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

Date: 12 April 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 Confidential Annexes 1 & 2

Lesser public redacted version of "Prosecution's application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3), and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)", 13 February 2017, ICC-02/11-01/15-796-Red

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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Introduction

1. This request relates to seven crime base witnesses upon whose evidence the Prosecution will rely to prove Incident 2: Attack on Yopougon (25 to 28 February 2011) ("Incident 2").
2. The Prosecution seeks conditional submission into evidence of the prior recorded statements, including related documents (collectively, "Rule 68(3) Documents"), of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 ("Rule 68(3) Witnesses"), 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 and articles 69(2), 64(9)(a) and 69(4) of the Rome Statute ("Statute") and rule 63(2) of the Rules.
3. The Prosecution further requests, under article 69(2) of the Statute and rule 67(1) of the Rules that Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 testify *viva voce* by means of video-link technology ("AVL") [REDACTED].
4. The Single Judge has ordered that the Prosecution file, no later than 28 February 2017, a consolidated application under rule 68 of the Rules for all remaining witnesses.² This application is filed separately, and in advance of the 28 February 2017 deadline, because the relevant witnesses are scheduled to testify relatively soon.³

Confidentiality

5. 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.

¹ ICC-02/11-01/15-498-AnxA.

² ICC-02/11-01/15-787, p. 6.

³ See ICC-02/11-01/15-788-Conf-AnxA, amending ICC-02/11-01/15-735-Conf-AnxA.

Procedural History

6. On 20 October 2016, the Prosecution filed its next order of witnesses pursuant to paragraph 4 of the amended and supplemented Directions on the conduct of the proceedings (“20 October 2016 Order of Witnesses”).⁴ It indicated that it would be submitting an application for Witnesses P-0433, P-0436, P-0402, P-0438 and P-0459 to testify under rule 68(3) of the Rules.⁵
7. On 31 January 2017, the Prosecution filed its submission of information pursuant to Chamber’s order ICC-02/11-01/15-787.⁶ In Annex A to that filing, the Prosecution slightly modified its 20 October 2016 Order of Witnesses (moving Witness P-0108 to the start, and adding Witness P-0109 to the end of the block of crime base witnesses for Incident 2). It further indicated that it would seek to submit the testimony of Witnesses P-0108 and P-109, as well as the testimony of Witnesses P-0433, P-0436, P-0402, P-0438 and P-0459 under rule 68(3), and that it would apply for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 to testify by means of AVL.⁷

Submissions

Rule 68 Applications

Applicable Law

8. The Prosecution incorporates by reference the law as set out in its first application under rule 68, in paragraph 11 on article 69(2) of the Statute; paragraph 12 on the meaning of “prior recorded testimony”; and paragraphs 20-21 on the applicability of amended rule 68.⁸
9. 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

⁴ ICC-02/11-01/15-735.

⁵ ICC-02/11-01/15-735, para. 6; ICC-02/11-01/15-735-Conf-AnxA.

⁶ ICC-02/11-01/15-788.

⁷ ICC-02/11-01/15-788-Conf-AnxA. Although an application was also foreshadowed for Witness P-0433, the Prosecution clarified by email to the Trial Chamber at 17:02 on the day of filing that it intended to call Witness P-0433 to testify in person.

⁸ ICC-02/11-01/15-487-Red-Corr.

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.⁹

10. Rule 68(1) also requires that the introduction of prior recorded testimony is not prejudicial to or inconsistent with the rights of the Accused.¹⁰

11. In its Decision on the First Rule 68 Application, this Chamber found that “a decision authorising the introduction of testimonial evidence via 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.¹¹” As the Appeals Chamber has stated, “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.¹²” However, “(t)he fact that the evidence in question may have been materially in dispute, related to facts central to the case and may have been uncorroborated does not necessarily require rejection of” an application under rule 68(3).¹³ The Prosecution submits - as recently stated by the Trial Chamber in the *Ongwen* case in the context of a request under rule 68(2)(b) of the Rules – that “it is ultimately the Chamber, not the parties, which determines what is materially in dispute in the case,” based on an objective assessment, “irrespective of the parties’ own assertions,” of the “degree to which a prior recorded

⁹ ICC-02/11-01/15-573-Red, para. 24. See rule 68(3) of the Rules.

¹⁰ ICC-02/11-01/15-573-Red, para. 24.

¹¹ ICC-02/11-01/15-573-Red, para. 25. See also ICC-02/11-01/15-744, paras. 71-72.

¹² ICC-02/11-01/15-744, para. 69.

¹³ ICC-02/11-01/15-744, para. 81. See also, ICC-02/11-01/15-573-Red, para. 24.

testimony potentially impacts on material matters actually contested in the proceedings.¹⁴”

12. As the Appeals Chamber in this case has also affirmed, good trial management and the relative importance of the witnesses are relevant factors for the Chamber to consider in making a determination under rule 68(3).¹⁵ The factors referred to by the Appeals Chamber in the *Bemba* case “are not requirements but, rather, factors that may be considered in assessing whether the introduction of prior recorded testimony under rule 68(3) of the Rules is prejudicial to or inconsistent with the right of the accused or with the fairness of the trial generally.¹⁶”

13. In its Decision on the First Rule 68 Application, this Chamber also found that rule 68(3) of the Rules 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.¹⁷” It further considered 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.¹⁸”

14. Finally, the Chamber has found that “[i]n case of introduction of written statements under Rule 68 of the Rules, any documentary evidence annexed is also to be considered submitted.¹⁹”

Introduction of Rule 68(3) Documents

15. The Prosecution requests the *conditional*²⁰ introduction and submission of the Rule 68(3) Documents, namely the prior recorded statements, accompanying annexes

¹⁴ ICC-02/04-01/15-596-Red, para. 15. *See also*, in the context of rule 68(3) of the Rules, ICC-02/04-01/15-621, para. 8.

¹⁵ ICC-02/11-01/15-744, para. 81.

¹⁶ ICC-02/11-01/15-744, para. 69. *See* ICC-01/05-01/08-1386, para.78. *See also*, in the *Ongwen* case, ICC-02/04-01/15-621, para. 7.

¹⁷ ICC-02/11-01/15-573-Red, para. 25.

¹⁸ ICC-02/11-01/15-573-Red, para. 24.

¹⁹ ICC-02/11-01/15-573-Red, para. 9.

and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 as listed at Confidential Annex 1. Confidential Annex 2 provides summaries of the evidence of each witness and time estimates for examination by the Prosecution. Also at Annex 2, the Prosecution (i) identifies the specific passages which the Prosecution wishes to submit as evidence;²¹ and (ii) provides the Evidence Registration Numbers (“ERNs”) for the other material, within the meaning of paragraph 51 of the Conduct Directions, which it seeks to introduce under rule 68(3).

16. The Chamber should exercise its discretion to allow the introduction of the Rule 68(3) Documents.

17. First, as described in Confidential Annex 2, the evidence of Witnesses P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 relates largely to the events of 25 February 2011.²² While Witness P-0108 does not provide direct evidence as to the events of 25 February 2011, he provides valuable background information, as also described in Confidential Annex 2. Similar to the crime base witnesses to the 16 December 2010 incident - who were the subject of the Prosecution’s first²³ and second²⁴ requests under rule 68 - these seven witnesses all testify to the events and issues “[...] from their own personal perspective.²⁵” None have insider knowledge related to the planning of the attack on Yopougon. As such, the same reasoning applies and “provided that the Defence is given adequate time to examine [these] 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.²⁶”

²⁰ Contingent upon their actual presence before the Chamber and consent to the submission of the previously recorded testimony. *See* para. 20 below.

²¹ As required by paragraph 51 of the Conduct Directions.

²² They nonetheless also include other important information such as, for example, information about the 12 April incident and the incitement and recruitment of youth militia.

²³ ICC-02/11-01/15-487-Conf. *See also* ICC-02/11-01/15-573-Conf.

²⁴ ICC-02/11-01/15-582-Conf. *See also* ICC-02/11-01/15-629-Conf.

²⁵ *See* ICC-02/11-01/15-573-Red, para. 38.

²⁶ *See* ICC-02/11-01/15-573-Red, para. 38.

18. Second, in relation to all seven 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-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 each voluntarily provided his statement in a language he fully speaks and understands.
19. Third, in relation to all seven witnesses, introduction of the Rule 68(3) Documents would expedite the proceedings and further streamline the presentation of the evidence, in reducing the estimated duration of the Prosecution's case-in-chief. The Prosecution notes, in particular, that if the Chamber allows introduction of the Rule 68(3) Documents, the Prosecution will require for its supplemental questioning of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 only thirty minutes each, and for Witness P-0109 one hour, resulting in considerable time saved when compared to the time estimated for its examination without the use of rule 68(3) of the Rules. In this regard, the Prosecution refers the Chamber to the table at Annex 2.²⁷
20. 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-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109.²⁸
21. As for the conditions under rule 68(3), Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 will be present before the Trial Chamber, and the Prosecution, Defence and Chamber will have the opportunity to examine them during the proceedings. The request is made for conditional introduction of the Rule 68(3) Documents because rule 68(3) requires a witness's actual presence before the Chamber and consent to the submission of the previously recorded testimony before the evidence may be introduced.²⁹

²⁷ See the table at Annex 2, last two columns. See also ICC-02/11-01/15-789, para. 9.

²⁸ See ICC-02/11-01/15-573-Red, para. 24.

²⁹ See rule 68(3) of the Rules: "if the witness [...]. See also ICC-02/11-01/15-573-Red, para. 39.

Limited supplementary examination

22. If the Chamber allows introduction of the Rule 68(3) Documents, then the Prosecution will limit its questioning of these witnesses to confirming, clarifying or highlighting passages of the prior recorded statements, and questioning on additional topics as follows.³⁰
23. With respect to Witnesses P-0438 and P-0109, the Prosecution anticipates asking them to describe the effect of the crimes on their lives. With respect to Witnesses P-0433, P-0436, P-0402, P-0459 and P-0109, the Prosecution anticipates showing them certain items of evidence relevant to their testimony. With respect to Witnesses P-0108 and P-0433, the Prosecution anticipates asking them questions of a clarifying nature.

Testimony by means of video-link technology

24. The Prosecution seeks authorisation under article 69(2) of the Statute and rule 67(1) of the Rules, for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 to testify *viva voce* by means of AVL [REDACTED].

Applicable Law

25. Pursuant to article 69(2) of the Statute, the Court may permit the giving of *viva voce* testimony by means of video or audio technology, as long as these measures are not prejudicial to or inconsistent with the rights of the Accused.
26. Under rule 67(1) of the Rules, a Chamber may allow a witness to give *viva voce* testimony by means of audio or video technology, provided that such technology permits the witness to be examined by the Parties and the Chamber. Rule 67(3) further states that the Chamber, with the assistance of the Registry, shall ensure that the venue chosen for video-link testimony is conducive to the giving of

³⁰ Conduct Directions, para. 49.

truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.³¹

27. This Chamber has previously authorised testimony via AVL for Prosecution witnesses.³² In authorising AVL for witnesses whose testimony was to be introduced under rule 68(3), the Chamber has considered “budget and logistical concerns” which “could affect the expeditious conduct of proceedings,” including that video-link testimony from Côte d’Ivoire “will enable the VWU to arrange their order of appearance in an uninterrupted manner” and – in circumstances where there was a break in the scheduled hearings – that “no witness will have to stay grounded in The Hague during that week.³³” In its decision granting testimony by means of video-link for Witness P-0441, the Chamber found that “[c]onsiderations related to the vulnerability of the witness and the paramount need to preserve their safety, physical and psychological well-being must prevail over any general consideration relating to the desirability of having testimony taking place inside this courtroom.³⁴”

28. Further, [REDACTED] has been deemed an appropriate venue for testimony by means of video-link.³⁵

Appropriateness of testimony via AVL

29. The Prosecution seeks authorisation for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 to testify via AVL, because these are all crime base witnesses, whose testimony the Prosecution is seeking to conditionally submit under rule 68(3) of the Rules. As such, their testimony is likely to be shorter than for other witnesses, such as insider witnesses. Video link testimony from [REDACTED] would enable

³¹ See also article 68(1) of the Statute: “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”

³² See e.g., ICC-02/11-01/15-T-12-CONF-ENG, p. 81-83; ICC-02/11-01/15-721; ICC-02/11-01/15-T-103-CONF-ENG, p. 82.

³³ ICC-02/11-01/15-721, para. 19.

³⁴ ICC-02/11-01/15-T-12-CONF-ENG, p. 82, lns. 9-11; See e.g. testimony of Witnesses P-0321, P-0441 and P-0520.

³⁵ ICC-02/11-01/15-T-12-CONF-ENG, p. 82, lns. 12-15.

the VWU to arrange the witnesses' appearances in an uninterrupted manner, and would avoid the need for them to stay in The Hague while waiting to testify.

30. In addition, allowing Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 to testify by means of AVL [REDACTED] may well carry the additional benefit – for these particular witnesses – of protecting their physical and psychological well-being. The Prosecution defers to the assessment of VWU on this aspect of its request.³⁶ It further notes that there is no reason, related to the vulnerability of these witnesses, why they should not testify with the combination both rule 68(3) and AVL.³⁷

31. Finally, AVL testimony would not be prejudicial to or inconsistent with the rights of the Accused. Counsel for the Accused would still be able to question the Witnesses, including through the use of documents. Further, the Chamber would still be in the position to observe the Witnesses' demeanour and the delivery of their testimony.

³⁶ ICC-02/11-01/15-721, paras. 13-14.

³⁷ See ICC-02/11-01/15-788, para. 13.

Conclusion

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

- (i) *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.
- (ii) Allow Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 to testify *viva voce* by means of video-link technology from [REDACTED].



Fatou Bensouda, Prosecutor

Dated this 12th day of April 2017

At The Hague, The Netherlands