

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/11-01/15
Date: 12 September 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 request for leave to appeal the “Decision on the ‘Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088”

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

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 “Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088” » (ICC-02/11-01/15-950-Conf)*”, filed by the Defence of Laurent Gbagbo on 27 June 2017 (“Request”).¹

1. On 6 June 2017, the Chamber issued the “Decision on the ‘Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088” (“Decision”),² whereby the Chamber, inter alia: (i) decided that the prior recorded statements of Witnesses P-0129, P-0266, P-0294, P-0360, P-0380, P-0426, P-0471, P-0476, P-0479, P-0489, P-0543, P-0573 and P-0594 shall be introduced and considered submitted to the Chamber as evidence, on the condition that a declaration by each witness, as provided for in Rule 68(2)(b) of the Rules, is submitted; and (ii) found that the written statements of Witnesses P-0054, P-0105, P-0172, P-0237, P-0293, P-0297, P-0362, P-0363, P-0364, P-0381, P-0407, P-0521, P-0554, P-0567, P-0568, P-0580 and P-0582 are in principle suitable for introduction under Rule 68(3) of the Rules and directed the parties to prepare accordingly.³

¹ ICC-02/11-01/15-969-Conf.

² ICC-02/11-01/15-950-Conf.

³ *Ibid.*, p. 45.

2. The Defence of Mr Laurent Gbagbo seeks leave to appeal the Decision in respect of the following issues:

- whether Chamber erred in law in creating a presumption of accuracy (*“une presumption d’exactitude”*) in the taking of prior statements of witnesses by the investigators of the Office of the Prosecutor and by reversing the burden of proof by imposing on the Defence the obligation to demonstrate the existence of errors in the taking of prior statement in order to have their utilisation rejected (*“First Issue”*);
- whether the Chamber erred in law in not drawing in the decision conclusions from experience (*“en ne tirant pas dans sa décision les conséquences de l’expérience”*) (*“Second Issue”*);
- whether the Chamber committed a certain number of errors of law in its understanding of the notion of corroboration (*“Third Issue”*);
- whether the Chamber erred in law in admitting (*“en admettant”*) not entire but truncated statements (*“Fourth Issue”*); and
- whether the Chamber erred in law by finding that the Defence was not deprived of its right to question witnesses whose statements are admitted (*“sont admises”*) under Rule 68(2)(b) of the Rules (*“Fifth Issue”*).

3. On 3 July 2017, the common legal representative of the victims participating in the proceedings⁴ and the Prosecutor⁵ responded to the Request, both submitting that it should be rejected. The Defence of Mr Charles Blé Goudé did not respond to the Request.

4. The provision applicable for the resolution of the Request is Article 82(1)(d) of the Statute. In brief, an interlocutory appeal can be allowed in respect of issues arising

⁴ ICC-02/11-01/15-974-Conf.

⁵ ICC-02/11-01/15-975-Conf.

out of the impugned decision, meaning issues essential for the disposition of the matter. In addition, appeal can only be certified in respect of issues which would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Chamber, immediate appellate resolution may materially advance the proceedings.

First Issue

5. The First Issue concerns paragraph 7 of the Decision, which states:

The Chamber also notes at this juncture the argument that there is “no control” over the investigators of the Office of the Prosecutor in the taking of statements from witnesses and that therefore, essentially, the statements must be received with circumspection, and the argument that no statement taken with the assistance of an interpreter may be introduced, including because it is not known whether the written statements in French were properly interpreted back to the witnesses before they were signed. The Prosecutor, her staff and interpreters engaged by the Court are subject to rules applicable to their function and/or profession and, in the absence of any indication of wrongdoing or negligence on their part, both arguments raised by the Defence of Laurent Gbagbo are entirely speculative and without merit.⁶

6. The Defence interprets this finding as giving rise to a presumption that any prior testimony accurately reflects the thought of the victim (*“une presumption faisant de toute déclaration antérieure le reflet fidèle de la pensée du témoin”*).⁷ On this basis, the Defence then also alleges that there has been a reversal of the burden of proof with respect to the question of accuracy of witness statement taking by the Office of the Prosecutor.⁸

7. The Defence’s interpretation of the Decision is not sustainable. The Chamber did not create any general principle of interpretation or presumption. What the Chamber did was to attach no consequence to speculative arguments of the Defence. There is no basis to state that this in any way represented a an abdication of the role of the

⁶ Footnotes omitted.

⁷ Request, para. 23.

⁸ *Ibid.*, para. 24.

Chamber to carry out its duty of considering all applicable factors when determining whether prior recorded testimony should be introduced under Rule 68(2)(b) or (3) of the Rules.

8. In any case, the Defence argument is entirely abstract, and the Defence does not even attempt to explain how this alleged error was essential for the decision to introduce particular witness statements. Indeed, it is not even clear whether the alleged issue is presented with respect to witness statements of which the introduction has been allowed under both Rule 68(2)(b) and (3), or only under Rule 68(2)(b) of the Rules.⁹ Moreover, the Defence submission that only the availability of an audio recording of the interview or of a transcript can satisfactorily address the alleged problem makes clear that the Defence takes issue not really with the Chamber's finding at paragraph 7 of the Decision, but primarily with Rule 111 of the Rules, which regulates the formality of statement taking by the Office of the Prosecutor.
9. In these circumstances, the issue as presented does not arise out of the decision and leave to appeal cannot be granted.

Second Issue

10. The Defence appears to reason, and it must be noted that not all steps in this reasoning are articulated explicitly, that because the testimony of witnesses in court has differed in substance from their prior statements, the process of recording prior testimony by the Prosecutor cannot be trusted, and, therefore, introduction of prior recorded testimony should not be allowed. In the words of the Defence, even if the presumption of accuracy of prior statements is, *arguendo*, accepted, such presumption has to be reversed in the present case.¹⁰

⁹ See *ibid.*, para. 26, last sentence.

¹⁰ *Ibid.*, para. 30.

11. In the assessment of the Chamber, the Defence position is speculative. The allegation that every single witness has provided different testimony in court than in their prior statement to the Prosecutor, is sustained by one single example. Moreover, the conclusion that a difference between the prior statement and in-court testimony means that the prior testimony was not recorded properly is not one that necessarily follows.
12. Accordingly, the Second Issue does not meet the criteria of Article 82(1)(d) of the Statute and must be rejected.

Third Issue

13. The Chamber notes that under Rule 68(2)(b) of the Rules, one of the factors which the Chamber shall consider in determining whether introduction of prior recorded testimony may be allowed is “whether the prior recorded testimony in question [...] is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts”. It is important to note that, contrary to the submission of the Defence,¹¹ the text of the provision does not require a finding by the Chamber that prior testimony is “of cumulative or corroborative nature” as a *conditio sine qua non* for introduction in writing.
14. In order for any issue relating to corroboration as a factor to be considered by the Chamber when deciding on introduction of prior recorded testimony under Rule 68(2)(b) of the Rules to meet the criteria for certification under Article 82(1)(d) of the Statute, it has to be shown that the issue was essential for the decision of the Chamber whether or not to introduce prior recorded testimony. Because the criteria for introduction of prior recorded testimony are assessed individually, such argument cannot be made wholesale, but must be specific. The Defence does not make any arguments to explain how the alleged errors with respect to corroboration

¹¹ *Ibid.*, para. 34.

affected the decision to allow the introduction of the prior recorded testimony of specific witnesses. The Chamber, therefore, does not have a basis to conclude that the Third Issue is one arising from the Decision for the purposes of Article 82(1)(d) of the Statute.

Fourth Issue

15. The Defence proposes to argue on appeal against the ruling of the Chamber that prior statements could be introduced with the exception of certain paragraphs. In the interpretation of the Defence, this ruling appears at paragraph 81 of the Decision.¹²
16. However, paragraph 81 of the Decision does not contain a ruling of the Chamber on the introduction of prior recorded testimony under Rule 69(3) of the Rules. That paragraph states, in essence, that concerns which necessitated the rejection of the Prosecutor's proposed introduction of the statements of Witnesses P-0087, P-0088, P-0164, P-0185, P-0226, P-0239 and P-0316 do not exist with respect to Witnesses P-0054, P-0105, P-0172, P-0184, P-0293, P-0297, P-0407, P-0554, P-0568 and P-0582, and that therefore those statements could be analysed under Rule 68(3) of the Rules. That analysis is then provided at paragraphs 82-84, 86-87, 89-99, 103-110, 112-124 of the Decision. Finally, the operative part of the Decision states that "the prior recorded statements", with no exclusion, of, *inter alia*, Witnesses P-0054, P-0105, P-0172, P-0293, P-0297, P-0407, P-0554, P-0568 and P-0582 are in principle suitable for introduction under Rule 68(3) of the Rules.¹³ Conversely, the Decision rejected the introduction of prior recorded testimony of Witness P-0184.¹⁴
17. Accordingly, the issue presented by the Defence does not arise out of the Decision, and leave to appeal cannot be granted.

¹² *Ibid.*, para. 47.

¹³ Decision, p. 45.

¹⁴ See Decision, p. 45 and para. 90.

Fifth Issue

18. As is apparent from paragraph 61 of the Request, the Fifth Issue is concerned with paragraph 21 of the Decision:

The Chamber notes that both Defence teams oppose the introduction of the written statements on the ground that they wish to question the witnesses on topics not covered, or not covered in detail, in the statement. However, the Chamber considers, as stated by other Trial Chambers, that the crucial question at present is not whether a person shall be called to testify before the Chamber, but whether a testimony which was previously recorded may, in light of its content and significance to the case, be introduced in writing. If this request is rejected, this does not create an obligation for the calling party to actually call the witness. Therefore, it does not follow that a request for introduction of prior recorded testimony under Rule 68(2)(b) of the Rules must be rejected because the witness may have knowledge of facts which are of interest to the Defence but are not reported in the statement taken by the Prosecutor. Indeed, the Defence will, in due course, have a full opportunity to present its case to the Chamber. The Chamber notes that there is a procedure in place for contacting witnesses of another party and that introduction of a written statement under Rule 68(2)(b) of the Rules in and of itself does not preclude that the other party subsequently conducts an interview with the witness to cover topics not covered in the statement introduced.¹⁵

19. It is noted that prior to the Decision, the Defence of Laurent Gbagbo argued that it needed to question witnesses P-0266 and P-0476 on topics not covered in their prior statements.¹⁶ The cited paragraph of the Decision, which the Defence seeks to contest on appeal, was the Chamber's ruling on the Defence argument.
20. The issue, which arises out of the Decision, concerns the alleged impact of the introduction of certain witness statements under Rule 68(2)(b) of the Rules and of the resultant inability of the Defence to explore with those witnesses in court other areas not addressed in the prior written statements. This is an issue arising out of the Decision. It is emphasised that the issue is not, at this stage, whether procedural fairness vis-à-vis the Defence is affected by the introduction of the prior recorded testimony of the concerned witnesses under Rule 68(2)(b) of the Rules.

¹⁵ Footnotes omitted.

¹⁶ ICC-02/11-01/15-884-Conf.

21. However, the Chamber cannot conclude that the issue as outlined above would significantly affect the fairness of the proceedings or the outcome of the trial. This is because the Chamber cannot appreciate in abstract the impact of the Defence being unable to question Witnesses P-0266 and P-0476 in court on topics which it deems of interest for its case. The Defence investigation and the construction of the Defence case are within the hands of the Defence. The Chamber cannot conclude, on the basis of submissions before it, that the inability to question in court two witnesses called by the Prosecutor on topics not addressed in the statements of the witnesses as introduced into evidence would interfere with the presentation of the Defence case to the extent that it would have to be held that the fair and expeditious conduct of the trial is significantly affected.
22. Accordingly, the Chamber concludes that the issue does not meet the requirements of Article 82(1)(d) of the Statute, and that leave to appeal cannot be granted.

Level of confidentiality of submissions

23. The Chamber notes that the Defence of Laurent Gbagbo, the common legal representative of the participating victims and the Prosecutor have not to date filed public redacted versions of their respective submissions. An appropriate time limit for the completion of this exercise is hereby set.
24. The Defence of Laurent Gbagbo is also reminded to comply with the Chamber's order in relation to the level of classification of document ICC-02/11-01/15-884-Conf.¹⁷

¹⁷ Decision, p. 45.

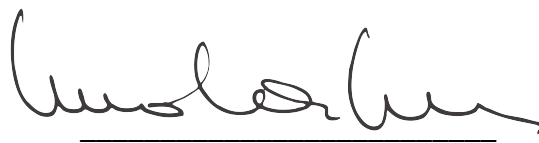
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY, BY MAJORITY,
JUDGE HENDERSON PARTIALLY DISSENTING,**

REJECTS the Request;

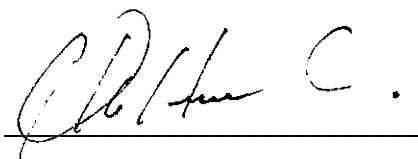
ORDERS the Defence of Laurent Gbagbo, the common legal representative of the participating victims and the Prosecutor to file public redacted versions of their respective submissions, or request their reclassification as “public”, by 19 September 2017.

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 12 September 2017

At The Hague, The Netherlands