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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

**Prosecution's response to Laurent Gbagbo's application for leave to appeal the
03 May 2017 oral decisions on the use of Witness P-0438's prior statement in court,
and maintaining the redaction of interpreter's name**

Source: Office of the Prosecutor

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The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of the Victims

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence's Application¹ seeking leave to appeal the Chamber's oral Decisions permitting Witness P-0438 to be confronted with his signed, sworn prior statement ("First Decision"),² and maintaining the redaction of the interpreter's name who assisted in taking that statement ("Second Decision"),³ should be dismissed because none of the Issues raised meet the criteria for leave to appeal under article 82(1)(d).

2. The Defence raises three Issues, two of which do not actually arise from these Decisions, and none of which significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. The First Issue⁴ does not arise as it is not an "issue" within the meaning of article 82(1)(d); rather it is a disagreement with the First Decision permitting Witness P-0438 to be confronted with his prior statement. The Second Issue⁵ does not arise from the Chamber's First Decision since it is based on a misunderstanding of the Decision and the Court's legal framework. In addition, none of these two issues meet the remaining criteria under article 82(1)(d). The Third Issue⁶ arises from the Second Decision. However, since the Appeals Chamber has already decided on a similar matter, there is no need for another determination by the Appeals Chamber. Instead, the Trial Chamber should reassess the need for maintaining the redactions after hearing the Parties.

II. Submissions

i. The First Issue does not arise from the Decision.

3. The First Issue—whether the Chamber erred in permitting Witness P-0438 to be confronted with his prior statement without any guarantee that the statement

¹ ICC-02/11-01/15-908 ("Application").

² ICC-02/11-01/15-T-150-CONF-ENG RT, p. 18, l. 4 – 21 ("First Decision").

³ ICC-02/11-01/15-T-150-CONF-ENG RT, p. 40, l. 14 – p. 41, l. 5 ("Second Decision").

⁴ Application, p. 6, Heading 1.1, paras. 12-24.

⁵ Application, p. 10, Heading 1.2, paras. 25-29.

⁶ Application, p. 12, Heading 1.3, paras. 30-36.

reflects what the Witness said⁷—does not arise from the Decision because it does not correctly reflect the Chamber’s reasoning nor the facts on record.

4. First, the Chamber did not state that Witness P-0438’s prior statement lacked reliability nor did the Defence show otherwise. Instead, the Court rightfully noted, “...in taking this statement, all the rules were followed. There was an interpreter. It was read back to the witness what was said, and he confirmed and signed the statement.”⁸ Hence, the Application misunderstands the Decision.

5. Second, the only interpretation issue that arose at trial was related to the live Dioula interpretation during the Witness’ testimony in court by a Court Management Section (“CMS”) interpreter. This, despite the Defence’s speculation,⁹ is unrelated to the interpreter who the Prosecution used for taking the Witness’ statement in 2014. As the Prosecution clarified on the record, CMS and Prosecution use different interpreters who are subject to different vetting and hiring practices.¹⁰ The Defence did not cite a single fact in their written or oral allegation to support their claim that interpretation issues exist with respect to this 2014 statement,¹¹ relying on incorrect and speculative assumptions instead.¹²

6. Third, the Prosecution confronted the Witness with his prior signed statement only once,¹³ and contrary to the Defence argument,¹⁴ the Witness’ response did not demonstrate an inconsistency. On the contrary the Witness confirmed that the

⁷ Application, p. 6, Heading 1.1, paras. 12-24.

⁸ ICC-02/11-01/15-T-150-CONF-ENG RT, p. 18, l. 15 – 19.

⁹ Compare ICC-02/11-01/15-T-150-CONF-ENG RT, p. 13 l. 1 -18 (Defence counsel commenting on errors in live Dioula interpretation during the proceeding); p. 32, l. 21 – p. 34, l. 3 (Prosecution commenting on errors in live Dioula interpretation during the proceeding); p.34, l. 6 – p. 35, l. 10 (Legal Representatives commenting on errors in live Dioula interpretation during the proceeding) with p. 15, l. 23- p. 16, l. 1 (Defence counsel claiming, without evidence, that “we suspect that there may have been some difficulties in interpretation during the investigation as well”) and p. 38, l. 9 – 15 (arguing, without a basis in fact, that this is a problem which has occurred in relation to other witnesses and may occur with future witnesses).

¹⁰ ICC-02/11-01/15-T-150-CONF-ENG RT, p. 32, l. 5 – 10.

¹¹ See above, footnote 10.

¹² Cf. ICC-02/11-01/11-350, para. 39.

¹³ ICC-02/11-01/15-T-150-CONF-ENG RT, p. 18, l. 22 – p. 19, l. 17.

¹⁴ ICC-02/11-01/15-T-150-CONF-ENG RT, p. 36, l. 17 – p. 37, l. 9.

relevant portion of the written statement was accurate.¹⁵ Indeed, during questioning by the Defence, the Witness testified that he had no concerns about the way he was being interpreted in his meetings with the Prosecution, and that he had no prior or subsequent dealings with the interpreter.¹⁶ Having failed to undermine the qualifications or the accuracy of that interpreter during their questioning, the Defence cannot now claim that there were interpretation problems.

7. For these reasons, the First Issue is purely speculative and amounts to a mere disagreement with the outcome of the Decision. Thus, it does not constitute an appealable issue.

ii. The First Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor may an immediate resolution by the Appeals Chamber materially advance the proceedings.

8. Even assuming, *arguendo*, that the First Issue arises from the Decision, the Defence has failed to meet the other requirements under article 82(1)(d). In particular, the Defence advances no arguments on how the Issue that it has identified would significantly affect the outcome or the expeditiousness of the proceedings. Considering that the applicant must show how the issues affect either the fairness and expedition *or* the outcome of the proceedings,¹⁷ the Application fails to show how this Issue meets the first prong of article 82(1)(d) and should therefore be dismissed on this basis alone.

9. The Defence further submits that the Chamber's authorisation for the Prosecution to confront Witness P-0438 with his prior signed statement unfairly

¹⁵ ICC-02/11-01/15-T-150-CONF-ENG RT, p. 18, l. 22 – p. 19, l. 17 (responding to being confronted with the prior statement by saying: "... I didn't get to that part. I haven't forgotten anything").

¹⁶ ICC-02/11-01/15-T-151-CONF-ENG RT, p. 18, l. 8 – p. 20, l. 3.

¹⁷ The Defence only addresses the impact of the purported issues on the fairness and how their immediate resolution by the Appeals Chamber may materially advance the proceedings.

resulted in the Parties not having an opportunity to verify whether the Witness' written statement accurately reflects what he said in 2014.¹⁸ The Defence argued that such a practice creates uncertainty and calls into question the fairness of the process.¹⁹ Here, the Defence ignores the purpose and function of a cornerstone of adversarial criminal trials: examination of a witness by the non-calling party, as described in rule 140(2)(b).²⁰ The opportunity to question sworn witnesses live, in the presence of the Chamber, presents the best opportunity to test the veracity of both the witness' current and prior statements. Both Defence teams took advantage of this opportunity at length, questioning Witness P-0438 for over six hours in total, in addition to questions from the Chamber. Hence, there was no unfairness, since the Defence had the opportunity to test the veracity of the Witness' account and the reliability of his prior statement.

10. Moreover, the Defence's submission is based on the incorrect premise that the Decision concerns the conduct of the proceedings, in general.²¹ To the contrary, the Decision concerns a very confined matter— the permissibility of confronting Witness P-0438 with his prior statement—and not the conduct of the proceedings in general. The Directions on the Conduct of the Proceedings, issued at the start of the trial, regulate the manner in which Parties may use and refer to prior statements during the questioning of witnesses.²² Resolution of this narrow trial management issue by the Appeals Chamber would not materially advance the proceedings.

11. 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 and that an immediate resolution by the Appeals Chamber

¹⁸ Application, para. 37.

¹⁹ Application, para. 11.

²⁰ Rule 140(2)(b) (indicating that "[t]he prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters).

²¹ Application, para. 41.

²² ICC-02/11-01/15-498-AnxA, paras. 39-42 (Amended Directions) and ICC-02/11-01/15-205, para. 47.

would materially advance the proceedings. Rather, the Defence request amounts to an unsuccessful attempt to call into question the Prosecution's interview practices.²³

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

12. The Second Issue— whether the Chamber legally erred in permitting the use of a “synthesis text” as witness statement since there is no recording or *verbatim* notes of the interview²⁴— does not arise from the Decision because it does not correctly reflect the factual record or the Chamber's reasoning.

13. First, contrary to the Defence's submission, the Chamber merely said that there was no recording of the interview, and did not characterise Witness P-0438's prior statement as a “synthesis text.”²⁵

14. Second, the premise of the Defence's argument is misplaced. There is no requirement in the Rules that the Prosecution record its interviews with every witness. The Prosecution fully complied with rule 111 in questioning Witness P-0438 in 2014, and compiling his written, signed statement²⁶ and rule 111 merely requires a signed record be made of formal statements made by any person questioned in connection with an investigation.²⁷ In contrast, rule 112 requires the audio or video recording of a person for whom article 55(2) applies, or for whom a warrant of arrest or a summons to appear has been issued. Read together, these rules clarify that audio or video recordings are only required for interviews of suspects, not other witnesses.²⁸

²³ See, e.g. Application, paras. 17-19.

²⁴ Application, p. 10, Heading 1.2, paras. 25-29.

²⁵ ICC-02/11-01/15-T-150-CONF-ENG RT, p. 41, l. 4 – 5.

²⁶ ICC-02/11-01/15-T-150-CONF-ENG RT, p. 18, l. 15 – 19.

²⁷ Rule 111 (emphasis added).

²⁸ See ICC-02/05-03/09-295 OA2, para. 26 (explaining that “[t]he Appeals Chamber is of the view that rule 111 establishes the general rule, but that rule 112 governs exceptions thereto and its application in particular cases.”; [t]he essential purpose of rules 111 and 112 is that a record must be made of the questioning of persons, and this purpose can be fulfilled through either a written record pursuant to rule 111 or an audio- or video-record

15. For these reasons, the Second Issue is misconceived and does not arise out of the impugned Decision, and thus does not qualify as an appealable issue within the meaning of article 82(1)(d).

***iv.* The Second Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor may an immediate resolution by the Appeals Chamber materially advance the proceedings.**

16. 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).

17. Since the Defence advances no arguments on how this purported Second Issue affects the fairness or expedition of the proceedings or the outcome of trial, the Application should be dismissed on this basis alone.

18. Moreover, the Defence erroneously assumes that the Decision concerns the conduct of the proceedings in general and thus the Defence's ability to verify the accuracy of other prior written statements.²⁹ As noted above,³⁰ none of these premises are accurate since the Decision was confined to one witness and given the ample opportunities the Defence is given to test the veracity and accuracy of witnesses' statements while examining them in court under oath.

***v.* The Third Issue arises but should be decided anew with further submissions in accordance with the new procedure outlined by the Appeals Chamber.**

pursuant to rule 112.”; “these provisions indicate that rules 111 and 112 set out two alternative procedures for the recording of questioning.”).

²⁹ Application, paras. 25-29.

³⁰ See above paras. 10-11.

19. The Third Issue— whether the Chamber legally erred in not requiring the Prosecution to justify the redaction of the interpreter’s name from Witness P-0438’s prior statement³¹— relates to the procedure to lift redactions upon request of the receiving Party. On 11 May 2017, and after the Defence filed its Application, the Appeals Chamber decided a very similar issue (albeit involving redactions of an intermediary of the Legal Representatives).³² Consequently, *another* resolution by the Appeals Chamber on this issue is unnecessary and would not materially advance the proceedings. Instead, and in light of this development,³³ the Trial Chamber should request further submissions from the Parties and decide anew the Defence request in accordance with the procedure outlined by the Appeals Chamber.³⁴

III. Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 15th day of May 2017

At The Hague, The Netherlands

³¹ Application, p. 12, Heading 1.3, paras. 30-36.

³² ICC-02/11-01/15-915-Conf OA9.

³³ Chambers have authority to reconsider in light of new facts and arguments, including jurisprudence, arising since the Decision was rendered and which may be relevant to the Chamber’s assessment. *See* ICC-02/04-01/15-468, para. 4 and ICC-01/05-01/13-1812, para. 6.

³⁴ ICC-02/11-01/15-915-Conf OA9, paras. 61-64.