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**International
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2017

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 Response to the “Prosecution’s application to conditionally admit the prior recorded statement and related documents in relation to Witness P-0045 under rule 68(3)” (ICC-02/11-01/15-775-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. On 16 December 2016, the Prosecution filed its application to conditionally admit prior recorded statement of Witness P-0045 and related documents under Rule 68(3) of the Rules of Procedure and Evidence (“the Application”).¹ The Prosecution considers that the said statement is relevant to the charges,² that together with its annexes, it is reliable³ and that admitting them will promote judicial economy.⁴ The Prosecution also asserts that the requested admission would not be prejudicial to or inconsistent with the rights of the Accused.⁵ Finally, it submits that the evidence expected to be given by Witness P-0045 would not reach the level of importance which would require hearing his testimony orally in full.⁶
2. The Defence of Charles Blé Goudé (“the Defence”) hereby opposes the Application. While the Defence avers that in certain instances there may be certain material advantages to admitting prior recorded testimony and documentary evidence of such testimony, it is of the view that, regarding Witness P-0045, such admission would not serve judicial economy and good trial management and that it would be prejudicial to or inconsistent with the rights of the Accused.

¹ ICC-02/11-01/15-775-Conf.

² *Ibid.*, paras. 9-11.

³ *Ibid.*, paras. 12-14.

⁴ *Ibid.*, para. 15.

⁵ *Ibid.*, para. 16.

⁶ *Ibid.*, para. 17.

II. Confidentiality

3. Pursuant to regulation 23bis (2) of the Regulations, the Defence requests that the present response be received and classified as “confidential”, as it refers to a request which has been classified as confidential.

III. Procedural history

4. On 4 May 2016, Trial Chamber I (“the Chamber”) issued the “Decision adopting amended and supplemented directions on the conduct of the proceedings” (“the Directions”).⁷
5. On 16 December 2016, the Prosecution filed the Application.⁸

IV. Applicable law

6. The primacy of the principle of orality under Article 69(2) of the Rome Statute (“the Statute”) creates the presumption that “the testimony of a witness in trial shall be given in person” and that any departure therefrom “shall not be prejudicial to or inconsistent with the rights of the accused”. Rule 68 of the Rules of Procedure and Evidence (“the Rules”) constitutes an exception to this general rule, and despite the 2013 amendment to this Rule, the Appeals Chamber in *The Prosecutor v. Ruto and Sang* reiterated the Court’s earlier rulings on the issue, and found that a cautious item by item assessment must be made of the evidence that the Prosecution is seeking to introduce as prior recorded testimony.⁹ In the present case, the Appeals Chamber recently

⁷ ICC-02/11-01/15-498, with Annex 1 and Annex A.

⁸ ICC-02/11-01/15-775-Conf.

⁹ ICC-01/09-01/11-2024, para. 85.

reaffirmed such approach of the rule of orality and the cautious assessment of its exceptions.¹⁰

7. Material may be admitted as prior recorded testimony under Rule 68(3) if the following five requirements are met: (1) the witness must be present, (2) the witness must not object to the admission of such testimony, (3) the material in question must constitute previously recorded testimony, (4) the witness must be subject to examination by the parties and the Chamber, and (5) any admission must be consistent with the rights of the accused, and the Court must consider whether the material admitted relates to issues materially in dispute.¹¹

V. Submissions

- a. The material which the Prosecution seeks to admit concerns core issues in the case which are materially in dispute
8. In determining whether admitting prior recorded testimony under Rule 68 would be prejudicial to the Accused, Chambers have considered *inter alia* whether the evidence concerned relates to issues that are materially in dispute, whether the evidence is central in the case, and whether the evidence is corroborative of other evidence.¹²

¹⁰ ICC-02/11-01/15-744, para. 65, *citing* to Bemba OA5 OA6 ICC-01/05-01/08-1386, para. 76; *See also* ICC-02/11-01/15-744, paras 65 and 69, *citing* to Bemba OA5 OA6 ICC-01/05-01/08-1386, para. 78 (referring to the “general requirement of in-court personal testimony”); *See also* Partially dissenting opinion of Judge Kuniko Ozaki, ICC-02/11-01/15-744-Anx, paras. 7-9.

¹¹ Rule 68(1) requires that the material concerned must constitute previously recorded testimony and be applied in accordance with article 69(2) and the rights of the accused, whereas Rule 68(3) provides further requirements such as the witness not objecting to the submission of the testimony, and the opportunity for the parties and the Chamber to examine the witness.

¹² ICC-02/11-01/15, para. 85 *citing* ICC-01/05-01/08-1386, para. 78; ICC-01/05-01/08-1386, para. 78; ICC-01/05-01/08-886, para. 8.

9. In the Application, the Prosecution states that “the evidence of this Witness does not reach the level of importance which would require hearing his testimony orally in full”.¹³ However, the Prosecution also states that “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”.¹⁴
10. The Defence notes that the issues regarding the existence of a so-called “parallel structure” and consecutive “orders contravening the normal chain of command” are not only central to the case but also materially in dispute. They even constitute the very essence of the charges alleged against the Accused.
11. According to the Prosecution, Witness P-0045’s evidence is also related to the 16 December 2010 march on the RTI, which is the first incident constituting the first charge against the Accused. It then cannot be held that Witness P-0045’s testimony does not relate to core issues of the case. A core issue in this case is whether the march on the RTI to install a new Directeur Général constituted a hostile act of an insurrectional nature by the pro-Ouatarra forces because it goes to the heart of the existence or not of an alleged policy to attack civilians under Article 7 of the Statute. Besides, this central issue which covers the purpose, the organisation and the progress of the 16 December 2010 march is materially in dispute.
12. Therefore, Witness P-0045’s evidence does reach the level of importance which requires hearing his testimony orally in full.

- b. The material which the Prosecution seeks to admit cannot be seen as corroborative of other evidence

¹³ ICC-02/11-01/15-775-Conf, para. 17. *See also, Ibid.* para. 2.

¹⁴ *Ibid.*, para. 10.

13. The notion of corroboration of evidence implies confirmation and reinforcement of other evidence. In the Application, the Prosecution refers to corroboration of evidence to be given by witnesses who have not appeared yet before the Chamber.¹⁵ In these conditions, it is materially impossible to draw any link of corroboration as at the present time, the Chamber, the parties and the participants do not know yet the content of the evidence to be given by witnesses who will appear after Witness P-0045. Following the Prosecution's reasoning would amount to assuming or even presuming the content of evidence that have not yet been provided to the case record.
14. Moreover, the Defence recalls that Witness P-0045 is a former FDS officer specialised in radio communications.¹⁶ Because of such qualification, his testimony may be reasonably expected to be of a very technical nature. The Prosecution expects him to testify on "the methodology applied to intercept communications, the radio system he set up in his house and the radio frequencies used by the FDS units".¹⁷ Hence, the Prosecution inaccurately described Witness P-0045's evidence as "corroborative" of other evidence. The Defence is of the view that Witness P-0045's evidence would attempt to "complement" and not "corroborate" the allegations developed by the Prosecution in its narrative, which consists of a partial and disputed representation of the events submitted to the Chamber in the context of the present trial. In other words, such evidence is not objectively corroborative but requires a certain interpretation to be seen as corroborative. For the foregoing reasons, the Defence considers that the evidence to be given by P-0045 is of such technical importance that it requires to be fully and orally explained in-court by the witness himself in the context of the examination by the Prosecution.

¹⁵ *Ibid.*, referring to [REDACTED] and [REDACTED].

¹⁶ *Ibid.*, para. 9.

¹⁷ *Ibid.*

- c. The admission of the material related to Witness P-0045 will not promote judicial economy

15. In the instant case, the Appeals Chamber decided that “[w]hile no one factor is, as a matter of principle, determinative, the Appeals Chamber considers, in particular, that where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally”.¹⁸ The evidence to be given by Witness P-0045 is central to core issues of the case that are materially in dispute and appears as uncorroborated.¹⁹ Following the Appeals Chamber Judgment, in the present case, the Chamber must be extra vigilant when assessing the prejudice that the requested introduction of a prior recorded statement may cause to the rights of the Accused or to the fairness of the trial.

16. In the Application, the Prosecution intends to prove that there would be no prejudice to the Accused as Defence will have ample opportunity to question the witness.²⁰ As this opportunity is directly provided for by Rule 68(3) of the Rules, it cannot be considered as an element to take into account to determine whether the rights of the Accused are prejudiced by the Application. On the contrary, the burden for the Prosecution is to prove that, in the context of the application of Rule 68(3) of the Rules which allow the Defence to examine the

¹⁸ ICC-02/11-01/15-744, para. 69, emphasis added. *See also* Partially dissenting opinion of Judge Kuniko Ozaki, ICC-02/11-01/15-744-Anx, paras. 9 and 15.

¹⁹ It appears that the Appeals Chamber made an alternative of the last condition by using the word “or”: “[w]hile no one factor is, as a matter of principle, determinative, the Appeals Chamber considers, in particular, that where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally”. Emphasis added.

²⁰ ICC-02/11-01/15-775-Conf, para. 16.

witness, there will be no prejudice for the rights of the Accused. The Prosecution may not do so by simply recalling the terms of the legal provision it seeks application of.

17. Besides, the Prosecution argues that “admitting Witness P-0045’s Statement would foster judicial efficiency and economy in reducing the estimated duration of his examination, as the Prosecution should now only need 1.5 hour of examination, rather than the initially estimated 4 hours”.²¹

18. The Defence strongly opposes this one-sided appreciation of judicial efficiency. Although it may be correct to consider that the Prosecution would need 1.5 hour instead of 4 hours, it would be unfair to ignore from the global appreciation of judicial efficiency and economy the time needed by the Defence to examine the witness. While for the Prosecution, the admission of a prior recorded testimony may directly result in a reduction of the amount of time necessary to examine the witness, the calculation is very different when it comes to the examination by the Defence.

19. Indeed, when the full prior recorded testimony is admitted to the case record, the Defence, following its mandate and its duty of diligence, has the obligation to challenge every part of the testimony that may be challenged. As it has already happened in the present trial,²² it may result in an extension of the time necessary to fully examine the witness, as every part of his statement may be subject to questions by the Defence and re-examination by the Prosecution.

²¹ *Ibid.*, para. 15.

²² For example, Witness P-0414 appeared before the Chamber between 19 September 2016 and 21 September 2016. ICC-02/11-01/15-T-74-Red-ENG WT 19-09-2016: the examination by the Prosecution lasted from 11:50:45 (p. 23) to 15:59:56 (p. 56) while it took the rest of the 19 September 2016 session and the next two days until 21 September 2016 15:42:42 for both defence teams to examine the witness (See ICC-02/11-01/15-T-76-Red-FRA WT 21-09-2016, p. 86).

20. Although the Prosecution chose to use the notion “judicial economy” in the Application, one may understand that through the promotion of judicial economy, the Prosecution seeks the application of the concept of good trial management which has been recently accepted by the Appeals Chamber as a factor that may be considered when making a determination under Rule 68(3) of the Rules. However, following Judge Kuniko Ozaki’s partial dissent, the Defence is of the view that good trial management in general, and the expeditiousness of the proceedings in particular, should not be applied in a manner that would be prejudicial to or inconsistent with the rights of the Accused. More specifically, the Defence submits that the assessment of the promotion of judicial economy should not only take into account the reduction of the amount time necessary for the Prosecution to examine the witness when his/her prior recorded statement is admitted, but should also integrate the consequences such admission bears on the Defence, i.e. the obligation to question the witness on every topic mentioned in the prior recorded statement that may be of relevance for the Defence.

RELIEF SOUGHT

For the fore going reasons, the Defence respectfully requests the Chamber to:

- REJECT the Application.

Respectfully submitted,



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

Dated this

16 February 2017

At The Hague, the Netherlands