

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/11-01/15  
Date: 9 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 29 November 2016 oral decision on the lifting of the redaction  
to the name of the intermediary of Witness P-0350**

**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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**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **I. Introduction**

1. The Chamber should reject the Gbagbo Defence's Application seeking leave to appeal<sup>1</sup> the Decision<sup>2</sup> rejecting the Defence's request to lift the redaction applied to the identity of the intermediary in Witness P-0350's victim application form. None of the three alleged issues<sup>3</sup> raised in the Application are appealable, as they either do not arise from the Decision or they constitute a mere disagreement with the Chamber. They also do not meet the remaining criteria for leave to appeal under article 82(1)(d) of the Statute. The Application fails to show that the fairness and expedition of the proceedings, or the outcome of the trial, is significantly affected, or that immediate resolution by the Appeals Chamber is necessary.

## **II. Classification**

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

## **III. Submissions**

3. None of the proposed issues may be certified for appeal since they misconstrue the Decision, or merely disagree with it. None of these issues is an 'appealable' issue, defined as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion." Such topics must be "essential for the determination of matters arising in the judicial cause under examination." They must genuinely arise from the impugned decision. Issues which fail some or all of these requirements may not be certified for appeal.

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<sup>1</sup> ICC-02/11-01/15-768-Conf ("Application").

<sup>2</sup> ICC-02/11-01/15-T-107-CONF-ENG ET, p.1, l.14 - p.2, l.16 ("Decision").

<sup>3</sup> Together, the "Proposed Issues".

### *The First Issue*

4. Under its First Issue, the Gbagbo Defence alleges that the Chamber committed an error of law by failing to require the Legal Representatives of Victims ("LRV") to justify maintaining the redaction, thereby reversing the burden of proof as to redactions.<sup>4</sup> The First Issue does not arise out of the Decision but simply misconstrues it, in an impermissible attempt to re-litigate a matter that has previously been adjudicated on multiple occasions. The Chamber has previously provided guidance on the matter when it issued decisions pertaining to maintaining redactions to intermediaries, including that of Witness P-0350 specifically.<sup>5</sup>

5. In its articulation of the First Issue, the Application misconstrues the Decision. The Decision does not constitute a reversal of burden as to lifting of redactions. Rather, it rearticulates what was initially set out in the Redaction Protocol<sup>6</sup> and again articulated by the Chamber in its first decision adjudicating the maintenance of redactions to information relating to certain intermediaries.<sup>7</sup> Specifically, it stated that

[I]n so finding, the Single Judge considers that the Defence has not demonstrated how the identity or contact information of these intermediaries is relevant to any known issues in this case . . . This ruling is without prejudice to the lifting of these redactions at any further stage of the proceedings, either *proprio motu* or upon request of a party or participant, if the redacted information becomes relevant to a live issue in the case.<sup>8</sup>

6. In conclusion, the Decision does not construe a reversal of burden and the First Issue does not arise out of the Decision.

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<sup>4</sup> See Application, paras. 8-14.

<sup>5</sup> See ICC-02/11-01/15-202; ICC-02/11-01/15-506.

<sup>6</sup> Protocol Establishing a Redaction Regime in the Case of the *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-737-AnxA.

<sup>7</sup> See ICC-02/11-01/15-202, paras. 20-21.

<sup>8</sup> *Id.*

### *The Second Issue*

7. Under the Second Issue, the Gbagbo Defence alleges that the Chamber committed an error of law by failing to respect the agreement between the Parties.<sup>9</sup> The Second Issue misconstrues the position of the Parties and misunderstands the nature of redaction. As such it does not arise from it.

8. The Prosecution notes that, while it had stated not to oppose the lifting of the specific redaction in question,<sup>10</sup> the redaction was implemented as a result of a request by the LRV, which itself was previously approved by the Chamber.<sup>11</sup> Indeed, the Chamber had authorised the Prosecution to maintain certain redactions based on requests by the LRV.<sup>12</sup>

9. In conclusion, the Second Issue does not arise from the Decision. The Chamber's decision to maintain the LRV redaction, despite lack of opposition by the Prosecution, does not constitute an error of law.

### *The Third Issue*

10. Under its Third Issue, the Gbagbo Defence alleges that the Chamber committed an error of fact by failing to see that lifting the redaction to the intermediary is required by common sense (*"la logique"*) because in the current case, intermediaries seem to have had an important role in the choice of witnesses and the manner their testimony is presented, particularly as pertains to the witnesses testifying about the RTI march.<sup>13</sup> The Third Issue is a mere disagreement with the Decision.

11. In the Third Issue, the Gbagbo Defence does not point to any specific error but rather argues with the Decision and reiterates its view on the importance of obtaining all information related the intermediaries. The Defence ignores the guidance of the Chamber that it "has not substantiated why the name of the said

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<sup>9</sup> See Application, paras. 8-14.

<sup>10</sup> Email of 28 November 2016, 9:51 a.m.

<sup>11</sup> ICC-02/11-01/15-506, para. 27.

<sup>12</sup> ICC-02/11-01/15-202, paras. 20-21.

<sup>13</sup> Application, paras. 18-23.

intermediary has become a live issue “<sup>14</sup> and instead simply reiterated that it is a live issue.<sup>15</sup> The Third Issue constitutes a mere disagreement with the Decision and is not an appealable issue.

***The Proposed Issues do not meet the requirement of article 82(1)(d)***

*The Proposed Issues does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.*

12. The Gbagbo Defence fails to particularise its arguments concerning the impact of the proposed Issues upon the fair and expeditious conduct of the trial, or its outcome.

13. The Gbagbo Defence fails to show, in concrete terms, that the Proposed Issues significantly affect the fairness of the proceedings.<sup>16</sup> Rather, it presents a general argument, claiming that without knowing the exact context that led to witnesses being in contact with the Court, the Defence will not be in a position to test the plausibility of witnesses’ testimony or to assess their credibility.<sup>17</sup>

14. 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. Moreover, Witness P-0350 has concluded her testimony and the Gbagbo Defence did in fact extensively put questions to her about her contacts with both the Court and with victim organisations.<sup>18</sup>

15. Further, the Gbagbo Defence impermissibly reiterates its disagreement with the role accorded to the LRV at the Court.

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<sup>14</sup> Decision, ICC-02/11-01/15-T-107-CONF-ENG ET, p.2, l.8-10.

<sup>15</sup> Application, para. 23.

<sup>16</sup> *Contra* Application, paras. 24-25.

<sup>17</sup> Application para. 24.

<sup>18</sup> ICC-02/11-01/15-T-107-CONF-ENG ET, p.71 – 84.

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

16. The immediate resolution of the Issues by the Appeals Chamber will not materially advance the proceedings.<sup>19</sup> The Defence's submissions to the contrary are speculative and based on the incorrect premise that the Decision outlined a general principle affecting the conduct of the rest of the trial; whereas in reality the Decision is limited to the redaction of the name of an intermediary of one specific witness. The Defence merely disagrees with the Chamber's finding that its request was unsubstantiated, and the Appeals Chamber need not intervene.

### **Conclusion**

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



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Fatou Bensouda, Prosecutor

Dated this 9<sup>th</sup> day of December 2016

At The Hague, The Netherlands

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<sup>19</sup> *Contra* Application, paras. 25-26.