

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/11-01/15
Date: 27 September 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***

Public redacted

Decision on the 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"

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of Victims

Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I (“Chamber”) of the International Criminal Court, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 82(1)(d) of the Rome Statute (“Statute”), Rule 155 of the Rules of Procedure and Evidence (“Rules”), and Regulation 65 of the Regulations of the Court issues this decision on the “*Demande d’autorisation d’interjeter appel de la « 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’ » (ICC-02/11-01/15-629-Conf)*”, filed on 25 July 2016 (“Request”).¹

1. On 9 June 2016, the Chamber issued 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’” (“Decision”),² whereby it, *inter alia*, (i) decided that the prior recorded statement of Witness P-0428 shall be introduced and considered submitted to the Chamber as evidence, on the condition that a declaration by the witness as provided for in Rule 68(2)(b) of the Rules is filed in the record of the case; and (ii) found that the written statements of Witnesses P-0414 and P-0501 were in principle suitable for introduction under Rule 68(3) of the Rules and directed the parties to prepare accordingly.³ The decision also clarified the status of certain documentary evidence submitted by the Prosecutor.⁴
2. The Defence of Mr Laurent Gbagbo seeks leave to appeal the Decision in respect of the following issues:
 - (i) whether the Chamber erred in finding that “the statement of Witness P-428 is peripheral and does not immediately relate to any fact of the charges”;

¹ ICC-02/11-01/15-635-Conf.

² ICC-02/11-01/15-629-Conf. Judge Henderson appended a partially dissenting opinion, see ICC-02/11-01/15-629-Conf-Anx. Public redacted versions of both documents are available, see ICC-02/11-01/15-629-Red and ICC-02/11-01/15-629-Anx-Red.

³ *Ibid.*, p. 18.

⁴ *Ibid.*, paras 35-40.

- (ii) whether the Chamber erred in finding that “it is not evident how [Witness P-0428] would be able to provide evidence beyond the scope of the written statement”;
 - (iii) whether the Chamber erred in finding that “there is no reason to suspect [Witness P-0428] of bias against either of the accused simply for [REDACTED]”
 - (iv) whether the Chamber erred in admitting (“*en admettant au dossier*”) the statements of Witnesses P-0501 and P-0414 under rule 68(3) of the Rules;
 - (v) whether the Chamber erred in permitting the admission (“*en permettant l’admission*”) of evidence emanating from members of the OTP while refusing their appearance as witnesses; and
 - (vi) whether the Chamber erred in law in prematurely and unlawfully proceeding to a notification on the basis of paragraph 47 of the directions on the conduct of proceedings.
3. The Prosecutor responded to the Request on 29 July 2016, submitting that leave to appeal should not be granted.⁵ The Defence of Mr Charles Blé Goudé and the common legal representative of the victims participating in the proceedings did not respond to the Request.
4. The provision applicable for the resolution of the Request is Article 82(1)(d) of the Statute. In brief, an interlocutory appeal can be allowed in respect of issues arising out of the impugned decision, meaning issues essential for the disposition of the matter. In addition, appeal can only be certified in respect of issues which would significantly affect either the fair and expeditious conduct of the proceedings or the

⁵ ICC-02/11-01/15-639-Conf (“Response”).

outcome of the trial, and for which, in the opinion of the Chamber, immediate appellate resolution may materially advance the proceedings.

5. The Request presented by the Defence of Mr Laurent Gbagbo, while identifying the issues proposed for appeal, focuses on arguments in support of its contention that the Chamber committed a series of errors of law and fact. In fact, it contains very little submissions under article 82(1)(d) of the Statute. It does not at all develop on the question how the proposed issues were essential for the Decision. In addition, the question whether the issues proposed for appeal would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and the question whether appellate intervention, on each of the proposed issues, may materially advance the proceedings, are addressed only cursorily and in a generalised manner.
6. The Chamber emphasises that it is not obliged, under article 82(1)(d) of the Statute, to entertain applications for leave to appeal that do not present complete arguments under the requirements of said provision. As is clear from a previous decision of the Chamber,⁶ incomplete applications may be rejected for that reason alone. However, in light of the fact that the issues proposed for appeal are identified with sufficient clarity, the Chamber is prepared to address them, in the interest of achieving the purpose of article 82(1)(d) of the Statute, which is to identify issues that need immediate appellate attention in order to ensure the proper course of the proceedings.

⁶ "Decision on requests for leave to appeal the 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" , 7 July 2016, ICC-02/11-01/15-612, para. 6.

Whether the Chamber erred in finding that “the statement of Witness P-428 is peripheral and does not immediately relate to any fact of the charges”

7. As regards the first issue, it appears to consist of no more than a disagreement with the Chamber’s appreciation of the significance of P-0428’s testimony. In fact, this is a discretionary finding used by the Chamber to come to its determination authorising the introduction of the statement under Rule 68(2)(b) of the Rules. As the Defence does not allege that the Chamber has abused its discretion, the issue cannot be certified for appeal.

Whether the Chamber erred in finding that “it is not evident how [Witness P-0428] would be able to provide evidence beyond the scope of the written statement”

8. While it is correct that the Chamber held in the Decision that it was not evident how Witness P-0428 would be able to provide evidence beyond the scope of the written statement, it is not established that a different finding on this particular point would have resulted in the rejection of the Prosecutor’s request to introduce the witness’s statement under Rule 68(2)(b) of the Rules. Indeed, the non-calling party’s interest in eliciting information from a witness during its examination is not an automatic ground to reject a request under rule 68(2)(b) of the Rules. Therefore, the second issue proposed by the Defence of Mr Laurent Gbagbo is not essential for the decision to introduce Witness P-0428’s written statement under rule 68(2)(b) of the Rules, and leave to appeal cannot be granted.

Whether the Chamber erred in finding that “there is no reason to suspect [Witness P-0428] of bias against either of the accused simply for [REDACTED]”

9. Regarding the third issue, the Defence seems to have wrongly interpreted the Chamber’s decision as implying a view on the role of [REDACTED] in the crisis in Côte d’Ivoire. What the Chamber said in paragraph 13 of the Decision was that

the mere fact that Witness P-0428 [REDACTED] is not sufficient to give rise to a presumption that the witness was biased. This is something very different from presuming the neutrality of [REDACTED] as such.

10. The Defence claims that the third issue is an error of fact. The error in question presumably consists in the Chamber failing to make a finding that Witness P-0428 was biased. However, the Defence does not allege any abuse of discretion on the part of the Chamber, nor does it provide the slightest explanation about which evidence of bias the Chamber is said to have disregarded or misinterpreted.
11. In short, the third issue appears to arise from a misunderstanding of the Chamber's Decision and suffers from a lack of precision and substantiation. No leave to appeal can be granted under these circumstances.

Whether the Chamber erred in admitting ("en admettant au dossier") the statements of Witnesses P-0501 and P-0414 under rule 68(3) of the Rules

12. The fourth issue, as presented for appeal by the Defence of Mr Laurent Gbagbo, encompasses the entirety of the Chamber's consideration of the written statements of Witnesses P-0501 and P-0414 under Rule 68(3) of the Rules as well as the final conclusion of the Chamber. As such, the issue arises out of the Decision. The Chamber does note, however, that the terminology employed by the Defence (referring to "admission" of the witness statements) is inaccurate and may in fact carry a meaning which would make the issue completely extraneous to the Decision. The Chamber assumes that the Defence, when speaking of admission, is actually referring to the Chamber's finding that the witness statements in question are in principle suitable for introduction under Rule 68(3) of the Rules.
13. The Defence identifies two alleged errors in the Chamber's decision. First, the Defence argues that it is not permissible to distinguish between witnesses in terms of how significant their testimony is. Second, the Defence argues that the Chamber is

not allowed to take into consideration the fact that the Defence will have the opportunity to examine the witness, as this is by definition allowed under Rule 68(3) and thus cannot be a factor in the application of this provision. As regards the first alleged error, the Chamber observes that it does not operate a distinction between witnesses as such. Instead, for the application of rule 68(3) of the Rules, it assesses the significance of the information the witness provides. The Chamber does not understand the Defence to take issue with this distinction. Accordingly, the first alleged error does not arise from the Chamber's decision and appears to be based on a misunderstanding of it. With regard to the second alleged error, the Chamber agrees that the mere fact that the defence will have an opportunity to examine the witness is not, in and of itself, a sufficient reason to grant a request under rule 68(3) of the Rules. In deciding such a request, the Chamber must consider the impact on the rights of the Defence. It is undeniable that having an opportunity to examine a witness – as opposed to not having such opportunity – is a relevant consideration in this regard. Again, the Chamber does not interpret the Defence to take issue with this view. Rather, it appears that the Defence disagrees with the weight the Chamber has given to the possibility to examine in light of the significance of the testimony. However, as the Defence does not argue that the Chamber abused its discretion in this regard, it is not possible to certify the issue for appeal.

Whether the Chamber erred in permitting the admission (“en permettant l'admission”) of evidence emanating from members of the OTP while refusing their appearance as witnesses

14. The fifth issue proposed for appeal by the Defence of Mr Laurent Gbagbo does not arise out of the Decision. First, the Chamber did not “permit the admission” of the documents. The Prosecutor submitted the documents in line with the directions on the conduct of proceedings, and the parties had an opportunity to raise any issues, including as concerns the relevance and admissibility of the documents. In line with the decision of 28 January 2016, the Chamber will make any ruling on the

admissibility or relevance of said documents in the final judgment, unless it becomes necessary to make an intermediary ruling.⁷

15. Secondly, the Chamber did not refuse the appearance of the OTP staff members as witnesses. While the Prosecutor originally included the two individuals (referred to as Witnesses P-0549 and P-0550) in her list of witnesses, the effect of the request of 10 June 2016⁸ was that she no longer wished to call them to testify in person. The Chamber did not reject a request to hear a witness because it was not seized of any such request.
16. Therefore, the issue as purported by the Defence of Mr Laurent Gbagbo does not arise from the decision and cannot be certified for appeal.

Whether the Chamber erred in law in prematurely and unlawfully proceeding to a notification on the basis of paragraph 47 of the directions on the conduct of proceedings

17. The sixth and final issue proposed for appeal by the Defence of Mr Laurent Gbagbo rests on an assumption that the text of footnote 49 at paragraph 38 of the Decision is a notification under paragraph 47 of the directions on the conduct of proceedings. However, this assumption is not correct. The matter addressed by the Chamber is a partial submission of an item of evidence being superseded by a submission of the item in its entirety. The footnote explains that in this case, the items are before the Chamber in their entirety for the purpose of supporting any findings related to the charges.

⁷ "Decision on the submission and admission of evidence", 29 January 2016, ICC-02/11-01/15-405, p. 10.

⁸ ICC-02/11-01/15-582-Conf.

18. Any issue related to the legality of a notification under paragraph 47 of the directions on the conduct of the proceedings, in the present circumstances, therefore does not arise out of the decision. Leave to appeal cannot be granted.

Level of classification of the submissions

19. The Chamber notes that the parties and participants have failed, to date, to file public redacted versions of the submissions made for the purpose of the present decision, as well as for the purpose of the impugned Decision.⁹ In light of this failure, and in the interest of the publicity of the proceedings, the Chamber deems it necessary to set time limits for the completion of this exercise.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

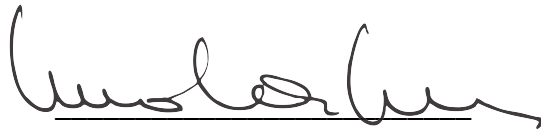
ORDERS the Prosecutor to file, by 30 September 2016, public redacted versions of filings ICC-02/11-01/15-582-Conf and ICC-02/11-01/15-639-Conf;

ORDERS the common legal representative of the victims participating in the proceedings to file, by 7 October 2016, a public redacted version of filing ICC-02/11-01/15-605-Conf;

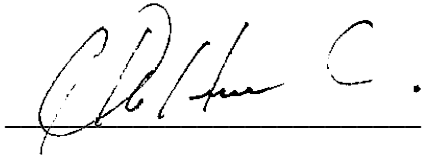
ORDERS the Defence of Mr Charles Blé Goudé to file, by 7 October 2016, a public redacted version of filing ICC-02/11-01/15-607-Conf; and

ORDERS the Defence of Mr Laurent Gbagbo to file, by 7 October 2016, public redacted versions of filings ICC-02/11-01/15-608-Conf and ICC-02/11-01/15-635-Conf.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 27 September 2016

At The Hague, The Netherlands