



Original: English

No.: ICC-02/11-01/15

Date: 27 June 2016

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
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 document

**Prosecution's Response to Mr Gbagbo's application for leave to appeal the oral
decision on protective measures of 16 June 2016**

Source: Office of the Prosecutor

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

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Introduction

1. On 16 June 2016, Trial Chamber I rendered an oral decision on protective measures.¹ Because the Trial Chamber has been informed of “several cases of the attempts to publicly identify [...] witnesses [which] have disrupted [...] proceedings significantly” and in order to “protect witnesses and [...] to prevent regular disruption of the proceedings”,² it held that for all future witnesses in relation to whom it orders protective measures to keep their identities confidential, the following specific measures shall apply: ³ “One, the public broadcast of the proceedings and the publication of the transcripts shall be delayed until completion of the testimony of the witness and until the entire testimony has been reviewed and redacted as necessary. Then the redacted video recordings and transcripts will be made available to the public [...]. Two, the Registry is ordered to collect for each visitor in the public gallery the full name and nationality. Any person refusing to provide this information shall not be admitted to the public gallery. In this way any breach in confidentiality shall be contained and followed up.”⁴

2. On 22 June 2016, the Defence for Laurent Gbagbo⁵ filed an application for leave to appeal the Decision,⁶ identifying five purported Issues and challenging primarily the restrictions to the live broadcast of court proceedings over the internet.

3. The Application should be dismissed because it fails to identify any appealable issues arising from the Decision. Instead, the Defence’s arguments are largely predicated on a misinterpretation of the Decision and a misunderstanding of the Court’s protection regime. In addition, instead of demonstrating the existence of appealable issues, the Defence expresses its disagreement with the Decision and argues the merits of the purported Issues.

¹ ICC-02/11-01/15-T-52-ENG, p. 98 ln. 15 to p.101 ln.12. (“Decision”).

² Decision, p. 99 lns. 1-14.

³ Decision, p.100 lns. 1-5.

⁴ Decision, p. 100 lns. 5-19.

⁵ (“Defence”).

⁶ ICC-02/11-01/15-597-Conf; ICC-02/11-01/15-597-Red (“Application”).

4. Even if, *arguendo*, any of the purported Issues were to qualify as an “appealable” issue, the Defence fails to demonstrate how these issues would meet the criteria for leave to appeal under article 82(1)(d). In fact, the Defence does not even attempt to do so in relation of any of the Issues. This is a ground for dismissal of the Application in *limine*.

5. In addition, the Defence’s arguments that live broadcast of the proceedings over the internet is necessary because society must be able to control the veracity of the testimony by ensuring that there would be “consequences for a lie”,⁷ exhibits an understanding by the Defence of the judicial proceedings and the witnesses’ role in those proceedings, which is disconcerting.⁸ A witness’ role is to tell the truth. If witnesses lie, the Court—and not society—may hold them accountable for that lie pursuant to article 70(1)(a) of the Statute. It is not for members of society to influence the substance of the testimony of witnesses in any way and certainly not by means of a threat of “consequences” where they do not approve of the witnesses’ testimony. That in itself would amount to an offence against the administration of justice under article 70(1)(c) of the Statute. The Defence’s arguments effectively condone a criminal practice of influencing witness testimony from outside the courtroom, which the Decision is intended to prevent.

Submissions

A. The Issues are not appealable issues arising from the Decision

6. None of the five Issues raised by the Defence amount to a subject the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.⁹

⁷ Application, para. 25: “A cet égard, le fait de témoigner publiquement constitue une garantie de contrôle démocratique du témoignage et un garde-fou contre les risques qu’un témoin ne dise justement pas la vérité, estimant qu’il n’y aurait aucune conséquence d’un mensonge exprimé à huis-clos.” See also paras. 22-24, 58.

⁸ Any helpful impact that the wide dissemination of the testimony may have on the truth-finding, for instance by individuals providing additional relevant information to a party can equally be ensured by delayed broadcast as ordered in the Decision.

⁹ ICC-01/04-168, para. 9.

The First Issue is not an appealable issue and does not arise from the Decision

7. The First Issue, namely whether the Chamber erred in law by inferring from risks to witnesses already heard in this case that there are risks for all Prosecution witnesses,¹⁰ is not an appealable issue and does not arise from the Decision. It should therefore be rejected. The Defence's arguments are predicated on a misinterpretation of the Decision and disagreements with the Chamber's findings.

8. First, The Decision does not conclude that there is a risk for all Prosecution witnesses, but only for those witnesses in relation to whom it has already found that there is a need to protect their identity and therefore to grant protective measures such as pseudonym and image and voice distortion.¹¹ These protective measures are granted based on a case-by-case assessment of any objective risks faced by each individual witness and not on the circumstances surrounding the testimony of other witnesses. Because of this misinterpretation of the Decision, the First Issue does not arise from it.

9. Second, the Defence merely disagrees with the manner in which the Chamber has assessed the risks in this case, which is insufficient to establish an appealable issue. The Chamber has identified a system of "attempts to publicly identify witnesses"¹² and noted that "the problem [which resulted in the disruption of the proceedings] persists".¹³ The Chamber is permitted—and indeed has a duty—to take these systematic and persistent attempts to identify witnesses into consideration when assessing and managing risks for other witnesses who will give evidence in this case under similar circumstances. Risk assessment must consider prospective threats to witnesses and protective measures must primarily aim to prevent risks before they occur. The Defence disagrees with the Chamber that systematic attempts on the social media to identify witnesses constitute a security threat for Prosecution witnesses who will testify in this case in the future.¹⁴ However, such disagreement

¹⁰ Application, paras. 34-39.

¹¹ Decision, p. 100 lns. 1-5.

¹² Decision, p. 99, ln. 1.

¹³ Decision, p. 99, lns. 3-10.

¹⁴ Application, paras. 34-38.

does not amount to an appealable issue, but merely demonstrates that the Defence is oblivious to how this Court assesses and manages security risk. Accordingly, the First Issue should be rejected.

The Second Issue is not an appealable issue

10. The Second Issue, namely whether the Chamber committed an error of fact by not considering the probable source of the potential threats for each witness,¹⁵ is not an appealable issue but a mere disagreement with, and a misunderstanding of, the Decision. It should therefore be rejected. As noted above, the Chamber properly assessed the systematic attempts to identify Prosecution witnesses through social media¹⁶ and concluded that the existence of such a system has already negatively impacted on the conduct of the proceedings. It further held that these attempts to identify witnesses constitute a real and objective security threat to future Prosecution witnesses. Bearing in mind the effects that the threats have already had on the witnesses and on the conduct of the proceedings, the Chamber was not required to personally identify the individuals who are behind the threats before reacting to them and before putting in place appropriate measures. The Defence merely disagrees with the manner in which the Chamber assessed the risk,¹⁷ but such disagreement is insufficient to establish an appealable issue.

11. The Defence further incorrectly states that no Gbagbo supporters have ever been found to present a threat of interference with witnesses in this case.¹⁸ These submissions ignore the litany of findings by the Pre-Trial Chamber, the Trial Chamber and the Appeals Chamber that the continued detention of Mr Gbagbo is necessary, among other reasons, to ensure that he does not obstruct or endanger the investigation or the Court proceedings. These conclusions were predicated on the Chambers' view that there exists an active network of Gbagbo supporters inside and

¹⁵ Application, paras. 40-46.

¹⁶ Decision, p. 33, lns. 1-2.

¹⁷ Application, paras. 43-44.

¹⁸ Application, para. 42.

outside Côte d'Ivoire that engages in obstructive behaviour towards witnesses.¹⁹ The Second Issue should therefore be dismissed.

The Third Issue is not an appealable issue and does not arise from the Decision

12. The Third Issue, namely whether the Chamber erred in law by deciding in advance not to broadcast the hearings without an individual assessment of the circumstances of each witness,²⁰ is not an appealable issue and does not arise from the Decision. The Trial Chamber did not rule that the hearings would not be broadcast; rather, it held that the broadcasts are to be delayed until the end of the testimony of the witnesses and until appropriate redactions are in place.²¹ In addition, the Fourth Issue largely overlaps with the First Issue and for the same reasons as listed above,²² the Defence's arguments are predicated on a misinterpretation of the Decision and disagreements with the manner in which the Chamber assessed and managed the risks to witnesses. The Third Issue should therefore be rejected.

The Fourth Issue does not arise from the Decision

13. The Fourth Issue, namely whether the Chamber erred in law by relying on the vague concept of "integrity of the proceedings" to justify the end of regular broadcasts of the hearings,²³ is predicated on a misinterpretation of the Decision and therefore does not arise from it.

14. The Trial Chamber did not solely rely on the "serious risk [created to] the integrity of the proceedings" but primarily on the "serious risk [created to] the safety of the witnesses who come to testify before the Court simply performing their duty to tell us what they know".²⁴ Further, and contrary to the Defence's contention, the concept of "integrity of the proceedings" which the Chamber aims to protect with its

¹⁹ See for instance ICC-02/11-01/11-180, paras. 57, 60-67; ICC-02/11-01/11-278 OA, paras. 60-63; ICC-02/11-01/11-291, paras. 48, 54-61; ICC-02/11-01/11-454, paras. 38-44; ICC-02/11-01/11-548-Red OA4, paras. 50-54; ICC-02/11-01/11-633, paras. 25-26, 28, 31-32, 34; ICC-02/11-01/11-668, paras. 30-31, 34-35, 41-42; ICC-02/11-01/11-718-Red, para. 48; ICC-02/11-01/11-808, paras. 30-39.

²⁰ Application, paras. 47-50.

²¹ Decision, p. 100 lns. 5-13.

²² See paras. 8-9 above.

²³ Application, paras. 51-53.

²⁴ Decision, p. 100 ln. 24 – p. 101 ln. 4.

Decision²⁵ is not vague or abstract.²⁶ The Chamber precisely explains in its Decision what it means by this and why it is necessary to impose the additional measures to protect the integrity of the proceedings. In particular, the Chamber refers to “attempts to publicly identify witnesses concerned”, which have “disrupted the proceedings significantly”.²⁷ It noted that because “the problem persists” it is necessary to “protect witnesses and [...] to prevent regular disruption of proceedings”.²⁸ The Fourth Issue should therefore be rejected.

The Fourth Issue does not arise from the Decision

15. The Fifth Issue, namely whether the Chamber committed an error of fact by considering that the infringement of the principle of public hearings could be mitigated by subsequently making available the redacted video recordings and transcripts of the hearings,²⁹ is based on a misinterpretation of the Decision and does therefore not arise from it.

16. Contrary to the contention of the Defence,³⁰ the Decision does not terminate the possibility for observers to follow the trial. First, the trial remains public and can be followed live in the public gallery. This in itself is sufficient to satisfy the legal requirements of a public hearing. Second, the public can follow the broadcast of the trial over the internet, after appropriate redactions have been applied to protect witnesses and the integrity of the proceedings.³¹ Although there is no right to have or general principle of public broadcasts over the internet, this is an additional feature of these proceedings. Third, the Defence’s assertion that the public will only have access to excerpts of the hearings through youtube³² is incorrect. The Decision specifically orders the Registrar to release the redacted video recordings as soon as appropriate redactions have been applied.

²⁵ Decision, p. 101 lns. 1-2.

²⁶ *Contra*, Application, paras. 51-52.

²⁷ Decision, p. 99, lns. 1-4.

²⁸ Decision, p. 99, lns. 10-12.

²⁹ Application, paras. 54-56.

³⁰ Application, para. 45.

³¹ Decision, p. 100 lns. 5-13.

³² Application, para. 55.

17. Even if, *arguendo*, it was necessary to broadcast the trial over the internet to ensure the publicity of the proceedings, the fact that the broadcast is delayed is irrelevant. If a delay had any impact, regulation 21(2) of the Regulations of the Court, which provides for a regular 30 minutes delay, would already infringe on the accused's right to a public hearing or a general principle of publicity. The Defence does not suggest that this is the case. In addition, regulation 21(2) provides that the broadcast must be delayed "at least" by 30 minutes and therefore gives a chamber the power to order a longer delay, if required, for instance to protect witnesses. The Decision delaying the broadcasting until appropriate protective measures are in place is fully consistent with this provision and does not impact in any way on the rights of the accused.³³ The Fifth Issue should therefore be rejected.

B. The Issues do not meet the criteria for leave to appeal under article 82(1)(d)

18. As noted above, none of the Issues referred to in the Application are appealable issues arising from the Decision. In any event, the Application fails to show how the Issues meet the remaining requirements of article 82(1)(d).

19. First, The Application should be dismissed *in limine*. The Defence's submissions consist of a few short sentences that fail to link any of the Issues for which the Defence seeks leave to appeal to the criteria under article 82(1)(d).³⁴ Trial Chamber III has recently held that applications for leave to appeal may be dismissed *in limine* if the applicant fails "to expressly link the relevant criteria to either the specific issues identified or even the specific Impugned Decision".³⁵ This Trial Chamber has followed a similar approach.³⁶ On this basis, the Application should be dismissed *in limine*.

³³ Regulation 21 provides a Chamber with broader powers. According to regulation 21(6), a Chamber may "order the *termination* of the broadcast of a hearing at any time" (emphasis added). The Decision does not terminate, but merely delay the broadcast.

³⁴ Application, paras. 57-60.

³⁵ ICC-01/05-01/08-3382, para. 12.

³⁶ ICC-02/11-01/15-598, para. 8.

20. Second, and as noted above,³⁷ the Decision does not impact on the public nature of the proceedings, on the accused's right to a public hearing or on the fair conduct of the proceedings.³⁸ The Decision merely delays the broadcast of the proceedings over the internet.

21. Third, the Defence's argument regarding the "complete irresponsibility of witnesses"³⁹ exhibits a troubling interpretation of the judicial proceedings and the witnesses' role in those proceedings. Witnesses are accountable to the truth and to the Court, but not to the society in which they live. It is not for society to control the veracity of in-court testimony whether by ensuring that there are "consequences for a lie" or in any other way.⁴⁰ Any such "control" which might impact on the substance of a witness' testimony could amount to an offence against the administration of justice pursuant to article 70(1)(c) of the Statute. The Defence's arguments effectively condone a criminal practice of influencing witness testimony from outside the courtroom, which the Decision is intended to prevent.⁴¹

22. Finally, because the Decision does not impact on Mr Gbagbo's rights and because the Defence arguments are premised on erroneous assertions, there is no need for an immediate appellate intervention on any of the above issues.⁴² The Defence has failed to identify issues or potential errors that could be corrected. Its erroneous interpretation of the Decision and its disagreements with it are insufficient to demonstrate that the Issues affect the fair or expeditious conduct of the proceedings or that immediate appellate intervention is required. The Application should therefore be rejected.

³⁷ See paras. 16-17 above.

³⁸ *Contra*, Application, para. 57.

³⁹ Application, para. 58. See also paras. 22-25.

⁴⁰ Application, para. 25: "*A cet égard, le fait de témoigner publiquement constitue une garantie de contrôle démocratique du témoignage et un garde-fou contre les risques qu'un témoin ne dise justement pas la vérité, estimant qu'il n'y aurait aucune conséquence d'un mensonge exprimé à huis-clos.*" See also paras. 22-24, 58.

⁴¹ See para. 5 above.

⁴² *Contra* Application, paras. 59-60.

Conclusion

23. For the above reasons, the Prosecution requests the Chamber to dismiss the Application.



Fatou Bensouda, Prosecutor

Dated this 27th day of June 2016

At The Hague, The Netherlands