to the case.²¹ As for Witness P-0501, the Prosecutor submits that his evidence is "also of limited

²⁰ "Decision on the Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules", 21 October 2015, ICC-02/11-01/15-303.

²¹ Application, para. 25.

nature and although it touches upon facts of great importance to the case ([REDACTED]), Witness P-0501 himself does not, relative to other [REDACTED] witnesses in the case, occupy a position of importance within the system of the evidence that is expected to be presented to the Chamber”.²² The Prosecutor submits that the statements of both witnesses bear sufficient indicia of reliability, and that introduction of their statements under Rule 68(3) of the Rules would “foster judicial efficiency and economy in reducing the estimated duration of the Prosecution’s case-in-chief”.²³ At the same time, the Prosecutor submits that it is her intention to examine the witnesses in Court in order to have them expand on certain issues.²⁴

18. The Defence of Charles Blé Goudé does not oppose to the introduction under Rule 68(3) of the Rules of the written statement of Witness P-0501.²⁵ However, it opposes the introduction under the same rule of the statement of Witness P-0414, because: (i) “the number of annexed and related documents appears as unusual for a witness who is ‘of limited nature and is not central to the case’”; (ii) the witness is not the author of most of the documents attached to [REDACTED] statement or does not recognise such documents; and the reliability of the documents is not substantiated by the Prosecutor.²⁶

19. The Defence of Laurent Gbagbo submits that the statement of Witness P-0414 relates to the events which are at the core of the charges and of which the precise unfolding is strongly contested by the Defence.²⁷ In addition, the Defence states that the witness should testify orally fully because [REDACTED]
[REDACTED]

²² *Ibid.*, para. 26.

²³ *Ibid.*, paras 27-28.

²⁴ *Ibid.*, paras 31-33.

²⁵ Blé Goudé Defence Response, para. 2.

²⁶ *Ibid.*, paras 24-31.

²⁷ Gbagbo Defence Response, para. 10.

██████████²⁸ As concerns Witness P-0501, the Defence draws attention to the fact that he is the only witness of the Prosecutor who ██████████
 ██████████ and that his statement is therefore by definition not corroborative of other evidence.²⁹

20. Witness P-0414 was at the relevant time ██████████
 ██████████
 ██████████. In addition, ██████████
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 ██████████
 ██████████. The witness also provides certain other information which ██████████
 ██████████. The statement of Witness P-0414 includes five annexes which were produced during the interview. In addition, the Prosecutor includes in the request 16 documents which were shown to the witness during the interview and are discussed in the written statement.

21. Witness P-0501 was engaged in ██████████
 ██████████. He describes ██████████
 ██████████
 ██████████. The four annexes to the statement were either produced during the interview or are copies of ██████████ that the witness comments on in the statement.

22. As submitted by the Defence teams,³⁰ it must be held that the written statements of Witnesses P-0414 and P-0501 do not pertain only to background information,

²⁸ *Ibid.*, para. 11.

²⁹ *Ibid.*, para. 13.

³⁰ Application, para. 26.

uncontested fact or facts of little relative importance for the case. On the contrary, Witness P-0414 provides evidence relating to two specific events underlying the charges against Laurent Gbagbo and Charles Blé Goudé. Witness P-0501, in turn, provides evidence concerning [REDACTED]

[REDACTED], which the Chamber understands to be of considerable importance for the Prosecutor's case, in particular as concerns the allegation of a common plan to commit the crimes charged.

23. However, in relation to Witness P-0501, the Chamber notes that his testimony provides limited evidence for the allegation that there were [REDACTED]. Besides explaining [REDACTED], Witness P-0501 provides names of [REDACTED]. His statement, however, contains no information on the reasons for [REDACTED], nor any content of [REDACTED].

24. As regards Witness P-0414, and as noted already above by the Chamber for Witness P-0428, who also was [REDACTED] at the time of the charges, [REDACTED] statement refers mainly to [REDACTED] during the time of the charges. Thus, [REDACTED] evidence is mostly for purposes of authentication of [REDACTED].³¹

25. The Defence will be given the opportunity to question both witnesses in the necessary depth on the all relevant matters arising from the statement. The

³¹ ICC-02/11-01/15-582-Conf, footnote 5.

Chamber considers that this opportunity to cross-examine is a sufficient counter-balancing factor to the relative importance of the witnesses.

26. Under these circumstances, the Chamber is of the view that the fact that Witness P-0501's and P-0414's statement can be linked to an issue of importance for the Prosecutor's case is no impediment to it being introduced through Rule 68(3) of the Rules.
27. In these circumstances, and provided that the Defence is given adequate opportunity to examine the two 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.
28. In line with the Chamber's previously explained approach,³² if the written statements of Witnesses P-0414 and P-0501 are finally introduced under Rule 68(3), the annexes shall also be considered submitted. The same applies to the documents which were discussed with Witness P-0414 and which are addressed in ■■■ statement, but are not annexed. The argument of the Defence of Charles Blé Goudé that the number of documents is "unusual" is without substance. The other submissions made by the Defence relate to the assessment of the probative value of the documents, which will be addressed in due course.
29. The Chamber therefore finds, in principle, that the written statements of Witnesses P-0414 and P-0501 are suitable for introduction under Rule 68(3) of the Rules. Introduction can, however, only occur when all of the conditions of the Rule are met. The witnesses will appear before the Chamber, and will be asked whether they object to the introduction of their written statements. If they do not object, their written statements will be considered as submitted.

³² ICC-02/11-01/15-573-Conf, para. 9.

30. The Prosecutor will be accorded an opportunity to conduct a limited supplementary examination of the witnesses, aimed at expanding or clarifying certain topics covered in the written statement. The Chamber notes that the Prosecutor has indicated that she would require 2.5 hours for the supplementary examination of Witness P-0414 and one hour for the supplementary examination of Witness P-0501.
31. The Defence teams will not be constrained to the amount of time used by the Prosecutor for the supplementary examination, and will be granted a reasonable amount of time to examine each witness. Examination of the witnesses by the legal representative of the participating victims shall be subject to the general regime applicable.
32. The Prosecutor seeks permission to depart from the witness familiarisation protocol³³ and conduct “limited witness preparation” of the Rule 68(3) witnesses, with a view to “saving the time that might otherwise be taken in Court for the witness to first, read the statement, and second, identify any corrections”.³⁴ The Prosecutor proposes that this is done in the presence of one representative of her Office and one representative of the VWU, and that any corrections be recorded in writing and notified to the Chamber and the parties and participants as soon as possible.³⁵ The Prosecutor advocates in favour of this procedure by stating that it is merely a “logistical arrangement which could streamline the testimony” and that “[t]ime spend in court to correct errors in the statement will defeat the purposes behind the principle enshrined at rule 68(3)”.³⁶

³³ See ICC-02/11-01/15-355-Anx.

³⁴ Application, para. 34.

³⁵ *Id.*

³⁶ *Id.*

33. Both Defence teams oppose the request of the Prosecutor on the ground that it is an attempt to circumvent a previous decision of the Chamber not to allow for witness preparation.³⁷

34. On 3 December 2015, the Chamber issued the “Decision on witness preparation and familiarisation”,³⁸ wherein it considered the possibility of authorising “witness preparation” and concluded that “mindful of the risks of witness preparation [...]. [the Chamber] does not consider that the risks of witness preparation in this case are outweighed by any other factors” and that witness preparation was therefore not appropriate.³⁹ The Chamber does not consider that the Prosecutor’s assertion that she “in no way seeks to revisit the Chamber’s decision on witness preparation and familiarisation” is accurate. While the Chamber understands this request to pertain only to Witnesses P-0414 and P-0501,⁴⁰ the aim of the request is to enable the Prosecutor to undertake an action which was previously considered inappropriate by the Chamber and not authorised. The Chamber accepts that a degree of flexibility is required, but the Prosecutor does not convincingly explain why, in the particular situation of the two witnesses, a departure from the general regime is appropriate, also considering that as per this general regime the prohibition of contact between the calling party and the witness is effective from the commencement of the familiarisation process by the VWU.⁴¹ In particular, the Prosecutor’s argument that with a “limited witness preparation” time would be saved is not dispositive, considering what has been concluded by the Chamber in the decision of 3 December 2015. Accordingly, this particular request is to be rejected.

³⁷ Blé Goudé Defence Response, para. 33; Gbagbo Defence Response, paras 32-35.

³⁸ ICC-02/11-01/15-355; with a partially dissenting opinion of Judge Henderson, ICC-02/11-01/15-355-Anx1.

³⁹ *Ibid.*, para. 19.

⁴⁰ Cf. the designation of “Rule 68(3) Witnesses” at paragraph 1 of the Application and the use of that designator at paragraphs 2, 34 and 38.

⁴¹ ICC-02/11-01/15-355-Anx, para. 26.

III. Submission of documentary evidence

35. The Prosecutor submits, “under paragraph 43 of the Conduct Directions”, the reports by Witnesses P-0549 and P-0550 describing how various 360-degree presentations are put together, the presentations themselves, as well as declarations by the two individuals certifying that the contents of their reports are true and correct. In addition, the Prosecutor submits the complete versions of three handwritten visitor logbooks which were, in her submission, used at the presidential residence in 2010-2011. The precise list of items of evidence submitted is contained at annex 3 to the Application, which also contains submissions by the Prosecutor as to their relevance and probative value, including authenticity.⁴²

36. The Defence of Charles Blé Goudé does not oppose the submission of documentary evidence relating to Witnesses P-0549 and P-0550.⁴³ As concerns the visitor logbooks, the Defence argues that the Prosecutor “should not be allowed to introduce the three logbooks because it has failed to provide necessary information regarding their authenticity and probative value”⁴⁴ and indeed contests the authenticity and the probative value of said evidence.⁴⁵

37. The Defence of Laurent Gbagbo submits that the Prosecutor is improperly making use of paragraph 43 of the Directions on the Conduct of Proceedings in order to introduce evidence relating to Witnesses P-0549 and P-0550 in the hope of avoiding their appearance before the Chamber.⁴⁶ It emphasises the importance of the witnesses being made available for questioning by the Defence.⁴⁷ As concerns the visitor logbooks, the Defence submits that: (i) the request is

⁴² ICC-02/11-01/15-582-Conf-Anx3.

⁴³ Blé Goudé Defence Response, para. 2.

⁴⁴ *Ibid.*, paras 34-36.

⁴⁵ *Ibid.*, paras 37-49.

⁴⁶ Gbagbo Defence Response, para. 21.

⁴⁷ *Ibid.*, para. 24.

superfluous because the documents can be submitted by way of being presented to the witness in the courtroom; (ii) the reasoning of the Prosecutor is circular, because she invokes the statement of Witness ██████ to establish the authenticity of the documents, something which can only be possible at the end of the witness' testimony.⁴⁸

38. In accordance with the Directions on the Conduct of Proceedings, the documents in question are considered submitted⁴⁹ and, in line with the Chamber's previous decision,⁵⁰ any decision on their admissibility and relevance will be decided in due course, when considered appropriate by the Chamber. At that time, the submissions made by the Defence in relation to the authenticity or probative value of the documents will be taken into account.

39. Accordingly, the Chamber recognises the submission of the documentary evidence pursuant to paragraph 43 of the Directions on the Conduct of Proceedings and directs the Registry to "ensure that the e-court metadata reflects the evidence which has been formally submitted to the Chamber".⁵¹

40. The Chamber considers it appropriate, in light of the submissions of the Defence of Laurent Gbagbo, to explain in some further detail why it considers that the documents related to Witnesses P-0549 and P-0550, in particular the reports authored by them, are properly submitted under paragraph 43 of the Directions on the Conduct of Proceedings. While the two individuals were included in the Prosecutor's witness list, they had previously not been formally interviewed by the Prosecutor. Although the concept of prior recorded testimony under Rule 68

⁴⁸ *Ibid.*, paras . 29-30.

⁴⁹ The Chamber notes that item CIV-OTP-0078-0085 was already submitted on 9 May 2016 and that therefore the present submission is unnecessary. Items CIV-OTP-0067-0402 and CIV-OTP-0088-0863 were also in part previously used in Court on 10 March 2016. The Chamber considers these items now to be submitted in their entirety, "for the purpose of supporting any findings relating to the charges" (paragraph 47 of the Directions on the Conduct of Proceedings).

⁵⁰ "Decision on the submission and admission of evidence", 29 January 2016, ICC-02/11-01/15-405.

of the Rules extends beyond records under Rules 111 or 112, which in any case only regulate investigation by the Prosecutor, the Chamber is of the view that the reports in question, containing purely technical information explaining how certain evidence was retrieved or created, considering the purpose of their preparation, can be more adequately introduced pursuant to paragraph 43 of the Directions on the Conduct of Proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY, BY MAJORITY, JUDGE HENDERSON PARTIALLY DISSENTING,

DECIDES that the prior recorded statement of Witness P-0428 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;

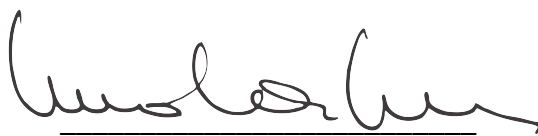
FINDS that the written statements of Witnesses P-0414 and P-0501 are in principle suitable for introduction under Rule 68(3) of the Rules and directs the parties to prepare accordingly;

RECOGNISES the submission of the documentary evidence listed in annex 3 to the Application; and

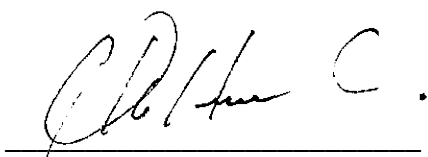
REJECTS the Prosecutor's request for limited witness preparation in respect of Witnesses P-0414 and P-0501.

Judge Henderson appends a partially dissenting opinion.

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



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 19 July 2016

At The Hague, The Netherlands