

**Cour
Pénale
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**International
Criminal
Court**



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No.: ICC-02/11-01/15
Date: 13 December 2016

TRIAL CHAMBER I

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

SITUATION IN CÔTE 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 de la Chambre accordant des mesures de protection aux témoins P-0350, P-0513 et P-0117 rendue oralement le 22 Novembre 2016' (ICC-02/11-01/15-760-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 22 November 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 misunderstanding or misreading of the Chamber’s ruling because the Decision (i) expressly provided the Defence with the opportunity to submit its arguments on Witness P-0350, (ii) explained that the Chamber considered Witnesses P-0117, P-0350 and P-0513 to be vulnerable on the basis, *inter alia*, of the analysis conducted by the VWU, and (iii) did not limit in advance the Defence’s investigation activities with regard to any of these witnesses.

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 22 November 2016, No. ICC-02/11-01/15-T-103-CONF-ENG ET (open session), p. 77, line 16 to p. 82, line 7 (the “Decision”).

II. Background

4. On 11 October 2016, the Prosecution requested in-court protective and/or special measures for Witnesses P-0106, P-0107, P-0117, P-0513, P-0555, P-0587 and P-0588 (the “First Prosecution Request”).³

5. On 20 October 2016, the Defence of Mr Gbagbo responded to the First Prosecution Request,⁴ followed by the responses of the Defence of Mr Blé Goudé and the Legal Representative on 21 October 2016.⁵

6. On 31 October 2016, the Prosecution requested in-court protective measures for Witness P-0555 (the “Second Prosecution Request”).⁶

7. On 9 November 2016, the Defence of Mr Gbagbo, the Defence of Mr Blé Goudé, and the Legal Representative responded to the Second Prosecution Request.⁷

8. On 11 November 2016, the Prosecution requested *inter alia* protective and special measures for Witness P-0350, and for said witness to testify *viva voce* by means of video-link technology (the “Third Prosecution Request”).⁸

9. On 22 November 2016, the Defence of Mr Gbagbo, the Defence of Mr Blé Goudé, and the Legal Representative responded to the Third Prosecution Request.⁹

³ See the “Public redacted version of ‘Prosecution’s application for protective and/or special measures for [REDACTED]’, 11 October 2016, ICC-02/11-01/15-720-Conf”, No. ICC-02/11-01/15-720-Red, 14 October 2016 (the “First Prosecution Request”).

⁴ See the “[REDACTED]”, No. ICC-02/11-01/15-736-Conf, 20 October 2016.

⁵ See the “[REDACTED]”, No. ICC-02/11-01/15-738-Conf, 21 October 2016; and the “[REDACTED]”, No. ICC-02/11-01/15-737-Conf, 21 October 2016.

⁶ See the “[REDACTED]”, No. ICC-02/11-01/15-743-Conf, 31 October 2016 (the “Second Prosecution Request”).

⁷ See the “[REDACTED]”, No. ICC-02/11-01/15-748-Conf, 9 November 2016; the “[REDACTED]”, No. ICC-02/11-01/15-749-Conf, 9 November 2016; and the “[REDACTED]”, No. ICC-02/11-01/15-750-Conf, 9 November 2016.

⁸ See the “[REDACTED]”, No. ICC-02/11-01/15-754-Conf, 11 November 2016 (the “Third Prosecution Request”).

10. On the same day, the Chamber issued an oral decision on the First, Second and Third Prosecution Requests,¹⁰ *inter alia* granting in-court protective measures to Witnesses P-0117, P-0350 and P-0513.

11. On 28 November 2016, the Defence of Mr Gbagbo (the “Defence”) submitted its request (the “Request”),¹¹ seeking leave to appeal the Decision on the following two issues:

- i) The Chamber made an error of law in granting protective measures to Witness P-0350 and in allowing this witness to testify via video-link before the deadline for a response by the Defence to the Prosecution’s request had elapsed (the “First Issue”);¹² and
- ii) The Chamber made an error of law in granting protective measures to witnesses found to be vulnerable without explaining what made said witnesses vulnerable and in creating an automatic right for the witnesses considered as vulnerable by one party to obtain protective measures (the “Second Issue”).¹³

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

⁹ See the “[REDACTED]”, No. ICC-02/11-01/15-759-Conf, 22 November 2016; the “[REDACTED]”, No. ICC-02/11-01/15-758-Conf, 22 November 2016; and the “[REDACTED]”, No. ICC-02/11-01/15-757-Conf, 22 November 2016.

¹⁰ See the Decision, *supra* note 2.

¹¹ See the “[REDACTED]”, No. ICC-02/11-01/15-760-Conf, 28 November 2016 (the “Request”).

¹² *Idem*, paras. 8-12.

¹³ *Ibid.*, paras. 13-22.

III. Submissions

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

a. The First Issue

13. The Legal Representative submits that the First Issue does not arise from the Decision but from a misunderstanding thereof by the Defence.

14. The Defence premises its arguments for the existence of an “error” on the contention that “[l]a Chambre a rendu la décision attaquée quelques heures avant l’expiration de ce délai, c’est à dire avant que la Défense ait pu faire valoir ses arguments”,¹⁴ and that “[l]es Juges n’ont pas abordé ces questions [sic] de façon adéquate et n’ont pas pris en compte les contradictions relevées par la Défense dans la demande du Procureur”.¹⁵

15. However, the Chamber expressly noted that “[i]t is possible to decide on all these applications on the basis of the information already available to it, and in spite of the fact that responses to filing number 754 [the Third Prosecution Request] might still be filed today [...] this, of course, is without prejudice to the possibility for either of the parties, the participants or the VWU to provide additional specific information which might make it necessary or appropriate to review this decision”.¹⁶

16. Accordingly, the Defence was not deprived of the opportunity to present its arguments concerning Witness P-0350. On the contrary, the Chamber expressly granted the Defence the opportunity for its arguments to have an immediate effect on the Decision.

¹⁴ *Ibid.*, para. 9.

¹⁵ *Ibid.*, para. 11.

¹⁶ See the Decision, *supra* note 2, p. 78, line 22 to p. 79, line 3.

17. In these circumstances, the Legal Representative submits that the Defence misreads the Decision and, as such, the First Issue cannot constitute an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.¹⁷

b. The Second Issue

18. The Legal Representative submits that the Second Issue does not arise from the Decision, but from another misreading thereof by the Defence.

19. The Defence premises its arguments for the existence of an “error” on the contention that “[l]a Chambre s’est fondée exclusivement sur ce qu’elle appelle «les événements traumatiques soufferts par ces témoins» pour justifier l’octroi de mesures de protection”,¹⁸ and that “[e]n présupposant la vulnérabilité d’un témoin, la Chambre crée en outre un droit automatique – au bénéfice de tous ceux parmi les témoins qui allègueraient avoir vécu des événements traumatisants – permettant d’obtenir des mesures de protection”.¹⁹

20. However, the Chamber explained that it decided on the Prosecution Requests after “[h]aving considered the information provided by the Prosecutor, the objections submitted by both Defence teams, the submissions by the Legal Representative of Victims, the Victim and Witnesses Unit’s assessment, assessments and recommendations, its previous relevant case law and the general background information relevant to this case”.²⁰ Moreover, the Chamber assessed the vulnerability of Witnesses P-0117, P-0513 and P-0350 “also in light of their family and residence circumstances”,²¹ and after considering the risks

¹⁷ 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.

¹⁸ See the Request, *supra* note 11, para. 14.

¹⁹ *Idem*, para. 20.

²⁰ See the Decision, *supra* note 2, p. 78, lines 18-22.

²¹ *Idem*, p. 80, line 14.

pointed out by the Victims and Witnesses Unit (the “VWU”) with regard to Witness P-0513.²²

21. Accordingly, contrary to the Defence’s contentions,²³ the Chamber did explain why these witnesses are vulnerable and did not create any automatic right for them to be considered vulnerable. On the contrary, pursuant to the directions given at the beginning of the trial,²⁴ the Chamber relied on the analysis of the witnesses conducted by the VWU and explained its conclusions on said analysis during the hearing.

22. In these circumstances, the Legal Representative submits that the Defence misreads the Decision and, as a consequence, the Second Issue cannot constitute either an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute.²⁵

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

23. Since neither of the Issues identified by the Defence arises from the Decision, the Request must be dismissed on this basis alone.²⁶

24. Assuming *arguendo* that any of said Issues arises from the Decision, the Legal Representative opposes the Defence’s contention that they significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial for the following reasons.

²² *Ibid.*, p. 80, lines 15-18.

²³ See the Request, *supra* note 11, paras. 15-16.

²⁴ See the transcript of the hearing held on 2 February 2016, No. ICC-02/11-01/15-T-12-CONF-ENG ET (open session), p. 83, line 21 to p 84, line 6.

²⁵ See *supra* note 17.

²⁶ See *e.g.* the “Decision on the request for leave to appeal the ‘Decision on the mode of testimony of Rule 68(3) witnesses’” (Trial Chamber I), No. ICC-02/11-01/15-756, 15 November 2016, p. 6.

25. Contrary to the requirements of article 82(1)(d) of the Rome Statute,²⁷ the Request does not articulate how each of the alleged Issues specifically affects the fairness of the proceedings. The Request only makes a general and vague reference to the principles of publicity and the “*audi alteram partem*” principle (“*le principe du contradictoire*”).²⁸

26. In any event, the Legal Representative submits that the Decision cannot be said to have affected the “*principe du contradictoire*”. The Defence has chosen to wait until the conclusion of Witness P-0350’s testimony to bring its arguments against the Decision,²⁹ whereas, as expressly allowed by the Chamber,³⁰ it could have done so even before said testimony started. In fact, the Defence’s response to the Third Prosecution Request was already filed but had not yet been notified to the Chamber at the time of the issuance of the Decision.³¹ In these circumstances, the Defence cannot rely on its inaction to seek redress from the Chamber (“*nemo auditur propriam turpitudinem allegans*”).

27. Moreover, contrary to the Defence’s contention,³² [REDACTED]. In fact, the Defence [REDACTED],³³ and fails to consider that this sort of speculations or hypothetical considerations cannot be the subject of an interlocutory appeal under article 82(1)(d) of the Rome Statute.³⁴

²⁷ 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. 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.

²⁸ See the Request, *supra* note 11, para. 25.

²⁹ *Idem*, para. 10.

³⁰ See *supra* para. 15.

³¹ See *supra* note 9.

³² See the Request, *supra* note 11, para. 18.

³³ *Idem*, para. 24.

³⁴ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 8; the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on

28. 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.³⁵ The Request does not address either the alleged impact of the Issues on the outcome of the trial.

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

29. [REDACTED].³⁶

30. 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.³⁷

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. 26 and the references contained therein; and the "Decision on 'Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'" (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6 and the references contained therein.

³⁵ 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 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.

³⁶ See the Request, *supra* note 11, para. 25.

³⁷ 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. 26.

IV. Conclusion

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

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 13th day of December of 2016

At The Hague, The Netherlands