

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **7 July 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

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))”

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 Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3) » (ICC-02/11-01/15-573-Conf”, filed by the Defence of Laurent Gbagbo on 15 June 2016,¹ and the “Defence Request for leave to appeal the Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3) (ICC-02/11-01/15-573-Conf), filed on that same date and corrected on 16 June 2016.²

1. On 9 June 2016, the Chamber issued the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)” (“Decision”),³ authorising the introduction of the prior recorded statement of Witness P-0590, 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. In the Decision, the Chamber also found that the prior recorded testimonies of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588 and P-0589 were in principle suitable for introduction under Rule 68(3) of the Rules and directed the parties to prepare accordingly.
2. The Defence of Laurent Gbagbo seeks leave to appeal the Decision in respect of the following issues:
 - (i) whether the Chamber erred in law in posing “good trial management” as a guiding principle for the admission of prior statements;⁴

¹ ICC-02/11-01/15-591-Conf (“Gbagbo Defence Request”). A public redacted version has also been filed, see ICC-02/11-01/15-591-Red.

² ICC-02/11-01/15-592-Corr (Blé Goudé Defence Request).

³ ICC-02/11-01/15-573-Conf. Judge Henderson appended a partially dissenting opinion, see ICC-02/11-01/15-573-Conf-Anx. Public redacted versions of both documents are available, see ICC-02/11-01/15-573-Red and ICC-02/11-01/15-573-Anx-Red.

⁴ Gbagbo Defence Request, p. 11.

(ii) whether the Chamber erred in law in admitting portions of statements that would not be admissible during *viva voce* examination;⁵

(iii) whether the Chamber erred in law in introducing a notion of “system of evidence”;⁶

(iv) whether the Chamber erred in law in permitting the automatic admission of the annexes to the witness statement by way of Rule 68 whenever the statement itself is admitted.⁷

3. The Defence of Charles Blé Goudé in turn proposes the following issues for appeal:

(i) whether the Chamber erred in allowing the submission of the Rule 68 statements that include opinion evidence and speculative evidence, including anonymous hearsay, which contravenes paragraph 23 of the amended Directions on the Conduct of Proceedings, and impermissibly contravenes Article 66(2) of the Statute;⁸

(ii) whether the Chamber erred by failing to apply the requirement that prior recorded testimony admitted under Rule 68(3) must not be prejudicial to the accused, by ignoring the guidance provided by the Appeals Chamber in *The Prosecutor v. Bemba*, which guidance does not provide for the criterion of “good trial management”, as introduced by paragraph 25 of the Impugned Decision;⁹

(iii) whether the Chamber erred by limiting its analysis of sufficient indicia of reliability to the formal requirement that the statement be taken by the Prosecution “pursuant to Rule 111 of the Rules and under all applicable

⁵ *Ibid.*, p. 13.

⁶ *Ibid.*, p. 14.

⁷ *Ibid.*, p. 16.

⁸ Blé Goudé Defence Request, para. 4.

⁹ *Id.*

guarantees, including article 54(1),” and not expanding it to include other factors included in Judge Henderson’s dissent such as but not limited to: “the competence of the witness to testify about the facts... potential bias of the witness, his or her (in)sincerity, but also the possibility of honest mistake”;¹⁰

(iv) whether the Chamber by Majority erred in law by finding that documentary evidence could be admitted through Rule 68 on the sole basis that such evidence was referred to in the individual’s statement, irrespective of the author of the statement being the producer of the document him or herself without the proffering party being obliged to provide information indicating the item’s relevance, probative value as well as authenticity.¹¹

4. On 20 June 2016, the Prosecutor¹² and the common legal representative of the participating victims¹³ responded to the requests for leave to appeal, both submitting that the requests should be rejected in their entirety.
5. As correctly noted by the Prosecutor and the common legal representative of the victims,¹⁴ the requests are scarcely reasoned with respect to how the proposed appeal on each issue meets the criteria of Article 82(1)(d) of the Statute. In addition, there are manifest inaccuracies and misrepresentations of the Decision, which the Chamber will detail below.
6. Nevertheless, in the present instance, which involves the first application by the Chamber of Rule 68 of the Rules, the Chamber considers it unwarranted to reject the requests for leave to appeal *in limine* for lack of proper substantiation and will proceed to an analysis of the issues proposed for appeal, even in the absence of

¹⁰ *Id.*

¹¹ *Id.*

¹² ICC-02/11-01/15-595 (“Prosecutor’s Response”).

¹³ ICC-02/11-01/15-596 (“Victims’ Response”).

¹⁴ Prosecutor’s Response, para. 2; Victims’ Response, para. 3.

comprehensive submissions by the Defence, to determine whether the requirements for granting leave to appeal under Article 82(1)(d) of the Statute are met.

7. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute, as set out in previous decisions.¹⁵ For a request for leave to appeal to be successful, it must satisfy this Chamber that the criteria of Article 82(1)(d) of the Statute have been met.
8. Accordingly, the Chamber will first determine whether the issues identified by the Defence qualify as “issues” pursuant to Article 82(1)(d) of the Statute¹⁶
9. The Chamber must then determine whether the issue has a significant impact on “the fair and expeditious conduct of the proceedings or the outcome of the trial”. Finally, leave to appeal shall be granted if, in the Chamber's opinion, the impugned decision must receive the immediate attention of the Appeals Chamber.

The requirements to authorise the introduction of prior recorded statements under Rule 68(3) of the Rules

10. The first issue proposed for appeal by the Defence of Laurent Gbagbo and the second issue proposed by the Defence of Charles Blé Goudé concern the Chamber's consideration of the criterion of “good trial management” in determining whether prior recorded testimony can be introduced under Rule 68(3) of the Rules, at the expense of the procedural rights of the accused and ignoring the previous guidance given by the Appeals Chamber on this matter.

¹⁵ Most recently in the “Decision on request for leave to appeal the ‘Fourth decision on matters related to disclosure and amendments to the List of Evidence’ and other issues related to the presentation of evidence by the Office of the Prosecutor”, 13 May 2016, ICC-02/11-01/15-524.

¹⁶ See, e.g., “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, 2 July 2015, ICC-02/11-01/15-117; Appeals Chamber, “Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168 ('Appeals Chamber Judgment'), para. 9.

11. In strict terms, this is a misrepresentation of the Decision. The Decision emphasises the respect of the procedural rights of the accused as a requirement which must always be taken into account,¹⁷ finds that the statements of the ten witnesses are in principle suitable for introduction under Rule 68(3) only after making reference to the need that the Defence is given adequate opportunity to examine them,¹⁸ and gives specific indication on how this is to be achieved.¹⁹ It is therefore incorrect to state that the Chamber, in the Decision, did not take into account whether there existed any prejudice to the accused²⁰ or that it put the procedural rights of the accused and “good trial management” on the same level.²¹
12. The Defence takes the position that the Chamber, by referring also to the criterion of “good trial management” as a relevant factor, improperly exercised its discretion in finding that the statements of the ten witnesses were in principle suitable for introduction under Rule 68(3) of the Rules. Accordingly, the first issue identified by the Defence of Laurent Gbagbo and the second issue of the Defence of Charles Blé Goudé arise out of the Decision.
13. The Chamber does not consider that the issues in question affect the fair and expeditious conduct of the trial, since the opportunity of the Defence teams to examine the witnesses has been fully preserved. Conversely, the Chamber is satisfied that the issues hold the potential to significantly affect the outcome of the trial, as part of the testimony of the ten witnesses subject to the Decision, who in any case form a relevant part of the evidence concerning some of the charges in the present case, is introduced in writing rather than orally through examination from the Prosecutor.

¹⁷ Decision, paras 24-25.

¹⁸ *Ibid.*, para. 38.

¹⁹ *Ibid.*, para. 41.

²⁰ Cf. Blé Goudé Defence Request, para. 7.

²¹ Cf. Gbagbo Defence Request, para. 37.

14. The Chamber is also of the opinion that appellate intervention at this stage will be beneficial to the proceedings, as it will reduce the risk of invalidating this part of the trial proceedings should the Defence finally succeed in an eventual appeal under Article 81 of the Statute.

15. Accordingly, the Chamber grants the Defence leave to appeal the Decision on the issue of whether the criterion of “good trial management” is a relevant factor in the Chamber’s exercise of its discretion to introduce prior recorded testimony under rule 68(3) of the Rules.

The issue of the alleged admission of parts of statements containing inadmissible evidence

16. In the view of the Chamber, the second issue of the Defence of Laurent Gbagbo and the first issue of the Defence of Charles Blé Goudé are founded on incorrect assumptions, and are in fact extraneous to the Decision.

17. The first incorrect assumption on the part of the Defence teams is that the witness statements were “admitted”, and that the Chamber has therefore already (implicitly) found them to be relevant and reliable in their entirety. In the Decision, the Chamber authorised the introduction of prior recorded testimonies pursuant to Rules 68(2)(b) and 68(3) of the Rules, provided that the remaining conditions under each of the provisions are met. If so, the written statements will be considered submitted to the Chamber.²² Second, the Defence teams incorrectly assume that there exists an exclusionary and absolute rule against any evidence provided by a witness other than what the witness saw or heard,²³ against speculation and opinion evidence,²⁴ or against anonymous hearsay or hearsay as such.²⁵ However, apart from Article 69(7)

²² See Decision, paras 23, 39. See also: “Decision on the submission and admission of evidence”, 29 January 2016, ICC-02/11-01/15-405.

²³ Gbagbo Defence Request, para. 47.

²⁴ *Id.*; Blé Goudé Defence Request, para. 6.

²⁵ Gbagbo Defence Request, para. 49.

of the Statute, such an exclusionary (not absolute) provision does not exist. Accordingly, the second issue of the Defence of Laurent Gbagbo and the first issue of the Defence of Blé Goudé do not arise out of the Decision and leave to appeal in their respect must be denied.

The issue of the Chamber's use of the notion of "system of evidence"

18. The Defence of Laurent Gbagbo raises as its third issue the validity of the Chamber's consideration of the relative importance of the prior recorded testimony in the system of evidence expected to be presented for the purpose of determining whether it was appropriate to introduce the witness statements of ten witnesses pursuant to Rule 68(3) of the Rules.
19. The Defence contests the ability of the Chamber to distinguish between witnesses, and the appropriateness of such an exercise, arguing that "a witness is a witness".²⁶ It appears that the Defence purports to challenge the mere existence of discretion of the Trial Chamber to decide whether to introduce prior recorded testimony under Rule 68(3) of the Rules. Moreover, the logical end of the argument of the Defence that the Chamber could not have introduced the prior recorded testimony of certain witnesses because they were relatively less important in the system of evidence expected to be presented would render Rule 68(3) of the Rules inapplicable
20. As such, the issue raised by the Defence is not only a disagreement with the Decision, but also a general disagreement with Rule 68(3) of the Rules. Such disagreement cannot, however, be resolved on appeal. Accordingly, the issue identified does not qualify as appealable under Article 82(1)(d) of the Statute.

²⁶ Gbagbo Defence Request, paras 53-54.

The issues of the introduction of annexes to the witness statements introduced under Rule 68 of the Rules

21. In the Decision, the Chamber held that “[i]n case of introduction of written statements under Rule 68 of the Rules, any documentary evidence annexed is also to be considered submitted”.²⁷ The validity of this specific decision is the object of the proposed appeal by both the Defence of Laurent Gbagbo and the Defence of Charles Blé Goudé as the third issue.
22. The Chamber considers that the issue as identified by the Defence teams is one arising out of the Decision. However, the Chamber finds that the issue has no impact on either the fair and expeditious conduct of the proceedings, or the outcome of the trial. The Directions on the Conduct of Proceedings provide for a relatively less stringent procedure for submission of documentary evidence that exists independently of the Decision.²⁸ Therefore, even if the Decision is incorrect in this aspect and reversed on interlocutory appeal, the ability of the Prosecutor to submit the documentary evidence in question will not change. Accordingly, leave to appeal cannot be granted.

The issue of “sufficient indicia of reliability”

23. Finally, the third issue identified for appeal by the Defence of Charles Blé Goudé relates to the introduction of the statement of Witness P-590 under rule 68(2)(b) of the Rules. More specifically, it concerns the following finding by the Chamber:

The Chamber also considers that the statement of Witness P-0590, bearing in mind that it was taken by the Office of the Prosecutor pursuant to Rule 111 of the Rules and under all applicable guarantees, including Article 54(1) of the Statute, bears sufficient indicia of reliability. The witness was explained the procedure and the significance of providing a statement to the Office of the Prosecutor. The statement also includes information as to how the witness came to know of particular facts.²⁹

²⁷ Decision, para. 9.

²⁸ ICC-02/11-01/15-498-AnxA, para. 43.

²⁹ Decision, para. 22.

24. The Defence of Charles Blé Goudé argues that the Chamber omitted consideration of other factors which it was obliged to consider. This is an issue arising out of the Decision which would significantly affect the fair and expeditious conduct of the proceedings. Although the Decision solely refers to the prior recorded testimony of one witness, it relates to an important part of the Chamber's analysis of the factors for introduction of prior recorded testimony under Rule 68(2)(b) of the Rules. Since the Chamber has encouraged the parties to use Rule 68 'to streamline the presentation of evidence where possible', an immediate resolution by the Appeals Chamber would materially advance the proceedings, by setting out clearly what the mandatory criteria and the discretionary criteria of the Trial Chamber are pursuant to Rule 68(2)(b) and (3) of the Rules.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY, BY MAJORITY,
JUDGE HENDERSON PARTIALLY DISSENTING,**

GRANTS the Defence of Laurent Gbagbo leave to appeal the Decision on the issue of whether "the Chamber erred in law in posing 'good trial management' as a guiding principle for the admission of prior statements";

GRANTS the Defence of Charles Blé Goudé leave to appeal the Decision on the issue of "whether the Chamber erred by failing to apply the requirement that prior recorded testimony admitted under Rule 68(3) must not be prejudicial to the accused, by ignoring the guidance provided by the Appeals Chamber in *The Prosecutor v. Bemba*, which guidance does not provide for the criterion of 'good trial management', and introduced by paragraph 25 of the Impugned Decision" and on the issue of "whether the Chamber erred by limiting its analysis of sufficient indicia of reliability to the formal requirement that the statement be taken by the Prosecution 'pursuant to Rule 111 of the Rules and under all applicable guarantees, including article 54(1),'

and not expanding it to include other factors included in Judge Henderson's dissent such as but not limited to: 'the competence of the witness to testify about the facts... potential bias of the witness, his or her (in)sincerity, but also the possibility of honest mistake''; and

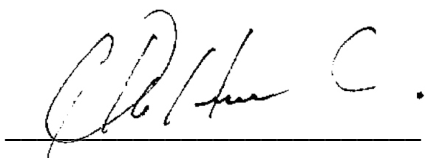
REJECTS the requests for leave to appeal the Decision in other parts.

Judge Henderson appends a partially dissenting opinion.

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



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 7 July 2016

At The Hague, The Netherlands