

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/11-01/15**
Date: **1 December 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***

Confidential

**Prosecution's response to Laurent Gbagbo's application for leave to appeal
the 22 November 2016 oral decision on the protective measures of
Witnesses P-0350, P-0513 and P-0117**

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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I. Introduction

1. The Defence's Application seeking leave to appeal¹ the Decision² granting in part the Prosecution's requests for protective measures for P-0513, P-0117³ and P-0350⁴ should be dismissed because neither of the two Issues meet the criteria for leave to appeal under article 82(1)(d).
2. The First Issue⁵ does not significantly affect the fair and expeditious conduct of the proceeding or the outcome of the trial. The Second Issue⁶ does not arise from the Decision and is not an "issue" within the meaning of article 82(1)(d). In any event, it does not significantly affect the fair and expeditious conduct of the proceeding or the outcome of the trial. In addition, the immediate resolution of either Issue by the Appeals Chamber will not materially advance the proceedings.

II. Classification

3. The Prosecution files this response as "Confidential" pursuant to regulation 23bis(2) of the Regulations of the Court, because it responds to a submission of the same classification.

III. Submissions

- i. The First Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.*

4. The First Issue—whether the Chamber erred in granting the Prosecution's Second Request for P-0350's protective measures and video-link testimony before the

¹ ICC-02/11-01/15-760-Conf ("Application").

² ICC-02/11-01/15-T-103-CONF-ENG, p.77, l. 16 to p.82, l. 7 ("Decision").

³ ICC-02/11-01/15-720-Conf ("First Request").

⁴ ICC-02/11-01/15-754-Conf ("Second Request").

⁵ Application, p. 4, Heading 1.1, paras. 8-12.

⁶ Application, p. 5, Heading 1.2, paras. 13-22.

Defence filed its Response⁷—does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

5. The Defence's submission⁸ is based on the incorrect premise that the Decision concerns the conduct of the proceedings in general and does not allow meaningful Defence's submissions on witnesses' protective measures in the future. To the contrary, the Decision concerns a very confined matter—granting protective measures to Witness P-0350 who has already testified—and not the future conduct of the proceedings in general.

6. In addition, the Decision was issued “without prejudice”⁹ to the Defence's arguments. The Chamber acknowledged that the “responses to filing number 754 might still be filed”¹⁰ at the time of the Decision, and stated that it would review its determination—to grant the protective measures and video-link testimony—if the additional information provided by the Parties in their submissions make it necessary or appropriate.¹¹ The Defence's arguments have not been ignored:¹² rather, the information provided by the Defence did not make it necessary or appropriate for the Chamber to review its determination.

7. Further, the Defence's submission is based on the wrong premise that the Chamber solely relied upon unchallenged Prosecution's submissions.¹³ In fact, consistent with the Directions on the Conduct of the Proceedings,¹⁴ the Chamber largely relied upon the VWU's expert assessment and recommendation,¹⁵ not addressed by the Defence in its Response to the Prosecution's Second Request.

8. For these reasons the Defence has failed to demonstrate that the First Issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

⁷ ICC-02/11-01/15-759-Conf (“Defence Response to Prosecution's Second Request”).

⁸ Application, paras. 23-24.

⁹ Decision, p. 79, l. 1.

¹⁰ Decision, p. 78, l. 23-24.

¹¹ Decision, p. 78, l. 18-p.79, l. 3.

¹² *Contra*, Application, paras. 9-12.

¹³ Application, para. 10.

¹⁴ ICC-02/11-01/15-498-AnxA, para. 56. *See also*, ICC-02/11-01/15-598, paras. 5-7.

¹⁵ Decision, p. 80, l. 11-18.

ii. The Second Issue does not arise from the Decision and does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

a. The Second Issue does not arise from the Decision.

9. The Second Issue—whether the Chamber erred by not explaining why the witnesses are vulnerable and effectively introducing an “automatic right” to protective measures for witnesses presented as vulnerable by one of the parties—¹⁶ does not arise from the Decision because it does not correctly reflect the Chamber’s reasoning.

10. First, contrary to the Defence’s submission,¹⁷ the Chamber did explain why it considered Witnesses P-0117, P-0513 and P-0350 to be vulnerable: it found that due to the traumatic events they suffered, and in light of their family and residence circumstances, there is a risk both for their security and their dignity, privacy, physical and psychological well-being—a risk that might be mitigated by the adopted protective measures.¹⁸

11. Second, by arguing that the Chamber should have waited to the end of each witness’s testimony to properly assess *beyond reasonable doubt* whether they truly suffered traumatic events,¹⁹ the Defence—and not the Chamber—“*rédui[t] à néant la logique judiciaire.*”²⁰ Contrary to what appears to be the premise of the Defence,²¹ the Chamber did not “presume” the witnesses to be truthful for the purpose of establishing the Accused’s criminal responsibility. Rather, the Chamber accepted—on the basis of the available information—that P-0350, P-0513 and P-0117 suffered traumatic events, only to grant protective measures.

¹⁶ Application, p. 5, Heading 1.2.

¹⁷ Application, p. 5, Heading 1.2.

¹⁸ Decision, P. 78, l. 18-24, p. 80, l. 11-18, p.82, l. 2-6.

¹⁹ Application, paras. 14-19.

²⁰ Application, para. 16.

²¹ Application, paras. 14-16.

12. The Application conflates the Chamber's obligation to assess the credibility of a witness, *after* their in-Court examination, to establish the guilt of the Accused beyond reasonable doubt²² with the Chamber's responsibility to determine, *before* the testimony, whether protective measures are needed for the witnesses' participation in the proceedings.²³ The Court's duty to manage identified security risks is not limited to those risks that have been established beyond reasonable doubt. Like for risks under article 58(1)(b), "[t]he question revolves around the possibility, not the inevitability, of a future occurrence".²⁴

13. Finally, having properly assessed that *these witnesses* require protective measures in light of the parties and VWU's considerations²⁵ the Chamber did not create an "automatic right to protective measures" for self-proclaimed vulnerable witness. The Defence's unsupported argument to the contrary²⁶ is based on a misrepresentation of the Decision.

14. For these reasons, the Second Issue does not arise from the Decision and amount to a mere disagreement with the outcome of the Decision.

b. *The Second Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.*

15. Even assuming, *arguendo*, that the Second Issue arises from the Decision, the Defence has failed to meet the other requirements under article 82(1)(d), namely that the Second Issue significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

16. The Defence's submission²⁷ is based on the incorrect assumption that the Decision concerns the conduct of the proceedings in general and limits the parties'

²² See Art. 66, 74(2).

²³ See Art. 68, Rules 87, 88.

²⁴ ICC-01/04-01/07-572 OA4, para. 21; ICC-01/05-01/08-323 OA, para. 55; ICC-01/04-01/10-283 OA, para. 60.

²⁵ Decision, p. 80, l. 11-18.

²⁶ Application, para. 20.

²⁷ Application, paras. 23-24.

right to ask questions to a newly created category of witnesses (*"nouvelle catégorie de témoins"*) that are "presumed" to be truthful.²⁸ None of these premises are accurate.

17. First, the Decision does not restrict the scope of the Defence's examination. Contrary to the Defence's submission,²⁹ the Chamber did not grant the Prosecution's request in this regard.³⁰

18. Second, as discussed above,³¹ the Decision does not create a new category of witnesses "presumed" to be truthful. The Chamber accepted—on the basis of the available information—that P-0350, P-0513 and P-0117 suffered traumatic events for the sole purpose of granting protective measures. That the crimes in questions took place remains to be proved beyond reasonable doubt.

19. Finally, contrary to the Defence's erroneous premise,³² the Decision concerns a very confined matter—the protective measures for P-0350, P-0513 (who have already testified) and P-0117 (who is scheduled to testify in the coming days)—and not the future conduct of the proceedings in general.

iii. The immediate resolution of the Issues by the Appeals Chamber will not materially advance the proceedings.

20. The immediate resolution of the Issues by the Appeals Chamber will not materially advance the proceedings.³³ The Defence's submissions to the contrary are speculative and once again based on the incorrect premise that the Decision allows the proceedings to be conducted in violation of the *principe du contradictoire et de la publicité de débats*.³⁴

21. As discussed above, the Decision addresses one discrete matter only relevant to the testimony of P-0350, P-0513 (that have already testified) and P-0117 (who is

²⁸ Application, para. 24.

²⁹ Application, paras. 19, 24.

³⁰ Decision, p. 79, l. 18-p. 80, l. 1.

³¹ See above para. 11

³² Application, para. 24.

³³ *Contra* Application, paras. 25-26.

³⁴ Application, para. 61.

scheduled to testify in the coming days). It does not redefine the principles governing the proceedings. An interlocutory appeal will not materially advance the proceedings in the sense of ensuring that the proceedings follow the right course.

IV. Conclusion

22. For all the reasons above, the Application should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 1st day of December 2016

At The Hague, The Netherlands