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No.: ICC-02/11-01/15
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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
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

With Confidential Annexes 1 – 3

Public redacted version of “Prosecution’s application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549 and P-0550”, 10 June 2016, ICC-02/11-01/15-582-Conf

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

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Introduction

1. Pursuant to the Chamber's order of 27 May 2016,¹ the Prosecution seeks:
 - i. conditional submission into evidence of the prior recorded statement, including related documents, of Witness P-0428 ("Rule 68(2)(b) Documents"), in accordance with rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules"), as well as articles 69(2), 64(9)(a) and 69(4) of the Rome Statute ("Statute") and rule 63(2) of the Rules;
 - ii. conditional submission into evidence of the prior recorded statements, including related documents (collectively, "Rule 68(3) Documents"), of Witnesses P-0414 and P-0501 ("Rule 68(3) Witnesses"), in accordance with rule 68(3) of the Rules, paragraph 49 of the amended and supplemented directions on the conduct of the proceedings ("Conduct Directions"),² as well as articles 69(2), 64(9)(a) and 69(4) of the Statute and rule 63(2) of the Rules;
 - iii. submission of documentary evidence pertaining to Witnesses P-0501, P-0549 and P-0550 under paragraphs 43 and 44 of the Conduct Directions ("Paragraph 43 Documents").

2. In addition, the Prosecution seeks permission to 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. The Prosecution envisages the presence of one Prosecution representative and a representative from the Victims and Witnesses Unit ("VWU") in order to do this. Any corrections would be recorded in writing and notified to the Chamber, Parties and participants, as soon as practicable and, in any event, in advance of the witness testifying.

¹ ICC-02/01-01/15-498-AnxA.

² ICC-02/01-01/15-498-AnxA.

3. The Prosecution seeks the introduction of this materially conditionally, for the following reasons: (i) in relation to the Rule 68(2)(b) Documents, in order to save the unnecessary expenditure of resources, as explained below;³ and (ii) in relation to the Rule 68(3) Documents, because rule 68(3) posits a witness' actual presence before the Chamber and his/her consent to the submission of the previously recorded testimony as conditions of admissibility of their previously recorded testimony.⁴
4. The Rule 68(2)(b) Documents are admissible because they are *prima facie* relevant and probative of the charges and do not concern the acts and conduct of the two Accused. The nature and content of the evidence contained within the Rule 68(2)(b) Documents is such that Witness P-0428's appearance for cross-examination is unnecessary. To the contrary, the Parties and participants will benefit from an expedited presentation of the Prosecution's case-in-chief.
5. The Rule 68(3) Documents are admissible because Rule 68(3) Witnesses will be available before the Chamber and the Parties and the Chamber will have the opportunity to examine the Witnesses during the proceedings. The Rule 68(3) Documents are *prima facie* relevant, probative and reliable, and Witnesses P-0414 and P-0501 will each be asked to confirm the accuracy of his/her statement and related documents.
6. Introduction of the Rule 68(2)(b) and Rule 68(3) Documents is not prejudicial to or inconsistent with the rights of the Accused.

³ See the requirements under rule 68(2)(b)(ii) and (iii) of the Rules; and ICC-02/11-01/15-303.

⁴ See rule 68(3) of the Rules: "if the witness [...]."

7. Submission of the Paragraph 43 Documents is in the interest of the efficiency of proceedings because introducing the documentary evidence directly will save time by first, avoiding the need for Witnesses P-0549 and P-0550 to appear and second, allowing Witness P-0501 to be examined about the documents without having to first take the time to introduce the documents through him.⁵ The Paragraph 43 Documents are admissible because they are relevant and probative.

Confidentiality

8. This filing is classified as “*Confidential*”, as it refers to information that is not yet available to the public. The Prosecution will file a public redacted version that will maintain the confidentiality of the relevant witness pseudonyms.

Procedural History

9. On 19 April 2016, the Prosecution filed the Prosecution application to conditionally admit the prior recorded statements and related documents of Witnesses [REDACTED] under rule 68(2)(b) and the prior recorded statements and related documents of Witnesses [REDACTED] under rule 68(3) (“First Rule 68 Application”).⁶
10. On 4 May 2016, the Chamber issued its Decision adopting amended and supplemented direction on the conduct of the proceedings.⁷
11. On 27 May 2016, the Chamber ordered the Prosecution to file applications pursuant to rule 68 for five Witnesses: P-0414, P-0428, P-0549, P-0550 and P-0501.⁸

⁵ In due course, the Prosecution will also be making applications under paragraph 43 of the Conduct Directions with respect to items of evidence pertaining to Witnesses P-0428 and P-0414. The documents pertaining to P-0428 are [REDACTED]. The documents pertaining to P-0414 are UN documents, including various reports generated by ONUCI during the post-election crisis period.

⁶ ICC-02/01-01/15-487-Conf.

⁷ ICC-02/01-01/15-498.

The Prosecution indicated that its application pertaining to the reports of Witnesses P-0549 and P-0550 might be filed pursuant to paragraph 43 of the Conduct Directions.⁹

12. On 9 June 2016, the Trial Chamber issued the Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3) ("Decision on the First Rule 68 Application").¹⁰

Submissions

RULE 68 APPLICATIONS

A. Applicable Law

13. The Prosecution incorporates by reference the law as set out in its First Rule 68 Application, paragraphs 11-21.¹¹
14. Under rule 68(2)(b) of the Rules, the prior recorded testimony must go to proof of a matter other than the acts and conduct of the accused, as well as be accompanied by a declaration confirming the veracity of its content under certain formal requirements.¹² If these two conditions are met, then, as the Chamber has clarified in its Decision on the First Rule 68 Application, it must determine whether such introduction 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.¹³

⁸ ICC-02/11-01/15-T-45-CONF-ENG ET, p. 11 l. 6-13, p. 12, l. 8-15.

⁹ ICC-02/11-01/15-T-45-CONF-ENG ET, p. 10 l. 22 - p. 12, l. 84.

¹⁰ ICC-02/11-01/15-573-Red.

¹¹ ICC-02/11-01/15-487-Conf.

¹² ICC-02/11-01/15-573-Red, para. 10.

¹³ ICC-02/11-01/15-573-Red, para. 10.

15. For introduction of prior recorded testimony under rule 68(3) of the Rules, the following conditions must be met: “(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.”¹⁴
16. This Chamber has also found that a decision authorising the introduction of testimonial evidence under 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.”¹⁵ Rule 68(3) must be understood as a tool in the exercise of the Chamber’s duty “to ensure that the trial unfolds in a focused and expeditious manner, while respecting the procedural rights of the parties and participants.”¹⁶
17. The introduction of prior recorded testimony under Rule 68 must also not be prejudicial to or inconsistent with the rights of the accused.¹⁷
18. As the Chamber has also found: “[i]n case of introduction of written statements under Rule 68 of the Rules, any documentary evidence annexed is also to be considered submitted.”¹⁸

¹⁴ ICC-02/11-01/15-573-Red, para. 24.

¹⁵ ICC-02/11-01/15-573-Red, para. 25.

¹⁶ ICC-02/11-01/15-573-Red, para. 25.

¹⁷ ICC-02/11-01/15-573-Red, para. 24.

¹⁸ ICC-02/11-01/15-573-Red, para. 9.

B. Introduction of Rule 68(2)(b) Documents

19. The Prosecution requests conditional introduction and submission of the Rule 68(2)(b) Documents, namely the prior recorded statement and accompanying annexes of Witness P-0428, as listed at Confidential Annex 1. Confidential Annex 2 provides a summary of Witness P-0428's evidence and the time estimate for Witness P-0428's examination by the calling party if [REDACTED] testimony is heard *viva voce*. Also at Annex 2, the Prosecution (i) identifies the specific passages which the Prosecution wishes to submit as evidence;¹⁹ and (ii) provides the Evidence Registration Number ("ERN") for the other material, within the meaning of paragraph 51 of the Conduct Directions, which it is sought to admit under rule 68(2)(b) of the Rules.

20. Witness P-0428's prior recorded statement goes to the proof of matters other than the acts and conduct of the two Accused, within the meaning of the criterion under rule 68(2)(b) of the Rules.

21. Further, the Chamber should exercise its discretion under rule 68(2)(b)(i) to allow the introduction of the Rule 68(2)(b) Documents. First, Witness P-0428's prior recorded statement is relevant and probative within the meaning of rule 63(2) of the Rules. That being said, second, Witness P-0428's prior recorded statement does not relate to disputed issues at the core of this case. As may be seen from the summary of evidence at Annex 2, Witness P-0428's evidence broadly relates to describing [REDACTED].²⁰ In particular, this witness speaks to [REDACTED].²¹ Witness P-0428's evidence "cannot reasonably be said to provide evidence that can assist the Chamber in resolving the central issues in the case."²² Third, the 68(2)(b) Documents bear sufficient *indicia* of reliability: the statement was

¹⁹ As required by paragraph 51 of the Conduct Directions; See Annex 2.

²⁰ See Annex 2.

²¹ [REDACTED].

²² See ICC-02/11-01/15-573-Red, para. 20.

obtained by the Prosecution in the ordinary course of investigations; and Witness P-0428 voluntarily provided [REDACTED] statement in the language [REDACTED] fully speaks and understands. Fourth, the interests of justice would be served by the introduction of this evidence, as the Trial Chamber will save court time by receiving, in written form, the evidence of a witness whose statement does not address matters that are pivotal to the case, and will spare the witness the burden of appearing.²³ Finally, introduction of the Rule 68(2)(b) Documents is not prejudicial to or inconsistent with the rights of the Accused.²⁴

22. The accompanying annexes should be submitted into evidence along with the prior recorded statement as they are referenced in the statement, and because the relevant passages in the statement would not be understandable if these materials were not also admitted.²⁵

23. As for the criteria under rules 68(2)(b)(ii) and (iii), in the event that the Chamber determines, in the exercise of its discretion, that the Rule 68(2)(b) Documents should, in principle, be admitted, the Prosecution will obtain the requisite accompanying declaration by Witness P-0428, in accordance with rule 68(2)(b)(iii) of the Rules and the Chamber's corresponding decision.²⁶

C. Introduction of Rule 68(3) Documents

24. The Prosecution requests the *conditional* introduction and submission of the Rule 68(3) Documents, namely the prior recorded statements, accompanying annexes and related documents of Witnesses P-0414 and P-0501, as listed at Confidential Annex 1. The referenced documents include, in the case of Witness P-0414, material cited in the statement, without which the statement would not be

²³ See ICC-02/11-01/15-573-Red, para. 21.

²⁴ See ICC-02/11-01/15-573-Red, para. 10.

²⁵ Conduct Directions, para. 51. See also ICC-02/11-01/15-573-Red, para. 9.

²⁶ ICC-02/11-01/15-303. See also ICC-02/11-01/15-573-Red, para. 23.

understandable. Confidential Annex 2 provides summaries of the evidence of each witness and time estimates for examination by the calling party. Also at Annex 2, the Prosecution (i) identifies the specific passages which the Prosecution wishes to submit as evidence;²⁷ (ii) provides the ERNs for the other material, within the meaning of paragraph 51 of the Conduct Directions, which it is sought to admit under rule 68(3); and (iii) additional topics to be addressed orally, within the meaning of paragraph 49 of the Conduct Directions.

25. The Chamber should exercise its discretion to allow the introduction of the Rule 68(3) Documents. First, Witness P-0414's evidence is of limited nature and is not central to the case. As may be seen from the summary of evidence at Annex 2, Witness P-0414's evidence broadly relates to her investigative field work and report drafting at ONUCI during the post-election violence period.²⁸

26. Second, Witness P-0501's evidence is also of limited nature and although it touches upon facts of great importance to the case [REDACTED] Witness P-0501 himself [REDACTED] that is expected to be presented to the Chamber.²⁹ As may be seen from the summary of evidence at Annex 2, Witness P-0501's evidence broadly relates [REDACTED]. In particular he will describe [REDACTED]³⁰ [REDACTED]³¹ [REDACTED].³²

27. Third, in relation to both witnesses, the Rule 68(3) Documents bear sufficient *indicia* of reliability. They were obtained by the Prosecution in the ordinary course of investigations and Witnesses P-0414 and P-0501 each voluntarily provided his/her statement in a language he/she fully speaks and understands.

²⁷ As required by paragraph 51 of the Conduct Directions.

²⁸ See Annex 2.

²⁹ See ICC-02/11-01/15-573-Red, para. 38.

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

28. Fourth, in relation to both witnesses, admitting the Rule 68(3) Documents would foster judicial efficiency and economy in reducing the estimated duration of the Prosecution's case-in-chief.
29. Finally, introduction of the Rule 68(3) Documents is not prejudicial to or inconsistent with the rights of the Accused as they each will have ample opportunity to put questions to Witnesses P-0414 and P-0501.³³ In all of the circumstances, there is no overriding reason preventing the streamlining of the presenting of evidence *via* rule 68(3), provided that the Defence is given adequate opportunity to examine the Rule 68(3) Witnesses.³⁴
30. As for the criteria under rule 68(3), Witnesses P-0414 and P-0501 will be present before the Trial Chamber, and the Prosecution, Defence and Chamber will have the opportunity to examine both witnesses during the proceedings. The request is made for conditional introduction of the Rule 68(3) Documents because rule 68(3) posits a witness' actual presence before the Chamber and consent to the submission of the previously recorded testimony as conditions of admissibility of their previously recorded testimony.³⁵
31. By its terms, rule 68(3) allows the tendering party to examine the witness whose previously recorded statement it seeks to admit. The Prosecution seeks permission to question this witness to confirm, clarify or highlight passages of the prior recorded statement, and to question on additional topics.³⁶ These topics are described in the attached Annex 2.

³³ See ICC-02/11-01/15-573-Red, para. 24.

³⁴ See ICC-02/11-01/15-573-Red, para. 38.

³⁵ See rule 68(3) of the Rules: "if the witness [...]. See also ICC-02/11-01/15-573-Red, para. 39.

³⁶ Conduct Directions, para. 49.

32. With respect to Witness P-0414, the Prosecution anticipates asking her to expand upon her knowledge of the methodology and circumstances under which the ONUCI reports were drafted, both in relation to the five charged incidents and other contextual incidents including as listed in the documents containing the charges.³⁷ Moreover, Witness P-0414 will be asked to describe incidents she had personal knowledge of through her own investigative work.
33. With respect to Witness P-0501, the Prosecution anticipates asking him to [REDACTED]. To this end, the Prosecution will also ask Witness P-0501 questions in clarification of the annexes to his statement [REDACTED]³⁸ and [REDACTED] which the Prosecution seeks (below) to introduce under paragraph 43 of the Conduct Directions.³⁹

D. Limited witness preparation to confirm and/or correct the statement

34. In addition, the Prosecution seeks permission to 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. The Prosecution envisages the presence of one Prosecution representative and a representative from the VWU in order to do this. Any corrections would be recorded in writing and notified to the Chamber, Parties and participants, as soon as practicable and, in any event, in advance of the witness testifying. The witness preparation would not extend beyond recording corrections to the witness statement, if any. The Prosecution in no way seeks to revisit the Chamber's decision on witness preparation and familiarisation,⁴⁰ but simply proposes this measure as a logistical arrangement which could streamline the testimony of Rule 68(3) Witnesses. Time spent in

³⁷ ICC-02/11-01/11-592-Conf-Anx2-Corr; ICC-02/11-02/11-124-Conf-Anx2-Corr.

³⁸ Annex 2 to Witness P-0501's statement, CIV-OTP-0071-0920; Annex 3 to Witness P-0501's statement, CIV-OTP-0071-0962; Annex 4 to Witness P-0501's statement, CIV-OTP-0071-0965.

³⁹ See *infra* paras. 28–30.

⁴⁰ ICC-02/01-01/15-355.

court to correct errors in the statement will defeat the purposes behind the principle enshrined at rule 68(3).

APPLICATION UNDER PARAGRAPH 43 OF THE CONDUCT DIRECTIONS

35. The Prosecution requests the introduction of the Paragraph 43 Documents as listed in Annex 3. While these documents themselves are not annexed, they are available to the Trial Chamber and the Parties on e-court.⁴¹ Paragraph 43 of the Conduct Directions allows Parties to “introduce documentary evidence directly, without producing it by or through a witness.”⁴² As required under paragraph 44 of the Conduct Directions, the Prosecution indicates at Annex 3 (i) each item’s relevance and probative value, including authenticity; and (ii) the date of disclosure.⁴³

36. As may be seen from Annex 3, the Paragraph 43 Documents related to Witnesses P-0549 and P-0550 are composed, for each, of reports describing how the various 360 degree presentations are put together,⁴⁴ and the 360 degree presentations themselves.⁴⁵ In addition, the reports are accompanied by Declarations signed by both Witnesses P-0549 and P-0550, certifying that the contents of the reports are true and correct.⁴⁶ Submitting these Paragraph 43 Documents will save court time by avoiding the need to call Witnesses P-0549 and P-0550 simply to repeat or

⁴¹ The two one page declarations (Witness P-0549: English version CIV-OTP-0092-0251; French version: CIV-OTP-0092-0252; Witness P-0550: French version CIV-OTP-0092-0254; English version CIV-OTP-0092-0255) will be disclosed and uploaded to e-court during the course of the week of 13 June 2016. The 360 degree presentations have been disclosed (see Annex 3) but are too large to upload in e-court. The Prosecution has distributed CD-Roms containing the 360 presentations to the Trial Chamber, Parties and the participant.

⁴² ICC-02/01-01/15-498-AnxA, para. 43.

⁴³ ICC-02/01-01/15-498-AnxA, para. 44.

⁴⁴ Witness P-0549: Technical note on 360 presentation on Abobo district, CIV-OTP-0073-0915; Technical note on 360 presentation on Lem Mosque, CIV-OTP-0078-0088; Technical note on 360 presentation on Carrefour Djeni Kobenan, CIV-OTP-0083-1415; Technical note on 360 presentation on the RTI and the Carrefour de la Vie, CIV-OTP-0083-141 ; Technical note on 360 presentation on the Banco Rond Point, CIV-OTP-0083-1411. Witness P-0550: The “Forensic mission to Abobo, Abidjan, Côte d’Ivoire, [REDACTED] 2013” report, CIV-OTP-0073-0906.

⁴⁵ 360 presentation on Abobo district, CIV-OTP-0073-0862; 360 presentation on Lem mosque, CIV-OTP-0078-0085; 360 presentation on Carrefour Djeni Kobenan, CIV-OTP-0084-3957; 360 presentation on the RTI and the Carrefour de la Vie, CIV-OTP-0084-3959; 360 presentation on the Banco Rond Point, CIV-OTP-0084-3961.

⁴⁶ Witness P-0549: English version CIV-OTP-0092-0251; French version: CIV-OTP-0092-0252; Witness P-0550: French version CIV-OTP-0092-0254; English version CIV-OTP-0092-0255.

confirm the content of their reports. The Paragraph 43 Documents are admissible because they are relevant and probative, as indicated in Annex 3. The Prosecution anticipates filing similar applications, in due course, together with the relevant investigator mission report(s), as appropriate (with accompanying Declarations) describing, for example, the circumstances of collection of the relevant body of documents to which the selected material belongs.

37. As may be seen from Annex 3, the Paragraph 43 Documents related to Witness P-0501 are [REDACTED]⁴⁷ [REDACTED]⁴⁸ [REDACTED]⁴⁹ [REDACTED].⁵⁰ Because the annexes to Witness P-0501's statement are composed of [REDACTED]⁵¹ the Prosecution is submitting [REDACTED] as Paragraph 43 Documents. Submitting these Paragraph 43 Documents ahead of Witness P-0501's testimony promotes the efficiency of proceedings because introducing the documentary evidence directly and prior to Witness P-0501's testimony will save time by allowing Witness P-0501 to be examined about the documents without having to first take the time to introduce the documents through the witness. The Paragraph 43 Documents are admissible because they are relevant and probative, as indicated in Annex 3.

Conclusion

38. For the foregoing reasons, the Prosecution requests that the Chamber:

- (i) *Conditionally* introduce and consider submitted the Rule 68(2)(b) Documents, subject to the fulfilment of the further conditions of admissibility set out in rule 68(b)(ii) and (iii) of the Rules.

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ Annex 2 to P-0501's statement, CIV-OTP-0071-0920 is a copy of 42 pages of [REDACTED]; Annex 3 to Witness P-0501's statement, CIV-OTP-0071-0962, is a copy of three pages of [REDACTED]; Annex 4 to Witness P-0501's statement, CIV-OTP-0071-0965, is a copy of five pages of [REDACTED].

- (ii) *Conditionally* introduce and consider submitted the Rule 68(3) Documents, subject to the fulfilment of the further conditions of admissibility set out in rule 68(3) of the Rules.
- (iii) Grant the Prosecution leave to conduct a limited examination by the calling party of the Rule 68(3) Witnesses.
- (iv) Grant the Prosecution leave to conduct a limited witness preparation of the Rule 68(3) Witnesses only to confirm and, if necessary, note corrections to the statements of these witnesses.
- (v) Submit the Paragraph 43 Documents.



Fatou Bensouda, Prosecutor

Dated this 30th day of September 2016

At The Hague, The Netherlands