

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: 7 April 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 statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)"**

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  
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**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**

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**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 Rules 67 and 68 of the Rules of Procedure and Evidence (“Rules”), issues this decision on the “Prosecution’s application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)”, notified on 7 February 2017 (“Application”).<sup>1</sup>

1. The Application seeks the “conditional submission into evidence of the prior recorded statements, including related documents”<sup>2</sup>, of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109. Annex 1 to the Application specifies the precise items of evidence which are covered by the Application.<sup>3</sup> The Application also seeks that Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 testify via video-link.<sup>4</sup>
2. In line with the Chamber’s decision granting a request for extension of time limit,<sup>5</sup> responses to the Application were filed on 6 March 2017. The common legal representative supports the Application,<sup>6</sup> while the Defence of Charles Blé Goudé<sup>7</sup> and the Defence of Laurent Gbagbo<sup>8</sup> oppose it in its entirety.
3. On 15 March 2017, the Prosecutor provided notice that Witness P-0402 will not be called to testify following the previously announced order and stated that “[t]he

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<sup>1</sup> ICC-02/11-01/15-796-Conf and confidential annexes 1-2. A public redacted version has been filed, see ICC-02/11-01/15-796-Red.

<sup>2</sup> Application, para. 2.

<sup>3</sup> ICC-02/11-01/15-796-Conf-Anx1.

<sup>4</sup> Application, para. 3.

<sup>5</sup> ICC-02/11-01/15-T-122-ENG, p. 15, lines 11-14.

<sup>6</sup> ICC-02/11-01/15-835-Conf.

<sup>7</sup> ICC-02/11-01/15-837-Conf and ICC-02/11-01/15-838-Conf.

<sup>8</sup> ICC-02/11-01/15-839-Conf.

Prosecution will provide reasonable advance notice of the new position of this Witness when it is able to do so". The Chamber takes note of this information which, however, has no impact on the substance of the present decision.

4. On 17 March 2017, the Prosecutor submitted the "Prosecution's amendments to its application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3)" ("Amendments").<sup>9</sup>
5. The Defence of Charles Blé Goudé<sup>10</sup> and the Defence of Laurent Gbagbo<sup>11</sup> responded to the Prosecutor's Amendments on 24 March 2017.

#### **I. Request for introduction of prior recorded testimony under rule 68(3) of the Rules**

6. This is the fifth 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.<sup>12</sup> 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.<sup>13</sup>
7. 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

<sup>9</sup> ICC-02/11-01/15-855-Conf. A public redacted version has been filed, see ICC-02/11-01/15-855-Red.

<sup>10</sup> ICC-02/11-01/15-862-Conf.

<sup>11</sup> ICC-02/11-01/15-863-Conf.

<sup>12</sup> "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.

<sup>13</sup> 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)'", 1 November 2016, ICC-02/11-01/15-744 OA8.

(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 low 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.

8. In the original Application, the Prosecutor submitted that “the evidence of Witnesses P-0433, P-0436, P-0402, P-0438, P-0459 and P-0108 relates largely to the events of 25 February 2011”, while Witness P-0108 provides “valuable background information” in this regard.<sup>14</sup> The Prosecutor further stated that because these witnesses all testified to the events and issues from their own personal perspective and because none had insider knowledge related to the “planning of the attack on Yopougon”, the introduction of their prior recorded testimony under rule 68(3) of the Rules was appropriate.<sup>15</sup> The Prosecutor also stated that the introduction of the prior recorded testimony of the witnesses would save court time, and that it would not be prejudicial to or inconsistent with the rights of the accused as they would each have ample opportunity to question the witnesses.<sup>16</sup>
9. The Defence of Charles Blé Goudé submitted in response to the Application that thus far in this trial the application of Rule 68(3) of the Rules has had no measurable effect on reducing in-court testimony.<sup>17</sup> It argued that it had to spend considerable time examining Rule 68(3) witnesses because “[t]he present proceedings have shown time and again that a witness’ statement can differ considerably from the evidence that is

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<sup>14</sup> Application, para. 17.

<sup>15</sup> *Id.*

<sup>16</sup> *Ibid.*, paras 19-20.

<sup>17</sup> ICC-02/11-01/15-838-Conf, paras 6-8.

lead on the stand”.<sup>18</sup> In this vein, the Defence explained in detail why it “will need time for extensive examination of the seven witnesses in order to safeguard Mr. Blé Goudé’s rights”.<sup>19</sup>

10. The Defence of Laurent Gbagbo similarly argued that the introduction of prior recorded testimony under Rule 68(3) of the Rules made it necessary for it to address the entirety of the substance of such prior recorded testimony during its examination at trial.<sup>20</sup> The Defence opposed the introduction of the prior recorded testimonies of the concerned witnesses on the grounds that they related to contested facts at the heart of the charges<sup>21</sup> and were not corroborated.<sup>22</sup>
11. By way of the Amendments, the Prosecutor excludes significant portions of the prior recorded testimony of the relevant witnesses from the application under Rule 68(3) of the Rules on the ground that they “contain evidence of the acts and conduct of the Accused and opinion evidence related to the Accused”. In addition, the Prosecutor revises upward the estimated time needed for the supplementary examination of the witnesses in order to ask “questions related to the acts and conduct of the Accused”.<sup>23</sup> The reasons for this change in approach appear in paragraph 8 of the Amendments:

After further considering its consolidated application, however, the Prosecution has decided to adopt a different approach in relation to the evidence for which it seeks submission under rule 68(3). In particular, the Prosecution has decided that it will lead *viva voce* – as necessary and appropriate – all evidence related to the acts and conduct of the Accused, instead of seeking submission of such evidence in writing. While it is not a requirement under rule 68(3) that evidence related to the acts and conduct of the Accused and/or which offers opinion evidence be excluded from submission in writing, the Prosecution adopts this practice in this case as a matter of fairness to the Accused.

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<sup>18</sup> *Ibid.*, para. 11.

<sup>19</sup> *Ibid.*, paras 12-27.

<sup>20</sup> ICC-02/11-01/15-839-Conf, paras 17-18, see also para. 24.

<sup>21</sup> *Ibid.*, paras 48-53.

<sup>22</sup> *Ibid.*, paras 54-56.

<sup>23</sup> Prosecutor’s Amendments, paras 12-19.

12. The Defence of Charles Blé Goudé regrets the untimely filing of the Amendments.<sup>24</sup> It states that it does not have the resources to analyse the witness statements again and requests, “[i]n the interest of fairness to Mr. Blé Goudé”, that the witnesses testify *viva voce* and that Rule 68(3) of the Rules not be applied.<sup>25</sup> Finally, the Defence submits that the Amendments “did not eliminate all the paragraphs relating to Mr Blé Goudé’s alleged acts and conduct, or the paragraphs, which would constitute opinion evidence relating to Mr. Blé Goudé”.<sup>26</sup> It requests, therefore, that two additional paragraphs be excluded from the statement of Witness P-0436.<sup>27</sup>
13. The Defence of Laurent Gbagbo reiterates its original response to the Application.<sup>28</sup> Specifically in relation to the Amendments, the Defence submits that a prior statement is a whole and that the Prosecutor cannot, on what the Defence argues are arbitrary criteria, exclude certain paragraphs of such a statement.<sup>29</sup> The Defence also refers to a risk of confusion which could result if the approach proposed in the Amendments is followed.<sup>30</sup>
14. The Chamber notes that Rule 68(3) of the Rules does not preclude the introduction of prior recorded testimony if it goes to the acts and conduct of the accused (cf. Rule 68(2)(b)) or if it “offers opinion evidence”. In any case, there are some practical concerns with the approach proposed by the Prosecutor, highlighted also in the Defence responses to the Amendments. It would be artificial to state that certain paragraphs of a statement are not considered submitted, but still may be needed in order to review the overall credibility and consistency of the testimony. Moreover, the Defence of Charles Blé Goudé argues that the criterion identified by the Prosecutor has been inadequately applied as there are additional portions of one

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<sup>24</sup> ICC-02/11-01/15-862-Conf, para. 5.

<sup>25</sup> *Ibid.*, para. 6.

<sup>26</sup> *Ibid.*, para. 7.

<sup>27</sup> *Ibid.*, p. 5.

<sup>28</sup> ICC-02/11-01/15-863-Conf, para. 10.

<sup>29</sup> *Ibid.*, para. 19, see also para. 32.

<sup>30</sup> *Ibid.*, paras 21-24.

witness statement that go to the acts and conduct of the accused. The Chamber wishes to avoid unnecessary litigation in court on these issues, as this can only lead to complicate the proceedings and convolute the record of the testimony of the witnesses.

15. The Chamber further notes that the Prosecutor states in the Amendments that she would require, if the Application is granted as amended, one hour for the supplementary examination of each witness, which is one third or one half of the estimated time needed if Rule 68(3) of the Rules is not applied. Considering that it cannot be stated that the introduction of prior recorded testimony would reduce the time needed for examination by the Defence, and considering that time would be spent on litigation on issues of procedure, the Chamber assesses potential time savings as low, if not negligible.
16. For these reasons, the Chamber concludes that the Prosecutor's Application, as amended, must be rejected in its entirety. Accordingly, the Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 will be heard *viva voce in toto*.

## **II. Request for authorisation of testimony by video-link**

17. The Prosecutor requests that Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 testify via video-link. In addition to the intended application of Rule 68(3), the Prosecutor justifies this request by reference to the fact that the witnesses are all crime base witnesses and that testimony by video-link may carry the benefit of protecting their physical and psychological well-being.<sup>31</sup>
18. The Defence of Charles Blé Goudé argues that "video technology is a generally undesirable alternative to live testimony and should only be used on an exceptional basis."<sup>32</sup> The Defence emphasises that the Witnesses' testimony via video-link is

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<sup>31</sup> Application, paras 29-30.

<sup>32</sup> ICC-02/11-01/15-837-Conf, para. 9.



prejudicial to or inconsistent with the rights of the accused.<sup>33</sup> It also argues that testimony by video-link hinders the parties' ability to fully examine them since "previous use of video link testimony in this case has shown that the presentation of documents, in particular any examination involving maps, was rendered much more difficult when using video link testimony".<sup>34</sup>

19. The Defence of Laurent Gbagbo objects to the absence of precise submissions by the Prosecutor, witness by witness, as to why it would be necessary to derogate from the principle that a witness should be physically present before the Court.<sup>35</sup>

20. The Chamber makes reference to its previous decision authorising testimony via video-link under Rule 67 of the Rules, where the general considerations are laid out in detail.<sup>36</sup> Considering that Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 are crime base witnesses whose testimony will be shorter than that of certain other witnesses, and considering that there is no significant difference between live testimony in The Hague and live testimony by means of video-link, this request can be granted. Indeed, the Chamber, by majority,<sup>37</sup> is of the view that the rights of the Defence are not affected by video-link testimony in the manner in which it has so far been organised in this case. Even the concern expressed by the Defence of Charles Blé Goudé as to the practicability of showing documents to a witness testifying by video-link is unwarranted as previous practice shows that with basic preparation (in particular by communicating to the Registry in advance the documents that may be shown to the witness) testimony by video-link can go as smoothly as testimony in the courtroom in The Hague.

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<sup>33</sup> *Ibid.*, para. 18.

<sup>34</sup> *Ibid.*, para. 22.

<sup>35</sup> ICC-02/11-01/15-839-Conf, paras 29, 65-67.

<sup>36</sup> "Decision on the mode of testimony of Rule 68(3) witnesses", 11 October 2016, ICC-02/11-01/15-721.

<sup>37</sup> For reasons expressed in his opinion of 18 October 2016, ICC-02/011-01/15-721-Anx, Judge Henderson does not concur with the reasoning on this point.

### **III. Level of confidentiality of submissions**

21. Finally, the Chamber notes that the public redacted version of the Application contains systematic redactions to witness codes. The Prosecutor has not explained the reason for these systematic redactions nor is one apparent to the Chamber. Accordingly, the Prosecutor is directed to lift such redactions.
22. As to the other parties and participants, the Chamber notes that they have not to date filed public redacted versions of their responses. An appropriate time limit for the completion of this exercise is hereby set.

### **FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

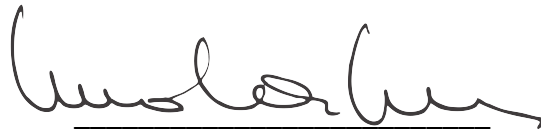
**REJECTS** the amended Application as concerns the requested introduction of prior recorded testimony under Rule 68(3) of the Rules;

**AUTHORISES BY MAJORITY** the testimony by video-link of Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 and **DIRECTS** the Registry and the parties and participants to prepare accordingly;

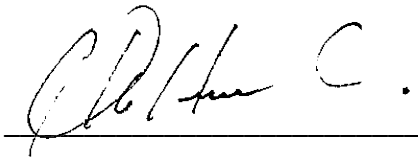
**ORDERS** the Prosecutor to file lesser public redacted versions of the Application and the Amendments by 13 April 2017; and

**ORDERS** the Defence of Laurent Gbagbo, the Defence of Charles Blé Goudé and the common legal representative of the participating victims to file public redacted versions of their respective responses by 21 April 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 7 April 2017

At The Hague, The Netherlands