

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/11-01/15
Date: **3 November 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 protective and special measures, mode of testimony and the order of
appearance of certain upcoming witnesses**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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James Stewart

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Counsel for Mr Laurent Gbagbo

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**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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REGISTRY

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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 Article 67(1)(e), 68(1) and (2), and 69 of the Rome Statute (“Statute”) and Rules 67, 87 and 88 of the Rules of Procedure and Evidence (“Rules”), issues this decision on protective and special measures, mode of testimony and the order of appearance of certain upcoming witnesses.

1. The present decision disposes of two applications received from the Prosecutor. The first of these is the “Prosecution’s application for testimony by means of video-link technology for Witness P-0047”, filed on 10 August 2017.¹ Responses to this application were received from the Defence of Laurent Gbagbo² and from the Defence of Charles Blé Goudé³ on 21 August 2017.
2. The second application addressed in the present decision is the “Prosecution’s application for protective and/or special measures for Witnesses P-0362, P-0554, P-0567, P-0568, P-0407, P-0185, and P-0404, for testimony by means of video-link technology for Witnesses P-0362 and P-0293, and for a change in the order of witnesses with respect to Witness P-0554”, filed on 10 October 2017.⁴ The common legal representative of the victims participating in the proceedings,⁵ the Defence of Laurent Gbagbo⁶ and the Defence of Charles Blé Goudé⁷ responded to this application on 19 October 2017.
3. On 24 October 2017, the Witnesses and Victims Unit (VWU) provided to the Chamber a preliminary assessment in relation to the Prosecutor’s request of 10 October 2017, as well as a vulnerability assessment of Witness P-0047.

¹ ICC-02/11-01/15-1002-Conf.

² ICC-02/11-01/15-1005-Conf.

³ ICC-02/11-01/15-1006-Conf.

⁴ ICC-02/11-01/15-1050-Conf-Corr (corrigendum filed on 11 October 2017) and confidential annexes A-D. A public redacted version is also available, see ICC-02/11-01/15-1050-Corr-Red.

⁵ ICC-02/11-01/15-1054-Conf.

⁶ ICC-02/11-01/15-1055-Conf.

⁷ ICC-02/11-01/15-1056-Conf.

4. The Chamber will address in turn the various requests raised by the Prosecutor: (i) the request for protective/special measures under Article 68(2) of the Statute (*in camera* proceedings) for Witnesses P-0407, P-0185 and P-0404; (ii) the request for protective/special measures under Article 68(2) of the Statute (anonymity vis-à-vis the public) for Witness P-0554; (iii) the request for various special measures in respect of Witnesses P-0407, P-0404, P-0362, P-0567 and P-0568; (iv) the request for authorisation of testimony by video-link for Witnesses P-0047, P-0362 and P-0293; and (v) the request for an amendment of the calling order of witnesses.
5. With a view to enabling the preparation of the parties, the witnesses concerned and the Registry for the upcoming testimony, this decision is taken without a final VWU assessment having been completed and provided to the Chamber. In this regard, the Chamber considers that the information currently available, including that provided by the VWU on 24 October 2017, is sufficient. In any case, decisions as concerning protective and special measures are always subject to review if relevant new or additional information becomes available.

Request for protective/special measures under Article 68(2) of the Statute (in camera proceedings) for Witnesses P-0407, P-0185 and P-0404

6. The Prosecutor requests, on the basis of Article 68(1) and (2) of the Statute and Rules 87 and 88 of the Rules, that Witnesses P-0407, P-0185 and P-0404 testify *in camera* on the ground that they were allegedly victims of sexual violence.⁸ The Prosecutor seeks *in camera* proceedings “to protect these witnesses from suffering psychological harm as a result of their testimony”.⁹ In the alternative, the Prosecutor seeks that measures in the form of continued use of a pseudonym, image and voice distortion, and

⁸ ICC-02/11-01/15-1050-Conf-Corr, paras 8-13.

⁹ *Ibid.*, para. 14. See also psycho-social evaluation reports for each witness in Annexes A-C.

limited *in camera* proceedings are ordered for Witnesses P-0407 and P-0404, and maintained as previously ordered for Witness P-0185.¹⁰

7. The common legal representative of the victims participating in the proceedings supports the Prosecutor's request and submits that she has recently met with dual status Witnesses P-0404 and P-0407, and that they "were both anxious about their upcoming testimony and expressed fear of being publicly exposed and revisiting traumatic events".¹¹
8. The Defence of Laurent Gbagbo opposes the Prosecutor's request that Witnesses P-0407, P-0185 and P-0404 testify *in camera*.¹² In particular, the Defence states that the evaluations of Witnesses P-0407 and P-0185 do not indicate any particular psychological problem ("*aucun problème psychologique particulier*") or mention any risk of retraumatisation.¹³ In addition, the Defence notes that it appears that the prospect of testimony *in camera* was presented to Witnesses P-0407, P-0185 and P-0404 as a given, despite the Prosecutor not having the authority to make such promise.¹⁴
9. Conversely, the Defence of Charles Blé Goudé does not oppose the request for in-court protective measures "in the form of continued use of a pseudonym, image and voice distortion, and *in camera* proceedings".¹⁵
10. Article 68(2) of the Statute provides that the Chamber may, as an exception to the principle of publicity and in order to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. According to the same provision of the Statute, such measures "shall be implemented in case of a victim of sexual violence or a child

¹⁰ *Id.*

¹¹ ICC-02/11-01/15-1054-Conf, paras 9, 11.

¹² ICC-02/11-01/15-1055-Conf, p. 18.

¹³ *Ibid.*, para. 36.

¹⁴ *Ibid.*, paras 37, 42-43.

¹⁵ ICC-02/11-01/15-1056-Conf, para. 7.

who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness". Rules 87 and 88 of the Rules then regulate in further detail, respectively, "measures to protect a victim, a witness or another person at risk on account of testimony given by a witness" and "measures to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence".

11. Witnesses P-0407, P-0185 and P-0404 are expected to testify about sexual violence perpetrated upon them. The Chamber has previously held, with respect to witnesses in an identical situation, that "due to the traumatic events they suffered, they are vulnerable and may indeed be exposed to retraumatisations if they were to testify publicly",¹⁶ and deems that these considerations are equally applicable to Witnesses P-0407, P-0185 and P-0404.
12. Bearing in mind the need to consider the views of the witnesses, as required by Article 68(2) of the Statute, the Chamber notes that the witnesses were "happy to learn" or "reassured" when they were informed of the protective measures available.¹⁷ The Chamber notes that the VWU states in its assessment that it will discuss with the witnesses concerned the use of closed session, as some witnesses may prefer to give their testimony publicly. The Chamber also agrees with the Defence of Laurent Gbagbo that the Prosecutor has presented the use of closed sessions to the witnesses as a *fait accompli*. However, the Chamber does not consider that this objection has a bearing on the Chamber's decision, which must be based on the objective risks to these witnesses and the VWU assessment.
13. The Chamber has also previously, in a similar situation, found it preferable that the entire testimonies be heard in closed session and decisions as to possible reclassification of parts of the testimony as public be deferred to a later stage, in

¹⁶ ICC-02/11-01/15-T-103-Red-ENG, p. 80, lines 12-14.

¹⁷ ICC-02/11-01/15-1050-Conf-AnxA, -AnxB and -AnxC.

order to prevent that the purpose of the measures be defeated.¹⁸ These considerations are equally valid in the present instance.

14. Accordingly, it is appropriate to grant the Prosecutor's principal request, *i.e.* that Witnesses P-0407, P-0185 and P-0404 testify *in camera*. As concerns specifically Witness P-0185, the Chamber clarifies that the present decision constitutes a variation of protective measures previously ordered.

Request for protective/special measures under Article 68(2) of the Statute (anonymity vis-à-vis the public) for Witness P-0554

15. The Prosecutor requests protective measures for Witness P-0554 in the form of continued use of a pseudonym, image and voice distortion, and limited *in camera* proceedings, in order to "give effect to the measures requested for Witness P-0407", considering that Witness P-0554's testimony is related to that of Witness P-0407.¹⁹
16. The common legal representative of the participating victims requests that Witness P-0554 testify entirely *in camera*, "taking into account the relationship with Witness P-0407 and the fact that the details of her expected testimony may inadvertently reveal information eventually given *in camera* by the latter".²⁰
17. The Defence of Laurent Gbagbo submits that the anonymity (vis-à-vis the public) of Witness P-0554 is not necessary: according to the Defence she can testify publicly and only those parts of her testimony which concern Witness P-0407 can be conducted in private session.²¹
18. The Defence of Charles Blé Goudé does not oppose the request.²²

¹⁸ ICC-02/11-01/15-T-103-Red-ENG, p. 80, lines 19-24.

¹⁹ ICC-02/11-01/15-1050-Conf-Corr, para. 18.

²⁰ ICC-02/11-01/15-1054-Conf, para. 17.

²¹ ICC-02/11-01/15-1055-Conf, para. 47.

²² ICC-02/11-01/15-1056-Conf, para. 7.

19. The Chamber considers that, due to the relationship between Witnesses P-0407 and P-0554 and the fact that they are expected to testify to the same facts, it is evident that the protective measure ordered for the benefit of Witness P-0407 can only be effective if the testimony of Witness P-0554 is equally not public.
20. In the consideration of the Chamber, withholding the testimony of P-0554 from the public in order to protect Witness P-0407 is a measure that plainly falls within the scope of Article 68(2) of the Statute. Indeed, that provision allows that when necessary to protect a witness, “any part of the proceedings”, therefore including the testimony of another witness, can be held *in camera*.
21. The Chamber notes the solution proposed by the Defence of Laurent Gbagbo (public testimony of Witness P-0554 with the part relating to Witness P-0407 heard in private session), but is of the view that this could be attempted only at a great risk to the effectiveness of the measure. Instead, the Chamber considers it warranted, for the reason explained above,²³ and as suggested by the common legal representative, to order that Witness P-0554 testify entirely *in camera*. Whether certain portions of the witness’ testimony can be made public will be determined at a later stage.

Request for various special measures in respect of Witnesses P-0407, P-0404, P-0362, P-0567 and P-0568

22. The Prosecutor seeks, for Witnesses P-0407 and P-0404, “subject to the views of the VWU”, special measures under Rule 88(1) of the Rules in the form of reading assistance, regular breaks in their testimonies, adapted questioning, and the presence of a psychologist during their testimonies.²⁴ The Prosecutor further seeks reading assistance for the benefit of Witness P-0362, adapted questioning, reading assistance and regular breaks in the testimony for the benefit of Witness P-0567, and reading

²³ See above, para. 13.

²⁴ ICC-02/11-01/15-1050-Conf-Corr, paras 19-21.

assistance, adapted questioning and the presence of a psychologist during testimony for the benefit of Witness P-0568.²⁵

23. The common legal representative of the participating victims supports the requested special measures.²⁶
24. The Defence of Laurent Gbagbo does not oppose the requested special measures, with the exception of the special measure of adapted questioning, in respect of which the Defence submits that it is the responsibility of the person conducting the questioning to pose questions as they see fit, taking into account the situation of the witness, in order to obtain all information conducive to the determination of the truth.²⁷
25. The Defence of Charles Blé Goudé states that it does not oppose the request.²⁸
26. The VWU supports the request for reading assistance to be provided to witnesses, and states that it will continue to work with the witnesses to assess their vulnerabilities.
27. The Chamber considers that the requested special measures may benefit the concerned witnesses during their testimony, while having no adverse impact on the rights of the parties and participants, in particular of the accused.
28. As concerns the Defence of Laurent Gbagbo's objection to the proposed special measure described by the Prosecutor as "adapted questioning", the Chamber considers that the granting of such measure does not interfere with the rights of the accused. Its effect is simply a reiteration of the Chamber's expectation from counsel to be mindful during questioning of the needs of individual witnesses.

²⁵ *Ibid.*, paras 22-25; see also p. 12 and annex D.

²⁶ ICC-02/11-01/15-1054-Conf, para. 20.

²⁷ ICC-02/11-01/15-1055-Conf, para. 53.

²⁸ ICC-02/11-01/15-1056-Conf, para. 7.

29. Accordingly, the special measures under Rule 88(1) of the Rules are granted as requested. Variations of these special measures will be ordered if necessary after the relevant reports are received by the Chamber from the VWU.²⁹

Request for authorisation of testimony by video link for Witnesses P-0047, P-0362 and P-0293

30. The Prosecutor requests that Witness P-0047 testify by video-link on the ground that he has not been medically cleared to travel by plane to the seat of the Court.³⁰ For Witnesses P-0293 and P-0362, the Prosecutor requests authorisation of testimony by video-link for other practical reasons, *i.e.* to ensure that Witness P-0293 is able to testify at the scheduled time in spite of not having obtained a passport and to ensure that both witnesses can be on stand-by during the week of 6 November 2017.³¹
31. The common legal representative of the participating victims, while not having responded to the Prosecutor's request for authorisation of testimony of Witness P-0047 by video-link, supports the Prosecutor's request with respect to Witnesses P-0293 and P-0362.³²
32. The Defence of Laurent Gbagbo opposes the use of video-link for the testimony of Witness P-0047, arguing in principle that testimony in video-link can be ordered only in case of absolute impossibility ("*impossibilité absolue*") for the witness to come to the seat of the Court, emphasising the importance of the testimony of the witness, arguing that it is not in position to respond to the request due to not having received relevant documentation and, in the alternative, proposing an examination of the witness by two experts, one nominated by the Prosecutor and the other by the Defence, to determine if the witness is fit to travel to The Hague.³³ For the event that

²⁹ Cf. ICC-02/11-01/15-1050-Conf-Corr, para. 25.

³⁰ ICC-02/11-01/15-1002-Conf.

³¹ ICC-02/11-01/15-1050-Conf-Corr, para. 30-31.

³² ICC-02/11-01/15-1054-Conf, para. 22.

³³ ICC-02/11-01/15-1006-Conf, paras 13, 24, 31, 35.

the Chamber authorises testimony by video-link, the Defence of Laurent Gbagbo proposes that representatives of the parties attend the testimony at the location of the witness.³⁴ The Defence of Laurent Gbagbo similarly opposes the request as concerns Witnesses P-0293 and P-0362.³⁵

33. The Defence of Charles Blé Goudé opposes the video link requests by the Prosecutor, on the one hand with general arguments that video-link testimony “cannot be equated with in person testimony”³⁶ and that there is a “presumption of testimony being given in person”.³⁷ On the other hand, the Defence also makes more practical and specific objections, and states, with respect to Witness P-0047, that the Prosecutor has failed to show that the witness’s health prevents him from travelling to The Hague,³⁸ and with respect to Witnesses P-0293 and P-0362, that “the use of video link technology for the testimony of witness P-0293 hinders the parties’ opportunity to fully examine the witness” as “[p]revious use of video link testimony in this case has shown that the presentation of documents was rendered much more difficult when using video link testimony” and submitting that the request by the Prosecutor is not sufficiently substantiated.³⁹

34. On 24 October 2017, the VWU recommended that Witness P-0047 testify via video-link, considering his health state and anxiety about travelling. For Witness P-293, the VWU has informed the Chamber that due to the Prosecutor not yet having been able to introduce the witness to the VWU, no assessment has taken place and there is insufficient time for the VWU to secure the necessary travel documents that would permit the witness to travel.

³⁴ *Ibid.*, paras 38-44.

³⁵ ICC-02/11-01/15-1055-Conf, paras 54-59.

³⁶ ICC-02/11-01/15-1005-Conf, para. 5.

³⁷ ICC-02/11-01/15-1056-Conf, para. 16.

³⁸ ICC-02/11-01/15-1005-Conf, para. 5.

³⁹ ICC-02/11-01/15-1056-Conf, paras 19, 22-28, 29.

35. The Chamber makes reference to its previous decision authorising testimony via video-link under Rule 67 of the Rules, where the general considerations are laid out in detail.⁴⁰ With respect to Witness P-0047, the Chamber considers that the state of his health and his anxiety about travelling are good reasons to hear his testimony by video-link. The Chamber considers that the information made available to it through the VWU is sufficient for the purposes of the present decision, and deems unnecessary the proposal of the Defence of Laurent Gbagbo for an adversary procedure with experts appointed separately by the parties. As concerns Witnesses P-0293 and P-0362, considering that they are crime base witnesses whose testimony will be shorter than that of certain other witnesses, and considering that there is no significant difference between live testimony in The Hague and live testimony by means of video-link, the request that they testify by video-link can equally be granted.
36. Indeed, the Chamber is of the view that the rights of the Defence are not affected by video-link testimony in the manner in which it has so far been organised in this case. As a consequence, the Chamber does not see a need to consider the proposal of the Defence of Laurent Gbagbo to have parties' representatives at the video-link location.⁴¹ In this regard, the Chamber also does not accept the Defence of Charles Blé Goudé's blanket assertion that presentation of documents is "much more difficult" when a witness testifies by video-link. As the Chamber has stated previously, practice shows that with basic preparation (in particular by communicating to the Registry in advance the documents that may be shown to the witness), testimony by video-link can go as smoothly as testimony in the courtroom in The Hague.⁴²

⁴⁰ "Decision on the mode of testimony of Rule 68(3) witnesses", 11 October 2016, ICC-02/11-01/15-721.

⁴¹ See ICC-02/11-01/15-1006-Conf, paras 38-44.

⁴² "Decision on the 'Prosecution's application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)'", 7 April 2017, ICC-02/11-01/15-870, para. 20.

Request for an amendment of the calling order of witnesses

37. The Prosecutor requests the postponement of the testimony of Witness P-0554, so that she testifies after Witness P-0404, “[i]n light of the difficulties experienced in establishing contact with Witness P-0554” and submitting that “[a]n order whereby Witness P-0554’s testimony follows that of Witness P-0407 would, in any case, make for a clearer presentation of the evidence”.⁴³
38. The common legal representative⁴⁴ and the Defence of Charles Blé Goudé⁴⁵ do not oppose the requested change in calling order, whereas the Defence of Laurent Gbagbo has not made any submission in this regard.
39. In the view of the Chamber, the proposed change is reasonable and can be accommodated without adversely affecting the preparation of the other parties and participants.
40. The Chamber notes the request by the Defence of Charles Blé Goudé “to instruct the VWU to take necessary and appropriate measures to ensure that witness P-0407 and witness P-0554 [...] do not discuss their testimony before and during their respective testimony”. In the view of the Chamber, these issues are properly addressed in the applicable VWU protocol and in the circumstances at hand there is no need for departure from that protocol.⁴⁶

⁴³ ICC-02/11-01/15-1050-Conf-Corr, para. 34.

⁴⁴ ICC-02/11-01/15-1054-Conf, para. 28.

⁴⁵ ICC-02/11-01/15-1056-Conf, para. 32.

⁴⁶ ICC-02/11-01/15-355-Anx.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that Witnesses P-0407, P-0185, P-0404 and P-0554 shall testify *in camera*;

DECIDES that Witness P-0362 shall be accorded the special measure of in-court assistance for reading;

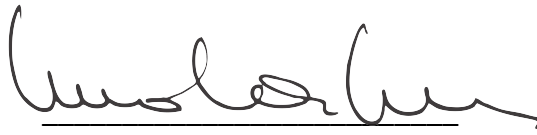
DECIDES that Witnesses P-0567, P-0568, P-0407 and P-0404 shall be accorded the special measures in the form of in-court assistance for reading, regular breaks in testimony, adapted questioning and the presence of a psychologist during testimony;

AUTHORISES the testimony by video-link of Witnesses P-0047, P-0362 and P-0293 and **DIRECTS** the Registry and the parties and participants to prepare accordingly; and

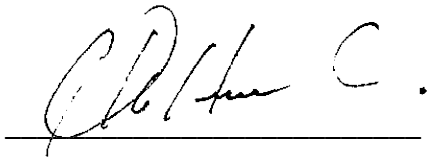
DECIDES that the testimony of Witness P-0554 shall be postponed to after Witness P-0404.

Judge Henderson will append a separate opinion in due course.

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



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 3 November 2017

At The Hague, The Netherlands