

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 24 June 2016

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuca
Judge Geoffrey Henderson

SITUATION INCÔTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Public Document

Redacted version of "Response to the "Demande d'autorisation d'interjeter appel de la décision orale de la Chambre du 16 juin 2016 par laquelle les Juges ont mis un terme au système actuel de retransmission continue en léger différé et sans censure *a posteriori* des audiences" (ICC-02/11-01/15-597-Conf)"

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that Mr Gbagbo’s request (the “Request”) for leave to appeal the oral decision issued by the Chamber on 16 June 2016 (the “Decision”)² does not satisfy the requirements of article 82(1)(d) of the Rome Statute and must be rejected.

2. The Request does not demonstrate that the alleged issues identified by the Defence arise from the Decision and can be the subject of an interlocutory appeal. The Request merely represents the Defence’s disagreement with and misunderstanding or misreading of the Chamber’s ruling because the Decision (i) does refer to instances where the specific risk for the witnesses at hand has been identified, (ii) sufficiently identifies the individuals allegedly responsible for said risks, (iii) does not discharge the Chamber from evaluating the situation of each witness prior to allowing the provision of their testimony with protective measures, (iv) is abundantly clear about the meaning of the legal term “integrity of the proceedings”, and (v) is based on a mere presumption of lack of knowledge on the part of the Chamber.

3. Moreover, the Request fails to show that the issues allegedly arising from the Decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In particular, the Request does not articulate how each of said issues specifically meets the requirements of article 82(1)(d) of the Rome Statute.

¹ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015; and the “Decision on victims’ participation status” (Trial Chamber I), No. ICC-02/11-01/15-379, 7 January 2016, p. 23.

² See the transcript of the hearing held on 16 June 2016, No. ICC-02/11-01/15-T-52-ENG RT (open session), p. 98, line 13 to p. 101, line 14 (the “Decision”).

II. Confidentiality

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially because it makes reference to submissions filed under the same classification. The Legal Representative files simultaneously a public redacted version of this submission.

III. Background

5. On 10 May 2016, the Chamber issued a reminder to the public that disclosing identifying information of protected witnesses is forbidden.³

6. On 8 June 2016, the Chamber found *inter alia* that disclosure of the identity of protected witnesses is prohibited and that any attempt to do so, either successful or futile, may constitute an offence against the administration of justice.⁴

7. On 16 June 2016, the Chamber issued the Decision, directing (i) the public broadcast of the proceedings and the publication of the transcripts of witnesses for whom protective measures have been ordered to be delayed until the completion of their testimony and until the entire testimony has been reviewed and redacted as necessary; and (ii) the full name and nationality of each visitor in the public gallery to be collected by the Registry, as a condition for any person to be admitted to the gallery.⁵

8. On 22 June 2016, Mr Gbagbo's Defence submitted its request (the "Request"),⁶ seeking leave to appeal the Decision on the following five issues:

³ See the transcript of the hearing held on 10 May 2016, No. ICC-02/11-01/15-T-36-Red-ENG WT (open session), p. 11, line 24 to p. 13, line 8.

⁴ See the transcript of the hearing held on 8 June 2016, No. ICC-02/11-01/15-T-48-CONF-ENG RT (open session), p. 26, lines 4-11.

⁵ See the Decision, *supra* note 2, p. 100, lines 2-22.

⁶ See the "Version publique expurgée de la demande d'autorisation d'interjeter appel de la décision orale de la Chambre du 16 juin 2016 par laquelle les Juges ont mis un terme au système actuel de

- i) The Chamber made an error of law in considering that there were risks for all upcoming Prosecution witnesses because there would have been risks for witnesses already heard (the “First Issue”);⁷
- ii) The Chamber made an error of fact in not taking into account the probable origin of the possible threats for each witness (the “Second Issue”);⁸
- iii) The Chamber made an error of law in deciding in advance not to broadcast the hearings without conducting a case-by-case evaluation of the situation of each witness (the “Third Issue”);⁹
- iv) The Chamber made an error of law in relying on the vague notion of “integrity of the proceedings” in order to justify the suspension of the regular broadcast of the hearings (the “Fourth Issue”);¹⁰ and
- v) The Chamber made an error of fact in considering that the breach of the principle of publicity could be mitigated by subsequently making available to the public the entirety of the hearings and the redacted transcripts (the “Fifth Issue”).¹¹

9. Pursuant to regulation 65(3) of the Regulations of the Court, the Legal Representative submits the following response to the Request.

retransmission continue en léger différé et sans censure *a posteriori* des audiences”, No. ICC-02/11-01/15-597-Red, 22 June 2016 (the “Request”).

⁷ *Idem*, paras. 34-39.

⁸ *Ibid.*, paras. 40-46.

⁹ *Ibid.*, paras. 47-50.

¹⁰ *Ibid.*, paras. 51-53.

¹¹ *Ibid.*, paras. 54-56.

IV. Submissions

1. The issues identified by the Defence do not arise from the Decision

a. The First Issue

10. The Legal Representative submits that the First Gbagbo Issue do not reveal the existence of an appealable “issue” under article 82(1)(d) of the Rome Statute, but a misunderstanding of the Decision or a mere disagreement therewith.

11. The Gbagbo Defence premises its arguments for the existence of an “error” on the contention that “[à] *aucun moment dans la décision attaquée, la Chambre ne fait état de risques concrets qui auraient été encourus par certains des témoins déjà entendus. Elle ne fait que se référer à des discussions sur les réseaux sociaux et à des supputations faites par des bloggers ou des journalistes sur l’identité des témoins*”.¹²

12. Moreover, the Defence argues that “[l]a *détermination d’un risque concret et spécifique à chaque témoin pour lequel sont demandées des mesures de protection est une condition sine qua non pour l’octroi de telles mesures [de protection]*”.¹³

13. In this regard, the Legal Representative submits that the Decision expressly indicates that “[t]he Chamber has been informed in several cases of the attempts to publicly identify the witnesses concerned, in particular through the social media. Although these are only speculations, they have disrupted proceedings, the proceedings significantly”.¹⁴

14. Since the Decision was issued in open session, the Chamber could not explain in detail the particular instances where said attempts to identify witnesses had taken

¹² *Ibid.*, para. 34. See also *ibid.*, para. 37.

¹³ *Ibid.*, para. 38.

¹⁴ See the Decision, *supra* note 2, p. 99, lines 1-5 (emphasis added).

place. However, the Decision refers to the rulings of the Chamber issued on 10 May and 8 June 2016,¹⁵ [REDACTED].¹⁶

15. This apparent misreading by the Defence of the referred attempts to identify protected witnesses is confirmed by its submission that the Decision confounds speculations (“*supputations*”) as to the witnesses’ identities with threats (“*menaces*”) to said witnesses based on objective criteria, thereby infringing upon the freedom of opinion and the freedom of expression.¹⁷

16. In these circumstances, the Legal Representative submits that the Defence misinterprets the Decision and, as such, the First Issue cannot constitute an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.¹⁸

17. Moreover, [REDACTED].¹⁹ Therefore, the First Issue is a mere criticism of the Decision.²⁰

18. Since a disagreement or conflicting opinion cannot amount to an appealable “issue” under article 82(1)(d) of the Rome Statute,²¹ the fact that the Defence does not agree with the Decision, as such, does not suffice for leave to be granted regarding the First Issue.²²

¹⁵ *Idem*, p. 99, lines 8-10.

¹⁶ [REDACTED].

¹⁷ See the Request, *supra* note 6, paras. 34-35 and 39.

¹⁸ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 19. See also the “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’” (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-132, 10 July 2015, para. 3 and references contained therein.

¹⁹ [REDACTED].

²⁰ See the “Decision on the Gbagbo Defence Request for leave to appeal the Chamber’s Decision granting protective measures to P-0321 (ICC-02/11-01/15-561)” (Trial Chamber I), No. ICC-02/11-01/15-598, 23 June 2016, para. 5.

²¹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

²² See the transcript of the hearing held on 10 November 2015, No. ICC-02/11-01/15-T-5-ENG ET, p. 15, lines 18-20; and the transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG

b. The Second Issue

19. Regarding the Second Issue, the Legal Representative submits that it is not an appealable “issue” under article 82(1)(d) of the Rome Statute but again a misreading of the Decision or a further disagreement therewith.

20. The Defence contends that “[p]arce qu’ils n’ont pas procédé à une réelle évaluation, en profondeur, de la menace pesant sur chacun des témoins, les Juges se sont trompés sur l’origine de la menace [...] en prononçant la fin des retransmissions des audiences sur la seule base d’éventuelles spéculations dans les réseaux sociaux sur l’identité des témoins, sans explorer les sources de pression pouvant émaner des Autorités ivoiriennes, la Chambre a commis une erreur de fait”.²³

21. In this regard, the Decision indicates that “[t]he Chamber has been informed in several cases of the attempts to publicly identify the witnesses concerned [...] [and] the problem persists”,²⁴ and that “[t]hese [protective] measures respond to the action of certain few individuals who surely do not represent the people of Côte d’Ivoire”.²⁵

22. From this wording, the Legal Representative submits that it cannot be argued that the Chamber is mistaken about who is responsible for the attempts to breach the protective measures ordered. In particular, said conclusion cannot be reached because the Decision does not disclose the identity of those responsible.

23. [REDACTED].²⁶ [REDACTED],²⁷ [REDACTED].

ET, p. 38, lines 11-13. See also the “Decision on Defence’s requests seeking leave to appeal the ‘Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record’ and seeking suspensive effect of it.” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015, para. 9; and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 18, para. 19.

²³ See the Request, *supra* note 6, paras. 41 and 46.

²⁴ See the Decision, *supra* note 2, p. 99, lines 1-3 and 11.

²⁵ *Idem*, p. 100, line 25 to p. 100, line 101.

²⁶ [REDACTED].

24. In these circumstances, the Legal Representative submits that the Second Issue is a misreading of the Decision and its context, which cannot constitute an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.²⁸

25. In any event, the Request provides substantive arguments, only to be submitted if leave to appeal was granted,²⁹ in support of the Defence’s contention that the sources of the threats are not Mr Gbagbo’s supporters.³⁰ In this regard, the Second Issue may, at most, be considered as a disagreement with the Decision, not an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.³¹

c. The Third Issue

26. The Legal Representative submits that the Third Issue does not arise from the Decision but from the Defence’s misunderstanding thereof. As such, this Issue cannot constitute an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.³²

27. The Defence argues that the Decision allows the Chamber to order in advance the lack of broadcast of a witness’ testimony “[s]ans procéder à une évaluation au cas pas cas de la situation de chaque témoin”.³³ The Request refers to an alleged “nouveau principe” established in the Decision,³⁴ whereby “[i]n all future cases when witness -- when protective measures are ordered to keep the identity of a witness confidential [...], the

²⁷ [REDACTED].

²⁸ See *supra* note 18.

²⁹ See the transcript of the hearing held on 9 March 2016, No. ICC-02/11-01/15-T-27-ENG ET (open session), p. 37, lines 23-25; and the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 22.

³⁰ See the Request, *supra* note 6, para. 42.

³¹ See *supra* notes 21-22.

³² See *supra* note 18.

³³ See the Request, *supra* note 6, para. 50.

³⁴ *Idem*, para. 47.

following specific measures shall apply [namely, the delayed broadcast of the testimony and of the redacted transcripts]”.³⁵

28. In this regard, the Legal Representative submits that the Decision does not discharge the Chamber from evaluating the situation of each witness prior to their respective testimony being provided to the public with delay and/or redactions. The wording of the Decision expressly indicates that the delay and/or redactions will be automatically adopted “[w]hen protective measures are ordered to keep the identity of a witness confidential”,³⁶ in other words, after the Chamber has conducted an evaluation of the situation of each witness prior to his or her appearance in the courtroom.

d. The Fourth Issue

29. Regarding the Fourth Issue, the Legal Representative submits that the Defence’s submissions do not reveal the existence of an appealable “issue” under article 82(1)(d) of the Rome Statute but another misunderstanding or misreading of the Decision.³⁷

30. The Defence contends that the Decision relies on the notion of “integrity of the proceedings”, which is not provided for in the legal texts of the Court and is not explained in the Decision.³⁸

31. The Legal Representative submits that this notion is expressly provided for in the law of the Court,³⁹ and that an attentive reading of the Decision suffices to understand that the expression “integrity of the proceedings” used therein refers to the proper, unimpaired development of the proceedings.

³⁵ *Ibid.*, quoting the Decision, *supra* note 2, p. 100, lines 2-9.

³⁶ See the Decision, *supra* note 2, p. 100, line 3.

³⁷ See *supra* note 18.

³⁸ See the Request, *supra* note 6, paras. 51-52.

³⁹ See Rome Statute, articles 56(1)(b) and 69(7)(b); Rules of Procedure and Evidence, rules 47(2) and 49(1).

32. The Decision notes that “[t]he attempts to publicly identify the witnesses concerned [...] have disrupted proceedings”,⁴⁰ refers to those “[w]ho have created a serious risk to the integrity of these proceedings and to the safety of the witnesses who come to testify before the Court”,⁴¹ and concludes that “[t]he environment has become such that this is now the only way to ensure the integrity of the proceedings while preserving their publicity”.⁴²

e. The Fifth Issue

33. The Legal Representative submits that the Fifth Issue does not arise from the Decision but from another disagreement therewith by the Defence. As such, it cannot constitute an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.⁴³

34. The Defence simply presumes that the Chamber is not aware of the manner in which the hearings and transcripts of protected witnesses will be made available to the public pursuant to the Decision.⁴⁴

35. Moreover, the Request provides again substantive arguments against the Decision, which must only be submitted to the Appeals Chamber once leave to appeal is granted by the Chamber.⁴⁵

2. The issues identified by the Defence do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

36. Since it is clear that none of the Issues identified by the Defence arise from the Decision, the Request must be dismissed on this basis alone. Assuming *arguendo* that any of said issues arises from the Decision, the Legal Representative opposes the

⁴⁰ See the Decision, *supra* note 2, p. 99, lines 2-5.

⁴¹ *Idem*, p. 101, lines 1-4.

⁴² *Ibid.*, p. 101, lines 11-13.

⁴³ See *supra* notes 21-22.

⁴⁴ See the Request, *supra* note 6, paras. 55-56.

⁴⁵ See *supra* note 29.

Defence's contention that they significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial for the following reasons.

37. Firstly, contrary to the requirements of article 82(1)(d) of the Rome Statute,⁴⁶ the Request does not articulate how each of the alleged Issues specifically affects the fairness and expeditiousness of the proceedings or the outcome of the trial.

38. The Request only makes reference to the importance of the principle of publicity and vaguely claims that the Decision creates “[l]es conditions d’une irresponsabilité complète des témoins”.⁴⁷

39. Secondly, the Legal Representative submits that the Defence fails to notice that the Decision indicates that “[t]he public broadcast of the proceedings and the publication of the transcripts shall be delayed”,⁴⁸ as opposed to being entirely suppressed. Therefore, the Decision does not affect the publicity of the proceedings to the extent required to “significantly” affect the fair and expeditious conduct of the proceedings or the outcome of the trial, as required by article 82(1)(d) of the Rome Statute.

40. Lastly, the Request fails to address the alleged impact of each Issue on the expeditiousness of the proceedings. Article 82(1)(d) of the Rome Statute requires verifying that each of the issues affects both the fair and the expeditious conduct of the proceedings.⁴⁹ The Request does not address either the alleged impact of the Issues on the outcome of the trial.

⁴⁶ See the “Decision on the Gbagbo Defence Request for leave to appeal the Chamber’s Decision granting protective measures to P-0321 (ICC-02/11-01/15-561)”, *supra* note 20, para. 8; and the “Decision on the ‘Prosecution’s Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility’ (Trial Chamber II), No. ICC-01/04-01/07-1958, 11 March 2010, para. 20. See also the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’” (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, para. 34.

⁴⁷ See the Request, *supra* note 6, paras. 57-58.

⁴⁸ See the Decision, *supra* note 2, p. 100, lines 6-7.

⁴⁹ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber

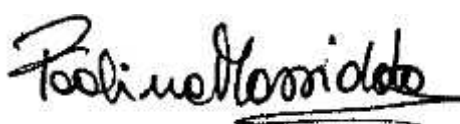
3. The Appeals Chamber's immediate resolution of the issues identified by the Defence will not materially advance the proceedings

41. The Defence contends that an immediate resolution by the Appeals Chamber would materially advance the proceedings because no adequate remedy could be provided for if the alleged Issues were to be decided in an appeal against the eventual judgement.⁵⁰

42. In this regard, since the Issues identified by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁵¹

V. Conclusion

43. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to reject the Request.



Paolina Massidda
Principal Counsel

Dated this 24th day of June of 2016

At The Hague, The Netherlands

II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21; and the "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo'" (Pre-Trial Chamber II), No. ICC-01/05-01/08-532, 18 September 2009, para. 16.

⁵⁰ See the Request, *supra* note 6, para. 59.

⁵¹ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 18, para. 26.