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**International
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2018

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

Defence Response to the Legal Representative's Application for the introduction of documentary evidence under paragraphs 43-44 of the Amended Directions on the conduct of the proceedings (ICC-02/11-01/15-1088)

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. The Defence of Mr Blé Goudé (“the Defence”) hereby responds to the “Legal Representative’s Application for the introduction of documentary evidence under paragraphs 43-44 of the Amended Directions on the conduct of the proceedings” (“the Application”).¹ The Defence opposes the Application as, according to the Directions on the conduct of the proceedings, the Common Legal Representative of the victims (“the LRV”) cannot submit documentary evidence under paragraphs 43 and 44. Therefore, the Application should be rejected *in limine*.
2. Besides, the LRV failed to substantiate the relevance of the document and has not allowed the Defence to properly appreciate its probative value.

II. Procedural History

3. On 4 May 2016, Trial Chamber I (“the Chamber”) adopted the Amended Directions on the conduct of the proceedings (“the Directions”).²
4. On 2 November 2017, the Chamber authorized the LRV to file any application to present evidence by 15 December 2017.³
5. On 15 December 2017, the LRV filed the Application.

¹ ICC-02/11-01/15-1088, the Application.

² ICC-02/11-01/15-498-AnxA, the Directions

³ See the Chamber’s email received on 2 November 2017 at 16:17.

III. Submissions

(A) The Application should be rejected *in limine*

6. Paragraphs 43 and 44 of the Directions allow for the introduction of documentary evidence other than testimonial (i.e. documents and audio-visual material), without producing it by or through a witness. Paragraph 43 states that:

“[i]n the interest of the efficiency of the proceedings, the parties are encouraged to introduce documentary evidence other than testimonial [...]”⁴

7. The wording of paragraph 43 makes it perfectly clear that only the parties to the trial, and not the participants, may submit documentary evidence.
8. Such restriction is further reinforced when comparing paragraph 43 to other paragraphs of the Directions that apply to both parties and participants. For example, paragraph 33 reads that:

“[o]bjections by a party or a participant concerning the mode, manner or scope of questioning by another party or participant must be raised with the Chamber at the time the question is asked, and will be decided on a case-by-case basis.”⁵

9. Paragraph 33 specifically refers to parties and participants for the rules applying to objections. Therefore, when participants are not referred to by a rule, such rule cannot apply to them. If the Chamber had intended to authorize the participants to submit documentary evidence under paragraphs 43 and 44 of the Directions, it would have specifically provided for it in the text of the relevant paragraphs.

⁴ Emphasis added.

⁵ Emphasis added.

10. In the Directions, the possibility for the LRV to submit documentary evidence is only promulgated once, at paragraph 20, with different conditions to meet than the conditions expressed at paragraph 44.⁶ The standard of evidence requested by the Chamber for the LRV to submit documentary evidence, pursuant to paragraph 20, is hence a stricter standard than the standard applying to the parties pursuant to paragraphs 43 and 44. Whereas, under paragraph 44 of the Directions, the parties shall submit documentary evidence accompanied by “succinct information”, the LRV, under paragraph 20, shall provide “concise information” as to the relevance and interest of the document she seeks to submit to the case records. Although the LRV may appear to have taken into consideration the conditions set out at paragraph 20, the content of the Application reveals that only a superficial and succinct assessment of the relevance, probative value and prejudice to the rights of the Accused has been carried out.

11. For the foregoing reason, the Defence holds that the Application should be rejected in *limine* following a misapplication of the Directions by the LRV.

(B) The LRV failed to substantiate the relevance of the document to the matters at issue in the case.

12. The LRV seeks to submit a list of 48 names of Nigerien nationals who were allegedly killed during the post-electoral crisis (“the List”).⁷

⁶ Para. 20 of the Directions: “Additionally, for any proposed witness, or an application to submit non-testimonial evidence, including documentary evidence, the LRV shall give concise information as to why the testimony of the proposed witness or the piece of evidence : (a) is relevant to the victims’ interests and to matters at issue in the case, (b) would contribute to the determination of the truth and not be repetitive of evidence already before the Chamber, and, as such, would not be inconsistent with the rights of the accused and a fair and expeditious trial.”

⁷ The Application, para. 12.

13. The Defence notes that the LRV has not substantiated how and to what extent the List would be relevant to issues of the case. The LRV indeed mentions that the List would be relevant to “a number of issues in this case”⁸ but does not elaborate on these issues and only names two of them *in abstracto*: “including: (i) the widespread and systematic character of the attack against the civilian population; and (ii) the targeting and persecution of civilians on political, racial, national, ethnic, cultural and religious grounds.”⁹
14. First, the Chamber is not put in the position to appreciate the full alleged relevance of the List as only two issues of the case are mentioned in broad and general terms.
15. Second, after raising these two issues, the LRV does not elaborate on them or demonstrate as to how the list would be relevant to the case. The Defence notes that, for a significant portion of the individuals named on the alleged List, the cause of death is not mentioned.¹⁰ The Defence also notes that, for another significant portion of the individuals named on the List, the date and the place of death are not mentioned.¹¹ In this regard, the LRV acknowledges in the Application that some of the dates of death extend to May 2011,¹² i.e. after the end of the crisis and fall *de facto* outside of the temporal scope of the charges. On the same line, the LRV notes that some of the individuals mentioned on the List allegedly died as early as of January 2010, i.e. one year before the temporal scope of the charges.¹³ Finally, the Defence notes that another significant portion of the individuals named on the List are mentioned with only a name and a place of birth, but without any

⁸ The Application, para. 11.

⁹ *Ibid.*

¹⁰ See Annex B of the Application.

¹¹ *Ibid.*

¹² The Application, para. 12.

¹³ *Ibid.*

information on the place, date and cause of death.¹⁴ For all of these significant portions of people mentioned on the List, it is impossible to ascertain whether or not the death is related to the post-electoral crisis, apart from the fact that the Prosecution at trial did not introduce evidence as to alleged Nigerien victims in this case. The Prosecution does not rely on the assumption that 48 Nigerien nationals were killed during the post-electoral crisis nor is there any evidence for this assertion. Prosecution expert P-0564 does not rely on 48 Nigerians being allegedly killed during the post-electoral crisis.¹⁵

16. Therefore, the Defence submits that the LRV has failed to provide the necessary information allowing the Chamber and the parties to appreciate the relevance of the List and hence has failed to substantiate the relevance of the document.

(C) The LRV has implemented unnecessary redactions which prevents the Defence from efficiently considering the probative value of the List.

17. The LRV submits that the List was provided to her on 13 December 2017 by the Embassy of the Republic of Niger in Côte d'Ivoire, *Haut Conseil des Nigériens de l'Extérieur en Côte d'Ivoire*.¹⁶ The List allegedly contains for each individual the complete name and, when available, the exact date and place of death.¹⁷

18. However, the List has been provided to the Defence with important redactions, which prevents any investigation on the probative value of the

¹⁴ See Annex B of the Application

¹⁵ See CIV-OTP-0050-0030, where only one Nigerian victim is included. Moreover, the LRV did not produce witnesses to this end.

¹⁶ The Application, para. 15.

¹⁷ *Ibid.*, para. 14.

document.¹⁸ The Defence recalls that disclosure to the parties does not equate disclosure to the public and that the LRV should have disclosed the unredacted List to the parties, especially when she submits that the List will be made available to the parties only if the Application is granted.¹⁹

19. The Defence firmly opposes such approach as it puts on the Defence the burden to investigate on the probative value of a document without the necessary elements to do so, while these elements will be revealed only if the submission to the case record is granted. The LRV does not present any reason to justify the implementation of the redactions and the fact that she intends to lift them if the List is submitted shows that they are not necessary and should not have been implemented in the first place.

20. For the foregoing reasons, the Defence submits that it is not in a position to provide a proper analysis of the probative value of the List because of unnecessary redactions affecting the document.

(D) The List does not contribute to the determination of the truth and, as such, is inconsistent with the rights of the Accused and a fair and expeditious trial.

21. The submission of a redacted List does not allow the Defence to investigate on it and to properly appreciate its probative value. Thus, the submission of the full List to the case record, without any possibility for the Defence to examine it beforehand, does not contribute to the determination of the truth and is of undue prejudice to the rights of the Accused.

22. The submission of a document which relevance to the charges has not been substantiated is of undue prejudice to the rights of the Accused and prevents

¹⁸ *Ibid.*, para. 8. See also Annex B of the Application.

¹⁹ *Ibid.*

the determination of the truth as it does not allow the Defence to properly appreciate the alleged relevance of the document and to respond accordingly.

23. For the foregoing reasons, the Defence submits that the Application should be rejected in its entirety.

RELIEF SOUGHT

24. In light of the foregoing, the Defence respectfully requests the Chamber to:

- REJECT the Application.

Respectfully submitted,



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

Dated this

22 January 2018,

At The Hague, the Netherlands