

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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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

Confidential

With Confidential Annexes A, B and C

Prosecution Notification of Conduct by Blé Goudé Defence Team Member

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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I. INTRODUCTION

1. The Prosecution notifies the Chamber that during a public event outside of the courtroom, Me Séri Zokou—a member of the defence team representing Mr Blé Goudé—commented on the merits of the evidence presented during the Prosecution's case against the Accused, including on the credibility and reliability of witnesses testifying during the ongoing trial.

2. The Prosecution invites the Chamber to remind counsel for Blé Goudé and their defence team that such comments are impermissible according to the case-law of ICC Trial Chambers and are contrary to counsel's duty towards the Court under the Code of Professional Conduct for counsel ("Code of Conduct").¹ Me Zokou's behaviour also raises concerns regarding obligations on the part of counsel – and counsel's assistants or staff--to respect the confidentiality of information in accordance with Court orders and the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.² Further, Me Zokou, as a member of the *Barreau de Bruxelles*, is also bound by specific Rules of ethics limiting public commentary concerning ongoing proceedings.³

3. For the reasons explained below, even if the behaviour being notified took place a year ago and the Prosecution witnesses have since been heard, the Prosecution submits that a reminder remains appropriate since counsel's duties to the Court continue.

II. CONFIDENTIALITY

4. The Prosecution files this submission and its annexes confidentially under regulation 23*bis* of the Regulations of the Court in order to avoid giving further publicity to comments by a defence team member regarding the merits of the case.

¹ Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, article 24(1) (Duties towards the Court).

² Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, article 8 (Respect for professional secrecy and confidentiality).

³ *Code de déontologie de l'avocat* at https://avocats.be/sites/default/files/code_octobre-2013.pdf.

III. BACKGROUND

5. On 22 April 2017, Me Zokou participated in a public conference organised in Paris by Investig'Action, entitled "*GBAGBO contre la Françafrique: Commission d'enquête*". On 24 April 2017, this conference was reported in Côte d'Ivoire in the newspaper *L'Inter*; this article can be found in Annex A. On 2 November 2017, a DVD of the event was commercially released.⁴ Upon becoming aware of the existence of a DVD of the event, on 10 November 2017, the Prosecution requested the ICC Library to purchase the DVD. On 15 November 2017, the ICC Library informed the Prosecution that it had purchased the DVD, which finally arrived some four months later, and on 19 March 2018, the ICC Library informed the Prosecution that the DVD was now available for loan. The video footage shows that during an interview with Michel Collon, who was conducting the event, Me Zokou made comments before a live audience on the merits of the evidence presented during the Prosecution's case against the Accused, including commenting on the credibility and reliability of the witnesses. A transcript of the interview with Me Zokou (registered as CIV-OTP-0104-0460) can be found in Annex B. A copy of the back cover of the DVD can be found in Annex C. The video has been released in eCourt for the Chamber, Parties and participants to consult.⁵

IV. APPLICABLE LAW

6. Under articles 64(2), 64(6)(f) and 71 of the Rome Statute, Trial Chambers have the power to regulate the conduct of the proceedings, including by ordering sanctions for misconduct occurring outside the courtroom where necessary.⁶ Trial Chambers have recognised that individuals linked to a party to proceedings should refrain from commenting publicly and particularly to the media on the merits of cases and issues that are pending before the Court.⁷ This is to avoid parallel litigation being conducted away

⁴ <https://www.investigaction.net/fr/gbagbo-contre-la-francafrique-nouveau-dvd-dinvestigation/>

⁵ CIV-OTP-0104-0455 at 0456 (*Disque 2*): see the (second) video file, after 0456.

⁶ See ICC-01/09-01/11-1773-Red, para. 9.

⁷ See ICC-01/09-01/11-T-51-Red2-ENG, pp. 12-13; ICC-01/09-01/11-T-59-Red-ENG, p. 25. See also ICC-01/04-01/06-2433, para. 40 ("respecting the Chamber, the judicial process and the other participants involves speaking

from the Chamber and before other *fora*.⁸ While the decisions of these Trial Chambers dealt, respectively, with comments made by an accused and by the head of one of the Prosecution's divisions, their findings are of broader application to the Parties in general.⁹ Furthermore, the obligation to refrain from publicly commenting on the merits of a pending case applies to both Parties.¹⁰ Remarks on these issues have been understood as breaching principles of respect for the Chamber, the judicial process and other participants "in a manner that is prejudicial to the ongoing proceedings (in the sense that they tend to prejudice the public's understanding of the trial), which tends to bring the Court into disrepute."¹¹

7. Specifically as relates to counsel, the Code of Conduct provides that "[c]ounsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute."¹² Violations of the Code of Conduct amount to misconduct by counsel.¹³ Counsel may also be liable for misconduct by his or her assistants or staff when he or she knows or has information suggesting that violations may be committed and takes no reasonable remedial action.¹⁴ Sanctions are available to address misconduct. Apart from the Code of Conduct's disciplinary regime,¹⁵ under rule 171 of the Rules of Procedure and Evidence the Chamber's Presiding Judge may "order the interdiction" of defence counsel from exercising his or her functions before the Court for up to 30 days when the misconduct before the Court consists of a "deliberate refusal to comply with an oral or

publicly about the proceedings in a fair and accurate way, and avoiding any comment about issues that are for the Chamber to determine.")

⁸ See ICC-01/09-01/11-T-51-Red-ENG, p. 12, lns. 19-20 ("The litigation in this case will have to be done in this courtroom and not in the media").

⁹ See ICC-01/09-01/11-T-51-Red2-ENG, pp. 12-13; ICC-01/09-01/11-T-59-Red-ENG, p. 25. See also ICC-01/04-01/06-2433, para. 39 (referring to "a party to proceedings").

¹⁰ See ICC-01/09-01/11-T-51-Red2-ENG, p. 13, lns. 15-17 ("when we say the merits of the case, we did say parties, we did not say only one side. So it is something that must be observed on both sides"); ICC-01/04-01/06-2433, para. 39 (referring to "a party to proceedings").

¹¹ ICC-01/04-01/06-2433, para. 41. See also para. 40.

¹² Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, article 24(1).

¹³ Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, article 31(a).

¹⁴ Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, article 32(1)(b).

¹⁵ Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, Chapter 4 (Disciplinary regime). Sanctions under article 42 include admonishment, public reprimand with an entry in counsel's personal file, payment of a fine, suspension of the right to practise before the Court, and permanent ban on practising before the Court and striking off the list of counsel.

written direction by the Court [...] and that direction is accompanied by a warning of sanctions in case of breach”.¹⁶

V. SUBMISSIONS

A. *Maître Zokou* is a member of Blé Goudé’s defence team

8. In 2015, Me Zokou was introduced before the Chamber as the Blé Goudé’s defence team’s legal assistant.¹⁷ During the 22 April 2017 event, Me Zokou also introduced himself to the audience as member of Blé Goudé’s defence team.¹⁸ As a result of his position, counsel’s duty to take all necessary steps to ensure that actions of counsel’s assistants or staff do not prejudice ongoing proceedings covers Me Zokou’s conduct. Counsel may also be held liable for Me Zokou’s conduct under the Code, as explained earlier.¹⁹ In any event, the ability of Chambers to remind individuals of their duty, issue warnings and even to impose sanctions for impermissibly commenting in public on the merits of a case is not limited to lead and associate counsel.²⁰ Furthermore, as explained earlier, Me Zokou is also bound by specific rules of ethics regarding public commentary on the proceedings as a member of the *Barreau de Bruxelles*.

B. *Maître Zokou* publicly made impermissible comments on the merits of the case

9. During the 22 April 2017 event, Me Zokou publicly made comments regarding the merits of the evidence, including the reliability and credibility of Prosecution witnesses. These are matters which are under consideration by the Chamber, and therefore should

¹⁶ Rule 171(1) and (2) of the Rules of Procedure and Evidence. *See also* ICC-01/11-01/11-233-Red, para. 29. The Presiding Judge may also impose more general sanctions not limited to counsel such as a fine or interdiction from the proceedings for up to 30 days (rule 171(1)) or for longer or permanent periods may refer the matter to the Presidency (rule 171(3)).

¹⁷ ICC-02/11-01/15-T-4-FRA-ET WT, p. 3, lns. 13-15.

¹⁸ “[m]embre de l’équipe de Défense de Charles Blé Goudé dans le cadre du procès j... du procès joint, donc Laurent GBAGBO”: Annex B, CIV-OTP-0104-0460 at 0461, lns. 18-19.

¹⁹ *See* Code of Conduct, article 2 (use of terms), stating that “[u]nless otherwise defined in this Code, all terms are used as defined in the Statute, the Rules of Procedure and Evidence and the Regulations of the Court”. *See also* Regulations of the Court, regulation 2 (use of terms), defining “counsel” as referring “to a defence counsel and a legal representative of a victim, whether lead or associate counsel.”

²⁰ *See for* Trial Chambers issuing warnings in respect of such conduct and finding that sanctions are available: ICC-01/09-01/11-T-51-Red2-ENG, pp. 12-13; ICC-01/09-01/11-T-59-Red-ENG, p. 25; ICC-01/04-01/06-2433, para. 53. In addition, under rule 171(1) the Presiding Judge may also impose sanctions not limited to counsel such as a fine or

not be publicly commented on so as to avoid intruding into the Chamber's role in that regard.²¹ In addition and as can be observed from the footage, the manner in which Me Zokou made his comments risked (1) prejudicing ongoing proceedings, by tending to prejudice the public's understanding of the trial; and (2) bringing the Court into disrepute.

10. Me Zokou's comments were made publicly. He was interviewed by Michel Collon, together with 15 others so-called main witnesses of the Ivorian crisis ("*16 témoins majeurs de la crise ivoirienne*")—among them Bernard Houdin, Robert Charvin, *Maître* Habiba Touré, Clotilde Ohouochi and Ahoua Don Mello—in the context of an event which was advertised as following the format of a public commission of enquiry ("*commission d'enquête publique*").²² Me Zokou was interviewed before a live audience, to whom he introduced himself as a member of Blé Goudé's defence team in the context of the joint trial with Laurent GBAGBO.²³ This introduction had the effect of increasing the risk that his comments on the evidence would prejudice the public's understanding of the trial, as reflected further below. His intervention was also reported in the press in Cote d'Ivoire.²⁴

11. *Maître* Zokou impermissibly commented on the reliability and credibility of witnesses whose evidence is pending before the Chamber. He stated that it had been shown that witnesses—presumably "crime-base" witnesses—did not see anything, did not know anything and had fabricated their accounts ("*il a été donné de voir que des témoins n'avaient rien vu, ne savaient pas et... fabriquaient des histoires*").²⁵ He also stated that it had been shown that "insider" witnesses' accounts had "demolished" the Prosecution's theory of the common plan ("*il a été donné de voir que il y a le corps de ceux qui ont exécuté le plan commun, notamment les...la haute hiérarchie militaire proche, donc, du Président GBAGBO, qui sont passés récemment et qui, au contraire, ont démoli la thèse du Procureur*").²⁶

interdiction from the proceedings for up to 30 days (rule 171(1)) or for longer or permanent periods may refer the matter to the Presidency (rule 171(3)).

²¹ See ICC-01/04-01/06-2433, para. 52.

²² See CIV-OTP-0104-0455 at 0457 (copy of the DVD cover).

²³ See Annex B, CIV-OTP-0104-0460 at 0461, lns. 18-19.

²⁴ See Annex A.

²⁵ See Annex B, CIV-OTP-0104-0460 at 0462, lns. 61-62.

²⁶ See Annex B, CIV-OTP-0104-0460 at 0462, lns. 62-65.

12. Further demonstrating that he was impermissibly commenting on “live” issues awaiting the Chamber’s determination, Me Zokou made specific reference to the evidence presented in respect of two charged incidents, the 16 December 2010 and 17 March 2011 incidents. In connection with the 17 March 2011 incident, for example, *Maître* Zokou expressed incredulity that a 120 mm mortar falling on the Siaka Koné market in Abobo did not cause a crater (“*sans qu’il y ait un cratère autour*”) and questioned the improbability that only Dioula were killed (“*et tue que des Dioula*”).²⁷ This last comment elicited cheering and clapping from the audience, demonstrating the effect of his comments in colouring the public’s perception of the trial, risking prejudice to ongoing proceedings and bringing the Court into disrepute.

C. The Chamber should consider reminding defence counsel for Blé Goudé and their team of their duty to the Court

13. *Maître* Zokou should not have commented on the merits of the evidence, expressing views on matters that are awaiting resolution by the Chamber. The Chamber should consider reminding counsel and the rest of Blé Goudé’s defence team of their duty to the Court, in particular the duty of counsel to “take all necessary steps to ensure that his or her actions or those of counsel’s assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute”, an obligation which encompasses ensuring that defence team members refrain from making comments in public such as the comments made by Me Zokou. In addition to the impermissible nature of the comments in question, public commentary on case-related issues also heightens the risk of disclosure of information and of breaching the obligation to respect the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.²⁸

14. The Prosecution also notes that as a member of the Bar of Brussels (French Section), Me Zokou is bound by the Code of ethics from that Bar. General obligations can be found

²⁷ See Annex B, CIV-OTP-0104-0460 at 0462, ln. 95.

under its article 1.2 and specific obligations regarding the media under article 7.4 and following, notably:

“S’agissant d’une affaire en cours dont il est chargé, il s’abstient en outre de contribuer à déplacer le débat hors de l’enceinte judiciaire et limite ses communications et commentaires à ce qui est justifié par les nécessités du droit de défense de son client.”²⁹

15. The Prosecution has on two previous occasions raised directly with Blé Goudé’s counsel instances of defence team members publicly commenting on the merits of the case.³⁰ The Prosecution also notified the Chamber of one of these instances.³¹ Given the recurrence of these comments by members of the Blé Goudé defence team—albeit from different individuals among it—the Chamber should consider reminding counsel and their team of their obligation under the ICC’s case-law and the Code of Conduct for counsel. Even if the statements of Me Zokou were made just under a year ago and the Prosecution witnesses have been heard, a reminder remains appropriate since counsel’s duties to the Court continue.

VI. CONCLUSION

16. For the foregoing reasons, the Prosecution files this notification with the Chamber

²⁸ See Code of Professional Conduct for counsel, ICC-ASP/4/Res.1, article 8 (Respect for professional secrecy and confidentiality).

²⁹ *Code de déontologie de l’avocat*, article 7.5, https://avocats.be/sites/default/files/code_octobre-2013.pdf

³⁰ Emails to Defence of Mr Blé Goudé on 21 March 2017 in relation to an interview of Me Kadji to TV5 Monde aired the week-end before and, on 24 August 2017, in relation to an interview of Me N’dry 28 July 2017 to the newspaper *Le Temps*.

³¹ See ICC-02/11-01/15-1012-Conf, fn. 23 (“Even the co-counsel of Mr Blé Goudé is commenting the Prosecution’s case in the media in contravention to his obligations under the ICC Code of Professional Conduct for counsel (ICC-ASP/4/Res.1) article 24.” See also Annex C (*Le Temps*, 28 July 2017, “L’avocat de Blé Goudé fait le grand déballage”).

and invites the Chamber to remind counsel for Blé Goudé and their defence team of their duty towards the Court.



Fatou Bensouda, Prosecutor

Dated this 29th day of March 2018

At The Hague, The Netherlands