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

Date: **22 August 2016**

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND
CHARLES BLÉ GOUDÉ***

Confidential

Defence Response to the "Prosecution's application to conditionally admit the prior recorded statements and related documents in relation to Witnesses P-0106, P-0107, P-0117 and P-0578 under rule 68(3)" (ICC-02/11-01/15-636-Conf)

Source: Defence team for Laurent Gbagbo

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

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Other

Classification of the application:

1. This document is filed as confidential in accordance with regulation 23 *bis*(2) as it is in response to an application¹ filed as confidential by the Prosecution.

I. Applicable law

2. As far as the applicable law is concerned, the Defence cites its filings ICC-02/11-01/15-502-Conf-tENG and ICC-02/11-01/15-591-Conf-tENG, containing detailed analyses of the requisite legal framework of any Chamber decision on applications for the admission of prior recorded statements of witnesses. The Defence cites, in particular, the arguments on the applicable principles in such cases.

3. Concerning the conditions for the admission of prior recorded statements, the Defence recalls that its appeal against the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”² is pending and that, in its appeal brief, the Defence argued that the Chamber had erred in law in relying on questionable legal criteria, in particular that of “good trial management”, to allow the Prosecution’s application of 19 April 2016 for the admission of the prior recorded statements of 11 witnesses.

4. Lastly, the Defence recalls that it has filed a request for leave to appeal the “Decision on the ‘Prosecution’s application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549, and P-0550’”.³ In its request, the Defence submits that the Chamber erred in law when it set up a system allowing quasi-automatic admission of prior recorded statements of witnesses submitted by a party under rule 68(3), by relying on the notion that the possibility of cross-examination by the Defence might justify validating the introduction of prior recorded testimony, even though that testimony concerns core issues disputed by the Defence. After all, to admit a prior recorded statement concerning core issues before

¹ ICC-02/11-01/15-636-Conf.

² ICC-02/11-01/15-591-Conf-tENG.

³ ICC-02/11-01/15-635-Conf.

any cross-examination can take place undermines the principle of orality of hearings and infringes on both the spirit and the letter of rule 68(3).

II. Discussion

5. The Prosecution is applying for the prior recorded statements of four witnesses to be admitted pursuant to rule 68(3) together with all documents relating to the said statements, which it lists in Annex 1 of its application.

6. This is the Prosecution's third application for the admission of prior recorded statements of witnesses since 19 April 2016.⁴ Should it be granted, as the previous two applications were, the implication would be that the Prosecution has been authorized to call in the normal way only six of the 23 witnesses whose testimonies are planned. In other words, if the Prosecution's application is granted the Prosecution will be allowed to exempt 17 of its 23 witnesses from having to appear in court and undergo a proper examination and cross-examination: 13 witnesses would testify only in part, on the basis of rule 68(3),⁵ and four would not be heard at all, as the Chamber has already admitted the prior recorded statements of P-0590⁶ and P-0428⁷ under rule 68(2)(b), and decided, without the need to hear the testimonies of P-0549 and P-0550⁸ – investigators from the Office of the Prosecutor – that the evidence they provided could be directly admitted into the record of the case pursuant to paragraph 47 of the Directions on the Conduct of Proceedings.

7. Any decisions allowing the Office of the Prosecutor's applications regarding prior recorded statements would render meaningless those provisions of the Statute and the Rules of Procedure and Evidence that are intended to establish the truth, thanks to the organization of examination and cross-examination; only 25% of Prosecution witnesses would be called to respond to a thorough examination. Not

⁴ ICC-02/11-01/15-487-Conf.

⁵ P-0169, P-0230, P-0555, P-0573, P-0587, P-0588 and P-0589 (Decision of 9 June 2016, ICC-02/11-01/15-573-Conf); P-0414 and P-0501 (Decision of 19 July 2016, ICC-02/11-01/15-629-Conf); P-0106, P-0107, P-0117 and P-0578 (Prosecution application dated 26 July 2016, ICC-02/11-01/15-636-Conf).

⁶ ICC-02/11-01/15-573-Conf.

⁷ ICC-02/11-01/15-629-Conf.

⁸ ICC-02/11-01/15-629-Conf.

only would that distort the rationale of the Statute – and of any modern, democratic judicial system, for that matter – but moreover it is unlikely to result in the expected time savings: experience in the instant case has shown that the in-court examination of Prosecution witnesses has produced very different results from their prior recorded statements – and the reasons are simple: the witnesses either deviated from what they had put in their statements and painted a completely different picture during testimonies at trial (compared with their prior recorded statements), or they claimed they had come under pressure – which would account, according to them, for the discrepancy between their prior recorded statements and their testimonies at trial. This point is important because the Chamber – like the Prosecution – seems to assume that testimonies at trial do not differ from prior recorded statements. Had this not been the assumption, the issue of time saving would not have arisen. However, the Chamber’s earlier decisions, like the Prosecution’s arguments for the admission of prior recorded statements, are founded primarily on the idea that applying rule 68 would save time. If, however, the testimony at trial and the prior recorded statements are not exactly alike, the potential time saving is then cancelled out and, on the contrary, the trial will be held up by the need to compare the testimony given by witnesses at trial with their prior recorded statements. Therefore, relying on prior recorded (and potentially disputable) statements – which also happen to concern core issues – has no added value and will even force the Defence to question the witness in order to crosscheck their statements concerning said core issues. To put it another way, the Defence would then be forced to carry out the task that the Prosecution should have performed, namely question the witnesses about their exact position on all the issues raised in their testimony.

8. The issue could also be examined from another angle: like the Prosecution’s, the Chamber’s earlier decisions were based on the assumption that the witnesses’ testimony at trial will not deviate from the prior recorded statement(s). In practice, as just observed, this assumption has been proved wrong. The analysis above concerned the why and wherefore of the matter? For example, the pressure witnesses come under from the Ivorian authorities when they are in Côte d’Ivoire? Let us now

examine the rationale: if a prior recorded statement is given the same weight as testimony at trial, the implication is that the judges lend equal credence to evidence obtained under very distinct conditions and at very different times. This is somehow tantamount to compelling witnesses to give testimony in keeping with what they said much earlier, which means their hands are tied during testimony at trial. If the Chamber concurs with the Prosecution's reasoning, it would be introducing hybrid testimony of a new kind. Should the Chamber allow the Prosecution's application, it would be surrendering the opportunity to hear a complete testimony at one hearing and opting instead to supplement what it might have garnered from the oral testimony with fragmentary information contained in witness statements. Witnesses' testimony would as a result comprise the witness's testimony at trial plus what might have been included in prior recorded statements – without any opportunity for sorting out possible contradictions between the testimony and prior recorded statements. That is why the rule is clear: prior recorded statements are admissible only when they concern minor issues that are not in dispute. If the Chamber allows the Prosecution's application, rule 68 – which safeguards the principle of orality of testimonies by providing that prior recorded statements are admissible only on an exceptional basis and in well-defined instances – could become an open door for violations of the principle of orality of testimonies and, as a result, completely *viva voce* testimonies would risk becoming the exception in the current proceedings.

9. Timesaving would appear to be a pipe dream and, in any case, the administrative objective of saving time cannot be to the detriment of the rights of the accused explicitly recognized in the Statute. The rights of the accused must be completely and utterly respected and cannot be weighed against other considerations, especially of a bureaucratic character (e.g. "good trial management"). Should the judges rely on prior recorded statements, the right of the accused to have sufficient clarity about the charges against them, especially in the context of testimony given by a Prosecution witness, would be compromised. In addition, how can anyone be cross-examined on the basis of a statement? How will the principle of orality of proceedings be upheld? The principle of a public hearing will also be undermined.

Lastly, how could the Prosecution be considered to have fulfilled its duty of proving its allegations if it relies solely on statements that were not elicited during testimony at trial and are often hundreds of pages in length, effectively barring the Defence from relying on cross-examination to test all the issues addressed, such that the Prosecution is given the leeway to raise those issues in its final submissions without the Defence having had an opportunity to cross-examine the witness thoroughly on all of them. In fact, if the Prosecution does not properly discharge its duty of proof, then the very presumption of innocence will be violated. In other words, it is not for the judges to weigh the rights of the accused against bureaucratic considerations. Their discretion does not extend to the rights of the accused, which, if they are to be truly enjoyed, must be respected in full. The judges' role is to ensure that, as a *sine qua non* condition of a fair trial, the accused fully enjoy their rights. They cannot justify any attempt to adapt those rights at their discretion.

1. Admission into the case record of the prior recorded statements of P-0106, P-0107, P-0117 and P-0578

10. The Prosecution seeks to introduce, under rule 68(3), the prior recorded statements of witnesses P-0106, P-0107, P-0117 and P-0578, so that the witnesses will testify in person but the *viva voce* part of their examination will be restricted. The Prosecution's application must be dismissed.

11. Firstly, it should be noted that each of the prior recorded statements made by the witnesses concerned covers a good many issues and allegations. These witnesses appear to be among those being called to testify about all sorts of events and, consequently, a number of Prosecution allegations.

12. For instance, each of these witnesses seems to have a contribution to make on a number of the events underpinning the charges (the march on RTI of 16 December 2010, the women's demonstration of 7 March 2011 and the events at Abobo on 17 March 2011).

13. Another example is that their statements also refer to a host of other issues which, when pieced together, reveal the Prosecution's line of thought. They concern

the structure and organization of the FDS (*Force de Défense et de Sécurité* [Defence and Security Force]), the conduct of the FDS during the post-election crisis, the role played by young people and the supposed presence of mercenaries or allegations of hatemongering.

14. As a consequence, not only are they important Prosecution witnesses, they also serve the purpose of filling the gaps in the Prosecution's arguments. Some of them give exclusive information in their statements.

15. Secondly, without exception the statements made by these witnesses concern issues that the Defence has disputed, including the unfolding of events on 16 December 2010, 7 March 2011 and 17 March 2011, or broader allegations about the conduct of the FDS during the post-election crisis.

16. This fact should move the Chamber to dismiss the rule 68(3) application for the admission of the prior recorded statements of these four witnesses. The case law of the Appeals Chamber concerning rule 68(3) clearly states that a Chamber may:

for example, take into account, a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.⁹

17. In this case, two of the criteria fixed by the Appeals Chamber are not met, namely: "whether the evidence relates to issues that are not materially in dispute" and "whether that evidence is not central to core issues in the case, but only provides relevant background information."

18. Thirdly, it should be noted that, contrary to what the Prosecution claims, the prior recorded statements are not from the witnesses' "own personal perspective". In fact, much of the content of the prior recorded statements is hearsay (at times second- or third-hand) and in them witnesses often express views on generalities without any reference to their sources. Insofar as the Defence could legitimately object to such statements in court or, more broadly, raise objections to

⁹ ICC-01/05-01/08-1386, para. 78.

witnesses shaping their testimony with their opinions, it is important not to allow a statement that revolves mainly around opinions and views to become part of the witness's testimony. Were the Chamber to allow the Prosecution's application, it would in effect be placing on a par with testimony sizeable portions of statements that are no more than the views of the witnesses making them. When testimony comes to be given, if the Prosecution opts for such a line of questioning the Defence would object; there is no justification for admitting lines of questioning that rely on a witness's opinion to the case record pursuant to rule 68.

19. Fourthly, it is hard to ascertain from the Prosecution's application and its annexes the point of admitting the prior recorded statements made by the four witnesses. In fact, the Prosecution seems bent on questioning the witnesses about most of the issues broached in their testimonies. The Prosecution therefore seems unwilling to formulate its questions differently according to whether its rule 68 application is allowed or rejected. The only argument given here is that its examination would take less time if its application is allowed. What then is the logical link between these two factors? Either the Prosecution chooses to address a given point in the way it sees fit during its examination and then uses the witness's response in its final submissions, or it does not address a particular matter and accordingly chooses not to cite it in its final submissions. As it happens, on the pretext of saving time, during testimony at trial the Prosecution seems set on addressing certain key issues in a superficial manner only, so that it can then use details of the statements in its final submissions. This means that, if the Prosecution is allowed to use a prior recorded statement, it would have an opportunity to conclude its questioning when testimony is being given in a manner which the Defence could not anticipate, thereby clearly circumventing the rules on examination and compromising the fairness of the trial. Furthermore, the Prosecution's claim that, if prior recorded statements are admitted, it will spend less time on each of the points raised, illustrates the fact that, in its view, testimony will no longer serve to meet its burden of proof, but rather will serve merely to "introduce" a topic, the details of

which, on the basis of prior recorded statements, will be produced by the Prosecution only in its final submissions.

20. Let us approach this issue from another angle: the Prosecution claim that it can now examine a given point faster has nothing objectively to do with whether or not prior recorded statements are used. Addressing a point in one hour rather than two can be achieved with or without prior recorded statements. Time saving does not therefore appear to be the reason why the Prosecution has applied for prior recorded statements to be admitted. It would seem instead that the Prosecution sees the admission of prior recorded statements as a safety net in the event that its witnesses fail to live up to its expectations. The Prosecution's experience with the first batch of witnesses, who evidently did not live up to its expectations, may have led it to conclude that it would be useful, where witnesses deviate too much from their prior recorded statements, for it to be able to cite them regardless in its final submissions under rule 68.

21. In conclusion, it seems that the conditions for the rule 68(3) admission of the prior recorded statements of witnesses P-0106, P-0107, P-0117 and P-0578 are not met. In fact, the statements concern core issues in the charges – issues which the Defence has vigorously disputed – and there is nothing to indicate that the scope of the Prosecution's examination would be considerably restricted were the prior recorded statements of these witnesses to be admitted. The Prosecution's application should therefore be dismissed.

2. Admission into the case record of material annexed or related to witnesses' statements

22. Insofar as the rule 68(3) application for the admission of the prior recorded statements of P-0106, P-0107, P-0117 and P-0578 must be rejected, the same goes for the application for the admission of the annexes to those statements and the documents mentioned in them.

23. Even supposing that the Chamber were to allow the rule 68(3) application for the admission of the prior recorded statements of P-0106, P-0107, P-0117 and P-0578,

the Defence submits that there is no provision under rule 68 for automatically introducing into the case record, alongside the recorded statements of given witnesses, any annexes or documents mentioned by said witnesses in their statements. Rule 68 concerns only “the introduction of [a] previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony” and clearly does not include annexes to statements and, even less so, those documents that the witness may have happened to mention at some point in those statements.

24. The legal framework applicable to such documents is paragraph 43 of the Directions on the Conduct of Proceedings, and that should form the grounds for the Prosecution’s application.

25. Relying directly on rule 68 to introduce documents without first referring to paragraph 43 of the Directions on the Conduct of Proceedings, on the pretext that the conditions for admission under that paragraph are “less stringent”¹⁰ than those under rule 68, is not convincing for several reasons:

26. Firstly, the implementation of a legal provision – rule 68 in this case – is guided solely by that provision’s specific criteria. Insofar as there is no provision under rule 68 for the admission of the annexes to prior recorded statements or documents mentioned in such statements, whatever the Chamber may incidentally have managed to put in place for admitting documents within the framework of the Directions on the Conduct of Proceedings is neither here nor there. In other words, whether the procedure under paragraph 43 is more “stringent” or less “stringent” does not alter the fact that those documents cannot be admitted under rule 68.

27. Secondly, in what way is the procedure under paragraph 43 of the Directions on the Conduct of Proceedings “less stringent”, as alleged? As part of any request founded on paragraph 43 of the Directions on the Conduct of Proceedings, the requesting party must, at the very least, present the Chamber (and other parties and participants) with proof of the authenticity and relevance of a document.

¹⁰ ICC-02/11-01/15-612, para. 22.

The Prosecution failed to do so – and the Chamber did not insist – with regard to the rule 68 application for admission in the instant case. In other words, the Prosecution’s present application would doubtlessly be rejected if it relied on paragraph 43 of the Directions on the Conduct of Proceedings. The procedure under paragraph 43 of the Directions on the Conduct of Proceedings would appear not to be “less stringent” than the admission procedure under rule 68 for which the Chamber opted and against which the Defence has requested leave to appeal.

28. Concerning the documents themselves, the Defence wishes to make a number of observations.

29. Firstly, in general terms, the Defence recalls that the Prosecution bears the burden of proving the authenticity and relevance of the documents it seeks to introduce, as a precondition for their admissibility. In this case, the Prosecution failed to show such proof, and the legal admission of those documents within the meaning of article 69 of the Statute cannot be finalized until such time as the Prosecution has submitted the relevant proof to the Chamber and the parties and the documents have been subjected to a genuine adversarial hearing.

30. Secondly, already at this stage, the Defence notes that it is being prevented from determining the authenticity of two of the documents (CIV-OTP-0019-0268 and CIV-OTP-0020-0062) because they contain redactions. The Prosecution should therefore remove the redactions to enable the Defence to do so.

31. Thirdly, one of the documents (CIV-OTP-0020-0098) which the Prosecution is applying to be admitted has never been disclosed to the Defence and is not on the Prosecution’s list of evidence. Accordingly, it should not be entered into the record of the case.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

Mindful of article 69 of the Statute and rule 68 of the RPE,

- **To reject** the Prosecution's application.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 22 August 2016

At The Hague, Netherlands