

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-02/11-01/15**
Date: **24 October 2016**

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
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

**Prosecution's response to Mr Gbagbo's request for leave to appeal the decision on
the mode of testimony of rule 68(3) Witnesses
(ICC-02/11-01/15-733)**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
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

The Office of Public Counsel for Victims

States Representatives

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. Mr Gbagbo's request for leave to appeal¹ the Trial Chamber's decision authorising seven Witnesses² to testify live before the Chamber by means of video-link technology³ should be rejected. None of the four alleged issues raised in the Application are appealable, as they either do not arise from the Decision or they constitute a mere disagreement with the Chamber. They also do not meet the remaining criteria for leave to appeal under article 82(1)(d) of the Statute. The Application fails to show that the fairness and expedition of the proceedings, or the outcome of the trial is significantly affected, or that immediate resolution by the Appeals Chamber is necessary.

Submissions

2. None of the proposed issues may be certified for appeal since they misstate the Decision, or merely disagree with it. None of these issues is an 'appealable' issue, defined as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".⁴ Such topics must be "essential for the determination of matters arising in the judicial cause under examination."⁵ They must genuinely arise from the impugned decision.⁶ Issues which fail some or all of these requirements may not be certified for appeal.

The issues proposed for certification are not 'appealable' or do not arise from the Decision

3. The Application presents four issues (together, the "Issues") for certification.

¹ ICC-02/11-01/15-733 ("Application").

² These are Witnesses P-0107, P-0587, P-0117, P-0555, P-0169, P-0588 and P-0589.

³ ICC-02/11-01/15-721 ("Decision").

⁴ See *e.g.* ICC-01/04-168 ("DRC Appeal Decision"), para. 9.

⁵ See *e.g.* DRC Appeal Decision, para. 9.

⁶ See *e.g.* ICC-01/05-01/13-1278, paras. 9-10

The First Issue

4. The First Issue alleges that the Chamber committed an error of law by rendering a decision without affording the Parties a genuine right to be heard.⁷ The First Issue misstates the procedure followed by the Chamber, and as such, it does not arise out of the Decision.
5. The Gbagbo Defence argues that the Parties were not genuinely heard on the basis that the Defence was not privy to either the email communication or most of the content of the email communication that the Victims and Witnesses Unit (“VWU”) sent to the Chamber with respect to hearing certain witnesses via video-link⁸ and because the Defence was not given the necessary time to present its arguments.⁹
6. Contrary to the Defence assertion, the Chamber afforded the Parties a genuine right to be heard prior to issuing its Decision. First, it is within the Chamber’s discretion to decide whether or not to share a direct communication between the VWU and the Chamber with the Parties and participant.¹⁰ In this instance, however, and contrary to the Gbagbo Defence argument, the Presiding Judge did share the content of the VWU communication the Chamber had received and even quoted from it.¹¹ This occurred during a court hearing through which the Chamber scheduled a subsequent hearing for the Parties to be heard on the issue.¹² Notably, the Gbagbo Defence did not request any additional information at the time.
7. Moreover, the Parties and participant were heard on the issue. On 23 September 2016, the Chamber announced it would hold a hearing the following week in order to seek the views of the Parties on the issue:

⁷ See Application, paras. 11-13 (under the sub-title : « *La Chambre a erré en droit en rendant une décision par laquelle elle renonce à la présence de témoins à la suite d’une procédure au cours de laquelle n’a pas été tenu de véritable débat contradictoire* »).

⁸ See Application, para. 11.

⁹ See Application, para. 12.

¹⁰ Similarly, the Chamber has previously stated that VWU assessments supporting requests for protective measures are by their nature mainly confidential *ex parte*. See ICC-02/11-01/15-598, para. 6.

¹¹ ICC-02/11-01/15-T-78-CONF-ENG ET p.24, lns. 11 – p. 25, ln. 5.

¹² *Ibid.*

“The second thing is that the Chamber would like to seek the views of the parties on some concerns submitted to the Chamber by the VWU in connection with the forthcoming testimony of witnesses -- we will then all obviously issue a decision on this -- whose statements have been provisionally admitted under Rule 68(3) [...] I think we will use the end of, say Tuesday’s session or something, or at the beginning, in order to address this issue so that we can during the week then file or issue a decision [...].”¹³

This hearing was indeed held four days later as announced and the Parties and participant were all afforded the opportunity to make oral submissions.¹⁴ As such, a “*débat contradictoire*” very much occurred. In making its oral submissions, the Gbagbo Defence was not given a maximum time limit nor were they cut short in the midst of submissions.¹⁵ At no point did the Gbagbo Defence request either additional time for its oral submissions, nor did they at any stage request the opportunity to supplement their oral submissions with further written submissions.¹⁶

8. In conclusion, the First Issue selectively presents the procedure followed by the Chamber in a manner that does not accurately reflect the opportunity afforded to the Gbagbo Defence to address the Chamber on this issue. As such, it does not arise out of the Decision, and should be dismissed.

The Second Issue

9. The Second Issue alleges that the Chamber committed an error of law by taking into account budgetary considerations in arriving at its decision.¹⁷ The Second Issue constitutes a mere disagreement with the Chamber’s exercise of discretion.

¹³ ICC-02/11-01/15-T-78-CONF-ENG ET p.24, lns. 11-14 and p. 25, lns. 6-8.

¹⁴ ICC-02/11-01/15-T-80-CONF-ENG ET p.79 –100.

¹⁵ ICC-02/11-01/15-T-80-CONF-ENG ET p.94 –97.

¹⁶ *Ibid.*

¹⁷ See Application, paras. 14-18 (under the sub-title : «*La Chambre a erré en droit en considérant que des questions budgétaires avaient à être prises en compte pour décider de la non présence de témoins dans l’enceinte judiciaire* »).

Moreover, it mistakenly assumes that the outcome of the Decision was premised on budgetary concerns, and hence, the Issue does not arise from the Decision.

10. The Application attempts to argue that the Chamber does not have discretion to take factors such as “budgetary and logistical concerns” into account. Finally the Application posits that the Decision did not explain the link between budgetary questions and the “expeditious conduct of the proceedings”.¹⁸
11. First, the Chamber enjoys broad discretion in the factors it can consider in deciding on an application to hear a witness *via* live testimony by means of audio or video-link technology under rule 67. Moreover, as the Decision plainly shows, the Chamber explicitly stated its Decision was not premised solely on budgetary concerns: “[a]lthough budget and logistical concerns are not determinative, they cannot be overlooked, particularly if such considerations could affect the expeditious conduct of the proceedings.”¹⁹ Finally, and contrary to the Application, the Chamber clearly established the link between “budget and logistical concerns”²⁰ and the expeditious conduct of the proceedings by explaining that it took into account the feasibility of VWU arranging the witnesses’ order of appearance in an uninterrupted manner²¹ and the fact that it would be desirable to avoid having witnesses grounded in The Hague during the break of hearings scheduled between 7 and 11 November 2016.²² The Defence thus fails to read the Decision in context.
12. In conclusion, the Second Issue constitutes a mere disagreement with the Decision and does not arise from it, and should be dismissed.

¹⁸ See *Application*, para. 17.

¹⁹ Decision, para. 19.

²⁰ *Ibid* (emphasis added). The Application has mistakenly replaced the Chamber’s consideration of “budget and logistical concerns” with just budget considerations, omitting to mention the Chamber’s reference to logistical considerations.

²¹ *Ibid*.

²² *Ibid*.

The Third Issue

13. The Third Issue alleges that the Chamber erred in fact and in law by basing its Decision on the premise that the testimony of rule 68(3) Witnesses would be shorter than the testimony of witnesses who are heard *normally*.²³ The Third Issue misinterprets the Decision in two ways and therefore does not arise from it.
14. *First*, the Application erroneously interprets the Decision as authorising video-link testimony for the seven Witnesses concerned simply *because* they are rule 68(3) Witnesses.²⁴ This contradicts the express text of the Decision, which made clear that “[a]lthough the submission of the witness’s statement pursuant to Rule 68(3) of the Rules is a consideration, it is not a fundamental consideration.”²⁵ Contrary to the Application, the Decision did not authorise rule 67 live testimony by means of video-link technology merely because these Witnesses’ statements have been found suitable for introduction through rule 68(3).
15. *Second*, the Application also misinterprets the basis upon which the Chamber stated that the live witness testimony who are the subject of the Decision “will be in all likelihood shorter than for other witnesses.”²⁶ The Defence wrongly suggests that the Chamber based this assertion on the fact that these witnesses are rule 68(3) Witnesses, and in doing so, fails to read the Decision in context. The Chamber explicitly stated that these Witnesses’ testimony would in all likelihood be shorter not only because they are rule 68(3) Witnesses “but also because they are all crime base witnesses whose testimony, in any case, would not have seemingly lasted for more than some hours.”²⁷ The Chamber based this assertion on the Prosecution’s time estimates.²⁸ In conclusion, the Third Issue is premised

²³ See Application paras. 19-25 (under the sub-title : «La chambre a erré en droit et en fait en fondant sa décision sur le postulat selon lequel un témoignage recueilli au titre de la Règle 68(3) serait plus court qu’un témoignage présenté normalement ce qui l’a conduite à considérer que la présence physique d’un témoin sous 68(3) se justifierait moins que celle d’un témoin témoignant *normalement* ». (emphasis added)

²⁴ See Application, paras 24-25 (emphasis added).

²⁵ Decision, para. 11.

²⁶ Decision, para. 19.

²⁷ Decision, para. 198.

²⁸ Decision, para. 19, fn.11

on misunderstandings of the Decision and therefore does not arise from it. It should be dismissed.

The Fourth Issue

16. The Fourth Issue alleges that the Chamber erred in law by failing to reason its decision on a case-by-case basis.²⁹ The Fourth Issue merely disagrees with the Decision.

17. The Gbagbo Defence's submission wrongly assumes that a reasoned decision can only come in the form of a decision where each witness is addressed in turn. Nor does it acknowledge the requirements for a reasoned opinion set out by the Appeals Chamber. Yet, the Chamber has indeed indicated "with sufficient clarity the basis of the decision." It need not recite and individually set out each and every factor that is before it.³⁰

18. Contrary to the Defence's understanding, the Chamber considered the submissions made by the Parties, participant, and VWU in arriving at its Decision. The Chamber also explicitly stated the relevant criteria it considered in arriving at its Decision. The fact that the Gbagbo Defence disagrees with the criteria considered by the Chamber³¹ is not equivalent to the Decision not being reasoned.

19. In conclusion, the Fourth Issue merely disagrees with the Decision. It should be dismissed.

The Issues do not meet the requirements of article 82(1)(d)

20. In any event, none of the proposed Issues meets the cumulative requirements of article 82(1)(d), and thus cannot be certified for appeal.

²⁹ See Application paras. 26-29 (under the sub-title : «La chambre a erré en droit en ne motivant pas sa décision au cas par cas »).

³⁰ ICC-01/04-01/06-773, para. 20.

³¹ Application, para. 26.

The proposed Issues do not significantly affect the fair and expeditious conduct of proceedings, or the outcome of the trial

21. The Gbagbo Defence fails to particularise its arguments concerning the impact of the proposed Issues upon the fair and expeditious conduct of the trial, or its outcome.
22. *First*, the Defence fails to concretely show that the Issues significantly affect the fairness of the proceedings.³² Rather it only complains in general terms that this Decision, combined with previous Chamber's decisions, violates the principle that the testimony of a witness at trial must be given in person. This is insufficient.
23. Further, the Gbagbo Defence impermissibly reiterates its disagreement with previous decisions that granted the admission of statements of certain witnesses through rule 68(3) and incorrectly states that the Chamber based these decisions as well as the Decision on bureaucratic factors such as time-saving and budgetary considerations.
24. Nor does it even attempt to argue that the Issues would affect the expedition of the proceedings.
25. *Second*, regarding the outcome of the trial, the Defence only speculates that "*si la majorité des témoins ne peuvent être entendus et interrogés par la Défense dans de bonnes conditions, quel poids pourra être accordé à leur témoignage dans lors du jugement final ?*"³³ This exceeds the scope of the Decision. This Decision authorised the video-link testimony of only seven Witnesses. And there is no indication that this would be so for "*la majorité des témoins.*" Indeed, the Chamber rejected the VWU's recommendation for two other Witnesses.

³² *Contra* Application, paras. 30-31.

³³ Application, para. 31.

Immediate resolution by the Appeals Chamber of any of the proposed issues will not materially advance the proceedings

26. Similarly, the Gbagbo Defence fails to show that the immediate intervention of the Appeals Chamber may materially advance the proceedings. Instead the Application generally asserts that the proceedings might continue in violation of the principle that all witnesses must testify in person.³⁴ This assertion wrongly assumes that this Decision outlined a general principle affecting the conduct of the rest of the trial; whereas in reality the Decision is limited to seven specific Witnesses. The Defence merely disagrees with the Trial Chamber's exercise of discretion on a trial management matter, and the Appeals Chamber need not intervene.

Conclusion

27. For all the reasons above, the Chamber should reject the Application.



Fatou Bensouda, Prosecutor

Dated this 24th day of October 2016

At The Hague, The Netherlands

³⁴ Application, para. 33.