

**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

Decision on the mode of testimony of Rule 68(3) witnesses

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 64, 67(1)(e), 68(1) and 69 of the Rome Statute (“Statute”), and Rules 67 and 68 of the Rules of Procedure and Evidence (“Rules”), issues this Decision on the mode of testimony of Rule 68(3) witnesses.

I. Procedural background

1. On 9 June 2016, the Chamber decided that the written statements of Witnesses P-0112, P-0169, P-0217, P-0230, P-0344, P-0555, P-0573, P-0587, P-0588 and P-0589 are in principle suitable for introduction under Rule 68(3) of the Rules and directed the parties to prepare accordingly.¹
2. On 26 July 2016, the Prosecution filed a further request seeking to conditionally admit the written statements of P-0106, P-0107, P-0117 and P-0578 under Rule 68(3) of the Rules.²
3. On 19 September 2016, the Victims and Witnesses Unit (“VWU”), in preparation for the appearance in court of witnesses CIV-OTP-P-0107, CIV-OTP-P-0587, CIV-OTP-P-0117, CIV-OTP-P-0106, CIV-OTP-P-0230, CIV-OTP-P-0555, CIV-OTP-P-0169, CIV-OTP-P-0588, CIV-OTP-P-0589 (“Rule 68(3) witnesses”), requested authorisation from the Chamber to arrange so that their testimony be given by means of video-link from Cote d’Ivoire.³
4. On 27 September 2016, the Chamber heard oral submission from the parties and participants as regards the suggested video-link testimony.⁴

¹ 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-Red, page 18.

² 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), ICC-02/11-01/15-636-Conf.

³ E-mail of VWU to Trial Chamber I Communications at 17:10.

⁴ ICC-02/11-01/15-T-80-CONF-ENG.

5. On 28 September 2016, the Chamber orally decided that the written statement of P-0578, who is due to testify shortly, is in principle suitable for introduction under Rule 68(3) of the Rules. It stated that the reasoning for this oral ruling as well as the decision on the introduction of the written statements of the other three witnesses, namely P-0106, P-0107 and P-0117 would follow in due course.⁵

II. Submissions

6. The VWU states that all the Rule 68(3) witnesses are due to testify successively for one and a half day each. The VWU noted that it may have financial and logistical impediments by having so many witnesses transferred to The Hague a short period of time. It also stated that for the well-being of the witnesses, it encouraged their testimony to be given via video-link, particularly since witnesses have to stay in The Hague a series of day before and after testimony, for a testimony of short duration. Apart from the logistical and financial implications for the VWU, it also observed that some witnesses have health issues and that long-haul travel for such a short testimony may cause physical and mental stress to the witnesses. Moreover, from a security point of view, the VWU is of the view that the less time witnesses spend out of their place of residence impacts positively on their security situation.
7. The Prosecutor stated that she requests video-link for the Rule 68(3) witnesses, with the exception of Witness P-0230 and P-0106. In principle, she stated that it is the responsibility of the Office of the Prosecutor to present its evidence and consequently that such applications for video-link should be made by the parties. She also submitted that applications should be individualised, as video-link should be treated as an exception to live testimony. She opposed requesting video-link only on the basis of generic considerations, as personal circumstances of witnesses and the nature of their evidence should also be considered.

⁵ ICC-02/11-01/15-T-81-CONF-ENG.

8. The Legal Representative of Victims does not oppose the video-link proposed testimonies. In relation to dual status witness P-0555, she also stated that the witness has no objection to testify via video-link. She however stated that the conditions for dual status witnesses should remain applicable if video-link is granted.
9. The Defence for Mr Gbagbo opposes the proposed video-link testimony for all Rule 68(3) witnesses. In its view, testimony is affected depending on whether witnesses are appearing live in court or via video-link. It submitted that budgetary or administrative arguments of the VWU are against the interests of justice. It also stated that all witnesses are equally important, irrespective of whether their testimony is long or short. Moreover, in its view, the arguments of the VWU in relation to stress are frivolous.
10. The Defence for Mr Blé Goudé equally opposes the video-link testimony. In its view, the VWU cannot make such a request. Moreover, it stated that management arguments are not decisive while the mere risk of stress mentioned by the VWU is too abstract and generic to accept video-link.

III. Analysis

11. At the outset, the Chamber notes that the conditional admission of the written statements of witnesses P-0106, P-0107 and P-0117 is pending. However, the Chamber will rule on the adequacy of video-link testimony for these witnesses. As developed in the paragraphs below, although the submission of the witness's statement pursuant to Rule 68(3) of the Rules is a consideration, it is not a fundamental consideration.
12. Pursuant to Article 69(2) of the Statute, the testimony of a witness at trial shall be given in person, except to the extent provided for in the Rules. Thus, although the preference for testimony in person before the Chamber is clear, the Chamber may authorise measures such as testimony by video-link, whenever this becomes

necessary and appropriate, and is not prejudicial to or inconsistent with the rights of the accused.⁶

13. Article 68(1), (2) and Rule 87 of the Rules give the Chamber the discretionary power to order protective measures in favour of witnesses, in order to protect their safety, physical and psychological well-being, dignity and privacy, taking into consideration factors such as age, gender, health, the nature of the crime and other circumstances, including the view of the witness concerned. These measures include, among others, testimony via video-link. In accordance with the aforesaid provisions, a decision of the Chamber in this regard may be triggered either by the parties, the victim or the witness concerned, their legal representative or the Chamber, on its own motion. However, before taking such a decision, consultation with the VWU, whenever possible and appropriate, is required.
14. Moreover, the Chamber has repeatedly stated that, as a general rule, in light of the assessments given by the VWU, and the powers vested in the Chamber, protective and special measures supported and recommended by the VWU will be granted by the Chamber.⁷ It also suggested that any recommendation for such protective measures, including video-link, should be brought to the attention of the Chamber as soon as possible.⁸
15. In light of the above, it would be illogical to deter the VWU from directly communicating with the Chamber when it considers that protective measures should be accorded to upcoming witnesses. Consequently, it welcomes such direct communication between the VWU and the Chamber. However, for future instances, and whenever possible, the VWU is directed to consult with the calling party and seek the views of the witness concerned. Moreover, as applicable, the conditions

⁶ ICC-01/04-01/06-1140, para. 41.

⁷ Decision adopting amended and supplemented directions on the conduct of the proceedings, 4 May 2016, ICC-02/11-01/15-498-AnxA, para. 56.

⁸ Decision adopting amended and supplemented directions on the conduct of the proceedings, 4 May 2016, ICC-02/11-01/15-498-AnxA, para. 55.

under Rule 87(2) of the Rules should be taken into consideration when making such a recommendation before the Chamber in order to safeguard the fairness of proceedings.

16. However, video-link should not be viewed as a protective measure. Although it is a possible protective measure, it is also a method that facilitates live testimony when other issues arise.⁹ For example, video-link testimony may be accorded in instances in which witnesses are not able to travel to the seat of the Court (*i.e.* impossibility to obtain a visa or illegal migratory status). In fact, as noted by Rule 67 of the Rules, video-link is not an exception to live testimony, but a means to give *viva voce* live testimony by means of audio or video technology. Moreover, it is to be noted that this technology has improved extraordinarily since the adoption of the said provision.¹⁰
17. Notwithstanding, Rule 67(3) of the Rules dictates that the venue chosen for video-link testimony must be ‘conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness’. Accordingly, when deciding on video-link testimony, the Chamber shall take this into consideration.
18. Turning to the proposed video-link for the Rule 68(3) witnesses, the Chamber notes that their live testimony will be in all likelihood shorter than for other witnesses. This is not only the result of the conditional submission of their written statements pursuant to Rule 68(3) of the Rules, but also because they are all crime base witnesses whose testimony, in any case, would not have seemingly lasted for more than some hours.¹¹
19. Although budget and logistical concerns are not determinative, they cannot be overlooked, particularly if such considerations could affect the expeditious conduct

⁹ See, ICC-01/05-01/13-1697, para. 16.

¹⁰ See, ICC-01/05-01/13-1697, paras 9-12.

¹¹ ICC-02/11-01/15-114-Conf-AnxB-Corr.

of proceedings. Unquestionably, video-link testimony from Cote d'Ivoire, where all witnesses appear to reside, will enable the VWU to arrange their order of appearance in an uninterrupted manner. Moreover, as there will be a break in the hearings from 7-11 November 2016, no witness will have to stay grounded in The Hague during that week.

20. Accordingly, the Chamber authorises witnesses CIV-OTP-P-0107, CIV-OTP-P-0587, CIV-OTP-P-0117, CIV-OTP-P-0555, CIV-OTP-P-0169, CIV-OTP-P-0588, and CIV-OTP-P-0589 to testify *viva voce* via video-link pursuant to Rule 67 of the Rules.
21. Notwithstanding, the Chamber directs the VWU to immediately contact these witnesses, in consultation with the Office of the Prosecutor, so that their testimony is given in a venue where they will be able to testify truthfully and openly. Moreover, the VWU shall take measures to ensure that their safety, well-being and privacy are guaranteed while testifying from Cote d'Ivoire. Moreover, the Registry is directed to make all necessary arrangements so that the video-link testimony is done in a manner that allows the witnesses' examination by the parties and the Chamber.
22. The Chamber notes that the Prosecutor opposes the testimony of witnesses P-0230 and P-0106 via video-link. Therefore, there appears to be a common agreement among all parties in these regards. Accordingly, the Chamber directs that these two witnesses testify live in The Hague.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY,

AUTHORISES witnesses CIV-OTP-P-0107, CIV-OTP-P-0587, CIV-OTP-P-0117, CIV-OTP-P-0555, CIV-OTP-P-0169, CIV-OTP-P-0588, and CIV-OTP-P-0589 to testify live before the Chamber by means of video-link technology pursuant to Rule 67 of the Rules;

DIRECTS that Witnesses OTP-P-0106 and CIV-OTP-P-0230 shall testify in the seat of the Court; and

DIRECTS the VWU and the parties, to prepare accordingly.

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 11 October 2016

At The Hague, The Netherlands