



Original: English

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

Date: 9 February 2017

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 Public Annexes 1 & 2

Public Redacted version of "Prosecution's application to conditionally admit the prior recorded statement and related documents in relation to Witness P-0045 under rule 68(3)", 16 December 2016, ICC-02/11-01/15-775-Conf

Source: Office of the Prosecutor

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

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Other

Introduction

1. The Prosecution seeks conditional submission into evidence of the prior recorded statement of Witness P-0045 and its annexes (collectively, his “Statement”) in accordance with rule 68(3) of the Rules of Procedure and Evidence (“Rules”), paragraph 49 of the amended and supplemented directions on the conduct of the proceedings (“Conduct Directions”),¹ articles 69(2), 64(9)(a) and 69(4) of the Rome Statute (“Statute”) and rule 63(2) of the Rules.
2. The Prosecution will rely on the testimony of Witness P-0045 to prove, amongst other, the means of communications within the FDS, the parallel structure and the repression of the RTI march on 16 December 2010.
3. The Prosecution seeks the introduction of Witness P-0045’s Statement conditionally, pending the Witness’s fulfilment of rule 68(3) requirements.
4. The Statement is admissible because Witness P-0045 will be present before the Chamber, the Parties and participants and the Chamber will have the opportunity to examine the Witness during his testimony. His Statement is *prima facie* relevant, probative and reliable, and Witness P-0045 will be asked to confirm its accuracy.
5. Introduction of Witness P-0045’s Statement is not prejudicial to or inconsistent with the rights of the Accused, since Defence will have the opportunity to question the Witness on its content and the Chamber will be able to assess the credibility of the Witness in the courtroom.

Confidentiality

6. 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 witness identity since it may file a request for in court protective measures.

¹ ICC-02/11-01/15-498-AnxA.

Submissions

7. The Prosecution incorporates by reference the law as set out in its submissions, including the First Rule 68 Application, paragraphs 11-12 and 17-21² and as set out in its Third Rule 68 Application, paragraphs 15-18.³ Furthermore, it recalls the Chamber's Decisions on the governing law.⁴
8. The Prosecution requests the conditional⁵ introduction and submission of Witness P-0045's Statement, namely his statement and accompanying annexes as listed at Confidential Annex 1. Confidential Annex 2 provides a summary of the Witness's evidence, time estimates for examination by the calling Party, the ERN of the submitted statement, the ERNs of the other material tendered for submission along with the Statement under rule 68(3),⁶ additional topics to be addressed orally,⁷ and the number of hours for examination. The Chamber should exercise its discretion to allow the introduction of the Statement and the accompanying annexes.

The Statement is relevant to the charges

9. Witness P-0045 is a retired FDS officer and former staff member at the Presidency of Côte d'Ivoire. He specialised in radio communications and, during the post-electoral crisis, he documented events through the monitoring of conversations he intercepted of members of the Republican Guard, the *Gendarmerie* and a special police unit. His evidence focuses on the methodology applied to intercept communications, the radio system he set up in his house and the radio frequencies used by these FDS units. Witness P-0045 will explain that he heard radio conversations during which code names were used by FDS officers of the

² ICC-02/01-01/15-487-Red-Corr.

³ ICC-02/11-01/15-636-Red.

⁴ ICC-02/11-01/15-573-Conf, para. 9; ICC-02/11-01/15-722-Conf, para.5.

⁵ Contingent upon their actual presence before the Chamber and consent to the submission of the previously recorded testimony. See para. 25 below.

⁶ Within the meaning of paragraph 51 of the Conduct Directions.

⁷ Within the meaning of paragraph 49 of the Conduct Directions.

Republican Guard, the *Gendarmerie* and the specialised police unit. Witness P-0045 never heard any communication from the Accused and his statement does not relate to the acts or conduct of the Accused.

10. His evidence mainly corroborates evidence that has already been heard or will be heard in this case. Witness P-0347 has testified *viva voce* on the codes used by the Republican Guard; document CIV-OTP-0012-0257 listing the codes and corresponding names has been submitted during Witness P-0347's testimony.⁸ Moreover, [REDACTED], will also give evidence on code names used by the police.⁹ Witness P-0045's evidence corroborates the testimony of Witness P-0330 in relation to the parallel structure and orders contravening the normal chain of command.¹⁰ Additionally, [REDACTED]¹¹ and [REDACTED]¹² amongst others will also testify about this issue.
11. Witness P-0045's evidence also relates to the repression of the 16 December 2010 march on the RTI, as he heard orders to "[translation] clean up" a road which led to the RTI and "[translation] to ram without restraint into the crowd" ("*rentrer franchement dans la foule*").¹³ These are specific instances where the Witness heard on the radio how the repression of protesters was implemented. The Trial Chamber received a large body of evidence of this repression both from crime base witnesses heard during the block of rule 68(3) witnesses (for example, Witnesses P-0578¹⁴ and P-0589¹⁵ testified that the FDS shot at unarmed civilians), and insider witnesses such as Witness P-0435¹⁶.

⁸ ICC-02/11-01/15-T-77-CONF-ENG ET, p. 80-83.

⁹ [REDACTED].

¹⁰ ICC-02/11-01/15-T-69-CONF-ENG ET, p. 3-7.

¹¹ [REDACTED].

¹² [REDACTED].

¹³ Annex 6 of Witness P-0045's statement, CIV-OTP-0005-0031 at page 0032.

¹⁴ ICC-02/11-01/15-T-84-CONF-ENG ET, p. 16, l. 9 to p. 18, l. 21.

¹⁵ Witness P-0589's statement, CIV-OTP-0084-0105 at 0112-0113, paras 34-36.

¹⁶ ICC-02/11-01/15-T-89-CONF-FRA, p. 65-67, ICC-02/11-01/15-T-92-CONF-FRA, p. 77.

The Statement and its annexes are reliable

12. The Statement bears sufficient *indicia* of reliability. The statement and annexes were obtained by the Prosecution pursuant to rule 111 of the Rules and in a language that Witness P-0045 fully speaks and understands.
13. The statement's annexes consist of the contemporaneous notes the witness took during the intercepted conversations¹⁷ and some summaries he made after taking these notes.¹⁸ Witness P-0045 provides the period of time when he drafted the summary during or after the post-election crisis, and the chain of custody of the original notes. Furthermore, the Witness provides additional details regarding the content of the annexes in his statement. The annexes therefore also bear sufficient *indicia* of reliability and their admission together with the statement is necessary as they form an inseparable part of the statement.
14. The Witness explains in his statement that he noted down what was said literally. That is to say that he did not interpret nor summarise when taking notes during the intercepted conversations.¹⁹ The Witness further states that after the conflict, he summarised some of his notes.²⁰

Admitting the Statement and annexes will promote judicial economy

15. By its terms, rule 68(3) allows the tendering party to examine the Witness whose previously recorded statement it seeks to admit. The Prosecution intends to question Witness P-0045 to clarify or expand on topics of his prior recorded statement.²¹ These topics are described in Confidential Annex 2. Nevertheless, admitting Witness P-0045's Statement would foster judicial efficiency and economy in reducing the estimated duration of his examination, as the

¹⁷ Annex 6, CIV-OTP-0005-0031; Annex 7, CIV-OTP-0005-0033.

¹⁸ Annex 1, CIV-OTP-0005-0019; Annex 2, CIV-OTP-0005-0022; Annex 3, CIV-OTP-0005-0024; Annex 4, CIV-OTP-0005-0025; Annex 5, CIV-OTP-0005-0026.

¹⁹ CIV-OTP-0005-0002 at 0008, para. 39.

²⁰ CIV-OTP-0005-0002 at 0011, para. 61; at 0012, para. 67 and paras 70-71, at 0013, para. 76.

²¹ Conduct Directions, para. 49.

Prosecution should now only need 1.5 hour of examination, rather than the initially estimated 4 hours.

Other factors

16. The introduction of Witness P-0045's Statement is not prejudicial to or inconsistent with the rights of the Accused as they each will have ample opportunity to put questions to P-0045.²²
17. Moreover, the evidence of this Witness does not reach the level of importance which would require hearing his testimony orally in full. The Appeals Chamber held in a previous decision in this case that the submission of evidence in writing, *in lieu* of oral testimony, may be rejected if it is deemed to be important in light of the charges.²³ While every witness's testimony is important, Witness P-0045's testimony is supportive of other, more central witnesses who were involved directly in the operations in Abidjan. As such, it is submitted that the evidence of this Witness does not meet the above-mentioned threshold of importance.
18. As for the criteria under rule 68(3), the Witness will be present in the courtroom, and the Prosecution, Defence, Legal Representatives and Trial Chamber will have the opportunity to examine them during the proceedings. The request seeking the introduction of the Statement is conditional to the requirements of rule 68(3), namely the Witness's actual presence before the Chamber and consent to the submission of the previously recorded testimony.²⁴

Conclusion

19. For the foregoing reasons, the Prosecution requests that the Chamber conditionally receive and consider submitted the Statement of Witness P-0045, subject to the fulfilment of the further conditions of admissibility set out in rule

²² See ICC-02/11-01/15-573-Red, para. 24.

²³ ICC-02/11-01/15-744-Conf, paras.71-72.

²⁴ See rule 68(3) of the Rules: "if the witness [...]. See also ICC-02/11-01/15-573-Red, para. 39.

68(3) of the Rules.

A handwritten signature in blue ink, appearing to read 'Fatou Bensouda', is written over a horizontal line.

Fatou Bensouda, Prosecutor

Dated this 9th day of February 2017

At The Hague, The Netherlands