

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/11-01/15
Date: 15 November 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 request for leave to appeal the “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 Article 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 mode of testimony of Rule 68(3) witnesses » (ICC-02/11-01/15-721)*”, filed on 18 October (“Request”).¹

1. On 11 October 2016, the Chamber issued the “Decision on the mode of testimony of Rule 68(3) witnesses” (“Decision”),² whereby it authorised 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.
2. The Defence of Mr Laurent Gbagbo seeks leave to appeal the Decision in respect of the following issues:
 - (i) whether the Chamber erred in law by rendering a decision, renouncing to the presence of witnesses in the proceedings without giving the parties the right to participate in a genuine debate “*contradictoire*”;
 - (ii) whether the Chamber erred in law when it considered budgetary issues when deciding about the non-presence of witnesses in the judicial process;
 - (iii) whether the Chamber erred in law and fact when it considered that a Rule 68(3) testimony will be shorter than a regular testimony and thus physical presence of the witness is less justified; and
 - (iv) whether the Chamber erred in law by not motivating its decision on case-by-case basis.

¹ ICC-02/11-01/15-733-Conf.

² ICC-02/11-01/15-721. Judge Henderson appended a partially dissenting opinion, see ICC-02/11-01/15-721-Anx.

3. The Prosecutor responded to the Request on 24 October 2016, submitting that leave to appeal should not be granted.³ The Defence of Mr Charles Blé Goudé and the common legal representative of the victims participating in the proceedings 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 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.
5. As in previous occasions, the Request presented by the Defence of Mr Laurent Gbagbo focuses on arguments in support of its contention that the Chamber committed a series of errors of law and fact. However, it fails to show how the requirements under article 82(1)(d) of the Statute are met. These requirements cannot be ignored solely to show discontent or disagreement with the Chamber's conclusions. As stated beforehand by the Chamber, these requirements must be developed by the party seeking leave to appeal.
6. The Chamber emphasises that it is not obliged, under article 82(1)(d) of the Statute, to entertain applications for leave to appeal that do not present complete arguments under the requirements of said provision. The Chamber has also previously indicated that, incomplete applications may be rejected for this reason alone.⁴

³ ICC-02/11-01/15-739 ("Response").

⁴ Decision on requests for leave to appeal the 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)', 7 July 2016, ICC-02/11-01/15-612, para. 6; Decision on the request for leave to appeal the "Decision on the 'Prosecution's application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549 and P-0550", 27 September 2016, ICC-02/11-01/15-685-Red, para. 6.

7. The Defence not only fails to demonstrate how the first issue proposed for appeal was essential for the Chamber's determination (*i.e.* preventing the parties a genuine *contradictoire*), but also misconstrues the Chamber's conclusions and proceedings leading up to the Decision, in which the parties were given genuine opportunity to give their observations on the manner of testimony of the witnesses concerned.⁵
8. In fact, the second issue is only a repetition of the submissions made by the Defence of Mr Gbagbo when it was given the opportunity to make observations on the matter and it indicated that the Chamber should not take into consideration the budgetary or administrative arguments of the Victims and Witnesses Unit ("VWU").⁶ Moreover, the second issue is a mere disagreement with the Chamber's discretionary power.
9. As regards the third issue, the Chamber notes that this is a patent misinterpretation of the Chamber's conclusions, which indicated at the outset that although the Rule 68(3) submission of a statement is a consideration, this was not fundamental.⁷ In fact, the Chamber considers other factors in the decision (*i.e.* video-link venue, well-being, dignity and privacy of the witnesses and crime-base nature of testimony).⁸
10. Finally, in relation to the third issue, the Defence failed to show how this is essential to the decision (alleged failure to make a case-by-case analysis). Moreover, it is based on a misunderstanding of the Decision and its differing views on the nature of video-link testimony. The Decision clearly states that video-link is a method to facilitate live testimony and should not be viewed as a protective measure or as an alternative to live testimony.⁹ Moreover, the Decision, albeit authorising testimony via video-link for the witnesses concerned, also directs the VWU to immediately contact these

⁵ ICC-02/11-01/15-T-78-CONF-ENG ET and ICC-02/11-01/15-T-80-CONF-ENG ET.

⁶ ICC-02/11-01/15-T-80-CONF-ENG ET.

⁷ ICC-02/11-01/15-721, para. 11.

⁸ ICC-02/11-01/15-721, paras 17-19.


⁹ ICC-02/11-01/15-721, para. 16.

individuals so that their testimony is done in a manner that protects both the rights of these witnesses but also allows the witnesses' examination by the parties.¹⁰

Accordingly, the Defence has failed to identify appealable issues and thus, an analysis of the requirements under Article 82(1)(d) is not necessary.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY
REJECTS the Request.**

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



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuca



Judge Geoffrey Henderson

Dated 15 November 2016
At The Hague, The Netherlands

¹⁰ ICC-02/11-01/15-721, para. 21.