

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/11-01/15
Date: 2 February 2017

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

Decision on the "Prosecution's application to conditionally admit the prior recorded statement and related documents in relation to Witness P-0045 under rule 68(3)"

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Eric MacDonald

Counsel for Mr Laurent Gbagbo

Emmanuel Altit
Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Geert-Jan Alexander Knoops
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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

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

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 64, 67(1)(e), 68(1) and 69 of the Rome Statute, and Rule 68 of the Rules of Procedure and Evidence (“Rules”), issues this decision on the “Prosecution’s application to conditionally admit the prior recorded statement and related documents in relation to Witness P-0045 under rule 68(3)”, filed on 16 December 2016 (“Application”).¹

1. The Application seeks the “conditional submission into evidence of the prior recorded statements, including related documents”², of Witness P-0045, under Rule 68(3) of the Rules. Annex 1 to the Application specifies the precise items of evidence which are covered by the Application.³
2. The Defence of Charles Blé Goudé⁴ and the Defence of Laurent Gbagbo⁵ responded on 9 January 2017, both objecting to the Application.
3. This is the fourth instance in which the Chamber addresses a request from the Prosecutor to introduce prior recorded testimony under rule 68(3) of the Rules. In the present decision, the Chamber follows the same general approach as that laid out in the first decision on the matter.⁶ The Chamber also notes that that decision has recently been confirmed on interlocutory appeal, including specifically on the Chamber’s application of Rule 68(3) of the Rules.⁷

¹ ICC-02/11-01/15-775-Conf and confidential annexes 1-2.

² ICC-02/11-01/15-775-Conf.

³ ICC-02/11-01/15-775-Conf-Anx1.

⁴ ICC-02/11-01/15-782-Conf (“Blé Goudé Defence Response”).

⁵ ICC-02/11-01/15-783-Conf (“Gbagbo Defence Response”).

⁶ “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, 9 June 2016, ICC-02/11-01/15-573-Conf, para. 9. A public redacted version is available, see ICC-02/11-01/15-573-Red.

⁷ Appeals Chamber, “Judgment on the Appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’.”

4. Rule 68(3) of the Rules posits the following conditions for the introduction of prior recorded testimony: (i) that the witness is present before the Trial 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. As always under Rule 68 of the Rules, the Chamber must also be attentive to the requirement that the introduction of prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused. In this regard, the Chamber considers 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.
5. The Prosecutor submits that the evidence of Witness P-0045 “focuses on the methodology applied to intercept communications [...] and the radio frequencies used by these FDS units”,⁸ and “also relates to the repression of the 16 December 2010 march on the RTI.”⁹ According to the Prosecutor, the evidence of the witness does not reach the level of importance which would require hearing his testimony orally in full.¹⁰ The Prosecutor also submits that the written statement bears sufficient indicia of reliability, that the introduction of written statements would foster judicial efficiency and economy, and would not be prejudicial to or inconsistent with the rights of the accused.¹¹
6. The Defence of Charles Blé Goudé argues that the material which the Prosecution seeks to admit, concerns core issues in the case which are materially in dispute.¹² The Defence also emphasises the relevance and technical nature of the witness’s

⁸ Application, para. 9.

⁹ *Ibid.*, para. 11.

¹⁰ *Ibid.*, para. 17.

¹¹ *Ibid.*, para. 12-16.

¹² Blé Goudé Defence Response, paras 8-12.

testimony, and the fact that the written statement is not corroborative of other evidence since it requires a certain interpretation.¹³

7. The Defence of Laurent Gbagbo protests the scope of application of Rule 68 of the Rules in the trial,¹⁴ and insists that promoting judicial economy cannot be privileged to the detriment of the rights of the accused.¹⁵ Further, the Defence makes arguments on the grounds that the Prosecutor previously informed the Chamber that she would not make an application under Rule 68 of the Rules for Witness P-0045,¹⁶ and that there is a lack of clarity on the French version of the witness statement since the investigators spoke to the witness in English and their questions were translated by an interpreter whose competence, according to the Defence, cannot be verified.¹⁷ The Defence also challenges the Prosecutor's arguments that the evidence of Witness P-0045 is corroborative of other evidence, and not crucial for the case.¹⁸ The Defence also questions the credibility of the witness.¹⁹ Lastly, the Defence opposes the introduction of the annexes to the written statement on procedural grounds.²⁰
8. The written statement of Witness P-0045 relates to his documentation of certain events during the post-election crisis through the casual monitoring of radio communications of members of the Republican Guard, the Gendarmerie and the Police.²¹ Among the radio communications that the witness states to have heard are orders given on the radio networks during the FDS operation related to the march of 16 December 2010.²² The annexes to the statement of Witness P-0045 are notes taken by the witness while he was listening to the radio communications (annex 6),

¹³ *Ibid.*, paras 13-14.

¹⁴ Gbagbo Defence Response, paras 5-7, see also para. 10.

¹⁵ *Ibid.*, paras 11-12.

¹⁶ *Ibid.*, paras 14-16.

¹⁷ *Ibid.*, paras 17-20.

¹⁸ *Ibid.*, paras 21-36.

¹⁹ *Ibid.*, paras 37-41.

²⁰ *Ibid.*, paras 42-48.

²¹ CIV-OTP-0005-0002.

²² *Ibid.*, at 0013-0014, paras 81-88.

summaries of the communications that the witness prepared subsequently (annexes 1, 2, 3 and 5) and a list of code signs compiled by the witness (annex 4).

9. The Chamber, considering the substance of the written statement of Witness P-0045 and taking into account the submissions of the parties, finds it preferable that the entirety of the testimony of the witness be heard *viva voce*. In the view of the Chamber, this will allow for optimal presentation of the evidence of this particular witness, also considering that the time saved by way of introduction of the prior recorded testimony of the witness would be relatively limited since the Prosecutor in any case proposes to take 1.5 hours for supplementary examination (as opposed to 4 hours estimated without use of Rule 68(3) of the Rules).
10. Considering that there are reasons that warrant that the Chamber exercise its discretion not to make use of Rule 68 of the Rules in respect of Witness P-0045, it is not necessary in this decision to consider further the conditions of said rule.
11. Witness P-0045 shall testify *viva voce*. Considering the scope of the evidence of the witness and the need to take measures to expedite the trial, the Prosecutor shall be accorded 3 hours for her examination of the witness.
12. Finally, the Chamber notes that the parties have failed, to date, to file public redacted versions of their submissions. 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.

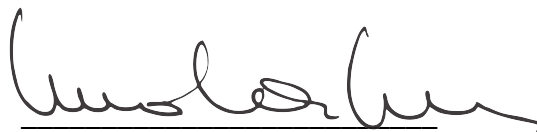
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Application;

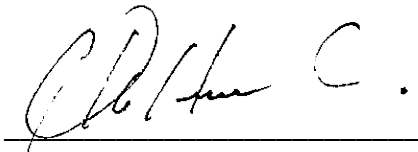
ORDERS the Prosecutor to file a public redacted version of the Application by 9 February 2017; and

ORDERS the Defence of Laurent Gbagbo and the Defence of Charles Blé Goudé to file public redacted versions of their respective responses by 16 February 2017.

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



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuca



Judge Geoffrey Henderson

Dated 2 February 2017

At The Hague, The Netherlands