

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 October 2015

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Single Judge

**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 request to designate a person authorised to witness
a declaration under Rule 68(2)(b) of the Rules**

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

Ms 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

Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Geoffrey Henderson, acting as Single Judge ('Single Judge') on behalf of Trial Chamber I of the International Criminal Court, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on the Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules'.

1. On 15 September 2015, the Office of the Prosecutor ('Prosecution') submitted a request ('Request')¹ for the Chamber to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules. The Prosecution submits that it 'envisages introducing in its case in chief the prior recorded statement/testimony of a number of witnesses, in whole or in part' under that provision, and that this may 'assist in a more concise and streamlined presentation of evidence'.² The Prosecution notes that other trial chambers have designated the Registry Legal Counsel, or an appropriate person delegated by him, as the 'person authorised to witness such a declaration' under Rule 68(2)(b)(iii) of the Rules, and it proposes that the same practice be adopted in this case.³ The Prosecution attaches to its request proposed forms to be used by the declarant and the person authorised to witness the declaration.⁴
2. On 24 September 2015, following the Chamber's instruction,⁵ the Registry submitted observations on the Request, indicating that if the Chamber deems it appropriate to designate a representative of the Registry, 'considering the nature

¹ Prosecution's request to designate a person authorised to witness a declaration under rule 68(2)(b) of the Rules of Procedure and Evidence, 15 September 2015 (notified on 16 September 2015), ICC-02/11-01/15-222, with Annex A.

² Request, ICC-02/11-01/15-222, para. 3.

³ Request, ICC-02/11-01/15-222, para. 6.

⁴ Request, ICC-02/11-01/15-222, para. 7, and Annex A, ICC-02/11-01/15-222-AnxA.

⁵ See Email communication from Legal Officer of the Chamber to the Registry on 22 September 2015 at 13:57.

of the functions envisioned under [R]ule 68(2)(b)(iii) of the [Rules], the Registry Legal Counsel, or anyone delegated by him, would be best placed'.⁶

3. Also on 24 September 2015, the defence team for Mr Gbagbo ('Gbagbo Defence') and the defence team for Mr Blé Goudé ('Blé Goudé Defence') filed their responses.⁷
4. Both defence teams submit that, *inter alia*, in light of the principle of the 'primacy of orality' as enshrined in Article 69(2) of the Statute and the right of the accused to confront the witnesses against him, as provided in Article 67(1)(e) of the Statute, the introduction of prior recorded testimony should be the exception and not the rule.⁸ They both submit that the Request is based on an amended Rule adopted approximately two years after the arrest warrants against the accused were issued. According to the Blé Goudé Defence an adversarial debate on retroactive application of the amendment to Rule 68 may not occur without a concrete Rule 68 application being filed. The Gbagbo Defence submits that the issue is currently before the Appeals Chamber in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and that the Chamber should refrain from deciding on the Request until resolution of the issue by the Appeals Chamber.⁹ Also, the Gbagbo Defence requests that the Prosecution indicate the number of witnesses for whom it intends to introduce the prior recorded testimony.¹⁰ The Blé Goudé Defence raises the issue that the Prosecution could potentially file all of its requests pursuant to Rule 68(2) of the Rules at the same

⁶ Registry's Submissions on the "Prosecution's request to designate a person authorised to witness a declaration under rule 68(2)(b) of the Rules of Procedure and Evidence", 24 September 2015 (notified on 25 September 2015), ICC-02/11-01/15-242, page 3.

⁷ *Réponse de la Défense à la « Prosecution's request to designate a person authorised to witness a declaration under rule 68(2)(b) of the Rules of Procedure and Evidence »* (ICC-02/11-01/15-222), ICC-02/11-01/15-239 ('Gbagbo Defence Response'); Defence Response to "Prosecution's request to designate a person authorised to witness a declaration under rule 68(2)(b) of the Rules of Procedure and Evidence" (ICC-02/11-01/15-222), ICC-02/11-01/15-237 ('Blé Goudé Defence Response').

⁸ Gbagbo Defence Response, ICC-02/11-01/15-239, paras 3-4, 8-16, 21-37; Blé Goudé Defence Response, ICC-02/11-01/15-237, paras 2 and 5.

⁹ Gbagbo Defence Response, ICC-02/11-01/15-239, paras 18-20; Blé Goudé Defence Response, ICC-02/11-01/15-237, para. 3.

¹⁰ Gbagbo Defence Response, ICC-02/11-01/15-239, para. 42.

time, making it difficult for them to respond within the time limit.¹¹ Both defence teams reserve the right to object to any request that the Prosecution will submit under Rule 68(2)(b) of the Rules.¹²

5. With regard to the Gbagbo Defence's submissions concerning the forms proposed by the Prosecution,¹³ the Single Judge notes that the Prosecution included in its annex to the Request both a form for the attestation by the witnessing officer and a form for the declaration by the person who provided a prior recorded testimony pursuant to Rule 68(2)(b)(iii) of the Rules, and that these forms were provided in English and French.
6. In consideration of the Request, the Single Judge notes that Rule 68(2)(b) of the Rules governs the introduction of previously recorded testimony for witnesses not present before the Chamber. It allows for the introduction of such testimony of a witness if several requirements are met, including a requirement that the said testimony must be 'accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief'.¹⁴ Rule 68(2)(b)(iii) of the Rules requires an authorised person to witness this declaration, and states that this authorisation may be given by 'the relevant Chamber or in accordance with the law and procedure of a State'.¹⁵
7. With regard to the Defence's submissions concerning the applicability of amended Rule 68 in the present case, the Single Judge first notes that in its 'Directions on the conduct of the proceedings', while recalling the primacy of

¹¹ Blé Goudé Defence Response, ICC-02/11-01/15-237, para. 6.

¹² Gbagbo Defence Response, ICC-02/11-01/15-239, para. 44; Blé Goudé Defence Response, ICC-02/11-01/15-237, paras 2-3.

¹³ Gbagbo Defence Response, ICC-02/11-01/15-239, paras 38-41.

¹⁴ Rule 68(2)(b)(ii) of the Rules.

¹⁵ Rule 68(2)(b)(iii) of the Rules requires the person witnessing the declaration verify specific points in writing, including that the person making the declaration: (a) is the person identified in the prior recorded testimony; (b) assures that he or she is making the declaration voluntarily and without undue influence; (c) states that the contents of the prior recorded testimony are, to the best of that person's knowledge and belief, true and correct; and (d) was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony.

orality and the right of the accused persons to examine or have examined the witnesses against them, in accordance with Article 67(1)(e) of the Statute, the Chamber already foresaw the possibility for admission into evidence of prior recorded testimony in the present case and set the procedure for filing any such request.¹⁶ The Single Judge has taken into consideration the recent decision taken by Trial Chamber V(a) in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*.¹⁷ In that case, Trial Chamber V(a) found that the Prosecution's request for the admission of prior recorded testimony was not a retroactive application of amended Rule 68, within the meaning of Article 51(4) of the Statute.¹⁸ Trial Chamber V (a) also determined that it would 'assess any detriment to the accused in any concrete application of the amended Rule 68 when deciding whether to introduce materials under this provision'.¹⁹ However, considering that this decision is currently before the Appeals Chamber,²⁰ but most importantly, because the Prosecution has not yet requested that the Chamber admit any evidence under Rule 68 of the Rules, the Single Judge considers that it is premature to determine its applicable scope.

8. In light of the above, the Single Judge designates the Registry Legal Counsel, or any appropriate person delegated by him, as the person authorised to witness declarations made pursuant to Rule 68(2)(b) of the Rules. This designation is without prejudice to any future decision on specific requests seeking the admission of prior recorded testimony.

¹⁶ Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15-205, paras 54-57.

¹⁷ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2.

¹⁸ ICC-01/09-01/11-1938-Corr-Red2, para. 23.

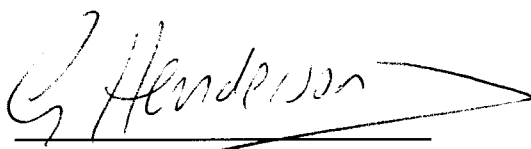
¹⁹ ICC-01/09-01/11-1938-Corr-Red2, para. 27.

²⁰ Decision on the Defence's Applications for Leave to Appeal the "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 10 September 2015 (notified on 11 September 2015), ICC-01/09-01/11-1953-Red-Corr.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DECIDES to designate the Registry Legal Counsel, or any appropriate person delegated by him, to be the person authorised to witness declarations made pursuant to Rule 68(2)(b) of the Rules for the purposes of this case.

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

A handwritten signature in black ink, appearing to read 'G. Henderson', written over a horizontal line. The signature is stylized with a large initial 'G' and a long, sweeping horizontal stroke extending to the right.

Judge Geoffrey Henderson, Single Judge

Dated 21 October 2015

At The Hague, The Netherlands