

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

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

Date: **15 June 2017**

TRIAL CHAMBER I

Before:

**Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Geoffrey Henderson**

SITUATION IN COTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE***

PUBLIC

**Public Redacted Version “Defence Response to the ‘Prosecution’s urgent request to add Witness P-239’s screening note to the witness’s familiarisation package””
(ICC-02/11-01/15-956-Conf)**

Source: Defence of Mr Charles Blé Goudé

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

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I. Introduction

1. On 12 June 2017, the Prosecution requested Trial Chamber I (“the Chamber”) to make an exception to its previous oral ruling and allow screening notes to be provided to a witness during familiarisation.¹ The Chamber previously held in unequivocal terms that screening notes, which are not signed nor authored by a witness, nor included or otherwise referred to in a statement, should not be provided to witnesses during their familiarisation.² The Prosecution requests that an exception be made with respect to Witness P-239 because a crucial detail, [REDACTED], is missing from P-239’s statement.
2. The Prosecution’s request should be rejected for the following three reasons: (1) the Prosecution has failed to demonstrate that the screening note for P-239 falls within the scope of permissible documents to be shown to the witness during familiarisation under paragraph 80 of *the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial*,³ (“Familiarisation Protocol”) (2) contrary to the Prosecution’s submissions, the Chamber has consistently found that unsigned screening notes are not a “reliable record” of information provided by a witness, and (3) the Prosecution’s reliance on the 9 March 2016 ruling in which the Chamber allowed for the use of screening notes during familiarisation is inappropriate since the Chamber later intimated that this was an oversight.

II. Confidentiality

¹ ICC-02/11-01/15-955-Conf.

² ICC-02/11-01/15-T-109-Red-ENG, p. 2, lines 1-4.

³ ICC-02/11-01/15-355-Anx.

3. Pursuant to regulation 23bis (2) of the Regulations, the Defence requests that the present response be received and classified as “confidential”, as it refers to a request which has been classified as confidential.

III. Submissions

4. Paragraph 80 of the Familiarisation Protocol delineates the documents that VWU is allowed to provide to a witness for the purposes of refreshing his/her memory. They fall into two categories, namely (1) the statements the witness has previously given, and (2) any document or other information that was “generated or provided by the witness when giving any of his/her previous statements.”⁴ On 12 May 2016 *via* e-mail, the Chamber in response to the Defence’s objection to certain documents to be used during the familiarisation of Witness P-369 recalled that the “the word ‘statement’ for the purposes of the familiarisation protocol is to be construed so as to encompass any items referred to in those statements without which the statements would not be comprehensible and which are relevant to the facts and circumstances to which the witness is likely to refer in the course of the testimony.” On 1 December 2016, the Defence objected to the use of unsigned screening notes, which had been taken before Witness P-117 made a formal statement. The Chamber sustained the Defence’s objection and determined that the screening notes for P-117 did not fall within the meaning of the word “statement” under the Familiarisation Protocol.
5. Here, like with Witness P-117, the Prosecution again tries to introduce the screening notes during familiarisation, and again fails to show how the screening notes meet the definition of a statement under the relevant protocol. While the Chamber broadened the meaning of statement under the protocol, there are still three cumulative criteria that must be met: (1) the item must be

⁴ ICC-02/11-01/15-355-Anx, para. 80.

referred to in the formal witness statement, (2) the item must be necessary for the understanding of the formal witness statement, and (3) the item must be relevant to the facts and circumstances to which the witness is likely to refer in the course of testimony. The Defence submits that only the third criterion is met, and it does not dispute that the missing information from Witness P-239's statement is [REDACTED].

6. However, contrary to the Prosecution's submissions, the first criterion is not met since the screening notes are not referred to in P-239's statement. Paragraph 9 of P-239's statement does not refer to an item or a document as required by the Chamber's ruling. Rather, the Witness refers to the meeting he had with investigators [REDACTED].⁵ The screening notes are the written impressions of that meeting by two Prosecution investigators. This event should not be confused with the item that the Prosecution wishes to submit, which is a written document that recounts the Prosecution's investigator's interpretation of the event referred to in paragraph 9 of P-239's statement. Since the item is not referred to in the statement, the statement is perfectly comprehensible without it, and thus the second criterion is not met.
7. Similar to P-117, P-239 had an informal meeting with the Prosecution to determine [REDACTED]. Like with P-117, Prosecution investigators took notes of this meeting, and these notes were not authored by and were never submitted to the witness. The screening notes are also not mentioned in both P-117's and P-239's statements. Therefore, as with P-117, the Chamber should sustain the Defence's objection and not allow the screening notes of P-239 to be used during his familiarisation.
8. The Prosecution also fails to substantiate how the screening notes are a reliable record of the witness' statement to the Prosecution. In the instant case,

⁵ CIV-OTP-0037-0425, at 0427-0428, para. 9.

the Chamber clearly made a distinction between Witness statements and screening notes when it instructed the parties to refrain from using screening notes during the examination of witnesses.⁶ When the Defence sought clarification of this decision, the Presiding Judge reiterated the Chamber's ruling and reasoned that screening notes are a summary by a Prosecution investigator of a meeting held with a witness, and therefore it is not fair to confront a witness "with something which she might have said in a different way or not said or would be an interpretation of a third party which was not then confirmed or re-read to the party and made proper by the party."⁷ Recently, in the Chamber's decision on the Prosecution consolidated Rule 68 application,⁸ the Chamber did not attribute any significance to the discrepancies the Defence raised between the investigator screening notes for Witness P-407 and Witness 407's statement. The Chamber cited the same reasons as in its oral ruling where it instructed the Prosecution to not include screening notes in the familiarisation package and the parties to refrain from using the notes during the examination of a witness.⁹ The fact that the witness never confirms the veracity of the screening notes makes such statements an unreliable record of the content of a meeting between a witness and investigators. Therefore, it is not certain whether these screening notes are in fact accurate, and they may have an effect of misleading Witness P-239 and influencing his testimony on a fact [REDACTED].

9. Lastly, the Prosecution inappropriately cites the Chamber's 9 March 2016 oral ruling in support of its argument to include P-239's screening note in the familiarisation package. The Prosecution argues that the Chamber held that

⁶ ICC-02/11-01/15-T-109-CONF-ENG, p. 2, lines 10-14.

⁷ ICC-02/11-01/15-T-110-CONF-ENG, p. 4, lines 23-25 to p. 5, lines 4-7.

⁸ Decision on the "Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088", ICC-02/11-01/15-950.

⁹ *Ibid*, para. 115.

“screening notes were ‘records of previous interviews of the witness in the context of the case...’”¹⁰ However, on 2 December 2016, the Presiding Judge clarified that the previous use of screening notes during the familiarisation or an examination of a witness, occurred without the Chamber realizing it.¹¹ Therefore, it is not appropriate for the Prosecution to argue that the Chamber held that the screening notes were in fact records of previous interviews of the witness since following the cited ruling the Chamber disavowed this practice, and implied it was allowed due to an oversight.

RELIEF SOUGHT

For the foregoing reasons, the Defence respectfully requests the Chamber to:

- **REJECT** the Prosecution Request

Respectfully submitted,



Mr. Knoop, Lead Counsel and Mr. N'Dry, Co-Counsel

¹⁰ ICC-02/11-01/15-955-Conf, para. 5.

¹¹ ICC-02/11-01/15-T-110-CONF-ENG, page 4, lines 10-19.

Dated this 15 June 2017

At The Hague, the Netherlands