

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/11-01/15
Date: 11 October 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 "Prosecution's application to conditionally admit the prior recorded statements and related documents in relation to Witnesses P-0106, P-0107, P-0117 and P-0578 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
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

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 (“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 statements and related documents in relation to Witnesses P-0106, P-0107, P-0117 and P-0578 under rule 68(3)”, filed on 26 July 2016 (“Application”).¹

1. The Application seeks the “conditional submission into evidence of the prior recorded statements, including related documents”, of Witnesses P-0106, P-0107, P-0117 and P-0578, under Rule 68(3) of the Rules. Annex 1 to the Application specifies the precise items of evidence which are covered by the Application.²
2. The Defence of Charles Blé Goudé³ and the Defence of Laurent Gbagbo⁴ responded on 22 August 2016, both objecting to the Application.
3. On 28 September 2016, the Chamber orally ruled on the Application insofar as it concerns Witness P-0578, finding that the written statement of Witness P-0578 is in principle suitable for introduction under Rule 68(3) of the Rules and directing the parties to prepare accordingly.⁵ The Chamber announced that the reasoning will follow in writing.⁶ The present decision, accordingly, resolves the remainder of the Application, and provides reasoning in respect of the written statement of Witness P-0578.
4. This is the third 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

¹ ICC-02/11-01/15-636-Conf and confidential annexes 1-2.

² ICC-02/11-01/15-636-Conf-Anx1.

³ ICC-02/11-01/15-650-Conf (“Blé Goudé Defence Response”).

⁴ ICC-02/11-01/15-651-Conf (“Gbagbo Defence Response”).

⁵ ICC-02/11-01/15-T-81-CONF-ENG, pp. 2-3.

⁶ *Id.*

present decision, the Chamber follows the same general approach as that laid out in the first decision on the matter.⁷

5. 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.
6. The Prosecutor submits that Witnesses P-0106, P-0107, P-0117 and P-0578 “relate in great part to the events of 16 December 2010” and, similar to Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588 and P-0589, testify to the events and issues from their own personal perspective and do not have knowledge of the planning and overall conduct of the FDS operation during the events.⁸ In the submission of the Prosecutor, the reasoning of the decision of 9 June 2016 applies and their written statements can equally be introduced under Rule 68(3) of the Rules.⁹ The Prosecutor also submits that the written statements bear sufficient indicia of reliability, that the introduction of written statements would foster judicial efficiency

⁷ “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.

⁸ Application, para. 21.

⁹ *Id.*

and economy, and would not be prejudicial to or inconsistent with the rights of the accused.¹⁰

7. The Defence of Charles Blé Goudé emphasises the relevance and detail of the written statements, and the fact that they are not corroborative of other evidence.¹¹ In addition, the Defence argues that the written statement of Witness P-0578 in part does not demonstrate sufficient indicia of reliability because the witness was not in a position to make certain detailed observations.¹²
8. The Defence of Laurent Gbagbo, in turn, draws the attention to what it deems excessive use of Rule 68 of the Rules by the Prosecutor.¹³ It also argues that the written statements in question are all large in scope, concern facts contested by the Defence, and are in large part constituted of hearsay.¹⁴ The Defence also questions the purpose of the Application, observing that the Prosecutor intends to still examine the witnesses on the majority of points touched upon in their statements (*"sur la plupart des points qui ont été abordés dans leur déclaration"*).¹⁵ The Defence opposes the introduction of the annexes to the written statements under Rule 68(3) of the Rules, arguing that this is in contravention of the requirements of the procedure under paragraph 43 of the directions on the conduct of proceedings.¹⁶ The Defence also objects to the redactions of some of the annexes, and notes that one annex mentioned by the Prosecutor was in fact not disclosed and does not appear on the list of evidence of the Prosecutor.¹⁷
9. The written statement of Witness P-0106 is centred on the witness's participation in the march of 16 December 2010. The witness describes the assembly of the

¹⁰ *Ibid.*, paras 22-24.

¹¹ Blé Goudé Defence Response, para. 1; see also paras 17-39.

¹² *Ibid.*, paras 40-45.

¹³ Gbagbo Defence Response, paras 6-7.

¹⁴ *Ibid.*, paras 11, 15, 18.

¹⁵ *Ibid.*, para. 19.

¹⁶ *Ibid.*, paras 22-29.

¹⁷ *Ibid.*, paras 30-31.

demonstrators in Abobo, the course of the march and the eventual repression by forces that he identifies as “BMO”.¹⁸ The witness also provides evidence of the injury that he sustained as a result.¹⁹ In addition, his statement touches upon other facts relevant to the charges, such as the women’s march in Abobo on 3 March 2011 and the shelling of Abobo “around three weeks before the arrest of Laurent Gbagbo”.²⁰

10. Witness P-0107 describes in his written statement how he took part in the march of 16 December 2010, in particular how he marched from Adjamé to Cocody where, according to his testimony, the FDS used lethal force against the demonstrators at a grand junction close to the RTI. The witness also narrates how he attempted to flee but was injured by bullet and later apprehended by FDS elements who briefly detained him and two other demonstrators.²¹ The witness also provides certain information related to the events of 3 and 17 March 2011 in Abobo.²²
11. Witness P-0117 provided a written statement in which she explains her participation in the march on the RTI on 16 December 2010. The most significant part of her testimony relates to killings of demonstrators by the police in Williamsville, the witnesses’ arrest and subsequent detention [REDACTED].²³ In addition, the witness also provides evidence on the events in Abobo relevant to the charges.²⁴
12. The statement of Witness P-0578 contains an explanation of six videos that the witness filmed in Williamsville on 16 December 2010, and of the events filmed, in

¹⁸ CIV-OTP-0019-0211 at 0216-0218, paras 27-36.

¹⁹ *Ibid.*, at 0218, para. 36; at 0230, paras 106-107; CIV-OTP-0019-0264, CIV-OTP-0019-0265, CIV-OTP-0019-0266, CIV-OTP-0019-0267.

²⁰ CIV-OTP-0019-0211 at 0220-0221, paras 46-52; at 0228, paras 89-95.

²¹ CIV-OTP-0020-0064 at 0072-0080, paras 54-117.

²² *Ibid.*, at 0082-0086, paras 131-163.

²³ CIV-OTP-0020-0033 at 0040-0050, paras 46-123.

²⁴ *Ibid.*, at 0054-0058, paras 151-184.

particular the incidents of violence used by persons armed with firearms against apparent demonstrators.²⁵

13. The parties all acknowledge that the written statements of Witnesses P-0106, P-0107, P-0117 and P-0578 relate to facts which are important for the determination of the charges and which are contested. The Chamber shares this assessment, but also considers that the content of the written statements of the four witnesses is not such that it would preclude the use of the procedure of Rule 68(3) of the Rules and require the witnesses to give the entirety of their evidence live in court.
14. The Chamber notes, in particular, that the evidence of each of the four witnesses is limited to facts they personally observed as indicated above for each witness. In particular, none of the witnesses have comprehensive knowledge of the events of 16 December 2016 and on the days that followed, or insider or other quality knowledge of the planning and overall conduct of the FDS operation.
15. The Defence will be given the opportunity to question both witnesses in the necessary depth on all relevant matters arising from the statement. The Chamber considers that this opportunity to examine the witnesses is a sufficient counter-balancing factor to the relative importance of the witnesses.
16. In these circumstances, the Chamber is of the view that the fact that the statements of the four witnesses concerned pertain to issues which are contested and which are of importance for the Prosecutor's case is no impediment to their being introduced through Rule 68(3) of the Rules. Provided that the Defence is given adequate opportunity to examine the witnesses, there is therefore no overriding reason preventing the streamlining of the presentation of evidence by allowing the introduction of the witness statements pursuant to Rule 68(3) of the Rules.

²⁵ CIV-OTP-0084-0142.

17. The Chamber notes the specific argument of the Defence of Charles Blé Goudé against the introduction of part of the written statement of Witness P-0578, on the ground that many of the details mentioned by the witness cannot be observed on the videos that he provided.²⁶ However, the Chamber does not understand that part of the witness's statement to be a mere description of the images seen on the video, but also, or mostly, an account of the witness's personal observations of the filmed events, which are prompted by the viewing of the video.
18. The Chamber is aware that, as pointed out by the Defence of Laurent Gbagbo, Rule 68 of the Rules will be applied to the majority of the witnesses forming part of the "RTI block" as identified by the Prosecutor.²⁷ However, the Chamber does not share the view of the Defence that this is in itself impermissible. This is because the Chamber has assessed the statement and the circumstances related to each witness against the requirements of the applicable law. In this regard, the Chamber also emphasises that making use of Rule 68 of the Rules, within its parameters, cannot come in conflict with the Statute because the latter instrument explicitly states in Article 69(2) that witnesses shall give testimony in person, except, *inter alia*, to the extent provided for in the Rules. Indeed, the Statute does not contain a principle of orality in the terms put forward by the Defence.
19. In line with the Chamber's previously explained approach,²⁸ the annexes to the statements and related documents shall also be considered submitted. This is with the exception of item "CIV-OTP-0020-0098", which is referred to by the Prosecutor in the Application but has not been disclosed and communicated to the Chamber.
20. The Chamber notes that the Defence of Laurent Gbagbo argues that annexes to witness statements cannot be introduced under Rule 68 of the Rules, but only via

²⁶ Blé Goudé Defence Response, paras 40-45.

²⁷ See ICC-02/11-01/15-487-Conf-Anx2.

²⁸ ICC-02/11-01/15-573-Conf, para. 9.

paragraph 43 of the directions on the conduct of proceedings.²⁹ The Defence insists that the procedure of paragraph 43 cannot be circumvented because it imposes on the submitting party an obligation to demonstrate the authenticity and relevance of the evidence submitted. However, this obligation exists with respect to all evidence that is submitted. If the Chamber cannot be properly satisfied of the authenticity or relevance of an item of documentary evidence, that item will not be relied upon for the purpose of the final judgment, regardless of whether the item of evidence in question was submitted via paragraph 43 of the directions on the conduct of proceedings or as an annex to a written statement introduced under Rule 68 of the Rules. The objection of the Defence is therefore unfounded.

21. As concerns the objection of the Defence to the introduction of an annex to the statement of Witness P-0106 and an annex to the statement of Witness P-0117,³⁰ the Chamber notes that, in line with the applicable protocol, adopted on 15 December 2014,³¹ the Defence should have raised its objection with the Prosecutor prior to seizing the Chamber of a disputed redaction. This procedure not having been followed, the Chamber will not address the matter.
22. The Chamber therefore finds, in principle, that the written statements of Witnesses P-0106, P-0107, P-0117 and P-0578 are suitable for introduction under Rule 68(3) of the Rules. Introduction of the statements of Witnesses P-0106, P-0107 and P-0117 can, however, only occur when all of the conditions of the rule are met. The witnesses will appear before the Chamber, and will be asked whether they object to the introduction of their written statements. If they do not object, their written statements will be considered as submitted.

²⁹ Gbagbo Defence Response, paras 22-29; see ICC-02/11-01/15-498-AnxA.

³⁰ Gbagbo Defence Response, para. 30.

³¹ ICC-02/11-01/11-737-AnxA.

23. The Prosecutor will be accorded an opportunity to conduct a limited supplementary examination of the witnesses, aimed at expanding or clarifying certain topics covered in the written statement. The Chamber notes that the Prosecutor has indicated that she would require one hour for the supplementary examination of each of the four witnesses concerned.
24. The Defence teams will not be constrained to the amount of time used by the Prosecutor for the supplementary examination, and will be granted a reasonable amount of time to examine each witness. Examination of the witnesses by the legal representative of the participating victims shall be subject to the general regime applicable.
25. Finally, the Chamber notes that the parties and participants 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, BY MAJORITY,
JUDGE HENDERSON PARTIALLY DISSENTING,**

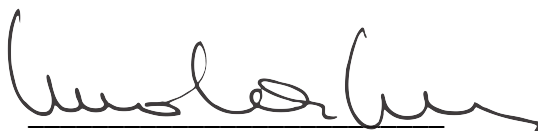
FINDS that the written statements of Witnesses P-0106, P-0107 and P-0117 are in principle suitable for introduction under Rule 68(3) of the Rules and directs the parties to prepare accordingly;

ORDERS the Prosecutor to file a public redacted version of the Application by 18 October 2016; and

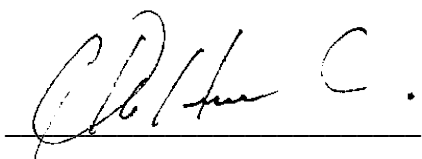
ORDERS the Defence of Laurent Gbagbo and the Defence of Charles Blé Goudé to file public redacted versions of their respective responses by 25 October 2016.

Judge Henderson will append a partially dissenting opinion in due course.

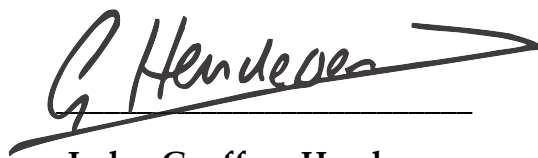
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser, Presiding Judge

A handwritten signature in black ink, appearing to read 'O. Herrera Carbuccion', written over a horizontal line.

Judge Olga Herrera Carbuccion

A handwritten signature in black ink, appearing to read 'G. Henderson', written over a horizontal line.

Judge Geoffrey Henderson

Dated 11 October 2016

At The Hague, The Netherlands